

YEARBOOK

HUMAN RIGHTS PROTECTION

**PROVINCIAL PROTECTOR
OF CITIZENS - OMBUDSMAN**

THE RIGHT TO HUMAN DIGNITY

NUMBER 3
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Republic of Serbia
Autonomous Province of Vojvodina
Provincial Protector of Citizens – Ombudsman

Institute of Criminological and
Sociological Research



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FOREWORD

The Provincial Protector of Citizens - Ombudsman and the Institute for Criminological and Sociological research from Belgrade, supported by the OSCE – Mission to Serbia, organized the 3rd annual International Scientific Conference ***The Right to Human Dignity***, held from 27-28 October, 2020 in Novi Sad, Serbia. The conference was attended by forty-eight academic, scientific and research representatives, from fourteen different countries¹ around the world, who contributed their work to the international scientific community. The conference papers and presentations had been compiled in the publication of the same title, and they are divided into two chapters: The conference papers and presentations had been compiled in the publication of the same title, and they are divided into two chapters: *Procedures* and *(I) The Right to Human Dignity in Judicial and Administrative Proceedings* and *(II) Human Dignity during the Pandemic in Protection of Children, the Elderly, People with Disabilities and other particularly Vulnerable Groups*

Scientific conferences have been deeply affected by the COVID-19 pandemic spread across the countries since early spring 2020. Therefore, the scientific and academic communities were challenged to find an alternative solution to preserve the crucial exchange of information between researchers.

Having this in mind, by following the Republic of Serbia government's and its health institutions' recommendations, the annual conference was successfully held, with adherence to social distance measurements, mandatory masks wearing, workspace disinfection, and limited numbers of participants in each of the sessions.

The text below offers a short overview of scientific and expert articles presented at the Conference. Hopefully, these papers will provide answers to some of the numerous currently active questions concerning human dignity.

¹ Serbia, Belarus, Bosnia and Herzegovina, Italy, Norway, Japan, Hungary, Northern Macedonia, Romania, Australia, Croatia, Russia, China.

I. THE RIGHT TO HUMAN DIGNITY IN JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

The first chapter comprises thirty-one papers addressing the right to human dignity related to the judicial and administrative proceedings activities. The number of papers presented at the Conference confirms the broadness and importance of the topic. Some of the topic's issues are linked to the right to the peaceful assembly from human rights ombudsmen, human dignity in the criminal proceedings, crime victims, and the right to human dignity. Also, some authors address the issues of the child's right to dignity and bodily integrity, human dignity in the face of usage of digital technology, and the right to die with dignity. Furthermore, the human rights protection in national laws of different countries, fair trial and cross-border judicial cooperation in criminal matters in the EU, personal dignity, and imprisonment challenges are also discussed.

PhD Dragana Ćorić, the Assistant Professor, The Faculty of Law, Novi Sad, Serbia in paper *How Much Does Dignity "Cost"?* discuss shortly about the content of dignity as well as of possibility that dignity has a price. Numerous domestic and international legal acts use the notion of dignity, declaring it as one of the highest social and legal values or even as the highest value. Some define it as the umbrella term and something that every human being has, from which all other personal rights derive. Contextual conditionality of the content of the term of dignity leads to numerous misinterpretations and misunderstandings of its basic intention and essence. The only one and the only correct meaning of dignity does not exist- that is why the dignity is defined differently in different legal documents, in accordance with the political agreement achieved at that time(whether they are national or international legal documents). Due to the imprecisely determined scope of this term, it becomes rather questionable how can be determined in practice a fair monetary compensation for the violation of dignity when we do not know exactly what dignity means.

PhD Zoran Pavlović, Full Professor at the Faculty of Law, University of Business Academy Novi Sad, Serbia, deals with the problem of personal dignity and challenges of imprisonment. Dignity of the person, or personal dignity, is a category that goes beyond basic human rights. It is about a concept that has been incorporated into practically all important international legal sources, as well as constitutional and legal provisions at the national level. In addition to the fact that there are still significant doubts in the conceptual definition, the context of the execution of criminal sanctions still represents a particularly turbulent field of re-examining the limits of respect for human dignity. In that sense, an overview of basic and more precise penologically relevant international legal documents

is given in this paper, as well as the practical context of the imprisonment issues. In addition to normative, legal and practical contradictions, proposals for further social reaction and realization of the complete protection of a man and a person are also defined.

Next, PhD Marina Matić Bošković, Research Fellow at the Institute of Criminological and Sociological Research offers interpretation of the European Court of Human Rights from the perspective of human dignity in the criminal proceedings. The paper examines notion of human dignity in criminal law and in criminal procedure in particular. The focus is on the analysis of some issues that may arise in situations such as detention, statement obtain through coercion, lifetime imprisonment and how concept of human dignity influenced regulation of these issues. The author elaborates practice of the European Court of Human Rights and how interpretation of dignity evolved over time in these specific group of cases. Jurisprudence of Serbian Constitutional Court as well as courts of general jurisdiction has to be developed and harmonized in the area of interpretation of human dignity, so the caselaw of the European Court of Human Rights should be used as guideline in this regard.

PhD Ranka Vujović, Assistant Director, Republican secretariat for legislation in the paper *The Child's Right to Dignity and Bodily Integrity - European Standards and Case Law* states that the Republic of Serbia, as a member of the United Nations and a signatory to a number of documents regulating and protecting human rights internationally, under the influence of the European Court of Human Rights, the United Nations Committee on the Rights of the Child and other treaty bodies monitoring the implementation of obligations arising from signed conventions, continuously works on the harmonization of its legislation and practice of its bodies with internationally established standards and practices. These processes necessarily impose new challenges, especially when it comes to accepting the positions expressed through general comments and respecting the recommendations for the improvement of legislation and practice, which the contracting authorities periodically communicate to the Member States. One of the challenges that the Republic of Serbia is currently facing, which requires systemic responses, is the request aimed at upgrading the regulations governing the child's right to bodily integrity, as part of the overall integrity and dignity of his/her personality, expressed through the recommendation of the Committee on the Rights of the Child banning corporal punishment of children in Serbia.

PhD Matko Pajčić, University of Split, Croatia, Assistant Professor at Chair of Criminal procedure law, analyzes the impact of rule of law violation in some EU member states on judicial cooperation in criminal matters and principles of mutual trust and mutual

recognition as pillars of that cooperation. In the article *Rule of Law, Fair Trial and Cross-Border Judicial Cooperation in Criminal Matters in European Union* author initially elaborates on independence of judiciary in EU, and on role of courts, on national and EU level, in protection of rule of law. Brief overview of legislative amendments in Polish law affecting independence of judiciary and different possibilities of reaction of EU to those amendments are main focus of the article.

In *The Protection of the Right to Human Dignity in the Context of the EU Police (Law Enforcement) Directive*, PhD Ana Batričević, a Senior Research Fellow at the Institute of Criminological and Sociological Research in Belgrade, analyzes the provisions of Police Directive, the relation between Police Directive and some other relevant sources of the acquis, the significance of its provisions for Serbia. She also offers suggestions and recommendations for its more efficient application in the future. The right to privacy is closely interrelated with the right to human dignity. It is declared in numerous international legal documents, including those of the European Union. The intrusion of the right to privacy in the favor of public interests is particularly noticeable in the cases where personal data is processed by competent authorities such as the police and judicial bodies. European Union adopted the so-called Police Directive in 2016, the aim of which is to maintain a balance between the interest of crime prevention and security protection and the right to privacy in the sense of personal data protection.

PhD Srđan Starčević, Assistant Professor at the Military Academy, University of Defence in Belgrade, reminds that a military organization is a specific work environment, in which special formal social relations, different from those that constitute status civilis, prevail. The command relationship really creates circumstances under which the right to human dignity can be violated, especially when it comes to subordinates. However, good command in modern armed forces requires strict respect for the right to human dignity, not only as part of respect for state laws and meta-legal principles of our civilization, but also for the very efficiency of military command. In this sense, the paper *Military Command and the Right to Human Dignity* presents a critical analysis of the relationship between command and respect for human dignity, whose ties necessarily lead through military discipline and morale. The multiple methods were used: analysis, synthesis, generalization, abstraction, historical and hypothetical-deductive method.

The paper *Human Dignity and the Search Warrant. Procedural Aspects Regarding Romanian Criminal Law* by Adrian Stan, LL.M, PhD Candidate, Teaching and Research Assistant, Faculty of Law, West University of Timișoara, Romania, analyzes this concept from the perspective of intrusions that are permitted by law, through which the judicial

bodies must identify certain objects related to the commission of crimes. Such objects can be found either at a person's home, on him, in the vehicle used. Information can also be identified by authorized search in computer data storage media. The legislator makes these concessions to the detriment of the right to the inviolability of the domicile, the right to property, the right to privacy. However, they are not at all foreign to the dignity of the person. At the domicile, goods can be very closely related to the elements that define dignity, and similar objects can be identified in possession of the individual. The same is the case with the informatic search. That is why the Code of Criminal Procedure states that these proceedings are carried out with respect for the dignity of the person. The author concludes that the protection of this right is sometimes inadequate and left to the discretion of those called to apply the legal provisions.

PhD Jelena Stojšić Dabetić, Assistant Professor at the Faculty of Law for Commerce and Judiciary in Novi Sad, Serbia, in the paper *Human Dignity in the Face of Usage of Digital Technology* shows how the overall usage of digital technology has dramatically transformed the landscape on which laws are created, because this aspect of modern everyday life cannot be outside normative regulation. In the world where there is no definite line between state of “men use and control the technology” and the state of “technology controls men”, one can question where lies the notion of human dignity? The paper will present various cases where legal regulation on the usage of digital technology meets, or doesn't meet, the demands for respect of human dignity, outlining the broad lines of policy developments in areas such as privacy protection, protection of personal data, online safety for children, policy in computer crimes, in the context of protection of human dignity.

And eventually, PhD Aleksandar R. Ivanović, Assistant Professor of Criminal law at Department for Law Sciences, International University of Novi Pazar, Serbia, and PhD Aleksej Sopronov, teaching assistant at Faculty of Security Skoplje, “St. Kliment Ohridski” University in Bitola, in the paper *Hate Crime in the Criminal Legislation of the Republic of Serbia and the Right to Human Dignity* deals with the question of the manner of application of Article 54a (special circumstance for sentencing for hate crimes) of the Criminal Code of the Republic of Serbia in accusation phase, presentation of evidence and adjudication in criminal proceedings from the aspect of respect for the right to human dignity of accused person and victim. In this regard, the author insists that in addition to applying Article 54a during determining the sanction, i.e. passing a verdict, in terms of protection of the right to human dignity, there is a need to Article 54a of the CC be cited in the indictment, as well as the obligation to examine existence of hate motives, in terms of Article 54a of the CC, on the perpetrators side during the evidentiary procedure.

PhD Silvia Signorato, Assistant Professor in Criminal Procedure - University of Padua (Italy), Lecturer in Criminal Procedure – University of Innsbruck (Austria) in the article *A New Right in Criminal Procedure Implied by Human Dignity: the Right to Non-Automated Judicial Decision-Making* analyses this issue in relation to the possibility of criminal judgements being issued by machines. In some cases, this kind of judgement is considered acceptable by Article 11 of directive (EU) 2016/680. However, a question must be asked: Does such automated judicial decision-making respect human dignity or not? The article shows the incompatibility of robotic decisions with the right to respect for human dignity. Consequently, Article 11 of Directive (EU) 2016/680, in that part in which it admits that such judgments can be issued if authorized by Union or Member State law, should be regarded as unlawful.

PhD Aleksandar Bošković, Full professor at the University of Criminal Investigation and Police Studies, Belgrade, in his paper *Questioning the Defendant via a Video Link – the Violation of the Defendant's Rights or Not?* addresses the national legal framework under which trials are permitted and conducted via Skype during a state of emergency during the pandemic COVID-19. Also, the author is questioning whether there was a violation of the principles of immediacy and publicity and relevant case law of the European Court of Human Rights regarding the possibility for the defendant to attend the main hearing without being physically present in the courtroom, as well as whether trials by Skype have led to restrictions and violations of the right to a fair trial. The basic question is whether in this way some basic rules of criminal procedure are endangered and violated, as well as the right to a fair trial, since it is one of the rights that cannot be limited or suspended even during a state of emergency.

PhD Dragan Obradović, Research Associate and judge at Higher Court in Valjevo, Serbia, in the paper *Respect for the Right to Human Dignity of Victims of Criminal Offenses during Criminal Proceedings in Serbia* points out the most important international documents that protect the rights of victims of crime and respect their right to human dignity. The criminal justice system in Serbia involves the participants in criminal proceedings, including the aggrieved party. The persons who are victims of certain criminal offenses are, on the basis of legal solutions, mostly denied certain rights in criminal proceedings. The author present the adhering to this right in the domestic criminal legislation, the development of indirect legal protection of victims as well as certain services that provide them with support and assistance. The author also point out some of the most relevant issues in that regard from the aspect of legal solutions, and a small number of court practice judgments regarding the protection of victims and respect for their right to human dignity through ensuring the protection of their property claims

in criminal proceedings. In brief, the aim of this paper is for experts to recognize and pay much more attention to this problem in practice, as there are still no adequate legal solutions.

PhD Milica Kolaković-Bojović, Research Fellow at the Institute of Criminological and Sociological Research, Belgrade together with PhD Zdravko Grujić, Assistant Professor at Law Faculty, University of Priština – Kosovska Mitrovica dedicated their paper *Crime Victims and the Right to Human Dignity - Challenges And Attitudes in Serbia* to the issue of protection of victims of crime and the necessity of standardization and a broader implementation of the right to human dignity of crime victims, through the analysis of the international and national normative framework and practice. Once proclaimed as the universal human rights value in 1948, the right to human dignity has been further elaborated through the number of universal and regional human rights instruments, with the different level of impact on the legislation and practices on the national level. In the context of criminal proceedings, initially, more focused on the procedural safeguards of accused and consequently of sentenced persons, the right to human dignity of crime victims slowly, but surely becomes the one of the main human rights values framing the content and scope of other crime victims' rights, rather than the stand-alone right.

PhD Laura Stanila, Associate Professor, Faculty of Law, West University Timisoara, Romania, aims to raise important questions on the right to dignity from a very specific perspective: that of the rape crimes victims. The rape crimes victims face a triple victimization process: as victims of a very serious crime – rape, as victims of the judiciary system, underpreoccupied by their rights and interests, and as victims of the society which, due its lack of culture and education, blames them for the crime. In this context, the fundamental right to dignity appears as underpreserved and underprotected, with no serious preoccupation for a change in this perspective. Several decisions of the ECHR emphasize the lack of the Romanian Courts' rationale marking a change of the victimization paradigm in the Romanian judicial procedure of indictment and conviction of the rapists.

PhD Ana Đanić Čeko, Assistant Professor at the J. J. Strossmayer University of Osijek, Faculty of Law Osijek, Croatia and Marijana Šego, PhD Candidate at the same Faculty, in the paper *Human Dignity and Legal Protection of Children in Administrative Procedures in the Field of Social Welfare* emphasize the importance of ensuring legal protection and the right to a declaration of the child, i.e. the child's participation in decision-making in selected special administrative procedures. Therefore, based on the normative analysis of the relevant procedural provisions of the GAPA (*lex generalis*), the

Family Act and the Social Welfare Act (*lex specialis*), certain deviations and specifics are pointed out. Using the case method, the statistical data of SWC Osijek in the observed period are analyzed in relation to the imposition of emergency measures and warnings. The already demanding role of social workers as protectors of citizens' rights with numerous powers and duties, as well as the scope of SWC's actions, was further emphasized and a "special burden" was placed on it under the influence of the COVID-19 pandemic.

PhD Zoran Pavlović, Full-time Professor of Criminal law, Chairman of the Department for Criminal Law, Faculty of Law for Commerce and Judiciary, University Business Academy Novi Sad, Ombudsman of the Autonomous Province of Vojvodina, Republic of Serbia and his colleague MA Nikola Paunović, Research Assistant, Attaché at Ministry of Foreign Affairs, Republic of Serbia, Ph.D. Candidate at The University of Belgrade, Faculty of law, in the paper *Protection of Children from Sexual Abuse and Exploitation in International, European and National Legal Framework* are dealing with the criminal law aspects related to this topic. In that regard, the paper provides an analysis of the relevant provisions concerning offences related to sexual abuse and exploitation at the level of the UN, the Council of Europe, the European Union and the Republic of Serbia. In that context, special attention is dedicated to the phenomenological analysis of the manifested forms of child sexual abuse and exploitation. The paper concludes that although the danger of child sexual abuse and exploitation for the proper development of children has already been recognized, in practice it is still noticed that there is an insufficient implementation of the adopted framework. Therefore, it is suggested that, in the context of its prevention, the most effective means is the early identification of sexual abuse and exploitation cases, thus avoiding the exposure of child victims to harmful consequences.

Veljko Turanjanin, Assistant Professor at Faculty of Law, University of Kragujevac, Serbia in the paper *Human Dignity and Defendant's Rights in the Criminal Procedure - Reflections of Bouyid V. Belgium* deals with the human dignity through the human rights. Human dignity is very known term in the international legal documents. However, the European Convention of Human Rights does not define this term. Through the elaboration one of the recent cases, Bouyid v. Belgium, the author places violation of the human dignity in Article 3 of the Convention, as a form of the degrading treatment. This is particularly important judgment for the criminal procedure law, because it limits police power during the interrogation. Besides that, the author in this work divide the Article 3 at the substantive and procedural level, and explains violation of the both levels and consequently, violation of the human dignity.

PhD Shin Matsuzawa, Professor at Waseda University, Tokyo, provides an overview and a brief analysis of victim protection in Japan. Although it has been said that victim protection in Japan lags behind that in Western countries, considerable progress has been made since the beginning of the 21st century. And further developments in accuracy are expected in the future. It is very desirable that the protection of victims be improved. At the same time, however, victim protection in Japan is often discussed in conjunction with severe punishment of offenders. This paper examines whether victim protection is inextricably linked to severe punishment of offenders.

Khilyuta Vadim Vladimirovic, Associate Professor of the Department of Criminal Law, Criminal Procedure and Criminalistics, Yanka Kupala State University of Grodno (Republic of Belarus), in the article *The Principle of Equality and Human Rights in the Criminal Law of Belarus* deals with the principles of criminal law of Belarus in the context of the concepts of equality and justice. The law enforcement practices of the Belarusian courts and prosecutors and the legal aspects of the interpretation of criminal law categories are analysed. Non-systemic approaches to the design of criminal law norms and avoiding the principle of equality of all before the law are shown on the example of theft and the grounds for exemption from criminal liability.

Acad. Miodrag N. Simović, judge of the Constitutional Court of Bosnia and Herzegovina, Full Professor of the Faculty of Law of the University of Banja Luka, Active Member of the Academy of Sciences and Art of Bosnia and Herzegovina and Marina M. Simović, PhD, Secretary of the Ombudsman for Children of the Republic of Srpska and Associate Professor at the Faculty of Law of “Apeiron” University in Banja Luka, present the paper *Human Dignity and Protection from Discrimination*. Human dignity is a term used to denote the right to respect and ethical attitude from birth. No human being can be dignified if he is not free. Also, human dignity is an internationally guaranteed category and is part of all acts regulating human rights. That is why every state must take care about dignity of its citizens. Human rights constitute an integrated system for the protection of human dignity in which democracy and the rule of law play a key role. In this context, human dignity is absolute and non-derogable and cannot be limited. Obtaining evidence by violation of human dignity makes that evidence illegal. Deviation from this rule is not allowed because no other individual right or freedom, i.e. no general or public interest, not even the one aimed at successful prosecution of the most serious crimes, is allowed to compare or be given priority over human dignity.

Associate Professor at Faculty of Philosophy, University of Belgrade, PhD Milana Ljubičić in her paper *The Right to Dignity in Practice: A Case Study on the Social Position*

of Serbs in Croatia analyzes the social position of Serbs in Croatia and seeks to answer whether the life circumstances violate their right to dignity. The contextual framework of the analysis includes social events and legal frameworks within which the identity of Serbian minority has been developing. These contextual factors will clarify the social positioning practices and everyday life of Serbs in Croatia, with emphasis on those living in the area of Special State Concern they mostly inhabited until ethnic cleansing in 1995. The analysis shows that the right to a dignified life of the Serbian minority in Croatia has been violated as well as that numerous actors are involved in further deterioration of its social position and power.

The paper by Ljubinko Mitrović, Human Rights Ombudsman of Bosnia and Herzegovina, and Predrag Raosavljević, Assistant Human Rights Ombudsman of Bosnia and Herzegovina analyzes *right to peaceful assembly from perspective of human rights ombudsmen of Bosnia and Herzegovina* in the paper of the same title. From the “Yellow Vests” movement in France to anti-government protests in Hong Kong and from “One in five millions” in Serbia to general strike of teachers in Croatia, it can be observed that freedom of public assembly is becoming one of the pivotal citizens’ rights in global context, not least for the fact that citizens use this right as the most effective mean of expressing discontent with their position, status or specific acts of government. Right to peaceful assembly in Bosnia and Herzegovina is not necessarily being restrictively interpreted by the authorities, but it is important to insist that any limitations must be narrowly defined, because of the presumption of the legality of the assembly. In examining whether response of the authorities was legitimate, there must be a justifiable balance between interests of those who want to enjoy the right to peaceful assembly and general interests of the community which is determined by applying proportionality test. It is necessary to underline that existing legal provisions apply exclusively to “peaceful” assemblies and gatherings, while assemblies with violent intentions or those whose aim is to cause civil unrest or violate rule of law, do not enjoy such level of protection.

Mario Caterini, University of Calabria (Italia), Professor and Director of the Institute of Criminal Law Studies “Alimena” and PhD candidate Valentina Aragona, Luiss University and La Coruna University (Spain), member Institute of Criminal Law Studies “Alimena” in their paper *Criminal Protection of Human Dignity: Racist Ideas, Denialism and Hate Speech in The Italian Legal Order* primarily verifying whether it is possible to give substance to the concept of dignity and fill it with contents in order to respect the principles of materiality and offensiveness of criminal law. To this end, they analyzed the recent reform of Italian criminal law which introduced the articles 640 bis and ter in the Criminal Code, having particular regard to the methods of construction of the crimes

almost entirely based on the scheme of the presumed danger. The authors also take into account the recent legislative proposals aimed at expanding the field of application of the human dignity, noting in conclusion how the current criminal protection is based on a vague concept that tends to be protected absolutely by removing it from the necessary balance with other legal assets of equal rank.

PhD Rejhan Kurtović, Associate Professor and PhD Maida Bećirović-Alić, Assistant Professor, both at the University of Novi Pazar, in the paper *The Right on Human Dignity Trought The Prism of Trial within a Reasonable Time* are claiming that the right to a trial within a reasonable time is a precondition for respect for human dignity and human rights, because delayed justice can be fully equated with injustice. There is an unbreakable link between human dignity and human rights, where human rights cannot be imagined without respect for human dignity, nor can human dignity be imagined without the human rights that guarantee its existence. Throughout history, human dignity has faced various challenges, ranging from slavery to various forms of discrimination. Today, human dignity goes through other types of challenges, because thanks to the existence of human rights, human dignity has been raised to a higher level, but with the modernization of society and social relations there has been a change in the way human dignity is endangered. The protection of fundamental human values and human rights loses all meaning if it is not timely.

Assistant Professor at Beijing Normal University, College for Criminal Law Science, China, Yang Chao analyses the human right protection in HKSAR national security law in the paper of the same title. The HKSAR national security law is for safeguard China's sovereignty, security and development interests, which effectively uphold the constitutional order of the HKSAR established by China's Constitution and the Basic Law. The law is consisting with the standard of international conventions of human right protection, insure that the crack the criminal and protect the interests for most the residents in HK and maintain long-term prosperity and stability of Hong Kong.

Next, PhD István László Gál, University of Pécs, head of Department of Criminal Law, analyzes the criminal law protection of classified information in Hungarian legal system. In the age of the information society, our world is highly dependent on the proper functioning of various information systems, and one of the most valuable parts of those systems is classified data. The number of attacks against such data shows an increasing trend, and the misuse of classified data attacks the legal order and violates or endangers the state order. That is the main reason why intelligence organizations operate in all

developed states. The author classifies the perpetrators and the legal objects of the crime, and presents the four possible offenses against the misuse of classified information.

PhD Dragan Stanar is an Associate Professor at the Faculty of International Politics and Security, Union Nikola Tesla University in Belgrade. In his paper *The Right to Die with Dignity: Soldiers in Post-Modern Warfare* explains how the development of modern technology, especially long-range and autonomous weapons may violate human dignity, in particular the right to die with dignity. Dehumanization, a necessary part of killing via post-modern military technology, implies reduction of human beings to lesser entities (inanimate objects, animals, etc.) and thus negation of their inherent human dignity, which elevates them above all other entities. Being the basis for human rights, human dignity must not be protected at all costs, especially in morally challenging times such as in war. Soldiers, the greatest and most tragic victims of wars, must be at least granted with the right to die with dignity, by the same civilization they fight for to protect. Therefore, the author asserts that an explicit moral condemnation, and perhaps legal prohibition, of dehumanizing weapons must be implemented in order to secure the soldier's right to die with dignity.

The author of the paper *The Right to Die with Dignity in Serbia*, PhD Sladana Jovanović Full Professor at the Union University in Belgrade, poses the questions: Who is entitled to the right to life: an individual or, society/state has some share in it, especially considering the right to choose when and how to die? Do terminally ill patients have an obligation to live in pain and suffering, losing self-esteem, and dignity? They need to commit suicide, or there should be more appropriate way to die with dignity (especially, when they are not capable to end life by themselves, due to severe, terminal illness)? The paper deals with the end-of-life issues such as (assisted) suicide and euthanasia, emphasizing the state of play in Serbia, especially the Civil Code Draft provisions on right to dignified death. Author points out that despite raising awareness that there is a real need to regulate end-of-life issues, it is obvious that states (like Serbia), and international institutions keep on avoiding clear answers. The paper has made a small step forward on the way of making euthanasia legal in Serbia, thus offering to those who suffer to die with dignity (preventing "death tourism", suicide, and different illegal practices).

Judge Suzana Radaković, Higher Court in Zrenjanin, in the paper *Rights of the Elderly to Lead a Life of Dignity* emphasizes that older persons across the world have been traditionally neglected and denied equal dignity. Shedding light on the various failures of society to protect the dignity of older persons is therefore of utmost importance. In this work, she attempts to spotlight some of the failures by: providing a historical perspective

of dignity and the right to dignity; examining domestic (Serbian) and international regulations that aim to protect dignity, with a special focus on legislations that explicitly concern older persons; focusing on two case studies of older persons' care institutions in Serbia and the U.S.; delineating specific violations of older persons' dignity; and finally, outlining a set of concrete actions that we can undertake to remedy these violations. While this report does not feature primary research data, it is meant to review and bring to light the illicit prejudice, injustice, and outward discrimination against older persons.

PhD József Hajdú, University of Szeged, Hungary and Member of the European Committee of Social Rights, Council of Europe, Strasbourg, France, emphasizes that the main theme of his paper – robocare and patients' dignity – is a probably dumbfounding and even extravagant idea in many traditional societies. However, there are some (not so numerous) countries where the demographic and labour market supply problem makes it happen in everyday practice. Traditionally, the role and responsibility for taking care of old family members were the moral and legal obligation of the family. Lately, on a residual basis the church, the state and NGOs entered in, and nowadays private for profit business organizations also entered this “business”. The main focus point of this article is whether the AI and its manifestation, the robots, will be able to replace or complement the human social carers.

II. HUMAN DIGNITY DURING THE PANDEMIC IN PROTECTION OF CHILDREN, THE ELDERLY, PEOPLE WITH DISABILITIES AND OTHER PARTICULARLY VULNERABLE GROUPS

The second thematic chapter deals with the notion of human dignity during the COVID-19 pandemic, with a particular focus on vulnerable social groups. It includes eight scientific and expert papers addressing the general questions related to human rights during the pandemic (from the perspective of lawyers and psychologists), the rights of the migrant children, non-western minorities in Norway, and Roma minorities in Serbia. Also, it addresses the questions of the isolation and its consequences and protection of women's dignity during the pandemic.

PhD Elena Tilovska-Kechedji, Associate Professor at the Faculty of Law, University St. Kliment Ohridski, Bitola, questions the human rights in times of pandemic in the paper of the same title (*Human Rights in Times of Pandemic*). The author emphasize that the world stopped due to pandemic COVID-19. A virus that spreads within the second and

affects all human beings: young, old, healthy or weak. And in order to stop the spread of the virus we need to be socially distanced from our friends and families. We cannot go to work or school, we have to stay home, our right to move, to travel is limited. Our right to health and adequate standard of living is limited. Therefore, the human rights which we inherit when we are born are threatened. And these threat should be neutralized. The author underline we should finally realize that human rights are our essence and we should respect and acknowledge them of their worth.

PhD Yury Evgenievich Pudovochkin, Doctor of Law, Professor, Chief Researcher of the Criminal Law Department of the Center for the Study of Problems of Justice, Russian State University of Justice in co-authored article with Alexey Dmitrievich Shcherbakov, Associate Professor of the Department of Criminal Law of the Russian State University of Justice in the paper *Pandemic and Adjustment of the Constitutional Limits of Human Rights Restriction: Russian Experience* (in Russian) undertake an instrumental understanding of the issues of legal restrictions of citizens in the context of a pandemic caused by COVID-19, from the standpoint of the criminal and administrative legislation of the Russian Federation. The subject of consideration was the norms of the Criminal Code of the Russian Federation (hereinafter referred to as the CD of RF), the Code of Administrative Offenses of the Russian Federation (hereinafter referred to as the Code of AO of the RF) and regulatory legal acts, which are classified by the authors as a specific category of “emergency”. The subject of consideration is the provisions of the domestic criminal and administrative legislation in the historical context, dating back to the time of the USSR. It is concluded that the current pandemic has generated a dangerous tendency to limit the constitutional rights of citizens, which, first, was expressed in the low quality of legislative work, as well as exposed the long-standing problems of organizing legislative and legislative activities in the Russian Federation.

In the paper *The Rights of Migrant Children during Pandemic in Serbia* Dušan Ilić, Research Assistant on Institute of European Studies and PhD Vojislav Dedanski, from Faculty of Geography, shows how the COVID-19 pandemic has affected the whole world and all spheres of society. Among the most affected parts of the population are migrants, and a particularly vulnerable group are migrant children. Intensive migrations were difficult during the pandemic, and a part of the migrant children remained stationed on the territory of Serbia. The corpus of rights of migrant children is realized in the corpus of fundamental human rights. Some of them, such as the right to education or the right to health care, are less available during a pandemic, not only in Serbia, but in general. Nevertheless, thanks to the inclusive legal framework, migrant children in the Republic of Serbia enjoy all the rights that other children enjoy. The main problems that these

children face are the new environment and ignorance of the Serbian language on the one hand, but also the general epidemiological situation on the other. The aim of this paper is to analyze the existing system of protection of the rights of migrant children in Serbia, their adaptation to that system, as well as solving the problems that migrant children face, especially during the pandemic.

Ralf Thomas Heberling, University Lecturer in Social Sciences, University of South-Eastern Norway (USN) in the paper *Human Dignity during the Pandemic: the Case of Non-Western Minorities in Norway* reviews the impact of the pandemic in spring 2020 on ethnic minorities in Norway. Here covid-19 has hit especially hard immigrants from Africa, Asia and the Middle East. Rates of infection and mortality for this group are far above average of the population. The article attempts to elucidate factors triggering and contributing to this situation, as well as reactions by concerned authorities and civil society. The author contests the common notion that language is the main problem and command of it the remedy. Good communication is necessary but not sufficient to improve the situation. The author argues the need for a comprehensive and coherent policy to create resilience among minorities and concludes that the crisis created by COVID-19 is too complex to be left to health-authorities and economists.

In the paper *Social Aspects of COVID-19 Pandemic in Informal Roma Settlements: Specific Challenges and Solutions* MA Andrej Kubiček, Research Assistant at Institute for criminological and sociological research, Belgrade, explores specific problems faced by Roma community in Serbia during the pandemic. Pandemic of Covid-19 of 2020 has qualitatively changed lives of many individuals. Yet, for those who are marginalized, such as members of the Roma community, change was rather quantitative, because level of their already existing everyday hardships multiplied. Impact of virus epidemic on one specific segment of population has ran over boundaries of epidemiological domain and enveloped all aspects of their social life. Health isn't the only concern of those struck by pandemic, which affected their economic status and employment chances; education of their children and overall social status. Article explores specific problems faced by Roma community in Serbia, and different answers and solutions provided by various stakeholders (government, international organizations, NGOs and local activists). Presented data was gathered from media reports and interviews with experts and actors in the field who have planned, organized and participated in these activities in different municipalities in Serbia.

PhD Vida Vilić, assistant director for legal matters at Clinic of Dentistry Niš and Research Associate in *Isolation during COVID-19 Pandemic: A Trigger For Domestic Violence*

analyses the negative consequences of isolation and lockdown during COVID-19. Physical distance, social isolation, restriction of freedom of movement, lockdown, obligatory self-isolation and other health measures that state authorities proposed during this pandemic resulted in increase of negative consequences for mental health, because people become worried and irritable through negative emotions. Domestic and partner violence became even more intense. Lockdown, isolation and the impossibility of leaving the home that you share with your partner, provided great opportunities for exercising all forms of gender-based violence against women. The aim of this paper is to point out that social isolation is a significant factor in the manifestation of gender-based domestic violence, and to provide basic guidelines for providing assistance and support to victims of domestic violence, in order to help them to overcome difficulties in combating this negative phenomenon during the pandemic.

Zorica Mršević, PhD, Principal Research Fellow, Institute of Social Sciences, Belgrade, in the paper *Protection of Women's Dignity during The COVID-19 Pandemic* probes the escalation of violence against women in the social and political context of deterioration the economic (labour and professional) position of women. These are the two basic areas of possible violation of the dignity of women during the COVID-19 pandemic in Serbia, both of which relate to the very basic of human existence. The aim of this paper is to, through the analysis of endangering and diminishing the dignity of women in the current moment of the pandemic crisis, simultaneously identify possible answers and measures to protect the dignity of women. The focus is on necessity of protection against gender based violence, women's human rights, institutional responses, solidarity, security and good communication. Attention is paid to both domestic and international sources and examples of good practice, especially from the region and Europe, from the OSCE, Council of Europe, the EIGE, European Institute for Gender Equality, to maybe most interesting campaign led by the FIFA. The future is still seen by all the mentioned actors as uncertain.

PhD Jelena Zeleskov Doric is a registered psychologist in Australia, Europe and Singapore, licensed Gestalt psychotherapist in Europe and Australia, Founder and Director of the International Gestalt Dots Institute, Sydney, Australia. In the paper *Human Dignity during the COVID-19 Pandemic - Gestalt Psychotherapy Narratives* the author deals with the contemporary pandemic throughout the prism of gestalt psychotherapy. The aim of this paper is to show that the therapeutic relationship can be a crucial process in preserving human dignity during the pandemic. The "social distancing" and "new normal" concepts have been created and widely implemented across the world, shifting people's experiences of themselves, others and life in general. Unpredictability and

surveillance are becoming daily experiences in people's lives, leading to a significant increase in mental health issues. Psychotherapy delivery formats are rapidly changing, with the therapeutic relationship being conducted through various virtual health platforms. The therapeutic relationship will be defined through various psychotherapy modalities, focusing on the process of rupture and reparation. The therapeutic presence during the pandemic is also considered from the perspective of phenomenology and Gestalt therapy, together with the potential impacts of COVID-19 on this important element of psychotherapy.

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PROLEGOMENON

Jovan Babić*

THE RIGHT TO HUMAN DIGNITY

Is there a right to human dignity? If there are human rights, then the right to dignity should be one of them, or, in fact, the first among them? Because, the respect of everyone's dignity is intimately related to what the very basis of the possibility of establishing any right and any value is: The true existence of freedom as actual reality, as something that truly and not just declaratively exists. On the other hand, freedom, as we know, can be abused in many different ways. The possibility of choosing evil is a metaphysical presupposition of the possibility that freedom exists - otherwise, we have necessity, principled absence of choice and impossibility to establish responsibility. Therefore we can say that freedom itself is not a value but a necessary presupposition of every value, both a positive and a negative one.

But values are about this polarity between the positive and the negative, right? If we focus on positive values (the same is with the negative values), we will have an interesting situation: Positive values are established through someone's interest in something - what no one is interested in is worthless. However, whether there will be interest is uncertain, because it depends on the free goal setting, free in the sense that the goal setting was a matter of choice, that the goals could not have even been set. Then the realisation of these goals will be something good, where the good can be greater or lesser. The good will be measurable, it will have its price and it might turn out to be too expensive. Also, if someone is deprived of such good, the damage will occur, which also has its price and, in principle, can be compensated. The total amount of good generated in such a way in the world is a matter of success in the production of goodness that can be "consumed", or used. The goodness is here to be used, "consumed", as things. Things differ from people precisely in the way that they can be used, and replaced in that process. The use of things

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(for any purpose) does not degrade things and question their determination. They are merely more or less “good” as a potential means for some (any) purpose. In that sense, things can have value, and then they have a price.

Is that the general property of value, do all values have a price? What happens with “the other side”, the one that is not “consumed” (so that it can be said that in that sense it would not be appropriate to refer to it as “good”), but is an entity or being that “consumes”, the entity whose interest (in the use of a certain thing for someone’s freely set goal), generally enables anything to have value and without which there would not be any values, those values that have their price. This is where we are confronted with the distinction that forms the basis of the world, the distinction between a person and a thing. In nature, which consists of things and events, there is no person, but it is so only because there is no freedom and the necessity of general determinism rules. In the world, on the other hand, in addition to nature, we also have a part that would not exist without freedom and which the free beings, *persons* (and their collectives), have produced by setting up certain goals whose implementation has generated values (values which have their price). Here we are confronted with completely different values, values for which it makes no sense to say they have a price - although these values can be violated but they can also be defended and protected. All these values, which arise on the basis of a person’s property to have their freedom, can be called dignity and they differ, in essence, from those values which have their own price list and which can be compensated.

We are dealing here with values that are above any price, and which, when endangered, are subject to protection through natural, or as it is now fashionable to say “human”, rights. What is protected here is the value embedded in the very fact of the existence of beings, who have, or for whom it is assumed (normatively necessarily) to have the property of freedom, and that value is what is called dignity.

To be a person **means** to be a being or entity who “has” dignity (that is to whom it must be necessarily attributed to have that property - even when they in fact might not (no longer) have it or when it is absent). We are dealing here with a completely different notion of value, with values that have *no* price! This, however, does not mean that the axiological dichotomy between positive and negative does not exist here as well, and that, like everything else is constituted by freedom, it cannot be abused and violated. (Every) *person has the right to not be used as a mere thing*, and this is fundamentally the right to dignity. Except that, strictly speaking, this is not about the right but about something that precedes the right, about the duty to respect (everyone’s) dignity.

This duty is universal and necessary. The fact that this is about the duty implies the possibility of violation, and (normative) necessity contained in it indicates the reflexivity: In this sense, it is not possible to respect one person and disrespect another (as it is possible to love, or hate one person and not love or hate another) - because the duty of the universal respect entails the necessity of acknowledging the personal character of every person. This property inevitably belongs to everyone and everybody is necessarily and peremptory obligated to acknowledge it to everyone who they recognise as a person (recognition, as any other perception, is not a free voluntary action). This necessity entails the universal duty of everyone's person, and the violation of this duty entails humiliation, which is not an ordinary damage that can be compensated. The duty to respect everyone's person is completely independent from the interest from which all values, that have certain price, arise. The violation of this duty is in the moral sense absolutely inadmissible, no kind of interest can justify the violation of this duty because the damage it causes is irreparable. The only morally correct way of restitution of that damage is punishment, which cannot be replaced by any compensation.

The duty of absolutely compulsory respect (everyone's, other people's but also one's own) for a person prohibits all arrogance, manipulation, violence and discrimination, and thus protects everyone, from others and from oneself. It is reciprocal: One cannot respect oneself and not respect others (this would be conceit, arrogance) and one cannot respect others without self-respect (this would be servility). Everyone's dignity, even when it comes to those who violate that duty, is protected by that duty: It is not correct to disparage the criminal who, after the just sentence, is led to the execution of the death penalty, because their dignity is still the subject of this universal duty (justice excludes humiliation). The duty of the universal respect refers precisely to the respect of everyone's dignity, the dignity of every person. It essentially comes down to the acknowledgement that no person is merely a thing and therefore, their existence must be the subject of moral and legal protection. This protection is the subject to the right to human dignity. In order to "have" this right, it is enough to "be" a person (and not merely a thing - because we are all, in addition to being persons, also things, and in addition to the law of freedom, we are also subject to the laws of nature). The things do not have this right, because they cannot have it, while persons have it inevitably. Persons are not mere things, and must never and under no circumstances be treated that way. This is the point at which the universal right to human dignity is established. This right applies to all people, completely independently of everything else that also determines people, in terms of values and facts.

Dragana Ćorić*

HOW MUCH DOES DIGNITY “COST”?

Numerous domestic and international legal acts use the notion of dignity, declaring it as one of the highest social and legal values or even as the highest value. Some define it as the umbrella term and something that every human being has, from which all other personal rights derive.

Contextual conditionality of the content of the term of dignity leads to numerous misinterpretations and misunderstandings of its basic intention and essence. The only one and the only correct meaning of dignity does not exist- that is why the dignity is defined differently in different legal documents, in accordance with the political agreement achieved at that time(whether they are national or international legal documents). Due to the imprecisely determined scope of this term, it becomes rather questionable how can be determined in practice a fair monetary compensation for the violation of dignity when we do not know exactly what dignity means. In this paper, we discuss shortly about the content of dignity as well as of possibility that dignity has a price.

Keywords: *dignity, definition, fair compensation*

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Defining dignity

Some authors point out that there is a “frequent, almost inflationary use of the term human dignity” (Марјановић, 3/2013: 96). Inaccuracy in defining dignity, combined with frequent use (both where it should be used and where it shouldn’t be used) has led to an expansion of the scope of this term and the possibility that “everyone can attribute whatever meaning they want to dignity”(Марјановић, 3/2013: 96).

Dignity, despite its imprecisely defined content, is often placed in the context of human rights, as a mechanism for their realization, as a criterion based on which it is assessed whether a right is respected or not, or is presented as an independent human right. Jürgen Habermas viewed dignity as a seismograph that lays the foundations for a democratic society based on mutual respect for the rights of every one (Хабермас, 2011:25). If there is no dignity, there is no free society.

Domestic legislation, as well as international conventions, often use the very notion of dignity, without further explaining what they mean by that term. “*All human beings are born free and equal in their rights and dignity,*” Article 1 of the Universal Declaration of Human Rights states pompously. “*People are endowed with reason and conscience and should act with each other in the spirit of brotherhood (communion),*” reads further in item 2 of the same article of the Universal Declaration. Reason and conscience sometimes fail- that is why the creators of this declaration already in Article 5 speak about the prohibition of torture and inhuman or degrading treatment of anyone, which are, in general, the violations of dignity. From the above, we may conclude that dignity is perceived as a special concept, or a relationship between itself and its holder. Or maybe it's different?

On the example of the use of the notion of dignity in the Universal Declaration of Human Rights, we have shown how much the lack of a clear legal definition of the notion of dignity leaves room for its different, contextual interpretation. The solemnity of the saying, which acts as a promise, diminishes the very notion of dignity. And promises are often broken.

The Constitution of the Republic of Serbia in Art. 23 paragraph 1 states that “*human dignity is inviolable and everyone is obliged to respect and protect it*”, without further specifying what the “*inviolability*” is. In dictionaries we find that “*inviolability*” means invincibility, supremacy, and infinity; so again, we are talking about the possibility of

injuring or violating something that is defined as – inviolable. If this is inviolable, how can it be violated, or attacked at any meaning?

Respect for the dignity of the person deprived of liberty is mandatory, under Article 28, paragraph 1 of the Constitution of Republic of Serbia, regardless of the personal and emotional attitude of those who deprive him of his liberty, and for what presumed cause or crime is he deprived of liberty). But, we have a certain specification of the notion of dignity in Art. 60 paragraph 4 of the Constitution of Republic of Serbia. When mentioning the dignity of a person at work, there are enumerated certain circumstances in which might be assumed that the dignity is fulfilled in some ways, such as: existence of safe and healthy working conditions, necessary protection at work, limited working hours, etc. So, it seems that we have specifications in our constitution about the definition of dignity, but they can be treated only as the beginning of the process of defining it. It means that it is possible to define dignity, beyond all the generalized political phrases that legal acts often contain.

Some authors say, while talking about our elderly citizens, that there is “a dose of fear” of the coming age category that is potentially exposed to the highest level of social marginalization: (Solarević, Pavlović, 2018: 64). They also say that we must see the position of elderly people different, through “the prism of active ageing as dignified and functional aging”, having in mind all recommendations given by the especially World Health Organization (Solarević, Pavlović, 2018: 60). In this sense, “dignity” has been given the role of adjective, while explaining that respecting the elderly people, respect for their emotions, memories, respect for all that they have been doing for their whole lives cannot be forgotten because of their age

Violation of dignity is defined as one of the consequences of any act of discrimination or violation of other laws, even if they are not specifically mentioning dignity. Thus, the Law on Public Information and Media in Article 79, paragraph 2 specifies that the violation of dignity is committed when in the media is “*published information which infringes a honor, reputation or piety, of a person by presenting the person in a false light by attributing traits or characteristics that he/she does not have, or by denying the traits or characteristics that he/she truly has.*” On the other hand, paragraph 4 of the same article stipulates that “*caricature, satirical, collage and other similar depictions of persons*” cannot be considered a violation of dignity”. We can justifiably ask where the satire then ends and when the insult begins ? No clear criteria have been set for determining the border between the stated ways of behavior and insults, humiliation, belittling, and other similar forms of behavior that can be considered a violation of one's

reputation ie. dignity. We are talking here about the violation of something that is not clearly defined, although it is presented as the highest good and value of any individual, while in the definition of dignity are used other terms which are also insufficiently precisely defined.

Also, more and more frequent calls for the legalization of euthanasia in the context of *“the choice of a dignified death”* are moving the definition of the notion of dignity to a field where it has never been before. In the preliminary draft of the Civil Code of the Republic of Serbia, Article 92 envisages the "Right to Dignified Death", or euthanasia, where dignity is a function of adjectives, describing the quality and manner of interrupting someone's life, which is not violent. It is questionable how dignified the interruption of life can be, or death itself, when we should be committed to life and to the preservation of life.

Finally, the Preliminary Draft of the Civil Code of the Republic of Serbia in Article 84 defines not the dignity, but the right on dignity, as follows:

The right to the dignity of the person is inviolable and everyone is obliged to respect it.

All other personal rights derive from the right to dignity

Here, too, the notion of dignity has not been specified, at least not in a direct way. Only through the wording from paragraph 2 of this article, we can conclude that the set of all personal rights represent the dignity of the person, but it is not excluded that this term should be more.

Our positive law has no precise answer on the question what is dignity. What about legal theory?

Dignity is defined in the theory and philosophy of law as one of the highest social and legal values, one of those whose existence and realization distinguishes people from the rest of the living world on earth. It is a special kind of attitude towards ourselves, our internal attitude about what we are and what we do not want to be (how we do not want to be treated in certain situations). We want to be recognized by other people as valuable complex of different characteristics, with clearly stated demands of what we do not want others to do to us, and how to respect everything that we are. J. Waldron explains it as such: “Dignity is the status of a person based on the fact that he is recognized for his ability to control and regulate his actions under his understanding of norms and reasons

that apply to him: it presupposes that a person can give and is authorized to offer his understanding of himself, which others must take care of, and that the person has the necessary means to demand that his existence among us as a human being must be taken seriously and adapted to the lives of others in their actions and their attitude towards it”(Waldron,2013:18) . Based on the above, dignity is marked as the status of a person - since it implies a set of rights and obligations towards oneself and others.

D. Mitrović differs two forms of human dignity: natural and social. According to this author, natural dignity derives from human natural qualities themselves. It has intrinsic value simply because we exist as beings and is therefore an inseparable part of us. On the other hand, social dignity “is derived from the obvious natural and social inequality of people, which is why it is acquired (not innate), changeable (not eternal), particular (not universal), and obsolete (not non-obsolete). As such, social dignity is always heteronomous and relative” (Mitrović,2016). M. Marjanović speaks about a similar concept, mentioning the universality and naturalness of dignity, as well as the preservation of which means resistance to humiliation, oppression, and disenfranchisement (Marjanović, 4/2013:45–60).

Some authors strongly connect the reputation of the state with the respect for human dignity of its residents, saying that “dignity. postulates life worthy of man, as a human being; thus this human right applies only to natural persons. Personal dignity is the basis of all other personality rights, and thus the right to preserve the physical integrity of the person (prohibition of beating, physical punishment),mental integrity (prohibition of insulting, humiliation, discrimination), the right to freedom and security (prohibition of slavery, servitude and forced labor), the right to respect for private and family life, the right to free development of personality, etc” (Popesku, 2018: 158).So, we have here specific attempt of defining of dignity, by enumerating everything that falls within the scope of the notion of dignity.

Others authors, like Shultziner, recognize “thick” and “thin” meaning of dignity. The “thick” human dignity is a particular cultural understanding of what it means to be human and have a dignified life with fellow human beings” (Shultziner, 2003:3). On the other side, the “thin” meaning of human dignity is a third discrete component of the thick meaning of human dignity, besides rights and duties, and honor. It is connected with behavior similar to humiliation and diminution of human worth. If the “thick” meaning of dignity could be seen as an organism, the “thin” meaning could be considered as a heart, the most essential organ, without which is impossible to live.

There are, of course, those who consider human dignity a useless and superfluous term, especially in medical ethics, because it expresses only what is already contained in the ethical principle of personality autonomy (Macklin, 2003: 1419–1420). Identifying the scope and content of any two (legal) terms does not always mean their complete equality of meaning, as in this case. Personal autonomy in this context means detailed and precise informing of the patient about all procedures that will be applied in his health situation as well as the appropriate consequences of these procedures, and the patient's decision based on this information on whether or not to apply such procedures to him. Equating the autonomy of the person and dignity inflicts a kind of injustice on the notion of dignity because it is much more than the definition of the autonomy of the person.

A different kind of defining the dignity

Dignity is often taken as the basis of international law precisely because of its conceptual width (McDougal et alia, 1977,227-308)), because, according to some authors, it contains faith in humanity and a better world, and at the same time encompasses all other values. In their article, McDougall, Chen, and Laswell cited an impressive list of violations of various rights that are directly or indirectly related to dignity in various spheres of life (more than 200), and in a way ***negatively defined the notion of respect for human rights and dignity***. “Though the nature, scope and magnitude of values at stake may differ from one community to another and from occasion to occasion, the nonfulfillments and deprivations encompass every value sector”, these authors agree (McDougal et alia, 1977:237). They recognized eight areas of deprivation of human rights (no matter whether the people are fully deprived from exercising their rights or are faced with inadequate responses to their needs). So, those authors defined dignity kind a backwards, by defining all kinds of violations of great number of personal and collective human rights and freedoms.

“Common demands for human dignity values have been rising on a world scale. Nevertheless, the actual patterns of demand vary in kind and in scope from community to community and from culture to culture”, say they further (McDougal et alia, 1977:239). All the areas that we will mention are rather important for constituting and maintenance of dignity in its the most widest meaning. What kind of deprivations (of dignity) are possible? We will list them in short , with some examples that those authors gave in their paper:

1. Deprivations relating to respect (for example, widespread denial of individual freedom of choice regarding participation in value processes including the

comprehensive and systematic deprivations inherent in slavery, caste, apartheid and equivalents; persistent discrimination on such invidious grounds as race (racism), sex (sexism), religion, political opinion, language, alienage and age; (McDougal et alia, 1977:237)). This group of deprivations affects personal rights of individuals more.

2. Deprivations relating to power (such as: arbitrary denial or deprivation of nationality causing numerous unprotected, stateless persons; denial of full participation in the processes of government by exclusion from voting and office holding; (McDougal et alia, 1977:239)). This group of deprivations is connected with exercising state powers and citizens' political rights. If citizens are not given possibility to exercise their political rights, citizens might get the impression that they are not important to their own state, that it does not consider them worthy to listen to their wishes and suggestions. They lose dignity here as well as they are humiliated in other area of their lives.
3. Deprivations relating to enlightenment (for example: continuing high illiteracy rate in many communities around the world; suppression of nondominant languages; (McDougal et alia, 1977: 243)). Cultural basis is very important for individuals as well as for the specific groups.
4. Deprivations relating to well-being (for example: persistence of human misery from disease and hunger (starvation); high mortality rate and low life expectancy in many parts of the world; high incidences of mental and emotional disturbances in stress-laden societies; (McDougal et alia, 1977:247)). Well-being is here connected not only with financial, but also with spiritual and emotional stability.
5. Deprivations relating to wealth (for example: prevalence of poverty around the globe, except in some pockets of affluence; inadequate provision of a basic income and social security; (McDougal et alia, 1977:251)).
6. Deprivations relating to skill (for example: the requisitioning of talent and skill; lack of exposure to training, both in content and method, appropriate to a culture of science and technology; the problem of the brain drain; (McDougal et alia, 1977:253)). All should be granted access to education and chances to improve themselves. If there are no chances or its availability is limited, dignity of an individual is infringed in a very specific way.

7. Deprivations relating to affection (for example: the family in crisis at a time of rapid social change; (McDougal et alia, 1977:254)). The state is made up of people who need to feel fulfilled and on a personal, emotional level. In times of crisis, they need support. If support is lacking, one can justifiably ask whether the state cares about its citizens in bad times or needs them now in good times.
8. Deprivations relating to rectitude(for example : warfare over religious conflicts; (McDougal et alia, 1977:256).

Lack of all listed (in McDougal et alia paper) ***deprivations represents the fulfillment of dignity in its entirety.*** It means that all rights and freedoms can be fully exercised by any man/ woman without any restriction and that they are fully dignified. So, we can say that we here have the most complete definition of dignity- although the list of requirements is rather long, it is the only correct way to defined it.

The “price” of dignity

Can dignity have its own price? Can it has its own value, monetarily expressed?

When something is insufficiently and imprecisely defined, such as dignity in our (positive) law, but is mentioned only as the highest, untouchable, invincible, we face the following challenges (in the context of pricing):

1. we must determine when the dignity has been injured, damaged, or “destroyed” and determine the degree of that injury(which is rather challenging because we truly don’t know the full extent of the dignity itself);
2. we must determine the cost/ price in monetary terms and according to the degree of violation, and not to humiliate it and diminish its significance of the (smallest) injury, because every injury is the same- breach of somebody’s rights;
3. in the end, we must determine an adequate measure of protection of deprived value (of dignity) and ensure that it will be never again attacked, injured, or violated in any way?

How does positive law determine the “price” of violated dignity?

It primarily uses the provisions of the Law on Obligations, namely Articles 198 and 200, as follows:

Article 198

1) Whoever violates the honor of another as well as who makes or transmits untrue allegations about the past, knowledge, ability of another person, or anything else, and knows or should know that they are untrue, and thus causes material damage, is obliged to compensate.

(2) However, the one who makes a false statement about another without knowing that it is not liable for the caused damage.

2) However, the one who makes a false statement about another without knowing that it is untrue, if he or the person to whom he made the statement had a serious interest in it, is not liable for the caused damage.

Article 200

(1) For suffered physical pain, for suffered mental pain due to diminished life activity, disability, violation of reputation, part, freedom or rights of a person, death of a close person as well as for fear, the court shall, if it finds the circumstances of the case, especially the severity of pain and fear and their duration justifies it, to award a fair monetary compensation, regardless of the compensation for material damage as well as in its absence.

(2) When deciding on a request for compensation for non-pecuniary damage, as well as on the amount of its compensation, the court shall take into account the significance of the damaged property and the purpose of that compensation, but also that it does not favor aspirations incompatible with its nature. and social purpose.

Dignity, therefore, includes certain personal rights, as well as the honor¹ and reputation² that result from the personal or professional sphere of activity of the person who has

¹ Honor is defined as : “the respect that people have for someone who achieves something great, is very powerful, or behaves in a way that is morally right; the belief and practice of someone who has high moral standards; something you do that you are proud of be an honor”. https://www.macmillandictionary.com/dictionary/british/honour_1, accessed on May 2020.

² Usually defined as :” overall quality or character as seen or judged by people in general; recognition by other people of some characteristic or ability”. <https://www.merriam-webster.com/dictionary/reputation> . Accessed on May 2020.

suffered damage. In most judgments, these three terms are listed together, because they unite both subjective and objective evaluation criteria.

In the judgment of the Court of Appeals in Novi Sad, №. Gž .3015 /13, dated 29 August 2013 year , which changed the judgment of the Basic Court in Novi Sad № P. 4541/2011 ,dated 27 February 2012 year, we come to the view that:

“the violation of reputation and honor of a person implies a set of objective and subjective elements, which need to be assessed in each specific situation. Honor is a set of human virtues and the opinion that an individual has about himself, and reputation is an objective category, which implies the attitude and opinion that the environment has about the personality of an individual. Therefore, for the injured party to be recognized the right to monetary satisfaction due to the stated type of non-pecuniary damage, it is necessary to have a cause-and-effect relationship between the event causing the damage and the occurrence of non-pecuniary damage, as well as the court's conviction that lead to satisfaction”.

Since in the specific case it was stated that the actions taken by the defendant represent a critical review of citizens on the work of state bodies where the plaintiff is employed and that persons employed in state bodies **“must be ready to submit all negative criticism and reactions with a greater degree of tolerance”**, the claim was denied. The court found it sufficient satisfaction for the plaintiff that all charges against him filed by the defendant even with the highest state authorities in the country were dismissed, because it was found that he had done his job professionally and that there was no breach of honor and reputation for which he could claim any compensation.

The Court of Appeals in Novi Sad, in case № Gž.3536 / 13 , from 28 November 2013, upheld the first-instance judgment of the Basic Court in Novi Sad, by which the defendants were obliged to jointly pay the plaintiff the total amount of 1,000,000 dinars in compensation for non-pecuniary damage, in the amount of 800,000.00 dinars in the name of mental pain suffered due to violation of honor, reputation, freedom, personal rights and dignity, and the amount of 200,000.00 dinars in the name of suffered fear. The subject of the dispute was the plaintiff's request for compensation for non-pecuniary damage she suffered as a victim of the crime of trafficking in human beings (the plaintiff was denied freedom of movement and was forced into prostitution for a long time by the defendants), for which defendants were found guilty. The judgment of the High Court in Novi Sad number K.195 / 10 of 15.07.2010. years. ***So, in this case, the court estimated that dignity “costs” 800,000.00 dinars.***

In its second judgment, also the Court of Appeals in Novi Sad, in the case № Gž. 5081/10 dated 17. February 2011. , has confirmed the first-instance verdict of the Basic Court in Novi Sad, where the plaintiffs were awarded 120,000.00 dinars in compensation for non-pecuniary damage due to injury to honor and reputation. The plaintiffs are persons employed in the republic Ministry of the Interior, who were insulted and physically attacked in the bank premises while performing their duties, where they came at the invitation of the staff to intervene. Although here too we have persons employed in state bodies, for whom a higher degree of tolerance applies to the behavior and comments of citizens on their work, the court appreciated the circumstances of the case which are very different from the case mentioned above (ie concerning Gž .3015 / 13 of 29.08.2013) determined that the *injured honor and reputation and dignity of the plaintiff “cost” 120,000.00 dinars.*

What is encouraging and what can unify the positions of court practice and give guidelines to judges for determining fair monetary compensation in case of violation of dignity, honor, and reputation is a special and different regulation of these cases in the Preliminary Draft of the Civil Code of the Republic of Serbia. Announcing these changes, Professor S. Perović explained that it is much more difficult to determine the value of moral damage, in cases of diminished life activities, due to damage to reputation, honor, freedom, death of a close person, or due to the particularly severe disability of a close person and crimes against the dignity of personality and morals. This type of damage cannot be “repaired” with monetary compensation, because it exists as a “scar” permanently in the soul of the person who suffered the injury. The injured party should be given such a fair amount, continues S. Perović, *“that for the awarded amount of money he can obtain for himself the satisfaction that enables him in the best way to restore the disturbed mental balance.”*

We will agree with S. Perovic, that *no monetary compensation can or must be equated with the violation of what is most essential in each of us - and that is dignity.* By determining the cost /price of value, we can only reduce its true, intrinsic value. The circumstances in which such an injury occurs may be corrective elements for determining a fair amount of money, by which the injured party will be able to afford something he/she could not because of the violation of dignity and suffering that resulted from that violation. We believe, however, that no amount can be sufficient, because it cannot annul something that has been done - with dignity, but that it can be adequate and acceptable.

Concluding remarks

But is it possible to make such a system of protection of dignity, so that its violation is reduced or eliminated? An aggravating factor in this sense is the lack of a general definition of dignity itself. It follows that it is additionally difficult to define dignity in any sphere of social life, especially within different professions. Therefore, we appreciate the need to ***determine the parameters of dignity within each profession and each part of life, in which a personal right may be violated.*** Besides, it would be necessary to *determine the degree of violation of each of the criteria for determining the existence of dignity within (for example) each profession and the equivalent fair amount of compensation for that degree of violation.* Such clarifications would facilitate the work of judges, on the one hand, and certainly inevitably lead to a certain degradation of dignity, because it would get - its cost in certain situations. Considering the maxima, that justice must be served and the aggrieved party satisfied, the stated proposals would, however, be more in favor of the injured party and his/her personal and emotional reparation and satisfaction.

We see that the vital role of dignity can be demonstrated by contrasting it with its absence (when we have humiliation) and its contributions to the escalation and protracted nature of violent conflicts. Dignity implies that each person is worthy of honor and respect for who they are, not just for what they can do. In other words, human dignity cannot be earned and cannot be taken away. It is our inseparable part, and every other good thing in life depends on the safeguarding of our fundamental dignity. If the only way to preserve and protect dignity is to threaten potential perpetrators with high monetary costs for violating dignity, then so be it, although it is clear to us that nothing can fix one's distorted or destroyed conception of one's own worth. Dignity is a beacon of freedom for all beings; if that beacon is in the fog, then the human future is also quite foggy and uncertain.

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Zoran S. Pavlović*

PERSONAL DIGNITY AND CHALLENGES OF IMPRISONMENT

Dignity of the person, or personal dignity, is a category that goes beyond basic human rights. It is about a concept that has been incorporated into practically all important international legal sources, as well as constitutional and legal provisions at the national level. In addition to the fact that there are still significant doubts in the conceptual definition, the context of the execution of criminal sanctions still represents a particularly turbulent field of re-examining the limits of respect for human dignity. In that sense, an overview of basic and more precise penologically relevant international legal documents will be given in this paper, as well as the practical context of the imprisonment issues. In addition to normative, legal and practical contradictions, proposals for further social reaction and realization of the complete protection of a man and a person will be also defined. The introduction of new standards in penal institutions has become an integral part of the positive changes that need to be accepted.

Keywords: Personal dignity, imprisonment, international law

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Introduction

The history of the practice of punishment and the concept of respecting the dignity of the person represent a large part of the penological evolution of the divergent category (Radoman, 2013). To shame, to degrade, to take away all the attributes of humanity, to torture mentally and physically, and even to deprive of life, seem to be the initial postulates of retributively oriented penology (Atanacković, 1988).

Having in mind the significant progress of the legal science, human dignity, in legal sources, in the period after the year of 1945, has been strongly positioned as a value that requires the highest and unambiguous protection. The dignity of the person is incorporated not only into national legal and constitutional provisions, but it is most often recognized as the initial premise of all important international legal acts (Gajin, 2012).

Nevertheless, in 2020, the practice of penance and the guarantee of respect for human dignity often seem to remain (still) in opposing positions. This refers not only to the globally analyzed penological problems, but also to the national, practical framework for the execution of criminal sanctions.

It is, for this reason that the relevant legislative provisions will be analyzed below, in the context of the execution of a prison sentence that is imprisonment. As the strictest and ultimate criminal sanction of our legislation, the imprisonment will be observed and analyzed between the assumed international legal obligations and the reality of the conditions of the current penological practice in the Republic of Serbia. The conclusions drawn will be focused not only on a more detailed identification of current problems, but also on the potential design of a problem solving strategy. This means that our unreserved support to the changes that have begun in this area will be given to, but also the scientific critique of the situation that is in the reform process will be addressed.

The notion of personal dignity and general international legal sources

The development of discourse on the institute of personal dignity finds its roots in philosophical debates. Originating from the Latin word "*Dignitas*", the given term refers to the positive value or reputation of a person, i.e. a conglomeration of different attributes, including personal reputation, and moral, i.e. ethical standards. Only in a legal context the given concept takes on significantly broader articulations (Hennette-Vauchez, 2011).

Immanuel Kant as a prominent German philosopher arguing that a man as intelligent being exists as an purpose in itself, excluded any possibility of using man as a means, and thus the arbitrariness to a human being. Man as a value, in itself, is therefore an object of respect, which cannot be abolished. The right to life and the right to dignity can consequently be understood as immanent categories (Kant, 1932).

Although philosophy, sociology, and even legal science contain numerous debates about the notion of dignity, this term seems to carry numerous uncertainties. Gunter Durig, a German legal theorist, insisted that dignity originally existed as a moral category, which was transformed by legalization into legal value (Franeta, 2011).

Šarčević, on the other hand, gives a somewhat more concrete description of this term, defining five categories that are immanent to human dignity. Namely, it is about the elimination of existential fear, non-discrimination, and preservation of identity and integrity of the person, i.e. the respect for the inviolability of the body. The fifth category of this framework is to limit and determine the extent to which state power and the rule of law can be applied on the individual (Šarčević, 2009).

According to Zlatanović (Zlatanović, 2013), one of the dilemmas is whether the dignity of a person can be equated with guaranteed human rights. The right to life or the right to work is clearly some of the basic human rights guaranteed today, and yet this in itself does not necessarily carry the quality of dignity. Only the given category carries a certain higher quality within the mentioned rights, which achieves the integrity of human rights and respect.

Finally, authors, such as Rašević, point out that the precise definition of a given concept and a contextual right is not only unnecessary, but can also be harmful. Limiting the subject framework (never with sufficiently comprehensive definitions) can actually hinder the function and development of human rights, with numerous negative implications (Rašević, 2015).

Analyzing the relevant legal sources, the notion of personal dignity represents the initial assumption of all further elaborations. United Nations Charter¹ adopted in 1945, set the

¹ Retrieved from https://advokat-prnjavorac.com/zakoni/Povelja_Ujedinjenih_nacija.pdf Accessed on 21.05.2020.

basic goal as the confirmation of faith in the basic human rights, in the dignity and worth of the human person, and the equality of men and women and of nations, large and small.

The International Covenant on Civil and Political Rights points out in its introductory remarks that human rights derive from the innate dignity of the individual.² The newly given legal framework also provides a fairly broad articulation of rights whose observance actually ensures the dignity of life. The same applies to the International Covenant on Economic, Social and Cultural Rights³, as well as the Universal Declaration of Human Rights⁴.

The last mentioned source has especially important implications in the field of execution of criminal sanctions. Namely, in addition to the Universal Declaration guaranteeing that all beings are born free and equal in dignity and rights (Article 1), further it emphasized the non-discrimination as imperative in the context of race, colour, sex, and language, religion, of political or other opinion, of national or social origin, of property, of birth or of other circumstances (Article 2).

Furthermore, the same framework emphasizes that each person has the right to life, to freedom and to safety of a person (Article 3), and that one must not been kept in captivity or submission (Article 4). At the same time any act of torture or cruelty, inhumanity or degradation or any kind of punishment is explicitly prohibited (Article 6).

Important criminal enforcement implications are also contained in Article 9 of the same Declaration, which states that no one may be arbitrarily arrested, detained or expelled. That is, the imperative of a fully equal right to a fair public trial before an independent and impartial tribunal that will decide the merits of any criminal charge against him is guaranteed by Article 10 of the same legal source.

² Retrieved from <http://www.mhrr.gov.ba/PDF/MedunarodniPakt%20B.pdf> Accessed on 21.05.2020.

³ Retrieved from <https://unmik.unmissions.org/sites/default/files/regulations/05boiak/BIntCovEcSocCulRights.pdf> Accessed 21.04.2020

⁴ Retrieved from <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/02/Univerzalna-deklaracija-o-ljudskim-pravima-1948.pdf> Accessed on 21.06.2020.

Although other legal sources, such as the European Convention on Human Rights⁵ implicitly or explicitly map the field of conditions for preserving the dignity of the person, it is interesting that there are a number of exceptions on the same level.

For example, while the right to life would be considered complete and inviolable, the European Convention provides legal conditions for the exclusion of this right, in the context of defending another person from unlawful violence, of making lawful arrests or of preventing the escape of a lawfully deprived person, or in order to suppress riots or revolts.

It is absurd that the mentioned legal source excludes the possibility of executing the death penalty, but on the other hand, depriving a convicted person of life while escaping from prison, and under appropriate conditions, considers as justified. The death penalty has been carried out in the past decade against thousands of people in at least 23 countries (according to some sources, 33), including the United States.⁶

The absence of a universally and uniformly accepted value of personal dignity and the right to life is noticeable in other comparisons as well. Article 3 of the Convention prohibits the torture, inhuman and degrading treatment or punishment of any subject. Only the recent history of the American wars and the fight against terrorism has shed light on the widespread use of various interrogation techniques for persons deprived of their liberty, which include asphyxia, exposure to cold, sleep deprivation, forced posture, and other forms of stress and duress tactics. Such a practice was also implemented in the territory of Europe (in Poland), although condemned by the European Court of Human Rights this practice has also different interpretations (Wierczyńska, 2011). For example, US President George W. Bush pointed out in a memorandum signed in 2002 that the content of the Geneva Convention and the consequent imperative of humane treatment of prisoners did not apply to members of Al Qaeda and other Taliban terrorist groups.

Following Pleić's allegations, observed in the period from 1959 to 2015, the European Court of Human Rights in 10% of cases found/determined a violation of the rights guaranteed by an article of the European Convention, which prohibits torture, inhuman or degrading treatment or punishment. It is important to note that only during 2015, out

⁵ Retrieved from https://www.echr.coe.int/Documents/Convention_SRP.pdf Accessed 21.04.2020

⁶ Retrieved from <https://www.bbc.com/news/world-45835584> Accessed 11.05.2020.

of the total number of submitted submissions, the same was determined in as much as 23.02%, which indicates the persistence of the given practice (Pleić, 2016).

The projection of the dignity of the person into the segment of other specified rights and the relativity of the subject concept finds other interpretations, too. With the development of modern technologies and the high frequency of information tools application, the right to respect private and family life, home and correspondence, becomes a field of significant turbulences (Lukić, 2019). This inviolability is excluded in situations of public authorities' interference, and in accordance to the law, when the same is done in the interest of national and public security, economic well-being of the country, to prevent riots or crime, to protect health or morals or to protect the rights and freedoms of others. The interpretation of morals and of the protection of the rights and freedoms of others becomes very problematic, and in practice it finds various forms of abuse, both in totalitarian societies and in those societies that are declaratively democratic.

A wide range of the notion of personal dignity carries other burdens in the segment of specific rights (Pavlović, 2019). The right to freedom of expression, freedom of thoughts, the right to freedom to associate, the right to freedom and security, are areas of life with numerous examples of ambiguity, both in the penal and non-penal framework (Schreng, 2019). Although protected by international legal sources, faced with the challenges of modern society, with the social change dynamism, and of the growing tendency of social control, the mentioned rights and a wide range of personal dignity find practical relativization in everyday life.

Precise/specific penologically relevant international legal sources and challenges of the practice

The development of international legal documents of Penological relevance brings additional specifications of the notion of personal dignity in the context of punishment. Namely, with the evolution of penology as a science and the redefinition of the principles and goals of the punishment, humanistic ally oriented penology, drastically, at least declaratively, turns away from retribution, as the central guideline of social reaction.

Revenge and cruelty of a treatment have long been considered as the leading tools, which would achieve general and especially preventive action. Only the establishment of new standards of respect for the dignity of the individual, necessarily over time, finds a prominent place in the criminal enforcement context (Soković, 2011).

The Standard Minimum Rules for the Treatment of Prisoners represents a basic document made at the UN level, which in fact seeks to define the necessary level of conditions for achieving the goals/aims of penal policy, while respecting all guaranteed human rights. In fact, already in the segment concerning basic principles, the document in question insists that all prisoners must be treated with respect for their dignity and for the values inherent in them as human beings. At the same time, it is pointed out that no prisoner should be subjected to torture or to other inhumane or degrading treatment or punishment, for which no circumstances can be used as justification. The same framework is finally contained in other legal sources, such as the European Prison Rules⁷, where human rights and dignity are noted as imperative categories.

The mentioned framework is especially important due to the fact that the public perception of the execution of a sentence towards those who are perpetrators of criminal acts, in fact, often justifies the cruelty of a treatment, and even the clear abuse (McCorkle, 1993). A blatant example is, for sure, the perpetrators of sexual crimes against children, where comments can often be heard in public discourse, saying that the cruelty of prison staff and other convicts is actually a deserved and expected punishment.

The document in question not only recognizes the fact that deprivation of liberty is in itself degrading, but also presents the penological context of the treatment in the light of psychosocial reorganization of convicted persons, who after serving their sentences should be empowered to live in accordance to the law and to take care of themselves. This is finally incorporated into national legislation as well. For example, Article 2 of the Code on the Execution of Criminal Sanctions of the Republic of Serbia⁸, states that the purpose of the execution of criminal sanctions is precisely the successful reintegration of convicted persons into society (Marković, Bogojević, 2013).

The corrective, moral, spiritual, social, health, and educational dimension of programmes and activities, in fact, organizes a new prism of penological work, which carries out divergent directions from the earlier understanding of punishment.

The minimum prison rules prescribe a number of specific procedures and procedures that ensure respect for the right of a person to serve a sentence. The elimination of arbitrariness is thus limited by the obligation to document and respect the principle of legitimacy. The

⁷ Retrieved from [http://www.hraction.org/wp-content/uploads/Evropska-zatvorska-pravila.pdf](http://www.hrraction.org/wp-content/uploads/Evropska-zatvorska-pravila.pdf) Accessed on 13.08.2020.

⁸ ("Official Gazette of RS", No. 55/2014 and 35/2019)

personal data of the convicted person, as well as all relevant events during the serving of the prison sentence, must therefore be recorded in a legally determined form and available to internal and external control (Pavlović, Radenović, Petković, 2016).

Multilevel right to appeal against the decision, as well as the possibility of filing a submission to the instances out of institutions, represents the principle incorporated in national legislation of the Republic of Serbia, which guarantees the legality of a treatment and the prevention of an abuse. Whether this, really works in practice, can be summarized from two perspectives. On the one hand, namely totalitarian prisons represent slowly changing mechanisms, with numerous unwritten rules. At the same time, the possibility of exposure to immediate physical danger carries a significantly higher potential, than, as a rule, a slow systemic reaction. Finally, if we assume that the convict is exposed to some kind of violence within the convict collective, any complaint is contrary to the principles of functioning of the informal group, which only strengthens the chain of victimization.

The protection of the dignity of the person while serving the sentence implies a guarantee of the existence and a security of the convicted person. This is a particular challenge in group accommodation settings, with the concentration of a large number of individuals who (as a rule) incline to aggressive patterns of behaviour. Only one of the solutions in this sense is the obligation of categorization of persons, which is being implemented according to the gender criterion, the criterion of reaching adulthood, as well as in relation to the estimated level of security risk that the person carries.

Practical problems of inefficiency of convicted person's categorization have been analyzed in detail by domestic authors (Pavlović, Petković, Babović, 2017). Hence, this principled logical premise requires a whole series of further elaborations, which far exceed the existing laws and bylaws. The formality of treatment today seems to be a fine aesthetization or symbolically colourful cellophane which, under the auspices of the protection and implementation of treatment programmes, actually covers the vital problems of the functioning of the penal system. The possibility for high-security convicts to be in direct and constant contact with convicts of low security level, not only exposes the latter to possible victimization, but is also abused in practice as a form of informal control and pressure on convicts.

Remaining at the same level, it is worth mentioning the well-known challenges of overbooking prison capacities (Đorđević, 2015). For example, it is worth pointing out to the reports from June 2020, according to which the number of convicts in some countries

in Africa and South America, and observed in relation to the planned capacities, ranges from 200% to over 600%.

Similar reports, although not so drastic, are noticeable in the countries of the region. For example, the total capacity of the prisons in Podgorica and Bjelo Polje during 2011 provided 1,100 beds, while in the same year 284 convicts were redundant, which accounted for more than 25% of the planned accommodation⁹.

It should be noted that in Croatia more than 200 complaints of convicts have been filed, some of which were assessed as well-founded before the International Court of Human Rights, in the context of overcrowding and poor housing conditions. Guided by newspaper reports, the legal representatives of some of the complainants point out that *“even after a full 10 years, the decision was not acted upon. In the Zagreb Prison, persons deprived of their liberty continue to eat, sleep and defecate in the same room. The toilet is not separated from the rest of the room as a whole, but the so-called a cowboy door that doesn't reach to the floor, and the wall and door are only 170 centimeters high”*¹⁰

Although significant investments have been made in the prison complex in Serbia over the last decade, this problem certainly still seems to be relevant in the national context. Bearing in mind, that in some prisons more than 15 people live and sleep in one room, the question of personal dignity and the possibility of achieving privacy, even when it meets the legal minimum criteria, remains questionable.

It should be emphasized that the prison system carries significant economic burdens, even in significantly developed countries. For example, in the United States, with a population of over 2 million convicts, the costs of operating a penal system are expressed in billions of dollars.¹¹ Precisely in that sense, all investments in improving the living standards of convicts, and thus preserving their dignity, raise issues of budget restrictions on the other side of the social spectrum. Only initiatives of this sense raise questions of priority and preservation of the dignity of those who have not violated the law.

⁹ Retrieved from <http://media.cgo-cce.org/2015/04/cgo-cce-postovanje-ljudskih-prava-ziks.pdf> Accessed on 15.08.2020.

¹⁰ Retrieved from <http://rs.n1info.com/Region/a539975/Sud-u-Strazburu-Hrvatsku-prozvao-zbog-losih-uslova-u-zagrebackom-zatvoru.html> Accessed 21.09.2020

¹¹ Retrieved from <https://www.marketplace.org/2017/05/19/how-much-does-it-cost-send-someone-prison/> Accessed June 24, 2020.

The multiple deprivation of the prison framework required other explications contained in international legal acts. The standardization of living and working conditions, the maintenance of hygienic needs, nutrition as well as health care, brings a whole series of listed provisions, which regulate the context in question. Nevertheless, not only the minimum criteria are not met in practice, but the adjustment to formal norms is such that it essentially raises questions of endangering human dignity.

As a note, it is worth pointing out the fact that respect for these values is actually directly related to the economic power of the state. The extent of the difference is evidenced by the disparity of comparing prisons in Norway, with, say, prisons in South America, and even in the Republic of Serbia. The standard that is difficult to provide for school-age children in their parents' apartment is thus the optimum for convicts in the mentioned country (Benko, 2018). That human dignity has a high price is evidenced, for example, by the example that only in one Norwegian prison, the painting of prison walls' murals was paid in millions of dollars, all in the aim of minimizing the negative emotional consequences of deprivation of liberty.

An integral part of preserving human dignity is non-discriminatory legal protection of health care. International documents, including the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, stipulate the existence of a health service in penitentiary institutions. Prescribing high standards, immediate and non-discriminatory health care, respect for patient privacy, as well as providing special conditions for the protection of women, pregnant women and minors while serving their sentences, this segment includes both prevention and curative. A particularly important role of the health segment is related to the identification, recording and reporting of all those indicators that indicate actions that do not comply with sub / legal norms. The application of coercive measures and solitary confinement are especially emphasized in this sense (Simović, Jovašević, 2015).

The role of the health service in prison is also significantly more complex. Namely, having in mind the increased frequency of self-injuries and suicides in penal institutions, the role of doctors includes the assessment of the effects of psychological stress, and possible negative effects on health. Finally, prevention of transmission of infectious diseases, such as Hepatitis C or HIV, is particularly important, both in the practice of tattooing and in the context of sexual violence in the convicted population (Duric, Ilic, Zobenica, 2014).

Making a small digression, the mention of sexual violence in penal conditions also leads towards an important topic of the position of homosexually oriented persons. Namely, in addition to the fact that personal dignity is based on the criterion of non-discrimination, homosexuals in prisons are often victimised not only by other convicts, but directly or indirectly also by prison staff (Eigenberg, 2000). Stigmatized by society, and placed in a limited spatial context, of highly aggressive potential, persons of homosexual orientation are burdened with high victorious homogeneous potential. They are cumulatively degraded in the context of humanity, dignity and universally proclaimed rights.

Summarizing the above, the normative framework for the protection of personal dignity seems to be placed at very high level. However, judgments of the European Court of Human Rights, (*Kalashnikov v. Russia*, application no. 47095/99) ¹² from 2002, plastically represents the burden of deprivation of liberty. Namely, according to the text of the verdict, in the room where the convicts were staying, they had to sleep in shifts, so that as many as three detainees came to one bed. Furthermore, it is alleged that the detainees ate at a table only a meter away from the toilet, with the person urinating constantly exposed to the gaze of others. Only apart from the fact that prisoners suffering from tuberculosis also stayed in the same room, the applicant himself became ill with fungal skin diseases, constantly exposed to tobacco smoke.

The problematic field of respect for the dignity of the individual and international legal norms must by no means be viewed as something far from the national framework and the burdens observed in the Republic of Serbia. Namely, in 2014, the court in Strasbourg passed a verdict ordering the state to pay material compensation for 37 convicted persons, who were serving a prison sentence in the Penitentiary in Nis.

Namely, this is a well-known case of a revolt in Serbian prisons, which in this case ended with the intervention of members of the Gendarmerie. According to the text of the verdict, apart from the fact that the convicted persons were victims of excessive use of force, the state is also charged with the lack of an efficient and impartial investigation.

The present case should be mentioned for two reasons. Namely, apart from the fact that in public hearings the intervention of the police was considered justified, and as a legitimate response of the state, the representatives of the Human Rights Committee from

¹² Retrieved from <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/12/Kalashnikov-protiv-Rusije.pdf> Accessed on 13.08.2020.

Leskovac referred to a larger number of victims. The given source thus states the existence of over 70 persons who in the meantime gave up the prosecution. Exposure to torture and blackmail, as well as manipulation by the health service, in terms of objective recognition (severity) of injuries, represent part of systemic pressure and violations of rights and human dignity (in a broader sense) within domestic penal institutions.

The list of rights that are implicitly or explicitly related to the dignity of the person, and which are protected by international law and which in reality become part of the internal legal order (Pavlović, 2017, 2) has further examples. However, only selectively, it is worth looking at another example. Namely, according to Bećirović-Alić (Bećirović-Alić, 2018), the right to a trial within a reasonable time, is based on the assumption that slow justice is a circumvention of justice. This applies both to those who expect some compensation through the court proceedings, and to those who are before the indictment, and whose rights are consequently limited.

Although the given legal principle is incorporated into practically all national legislations, as well as international legal sources, one gets the impression that the politicization of law significantly leads to the dispersion of the perception of the notion of human dignity. Although in a strictly formal legal sense, the following example has not been confirmed before international legal instances, it is worth pointing out one striking legal parallel. Namely, the well-known criminal trial, the so-called Nuremberg trials, lasted a little less than a year, bringing the greatest criminals of Nazi Germany to justice. Only more than half a century later, with the expected increase in the efficiency of the judiciary, the proceedings against Vojislav Šešelj, before the International Court of Justice in The Hague, was not completed even after 10 years of the detention of the accused. Without going into the details of the later verdict at this point, the relativity of the notion of the dignity of the person, obviously in practice, exceeds the framework of strict legal norms.

Instead of a conclusion

Some interpretations of the dignity of the person point out that imprisonment is practically incompatible with the possibility of full respect for this principle. Hence, the new penological revolution insists on the introduction of innovations in the system of punishment, introducing a wide range of out-of-prison, alternative sanctions (Mitrić, 2015).

Pointing out that these models repeatedly avoid the negative effects of imprisonment, and exposure to the aforementioned risks, the subject area also carries significant dilemmas.

Thus, today, alternative criminal sanctions are mentioned more and more often in public debates as a privilege of the rich. Serving a prison sentence in a 25-square-meter studio or in a luxury villa on the outskirts of the city certainly raises the question of the identity of the criminal burden. Finally, if we accept that a given sanction is not always imposed with electronic surveillance, and that in practice effective monitoring of compliance with imposed restrictions is often impossible, we come to the issue of the dignity of the individual and of all those whose rights are endangered by the crime, as practically ridicules.

Looking *pro et contra* in the context in question, however, it remains clear that imprisonment, despite all the penological innovations, cannot, as expected, be abolished in the near future. The perpetrators of serious crimes that pose a constant danger to others and society as a whole, are an essential subject of social elimination. Examples of prisons with a particularly high level of security, in which convicts are isolated from others for many years, with minimal and supervised contact with family members, represent a real crimi - political and social need that states will certainly not give up.

Making a clear line between the legitimate right of the state to restrict the rights of the convict and the violation of human dignity is not always easy to make. However, extreme examples of torture and failure to provide minimum living and working conditions are something that can and must be eliminated. Beatings, poor hygienic conditions, overbooking of capacities are demands that cannot be compromised.

Although legally regulated national mechanisms of multilevel protection bring formally good solutions, they often in fact represent an essential address to instances (although legally different). The negativism of attitudes that generally surrounds convicted persons, as well as, as a rule aggressively oriented prison subculture, are additionally not an objective field that attracts special social empathy. If we add to this the views that in addition to the damage they cause by committing crimes, convicts also bear the costs of accommodation, storage, food and health care, it seems clear that there will be no drastic qualitative changes in the near future.

The establishment of the National Preventive Mechanism for the Protection of Persons Deprived of Liberty from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, within the competence of the Protector of Citizens, is one of the positive steps in protecting the context. By the fact that it is an independent, although state instance, it is possible to achieve a higher level of objectivity and independence in the assessment. The problem of this level lies in the limited competence of possible

interventions of the Ombudsman, which are mostly, in practice, limited to the advisory and preventive concept (Jovanović, 2015).

Observed at the national level, material investments in institutional capacities in recent years are not insignificant. However, what seems particularly striking can be called tacit penological regression (Pavlović, 2019,2) which again reduces the sentence to imprisonment only to the mechanism of segregation or social isolation. In a fairly comprehensive formal framework, the corrective ideals of social reintegration still seem to be the ideal we strive for. The idea that convicts can be corrected, the impression is gained, increasingly finds the perspective of utopianism. The high rates of criminal recidivism in Serbia, as well as the practice of the courts in proceedings for parole, are led by formal criteria, and not by essential assessment of the achieved educational correction, it is clear that after evolution and revolution in penology, regression performances (Stevanovic, Mededović, Petrovic , Vujicic, 2018) ; (Jovanić, Petrović, 2017) .

A truly corrective treatment have to be less formal and more real treatment and it have to follow the achievements of modern penological science (Radojković, Petković, 2017). The absence of uniformed, scientifically based and proven treatment programs is therefore an essential and perhaps the greatest violation of the rights of convicts. Starting from the tacit premise that convicts are incorrigible and that formal improvisations are sufficient in that sense, in fact, the dignity of the person is violated.

This practice not only stigmatizes convicted persons in terms of values as socially incompatible, but also leads to a vicious circle of all other problems, which did not arise at once, and it will certainly take a long time to solve them. The absence of substantial corrections and educational work, leads to the proven high rate of recidivism, which is the final round of problems conditioned the overbooked penal capacity and all the implied security problems. That is why the standards that are being introduced more and more in penal institutions represent a big step forward.

Personal dignity is a complex multilevel principle that is found in the special challenges of penal conditions and must be systematically protected. Omitting the essential, humanistic segment, the prison would not differ in any way from the zoo where dangerous beasts are kept. That is why the current reform processes that are aimed at changing the inherited situations from earlier times deserve unconditional support. The personal, family stories of most convicts carry mostly tragic scars of neglect and abuse, of varying levels. The lack of timely recognition and adequate social response to protection, and

often even during childhood, is already in some way a violation of the dignity of the person. These are injuries, which oblige the society to fully recognize its responsibility, and to provide the missing factor of pro social orientation, even at the price of economic costs, which do not always justify the character in the eyes of the laymen public. That is why scientific analyzes are an incentive for those responsible not to give up on reforms, but to continue them at the same or increased pace, and an indicator of what was wrong for the laymen and other public, but also for positive changes that are unstoppable.

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HUMAN DIGNITY IN THE CRIMINAL PROCEEDINGS – INTERPRETATION OF THE EUROPEAN COURT OF HUMAN RIGHTS

After World War II the human dignity entered in the field of human rights and was included in international human rights instruments, as well as in the national Constitutions. The paper examines notion of human dignity in criminal law and in criminal procedure in particular. The focus is on the analysis of some issues that may arise in situations such as detention, statement obtain through coercion, lifetime imprisonment and how concept of human dignity influenced regulation of these issues. The author elaborates practice of the European Court of Human Rights and how interpretation of dignity evolved over time in these specific group of cases. Jurisprudence of Serbian Constitutional Court as well as courts of general jurisdiction has to be developed and harmonized in the area of interpretation of human dignity, so the caselaw of the European Court of Human Rights should be used as guideline in this regard.

Keywords: *human dignity, criminal law, protection of human right, European Court of Human Rights, inhuman and degrading treatment*

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1. Human dignity in the criminal justice

The rule of law requires protection of human rights, including human dignity. The European Commission for Democracy through Law explained in a research report that the underlying standards of the rule of law entailed among other elements, respect for human rights.¹ The rule of law standards prohibits any form of humiliation of the person, even if he has committed illicit acts.

Human dignity entered the field of human rights as a response to the atrocities committed during World War II. Human dignity was included in the United Nations Charter, the Universal Declaration of Human Rights, but only since 2002 with adoption of Addition Protocol 13 the European Convention on Human Rights included human dignity in its wording, but not as a separate human right (Heselhaus, Hemsly, 2018: 2).

International protection of human rights increased significantly over the last century, due to acknowledgement that individuals must be protected certain attacks against their person. The Universal Declaration on Human Rights had key role in popularizing the use of human dignity in the human rights dialogue (McCrudden, 2008: 655). In the context of the criminal justice safeguards are protection against abuses of power which affect the life, liberty and physical integrity of individuals (Bassiuoni, 1993: 236).

The international treaties influenced movement of incorporating dignity into national constitutions (Mc Cruden, 664). However, there is no consensus on the approach. While some countries include a separate human right to dignity in their constitutions, other do not (Heselhaus, Hemsly, 9). The Constitution of Serbia refers to the human dignity in general and more specific context (Frenata, 2008: 3). According to article 19 of the Constitution whole Serbian legal system must be interpreted with the purpose of preserving human dignity. Definition of human dignity in Serbian Constitution is in line with European trends and it is very similar to the wording of EU Charter on Fundamental Rights (Etinski, 2015: 20).

In relation to the area of criminal law, article 28 of the Constitution calls for human treatment and respect of the dignity of persons deprived of liberty. The same article forbids violence and extorting of statement as ways of violation of human dignity. The guarantees of human dignity of persons deprived of liberty, are advanced in the Criminal

¹ European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, 4 April 2011, 512/2009, CDL-AD(2011)003rev.

Procedural Code by defining that a search of an individuals should be conducted with the respect of their dignity (article 157) and forbidding insults to the persons and the dignity of detainees (article 217). In addition, the guarantees are elaborated further in the Law on Execution of Criminal Sanctions orders respect of the dignity of the persons against whom the sanctions are executed (article 6). The respect of dignity includes specifically prohibition of torture, inhuman or degrading treatment or punishment, abuse or experimentation. The coercion against the person is punished if it is disproportion to the purpose of the sanction. Moreover, the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles protects the dignity of juveniles against whom the criminal sanctions are executed (article 89). It is particularly emphasized that the treatment of the juveniles should contribute to their proper development and re-socialization (Stevanović, Vujičić, 2019: 263).

Principle of human dignity in criminal law can relate to offenders but also to the victims and protection of their rights. Principle of human dignity of offenders can be expressed in several forms such as prohibition of torture and all inhuman or degrading punishment or treatment, which includes sentencing policy, procedural rights like right to counsel and the right to be presumed innocent, and resocialization, especially in the case of imprisonment (Cuesta, 2011: 459). The article is focused on procedural rights and sentencing policy through analyzing the jurisprudence of the European Court of Human Rights and systematic review of the different approaches used by the Court.

2. Relevance of human dignity for offender's procedural rights

International human rights instruments² provide for a number of fundamental human rights, including human dignity that are interrelated to the criminal process. These instruments set limitation to the state actions within the prosecution, trial, conviction and sanctioning of offenders. One of these limitations is set in the article 10 of the International Covenant on Civil and Political Rights states: "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Convention on the Right of Child incorporates protection of child deprived of liberty in article 37, including the right to legal assistance, fair trial, but also treatment with dignity and respect (Tilovska-Kechedji, Rakitovan, 2019: 131).

² Specifically, the International Covenant on Civil and Political Rights, European Convention on Human rights and Fundamental Freedoms, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, European Convention for the prevention of Torture and Inhuman or Degrading Treatment or Punishments.

Additional limitations are defined in the European Convention of Human Rights and caselaw of the European Court of Human Rights, especially in relation to article 3 of the Convention on prohibition of torture, inhuman or degrading punishment and treatment. The Court assessed cases related to the handcuffing the suspects, length of hearing or keeping prisoners in a metal cage during hearing and its compliance with article 3 of the Convention.

According to the Recommendation no. R. (87) 3 of 12 February 1987 it is forbidden to use handcuff and chains. The handcuffs may only be used during a transfer to avoid escape or for the medical reasons, but only based on guidance of the physician. However, the European Court of Human Rights in case *Rupa v. Romania (no. 1)*³ decided that even during the transfer these measures could be qualified as inhuman treatment if are applied for a long period of time, accompanied by humiliating situations and lack of appropriate medical attention in view of the vulnerable psychological state of the detainee.⁴

Another aspect of respecting human dignity during criminal proceedings is related to the hearings of person and duration of hearing. The Court has established in its caselaw that the cumulative use of certain interrogation techniques in a longer time may cause physical and psychological suffering of the person, which constitute a practice of inhuman and degrading treatment and represent violation of article 3 of the Convention.⁵

The Court interpreted the violations of human dignity as assaults on the collective human conscience in the case *Svinarenko and Slyadnev v. Russia*,⁶ where the Court found that the practice of keeping remand prisoners in a metal cage during court hearings presents degrading treatment (Mavronicola, 2020: 119). The Court found that “holding person in a metal cage during a trial constitutes itself – having regard to its objectively degrading nature which is incompatible with the standards of civilized behavior that are the hallmark of a democratic society – an affront to human dignity in breach of Article 3” (para 138).

Significant number of cases and the jurisprudence of the European Court of Human Rights related to the treatment in detention, statement obtain through coercion and right

³ Application no. 5847/00, judgment of 16 December 2008.

⁴ See: case *Pop Blaga v. Romania*, application no. 37379/02, judgment of 10 April 2012; case *Costiniu v. Romania*, application no. 22016/10, judgement of 19 February 2013.

⁵ Case *Ireland v. United Kingdom*, application no. 5310/71, judgment of 18 January 1978; para 246.

⁶ Application no. 32541/08 and 43441/08, judgement of 17 July 2014.

to a counsel. The Court's interpretation of the human dignity in these types of cases will be elaborated further.

2.1 Prohibition of torture and any inhuman or degrading punishment and treatment in detention and statement obtain through coercion

The principle of human dignity in criminal law is reflected through the prohibition of torture and of any form of inhuman or degrading punishment and treatment. This prohibition is incorporated in the key international instruments, including the Universal Declaration of Human Rights from 1948 (article 5), Covenant on Civil and Political Rights from 1966 (article 7), followed by the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishments from 1984. The UN Convention defines a basic international understanding of torture as any act by which severe pain or suffering that is intentionally cause on a person to obtain information, confession or punish him or third person (article 1). In addition to torture, cruel, inhuman or degrading punishment or treatment are prohibited by the UN Convention (article 16).

Interpretation of torture, inhuman and degrading punishment and treatment has been subject of the work of the European Court of Human Rights. Specifically, the application of the article 3 of the European Convention on Human Rights by the Court. Even though article 3 of the Convention does not explicitly contain the words human dignity, the Court in the case *Tyrer v. United Kingdom*⁷ confirmed that one of the main purposes of the article 3 is to protect person's dignity and physical integrity (para. 33).

Article 3 has been often described as an absolute right since article 3 makes no provision of lawful exceptions (Mavronicola, 2015: 724). Case law of the European Court of Human Right is pivotal for understanding human dignity and principles underpinning dignity emerging in the Court's analysis, including questions what is degrading or not, what is torture or not and whether a certain treatment offends human dignity.

The clearest examples of the Court's interpretation relate to treatment of people in detention. The European Court of Human Rights in the case *Selmouni v. France*⁸ emphasized that "in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3" (para 99). The Court

⁷ Application no. 5856/72, judgement of 25 April 1978.

⁸ Application no. 25803/94, judgment of 28 July 1999.

interpretes that unnecessary force applied to detainees violates the human dignity and prohibitions set in article 3 of the Convention. However, for the interpretation if there was violation of dignity the Court took into consideration many factors including “the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim, etc.” (para 100).

In *Bouyid v. Belgium* case,⁹ which also relates to the treatment of people in detention, the European Court of Human Rights placed human dignity as the essence of the Convention (para 89 of the judgement). For that reason, any conduct of law enforcement officers which diminishes human dignity constitutes a violation of Article 3 of the Convention “in particular to their use of physical forces against individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question” (para 101). The relevance of the Bouyid judgement is twofold, since the Grand Chamber adopted position with respect to violence in circumstance of power asymmetry and put the burden of disproving abuse on the more powerful party and affirming that the ‘minimum level of severity’ threshold is qualitative and attached to the wrongfulness of the treatment (Mavronicola, 2020: 123)

Relevant for violation of dignity and article 3 of the Convention are also cases related to the statements obtained through coercion or using inhuman and degrading treatment to collect evidence. In the case *Jalloh v. Germany*,¹⁰ the Court interpreted that the “the manner in which the impugned measure was carried out was liable to arouse in the applicant feeling of fear, anguish and inferiority that were capable of humiliating and debasing him” (para. 82). The Court confirmed the applicant claim that authorities interfered with his physical and mental integrity without his will.

To overcome challenges and provide guarantees to safeguard against the risk of obtaining statements through coercion countries took different measures, including the legal prohibition or criminalization of coercion by law enforcement, informing a suspect of his rights and right to remain silent, ensuring access to interpretation and translation and access to a counsel at the earliest stage (Brants, Franken, 2009: 36).

However, the special measures and conditions are developed and applied for detainees suspected of terrorism. The Netherlands has special detention regime for organized and dangerous crime. This duality of regimes and stringent security measures in detention

⁹ Application no. 23380/09, judgement of 28 September 2015.

¹⁰ Application no. 54810/00, judgement of 11 July 2006.

diminished human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing in breach of article 3 of the Convention as the Court found in the case *Van der Ven v. the Netherlands* (para. 48 and 63)¹¹ and case *Lorsé v. the Netherlands* (para. 74).¹² In both cases the Court assessed whether such stringent measure may fall within the ambit of Article 3 regarding particular conditions, duration of measures, the objective pursued and its effects on the persons concerned.

2.2 Right to counsel

As it is already mentioned, failure to provide adequate access to legal counsel and denial of access to a lawyer can jeopardize whole criminal procedure, including violation of fair trial and other rights of suspect and accused persons, especially preventive measures against obtaining statement through coercion. This position is confirmed in the caselaw of the European Court of Human Rights. According to the Court's judgement in the case *Salduz v. Turkey*,¹³ in the situation when there suspect and accused did have access to a lawyer as from the first interrogation by the police, whole procedure could be unfair (para. 53-55).¹⁴ The Court highlighted importance of the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) that right of detainee to have access to legal advice is a fundamental guarantee against ill-treatment (para 39-40).

Denial of access to lawyer to suspect might happen because that he is not informed on his rights, especially right to remain silent during police interrogation and privilege against self-incrimination (Matić Bošković, 2020, 32). Psychological pressure of detention could lead to unjustified self-incrimination (Voorhout, 2017: 178). In addition, the lawyers should be understood as profession that should defend human dignity (Luban, 2005: 815).

In the case *Salduz v. Turkey*, European Court of Human Rights holds that there has been a violation of article 6 of Convention that guarantees right to a fair trial, since Salduz lack legal assistance of the lawyer while he was in police detention. During police detention,

¹¹ Application no. 50901/99, Judgement of 4 February 2003.

¹² Application no. 52750/99, Judgement of 4 February 2003

¹³ Application no. 3691/02, Judgement of 27 November 2008.

¹⁴ Similar position the European Court for Human Rights had in the following cases: *Ocalan v. Turkey*, application no. 46221/99, judgement of 12 May 2005; *Adamkiewicz v. Poland*, application no. 54729/00, judgment of 2 March.2010, para. 84; *Dayanan v. Turkey*, application no. 7377/03, judgement 13 October 2009, para. 32; *Panovits v. Cyprus* application no. 4268/04, judgment of 11 December 2008, para. 69–77.

Salduz signed statement and admitted his involvement in the criminal act. However, in front of public prosecutor Salduz claimed that he admitted crime since he was beaten and insulted in the police detention. According to the interpretation of the European Court of Human Rights that access to a lawyer should be provided from the first interrogation of a suspect by the police (para. 55). Even when there are compelling reasons that can justify restriction of access to a lawyer, such a restriction must not unduly limit rights of the accused (Sluiter, et al, 2013, pp. 244).

The case *Ponovits v. Cyprus*¹⁵ is relevant for better understanding how denial of right of suspect and accused to a legal counsel can influence on the rights of suspect and accused during criminal procedure and on the fairness of the whole process.¹⁶ In March 2009 the European Court of Human Rights concluded that lack of legal counsel during interrogation presents violation of right to fair trial that is guaranteed in the article 6 of the Convention (para 65). In addition, the Court stated that there was violation of article 6(1) since confession from police interrogation was used during the proceedings.

However, there is still certain number of questions that are partially interpreted or unclear. In its caselaw the European Court of Human Rights did not interpreted consequences of violation of access to legal counsel. The Court systematically emphasized that national institutions should to annual the consequences of the violations by placing the persons in the same position he would have been in if the violation had not occurred. This position of the Court enables that common standards are interpreted differently in the practice.

Although the caselaw of the European Court of Human Rights is important for protection of human rights across the Council of Europe member states, there are practical problems that individual could have in addressing to the Court. Individual can submit application to the Court only when all national legal remedies are used. In addition, the Court is annually receiving significant number of applications which creates huge backlog of cases and protection of rights by the Court might happen after several years following violation. Abovementioned deterred people whose rights are violated to submit application to the Court (Cape, Namoradze, Smith, Spronken, 2010: 23-62).

¹⁵ Application no. 4268/04, judgment 11 March 2009. Suspect was 17 years old when police invited him and father to visit police station conserving the murder and robbery. After 30 minutes of questioning in the police station the accused confess guilt for both crimes. Police officers did not provide to accused legal representation, not even after he was arrested, nor during interrogation. Confession was made under the pressure, when police officer explained to accused that he should admit everything so he could go home.

¹⁶ Similar position European Court of Human Rights had in the case *Pishchalnikov v Russia*, application no. 7025/04, judgement of 24 September 2009.

The jurisprudence of the European Court of Human Rights leads to the progressive interpretation and acceptance of common standards in all member states. However, the case law of the Court promotes partial solutions and present *ad hoc* pressure on national authorities to reform practice and legislation. There are examples of the European Court of Human Rights caselaw influence on member states to amend procedures that the Court found as violation of fair trial. The judgment in the *Salduz* case influenced on the interpretation of the supreme or constitutional courts in several members states (France, UK, the Netherlands and Belgium).¹⁷

These examples point to the limitation of the European Convention of Human Rights. *Salduz* principles were interpreted differently in different countries, although courts and legislators were putting efforts to harmonize procedure with European Convention of Human Rights, that was achieved only partially (Kristen, 2011: 1-7).

3. Impact of human dignity on sentencing policy

The principle of human dignity in criminal law also influenced sentencing policy. This influence is especially elaborated in relation to death penalty and lifetime imprisonment.

The Council of Europe member states are bound by the European Convention on Human Rights, particularly article 2 and right to life and by Protocols No 6 from 1985 on the abolition of death penalty in time of peace and No 13 from 2003 that provides for its abolition in any circumstances. The Court jurisprudence also stand on position that death penalty could present inhuman and degrading punishment and treatment, especially in context of extradition to countries where death penalty still exists. In the case *Soering v. the United Kingdom*¹⁸ the Court found that extradition to the United States would represent violation of article 3, particular because of the death row phenomenon where people spent several years in extreme stress and psychological trauma awaiting to be executed.¹⁹ The method of execution of death penalty was also subject of the Court

¹⁷ Supreme Court of the UK in the case *Cadder* found that system of police detention in Scotland is not in line with *Salduz* principles. In France the Constitutional Council in the decision from 30 July 2010 found that the regime *garde à vue*, when lawyers cannot participate in the interrogation of suspect, and statement can be used later against suspect, is not in line with the Constitution. Both decisions were followed by the amendments of legislation.

¹⁸ Application no. 14038/88, judgement of 7 July 1989.

¹⁹ See: case *Poltoratski v. Ukraine*, application no. 38812/97, *Kouznetsov v. Ukraine*, application no. 39042/97, *Nazarenko v. Ukraine*, application no. 39483/98, *Dankevitch v. Ukraine*, application no. 40679/98, *Aliiev v. Ukraine*, application no. 41220/98 and *Khokhlitch v. Ukraine*, application no. 41707/98, judgments of 29 April 2003; *G.B. v. Bulgaria*, application no. 42346/98 and *Iorgov v. Bulgaria*, judgments of 11 March 2004.

assessment. The Court declared that exposure of a woman to a risk of being stoned to death give rise to a violation of article 3 of the Convention.²⁰

According to the article 10 of the International Covenant on Civil and Political Rights deprivation of liberty should be executed “with humanity and with respect for the inherent dignity of human person”. The aim of the imprisonment should be reformation and social rehabilitation of prisoners (article 10 of the Covenant). Despite the life imprisonment being a common punishment across the Council of Europe countries, limitations have been imposed on its application. These limitations have mainly been developed by the European Court on Human Rights jurisprudence on life sentencing and interpretation under article 3 of the Convention on prohibition of torture, inhuman and degrading treatment.

Problem of inhuman character of life imprisonment has been discussed for centuries (Van Zyl Smit, 1998: 6). The long-term imprisonment has negative psychological and social effects (Haney, 2006: 306), while loss of hope of possible release can make this sanction a torture (Murphy, 1979: 240). Lifetime imprisonment should be accompanied with the possibility of its revision at the end of serving a certain number of years (Verelst, 2003: 283). The European Court of Human Rights assessed compliance of lifetime imprisonment without parole with article 3 of the European Convention of Human Rights. The Council of Europe Resolution from 1976 stated that imprisonment of a person for life without any hope of release is not compatible with the principle of humanity.²¹

The European Court of Human Rights in the case *Kafkaris v. Cyprus*²² found that ‘imposition of an irreducible life sentence on an adult may raise an issue under article 3’, but the life sentence was not in itself prohibited or incompatible with article 3 (para. 97). The Court provided criteria for assessment of irreducible sentence. According to the Court interpretation the Article 3 will not be violated if the national law ‘affords the possibility of review of life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner’ (para. 98). The Court has found that even when the possibility of parole for prisoners serving a life sentence is limited the hope of release exists. For the purpose of article 3 it is enough that a life sentence is *de jure* and *de facto* reducible, even when in practice it may be served in full.

²⁰ Case *Jabari v. Turkey*, Application no. 40035/98, judgement of 11 October 2000.

²¹ Council of Europe, (1977) Resolution 76 (2), Treatment of Long-term Prisoners, Strasbourg.

²² Application no. 21096/04, judgment of 12 February 2008.

In the case *Vinter and Others v. UK*²³ the human dignity is placed at the centre of Article 3 of the Convention and recognition of the human dignity of all offenders no matter what they have done (Van Zyl Smit, Weatherby, Creighton, 2014: 65). The Court does not provide exhaustive definition of dignity but calls to a concrete application of it (para. 113). The Court found that the imposition of sentence of whole life imprisonment without the prospect of release through a suitable review mechanism constituted a breach of Article 3. According to the Court the lifetime prisoner is entitled to know what he must do to be considered for release and under what conditions. When domestic legislation does not include any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 arises at the moment of imposition of the sanction.²⁴

The Court indicated in para. 111 that legitimate penological grounds for detention will include punishment, deterrence, public protection and rehabilitation. Although many of these grounds will be present at the time when a life sentence is imposed, some of them might not be present after long sentence. Denial of the review of life imprisonment whatever progress prisoner made in rehabilitation establish retributive character of sanction (para. 112). The Court stated that the purely retributive life imprisonment present violation of article 3 since it prevents incentives towards rehabilitation. In the judgement the emphasis is put on rehabilitation that should be offered also to those serving life sentences. The success in rehabilitation is linked with the prospect of release (para. 114) and functioning as responsible members of the society again.

The Court applied in other cases considering different countries standards defined in the case *Vinter and Others v. UK*,²⁵ although there were discussions if the recent judgments of the Court are lowering established standards of prisoners' protection (Graham, 2018: 266). Furthermore, the Court assessed different mechanisms that exists across Europe from the perspective of applicants' prospect of release. The Court did not accept amnesty as a measure giving lifetime prisoners a prospect of release, as well as presidential pardon in the case *Matošaitis and Others v. Lithuania*.²⁶ Presidential pardon was not acceptable since there was no obligation to provide reasons for refusing a request for a pardon,

²³ Application nos. 66069/09, 130/10 and 3896/10, judgement of 9 July 2013.

²⁴ See: Council of Europe (2020) Guide on the caselaw of the European Convention on Human Rights – Prisoner's rights, pp. 55-59.

²⁵ See: case *Öcalan v. Turkey* (no. 2), application nos. 24069/03 and 3 others, judgement of 18 March 2014; *László Magyar v. Hungary*, application no. 73593/10, judgement of 20 May 2014; *Harachiev and Tolumov v. Bulgaria*, application nos. 15018/11 and 61199/12, judgement of 8 July 2014; *Čačko v. Slovakia*, application no. 49905/08, judgement of 22 July 2014; *Bodein v. France*, application no. 40014/10, judgement of 13 November 2014; *Murray v. the Netherlands*, application no. 10511/10, judgement of 26 April 2016.

²⁶ Application nos. 22662/13 and 7 others, judgement of 23 May 2017.

pardon decree lacks guidance how prisoners should reform in order to try to get presidential pardon, pardon decrees were not subject to judicial review and could be challenges by the prisoners directly, and the work of the relevant pardon commission was not transparent so it was not possible to inform how criteria for examination of pardon please are examined, and its recommendations were not binding on president (para. 170-171). Similar interpretation the Court gave in the case *Petukhov v. Ukraine (no. 2)*²⁷ since the presidential clemency, as the only procedure for early release, was not clearly formulated nor did it have adequate procedural guarantees against abuse (para. 177-180).

4. Conclusions

Application of principle of human dignity in the criminal justice prohibits torture and all inhuman or degrading punishment of treatment. This prohibition has effects on the procedural rights of the suspect and accused, trough introduction of preventive mechanisms and instruments in the criminal procedure legislation, but also cases significant impact in the field of sanctions. In the area criminal sanctions, the principle of human dignity has a consequence putting barriers against death penalty, life imprisonment and very long punishments, inhuman or degrading prison system. When it comes to the penitentiary system and execution of prison sanctions the human dignity puts in the focus maintaining of resocialization.

The jurisprudence of the European Court of Human Rights is significant tool for better understanding of human dignity effects and interpretation in the area of criminal justice. As we could see from analyzed caselaw, the European Court of Human Rights applies multilayer concept of human dignity. The Court is interpreting concept of human dignity on a case-by-case basis to ensure flexibility in each case, which is especially visible in the decisions concerning life imprisonment. The human dignity serves as an instrument for expansion of the scope of protection of other human rights in the interpretation of the European Court of Human Rights.

Interpretation and reasoning of the ECHR related to the human dignity could be used by Serbian judicial authorities, specifically the Constitutional Court, Supreme Court of Cassation, but also lower courts when they are deciding on protection of human dignity in criminal cases, especially those related to the ill and inhuman treatment. Since Serbian courts are putting efforts to harmonize jurisprudence, review of the European Court of

²⁷ Application no. 41216/13, judgement of 12 March 2019.

Human Rights practice is even more important.²⁸ This is in line with the statement of the former president of the European Court of Human Rights who emphasized that the Court is not only deciding specific cases, but in using dignity sends a signal to states on the importance of what is at stake (Costa, 2013: 402).

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²⁸ According to Franeta the court practice in Serbia is neither coherent nor clear enough concerning the status and meaning of human dignity in Serbian courts. Same conclusion on Serbian Constitutional Court caselaw is presented by Simović.

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Ranka Vujović*

THE CHILD'S RIGHT TO DIGNITY AND BODILY INTEGRITY - EUROPEAN STANDARDS AND CASE LAW

Human dignity is a value principle underlying all international legal acts in the field of human rights. Consequently, any state that is considered part of a community of democratically governed states must take into account the dignity of its citizens, as one of its core values. The Republic of Serbia, as a member of the United Nations and a signatory to a number of documents regulating and protecting human rights internationally, under the influence of the European Court of Human Rights, the United Nations Committee on the Rights of the Child and other treaty bodies monitoring the implementation of obligations arising from signed conventions, continuously works on the harmonization of its legislation and practice of its bodies with internationally established standards and practices. These processes necessarily impose new challenges, especially when it comes to accepting the positions expressed through general comments and respecting the recommendations for the improvement of legislation and practice, which the contracting authorities periodically communicate to the Member States. One of the challenges that the Republic of Serbia is currently facing, which requires systemic responses, is the request aimed at upgrading the regulations governing the child's right to bodily integrity, as part of the overall integrity and dignity of his/her personality, expressed through the recommendation of the Committee on the Rights of the Child banning corporal punishment of children in Serbia. Are the existing legal solutions in Serbian law really contrary to convention principles ma, since the Convention on the Rights of the Child, the implementation of which is monitored by the Committee, does not contain an explicit prohibition of corporal punishment, or is it a misinterpretation of established standards in the application of domestic regulations? Is further proliferation of imperative rules in the domain of parent-child relations necessary or just a change of practice?

Keywords: *dignity, bodily integrity, court, children's rights, parental rights*

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1. Dignity as the leading ethical and legal principle

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. It is, one might say, another name for human rights. The term itself, derived from the Latin word *dignitas*, meaning: valuable, worthy, in the Serbian language has a meaning derived through synonyms: sublime, proud, which refers to honor and reputation, to humaneness, as ethical and moral categories that characterize man, to the totality of the identity and integrity of the personality of every human being, from their birth and throughout their lives.

The fact that this is a quality that accompanies a person from birth is indicated by the first paragraph of the first article of the Universal Declaration of Human Rights (UDHR, 1948): “All human beings are born free and equal in dignity and rights.” Although violations of freedom or equality (also ethical categories) are in principle relatively easy to establish, legally, empirically, and even quantitatively, because they have a clear conceptual equivalent on the opposite side: lack of freedom or inequality, this is not the case with the violation of dignity. The existence of a violation of dignity is most often subject to subjective assessment and subjective criteria, since there are no objective, quantitative indicators of the amount of dignity of a human being. A human being is dignified or not dignified to the extent that they or the community in which they live see it through their own (subjective) value prism. Therefore, violations of dignity are common in cultures with weak ethical codes, because they are not recognized (Stevanović, 2017: 97-99). They usually arise from a relationship of subordination, submission or helpless position in a personal relationship, and have particularly severe and far-reaching consequences for society as a whole when they occur in family relationships, particularly in the relationship between children and parents. Therefore, all modern democracies strive to promote dignity through their legal systems as a guiding ethical and legal principle in the field of realization and protection of human rights, which, of course, includes the rights of the child.

In order to protect the dignity of every human being and the enjoyment of human rights and fundamental freedoms of all peoples, numerous conventions have been adopted at the international level, through a system of improving and harmonizing legislation through international universal and regional organizations. The most important among them have become part of the domestic legal order, through ratification.

2. European standards in exercising and protecting dignity and bodily integrity

When it comes to Europe, seven decades ago, efforts aimed at countering all forms of violence and inhuman and degrading conduct resulted in the adoption, under the auspices of the Council of Europe, of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR, 1950). Article 3 stipulates that *no one shall be subjected to torture or to inhuman or degrading treatment or punishment*.

A provision of almost identical content was taken over a decade and a half later and incorporated, as Article 7, into one of the universal international legal acts adopted under the auspices of the United Nations – the *International Covenant on Civil and Political Rights* (ICCPR, 1966). None of these documents, however, although explicitly prohibiting “inhuman” and “degrading” acts and punishments, specifically mention corporal punishment. In general, international human rights treaties have not addressed the issue of corporal punishment more seriously, with the exception of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT, 1984), which, in Article 1, excludes “legal punishments” from the definition of abuse.¹ “There is no doubt that the authors of this clause originally (at the time of its adoption) wanted to leave it to the states to make a sovereign decision on whether to keep corporal punishment in their legal systems. However, given the evolutionary nature of international human rights law, another interpretation of the “legal penalties” clause is possible, according to which penalties are “legal” only if they are in line with current international norms and standards, regardless of national legislation. From that perspective, corporal punishment is inhuman and/or degrading” (Dragičević-Dičić & Janković, 2011: 78,79). This view is supported by the position of the UN Human Rights Committee (the contracting authority that oversees the implementation of the ICCPR), expressed in General Comment No. 20 on Article 7 of the ICCPR, according to which the prohibition of cruel, inhuman and degrading treatment or punishment *must extend to corporal punishment, including excessive punishment imposed as punishment for a criminal offense or as an educational or disciplinary measure* (para. 5).

¹ Art 1. UNCAT: “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The case law of the European Court of Human Rights, established and developed during the decades-long implementation of the ECHR, is still today the most effective and sophisticated international legal instrument for the protection of human rights on the long road of their rise within the EU acquis. From the corpus of human rights, and in connection with the topic of this paper – the prohibition of corporal punishment of a child in a family environment, are the provisions of the ECHR on the right to respect for family life. Legal notions of family and the right to family life, unlike the institute of the right to life or the prohibition of torture or degrading treatment or punishment (ECHR, Art. 3), which could be said to have a certain level of permanence, are interpreted extremely dynamically through the case law of the European Court. Although the case law of the European Court leaves a somewhat wider margin of appreciation to states regarding the regulation of the right to family life, it is certain that any possible state intervention in the sphere of the right to family life must be not only in accordance with national law but also pursue the legitimate aim prescribed by the Convention itself. In this respect, the ECHR guarantees everyone the right to respect for family life, while prohibiting public authorities from interfering in the exercising of that right, unless such interference is *in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, protection of health or morals, or for the protection of the rights and freedoms of others* (ECHR, Art. 8.1). According to the term “right to respect”, the European Court means not only the absence or refraining from activities by which public authorities endanger or violate the right to family life (the so-called primary negative obligation), but also taking effective measures to enjoy that right (the so-called positive obligations). The right to respect for family life implies the right to respect for the moral and physical integrity of all family members, and the special vulnerability of victims of domestic violence increases the need for active state involvement (*Hajduová v. Slovakia*, App. 2660/o3, 30 November 2010). The positive obligations of the state, according to the case law of that court, are measures aimed at effective prevention of violations of rights and effective respect for family life, and they are reflected in the adoption of appropriate laws prescribing legal protection in the field of civil, criminal or administrative law and regulations ensuring availability of the court (*Airey v. Ireland*, App. 6289/73, 21 February 1975) or promoting the organization and efficiency of justice (*Opuz v. Turkey*, App. 33401/02, 9 June 2009). Positive obligations include measures of the so-called “effective deterrence” from the violation of rights, i.e. the obligation of the state to take all steps that can reasonably be expected of it in order to prevent the infliction of damage of which it is aware or should be aware (*A. v. Croatia*, App. 55164/08, 14 October 2010), whereby the judicial passivity in the case when the victim withdraws the report of violence as well

as non-enforcement of court decisions is considered ineffective justice and undermining the very aspect of effective deterrence (*Opuz v. Turkey*, App. 33401/02, 9 June 2009).

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.

Efforts to protect the dignity and integrity of every child and to eradicate corporal punishment of children on the European continent have intensified since the adoption of the United Nations Convention on the Rights of the Child (CRC, 1989), ratified, *inter alia*, by all Council of Europe member states (Savić, 2019: 305-312). This was followed by a series of recommendations of the Committee of Ministers of the Council of Europe, aimed at protecting children's rights, such as R (90)2 on social measures related to domestic violence, R (93)2 on medical and social aspects of abuse and Rec (2006)19 on a practical policy to support good parenting. The Council of Europe also played a key role in the process of drafting the United Nations Secretary-General's Study on Violence against Children (2006), which explicitly called for the general abolition of corporal punishment of children, in the family and in all other environments where children are included, by law, with a very ambitiously set deadline – until 2009 (par. 116). To this end, the CRC is of undoubted importance, as a universal treaty of international law which for the first time defines the rights of the child as a special category of human rights, and which, at the same time, has a binding character for the signatory states.

Of particular importance for considering the prohibition of corporal punishment are the provisions of the CRC which oblige Member States to take *all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligence, harassment or exploitation, including sexual abuse, while in the care of a parent, legal guardian or other person entrusted with the care of a child* (CRC 1989, Art. 19.1). It is the duty of the state

to ensure that *no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment* (CRC 1989, Art. 37 (a)).

It is also the duty of the state to take all effective and appropriate measures *to eliminate traditional practices that harm the health of children*, including appropriate measures to ensure *that discipline in schools can be implemented in a manner consistent with the human dignity of the child* (CRC 1989, Art 24.3 and Art. 28.2).

The Committee on the Rights of the Child, as the CRC's supervising body, addressed this issue in a separate commentary, emphasizing that human rights require elimination of all forms of corporal punishment, however mild, as well as all other forms of cruel or degrading treatment of children. In an effort to harmonize the legislative framework and practice of the CRC Member States with regard to the exercise of the child's right to dignity, in 2006 the Committee adopted the *General Comment No. 8 on the Protection of the Child from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* (CRC/C/GC/8). In that document, in a separate (III) chapter containing definitions of terms used in the document, "corporal" or "physical" punishment is defined as *any punishment in which physical force is used and which is intended to cause some degree of pain or discomfort, however mild*. It is further explained that in most cases this involves hitting children (beating, slapping, hitting the buttocks) with the hand or another means – a whip, stick, belt, shoe, mixing spoon, etc., but it can also include, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or hitting ears, forcing children to be in an uncomfortable position, causing burns, steaming children with hot water or forcing them to swallow (for example, washing children's mouths with soap or forcing children to swallow hot spices). The position of the Committee on the Rights of the Child, expressed in the aforementioned General Comment, is that corporal punishment, without exception, is humiliating, violates the dignity of the child and is therefore contrary to the Convention.

Although the general comments of the contracting authorities are in principle not binding, they are certainly an important mechanism for the interpretation and application of legal norms and legal standards in the member states of the convention, the application of which they supervise. Moreover, they are a key instrument for monitoring the implementation of the convention and evaluation of compliance, i.e. fulfilling the obligations of the member states undertaken by the ratification thereof (Vujović, 2020: 437). Following the implementation of the CRC, the Committee on the Rights of the Child has repeatedly expressed concern about the persistent practice of corporal punishment in public and private schools in many countries, despite the existence of legal

prohibitions, such as in Canada, Japan, Zimbabwe, Syria, Guatemala, Nigeria, England and Wales, Senegal, etc. (UNICEF, 2002: 424-426; UNICEF, 2007: 79-80). A decade after the adoption of General Comment No. 8, at its 75th session, the Committee issued recommendations for as many as seven countries related to the introduction of a legal ban on corporal punishment of children (Antigua and Barbuda, Bhutan, Cameroon, Lebanon, Qatar), i.e. effective implementation of the prescribed ban on corporal punishment of children – Romania and Mongolia (OHCRC, 2017). There is an opinion among domestic legal writers that even our country has not correctly understood the provision of Article 19 of the CRC, which does not mention the explicit prohibition of corporal punishment of a child, but mentions violence, specifying its forms, etc., and that it was not the only country that interpreted it in such a way that it does not refer to the prohibition of any physical (corporal) punishment of a child, but only to its more severe forms which are manifested through injury or abuse, and that this motivated the Committee on the Rights of the Child to adopt General Comment No. 8 (Cvejić-Jančić, 2015: 7)

This observation seems to be quite correct, because after considering the Second and Third Periodic Reports of the Republic of Serbia on the Realization of Children's Rights Guaranteed by the CRC, the Committee on the Rights of the Child sent 41 recommendations to our country for the improvement of children's rights, including je recommendation on explicit ban of corporal punishment of children (CRC/C/SRB/CO/2-3, 2017). The recommendation suggests the need to explicitly prohibit corporal punishment of children by law, to monitor and enforce this prohibition in all environments, and to promote positive, non-violent and participatory modes of parenting through raising awareness.

3. The right to dignity and bodily integrity of the child – the situation in Serbia

In the constitutional-legal system of the Republic of Serbia, the guarantees of inalienable human and minority rights serve to preserve human dignity and achieve full freedom and equality of every individual in a just, open and democratic society, based on the principle of the rule of law. Everyone is equal before the Constitution and the law. Human dignity is inviolable and everyone has a duty to respect and protect it. Human life is also inviolable. The Constitution explicitly guarantees the inviolability of physical integrity, and stipulates that no one may be subjected to torture, inhuman or degrading treatment or punishment. 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).

Starting from the proclaimed constitutional guarantees and principles, the Family Law of the Republic of Serbia (FL, 2005) regulates in more detail the rights of the child and the manner of their exercise, as well as issues related to their civil-legal protection. When it comes to the principles of personal integrity and human dignity, the provisions of the FL regulating parent-child relations, personal rights of the child and protection from domestic violence, are of key importance.

According to the FL, a child has the right to *proper and complete development* (Art. 62, par. 1). It is, in fact, one right of the child that has the character of the most general principle that permeates the application of all other rights of the child. All other rights of the child and the obligations of the parents (and other persons who in certain cases have such responsibility towards the child) must be exercised in such a way as to aim at the proper and complete development of the child (Vujović, 2020: 423). Parents have the right and duty to develop *a relationship with the child based on love, trust and mutual respect*. They are obliged, above all, to take care of the child, their life and health, personally, and not in just any way, but by providing the best possible living and health conditions for *proper and complete development* (FL, Art. 62, par. 1, Art. 69, par. 1. and Art. 70). Parents are prohibited from subjecting a child to *degrading acts or punishment that violate the child's human dignity*. They are also obliged to *protect the child from such actions of other persons* (FL, Art. 69, par. 2).

On the other hand, the obligations of the state are *to respect, protect and promote the rights of the child* and to take all necessary measures to protect the child, inter alia, from physical abuse (FL, Art. 6, par. 2. i 3).

Parents are prohibited from abusing their parental rights (FL, Art. 7, par. 3). Violation of the child's bodily integrity, depending on the specific circumstances, may be a reason for the introduction of corrective supervision over the exercise of parental rights (warning parents of deficiencies in the exercise of parental rights, referral of parents to counseling in a family counseling center or other specialized institution - FL, Art. 80), as well as for the application of civil-legal (family legal) protection measures that go deeper into parental rights, such as: temporary removal of the child from the parents (FL, Art. 60, par. 3), prohibition or restriction of personal relations of parents with the child (FL, Art. 61, par. 3) or deprivation of parental rights (FL, Art. 81, par. 2, item 1). This may also be a reason to impose on the parent some of the prescribed measures of protection against

domestic violence (eviction of the abusive parent from the family apartment or house and/or prohibition of access to the area around the child's place of temporary or permanent residence (FL, Art. 198, par. 2). The notion of domestic violence is quite precisely defined in Article 197, paragraph 2 of the FL, according to which *inflicting or attempting to inflict bodily injury, even the threat itself, i.e. causing fear by threatening to inflict bodily injury*, is considered domestic violence, which, according to Article 10, paragraph 1 of the FL, is expressly prohibited.

Neither the circumstances nor the reasons for such parental behavior affect the possibility of determining measures of civil law protection of children whose physical integrity has been violated or endangered by the behavior of parents. It is sufficient for the court or guardian authority, for measures within its jurisdiction, to establish that the rights of the child and his/her best interests are violated or endangered by the actions of the parents, because each of them is obliged to be guided by the best interests of the child in all activities concerning the child (FL, Art. 6, par. 1). Things are different when it comes to criminal law protection, which is logical considering the different starting points of family and criminal law. It may seem unbelievable that parents who have at least average moral and mental maturity can consciously inflict injuries on their child. Unfortunately, even the most severe forms of corporal punishment of children, which are criminalized by criminal legislation, are not unknown in life. Therefore, such a parent must not only be restricted in the further exercise of parental rights, in order to protect the child, but must also be prosecuted and punished accordingly. Therefore, in addition to the norms of family law, in Serbian law the bodily integrity and dignity of the child are also protected by the norms of criminal law.

Criminal Code of the Republic of Serbia (CC, 2005), in addition to criminal offenses whose perpetrator or victim may be any person (such as criminal offenses: light bodily injury under Art. 122 CC, severe bodily injury under Art. 121 CC, abuse and torture from Art 137. CC, violent behavior under Art. 344 CC), specifically provides for criminal liability for a parent who *abuses a minor child* (Art. 193, par. 2) and for a parent who *commits domestic violence* (Art. 194). Criminal liability is prescribed in the same way for the adoptive parent, guardian and any other person who abuses a child, i.e. any family member who *commits violence*. According to the CC, criminally responsible is parent, as well as any other family member who, *by using violence*, as well as *threatening to attack life or body*, i.e. by insolent or reckless behavior *endangers the child's peace, physical integrity or mental state*. For the criminal offense of domestic violence, depending on the circumstances (used tools, severity of consequences, etc.), a prison sentence of three months to three years, or six months to five years, is prescribed, and if the offense was

committed against a minor, it is a qualified (more serious) form of that criminal offense with a stricter sanction – from two to ten years in prison (CC, Art. 194, par. 3). The perpetrator of the criminal offense of child abuse can be punished by imprisonment from three months to five years (CC, Art. 193, par. 2).

The specificity of the parent-child relationship is that the parent cannot be forced by any means of legal coercion to take care of the child, and especially cannot be forced to care in accordance with the assumed (and required) standards of achieving child welfare that apply in a society, but the protection of rights, when an injury occurs, is achieved through various forms of intervention by the competent state authorities (Vujović, 2019: 56). This issue is particularly complex if the standards that define the *endangering* of the physical integrity of the child and *degrading actions and punishments that violate his/her human dignity* are unclear or if there is no social consensus on this issue. Where are the limits of parental misconduct and who determines them – family or criminal law? While family law prohibits domestic violence (FL, Art. 10, par. 1), which it defines as *conduct* by which one family member endangers the *physical integrity, mental health or peace* of another family member (FL, Art. 197, par.1) and provides for appropriate civil sanctions are provided for violating this prohibition, the criminal law recognizes as a criminal offense, under the same name (domestic violence), *the use of violence* (without special definition), *the threat of attacking life or body* and behavior that is *insolent or reckless*, and which endangers the same values - *peace, physical integrity or mental state* of a family member, i.e. child (CC, Art. 194, par. 1).

The analysis of domestic regulations suggests that the legal system of the Republic of Serbia prohibits all forms of corporal punishment and all other forms of violence against children, regardless of the context in which it is manifested and who the perpetrators are (Vučković-Šahović & Petrušić, 2015: 138; Ćorović, 2012: 216). In fact, any kind of endangering the bodily integrity of any person is prohibited. In addition, it should be borne in mind that violence against children is prohibited by key international legal documents on human rights, such as the ECHR and CRC, and that these documents, by ratification, have become an integral part of the internal legal order (Constitution of the Republic of Serbia, Art. 16, par. 2. and Art. 194, par. 1 and 4), as well as that the views and recommendations of the contracting authorities implementing these conventions or monitoring their implementation and the standards established by those bodies through their actions (and from which it unequivocally follows that corporal punishment of children is prohibited), are proclaimed as an instrument of interpretation of norms of domestic legislation relating to human rights (Constitution of the Republic of Serbia, Art. 18, par. 3).

Still, in legal theory there are different views on whether any intentionally inflicted violation of physical integrity of the child by the parents (corporal punishment) is at the same time a violation of child's human dignity and whether it is subject to sanctions.

The position that corporal punishment of children is a legitimate and legal procedure that falls within the domain of the right of parents to raise and educate a child, is based on the claim that the so-called *reasonable and moderate application of corporal punishment of children* is allowed. In this view, the standard of "reasonable punishment" implies the existence of several elements. First, it is necessary that there is no intention to inflict suffering – the motives of the parents must not be anger, hatred, irritability, aggression, sadistic urges, etc. (Marković, 2014: 296). Further, the parent's action must be aimed exclusively at correcting or controlling the child's behavior, whereby the pain caused by corporal punishment must be of certain, as a rule, low intensity, and must not injure the child (Freeman & Saunders, 2014: 684).

However, the European Court of Human Rights has challenged the concept of "reasonable punishment" by parents in several of its decisions. Thus in the case of *A. v. The United Kingdom*, App. 25599/94, Judgment 23 September 1998, the Court unanimously concluded that the corporal punishment of a boy in England by his stepfather constituted degrading treatment contrary to Article 3 of the ECHR. The lawsuit against the stepfather was previously rejected before the courts in the United Kingdom, on the grounds that it was a *reasonable punishment*. The European Court concluded that the UK Government was responsible for the fact that domestic law, which allowed *reasonable punishment*, had failed to provide adequate protection for children, including *effective deterrence*, and ordered the payment of £ 10,000 to a boy who was constantly beaten with a stick by his stepfather.

Although the institute of "reasonable punishment" still exists in a number of legislations, such as the UK (see: Children Act 2004, section 58 (1)), it does not exist in Serbian family and criminal law. Insufficiently accurate and uneven legal definitions of key terms, such as: "degrading treatment", "punishments that insult human dignity", "abuse", "physical abuse", "use of violence", etc., contribute to the existence of opposing views on the issue of (in)admissibility of corporal punishment of children in Serbia. (Vujović, 2020: 439).

The absence of precise definition of the mentioned terms has conditioned the existence of different interpretations of legal provisions on (in)admissibility of corporal punishment for the purpose of education, and thus a position appears (which is also dominant) according to which from the content of the provision of Art. 69, paragraph 2 of the FL

(which prohibits parental *degrading treatment and punishments that insult the human dignity of the child*), by applying *argumentum a contratio*, it follows that corporal punishment of children by parents is allowed *if it is not degrading and does not insult the human dignity of the child* (Panov, 2015: 198; Stevanović, 2006: 299; Marković, 2014: 287). In addition, neither the FL itself, nor the CRC, mention explicit prohibition of corporal punishment of a child, but violence, its forms, etc. are mentioned, which is interpreted in such a way that these norms do not apply to the prohibition of any physical (corporal) punishment of the child, but only to its more severe forms that are manifested through injury or abuse (Cvejić-Jančić, 2015: 7). Such views are based on the fact that the above provisions of the FL essentially limit parental rights and that any extensive interpretation of these norms is inadmissible, because it expands the field of application of imperative rules in a sensitive area of legal relations. According to them, the *ratio legis* of the legal norm points to the conclusion that the FL does not explicitly prohibit corporal punishment of children.

This position does not deviate from the generally accepted definitions in comparative theory, which distinguish between the terms “corporal punishment” and “abuse”, i.e. “violence”, and according to which corporal punishment is defined as: “use of physical force with the intention of causing pain, but without injury, to correct or control the child’s behavior” (Straus & Donnelly, 1994: 4), insisting that this type of punishment of the child by no means involve bodily injury – otherwise, it would constitute abuse or domestic violence (Freeman & Saunders, 2014: 684).

However, there are also legal writers who believe that from the provisions of the FL, by systematic interpretation (by linking Article 69, paragraph 2 and Article 197), it undoubtedly follows that all forms of corporal punishment of children are prohibited, as well as any other type of humiliating action or punishment (Ćorović, 2012: 216).

The issue of understanding the content of the provisions of the FL governing parental rights (especially those related to the upbringing of children) and the child’s right to dignity and physical integrity is extremely important for establishing criteria for distinguishing situations in which exercising parental authority is a special basis for excluding illegality when all the legal features of the crime have been met, such as the crimes of *abuse of a minor child* or *domestic violence*.

There are two things to keep in mind here. First, the exercise of parental rights as a basis for excluding illegality is not explicitly provided for in the Serbian Criminal Code.

Second, in family law, as we have seen, there is no explicit provision prohibiting corporal punishment of children.

The prevailing understanding in theory is that the essence of illegality is opposition to legal regulations in general, and not exclusively to provisions of criminal law. On the basis of this understanding, the grounds were created for the exclusion of illegality that are not provided by criminal law norms, i.e. they are not provided in terms of *numerus clausus*, precisely because it is possible for some new grounds to emerge over time, and for some old ones to cease to exist or to change their content. Therefore, they are derived from some other laws or from the “spirit” of the entire legal system.

Thus, most domestic legal writers state that exercising parental rights towards minor children is a special basis for excluding illegality (Delić, 2009: 26). Some of them recognize not only the right and duty of parents to bring up their child as the basis for excluding illegality, but also the narrower right of “disciplinary” and/or “educational punishment” of the child (Milović, 2008: 60; Čejović, 2005: 108). Such views are in principle not disputable, as long as they are educational and disciplinary methods that exclude the use of corporal punishment. The problem arises when we come to the point where the content of parental authority (rights and duties) prescribed by family law is determined and the question - whether corporal punishment of children is allowed in our family law (using the standard of “reasonable punishment”) or prohibited (as may be concluded based on systematic interpretation of the FL). Unlawful conduct exists only if the parent exceeds his or her legal rights, with the limit of exceeding always being a matter of factual assessment. Insufficiently precise legal norms leave a wide, unrestricted field for the courts to decide in each specific case whether the behavior of the parents is legal, i.e. whether the criminal offense exists or whether its illegality is excluded.

Therefore, it is not surprising that there are very few court proceedings for abuse, and even when there are, the sentences are inappropriately mild. At the same time, thanks to the deficient of legal solutions, the same acts of abuse can be qualified in several ways, which creates certain confusion and compounds the work of prosecutors and judges. The result is uneven case law, which often deviates significantly from international standards binding on Serbia, and may result in proceedings to determine the state's responsibility for violations of its international legal obligations before the competent international bodies (Dragičević-Dičić & Janković, 2011:15).

Of course, the views of the Committee on the Rights of the Child, expressed in General comment no. 8, according to which the principle of equal protection of children and adults from physical abuse, including domestic abuse, does not mean that all cases of corporal punishment of children by their parents, which come to light, must necessarily lead to criminal prosecution of parents, are of assistance. The *de minimis* principle, according to which the law does not deal with trivial issues, ensures that minor offenses among adults come to court only in exceptional circumstances. The same applies to minor offenses related to children. State efforts should be directed towards effective deterrence and advisory mechanisms. The aim is to prevent parents from using violent or other cruel or degrading forms of punishment, through interventions that have the character of support and education, not punishment (General comment No. 8 (2006), par. 40, 41).

4. Conclusion

The protection of dignity and bodily integrity is a universal right and the right of the child, and the prohibition of corporal punishment of children is an international legal standard. Corporal punishment, in addition to dignity and bodily integrity, endangers many other rights of the child, such as the right to development, health, proper upbringing, and even the right to life. Therefore, more and more countries have banned it with their legislation. In the Republic of Serbia, the law governing family relations prohibits physical abuse of children, as well as any form of degrading treatment and punishment that violates the human dignity of the child while the norms of the Criminal Code apply to cases where, with its intensity or manner in which it is carried out (*insolently and carelessly*), it actually constitutes child abuse or domestic violence. It is disputable, however, whether corporal punishment of children in the family is a reason for excluding illegality, i.e. whether the so-called *reasonable and moderate use of corporal punishment towards children*, with the aim of education, i.e. adoption of social values, is allowed, as stated in the legal literature.

The Family Law does not prescribe an explicit prohibition of corporal punishment, but it does prescribe an explicit prohibition of subjecting a child to degrading acts and punishments that violate human dignity, and any corporal punishment is degrading in itself. If we interpret the FL as a whole, systemically, then we must keep in mind that, according to that law, inflicting or attempting to inflict bodily injury on any family member, even the threat itself, i.e. causing fear by threatening with bodily injury, is considered domestic violence, which is expressly prohibited. Moreover, if we start from a clearly hierarchical domestic legal system in which the Constitution is the highest legal act, which explicitly guarantees the inviolability of physical integrity (Constitution of RS

2006, Art. 25, par. 1), and all other acts must be in accordance with it, and that all acts of lower legal force belonging to the corpus of human rights elaborate and operationalize the constitutional norms, no different conclusion can be drawn but that corporal punishment of children is prohibited in Serbia. Any other interpretation would mean that the constitutional guarantees of the inviolability of physical integrity do not apply to children, and this is simply not true. However, both legal theory and court practice do not have a single position on the issue of (im)permissibility of corporal punishment of children. Therefore, it seems that the explicit legal norm on the prohibition of corporal punishment is a necessity. The primary purpose of such a norm would be legal-pedagogical – it would send a clear message to those who protect the rights and interests of children, including the police and the judiciary, but also to parents and others affected by the principle of family privacy, that hitting one's own child is no more acceptable or legal than injuring the bodily integrity of any other person. Finally, such an explicit norm would put an end to the debate among law theorists as to whether disciplining children through corporal punishment belongs to the corpus of parental rights.

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Matko Pajčić*

RULE OF LAW, FAIR TRIAL AND CROSS-BORDER JUDICIAL COOPERATION IN CRIMINAL MATTERS IN EUROPEAN UNION

Backsliding reforms of laws regulating position of judiciary and constitutional court in some EU member states, like Poland, are violating some elements of rule of law. In this article author initially elaborates on independence of judiciary in EU, and on role of courts, on national and EU level, in protection of rule of law. Brief overview of legislative amendments in Polish law affecting independence of judiciary and different possibilities of reaction of EU to those amendments are main focus of the article. After that, author tries to analyze the impact of rule of law violation in some EU member states on judicial cooperation in criminal matters and principles of mutual trust and mutual recognition as pillars of that cooperation.

Keywords: rule of law, independence of judiciary, Poland, EU, Court of Justice of European Union, mutual recognition, judicial cooperation in criminal matters

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1. INTRODUCTION

Mutual trust is base of cross-border judicial cooperation within European Union (hereinafter: EU). The source of mutual trust principle could be found in art. 2. of Treaty of European Union (hereinafter: TEU) where the authors of Treaties wrote that *the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights and that these values are common to the Member States.*” Court of Justice of European Union (hereinafter: CJEU) stated that EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 of TEU. *As CJEU explained, exactly that fundamental premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized*”¹ But what happens (or should happen) when legislative reforms in some EU member state seriously undermine rule of law, like it is in case with new laws on judiciary in Poland? Does that imply that mutual trust and principle of mutual recognition, as supposed pillar of cross – border judicial cooperation in European Union, are no longer valid or applicable? Regarding that question, CJEU issued in 2018. an interesting judgment deciding on request of Irish court for preliminary ruling in connection with execution of European arrest warrant issued by Polish authorities.² But this decision did not resolve all the problems that arise from this matter. In the meantime, further legislative reforms additionally worsened the situation with the independence of judiciary and rule of law generally in Poland. This question is extremely important because it touches (or erodes) not only foundation of judicial cooperation in EU, but also the basic values on which EU was founded.

2. INDEPENDENCE OF JUDICIARY AND RULE OF LAW IN EUROPEAN UNION

Rule of law, as one of the values from art. 2. TEU on which European Union is founded, is concept that could be interpreted in many different ways. Despite the rule of law being listed amongst the values on which the EU is founded, scholars have not adopted a broadly accepted definition of it (Rios-Figueroa, Staton, 2009, according to: Hoffman, 2018, 1169). Yet, some common elements could be agreed upon and judicial

¹ CJEU Judgment of the Court (Grand Chamber) of 6 March 2018 — Slowakische Republik v Achmea BV (Case C-284/16) p. 34.

² CJEU Judgment of the Court (Grand Chamber) of 25 July 2018 LM Request for a preliminary ruling from High Court (Ireland) (Case 216/18)

independence is definitely one of the requirements that are considered as necessary when speaking about rule of law. However, we find scholarly differences with the understanding and defining that concept too (see: Geyh, 2014: 186, according to: Hoffman, 2018: 1170).³

Determining the rule of law, judicial independence and mutual trust is even more complex within European Union, because of many national legal orders and judiciary systems that differs greatly, yet with the strong need for intense cooperation as part of EU stronger integration. Therefore it is hard to oppose *Lenaerts* when he writes that since the principle of judicial independence is an essential component of the rule of law within the EU, *strong and independent courts area necessary prerequisite so that "European integration may continue to move on to new horizons"*. He emphasizes that *"integration through the rule of law" defines what the European Union stands for. In his view that expression conveys the powerful message that further intergration of Europe can only take place when both the EU institutions and the Member States respect the "rules of the game"*(*Lenaerts, 2020: 29*).⁴

Who is in charge of securing rule of law? Courts: national and EU courts. Therefore is judicial independence crucial for securing rule of law. Courts acting as independent umpires have the final say on the question of whether those rules have been breached. Hence, it is the role of courts, both at EU or national level, to defend the rule of law within the EU by making sure that no one is above the law”(*Lenaerts, 2020: 29*). To be able to understand judicial independence and accountability of judiciary, we have to consider how the other branches of state power can influence not only decision making of particular judges but also how the executive and legislative power r can influence the judiciary as a whole, especially the process of choosing of new judges, setting or diminishing the salaries of judges, or the disciplinary proceedings of judges (*Molitermo et al. 2018: 484*). This is extremely important because very often pressure of executive or

³ Regarding the importance of research of the topic, Dabetić emphasized that studying the ways of endangerment of institutional independence gives insight into the applicability of the principles of separation of power and an independent judiciary, which, as the foundations of each modern state, should guarantee the legal security and freedom to every individual in a society. Dabetić, 2018: 372).

⁴ Regarding the further integration of EU members, he pointed out that “the next phase of European integration must not be built on unstable foundations, but must rather be based on secure and solid values, in particular, respect for the rule of law.”(*Lenaerts, 2020: 29*). Baraggia also emphasizes that the Court of Justice of the EU (CJEU) “has become a pivotal actor in the evolution of EU integration as a multilevel constitutional system”. (Baraggia, 2020: 117).

legislative power on judiciary is not always visible at the first look and large part of the influence is exercised in indirect ways.

Trying to answer the question what happens when executive and/or the legislature of a Member State unduly interferes in the judicial process by undermining the independence of its own judiciary, *one must differentiate between national and EU level*. At the level of Member states “*the rule of law and fundamental rights would be weakened in that scenario and democracy would be damaged as the boundaries between law and politics become blurred*” while at EU level, “*the system of effective judicial protection would be at risk because the premise on which it has been built from its founding is shaken and called into question*”(Lenaerts, 2020: 31). In some cases even serious rule of law crises on national level could be resolved without the intervention of the EU: in certain situations, national institutions, such as constitutional courts, parliaments, but public opinion too, are strong enough to deal with the crisis (Closa et al. 2014: according to: Peirone, 2019: 65). *On the other hand, it is impossible for national courts to fulfill its role of gatekeepers of rule of law if they are under very strong pressure of others branch of government. Therefore, they cannot provide effective judicial protection regarding the remedies that are grounded in EU law. “Without judicial independence, remedies grounded in EU law become paper tigers”*(Lenaerts, 2020: 31-32).⁵ Therefore, although the strength of political pressure on judiciary is perhaps the most important single element to be considered, the strength of (not only judicial) institutions, democratic tradition and general respect for rule of law in some society are also very important.

The question is how can we know if the courts in some Member state are truly independent? Lack of *de iure* independence can be seen from the provisions of constitution and laws regulating judiciary, but the situation where judiciary is independent *de iure* but not *de facto* is much harder to recognize and to prove. Some researchers have though tried to establish some criteria and methods to measure *de facto* independence (see van Dijk, Geoffrey 2018) that can be valuable tools for addressing this issue.

⁵ Lenaerts pointed out that the free movement of persons should be accompanied by the free movement of judicial decisions, i.e. by mutual recognition and enforcement of those decisions. Prerequisite for that is that national courts must trust that courts from other Member States are equally committed to upholding the values on which the EU is founded. “As the principle of judicial independence constitutes the essence of the fundamental right to effective judicial protection, respect for that principle is of paramount importance in order to underpin the free movement of judicial decisions.” (Lenaerts, 2020: 32)

3. REFORMS OF JUDICIARY IN POLAND

When we discuss if the person would have a fair trial in criminal proceedings against him in particular country, the situation is usually viewed through the prism of a specific situation, that is, a specific defendant and specific crime (it's often case involving some political elements in direct or indirect way). But the situation becomes even more interesting when it comes to the general structural flaws in the legislative and judicial system, which then has a virtually automatic impact on every trial that is being held before the courts in that country. Therefore, the case of Poland, the reforms in its legislative system and the impact on international criminal assistance between Poland and other EU Member States will be presented below.

In the last decade Poland has implemented reforms, which should be assessed not only as a major step backwards, but as a very serious endangerment of the rule of law in that country.⁶ In this chapter, due to scope limitation of this article, only the important reforms in Polish law regarding the judiciary will be mentioned.⁷ Zoll and Wortham systematized all legislative changes related to the judiciary as follows: a) merging the Minister of Justice and the General Prosecutor, b) changes regarding the Polish Constitutional Tribunal, c) changes regarding the Polish Supreme Court, d) changes regarding the National Council on the Judiciary and e) changes regarding Ordinary Courts (Zoll,

⁶ The case of legislative reforms in Hungary has some parallels with the situation in Poland, although not quite. In this article the situation with Hungary will not be presented. Reforms in these EU members had also different reaction in EU bodies: in the case of Hungary, European Commission was initially not so eager to take measures to address such legislative changes. Yet, in September of 2018, the European parliament started proceeding against Hungary according to art. 7., because of (among other reasons) lack of judicial independence. See European Parliament Press Release 201809061PR12104. Up to May 2020. no proposal was put to voting yet.

Spieker pointed out that “governing political parties in Poland, Hungary, and Romania started rejecting the model of a liberal democracy and attacking checks and balances of the political process (e.g. independent courts, free media, or NGOs). Yet, other Member States are not immune to such attacks-as evidenced, for example, by the media concentration in Italy, Greece, and Spain.” (Spieker, 2019: 1182-1183). One very interesting topic is relation of ruling political elite in some country towards money laundering. Money laundering is necessary step in legalizing of „dirty money” that is sometimes acquired by misusing the political power and through corruption. Gal made very good objection that „there are countries that conduct a very profitable business through the tacit suffering of money laundering, by allowing phantom firms to be formed and, by the very strict interpretation of banking secrets, make anonymous bank deposits possible. As “unclean” money very quickly finds such areas, these countries come into outstandingly high incomes through money laundering.” (Gal, 2018: 352).

⁷ For more detailed overview and commentary of this reforms until end of 2018., see: Zoll, Wortham, 2019: 889-898. and Hoffman, 2018: 1161-1166. Overview of these reforms and its negative impact on rule of law can also be found in: Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland, Brussels, 20.12.2017, com(2017) 835 final 2017/0360 (app) (for legislative changes until the end of 2017.).

Wortham, 2019: 889-898). At the following pages, I will use this system with slight changes and newest developments considering latest changes in 2019 and 2020.

a) Merging the Minister of Justice and the General Prosecutor.

From March 2016, the Office of the Public Prosecutor General was merged with the Minister of Justice. This is especially problematic because Polish Minister of justice has broad powers (directly and indirectly, via budgeting) over both prosecutors and judges. Law gives him great influence in the process of selection of presidents of courts and disciplinary proceedings against judges (Zoll, Wortham, 2019: 891-892)

b) Position of Polish Constitutional Tribunal.

Because of its complexity, we will not go into details of these reforms that deal mostly with appointment of judges, jurisdiction and procedural rules,⁸ but it should be stated that after these reforms of 2015 and 2016, Polish Constitutional Tribunal's "legitimacy and independence" are now so undermined that it casts "*serious doubts over its capacity to protect constitutional principles and to uphold human rights and fundamental freedoms*" (Zoll, Wortham, 2019: 892). It is also easy to agree with the commentators that argue that at the core of this legislative reforms "*there is a political aspiration - especially against the constitutional principle of the division of powers - to obtain power not limited by an external control*" and that "*these actions are accompanied by actual legislative actions (inactions) of the ruling party which also aim to paralyze the Constitutional Tribunal.*" (Rytel-Warzocha, Szmyt 2016: 263-290).⁹ Considering the role of constitutional courts in upholding the rule of law in modern democratic societies, it is obvious that attempts to put judiciary under political control could prove itself less efficient if the constitutional court is "Grinch".

⁸ For legal analysis of 2015. reforms, including analysis of A) constitutional basis, B) procedure, C) disciplinary proceedings and dismissal of judges, D) removal of certain provisions from the Act and E) composition of the Court, see: Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)001-e, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e)

⁹ See also deliberations on relation between Constitutional Court and Parliament after 2015. Constitutional Court reforms in: Stebelski, 2016: 407-430).

c) Position of Polish Supreme Court.

There are two main issues regarding Supreme Court judges. The first one was “forced” retirement of more than 1/3 of judges of Supreme Court as a consequence of new law on the Supreme Court that prescribed new, lower retirement age (65 years) applying (which was the greatest problem) also for sitting judges. Provision that particularly goes against independence of judges is the one that affected judges could apply for extension of its terms, but the decision is in the hands of President of the State (Zoll, Wortham, 2019: 894 and Hoffman, 2018: 1155).

d) National Council on the Judiciary and disciplinary proceedings against judges.

Amendments of the Law on National Council on the Judiciary (hereinafter: NCJ) from December 2017 changed the way judicial representatives are elected. Out of total 25 members of NCJ, 15 representatives are still coming from judiciary, but the new model of nomination does not represent different level courts like it was case before. Those 15 members of NCJ are now elected by Parliament.¹⁰ More important, like in the situation with the term of Supreme Court judges, the term for the fifteen current judge members of NCJ ended in February 2018 regardless of the end date of their 4-year term (Zoll, Wortham, 2019: 897-898 and Hoffman, 2018: 1160-1161). Some commentators argue that amendment to the Act on the National Council of the Judiciary (NCJ), gave “politicians full control over the appointment and promotion of judges” and that the attack on the separation of powers means that “three powers become one” (Matczak, 2017).¹¹

The situation become even worse with the latest legislative changes regarding the independence of Polish judges and possibility of disciplinary proceedings against them. These changes are sometimes called “*Muzzle law*” - amendments to the laws on the judiciary, passed by the Polish Parliament (Sejm) on 20 December 2019.¹² To describe

¹⁰ This new law increased the number of NCJ members appointed by Parliament from eight to fifteen.

¹¹ Sledzinska-Simon emphasized few important consequences of the reform and the “harsh political attacks on the judiciary.” In her opinion, the first one is that society continues to manifest solidarity with judges and this credit of trust should not be wasted. Second, the judiciary realized that it needs to actively involve the public in the defense of the judicial independence and improve its communication with Polish society. Third conclusion is that judges have lost their representation in the National Council of the Judiciary, and have to create alternative fora for expressing their positions vis-a-vis the government.” (Sledzinska-Simon, 2018: 1868).

¹² The term “Muzzle law” was coined by former president of Polish Supreme court Malgorzata Gersdorf (Wójcik, 2020).

the core of that law, we will take a look at the summary of joint urgent opinion of Venice Commission and Council of Europe Directorate General Human Rights and Rule of Law. They pointed out main changes of this Amendments regarding the disciplinary proceedings against judges: 1) *the Amendments prohibit any political activity of judges and oblige them to disclose publicly their membership in associations*; 2) *the Amendments declare that any person appointed by the President of the Republic is a lawful judge, and it is prohibited to question his/her legitimacy. Doing so is a disciplinary offence punishable, potentially, with dismissal. Only the Extraordinary Chamber can decide whether a judge is independent and impartial*; 3) *new disciplinary offences and sanctions in respect of judges and court presidents are introduced by the Amendments*.¹³

In the Opinion they came to the conclusion that at least *some of the December 2019 amendments “may be seen as further undermining the independence of the judiciary... Thus, by virtue of those amendments, the judges’ freedom of speech and association is seriously curtailed. Polish courts will be effectively prevented from examining whether other courts within the country are “independent and impartial” under the European rules. ... New disciplinary offences are introduced and the influence of the Minister of Justice on disciplinary proceedings is increased further...”*¹⁴ Beside these provisions on NCJ and disciplinary proceedings, amendments of 20 December 2019. affected also negatively some other important guarantees of judicial independence.¹⁵

e) Ordinary Courts

After introduction of New Law on Ordinary Courts from July 2017, retirement age for judges was lowered with the possibility of extension upon which Minister of Justice decides. Additionally, large majority of presidents of ordinary courts were dismissed, without explanation or possibility of submitting appeal. (Zoll, Wortham 2019: 898-899). According to new Law, Minister of Justice is in charge of appointing the presidents of the ordinary court (all courts except Supreme Court).

¹³ Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe, on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws (Poland) , Strasbourg, 16 January 2020. Opinion No. 977 / 2019. par 19. (hereinafter: Venice Commission Opinion No. 977 / 2019.)

¹⁴ Venice Commission Opinion No. 977 / 2019. par. 59.

¹⁵ See Venice Commission Opinion No. 977 / 2019. p. 46-57.

4. REACTION OF EUROPEAN UNION TO THE LEGISLATIVE CHANGES IN POLAND

Such changes of Polish laws endangering the rule of law have led to multiple reactions of European Union institutions. Some possible ways of addressing this problem that will be briefly presented are: 1) political mechanism from art. 7. of TEU. 2) financial pressure mechanism – connecting the existence of rule of law in Member states with the EU budget and receiving money from EU funds. 3) procedure before CJEU according to art. 258 of TFEU and 4) indirect effect through international cooperation in criminal matters within EU and article 267 of TFEU - Requests for Preliminary Rulings on Interpretation of EU Treaties.¹⁶

4.1. Political mechanism - art. 7. of TEU

As we already mentioned in the introduction, rule of law is one of the values from art. 2. of Treaty of European Union upon which EU is founded. TEU contains protective mechanism in its art. 7.¹⁷ It has two forms and “*is best understood as a political rather than a judicial tool for enforcing Member State compliance with the rule of law*” (Lavelle, 2019: 41). According to art. 7. par. 1., the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in art. 2.¹⁸ But the determination of the existence of a serious and persistent breach by a Member State of the values referred to in art. 2, lies in the hands of European Council. Such decision can only be brought acting by unanimity on a proposal by one third of the Member States or by the European Commission (hereinafter: “EC” or “Commission”) and after obtaining the consent of the European Parliament after inviting the Member state in question to submit its observations. Where such determination under art. 7. par. 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain rights deriving from the application of the Treaties to the Member State in

¹⁶ Overview of these possible reactions of EU bodies was structured according to following authors: Lavelle, 2019, Zoll, Wortham 2019 and Hoffman 2018 who addressed also the possibility of suspension of Member state from the Schengen area because of violation of values from art. 2 TEU.

¹⁷ *Besselink* emphasizes that Article 7 is unique in that it is the only article of the Treaties giving power to the Union over matters outside the scope of EU law and solely within the realm of Member State activity, and therefore beyond simply violations of the *acquis*. *Besselink, 2017: according to: Lavelle, 2019. 40.*

¹⁸ The Council can act on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. (TEU, art. 1.).

question, including the voting rights of the representative of the government of that Member State in the Council.”¹⁹

On December 12th 2017, European Commission put proposal to the European Council to declare that there is a clear risk of serious breach of the rule of law (as referred to in art. 2 of the TEU) by the Republic of Poland and to make the necessary recommendations in that regard.²⁰ In this proposal, the first of its kind in EU history, the Commission explained in detail why it considered that the rule of law had been violated in Poland, highlighting in particular two issues: (i) lack of an independent and legitimate assessment of constitutionality and (ii) threat to the independence of the regular judiciary. However, the proposal was never put to voting. From the requirements set in art 7. of the TEU, only art. 7.1. (determination of clear risk of serious breach) could have some (though small) chance of success, because it does not require unanimity, but it is questionable even if majority of 22 votes could be achieved, because some other Member states do not want principle of rule of law to be interpreted too strictly because of their domestic situation and rule of law issues (*Moriarty, O’Keeffe*, 2018). Hungary made it clear at the outset that they will vote against any such proposal, but some other countries were also considered not to be too eager to put sanctions on Poland. Anyway, art. 7.1 does have only declarative effect, because only determination of the existence of a serious and persistent breach of rule of law (or other values from art. 2 TEU) could lead to sanctions from art. 7. p. 4. The failure of Commission’s proposal under art. 7. was politically conditioned, so we should definitely agree with the conclusion of *von Bogdandy and Ioannidis* that its political nature could equally be one of its greatest issues, particularly at the present moment, in “*a Union rife with mutual distrust, alienated citizens and nationalisms*”(von Bogdandy, Ioannidis, 2014, according to: Lavelle, 2019: 42). *Pech* argues that if Hungary had also been under art. 7 proceedings, since both member states simultaneously would be under Article 7 TEU proceedings, “one could argue that no country currently under Article 7 challenge should be able to protect another State similarly under challenge since any interpretation of Article 7 in the light of the *effet utile* principle should logically lead one to conclude that Poland and Hungary ought to lose their veto of sanctions against the other in such a scenario” (*Pech*, 2017: 29).

¹⁹ The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed. (TEU art. 4.).

²⁰ The Reasoned Proposal in accordance with art. 7(1) of the Treaty on European Union regarding the rule of law in Poland, , Brussels, 20.12.2017, COM(2017) 835 final 2017/0360 (APP)

4.2. Making access to EU structural funds dependable on the respect of rule of law

Inability to reach success under mechanism of art. 7. TEU, forced European Commission to consider some other, possibly more effective, solutions. As always, financial aspect is one of the most sensitive and important for every Member state, so it is no wonder that EC tried to address this question of serious breach of rule of law in Poland in the process of preparation of EU budget. EU budget proposal for period 2021.-2027 was presented by EC in May 2018. The EU budget proposal was accompanied with Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regard the rule of law in the Member States²¹ which sets certain requirements for Member states legal systems, to be able to protect the budget and financial interests of the Union.²² EC is convincing when it states that *"only an independent judiciary that upholds the rule of law and legal certainty in all Member States can ultimately guarantee that money from the EU budget is sufficiently protected."*²³ This mechanism could definitely prove itself as more efficient way than mechanism from art. 7 of TEU, because Poland is in the group of countries that rely heavily on EU funds.²⁴ But the problem of this first version of Proposal was that EC, who should be in charge of deciding if some Member state has "generalized deficiencies as regard the rule of law", had too broad discretionary power and it was not precisely enough defined what does "generalized deficiencies" mean. Therefore, the Proposal was later changed, making clearer borders to Commission's discretion and strengthening the role of Parliament and Council. However, up to the June 2020., the proposal was not adopted.²⁵

²¹ Proposal from May 2, 2018. Explanatory memorandum explains that the proposal is based on Article 322(1)(a) of the Treaty on the Functioning of the European Union and Article 106a of the Treaty establishing the European Atomic Energy Community.

²² In the art. 2. Proposal for a Regulation on the protection of the Union's budget, 'the rule of law' is described as that "it refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including of fundamental rights; separation of powers and equality before the law."

²³ EU Budget for the Future: Sound Financial Management and the Rule of Law, European Commission (May 2, 2018), https://ec.europa.eu/commission/sites/beta-political/files/budget-proposals-financial-management-rule-law-may2018_en.pdf

[<https://perma.cc/3TE6-TNNW>]. Cited from: Zoll, F.; Wortham, L. (2019) Judicial independence and accountability: Withstanding political stress in Poland. *Fordham International Law Journal*, 42(3), p. 917-918.

²⁴ Poland is the largest beneficiary of European Union funds, receiving "some 14 billion euro annually. Sierakowski, 2018: according to: Zoll, Wortham, 2019: 918.

²⁵ <https://www.europarl.europa.eu/legislative-train/theme-new-boost-for-jobs-growth-and-investment/file-mff-protection-of-eu-budget-in-case-of-rule-of-law-deficiencies> Last time visited, 20 June 2020.

4.3. Infringement proceedings before the CJEU according to art. 258 - 260 TFEU - failure to fulfill an obligation under the Treaties

Considering that the procedure under art. 7 TEU proved itself insufficient alone to address systemic breaches of the rule of law, infringement proceedings before the CJEU under Article 258-260 TFEU was the next most obvious enforcement mechanism to consider (Lavelle, 2019: 44). If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the CJEU according to art. 258 p. 2. TFEU. If the CJEU find that a Member State has failed to fulfill an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. The Commission may bring the case before the Court, if it considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court.²⁶

4.4. CJEU rulings on cooperation in criminal matters according to art. 267 TFEU

One further procedural possibility of reaction to general deficiencies in rule of law in some Member state relates to international cooperation in criminal matters and with art. 267 of TFEU where Member states can put request for preliminary ruling to CJEU. In that sense, the CJEU's ruling in "Minister for Justice and Equality v LM"²⁷ "*opens up another avenue in considering how systemic breaches of the rule of law in Member States can be addressed*" (Lavelle, 2019: 47).

a) CJEU Minister for Justice and Equality v LM" (case C 216/18)

This request for preliminary ruling concerns the interpretation of Article 1(3) of European Arrest Warrant (hereinafter: EAW) Framework Decision 2002/584. An Irish court appealed to the CJEU when deciding on EAW issued by Poland seeking the surrender of a Polish national suspected of narcotics trafficking. After the wanted person was arrested in Ireland in 2017, at the interrogation he stated that he opposed the surrender, arguing

²⁶ It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. (art. 260 p. (1) and (2) TFEU).

²⁷ Case C 216/18.

that surrender to Poland would put him at real risk of the apparent denial of the right to due process guaranteed in Art. 6 of the European Convention for the Protection of Human Rights (hereinafter: ECHR). He claimed that the recent reforms of the judicial system in Poland would deprive him of the right to due process, since they essentially undermine the basis of mutual trust between the issuing State and the executing State.²⁸

The question Irish court referred for preliminary ruling CJEU was what should national court do if it finds that there is cogent evidence that the conditions in the issuing Member State of the EAW are incompatible with the fundamental right to a fair trial because the judicial system of the issuing Member State itself no longer acts in accordance with the rule of law? Must the competent authority of the executing State necessarily carry out any *“further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?”*²⁹

CJEU recalled that in the area covered by EAW Framework Decision 2002/584, the principle of mutual recognition is the cornerstone of judicial cooperation in criminal matters and that the competent judicial authorities of the executing State can therefore, in principle, refuse to execute such an order solely for the reasons for non-execution, which are exhaustively set out in the EAW Framework Decision. The Court emphasized that the demand for judicial independence is at the heart of the fundamental right to a fair trial, but that automatic refusal of surrender is not possible without European Council decision according to art. 7 TEU.³⁰ However, CJEU relying on its previous judgement in Aranyosi and Căldăraru acknowledged that Article 1(3) of EAW Framework Decision, must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a EAW has been issued is to be surrendered, must

²⁸ The person sought referred to the aforementioned European Commission proposal of 20. December 2017. pursuant to Art. 7. TEU on the rule of law in Poland.

²⁹ CJEU judgement in case C 216/18, p. 25.

³⁰ Given that the possible suspension of the application of the EAW to a particular Member State to which the executing court relied was only a proposal (never put to voting for political reasons), and that there was no decision by the European Council to accept such a proposal, the CJEU stated that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State. Therefore, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected. CJEU judgement in case C 216/18, p. 71-72.

establish if the material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicates that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the EU, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary. *"If that is the case, executing authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which the person sought is being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by the issuing Member State, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State"*.³¹

In this CJEU judgement we can easily notice that the Court, in the absence of political decision from art. 7. p. 3. TEU, tried to reach equilibrium between the need to protect rule of law and the need to maintain cooperation in criminal matters within EU on the basis of mutual trust and recognition. The threshold set is rather demanding. The problem, of course, lies in the second step and the necessity to make a qualitative determination, explaining the "real risk of a violation of the right to a fair trial in a particular case". Therefore, it is no wonder that the Irish High Court surrendered the person concerned to Poland because it came to the conclusion that the second requirement from the test was not fulfilled.³² That request need not to be interpreted in such a way as to require that there are circumstances of a particular case concerning that defendant that must indicate a risk of a violation of the right to a fair trial.³³ Nevertheless, the importance of such CJEU decision admitting that in certain cases national courts could stop surrender even without European Council's decision from art. 7 p. 3 of TEU should not be underestimated and we could agree with some commentators who pointed out that „acknowledgment that national courts may suspend mutual trust and refuse to execute an EAW could have far-reaching implications.”³⁴ Mitsilegas convincingly elaborates that CJEU has moved *“from a model of presumed or blind trust to one of earned trust based on detailed scrutiny of*

³¹ Case C 216/18, judgement, p. 79.

³² Surrender order of High Court was confirmed by Irish Supreme Court who came to conclusion that “the High Court had correctly decided the threshold identified by the CJEU for refusing surrender had not been reached”. Carolan, 2019.

³³ It is interesting to note that such specific circumstances perhaps existed in this case, as some officials indicated to Poland that the person sought was a dangerous dealer. This clearly violated the presumption of the defendant's innocence (see ECtHR judgment in the case of Peša v. Croatia).

³⁴ Broberg, 2017, according to: Lavelle, 2019: 48.

*the fundamental rights consequences of a decision to recognize a judgment from another Member State.”*³⁵

5. CONCLUSION

Judicial independence and rule of law are (like most valuable and precious things) hard to build and very fragile at the same time. Judicial independence must be supported by a culture of judicial independence; this condition is usually created through a "long and gradual process," with the "political leadership and the professional and legal elite" working together to develop this culture to protect, support, and nurture judicial independence (Shetreet, 2012: 17, according to: Zoll, Wortham, 2019: 942). Although we could definitely agree with Jacob that the "rule of law cannot completely protect democracy in political reality", and that "in fact it is partly the other way around: democratic rotation guarantees the rule of law" (Jacob, 2020: 5-6) EU must try to protect it using all available legal means.

Parliamentary Assembly of the Council of Europe noted *that "the concerns about the independence of the Polish judiciary and justice system, as well as Poland's adherence to the rule of law, directly affect Europe as a whole"* and warned that *"these questions about the independence of the justice system and the respect for the rule of law are therefore not to be considered as internal issues for Poland."*³⁶ Of course, States integrated in the EU may have different legislative choices in many areas, "as long as they comply with EU law where there is one, and provided they stay obedient to the Union principles where there is none" but judicial independence and rule of law may not be subject to limitations, regardless of the public objectives chosen by the national executive or legislature (Lenaerts, 2020: 38, 32). European Union is aware of this problem, but one could argue that institutions of EU lack mechanism and instruments to efficiently address this problem in the current political environment. Different possibilities of addressing this problem were analyzed in this article and it is obvious that "political mechanism" from art. 7 TEU has few chances of success, especially art. 7. p. 2. that requires unanimity of all other Member states, particularly considering present political situation where nationalism and aspirations towards more national sovereignty only get stronger. Modification of text of art. 7 (2) from unanimity to majority voting could improve efficiency, but it is not realistic to achieve changes of such significance in present-day

³⁵ Mitsilegas, V. (2020). Trust. German Law Journal, 21(1), p. 70.

³⁶ Parliamentary Assembly of Council Of Europe Resolution n. 2316 (2020) of 28 January 2020), n. 12.

EU.³⁷ Another mechanism, infringement procedure under Article 258 TFEU is also not adequate solution, “because of its nature that is restricted solely to violations of the EU *acquis* and too case-specific” (Lavelle, 2019: 49). Perhaps the most realistic way could be financial mechanism, or pressure of depriving of money from European funds the Member state that abandoned rule of law. But until now, such solution has not yet been adopted and it is in process of negotiation.³⁸

Cooperation in criminal matters within EU is based on principles of mutual trust and mutual recognition. So how does judicial reforms in some member states that negatively affect judicial independence and consequently the rule of law affect principle of mutual recognition? Although EAW Framework decision states that implementation of EAW may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU determined by the European Council pursuant to Article 7(2) TEU, in case C 216/18 CJEU transposed principles earlier adopted in *Aranosy and Caladararu* case to the right to fair trial and adopted two-step test as instruction for executing body when deciding on European Arrest Warrant. However, it must be noted that fulfilling the second requirement from this two-step test is rather burdensome for courts of executing states when they have to decide on EAW issued by member state not adhering to rule of law principles.

In the situation where politics is unable to achieve majority required to determine the existence of violation of rule of law, the CJEU and also courts of Member states face hard task of securing respect for rule of law and human rights in judicial cooperation without completely destroying some foundations and efficiency of cooperation itself. Regarding the mutual trust and mutual recognition as pillars of cooperation within EU in criminal matters, one may conclude that despite the written significance of mutual trust in EU law, that principle is, at best, only a rebuttable presumption. Taking into account political situation in EU, it can be argued that the trust would have to be earned by continuous adherence to rule of law and that creation of some narrower inner circles inside EU between countries that trust each other is very possible future form of cooperation in criminal matters within EU.

³⁷ See: Larion, I. (2018), p. 172-173 for more detailed elaborations on possible problems with art. 7 and some other eventual solutions of the matter.

³⁸ Some authors state that the intervention of EU bodies against any other Member States threatening rule of law and thus the EU political homogeneity, is part of the EU constitutionalisation process towards a more structured federal entity (Peirone, 2019: 98). Obviously, there is still long and hard way before EU achieves such homogeneity.

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Parliamentary Assembly of Council Of Europe Resolution, 2316 (2020) of 28 January 2020)

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THE PROTECTION OF THE RIGHT TO HUMAN DIGNITY IN THE CONTEXT OF THE EU POLICE (LAW ENFORCEMENT) DIRECTIVE

The right to privacy is closely interrelated with the right to human dignity. It is declared in numerous international legal documents, including those of the European Union. The intrusion of the right to privacy in the favor of public interests is particularly noticeable in the cases where personal data is processed by competent authorities such as the police and judicial bodies. European Union adopted the so-called Police Directive in 2016, the aim of which is to maintain a balance between the interest of crime prevention and security protection and the right to privacy in the sense of personal data protection. After defining privacy and its interrelation with the right to human dignity, the author analyzes the provisions of Police Directive, the relation between Police Directive and some other relevant sources of acquis, the significance of its provisions for Serbia and, finally, offers suggestions and recommendations for its more efficient application in the future.

Keywords: privacy, human dignity, personal data, European Union, Police Directive

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1. Introduction

The Right to Human Dignity and The Right to Privacy

Dignity is the characteristic of every free human being (Mitrović, 2016: 25). As an inherent feature of every person, dignity in the natural sense only partially overlaps with dignity in the formal or legal sense and turns into a legal value, derived from human nature as its primary source (Mitrović, 2010: 558–559). In modern democratic societies based upon the rule of law, the attitude of the state towards human dignity is considered particularly important, meaning that human dignity should be treated as the supreme value, whereas all other human rights should be understood as its core elements (Mitrović, 2016: 28).

The right to human dignity is indivisible from privacy, as one of fundamental human rights. For example, Bloustein argued that the invasion or the intrusion of privacy is closely intertwined with personhood, individuality and human dignity (Bloustein, 1964: 973-974, in: Lukacs, 2016: 258-259). Similarly, Dürig recognized several types of human dignity violations, including the violation of intimacy, i.e. privacy which he regarded as the key precondition for a person's integrity and identity (Dürig, 1998: 127–132, in: Mitrović, 2016: 30).

It can be said that privacy is actually as old as the mankind and it has known a long development (Lukacs, 2016: 256). However, what should be considered private significantly depends on several circumstances: the era, the society and the individual, and, a difference can be distinguished between what is considered private, on the one hand, and what is legally protected as private, on the other (Lukacs, 2016: 256). In 1890, Warren and Brandeis defined privacy as “the right to be let alone”, i.e. the right to determine the extent to which the thoughts, sentiments and emotions of an individual (Bratman, 2002, 630-631) or the information about him or her (Westin, 2003: 432-453) can be communicated to others. In other words, privacy stands for an individual's option to limit the access that others have to his or her personal information as well as to conceal any information about himself or herself (Solove, 2008, in: Puaschunder, 2019: 64). Therefore, it can be argued that the introduction of “the right to be let alone” actually confirmed the need for the legal protection against the unwanted disclosure of private facts, thoughts and emotions (Lukacs, 2016: 258).

Nowadays, the amount of personal data that is being processed is rapidly increasing, particularly via social networking sites, location-based services, smart cards and cloud computing (Karovska-Andonovska, Kirkova, 2016: 80). Technology appears to be

eroding privacy in a much faster way than the legal system can provide adequate legislative frameworks and mechanisms for its protection (Holtzman, 2006: 15-19, in: Karovska-Andonovska, Kirkova, 2016: 80). Despite their numerous advantages, technological developments and innovations tend to threaten not only the right to privacy, but also the right to human dignity, which is highly correlated with privacy, especially in the cases where the public interests (such as crime prevention and public security) need to be protected. Namely, in some cases, the privacy of an individual has to be interrupted due to some more important, i.e. public interests, which means that, particularly from the standpoint of criminal law, not every invasion of privacy is illegal, even if it has been committed without a court permission (Pavlović, 2017: 224). That is when the issue of the balance between public and private interest emerges and there seem to be tendencies everywhere for fragile freedoms to be violated in the name of security, trust or anti-corruption (Buttarelli, 2017: 326).

Starting from the second half of the 20th century, the right to privacy became recognized as the first-generation human right in several international human rights conventions, of universal and regional scope of application, and its introduction into national legislations of states-parties to these conventions followed (Lukacs, 2016: 259). The European Union (hereinafter: EU) has also been dedicating a lot of attention to the issue of privacy and personal data protection, particularly in the past couple of years. The protection of personal data, which is of crucial importance for the protection of the right to privacy, and hence the right to human dignity as well, is analyzed in this paper, with the focus on particularly delicate cases – those involving the processing of personal data by the police and judicial authorities in the EU.

2. The Right to Privacy and Human Dignity in the European Union Law

The General Data Protection Regulation (GDPR, Regulation 2016/679)¹ (hereinafter: GDPR), in force since May 25th 2018², represents key source of *acquis* regulating the rights and obligations of data subjects (i.e. persons whose personal data are collected and processed) and data controllers (i.e. companies and governments that collect and process

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN>, accessed on 25.08.2020.

² GDPR replaced the EU Data Protection Directive (Directive 95/46/EC) on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN>, accessed on 25.08.2020.

these personal data) (Custers et al., 2018: 235). The adoption of this document is considered by far the greatest effort to prevent the intrusions of the so called “technological hegemony” into citizens’ privacy (Snowden, 2020: 342). GDPR constitutes the *lex generalis* in the legal framework for personal data protection (Kędzior, 2019: 506). Due to numerous specific characteristics, the protection of individuals’ personal data when their data is being processed by the police and criminal justice authorities is regulated by another source of *acquis*, known as the Police or Law Enforcement Directive³, the goal of which is also to improve cooperation in the field of combatting terrorism and cross-border crime in the EU by facilitating a more efficient and exchange of information necessary for investigations among police and criminal justice authorities in EU countries⁴.

As parts of the EU data protection reform package, Police Directive and GDPR establish fundamental principles and minimal standards for personal data handling in the EU, with the purpose to guarantee the respect of individuals’ rights, in particular the right to privacy (Karovska-Andonovska, 2013: 187-196). These sources of *acquis* are focused on the use of consent and personal data, providing data subjects with several rights, and introducing changes that prompted innovation within the EU, affecting both - the industry as well as the academic community (Pandit et al, 2018: 481-482). One of the most important instruments introduced by GDPR is the self-assessment of the digital risks and the modulation of the duties on the grounds of the impact assessment analysis, including special measures designed to preserve human dignity and fundamental rights of the data subject (Palmirani *et al.*, 2018: 139-140).

Despite the fact that it is not applied on data processing in the cases of public security protection and by the police and judicial bodies, GDPR is significant as a document that sets some general standards in the field of personal data protection, hence protecting privacy and human dignity in the context of data processing. That is the reason why some

³ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L0680&from=EN>, accessed on 28.08.2020.

⁴ Protecting personal data when being used by police and criminal justice authorities (from 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:310401_3&from=EN, accessed on 28.08.2020.

of its provisions significant for the protection of human dignity are briefly presented in this paper.

GDPR explicitly mentions the right to human dignity only in its Article 88, regulating the processing of personal data in the context of employment, prescribing that: *“Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context...”* (Article 88 Paragraph 1). This particularly refers to the following purposes: *“the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organization of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and the termination of the employment relationship”* (Article 88 Paragraph 1). The right to human dignity is referred to in Paragraph 2 of Article 88, which emphasizes that the aforementioned rules have to include *“suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place”*.

The cited provision contains two assumptions: 1) that the data subject has to be a human person, whose dignity is safeguarded (a legal person cannot enjoy human dignity) and 2) that human dignity is different from legitimate interests (Floridi, 2016: 307). Despite the fact that its presence in the GDPR is almost invisible, human dignity seems to represent the fundamental concept, providing the framework for the interpretation not only of GDPR but also of the European culture and jurisdiction in the area of informational privacy (Floridi, 2016: 307). Similarly to the cases regulated by the Police Directive, the cited provision of GDPR refers to the situations where there seems to be a conflict of interests: on one side, there is the interest of the employer to process employees' personal data for the aforementioned purposes, all of which are related to employment and work, whereas on the other, there is the interest of the employees to keep their privacy intact. In the Police Directive, the collision of interests refers to the interests of state bodies, such as judicial authorities and police, to prevent crime and maintain public security, on one side, and individual's interest to protect his or her privacy, on the other. But, while GDPR uses human dignity as the criteria to make a distinction between the acceptable and unacceptable intrusion of privacy for the sake of a “higher” interest, Police Directive does

not contain any provision explicitly mentioning human dignity or the right to human dignity. Also, in the cited provision of GDPR the interest in the favor of which individual's privacy is "sacrificed" (but only within the limits drawn by the right to human dignity) is the interest of the employer, who is not a state body, whereas in the cases regulated by the Police Directive, the advantage is given to public interest, i.e. the interest of state bodies and, in the broader sense, the entire state or society.

3. The Police Directive

3.1. The Adoption of the Police Directive – Background

The Police Directive was adopted as the replacement of the 2008 Data Protection Framework Decision⁵ (hereinafter: DPDFD) (Article 59, Police Directive), with the purpose to create a more comprehensive and reliable legal framework for data protection in the EU. The main reason for the adoption of DPDFD was the intention to set minimal standards in the field of personal data processing by the police and criminal justice authorities (De Hert, Papakonstantinou: 2016, 8). However, its scope eventually became too restricted, the application of its principles was not properly enforced and it prioritized the needs of security instead of the rights of individuals, which led to the adoption of the Police Directive, as a means to correct these imperfections (De Hert, Papakonstantinou: 2016, 8). Namely, Article 16 B of the Treaty of Lisbon⁶, which came into force, on December, 1st, 2009, actually required the re-establishment of the EU data protection standards (De Hert, Papakonstantinou: 2016, 8). According to Article 16 B of the aforementioned Treaty, *"Everyone has the right to the protection of personal data concerning them"* and the European Parliament and the Council have to lay down rules pertinent to *"the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data"*. Article 16 B also introduces the control of the application of the rules related to data protection by independent authorities.

⁵ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p. 60–71, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008F0977&from=EN>, accessed on 27.08.2020.

⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12007L/TXT&from=EN>, accessed on 27.08.2020.

The establishment of a special regime at the EU level, regulating the protection of personal data processed by the police and judicial authorities is rational for two reasons: 1) the substantial one and 2) the formal one (Pejić, 2019: 3). The substantial reason is derived from the fact that state bodies in charge of law enforcement, unlike other entities, such as for example private companies or non-governmental agencies, collect and process personal data without the consent, and often without the knowledge of the citizens (Pejić, 2019: 3). Moreover, they do it for the cause of public interest, i.e. the prevention of criminality and other public safety risks (Pejić, 2019: 3). So, unlike general personal data processing, processing conducted by the police and judicial bodies and for the purpose of security protection has to be given a certain amount of flexibility (De Hert, Papakonstantinou: 2016, 9). Moreover, when it comes to the requirements related to the quality of data, they cannot be expected to be too strict in the cases when information are collected for the purpose of security protection, because they are often collected from undercover sources or rumors and based on “hearsay” (De Hert, Papakonstantinou: 2016, 9). Also, it is rather difficult to apply the principle of purpose limitations in these cases, since, for example, the information that is collected within one case might be used for resolving other related cases in the future (De Hert, Papakonstantinou: 2016, 9). Finally, it is also important to have in mind the fact that if the right to information and access (which is explained in details in the part of the paper dedicated to the most important provisions of PD) were respected to their fullest extent, no suspect surveillance operation could be conducted properly (De Hert, Papakonstantinou: 2016, 9).

The formal reason for choosing the form of a directive in this case comes from the fact that the jurisdictions of the EU in the field of cooperation between police and judicial bodies are relatively new and less strict in comparison to those related to the common market (on which GDPR is applied), giving the Member States more autonomy and freedom when it comes to regulating proceedings before judicial and police authorities in their national legislations (Pejić, 2019: 3). So, the choice to adopt the rules regulating the protection of personal data in the proceedings conducted by the police and justice authorities in the form of a directive was based upon the fact that a directive, as an instrument, gives Member States a certain amount of flexibility in the process of their incorporation into their national legislations (De Hert, Papakonstantinou: 2016, 9). Namely, a directive as a source of *acquis*, provides only binding frameworks and guidelines that have to be followed in national legislations, but its provisions are not applied directly (Pejić, 2019: 3).

3.2. The Police Directive and General Data Protection Regulation

It should be emphasized that the rules regulating the processing of personal data in the Police Directive are largely consistent with the general data protection norms laid down in GDPR (Kędzior, 2019: 508). However, there are some crucial differences between GDPR and PD. On the one hand, some segments of PD prescribe more flexible standards in comparison to those prescribed by the GDPR, whereas on the other, Police Directive contains some specific solutions designed to respond to the needs of state bodies in charge of law enforcement. (Pejić, 2019: 4).

Whereas the system of data protection established by the GDPR is based upon the assumption that the processing of personal data substantially depends on the consent of the personal data subject, this cannot be applied in the cases when personal data is processed within the activities of police or judicial authorities (Kędzior, 2019: 508). Therefore, in accordance with the principle of legality, such data has to be processed on the basis of a legal act and in harmony with the legal grounds established by that act, exclusively for the purpose of the accomplishment of particular tasks prescribed by the law (Kędzior, 2019: 508).

Furthermore, Police Directive does not insist on the transparency of personal data processing, it minimizes the obligation to reduce the quantity of collected personal data to the necessary minimum, it allows much more severe limitations of the rights of personal data subjects and only generally regulates the jurisdictions of relevant supervisory bodies of Member States (Pejić, 2019: 4). In addition, Police Directive contains some provisions that are designed exclusively for the field of law enforcement and, as such, do not have their equivalents in the GDPR, such as: the obligation to categorize persons and their personal data, the obligation to collect information about each individual approach to data and processing of data as well as the obligation to determine time frames for the conservation of personal data (Pejić, 2019: 4).

Also, the Police Directive insists that Member States should make a clear difference between various categories of data subjects. However, the actual implementation of this provision and therefore the final decision about which data shall be processed in relation to a given data subject stays within the jurisdiction of Member States (Kędzior, 2019: 508).

It should be noted that GDPR and Police Directive are not the only new sources of *acquis* dealing with the issue of data protection. Namely, Regulation 2018/1725 on the protection

of individuals with regard to the processing of personal data by the EU institutions, bodies, offices and agencies and the free movement of such data and repealing the Regulation No 45/2001⁷ became effective as of 12 December 2018. Its goal is to harmonize the principles of data protection within the EU institutions and to strengthen the role of the European Data Protection Supervisor (Kędzior, 2019: 508). It should also be highlighted that the revised Regulation will apply to Eurojust after the reform of this agency is completed and that in 2022, the rules should be extended to Europol and the European Public Prosecutor's Office (Kędzior, 2019: 508).

3.3. Key Standards of The Police Directive

Police Directive regulates the protection of natural persons' rights in the cases when their personal data are processed by competent authorities for the following purposes: 1) the prevention, investigation, detection or prosecution of criminal offences, 2) the execution of criminal penalties and 3) the safeguarding against and the prevention of threats to public security (Article 1, Paragraph 1). It obliges the EU Member States to: 1) protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data; and 2) ensure that the exchange of personal data by competent authorities within the EU, where such exchange is required by Union or Member State law, is neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data (Article 1 Paragraph 2). Police Directive sets minimal standards in this field, allowing the Member States to provide higher safeguards for the protection of the rights and freedoms of the data subject in the cases of their processing by competent authorities (Article 1 Paragraph 2).

So, Police Directive is applied to the processing of personal data by competent authorities solely for the purposes explained in Article 1 (Article 2 Paragraph 1), to the processing of personal data either entirely or partially by automated means, or to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system (Article 2 Paragraph 2). However, the Directive is not applied if the processing of personal data is conducted: 1) within an activity which falls outside the scope of EU law and 2) by the EU institutions, bodies, offices and agencies (Article 2 Paragraph 2). In accordance with Article 3 Paragraph 7 of the Police

⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39–98, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1725&from=EN>, accessed on 31.08.2020.

Directive, Competent authorities refer to the following entities: 1) any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; and 2) any other body or entity authorized by Member State law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

Police Directive defines personal data in Article 3 Paragraph 1, as any information relating to an identified or identifiable natural person (which it refers to as “data subject”), i.e. an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. According to Article 3 Paragraph 2, processing includes any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

In its Article 4, Police Directive sets several principles that have to be followed in the cases when personal data are processed by competent authorities for the previously mentioned purposes. First of all, personal data must be processed lawfully and fairly. They can be collected only for specified, explicit and legitimate purposes and cannot be processed in a manner that is incompatible with those purposes. Also, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed. Moreover, the data must be accurate and, where necessary, kept up to date. Accordingly, reasonable steps must be made to guarantee that inaccurate personal data (having regard to the purposes for which they are processed) are erased or rectified without delay. Furthermore, data must be kept in the form that allows the identification of data subjects for the period that is not longer than it is necessary for the purposes for which they are processed. Finally, data must be processed in the way that ensures adequate security of the personal data.

Police Directive is familiar with different categories of data subjects and Member States have to oblige the controllers to make a clear distinction between personal data belonging to different categories of data subjects (Article 6). These include: 1) persons with regard

to whom there are serious grounds for believing that they have committed or are about to commit a criminal offence; 2) persons who have been convicted of a criminal offence; 3) victims of a criminal offence or persons with regard to whom certain facts give rise to reasons for believing that they could be the victim of a criminal offence; and 4) other parties to a criminal offence, such as, for example the persons who might be called on to testify in investigations related to criminal offences or subsequent criminal proceedings, persons who can give information about criminal offences, or contacts or associates of one of the persons referred to in points 1 and 2.

According to its Article 7, Police Directive makes a clear distinction between personal data and the verification of quality of personal data, through obliging Member States to ensure that personal data based on facts are distinguished, as much as it is possible, from those that are based upon personal assessments. That is the reason why Member States must ensure that competent authorities take all necessary steps to make sure that inaccurate incomplete or no longer up to date personal data are not transmitted or made available. Therefore, each competent authority has to verify the quality of personal data before they are transmitted or made available and if it happens that incorrect personal data have been transmitted or personal data have been unlawfully transmitted, the recipient has to be notified about that without delay.

Processing of personal data in the context of the Police Directive has to be lawful and performed only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) and it has to be based on the EU or Member State law (Article 8 Paragraph 1).

Police Directive sets some special standards when it comes to the processing of particularly sensitive personal data. According to its Article 10, these special categories of personal data include: personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. The processing of such data is allowed only when this is strictly necessary, respecting appropriate safeguards for the rights and freedoms of the data subject, and only under the following circumstances: 1) if it is allowed by the national law of the Member State; 2) in order to protect the vital interests of the data subject or of another natural person; or 3) in the cases when such processing is related to data which have been manifestly made public by the data subject. Also, processing of special categories of personal data by the same or another controller for any of the purposes set out in Article 1(1) other than that

for which the personal data are collected is allowed only if in accordance with the EU or Member State law: 1) the controller is authorized to process such personal data for such a purpose; and 2) processing is necessary and proportionate to that other purpose.

Article 13 of the Police Directive obliges the Member States to provide that some information is made available to the data subject, including: 1) the identity and the contact details of the controller; 2) the contact details of the data protection officer, where applicable; 3) the purposes of the processing for which the personal data are intended; 4) the right to submit a complaint with a supervisory authority and the contact details of the supervisory authority and 5) the existence of the right to request from the controller access to and rectification or erasure of personal data and restriction of processing of the personal data concerning the data subject. In specific cases, Member States are also expected to provide for the controller to give to the data subject the following further information with the purpose to facilitate the exercise of his or her rights: 1) the legal basis for the processing; 2) the period for which the personal data will be stored, or the criteria used to determine that period; 3) where applicable, the categories of recipients of the personal data, including in third countries or international organizations; 4) where necessary, further information, in particular where the personal data are collected without the knowledge of the data subject. The provision of these information may be restricted or omitted by legislative measures, but only to the extent and until such measures are necessary and proportionate in a democratic society with due regard for the fundamental rights and the legitimate interests of the natural person concerned. Hence, the restrictions and omissions are allowed only with the purpose to: 1) avoid obstructing official or legal inquiries, investigations or procedures; 2) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; 3) protect public security; 4) protect national security; 5) protect the rights and freedoms of others.

In Article 14, Police Directive obliges Member States to allow the data subject to obtain the confirmation from controller about whether his or her personal data are being processed and, if that is the case, to access personal data and the following information: 1) the purposes of and legal basis for the processing; 2) the categories of personal data concerned; 3) the recipients or categories of recipients to whom the personal data have been disclosed, 4) where possible, the predicted period for which the personal data will be stored, or, if that is not possible, the criteria applied to estimate that period; 5) the existence of the right to request from the controller to correct or erase personal data or restriction of processing of personal data concerning the data subject; 6) the right to submit a complaint with the supervisory authority and the contact details of the

supervisory authority; 7) communication of the personal data undergoing processing and of any available information as to their origin.

According to Article 15, data subject's right of access can be entirely or partially limited by legislative measures, to the extent and as long as such restriction represents a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned, with the purpose to: 1) avoid obstructing official or legal inquiries, investigations or procedures; 2) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; 3) protect public security; 4) protect national security and 5) protect the rights and freedoms of others.

Member States are obliged (in accordance with Article 16) to provide for the right of the data subject to obtain without undue delay from the controller the correction of his or her inaccurate personal data as well as to have incomplete personal data completed. The erasing of personal data has to be provided without undue delay if the processing infringes the provisions adopted in accordance with Articles 4, 8 or 10 of Police Directive or where personal data has to be erased in order to comply with a legal obligation to which the controller is subject. However, instead of erasing, the processing will be restricted if: 1) the accuracy of the personal data is contested by the data subject and their accuracy or inaccuracy cannot be ascertained; or 2) the personal data must be maintained for the purposes of evidence.

The aforementioned Articles are only some of the provisions of the Police Directive that illustrate the approach to the protection of personal data and, through them, the protection of the right to privacy and human dignity in the EU in particularly delicate situations, where the interests of individuals to have their privacy guaranteed is confronted with the interests of the society, i.e. the state to facilitate crime prevention and security protection. It can be noticed that Police Directive frequently uses the terms such as “where possible”, “where necessary”, “where applicable” etc., all of which leave enough space for a rather flexible interpretation of its provisions.

Article 29 of Police Directive obliges Member States to provide for the controller and the processor to implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk, in particular as regards the processing of special categories of personal data referred to in Article 10. In the case of a personal data breach, the controller has to notify without undue delay and, where feasible, not later than 72 hours after having become aware of it, the personal data breach to the supervisory

authority, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons (Article 30). Moreover, if the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, Member States have to provide for the controller to communicate the personal data breach to the data subject without undue delay (Article 31).

Another guarantee for the protection of personal data is the introduction of a special entity – data protection officer. Namely, in accordance with Article 32 of Police Directive, Member States are obliged to provide for the controller to establish a data protection officer (on the basis of his or her professional qualities and, in particular, his or her expert knowledge of data protection law and practice and ability to fulfil the tasks referred to in Article 34) allowing them to exempt courts and other independent judicial authorities when acting in their judicial capacity from that obligation. A single data protection officer may be designated for several competent authorities, taking account of their organizational structure and size. Data protection officer is in charge at least of the following tasks, enumerated in Article 34: 1) to inform and advise the controller and the employees who carry out processing of their obligations; 2) to monitor compliance with this Directive, with other Union or Member State data protection provisions and with the policies of the controller in relation to the protection of personal data; 3) to provide advice where requested as regards the data protection impact assessment and monitor its performance; 4) to cooperate with the supervisory authority; 5) to act as the contact point for the supervisory authority on issues relating to processing.

Another means to ensure the protection of fundamental rights and freedoms of natural persons in relation to processing personal data within the Union is the obligation of the Member States to provide for one or more independent public authorities to be responsible for the monitoring of the application of the Directive (Article 41 Paragraph 1). These entities are supposed to contribute to the consistent application of the Directive and, in order to achieve that goal, they are supposed to cooperate with each other as well as with the European Commission (Article 41 Paragraph 2). It is important to mention that Police Directive insists that the Member States provide for each supervisory authority to act absolutely independently when performing their tasks and exercising their authorities (Article 42 Paragraph 1). Accordingly, members of supervisory authorities have to remain free from direct or indirect external impact and are not allowed to ask for or accept anybody's instructions (Article 42 Paragraph 2).

3.4. The Relevance of the Police Directive for Serbia

Since the provisions of Police Directive formally oblige only the EU Member States, this document is not applied in Serbia. However, it is important that relevant subjects in Serbia become familiar with its key principles and standards for two reasons. The first one is the intention to fully harmonize Serbian national legislation with the *acquis* within the process of European Integrations, whereas the second one is the requirement that national law enforcement bodies guarantee the same level of personal data protection as the EU bodies, so that they can exchange relevant information for the purposes of transboundary crime suppression (Pejić, 2019: 4).

In Serbia, the protection of individuals' personal data is regulated by the Law on Personal Data Protection⁸ (hereinafter: LPDP), adopted in 2018. The intention of LPDP is to provide for the harmonization of Serbian legislation in this field with relevant *acquis*, i.e. with the provisions of GDPR and Police Directive (Sironič, Novak, 2019: 2). However, the articles that regulate the processing of personal data by competent authorities for special purposes (prevention, detection or prosecution of criminal sanctions or the enforcement of criminal sanctions including the prevention of and protection from threats to public and national security) appear to be distributed all over the LPDP, which makes their proper interpretation rather difficult (Sironič, Novak, 2019: 3). Namely, the LPDP only emphasizes either in the final or in some of the paragraphs of a particular article that the entire Article or some of its paragraphs shall not be applied in the cases of data being processed by competent authorities for the special purposes (Sironič, Novak, 2019: 3). However, experts suggest that it would be much more appropriate to create a separate chapter within LPDP that would be dedicated exclusively to the processing of personal data in special cases regulated by the Police Directive. (Sironič, Novak, 2019: 3).

The majority of LPDP's provisions only repeat the provisions of the LED, which makes them remain declarative, without providing for any additional value, clarity or information necessary for the genuine and applicable transposition of Police Directive (Sironič, Novak, 2019: 4). Such approach allows different interpretations of legal provisions and a wide discretion when it comes to their application (Sironič, Novak, 2019: 4). Finally, the sanctions for the violations of certain obligations of competent authorities seem to be missing, which implies that this field should be regulated in a more systematic and detailed manner (Sironič, Novak, 2019: 4).

⁸ Law on Personal Data Protection, Official Gazette of the Republic of Serbia, No. 87/2018.

4. Conclusions and Recommendations

Privacy and human dignity, as fundamental internationally and nationally recognized human rights, are closely interrelated and both are seriously endangered due to the development of modern technologies, particularly in the cases when they are in collision with the public interest to protect security and crime prevention. Due to rapid and expansive technological development, the protection of the right to privacy is constantly facing new challenges despite the fact that this field is regulated in national and international legal frameworks (Lukacs. 2016: 261).

As Edward Snowden argues, the lack of a universally accepted definition of privacy makes the citizens of pluralistic technologically advanced democratic societies feel that they should explain why they want their privacy to remain intact, which is wrong because the state is the one should justify the intrusion of privacy (Snowden, 2020: 220). Also, in the context of the development of modern technologies facilitating the intrusion of privacy in various different ways, it seems more reasonable to set the grounds for the protection of privacy directly on the protection of human dignity, instead of opting for an indirect protection through other human rights such as, for example, the right to property or the right to freedom of expression (Floridi, 2016: 308). However, regardless of the manner in which the protection of privacy is provided, maintaining a balance between the interest to protect personal data (and, through it, the right to privacy and human dignity) and achieve the objectives of security policy is a rather delicate task (De Hert, Papakonstantinou: 2016, 9). So, the balance between these two interests (security and freedom on one side and privacy on the other) should be considered of the main goals of a democratic state (Pavlović, 2017: 220).

A detailed and comprehensive legislative framework prescribing not only the basic standards of personal data protection, but also the mechanisms for the monitoring of their application and effective sanctions for their violations, certainly represents a key precondition for the efficient protection of the right to privacy and human dignity. Nevertheless, the actual protection, does not depend solely on the legislative framework, but also on the implementation and interpretation of the legal provisions and the ways in which they are applied by courts and Data Protection Authorities (DPAs) (Custers et al., 2018: 235). This in particular refers to the protection of personal data in the proceedings before the police and judicial bodies, regulated by the Police Directive, analyzed in this paper, since Police Directive contains numerous provisions that leave a lot of space for different interpretations, depending on the actual circumstances. Therefore, the role of

appropriate monitoring by the independent supervisory bodies is crucial for the appropriate implementation of Police Directive.

When it comes to Serbia, it is important to highlight the significance of the implementation of Police Directive into national legislation, in spite of the fact that our country is not an EU Member State. Although LPDP does contain provisions the aim of which is to facilitate the harmonization of Serbian national legislation with Police Directive, they should be organized in a more systematic manner, i.e. in a separate chapter and amended so that they provide for more precision and leave less space for extensive interpretation. Finally, adequate sanctions for the violations of the standards and rules contained in the Police Directive and implemented in national legislation should be provided. One should also concern the fact that the Police Directive leaves a lot of space for different interpretations of its provisions and, in Serbian legal system, the principle of the freedom of judicial discretion is treated as unlimited freedom that allows a judge to hand down completely different decisions in cases of identical or almost identical factual description (Kolaković-Bojović, Tilovska Kechegi, 2018: 124-125). Such approach threatens the equality of citizens before the law and might even degrade the legal predictability (Kolaković-Bojović, Tilovska Kechegi, 2018: 125). This has to be taken into consideration when implementing the Police Directive in Serbian national legislation

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Srdan Starčević*

MILITARY COMMAND AND THE RIGHT TO HUMAN DIGNITY

A military organization is a specific work environment, in which special formal social relations, different from those that constitute status civilis, prevail. The command as a social relationship, which can be understood as a political relationship and as a relationship of functional coordination, is necessary in the military because without it, the military would not be an efficient state institution adapted to operate in the combat conditions. However, due to the feature prominence of command relationship, the military is rightly considered as one of the authoritarian organizations. The command relationship really creates circumstances under which the right to human dignity can be violated, especially when it comes to subordinates. However, good command in modern armed forces requires strict respect for the right to human dignity, not only as part of respect for state laws and meta-legal principles of our civilization, but also for the very efficiency of military command. In this sense, the paper presents a critical analysis of the relationship between command and respect for human dignity, whose ties necessarily lead through military discipline and morale. The multiple methods were used: analysis, synthesis, generalization, abstraction, historical and hypothetical-deductive method.

Keywords: military, command, military discipline, political relationship, functional relationship, human dignity

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1. Introduction

During the War of the Seventh Coalition, last campaign in a quarter of a century long period of the French Revolutionary Wars and the Napoleonic Wars, Prussian general August von Gneisenau, acting Chief of Staff in Belgium 1815, sent an order to general Friedrich von Bülow, acting commander of one Prussian corps, to march with his unit to Sombreffe and Ligny. Gneisenau wrote the usual order, but took a good care of high etiquette addressing von Bülow who was not only senior in rank but also a member of the old Prussian nobility. Receiving such an order, von Bülow did not understand the urgency of the march to the ordered position and the result was the defeat of the Prussian army in Battle of Ligny (Chandler, 2005: 90). Apparently, it was a bad result of mannerliness and courtesy. In fact, these were the consequences of the communication style inherent in the command relationship in the standing armies in feudalism and the social relations that existed between the military officers of that time. Namely, from the formation of the aristocratic officer corps in the 17th century until the first half of the 19th century, relations between officers in the army were subjected to their social status and their private relations. On the other hand, the attitude towards soldiers reflected the social distance between the classes, often supported by degrading corporal punishment. The French bourgeois revolution has brought a great change in these relations. During the Revolution, and after it, European states, first France and then others, formed mass armies with the general conscription and the professional officer corps (Starčević, Kajtez, 2018: 780–781). During the 19th century, the military became a bureaucratic institution, and the social relations that ruled in it became formal. This inevitably gave rise to changes in communication style between members of the military, whose professional language has become more precise, but also more authoritarian – anyhow, the changes have made it more reflective of the solid reality of the command relationship. At the same time, the military becomes a total institution, whose members are expected to subordinate their interests to the general interests (of the either unit or armed forces or even state) and to develop their capabilities in the direction (or directions) expected by the institution. All the time, they are subject to stable and strict control policies of the institution. As Morris Janowitz points out, military life is an institutional life (Janowitz, 1959: 25).

In modern society, the army is organized as a bureaucratic state institution whose basic social function is to defend the state from external armed threats. As such, it is inevitably directly influenced by the imperative of victory in armed conflict. In addition, the presumption that the military is capable of winning a potential armed conflict and defending state laws (their validity) “provides a moment of obligation contained in the trust in the laws” (Babić, 2018: 163). The combat efficiency of the military or its ability

to achieve victory in war is probably the most important requirement facing the military and at the same time one of the great values within the army and the military profession (Waldman, 2010: 6). The ability to win is so important that some authors include it in the definitions of the military they set (Vjatr, 1987: 34–35). Since the basic social role of the military presupposes its use in armed conflict and since many long-term activities of the military (but its everyday activities also) revolve around this presumed use and the imperative of victory in combat, it is not surprising that many characteristics of the military, especially those that constitute *differentia specifica* of this institution, have been determined precisely by the nature of war combat and the imperative of victory (Ibrahimpašić, 1981: 363). A command relationship in the military is one of them.

2. Command as a social relationship

“Command (commanding) is the term of hierarchical organisations, in most cases the military” (Lewinska, 2015: 38). Moreover, all other organizations in which command is claimed have taken over part of what military command implies. Nevertheless, the army remains recognizable by the fact that its command is always present and undisguised. Inextricably linked to control, it is one of the characteristic of great importance, because command integrates and directs other characteristics and activities of the armed forces. Command implies unconditional submission and military discipline as well as acceptance of risks and willingness to sacrifice that are not characteristic of other hierarchically organized state institutions. The job of military professionals is specific precisely because of the risks that a military professional assumes: in the cases where war becomes a way of deciding on resolving social conflicts, military professional becomes a legitimate military target but not because of personal interests – Martin van Creveld mock rightly the thesis that some interest motivate people in war, because “dead people have no interest” – but because of great social values (Kreveld, 2010: 150). It could be said that in the extreme cases, such as war, the starting point for soldiers is located at the position where other (civil) servants stop with their duties. Therefore, command in the army does not have the characteristics of managerial performance until the fulfillment of a lucrative contract or execution of a transaction, but implies relatively long-term charismatic motivation of personnel which make possible to lead people into the battle in addition to rational bureaucratic (in Weber's sense of the term) directing and coordinating military unit activities.

In such an institutional and working environment, a command relationship is established between different levels of command, as well as between individuals. It exists in the entire military hierarchy and in every military unit and institution. Ubiquitous, this relationship

grips every individual working in the military with a firm hand and does not weaken during its movement up the hierarchical ladder: every person in a military uniform has someone above him whose orders he is obliged to carry out. Although command is the responsibility of military officers, the command relationship applies to every uniformed person, even the oldest general. The chain of command does not end in the hands of a military person with the highest rank and position, but extends to one of the state bodies that either represents the will of the people expressed in elections or traditionally symbolizes state unity and sovereignty. This is also a part of the civilian democratic control, indispensable because the military is an institution that can become dangerous for the society (Starčević 2018, 52; Starčević, 2010: 193–209).

The command relationship has two essential functions. The first one could be called political or ruling function. In this sense, the command relationship is a political relationship that ensures the subordination of the armed forces to the state and the transfer and implementation of decisions of the state leadership in terms of military engagement. The subordination of the armed forces to the state is achieved through the supreme command authority, which is an important element of the political system (often it is the highest state institution). This ensures the reliability of the armed forces as the protector of the state policy and the real guarantor of its order (Starčević 2020, 215). At the same time, the command relationship materializes the “general authority of sovereign power” which, in the well-known opinion of Andre Gavet, the state gave to the officer “because it placed the citizens in his hands and forced them to fully obey him” (Gave, 1993: 33). Citizens (now in uniform) are obliged to carry out the orders of their superior military officer in order to successfully carry out military tasks. At the same time, they are harnessed to the great political carriage and drag it towards the goals defined by politics as human activity of determining general goals and directing society towards their realization, prescribing at the same time the common rules of public life and mutual action (Hejvud, 2004:12; Pečujlić, Milić, 2005: 142).

The second function of the command relationship is coordinating one. In this sense, the command relationship is the relationship of functional coordination (Ibrahimpasić, 1981: 385). According to the famous and wise words of Herbert Spencer, military history is the history of victories of those people who have learned to move and fight coordinated (Starčević, 2020: 216). Traditionally, the conduct of military operations is seen as a game of chess played by the commanding generals of the two warring parties (with an important difference consisting of the different conditions in which the game begins, the different number of chess pieces and the absence of strict fair play rules). Such a view of warfare would not be possible if the military were not expected to be a transmission of the wills

and decisions that are created in the supreme commands. Although such a view of warfare is necessarily simplified, it expresses an ideal type of command: decisions are made at the top of the hierarchical chain occupied by the most competent officers and the most powerful political leaders; they are transmitted cascade down the chain of command, but at each subsequent level of command, orders are executed accurately, unconditionally and completely, and this leads to the execution of exactly the same actions and other activities as they were ordered. Establishing and conserving (or developing) a command relationship is the way the military approaches that ideal. With an implicit deviation from such an ideal, the command relationship solves the problems of decision-making and coordination of activities, execution of orders and communication in a complex, dynamic, changeable, dangerous, uncertain and decisive situation such as combat in war.

It is the command relationship that gives the right to decide (order) to one person at one level of command, connecting these levels into a single chain of command by the right of the superior to make orders and the duty of the subordinate to carry out orders, and finally, formalizes communication between superior and subordinate in authoritative language (Ibrahimpasić, 1981: 387; Starčević, 2011: 249–250). This solves Gneisenau's mistake. But, like any choice, it provides certain benefits in exchange for agreeing to its inconvenient sides. These inconvenient, bad sides are materialized in a wide range of possible abuses by the superior who is provided with a concentration of authority and discretion, unconditional obedience already assumed in the linguistic formulation of orders, and authoritarian patterns of firm command and mechanical type of military discipline.

The command relationship is necessary because it arises from the nature of things, to use Montesquieu's expression. The command relationship, however, did not imply the same power relations and inequalities between the superior and the subordinate throughout history. On the basis of known historical sources, we can get an idea of what authority over his army had the despot in the eastern despotisms, or the commander of the army in ancient Rome or ancient Carthage. Today unthinkable, but true: the lives of his soldiers were in his hands. Wellington, on the other hand, notes in the 19th century that nothing was more magnificent than the sight of Napoleon's army in attack, but that he himself could never afford such feats, because for every 500 soldiers killed in vain he would kneel before the Lower house in Parliament (Džonson, 2007: 58). In essence, the authority of commanders over subordinate officers and soldiers has changed, with a tendency for greater respect for human rights. Nevertheless, the command relationship still is fraught with all the danger inherent in state of inequality (in rights and power) between the people. A superior who can influence the life moments of his subordinate (such as a change of

garrison, career choice, career development, etc.) may be tempted to demonstrate his power in everyday behavior in a way that violates the dignity of the subordinate, especially if he himself is an authoritarian person. This is especially dangerous when it is supported by traditional authoritarian patterns of society on the outside, and on the inside by the systematic reproduction of authoritarian patterns disguised by military discipline and pseudo-rules (“that's how we always do it”).

Inequality among people is the source of many dangers. But, although people differ in many ways and despite the fact that they are unequal in terms of power, wealth and status, people remain equal, in the sense in which we commonly use the term “all people are equal”, as long as their right to dignity is respected. Resolving the issue of real equality of people, Leszek Kolakowski points out: “When we say that people are equal, we mean that they are equal in human dignity, which belongs to everyone and which no one has the right to violate ... That dignity is independent of everything that makes differences between people – in relation to sex, race, nation, education, profession, character” (Kolakowski, 2001: 19).

Studying the phenomena of superiority and subordination, well known to anyone who became acquainted with the military organization, even superficially, Georg Simmel found that superiority (seniority), as well as subordination, can never be absolute without causing the annulment of humanity. If a man (or a group) were to completely submit to another, he would cease to be a man and become a thing. Thus, the social relationship between the superior and the subordinate would cease, because the social relationship is the relationship between people, and not between man and things. Simmel even drew the conclusion that superiority can be maintained only if the superior takes care of his subordinates. Simmel also noted that the relationship of superiority and subordination does not have to be based only on force and punishment, but can have its stronghold in the authority, personality of the superior and his function in the group (Lukić, 1987: 48–81).

We can only expect people to show sacrifice, courage, initiative, ingenuity, fearlessness, to work with zeal, to exceed their capabilities ... We never expect that from things. That is why it is important to understand that the command relationship is a social relationship. Its structure contains elements of unequal functions and power, but also a minimum of equality that springs from the right to human dignity, which maintains the relationship between these elements in the field of sociability.

3. Conscious military discipline and human dignity

The military, like command, is relied on military discipline. It could be said that it is the discipline that brings the decision of the commander from the sphere of ideas into reality and determines the scope of its realization, as well as its effects. The significance of this conclusion in military operations is great – it is enough to recall the famous Napoleon's statement about war, according to which war is a simple science whose essence is in execution.

There are two types of military discipline: mechanical and conscious discipline. Mechanical discipline requires soldiers to be trained in executing commands, reflexively and without thinking. Conscious discipline requires soldiers to understand their activities, but more than that: to accept the goals of war and be motivated to endure war efforts and take risks in combat because they accept that the value they are fighting for is something that transcends and encompasses them. Most often, these two types of discipline are combined, but in the history of warfare, there were military organizations that preferred one of these disciplines.

Mechanical discipline was most often associated with humiliating and life-threatening corporal punishment of soldiers for violations of discipline, while conscious discipline relied on ideological background and dominant social values. Sometimes the awareness of soldiers about their obligations and responsibilities went beyond the framework of military organization and entered the sphere of politics. Thus, according to some authors, democracy in the poleis of ancient Greece was a consequence of the invention of the phalanx and changes in the way the ancient militia fought, caused by the tactical use of the phalanx. However, the numerous middle class of free citizens who fought in the war as heavy infantry organized into phalanxes, took on the heavier burden of the fight compared with their richer fellow citizens who fought as cavalry or supported the fleet with their money. Returning from the war to their cities, these citizens demanded that their contribution to victory be paid in the currency of greater participation in political life (Karlton, 2001: 92).

According to the socio-historical types of military, conscious discipline referred to militias, and mechanical discipline to mercenary armies. A systematic synthesis of the two types of disciplines was achieved in the national standing armies of the 19th century, when national ideals and education of soldier became a relatively stable source of conscious discipline, and military training still required a high level of mechanical discipline. At the same time, since the French Revolution, significant attention has been

paid to the conscious discipline of soldiers who enlisted in the armed forces in order to defend the nation. It was Gneisenau, the general mentioned at the beginning of this paper, who was among the first to clearly point out the cause of this change – the French Revolution that awakened the hidden forces of the nation – and its scope (Erl, 1952: 113). In the Prussian army, known for its strict discipline, in the 18th century, there was the rule that a soldier should be more afraid of his officer's stick than of an enemy bullet. Strict discipline maintained by the corporal punishments could be applied in the conditions when the tactics required the soldiers to move in tight rows, next to each other, in front of the eyes (and within reach) of their officers. Moreover, during the battle, the whole army was in front of the eyes of its military leader, who usually watched it from a height. The result of strict mechanical discipline was an increase in the efficiency of the Prussian army. But even then, the reliance on corporal punishment had significant shortcomings: Prussian generals avoided night marches, because their soldiers used protection of the darkness to separate from their units unnoticed and desert. When this army, famous for its discipline and victories from the past, met the army of the French Republic at Valmy in 1792, it would rather retreat than accept the fight (Melkior-Bone, 1990: 59). Later, in 1806, on the battlefield near Jena and Auerstädt, in a clash with Napoleon's Great army, it experienced “a total disgrace” (Esdaile, 2007: 272).

The explosion of national awareness and national unity, with the recognition of freedom and equality of citizens, changed the meaning of mechanical discipline, reducing it to a reliable and fast execution of certain movements and actions, and at the same time initiated greater confidence in democratic, conscious discipline.

But, apart from these reasons stemming from social and political change, there are the reasons to move the pendulum of discipline towards positions of conscious discipline that are the products of changes in the way we fight. The armies became massive and the military leader could no longer monitor them in battle. This became especially apparent after great battles such as those at Borodino and Leipzig. At the end of the 19th century, the need for conscious discipline was further determined by the development of war techniques and a change in tactics. The distance between the soldiers in the combat schedule was introduced, and the unit took up more space than before. Control over the soldiers could no longer be easily achieved by visual inspection. Since they could not keep an eye on them, officers and non-commissioned officers could neither rely on mechanical discipline, nor handle the fire of their units in the old way. There was an expectation from the soldiers to do some of the work themselves and make some of the decisions which had been ordered to them in earlier times. Just as Herbert Spencer predicted, the size of the military, the specialization of its parts, and their

interconnectedness increased (Supek, 1965: 181–208). All these changes also led to the strengthening of the soldier's right to human dignity: humiliating punishments were removed from military regulations, relations between superiors and subordinates were regulated by rules and regulations, and set of human rights, protection from abuse, ethical training, etc. were introduced.

It is interesting that these changes in terms of morale and discipline of the military were noticed early by Serbian officers and implemented in the Serbian army in the second half of the 19th century (Đukić, 2019). A special theoretical contribution to this was given by officers educated in France, such as Todor Pavlović (Ivetić, 2015: 211–212). Perhaps it is about time to return again to this literature as a source of inspiration for overcoming the challenges of command in “fluid modernity” as Zygmunt Bauman describes our time (Bauman, 2009: 60–61).

The chain of command, under the guise of indisputable authority and relentless subordination that are alternately repeated, hides one important truth: the dependence of its efficiency on respect for the human dignity of the “lower links” in that chain. The efficiency of command depends on the execution of commands that cascade down the chain of command – generals do not command the platoons and companies directly, which does not mean that the platoons and companies do not carry out their orders, but reinterpreted by platoon and company commanders. If the commanders in the lower positions do not have authority, their orders (reinterpreted orders of their generals) will not be carried out with zeal, and may not be carried out at all. Therefore, the obedience and zeal with which the order is carried out depends on the authority of each of the links. Every time a superior humiliates his subordinate in front of his subordinates, he violates the human dignity of his subordinate and violates his authority, but thus weakens his own authority and ability to command. He corrupts the chain of command. The conclusion that follows is that respect for the human dignity of subordinates is an important condition for successful command in the military. From a command perspective, respect for the right to human dignity is an internal need, not a limiting factor.

This means that although “The rule of law is essentially a mechanism for implementing natural law standards on human rights in international law and in national legislation” (Kambovski, 2018: 37), the importance of human dignity for command also lies in the need for command itself to be efficient.

4. Conclusion

The military would not be able to effectively fulfill its basic social role without a command as a socioal relationship. The command relationship, however, acts like a double-edged sword. On the one hand, consistently built, it solves numerous problems related to decision-making, coordination of activities and execution of orders. On the other hand, however, the command relationship makes the military a “model of authoritarian organization” (Čupić, 2001: 31). Under the influence of the command relationship, authoritarian patterns of behavior are formed and favored. These patterns then affects the creation of a working environment in which the right to human dignity can be violated, especially at the bottom of the hierarchical pyramid.

However, due to great changes, both technical (that changed the armament of the military, and thus its tactics) and social (that disrupted the old patriarchal patterns of submission to the authority of the state), modern command cannot be based on violent submission of people. The “officer's stick” of Frederick the Great's army is no longer (if ever) doing a good job. Instead of mechanical discipline and patriarchal morality, command had to rely on the conscious discipline and values of modern society. This implies, above all, respect for the numerous rights of members of the military, especially the right to human dignity. As shown in previous chapters, this is not only part of respect for the laws prescribed by the state and the supreme values of our civilization, but an important factor in the efficiency of military command.

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HUMAN DIGNITY AND THE SEARCH WARRANT. PROCEDURAL ASPECTS REGARDING ROMANIAN CRIMINAL LAW

Human dignity is, along with its indisputable philosophical meaning, a concept related to a large number of areas of law. Protected mainly by private law, interference with the public domain of law is not to be neglected.

Being a concept with a certain degree of abstraction, it is quite difficult to give a definition of it. Dignity is closely related to the person itself, perhaps the closest. Its character is of an absolute right, from which no derogations are allowed, as they are sometimes permitted in the case of other fundamental rights.

Obviously, a complete treatment of this subject can be achieved only through particularly consistent works. We have proposed in this paper to analyze this concept from the perspective of intrusions that are permitted by law, through which the judicial bodies must identify certain objects related to the commission of crimes. Such objects can be found either at a person's home, on him, in the vehicle used. Information can also be identified by authorized search in computer data storage media.

The legislator makes these concessions to the detriment of the right to the inviolability of the domicile, the right to property, the right to privacy. However, they are not at all foreign to the dignity of the person. At the domicile, goods can be very closely related to the elements that define dignity, and similar objects can be identified in possession of the individual. The same is the case with the informatic search. That is why the Code of Criminal Procedure states that these proceedings are carried out with respect for the dignity of the person.

We will briefly observe the concept of dignity and then look at the internal search provisions that protect this right. We will then conclude that the protection of this right is sometimes inadequate and left to the discretion of those called to apply the legal provisions.

Keywords: search warrant, dignity, private life, property

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1. Introductory remarks. The concept of human dignity

At its most basic, the concept of human dignity is the belief that all people hold a special value that's tied solely to their humanity. It has nothing to do with their class, race, gender, religion, abilities, or any other factor other than them being human.

The term "dignity" has evolved over the years. Originally, the Latin, English, and French words for "dignity" did not have anything to do with a person's inherent value, like nowadays. It aligned much closer with someone's "merit." If someone was "dignified," it meant they had a high status. They belonged to royalty or the church, or, at the very least, they had money. For this reason, "human dignity" does not appear in the US Declaration of Independence or the Constitution. The phrase as we understand it today wasn't recognized until 1948, when The United Nations ratified the Universal Declaration of Human Rights¹. The text has a special force².

The concept of human dignity has a history of 2,500 years (Barak, p. XVII). Over the centuries, it has been the subject of concern by many theologians and philosophers who have influenced its evolution. Among them, "the father of the modern concept of human dignity" is considered to be the philosopher Immanuel Kant, who in the work "Foundations of the metaphysics of morals" (1785) made the following important considerations from the perspective of this study: "Respect for others or the one that another can show me (*observantia aliis praetenda*) is, moreover, the recognition of a dignity (*dignitas*) in other people, such as a value that has no price, no equivalent, in exchange for which he can The judgment of a thing as having no value is contempt, and as such, every man has a rightful claim to respect from his fellows, and reciprocally, he is also obliged to respect each one. among them" In the opinion of the German philosopher, pride, slander and mockery are vices that damage the duty of respect for other people. According to the philosopher from Königsberg, man must be seen as an end in itself, not just as a means to be used by another will (Bratiloveanu, p. 3).

Dignity interpenetrates with right to private life. It was said that: *"It should be taken into account that the difference between concepts of "privacy" and "personal life" lies not solely in the area of legal definition. Both serve as a definite reflection of essential political aspects that characterize features of a state, its political system, economic model*

¹What is Human Dignity? Common Definitions, accessed on <https://www.humanrightscareers.com/issues/definitions-what-is-human-dignity/>

² According to art. I, "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

of operation etc. Thus, under socialism the idea of private property was completely rejected and the idea of collective property developed, which included personal (individual) property just as its component. In this regard, rights and freedoms of citizens were designed as individual rights and freedoms. Accordingly, the proclaimed rights and freedoms were in conformity, at least on the surface, with the socialist political system. Therefore the notion "personal" was treated positively, and the notion "private" - negatively. Such an approach was developed regarding everything that was associated with the notion "private". Respectively, the legislation provided for the protection of personal human rights as those not having property content and such that cannot be separated from the personality of an individual"(Streltsov, p. 47).

The right to privacy, one of the important rights in discussion regarding our subject, the search warrant, has a very close relation with dignity. This fundamental rights involve a negative obligation for the authorities: to avoid giving the public information about personal data, which do not concern the criminal investigation. Scholars observed that *"publication of the address of the ministers' family members cannot, therefore, be justified and it constitutes a disproportionate and unlawful personal data processing . In such cases the question is whether freedom of press has greater value of the over the right to privacy in cases when an information is not related to issues of public interest. Perhaps standards for determining public interest should be established in the light of the legitimate expectations of public figures concerning their privacy. The assumption is that the limits of freedom of press are more extensive when they concern politicians.*

The borderline between the right to privacy and the right to free information is unclear, yet there must certainly be an established minimum to it. Today, protecting the right to privacy and personal data protection, is much more than an issue of technical information processing. It is one of the basic political issues in any society (Pavlovic, p. 321).

2. The Romanian Constitution

Human dignity, as some of the ruling values, appears in Article 1 of the Romanian Constitution, as a supreme right, thus being at the heart of the rights protected by the fundamental act: "Romania is a rule of law state, democratic and social, in which human dignity, rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed."

Private and family life, the privacy of the person, can not be respected and protected without a protection of the space in which the individual lives, usually or only temporarily. From a constitutional point of view, respect and protection of the home concern two aspects: the free movement of the individual and the inviolability of his residence (Muraru, Tănăsescu, p. 259).

The International Covenant on Civil and Political Rights³ states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or home, or to unlawful attacks on his honor or reputation.

According to art. 27 from Romanian Constitution,

- (1) The domicile and the residence are inviolable. No one may enter or remain in a person's home or residence without his or her consent.
- (2) The provisions of paragraph (1) may be derogated by law for the following situations:
 - a) execution of an arrest warrant or a court decision;
 - b) the removal of a danger regarding the life, physical integrity or property of a person;
 - c) defense of national security or public order;
 - d) preventing the spread of an epidemic.
- (3) The search shall be ordered by the judge and shall be carried out under the conditions and in the forms provided by law.
- (4) Searches during the night are prohibited, except in the case of *flagrante delicto*.

After being a international and constitutional principle, dignity is a civil law concept. Article 72 of the Romanian Civil Code with the generic name “Right to dignity” stipulates that “(1) Every person has the right to respect for his dignity. the limits laid down in Article 75”. The Romanian legislator does not define what dignity means, limiting itself

³ ICCPR is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976

to proclaiming the existence of the right to dignity and specifying the content formed by the honor and reputation of the person.

Honor is that complex feeling, determined by the perception that each person has about his dignity, but also about how others perceive him in this respect, and reputation is the social expression of the same whole, acquired by the way the person is perceived in private or social life as a result of his behavior. Any violation of the right to dignity causes the victim moral (mental) suffering and exposes her to the risk of exclusion from the social, professional and family sphere.

Civil scholars observe the “impossibility to give a definition for right to dignity” (Baiaș, Chelaru, Constantinovici, p. 78-79). It is said that the right to dignity is part of the category of those rights of the human personality that have an object that corresponds to generic concepts, irreducible to precise definitions (Cornu, p. 254). Therefore, the difficulty of elaborating a definition made the legislator refrain from trying one, especially since the field of dignity is analyzed primarily by reference to a series of moral values.

3. The criminal procedural dispositions

According to art. 156 Romanian Criminal Code of Procedure⁴:

“(1) The search may be a home, body, computer or vehicle search.

(2) The search shall be carried out with respect for dignity, without constituting disproportionate interference with privacy.”

It is the only legal provision that refers to dignity in the field. However, its implications are special.

This is because it is unanimously acknowledged that the search of all places calls into question a number of other fundamental rights (Udroiu, Slăvoiu, p. 1089).

Carrying out the search often acquires a decisive importance during the criminal process, through it ensuring not only the material means of evidence whose existence is known, but also new evidence necessary to solve criminal cases. Usually, by carrying out this activity, the aim is to discover the traces of the crime, the bodies of crime and objects of

⁴ The new Romanian CCP was adopted on 2010 and entered into force on February 1, 2014

interest in establishing the circumstances of the crime, the identification of the offender, ensuring the reparation of material damage, the discovery of persons evading prosecution, trial, of the discovery of corpses and missing persons, etc.

The home search, according to art. 157 CCP may be ordered if there is a reasonable suspicion that a person has committed a crime or in possession of objects or documents related to a crime and it is assumed that the search may lead to the discovery and collection. evidence regarding this crime, the preservation of the traces of the commission of the crime or the arrest of the suspect or defendant.

The law edicts that the prosecutor has to request a search warrant from a judge. The request has to contain the description of the place where the search is to be carried out and, if there are reasonable suspicions as to the existence or possibility of the transfer of evidence, data or persons sought to neighboring places, a description of those places; the indication of the evidence or data from which the reasonable suspicion regarding the commission of a crime or regarding the possession of objects or documents related to a crime results; indication of the crime, of the evidence or of the data from which it results that in the place where the search is requested to be carried out is the suspect or the defendant or evidence can be discovered regarding the commission of the crime or traces of the commission of the crime; the name, surname and, if necessary, the description of the suspect or defendant suspected of being in the place where the search is carried out, as well as the indication of the traces of the crime or other objects presumed to exist in the place to be searched.

But we do not insist about the procedure, because the central aim of our observations regard the relation between the search and the right to dignity. Some other legal dispositions may give us some answers.

So, art. 159 CCP, which regards the technic procedure of the domicile search, provides, even after the filter the judge applies, some other limitations. Apparently, most of them are aimed to protect the inviolability of the domicile, but if we take a closer look, they protect also the right to dignity of the person.

There is said (Chiriță, Uzlău, p. 443) that the manner in which the search is carried out requires special care in respecting fundamental human rights. Thus, safeguards are provided for persons who are present at the place of the search, and their freedom may be restricted only if necessary. The rule is therefore that of not restricting the freedom of

movement of homeowners, relatives that are present or any visitors who can be identified at that moment.

The right to respect one's dignity interfaces with many rights and, indeed, implies respect for all of a person's attributes. The conduct which impairs a person's dignity may simultaneously be a violation of a person's right to privacy. The right to dignity may accordingly be asserted as an additional ground in a challenge to some other law or practice which impairs a person's rights. This implies for example that when a person challenges a search with or without a warrant, on the basis that it was an unreasonable infringement of his or her right to privacy, he or she might add the violation of his or her right to dignity (Basdeo, p. 46).

So, when we talk about the right to dignity, we observe that it has a more abstract acceptance than other protected rights, very similar with the right to be subjected to torture or to inhuman or degrading treatment or punishment, enacted under art 3 of the European Convention on Human Rights.

The Convention does not provide for any situation in which this right may not be respected. Also, art. 15 §2 of the Convention expressly provides that no derogation from this right shall be permitted. That is, even in case of war or other public danger of similar gravity (threatening the life of a nation), torture or inhuman or degrading treatment⁵ or punishment may not be allowed.

ECtHR held some decisions (Bîrsan, p. 449) regarding the relation between dignity and the search. In *Amarandei vs. Romania*⁶, Court of Strassbourg noted: *"some acts do not physically affect the applicants, such as destruction of their homes, even if they were committed without the intention of punishing them, may be considered ill-treatment [Selçuk and Asker v. Turkey, 24 April 1998, paragraphs 78-79, also Bilgin v. Turkey, no. 23819/94, point 103, November 16, 2000 and Dulaş v. Turkey, no. 25801/94, § 55, January 30, 2001]. Moreover, the Court held that a person's feeling deep unrest, associated with a contempt shown against him by the authorities, has reached the*

⁵ ECHR tries to give a definition to the degrading treatment in *Ireland vs. The United Kingdom* (5310/71), §167: they (the degrading techniques) caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

⁶ *Amarandei and others vs. Romania*, 1443/2010, decision from 26.06.2016

threshold of gravity necessary to fall under the incidence of art. 3 (Mubilanzila Mayeka and Kaniki Mitunga against Belgium, no. 13178/03, point 70, ECHR 2006-XI) ”

And further, Court observed (§§234-237) that:

”234. The Court notes that, for the purpose of the investigation, the search of each building was filmed by the military who took part in the operation. Subsequently, these recordings were made available to the press and had extensive media coverage. The main national news channels and newspapers presented reports and articles that included films and photographs provided by the authorities, in particular, according to the report of the Judicial Inspection of the Superior Council of Magistracy, by the Ministry of Interior (see paragraphs 56 and 93).).

235. An analysis of excerpts from the written and audiovisual articles shows that the images provided by the authorities depicted the tenants of the buildings, in particular young women, lying on the floor in humiliating positions. However, it must be stated that the authorities which made those images available to the press did not take the slightest precautionary measures to protect the privacy of the persons concerned: their bodies and faces were not concealed and the disputed images were filmed in space. private.

236. The Court is not persuaded by the prosecution's argument that the applicants' complaint should be rejected (see paragraph 56 above), namely that the dissemination of those images was a matter of general interest. It considers that other methods which are less detrimental to the applicants' privacy, which, as 'ordinary persons', could legitimately expect greater protection of their privacy, would have made it possible to inform the public. regarding the ongoing investigation.

237. The Court therefore considers that the national authorities which provided the media with records of the police operation unduly infringed the applicants' right to the protection of their privacy.”

Returning to the CCP dispositions, we can identify other text that protects the right to dignity. The law says that from the searched home there will be removed only the objects for which the judicial bodies have received a warrant from the judge, which are related to the criminal offence for which the criminal investigation is being carried out.

However, objects or documents which the circulation or possession is prohibited or if there exists a suspicion that they may be related to the commission of an offense for which

the criminal action is initiated *ex officio*⁷, shall always be seized. This seems to be an obligation, and not an option for the authorities.

So, an observation can be made. Of course, the disposition protects firstly the right to property and the right to private life. But we can not exclude the right to dignity. We can assume that some objects can regard this concept, and the authorities are not able to pick them. At the person's domicile there can be identified personal notices, intimate objects that regard private life. Making public the presence of them, even their possession is not prohibited, may affect the dignity.

The objects that are prohibited from detaining are the ones that represent *per se* a state of danger for society, *e.g.* the drugs, weapons illegally possessed, smuggled goods or falsified documents. They, as the law edicts, have to be in all the situations taken by the police officers. Regarding the suspicion that some objects may be related to their offences, scholars said (Chiriță, Uzlău, p. 444) that the text is not predictable and it can be used arbitrarily by the authorities. We agree with this opinion and observe the margin of appreciation of the police officers is too large, so any object may be picked up based only on a simple suspicion, not even a reasonable one.

Another provision that protects, along with other rights, the dignity is, we consider, the one that limits in time the moment of conducting the home search.

In the Romanian system, the search can be carried out only between 6.00 and 20.00, away from these hours it can be carried out only in case of *flagrante delicto*. By exception, in public places open at night, the search can be carried out free of the abovementioned hours. But, certainly, the search that begins in this interval can continue outside it, a natural aspect, because a possible interruption would be completely useless (Mateuț, p. 592). Once again, the dignity can be identified as protected, because, we assume, it can not be isolated from the private life. The prohibition is a strong barrier for night searches. Anyway, as law provides, public interest prevails in case of flagrance, when the search can be admitted at any hour in night.

Regarding the corporal search, this means searching for objects and documents on a person's body, including in the luggage he is traveling with or in his clothing (Herzog-Evans, p. 737). The text of the law governing this procedure states that body search

⁷ in Romanian penal system, for certain offences (corporal harm, threats, destruction, etc.) the criminal action (the criminal prosecution of the accused) is carried out only upon the complaint of the injured party

involves the external examination of a person's body, mouth, nose, ears, hair, clothing, and objects that a person has attached on him or her, or under his or her control at the time of the search.

In Romanian law, the body search is subject to specific conditions, which are part of the general mechanism of protection of privacy and dignity of the person, as well as professional secrecy in some cases.

The rule is that the search of the person's body is carried out when he is caught at the time of the crime or immediately after it (*flagrante delicto*). This, of course, in order not to remove the objects on it or for safety reasons for the person conducting the search. Unlike the home search, the body search can be carried out at any time, before or after the start of the criminal investigation (Mateuț, p. 598). Rigor does not appear necessary, because it is obvious that, in the case of a flagrant arrest, the documents for initiating the investigation cannot be drawn up, and will be made after the arrest, immobilization and corporal search of the accused.

Art. 166 CCP provides that the body search is carried out with respect for human dignity but also that it is carried out by a person of the same gender as the person searched. The protection of dignity is obvious, because the privacy of the person suffers one of the most serious intrusions in this case. The origin of this procedure can be found in American constitution, being observed by scholars in extended works⁸.

4. Conclusions

A leading human rights principle, the right to dignity is also a rule that criminal procedure has a number of interferences. The home or the body search for objects cannot be carried out without protecting it.

The principle of protection of property and privacy are the first that the procedures for obtaining evidence bring us in mind. However, perhaps somewhat neglected by doctrine is the dignity of the person. The starting point is the one that casts a shadow over it, and this is because we are talking about a person who is suspected of committing a crime.

⁸ Capers, B., Unsexig the Fourth Amendment, accessed on https://lawreview.law.ucdavis.edu/issues/48/3/Articles/48-3_Capers.pdf, accessed on 25.09.2020

Romanian CCP provides for a number of provisions in which it refers to the dignity of the person during searches, leaving the authorities his margin of protection. So, this is, we observe, a limit of criminal procedure. It has to impose some rules, but at the same time these rules cannot contain details of some such intimate rights.

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HUMAN DIGNITY IN THE FACE OF USAGE OF DIGITAL TECHNOLOGY

The overall usage of digital technology has dramatically transformed the landscape on which laws are created, because this aspect of modern everyday life cannot be outside normative regulation. In the world where there is no definite line between state of “men use and control the technology” and the state of “technology controls men”, one can question where lies the notion of human dignity? The paper will present various cases where legal regulation on the usage of digital technology meets, or doesn’t meet, the demands for respect of human dignity, outlining the broad lines of policy developments in areas such as privacy protection, protection of personal data, online safety for children, policy in computer crimes, in the context of protection of human dignity

Keywords: *human dignity, digital technology, right to privacy, personal data, cybercrime, right to be forgotten.*

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1. Introduction

Digital technology has permeated every aspect of personal and professional life of almost every person today, as well as social, economic, political, security and cultural order in every state. The overall usage of digital technology has dramatically transformed the landscape on which laws are created, because this aspect of modern everyday life cannot be outside normative regulation. In the world where there is no definite line between state of “men use and control the technology” and the state of “technology controls men”, one can question where lies the notion of human dignity? What is the position of the concept and inherent values that human dignity consists of in the landscape of regulating the usage of digital technology? In this paper, the author will present various cases where legal regulation on the usage of digital technology meets, or doesn’t meet, the demands for respect of human dignity. It is not author’s intention to provide a detailed legal analyses of the normative regulation, but rather to give examples of the legal and social impact of these developments and to outline the broad lines of policy developments in areas such as privacy protection, protection of personal data, online safety for children, policy in computer crimes, in the context of protection of human dignity.

2. The notion of human dignity in the context of the usage of digital technology

The notion of human dignity takes central place in human rights discourse. In the first half of the 20th century, human dignity began to enter legal, and particularly constitutional and international legal, discourse. Universal Declaration of Human Rights recognises inherent dignity and inalienable rights of all humans as the foundation of freedom, justice and peace in the world. This concept is further developed in international Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, which state that all human rights derive from inherent dignity of the human person. Some modern constitutions include human dignity as a fundamental non-derogable right, others mention it as a right to be protected alongside other rights (McCrudden, 2008: 658).

In legal theory, concept of human dignity is being perceived from differing perspectives, but still based on human rights discourse. These perspectives include criminal law considerations, reparation law considerations, administrative law considerations, and inevitably new dimensions that emerge in law today, such as the law of digital technology. In essence, every legal regulation must resort to human dignity in order to justify its claims and obligations established. But, the concept of human dignity is usually stated at

a very high level of generality, which makes it easy for adaptation, but can be problematic when there is need to be precise.

In the modern context of the usage of digital technology, to speak about human dignity means to determine legal position of human person against every aspect of the usage of digital technology. This task emerges as difficult one, having in mind that digital technology rapidly changes, as well as modalities of its usage and misuse, while other legal notions tend to be more static. It can be said, with much certainty, that classic notion of human dignity will be revised in the discourse of the law of digital technology. In this paper author's intention is to point out several issues where the notion of human dignity emerged in creating or modifying normative framework.

3. Right to privacy and digital technology – human dignity issues

The right to privacy is considered as fundamental human right, one that protects person against interference by public spaces, in particular against surveillance and control. With the rapid development of technology, and ever growing need for security, legal and everyday understanding of privacy changes, constantly. The need for more surveillance and control, in order to raise security, undermines and imposes serious challenges to protection of privacy, blurring the line between private and public spheres and changed our understanding of privacy (Streltsov, 2017). As the major concern poses the question how can law afford protection to right to privacy against technology?

When we consider the points that lead to undermining the protection of privacy, we must follow two roads, first, issues that emerge from institutional public sphere in order to achieve security and, secondly, issues that emerge from privacy expectations of persons when using digital technology. When we use networks, or integrated services digital networks, it is basically the process of collecting the data via technology i.e. the data is collected as normal phase in the usage of network, without the intervention of the individual. One cannot use digital networks without providing, knowingly or not, personal data. This opens the door for various types of surveillance of citizens, collecting personal data without knowledge or consent of the subject, exploitation of data, all in all creates situation which one can perceive as absence of democratic control. Creation, usage and ever so rapid development of digital technology creates various and adverse consequences for the individual in the sphere of private life, human identity, dignity and autonomy.

Constant usage of digital technology today requires system of democratic control and transparency, especially in the sphere of collecting and using personal data when using digital technology. Laws should be created with special concern for human rights, where every individual would have legal tools and remedies to control where and to whom their data is shown, but also laws must ensure security. Security requirements necessarily include some sort of usage of technology for control, but fair balance must be achieved.

On the other hand, popularity of social networks shows enormous readiness of people to expose themselves and connect with others publically, to cast away concerns about privacy in order to become more popular or acquire more “followers”. Modern user of social networks is constantly torn between fright of complete loss of privacy and need to share more information in order to become more popular. As social phenomenon, this kind of behaviour significantly devaluates privacy and reshapes attitudes towards privacy and its protection, which is based on consent. Violation of privacy occurs when we do not give our consent to disclose certain, personal, information. As long as we are aware of the rules and accept them, privacy is not in danger (Custers et. Al, 2014: 273)

When privacy is concerned, human dignity is linked to consent, when using social networks and other digital networks, and adequately created public policies which properly balance security issues and need for protection of human identity, dignity and privacy. Public policies and laws, from constitutional to lower levels, should establish transparent system of surveillance, control and collection of personal data of citizens. Human dignity, as a core value of modern society, must be at the top of the legal approach for the application and usage of information or digital technology, and starting point when defining privacy. Privacy, as any other concept eligible for legal regulation, depends on a particular framework, so when privacy is not clearly defined within a certain context, there can be no democratic policies or proper legislation to protect it (Schremer, B et. Al, 2014).

3.1. Privacy in social media usage

Social media today attracts large amount of users, weather using User Generated websites (YouTube, Wikipedia) or Social Network Sites (Facebook, Instagram, etc). This type of media depends on processing of personal data of its users. The disclosure of personal data, while using these networks, should be based on informed consent. In this context, informed consent means, in broad sense, to have control over one’s own life and actions. The notion of informed consent roots in notion of human dignity and the need for respect of people as individuals and their autonomy. When there is no consent, there is no

autonomy, the action is not intentional and there is no control over one's independence. Consent is conceived as form of autonomous action, every rational human being has natural need to freely choose his course of action. Informed consent, not only in social media usage, ensures making well-considered decisions, based on previously disclosed and presented information. This notion of informed consent puts the individual in the focus. To be clear, consent is only but one tool to safeguard the autonomy of person.

The disclosure of personal data is prerequisite in social media usage, therefore consent emerges as important notion. In that context, informed consent means that every act of disclosure of personal data by social network users must be based on conscious, rational and autonomous choice. This is the point where we meet concerns about privacy issues. Two questions arise when one tries to answer these concerns: whether data subjects (social network users) are in every occasion capable of making choices about consent to disclosure of their personal data, and are data subjects willing to make these choices in practice. Personal data processing is complex process whose implications, risks and consequences cannot be grasped and even properly understood by majority of people using social networks, or even digital technology services that rely on personal data processing.

Social networks have an obligation to publish (informed) consent requests to their users. Request for consent must contain information provided by data controller which must be sufficient and adequate for data subject to make a decision about personal data disclosure when using social network. This information must indicate the goals of data processing, privacy policy if exists, user agreement, and all other information that social media websites, or their administrators, consider necessary for users to be able to make informed decision about personal data processing. On the basis of information provided (via privacy policy, user agreement, terms and conditions), data subject gives or refuses consent. In practice, there is growing skepticism regarding the effectiveness of notice and consent (Custers et. Al, 2014: 278). Data subjects, as social media users, when online, tend to take minimum notice to consent requests and simply contest to requests that "pop up". Usually, it is the side of data subject that threatens the notion of dignity and autonomy when loosely gives consent to data processing, neglecting the importance of added conditions that make consent an informed one, be that because of lack of taking notice or not understanding. Public policies that concern social media usage must influence the awareness and concern about privacy issues, which today shows as low, while at the same time, social media usage increases on daily bases.

3.2. Right to be forgotten in digital sense

The emergence of computers, followed by computer networks, resulted in huge amount of collected personal data of almost every person that uses computer of any other form of digital technology, no matter how often, or even at all. Every day, information is collected about our movements, whereabouts, interests, even information where we collect our savings, drink coffee or go shopping. Amazing amount of personal information can be traced on Internet, and that inevitably leads to different possibilities of abuse. Internet has limitless memory space, while Internet browsers are constantly upgraded to the point when one can profile a person using one key word (or name) and “click”. How can notion of privacy, as defined today, survive in these circumstances, when every aspect of our lives can be traced online and affect decisions that shape our professional, personal, emotional and every other aspect of life? Interesting development emerged in form of right to be forgotten or right to delete personal data (Midorović, 2019: 285), and deserves to be mentioned in context of this paper’s theme. Right to be forgotten is created as personal right, in broader sphere of right to protection of personal data, but, as we will see, the protection is fully in the hands of private entities, so concerns arise as to its effectiveness.

Right to be forgotten means removing specific link from results index in certain browser (Google, Yahoo, Bing, etc) when they appear as results of search based on name and surname of certain person. What is being removed is link that would lead to website which contains information that can lead to identification of person. In practice, it is not impossible to find that information, it is not deleted *per se* from the Internet, but is made difficult to approach it via certain browser. Information is still available on website, only link is removed from search results. Request for removing the link is addressed to operator of internet browser on whose list of search results the link appears. When request is sent, operator weighs confronted interests – right to protection of personal data on one side, and right to freedom of information and expression, on the other. In essence, private entity decides and therefore protects personal rights, and its decision is subjected to control of national public bodies (courts, public bodies for protection of personal data, etc).

This newly designed personal right is one more attempt to place control in hands of data subjects, and to raise awareness about being responsible when using digital technology and Internet. Certainly law cannot reform quickly as digital technology and Internet can develop, but having in mind core notions of individual autonomy while using as well as regulating Internet and the usage of digital technology in general, is one step closer to creating privacy friendly digital environment.

3.3. Personal data as currency in digital context

When people use digital technology in form of networks, social media or any other mode that considers generating content or online interaction, personal data collection for needs of processing is required as prerequisite. This gives additional quality and value to personal data, such as name and surname, personal residence, e-mail address, and makes them treatable as currency. Access to digital content or services is conditioned with allowing access to personal data or revealing personal data, which is more or less precisely stated in terms of service, privacy policy or request for consent. Providers of digital content and digital services massively collect and process personal data. Personal data are still in the domain of human rights, to be more precise protection of personal data is considered one of the fundamental human rights, so question arises how can this monetization of personal data be in conformity with human rights protection?

Personal data can be used by providers of digital content and digital services for various purposes: advertising, enhancing existing digital products and creating new ones, tailoring digital content and services to audiences' preferences, as well as transactions, namely selling personal data to other entity (Midorović, Sekulić, 2019). This trend makes personal data an economic asset, in essence person gives consent to procession of personal data in return of digital content or access to network service, and urges modifications of legislation. But where to place this regulation – in domain of human rights, consumer rights or trade law?

Personal data are aspect of human autonomy, treating person as master of information which can lead to identification of person. On the other hand, digital services are necessary today for almost every aspect of private and professional life. One cannot avoid giving consent to collection or processing of personal data when having need to use digital services. In this aspect we can agree that balance has shifted to the situation of "technology controlling men", which can lead to new understanding of human dignity and autonomy, in context of usage of digital technology.

4. "Culture of control" as public policy framework for online safety for children and adolescents

New media and mobile and online technology, as well as new ways of application of these technology by young people (meaning children and adolescents) reveal new challenges, new risks and new needs for normative regulation. Authors often state that adolescents today are in the state of "innerreality" (Van der Hof, 2011), meaning their offline and

online worlds are intertwined in activities and social interactions – online games, social networks, messaging, webcam usage, etc. Adolescents' online behavior is inevitably linked to online risks, like improper or aggressive content, potentially risky contacts and criminal or otherwise inappropriate conduct. Therefore, public policies regarding online safety, e-safety policy in general and cybercrime policy, give much attention to online safety of adolescents, but in the context of growing control over adolescent behavior.

Culture of control, as approach in creating public policies, heavily relies on criminal law as primary policy instrument, with emphasis on high levels of incarceration and penal harshness. The aim is to control risks, through repression and supervision (Pavlović, Paunović, 2019). With the emergence and growing severity of cybercrime, concerns arise as to legitimacy of criminal law policy, in terms of its justification and necessity. The protection of person and core social values poses as border line and foundation for list of criminal act and criminal sanctions, but doctrine often finds that this trend is becoming “criminal law expansionism”, especially in the context of cybercrime (Grujić, 2018). On the other side, protection of adolescents must include conditions for self-development and freedom of young person. This is where these two, publicly recognized needs, collide.

Internet, as main domain for social interactions of adolescents today, is the place where young people foster self-development, freedom, risk-taking and experimental activities, experiencing autonomy in order to develop into responsible and independent adults. This must be taken into account when creating public policies for online safety. Optimal balance must be reached in controlling what is harmful or too risky and at the same time achieve high level of freedom and opportunities, which adolescents are entitled to as human beings. Harmful behavior must be repressed, but individuality and personal freedom must be secured, as essential for self-development of adolescents. So, how can this balance be reached? Ideally, by stimulating digital literacy of adolescents, starting from very young age. Children must be aware that usage of digital technology, especially usage that involves online activities, is a relationship based primary on responsibility, both user and provider. Young people must be aware of risks that encompass using digital technology and of consequences that their reckless behavior can cause. At the same time, in situations where risks become too high and too dangerous, public policy must take charge, even at the cost of limiting personal freedom and autonomy. Striking a reasonable balance between control and personal autonomy shifts public policies for online safety in conformity with human rights values.

5. Concluding remarks

Human rights, as general set of values and principles, which are found on the notion of human dignity, still pose as wider context for new normative acts in the sphere of the usage of digital technology. The major flow and usage of personal data in the course of usage of digital and information technology needs re-establishing transparency and control as democratic heritage. The notion of privacy is undergoing a redefinition, in order to include the concept of informed consent, as form of autonomous action. This, in wider sense, belongs to human rights discourse, because it puts individual in focus.

Social media usage must be responsible, in order to respect established notion of human dignity. But in this context, the main responsibility is on the users, and secondary on State and other stakeholders, to create public policies which raise digital and privacy awareness.

The right to be forgotten emerges as new personal right whose application depends on other rights – right to protection of privacy and freedom of expression. It only shows that human rights discourse cannot be overlooked. Also, criminal policy regarding cybercrime must take into account that major part of human interaction and self-development takes place “online” today, in pursuing the right balance between security needs and autonomy of person.

Creating privacy friendly digital environment also means incorporating personal data as currency in human rights discourse. And to conclude, it shows as very challenging task to incorporate traditional notion of human dignity in modern normative framework of the usage of digital technology. Every aspect of legal system is inevitably undergoing major changes due to digital technology. In the human rights discourse, maybe we can see the emergence of “human cyber - dignity”.

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HATE CRIME IN THE CRIMINAL LEGISLATION OF THE REPUBLIC OF SERBIA AND THE RIGHT TO HUMAN DIGNITY

The authors deals with the question of the manner of application of Article 54a (special circumstance for sentencing for hate crimes) of the Criminal Code of the Republic of Serbia in accusation phase, presentation of evidence and adjudication in criminal proceedings from the aspect of respect for the right to human dignity of accused person and victim. In this regard, the authors insists that in addition to applying Article 54a during determining the sanction, ie passing a verdict, in terms of protection of the right to human dignity, there is a need to Article 54a of the CC be cited in the indictment, as well as the obligation to examine existence of hate motives, in terms of Article 54a of the CC, on the perpetrators side during the evidentiary procedure.

Keywords: hate crime, right to human dignity, criminal procedure, defendant, victim.

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Introduction

Hate crime is a term that is widely used in the field of criminal law, criminology, criminology, social pathology, political science, journalism, as well as various other areas, which due to different ways of defining this phenomenon are characterized by diverse interpretations of its meaning. Namely, in the case of hate crimes, as well as in the case of defining any form of criminal manifestation, it is very difficult to give a universal and comprehensive definition given the diversity of social norms, non-unification and variability of legal norms, as well as different influence of political, cultural and other social factors. different social communities. Thus, hate crime is no exception to this rule, especially because the definition of this particular category of crime is particularly problematic due to the subjectivity associated with the conceptualization of hatred and inconsistencies inherent in the definitions of both theory and practice (Chakraborti & Garland, 2009:4). According to the most accepted meaning, it is a crime in which the perpetrator chooses the victim because of who she is or what she believes in. This choice of victim makes the crime more insidious, and limited research suggests that the victim needs much more time to recover from this than from any other crime. Such crimes negatively affect the trust of the community and undermine its cohesion (Soltvedt & Ivanović, 2016:75). When it comes to a longer recovery of a victim of hate crime in relation to the victims of classic crime, the difficulty of repairing the psychological and physical consequences of the victim of this type of criminal manifestation is primarily meant. As already pointed out, the limited research available in this segment of hate crime has resulted in a number of differences of opinion on the severity of the consequences of hate crime. Therefore, at this point we will present some of the author's views, first on the issue of psychological and then physical consequences of hate crimes against victims (Ćorović, et. al, 2020:18).

Namely, according to Steven Weisburd and Brian Levin, “in addition to low self-esteem and depression, victims of hate crimes also suffer from ”deep” sadness, a lack of trust in people; withdrawal; excessive fear for the personal and safety of his family; sleep problems, headaches; physical weakness; increased alcohol and drug use; excessive anger; and suicidal feelings” (Weisburd & Levin, 1994:26). The problem with these claims is that they are difficult to confirm by empirical research. Namely, regarding the question of whether the victims of hate crimes experience psychological trauma, there is almost no dilemma, but the question is whether they experience more trauma than the victims of classic crime. As James Jacobs and Kimberly Potter point out, it should come as no surprise that victims of hate crimes show psychological and emotional effects (trauma), because all victims do” (Jacobs & Potter, 1998:83).

A very limited number of studies have been done in the world that have had as their subject a real assessment of the emotional state of the victims of hate crimes. Two studies often cited in the literature were conducted by the National Institute Against Prejudice and Violence - NIAPV of the United States and in both of these studies the conclusions were that victims of hate crimes suffer more than victims of other forms of crime. However, neither study was methodologically strong and both included only victims of hate crimes, so the validity of this claim is questionable. Moreover, when Arnold Barnes and Paul Ephross reviewed data from the 1989 NIAPV study, they concluded that for the most part, "the predominantly emotional responses of victims of hate crimes are similar to those of victims of other types of so-called "contact crimes" (Barnes & Ephross, 1994:250). Thus, answering the question of whether hate crimes are psychologically more harmful than classical crime is complicated by several different factors, none of which have been studied to such an extent that we can certainly clarify this dilemma. In that sense, Jacobs and Potter suggest that victims of violent crime are equally traumatized, no matter how motivated by bias, while victims of minor crimes, such as those reflected in graffiti writing, are more traumatized when such crime was motivated by bias. This is certainly a reasonable hypothesis, which leads us to say that the most we can say with certainty is that under certain circumstances, hate crimes can be more traumatic than other crimes. We can also conclude that although this is a logical and reasonable statement, it does not have strong empirical support (Gerstenfeld, 2011:21). When it comes to the more severe physical consequences of this type of criminal manifestation, they mostly start from the claim that hate crimes result in physical injury to the victim on a larger scale. Evidence, these claims are even more questionable than evidence of psychological trauma. However, many authors, such as Jack Levine and Jack McDevitt, conclude that hate crimes have the weight of being brutal (Levin & McDevitt, 1993:11). Namely, such claims are mainly based on the analysis of police reports for certain areas, which showed that violence is more prevalent in those crimes that are motivated by hatred, than in other crimes. The problem with drawing such conclusions on the basis of police and criminal justice records is that some cases of this kind have certainly remained unreported. Also, it is logical to expect that non-violent forms of hate crimes are reported to a lesser extent than those of a violent nature. Thus, the objection to this claim is reflected in the fact that, even if we could say that police and criminal justice records give a realistic picture of the state of crime in a society, based on the number of crimes is not enough to argue that crimes out of hatred more violent in relation to the classic forms of crime of the same type. In this regard, one can come to the position in the literature according to which the

claim of a higher degree of violence of these crimes, more based on anecdotes,¹ than in the real state. The authors of this view do not deny the fact that many cases of hate crimes, such as the murder of Matthew Shepard and James Byrd, have involved brutal violence, but that to the same extent it can easily be found in many other hate/prejudice motivated murders (Gerstenfeld, 2011:22). Precisely, this linking of the brutality of hate crimes to anecdotes, perhaps best reflects the social danger of hate crimes versus classical crime.

Namely, although, due to the lack of a larger number of empirical researches, the more difficult recovery of the immediate victim of hate crimes, ie more severe psychological and physical trauma, is questionable, in relation to the classic forms of crimes of the same type. What is unquestionable is that, unlike classic crime, hate crime has a greater negative impact on the trust of the community and undermining its cohesion. Namely, this statement is reflected in the fact that hate crimes do not only affect the immediate victim (the person who was the subject of the criminal attack), but also all other members of the group to which that person belongs (and because of whose affiliation he or she was chosen to attack). It is logical that people feel less secure when they hear that someone has been a victim of a crime in their local community or neighborhood, but this degree of insecurity is greater when they hear that someone has been a victim of a crime just because they belong to certain (racial, ethnic, religious, etc.) .) the group to which they themselves belong. Thus, hate crime has a greater effect compared to classic crime, which causes additional fear among members of the group from which the victim who was the subject of the attack in a given case of hate crime comes.

It should be emphasized here that a limited number of researches have been done on this issue, but that they have shown that members of the group to which the victim of hate crimes belongs are more traumatized than those citizens who do not belong to that group. This is primarily because the members of the group identify with the immediate victim and fear that they too could become victims of a criminal attack on that basis. Due to this fear of continuing to attack members of this group, especially if the reaction of the competent institutions was inadequate (eg the crime is not characterized as a crime motivated by hatred or prejudice, but as a classic attack), at least in the opinion of members of this group, it can result in serious riots, revenge, and social conflicts in general. There are several examples from American society in which e.g. the target of the hate crime attack was a victim of African-American descent, which led to serious protests and riots by members of the group, as they felt more threatened by one such crime against

¹ Anecdotes mean concise testimonies, ie stories about a person or event.

a member of their group. In addition, the consequences of hate crimes can be greater than simple violence aimed at retaliation. As it has already been pointed out, this is reflected in the disruption of social cohesion and social order in general, leading to mistrust, fear and intolerance. The question of the extent to which hate crime can disrupt the cohesion of a community is something we still do not have a precise answer to, because there is no research that would measure the level of impact of hate crime on disintegration and disruption of relations within a community. However, many cases of hate crimes, as well as the reactions of protected groups after such incidents, tell us that this negative impact is indisputable, as well as it is no less negligible. Due to all this, there is a need for the existence of hate crimes as a criminal law institute within the domestic criminal legislation, as well as stricter punishment of the perpetrators of this type of criminal manifestation. Namely, hate crime is especially socially dangerous because it is mainly conceived in such a way as to harm the victim himself, but also to send a message of hatred to the entire group to which the victim belongs (represents) (Turpin-Petrosino, 2015:9).

Hate crimes are crimes motivated by bias or prejudice against certain groups of people. This definition is offered by the Organization for Security and Co-operation in Europe (OSCE) through its Office for Democratic Institutions and Human Rights - ODIHR. Historical circumstances, social context, and national legislation will determine which of the many personal characteristics of identity will be further protected by state hate crime legislation (Jokanović, 2018:22).

According to Barbara Perry, “hate crime” includes acts of violence and intimidation, usually targeting an already stigmatized and marginalized group. As such, it is a mechanism of power and oppression, the aim of which is to affirm the uncertain hierarchies that characterize a particular social order. It attempts to re-create at the same time the threatened (real or imagined) hegemony of the group to which the perpetrator belongs and the “appropriate” subordinate identity of the group to which the victim belongs. It is a means of labeling themselves and others in such a way as to re-establish their “appropriate” relative position, as presented and reproduced in broader ideologies and patterns of social and societal inequality (Chakraborti & Garland, 2009:5).

The Congress of the United States of America defined hate crime as “a crime committed against a person or property, wholly or partly motivated by a prejudice against the perpetrator, race, religion, group of a particular ethnic or national origin, or group of a particular sexual orientation.” In short, hate crimes are directed against members of a particular group mainly because of his or her belonging to that particular group

(Altschiller, 2015:9). It should be noted here that the 1990 Hate Crime Statistics Act - HCSA, signed by President George Bush, is a federal law requiring the U.S. Attorney General to collect hate crime statistics, and also the first U.S. federal law to use the term “hate crime”, defining it as a complex of “crimes showing evidence of prejudice based on race, religion and sexual status” by orientation or ethnicity, including where possible the crimes of murder; negligent murder; forced rape; aggravated assault; simple assault, intimidation, fire, destruction of property and harmful vandalism” (Ivanović & Keenan, 2019:92). The term “hate crime” was first coined by three members of the US House of Representatives, John Conyers, Barbara Kennelly and Mario Biaggi, who sponsored the bill during a debate in the US House of Representatives. They were the first to use the term “hate crime” in 1985 to denote crimes motivated by racial, religious and ethnic prejudice (Naidoo, 2018:125). Since that year, the term “hate crime” has entered American media and social discourse and continues to appear in new articles, school books, and university textbooks around the world.

It should be noted that although the term “hate” is generally accepted for this type of crime, the perpetrator does not have to really “hate” his victim in order to commit a “hate crime”. Namely, many understand “hate” as “prejudice”. Understanding hatred in this way has stimulated further debate on how prejudice should be defined and whether such a phenomenon can be linked to the mental element of the crime - *mens rea*. Gordon Allport defines “ethnic prejudice” as antipathy based on wrong and inflexible generalization. It can be felt or expressed. It can be aimed at the group as a whole or at the individual because he is a member of that group (Walters, 2011:315).” According to this definition of prejudice, a person must feel or express animosity towards the whole group based on generalizations created about its members. Such generalizations are often the result of stereotyping.

When it comes to the necessity of the existence of hatred on the part of the perpetrator, as a subjective feature of the act, in terms of the existence of hate crimes, two modalities of codification of this legal institute are possible. The first is the discriminatory selection model, while the second is the hostility model. In the first model, it is not necessary to prove the existence of hatred or intolerance on the part of the perpetrator, but it is enough that the perpetrator chose his victim because of his actual or presumed connection with a certain group, while the second sets a higher level, that is, requires the expression of personal intolerance or hostility of the perpetrator towards the victim the group to which it belongs (Munivra Vajda & Šurina Marton, 2019:397-398).

As far as basic human rights such as equality and non-discrimination are concerned, hate crimes are criminal behaviors that affect the very core of the principles of modern democracy and basic human rights. That is why the EU, the OSCE and the Council of Europe are paying more and more attention to the issues of registration and countering of this type of criminal manifestation. That is the reason why an increasing number of countries, including the Republic of Serbia, by including hate crimes in their criminal legislation, are trying to make those crimes more visible and to punish their perpetrators with appropriate sanctions.

Based on all of the above, we can conclude that hate crimes are crimes motivated by hatred or prejudice. Therefore, every hate crime has two elements. The first is that it is a criminal offense prescribed as a criminal offense by national criminal law. The second element is that the perpetrator deliberately chose a victim who has protected characteristics (Ivanović & Soltvedt, 2018:128). Protected characteristics are common to some groups identified as race, religion, ethnic or national affiliation, citizenship, gender identity, sexual orientation, or some other common element. The OSCE / ODIHR advocates that, when hate crime laws are developed, protected characteristics should be limited to those that function as creators of group identity and those that have been the basis for past and recent incidents (Jokanović, 2018:22).

1. Models of incrimination of hate crimes in national criminal legislation

When it comes to models of incriminating the institute of hate crimes in criminal legislation in the world, three models are in use. The first which is reflected in the prescribing of separate criminal offenses with the motive of bias / hatred, the second which is reflected in the prescribing of increasing the sanction for criminal offenses already prescribed by criminal law, which were committed due to the motive of hatred according to the personal characteristics of the victim, and the third, which is a combination of these two models.

In the first model, the criminal legislation prescribes separate criminal offenses committed with the motive of bias / hatred, in which bias / hatred is a constitutive element of the being of such a criminal offense. When it comes to OSCE members, this kind of codification of the institute of hate crimes is extremely rare. This type of prescribing the institute of hate crimes in criminal legislation is found in the United Kingdom, which prescribes separate crimes with this motive, while in most other countries a different model is represented. The provisions of Chapters 29 to 32 of the UK Crime and Disorder Act 1998 set out new offenses such as “racially motivated” and “religiously motivated”

assault, damage caused by the commission of a criminal offense, harassment and breaches of public order (Ćorović, et. al, 2020:23).

The advantages of this model of incrimination of hate crimes are reflected in the fact that in this way the condemnation of hate crimes is given importance, ie. by treating this type of criminal manifestation separately, prejudice / hatred is explicitly condemned as a forbidden motive, which symbolically increases the value of condemnation. In addition, this provides better visibility of this type of criminal manifestation, and at the same time facilitates the collection and recording of data on the so-called hate crimes.

On the other hand, this way of incrimination has its negative sides, and they are primarily reflected in proving and prosecuting such acts. Namely, in order for the perpetrator to be convicted for this separate act, the motive of prejudice / hatred must be proven, which may affect prosecutors, in such a way that due to fear that they will fail to prove a special motive, they prefer to prosecute the basic criminal act (which in itself as a constitutive element does not contain prejudice / hatred) but a separate part of the so-called. hate crimes. For the same reason, there is a risk that prosecutors would rather accept a plea agreement for a basic crime in order to secure a conviction, than enter into regular proceedings for a separate act of hate crime.

When it comes to the second model, it should first be pointed out that within this type of incrimination of the institute of hate crimes, we distinguish two ways that are based on increasing sanctions.

The first is reflected in the prescribing of qualified forms, forms with a more severe sanction, in certain already existing criminal offenses, in which the criminal offense was committed due to prejudice, ie hatred due to some personal characteristics of the victim. This is the case, for example, with Article 146 (2) (f) of the Criminal Code of the Czech Republic (*Zákon trestní zákoník*²) among other things, it is prescribed as a more serious form of the crime of grievous bodily harm, when grievous bodily harm is inflicted on another due to his actual or presumed race, ethnicity, nationality, political opinion, religion or lack of religion. For this qualified form of grievous bodily injury, a sentence of five to twelve years is prescribed, while for the basic form of grievous bodily injury, a prison sentence of three to ten years is prescribed.

² Zákon trestní zákoník, Zákon č. 40/2009 Sb.

Second, the form is reflected in the prescribing of provisions on aggravating circumstances when determining the sanction, for every criminal offense committed due to prejudice, ie hatred due to some personal characteristic of the victim. It should be noted here that most OSCE participating States apply the model of increasing the sanction as a form of incrimination of the institute of hate crimes. A typical example of such a model is the model implemented in the Republic of Serbia in Article 54a. Of the Criminal Code³ (hereinafter: the Criminal Code), entitled “Special Circumstance for Sentencing for a Hate Crime”. Subject provision: “If the crime was committed out of hatred due to race and religion, nationality or ethnicity, gender, sexual orientation or gender identity of another person, the court will assess that circumstance as an aggravating circumstance, unless it is prescribed as a feature of the criminal offence.”

The model of increasing the sanction for hate crimes also has its pros and cons. When it comes to the strengths of this model, they are primarily reflected in the easier introduction into existing criminal legislation. Namely, its introduction does not make big changes in terms of the nature of criminal acts, but only explicitly states the factors that can lead to an increase in the punishment for a certain criminal act. In addition, the possibility of applying this institute is greater, because it can be applied to almost any crime, except those where hatred is prescribed as a criminal offense. Also, the failure to prove the motive of prejudice / hatred generally does not jeopardize the passing of a conviction for the underlying crime. When it comes to the shortcomings of this model, they are reflected in the fact that when, for example, another form of this model is in question (prescribing provisions on aggravating circumstances when imposing a sanction), the court's decision to increase the sentence based on proven prejudice / hatred omitted from the public court record. This may have the consequence that based on the excerpt from the criminal record of the accused, it is not possible to see whether he has previously committed a crime motivated by prejudice / hatred. In addition, perhaps the main disadvantage of this model is the fact that the court will assess this circumstance as aggravating, which means that if there are more mitigating than aggravating circumstances on the part of the perpetrator, there will be no significant increase in punishment. This is especially a problem when it comes to perpetrators who have not committed crimes before, and in addition there are other mitigating circumstances that are in favor of mitigating the sentence. Finally, with the second form, the second model of incrimination of hate crimes into criminal law, it is more difficult to monitor and record cases of hate crimes.

³ Krivični zakonik Republike Srbije, Službeni glasnik RS, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

Finally, there is the third model, which is a combination of the first and second models, or a combination of both forms of the second model (increasing the sanction). Namely, the first combined model implies prescribing specific crimes that are treated separately and that require the existence of prejudice/hatred as a motive, while at the same time there are general provisions on increasing the sentence for other crimes. This model is represented in the United States, both at the federal and individual levels. The second combined model implies the existence of qualifying forms (which prescribe a heavier sanction) for a certain number (most often committed acts with hatred) of existing crimes, on the one hand, as well as general provisions on increasing the sanction due to the existence of this motive in other crimes, on the other hand. This model has been applied in Croatia in such a way that Article 87, paragraph 21 of the Criminal Code⁴ defines hate crimes, in a way that this institution is defined as a crime committed due to racial affiliation, skin color, religion, national or ethnic origin, language, disability, gender, sexual orientation or gender identity of another person. Such conduct shall be taken as an aggravating circumstance if this Code does not explicitly prescribe a more severe punishment. While in addition to this, a qualifying form is provided for certain criminal offenses, if the offense was committed out of hatred. Thus, for example, in the criminal offense of grievous bodily injury from Article 118, paragraph 2 of the Criminal Code, it is prescribed that whoever seriously injures another or seriously impairs his health, among other things out of hatred, shall be punished by imprisonment for three to eight years. The basic form of this crime is a prison sentence of six months to five years.

2. Protection of human dignity in criminal proceedings with special focus on hate crime cases

Article 23, paragraph 1 of the Constitution of the Republic of Serbia guarantees respect for human dignity, in such a way that the mentioned article prescribes that human dignity is inviolable and everyone is obliged to respect and protect it. As can be seen by this provision, dignity is first proclaimed as an inviolable right, followed by its protection and respect by all persons, regardless of their natural or legal characteristics. Besides that we can conclude that the right to human dignity is the right of every person as a human being. Young and old, man and woman, physically and psychologically healthy or ill, prisoner, detainee and upstanding member of society, domestic citizens or foreigner, each of them has right to human dignity. There is no requirement that the right holder be able to

⁴ Kazneni zakon, *Narodne novine RH*, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, <https://www.zakon.hr/z/98/Kazneni-zakon> (accessed 18.09.2020.).

exercise his own right. A person in a “vegetative state” has right to human dignity (Barak, 2015:301).

We should have on mind fact that, all personal rights are in constant state of conflict with the rights of other persons or the public interest. Sub-Constitutional provisions tend to manage with this conflicts. Restrictions imposed by law might be placed upon the human dignity of one person in order to ensure another persons right or the public interest. These restrictions, which are a product of, sub-constituonal law, are constitutional if they are proportional (Barak, 2015:301). Thus, both a person in prison, and free person, offender and victim, enjoy right to human dignity. Taking in consideration nature of hate crimes, which undoubtedly attack the right to human dignity, respect for the suspect's right to human dignity, as well as respect for the human dignity of a victim of hate crime, is a particular challenge for criminal law enforcement. Namely, any assault or attack on a person because of some personal characteristic or belonging means an assault and endangering of democratic society in which all it members are respected as equals, as well as attack on human dignity. Punishment of expressions or manifestations that undermine human dignity represents a moral statement of what society values and is and expressions of solidarity with the object of hate (Bakalis, 2016:256). In line with the above, there is no doubt that combating hate crimes protects the right to human dignity of vulnerable (mostly minority) groups. However, a special challenge is the protection of the right to human dignity of perpetrators of hate crimes, as well as victims of hate crimes in criminal proceedings related to this crimes. In this regard, in the next part of the paper we will focus on this issue, with a special focus on the provisions of the criminal legislation of the Republic of Serbia, which prescribes the so-called, institute of hate crime.

Dignity as personal integrity, which recognizes the distinctively human condition of frailty and vulnerability to injury, diseases, and death, requires that people be protected against state actions that fatefully compromise this capacity or endanger it. Front-line criminal justice actors are particularly likely to be exposed to situations in which dignity as personal integrity is at stake. If dignity as personal integrity is critical to the Constitution in these circumstances, it may have much more to say about the right of the same person to avoid unnecessary humiliation during the arrest process, pretrial release under the least – intrusive circumstances, respect for privacy in jails and prisons, and the right to keep their prison record private (Simon, 2017:295). All this applies to all forms of crime, however, when it comes to hate crime, to all this should be added the right to defend the defendant from accusations that accuse him of committing a crime with a motive of hatred. This is a particularly important issue, which is expressed in hate crimes,

because the legislator explicitly placed an obligation on the court to determine the existence of this motive as an aggravating circumstance, which in the first years of this institute was understood as the absence obligation to the police and Prosecution to investigate the possible existence of hate motives and to point out in their submissions, as well as the lack of obligation for court and parties at trial to especially discuss about this issue at the main trial, it was already considered that this is something the court should evaluate *ex officio*, when the evidentiary procedure is completed, in the same way as he assesses other aggravating circumstances such as previous conviction, circumstances under which the act was committed, etc. In this way, the defendant is denied the right to defend himself from the fact that he committed the act out of hatred, because the motive of hatred itself was not even stated in the indictment, which led to the possible existence of a motive of hatred not being discussed at the main trial, by which is endangered the defendant's right to human dignity. On the other hand, this also led to a threat to the victim's right to human dignity. Namely, criminal law is a societies expression of its locality to human rights in general and victims rights in particular. Criminal law protecting human right only restricts the freedom of potential offender so the extent necessary to preserve its citizens confidence in the protection of their rights, it only takes than amount of freedom from offenders that they owe to their victims and to potential victims (Dearing, 2017:58). Namely, prescribing institute of hate crime as an aggravating circumstance in imposing sanctions, shown as not enough for effective enforcement of this provision. The police and the prosecutor's office, according to criminal law in at lest first 5 years of existence of article 54a of CC, thus interpreted that they do not have any obligation to pay special attention to discovering the hate motive. The result of such approach was that the police usually fail to examine the motive of the perpetrator, consequence being that such crimes will not be recognized as hate crimes, and they will not be registered and qualified as hate crimes, and the perpetrator will not be ordered an appropriately stricter criminal punishment. Also, if the prosecutor in the indictment, especially when elaborating the subjective side of the crime, don't underline (which was the standard sin prosecutorial practice in Serbia in at least 5 years after introducing institute of hate crime in criminal legislation of Republic of Serbia) the motive of hatred that has led the perpetrator to commit the crime, then the judge will usually treat this offence like normal criminal offence (without the hate elements). And because of that there is no applying of article 54a of Criminal Code of Republic of Serbia, which was endangering of right on human dignity of victim of this crime, as well as other potential victims who belong to same (targeted) group.

We must note that some progress has been made when it comes to this practice. Namely, in 2018, a manual entitled “Guidelines for the Prosecution of Hate Crimes in the Republic of Serbia” was published, prepared by co-authors Tamara Mirović, Dr. Jasmina Kiurski, Milan Antonijević and Jelena Jokanović, and published by the OSCE Mission to Serbia. This was the first professional publication in this area, which in one place systematized both normative and legal provisions, as well as practical instructions for discovering, processing and proving the so-called. hate crimes. Among other things, the mentioned guidelines state that if a criminal offense is committed out of hatred, in terms of Article 54a of the CC, the facts and circumstances from which it follows that the criminal offense was committed out of hatred are circumstances necessary to determine the criminal offense as accurately they must be described in the operative part of the indictment.⁵ We intentionally state this fact, because one of the suggestions in EKRI's report from 2017 was that the prosecutors in the indictments should explicitly refer to Article 54a of the Criminal Code. The trainings that were realized in this period, as well as the development and distribution of the mentioned guidelines, led to the first cases of application of Article 54a of the Criminal Code in the second half of 2018, and such practice continued. However, what is more discouraging is that some police representatives can still be heard saying that it is not their duty to determine the motive, but that the prosecutor in the investigation is doing it. We consider this understanding to be wrong, and very important when it comes to recognizing hate motives in the sense of Article 54a CC, and therefore in this paper we insist on the earliest possible recognition of indications indicating the possible existence of hate motives, as well as mandatory citation and description of circumstances of its existence not just in incitement, but in criminal charge made by police. However, only by transparently pointing out the possible existence of a motive for hate crimes, while respecting other provisions of criminal procedure legislation, can we ensure full respect for the right to human dignity of both victims and perpetrators of hate crimes.

3. Detecting and proving of hate crimes

Detection of a criminal offense and its perpetrator is a precondition for initiating criminal proceedings, which mostly reflects the role and importance of criminal investigation of a criminal offense in the pre-investigation phase. Therefore, in order to initiate and successfully end criminal proceedings, and thus achieve the goals of criminal proceedings, it is necessary to create the necessary conditions for initiating criminal

⁵ Ibid, 27.

proceedings through heuristic criminal activity. In terms of prosecuting perpetrators of hate crimes within the meaning of Article 54a of the CC, timely detection of hatred / prejudice as an incentive to commit a crime is a prerequisite for effective prosecution and proving the perpetrator's guilt. In this regard, in the fight against hate crimes, it is very important to recognize as soon as possible both direct evidence of hatred / prejudice and indirect evidence, the so-called indicators or indicators of hatred by police as well as by prosecutor office.

Immediate evidence of hatred / prejudice are facts that relate to certain manifestations before, during and after the commission of a crime that directly indicate the existence of this motive. For example, these are statements given before the commission of the crime, then abusive words addressed to the victim during the commission of the crime, as well as after the commission. Then, there are realistic messages that can be sent to the victim in the form of drawn symbols, graffiti, abandoned objects that have the symbolism of hatred towards the given group, to which the victim belongs. These are circumstances that are related to the manner of committing the crime, which indicate the motive of hatred / prejudice due to the victim's belonging to a certain social group, e.g. graffiti or inscriptions of offensive content, various symbols that propagate hatred towards a given social group, certain objects or things left on the spot, which may represent a message of hostility towards a given social group.

The testimonies of the victim, eyewitness witnesses, recordings made with mobile phones, photographs, etc., can serve as proof of these facts.

Under indirect evidence of hatred / prejudice, the so-called Hate indicators are one or more facts that alone or in combination with other facts and circumstances indirectly indicate that the perpetrator's actions, in whole or in part, could be motivated by hatred / prejudice (Mirović et. al, 2018:30).

The authors of the aforementioned Guidelines for the Prosecution of Hate Crimes in the Republic of Serbia divide indicators, ie indicators of hatred into objective and subjective (Mirović et. al., 2018:31).

Objective indicators of hatred are understood as certain circumstances under which the act was committed, and which, independently or in connection with other facts and circumstances, indirectly indicate that the criminal act is motivated by hatred. These are the following indicators:

- Circumstances related to the victim, e.g. her belonging to a certain social group (nationality, ethnicity, gender, sexual orientation, gender identity, race, etc.);
- Circumstances related to the perpetrator, e.g. the perpetrator belongs to a certain social group (nationality, ethnicity, gender, sexual orientation, gender identity, race, etc.); the perpetrator's membership in an extremist organization; his previous negative comments or statements about the social group to which the victim belongs; existence on the perpetrator's side incidents involving the promotion of hatred and intolerance towards certain social groups, manner of dress, symbols on the perpetrator's clothing, indicating that he shares certain attitudes based on so-called hate ideologies, etc.);
- Circumstances related to the place where the criminal was committed, ie the object of the attack, e.g. the act was committed over a religious building, a building that is in the function of a certain social community or represents a gathering place for members of a certain social group (cultural centers, public kitchens, schools, certain bars, cemeteries, etc.);
- Circumstances related to the time of commission of the criminal offense, e.g. the act was committed during a national or religious holiday, ie a date that is important for a given social group;
- Circumstances related to the manner in which the crime was committed, which indicate a motive of hatred / prejudice due to the victim's belonging to a certain social group, can be reflected in excessive brutality. Of course, it should be emphasized that excessive brutality does not automatically mean that it is a hate crime, but in the absence of other motives, excessive brutality in the use of violence against the victim is an indication that there is a motive in the sense of Article 54a of the Criminal Code.

Subjective indicators of hatred represent the very perception of the victim, ie the witness, according to which the crime is motivated by hatred / prejudice.

In addition to this, the absence of other motives may appear as an indicator of the existence of hatred / prejudice in the commission of a certain criminal offense.

4. Types of evidence of hate crimes

In the work on proving hate crimes, the starting point is legal provisions of Criminal law, which means that we must first look at these provisions that regulate this matter and determine whether they require evidence of "hate" or hostility on the part of the

perpetrator, or whether the law requires that the target of his crime, ie. an individual or more selected because of his/her actual or presumed affiliation or connection to a particular group.

These two different approaches, as already pointed out in the part of the publication that deals with the models of incrimination of hate crimes, are known as the model of hostility and the discriminatory model, ie the model of discriminatory selection.

The model of discriminatory selection implies an objective approach in processing and proving, because in it the prosecution must only prove that the perpetrator chose the victim because of her belonging to a certain group. The choice of the victim does not necessarily imply negative emotions on the part of the perpetrator and towards the individual or a given group. In other words, the question to be asked in such a model is “Was the victim chosen because of some personal characteristic of the group to which he belongs (for example, race, ethnicity or religion?)”, And not whether the perpetrator feels hatred / prejudice towards the given groups. A model of discriminatory selection exists in a case, for example, if the perpetrator admitted that he intentionally attacked a migrant based on the belief that the migrant would not report the crime to the police because of his immigrant status (Prosecuting Hate Crimes: A Practical Guide, 2015:51).

Unlike the discriminatory model, the hostility model has a more subjective approach, which sometimes requires the provision of additional evidence of hostility towards the group to which the victims belong. For example, it would be a confession of the perpetrator that he wants all migrants to leave his country, because his fellow citizens are deprived of jobs, or the use of derogatory xenophobic names towards the victim. In this model, the key question that arises is: “Does the perpetrator feel hatred / prejudice against a given group?”

In practice, both legislative approaches generally require similar types of evidence, purposeful victim selection, bias, and prejudice that are similar to hate drivers regardless of the legal incrimination model used in a given country. When building a hate crime case, prosecutors ask the same key questions regardless of the model, even if their approaches to the question of adequacy of evidence may differ.

Considering that a discriminatory model has been applied in the Republic of Serbia, which means that there is not necessarily hostility, but that the victim was deliberately selected because of his or her group membership, and that these things usually go together in most cases. hatred / prejudice) this means that in detecting, clarifying and proving hate

crimes, both of the above questions should be asked, first whether the victim was deliberately selected because of his personal characteristics, and then whether there is hatred towards a given group in a given case, and only then, depending on the answer, make a plan with which evidence to confirm it.

5. Competent authorities for the suppression of hate crimes and the way of underlining of hate indicators in their legal submissions/decisions

The authorities responsible for combating hate crimes are: the police, public prosecutor's offices and courts. When it comes to the role of the police in combating hate crime, given that members of the police are in most cases those who first learn of the existence of a hate crime, as well as the first to go to the scene, it is extremely important for effective research, clarification and proof in criminal proceedings, as well as respect for the right to human dignity, is for the police to timely recognize the existence of both direct evidence of hatred and indirect evidence of hatred / prejudice, the so-called indicators of hatred, set versions on the possible existence of hate motives in terms of Article 54aKZ, and to investigate and collect all available information that supports its existence, as well as those that are against, and in case to determine the existence of such evidence, ie indicators of the same must be described in the criminal report submitted to the public prosecutor.

This should be done by stating, among other things, these indicators, if their existence has been established, in the part of the criminal report that refers to the statement on the existence of the necessary basis for suspicion that the suspect committed a crime and legal qualification. Namely, the statement on the existence of the necessary basis for suspicion that the suspect committed a criminal offense and the legal qualification are stated in the criminal report below the data regarding a certain status of the suspect, in the way that the required basis for suspicion, which reads "due to the existence of reasonable suspicion that he committed a criminal offense:" while the legal qualification of the offense is stated depending on the severity of the case by writing the full name of the offense, and then the article and paragraph prescribing the offense in the Criminal Code, and possibly a member with whom the commission of a criminal offense is related. We are of the opinion that if the police recognize a motive of hatred, in this part of the criminal report they must state the connection with Article 54a of the Criminal Code, while the circumstances indicating the existence of a motive of hatred in terms of Article 54a should be described in the next part of the criminal report, ie a factual description of the criminal offense in relation to which there is a basis for suspicion that it was committed, where possible indicators of the existence of hatred motives should be described in detail.

When it comes to the role of the public prosecutor's office in opposing hate crimes, it is reflected, as in the case of the police, primarily in recognizing hatred as an incentive to commit a crime within the meaning of Article 54a of the CC at the earliest possible stage of proceedings (pre-investigation and investigation). hatred / prejudice and providing evidence to support its existence. Also, in accordance with the principle of legality and objectivity, the public prosecutor is obliged to examine with equal care the facts that speak against the existence of motives of hatred / prejudice in the sense of Article 54a of the Criminal Code. When it comes to the function of criminal prosecution, in those legislations where the institute of hate crimes is prescribed in such a way that hatred is a qualifying circumstance, the public prosecutor is obliged to commit prosecution of hate crime in accordance with the principle of legality, bearing in mind that in that case hatred is an element of the legal nature of the crime. The same applies to criminal offenses in which hatred is an element of the being of the criminal offense (for example, in the criminal offense of inciting national, racial and religious hatred and intolerance under Article 317 of the CC). the institute of hate crimes is prescribed as an obligatory aggravating circumstance that is assessed when sentencing, as is the case in the criminal legislation of the Republic of Serbia (Article 54 of the CC), and in theory and practice the question is often asked whether the prosecutor is obliged to , although it is not an element of the nature of the criminal offense, he states that the criminal offense was committed out of hatred, in order to present evidence during the evidentiary procedure in the direction of establishing this circumstance. It should be noted here that although our domestic criminal legislation does not explicitly provide for the obligation of the public prosecutor to state in the indictment the facts from which it follows that the act was committed out of hatred, which is not an element of the crime, international standards, especially European (Council of Europe) and the OSCE), which Serbia has ratified, impose an obligation on state bodies to prosecute hate crimes even when hatred as an incentive is not an element of the legal description of the crime, ie. and in a situation when the law prescribes hatred as an incentive in terms of a particularly aggravating circumstance. In that sense, the contrary would constitute a violation of Article 14 of the Convention on the Prohibition of Discrimination, in connection with a violation of another human right guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Also, if the prosecutor in the indictment, especially when elaborating the subjective side of the crime, does not point out the motive of hatred due to when the perpetrator committed the crime, then the judge will generally treat this crime as a standard crime, ie a crime without elements of hatred (Ivanović, Soltvedt, 2018 : 148), in the sense of Article 54a of the Criminal Code, which is shown by the practice

in our country, where since the introduction of this institute in our legislation in the first 5 years, this institute has not been applied.

In order for the factual description of the commission of a criminal offense to be individualized, it is necessary to state in the disposition of the indictment after the stated time and place of commission of the criminal offense, as well as the description of the offense from which the legal features of the criminal offense derive, that the act was committed, but also all other circumstances that affect the fact that a certain event is precisely determined. In accordance with the above, the legal name of the criminal offense represents the legal qualification of the criminal offense given by the public prosecutor. The legal qualification of a criminal offense is primarily important in order to determine the jurisdiction of the court. Although this is an element that is obligatory, it is necessary to point out that it is an element that does not oblige the court in further decision-making. This implies that the court in the decision-making phase can bring the factual description of the act under any other norm, ie it can perform retraining, which does not exceed the identity of the prosecution. The legal name of the criminal offense does not imply only the provisions that legally qualify the criminal offense prescribed by a special offense of the Criminal Code, but it is also necessary to state the provisions relating to general institutes of criminal law depending on the specific case. In this regard, it is always necessary to state the provisions that refer to institutes such as complicity, attempted crime, prolonged crime and the like.

It has become controversial in the professional public whether in criminal acts committed out of hatred due to race and religion, national or ethnic affiliation, gender, sexual orientation or gender identity of another person, the legal name of the crime should indicate that the crime was committed in connection with those affiliations.

One part of the professional public is of the opinion that it is necessary to mark this circumstance already during the legal name of the criminal offense, considering that belonging to a certain group is a key motive for committing a criminal offense and as such deserves to be in the legal qualification of a criminal offense. Considering that this is an obligatory aggravating circumstance, we are of the opinion that it should be indicated in the part of the indictment which refers to the legal qualification of the act, stating the connection of the given act with Article 54a of the Criminal Code.

When it comes to the role of the court in opposing hate crime, it stems from the very provision by which the institute of hate crime is incriminated in our legislation. Namely, as it has been pointed out in this work, Article 54a of the Criminal Code of the Republic

of Serbia prescribes that the commission of a hate crime will be taken into account as a special, aggravating circumstance when sentencing. It also stipulates that a crime will be considered a hate crime if it is committed due to race and religion, nationality or ethnicity, gender, sexual orientation or gender identity of another person, unless it is prescribed as a feature or element of the crime. Based on relevant international documents, the goal of this provision, ie Article 54a of the CC, is to provide stricter punishment, which strengthens criminal protection in relation to certain vulnerable social groups whose members are victims of various hate crimes due to this affiliation. The meaning of special (severe) punishment of hate crimes is to prevent crimes motivated by prejudice in relation to others and thus ensure equality and social tolerance (Filipović, 2019: 39). The institute of hate crimes protects the right to equality and non-discrimination. Considering that the criminal law is the ultima ratio, it means that the application of this institute occurs when these rights are already endangered. Considering that our legislator has chosen the model of increasing the sanction as a model of codification of the institute of hate crimes, in such a way that the motive of hatred is taken as an obligatory aggravating tendency in sentencing, and that the meaning of special (severe) punishment of hate crimes is to prevent criminal acts motivated by prejudice (special and general prevention) in relation to others and thus ensure equality and social tolerance. Therefore, from the aspect of the application of the institute of hate crimes, the court is obliged by law that when during the procedure it determines that the act was committed out of hatred in the sense of Article 54a of the CC, it must assess that circumstance as aggravating when determining the sanction. Taking into account that the burden of proof is on the prosecutor, the question of the court's obligation to determine the existence of a motive for hatred arises. The answer to this question must be viewed from the aspect of the relationship between the prosecution and the verdict. Namely, if the motive of hatred is stated in the dispositive of the indictment, ie the factual description of the act in the indictment contains facts and circumstances from which it follows that a specific crime was committed out of hatred, then the court would have to discuss it at the main trial. Also, although Article 15 paragraph 3 of the CPC stipulates that the court presents evidence at the request of the parties, paragraph 4 of this article stipulates that the court may order the party to propose additional evidence or exceptionally order that such evidence be presented, if it finds that the presented evidence is contradictory or unclear and that it is necessary for the subject of proof to be comprehensively discussed. Which gives the court the opportunity to determine on its own initiative the presentation of certain evidence, if it is necessary for the motive of hatred in the sense of Article 54a of the CC, as a subject of proof to be comprehensively discussed.

It should be noted here a possible situation in which the motive of hatred is not stated in the indictment, ie the factual description in the indictment does not contain facts and circumstances and which results that the crime was committed out of hatred, and in which the court applied it, and took the existence of a motive of hatred as an obligatory aggravating circumstance, the question of exceeding the accusation can be raised, ie whether the orchestra would in that case be declared for something that was not charged against him by the indictment (Mirović, et. al, 2018: 27-28) . Also, this position is in accordance with the provisions of the CPC which refer to the rights of the accused (Article 68, item 1 of the CPC). Namely, having in mind the right of the defendant to state all the facts and evidence against him and to present facts and evidence in his favor, the right to defense of the defendant would be jeopardized if he were not allowed to state the part of the accusation related to on the basis of hatred for a committed crime. All this again leads us to the conclusion that hatred in the sense of Article 54a of the Criminal Code must be stated in the indictment, while the role of the court in the procedure will be to determine its existence or non-existence on the basis of presented evidence, it must be taken as an aggravating circumstance when determining the sanction.

Conclusion

Based on all the above, we can first conclude that by the prevention and countering of hate crimes protects human dignity, because it is a special type of crime that endangering basic human rights such as the right to equality and non-discrimination. In addition, when hate crimes are committed, the protection of the right to human dignity of both the perpetrators of these crimes and the direct and indirect victims is a challenge for law enforcement authorities. Considering that in the Republic of Serbia the institute of hate crimes is envisaged as a particularly aggravating circumstance when sentencing, which is assessed by the court, we believe that although there is no explicit legal obligation for police and prosecutors, in terms of Article 54a of the Criminal Code, to investigate and record possible existence of a motive of hatred in the sense of Article 54a of the Criminal Code, this obligation for these two state authorities derives from the international documents ratified by the Republic of Serbia. Also, only timely recognition and adequate research of the possibility of the existence of hate crimes, as well as recording indications that indicate the existence of hate motives, ensures, among other things, respect for the right to human dignity. Namely, if the police or the prosecution miss to investigate the existence of hate motives, and to emphasizes it in the indictment, ie presents it at the main trial, it is difficult to expect that the court will apply Article 54a of the Criminal Code, which will jeopardize the victim's right to human dignity, in the sense of stricter punishment of the perpetrators of such crimes. On the other hand, if the court applies this

provision, based on the belief that the crime was committed out of hatred, and that it was not previously the subject of discussion at the main trial, there will be a threat to the defendant's right to defense, ie. opportunities to try to challenge the existence of hate motives within the meaning of Article 54a of the Criminal Code, which means endangering the right to human dignity of a defendant for a hate crime. Therefore, the existence of a possible motive of hatred in the sense of Article 54a of the Criminal Code of the Republic of Serbia, it is necessary to investigate as early as possible and document all the facts that speak in favor of its existence and its non-existence. The obligation to investigate a possible motive of hatred lies with both the police and the prosecution, regardless of the fact that the Criminal Code prescribes the obligation only for the court to apply this article, its emphasis in the criminal report and indictment is crucial for its proper application in the verdict, for the protection of the right to human dignity of both the accused and the victims of hate crimes.

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Silvia Signorato*

A NEW RIGHT IN CRIMINAL PROCEDURE IMPLIED BY HUMAN DIGNITY: THE RIGHT TO NON-AUTOMATED JUDICIAL DECISION-MAKING

The right to respect for human dignity is a fundamental right that gives substance to all other rights. Human dignity is inviolable. It prevents any reification of man and postulates respect for the Kantian categorical imperative, which states that “Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end”.

However, information technology poses new challenges regarding human dignity. This article analyses this issue in relation to the possibility of criminal judgements being issued by machines. In some cases, this kind of judgement is considered acceptable by Article 11 of directive (EU) 2016/680. However, a question must be asked: Does such automated judicial decision-making respect human dignity or not?

The article shows the incompatibility of robotic decisions with the right to respect for human dignity. Consequently, Article 11 of Directive (EU) 2016/680, in that part in which it admits that such judgments can be issued if authorized by Union or Member State law, should be regarded as unlawful.

Keywords: *human dignity, robotic decision, right to non-automated judicial decision-making in criminal matters, Article 11 of Directive (EU) 2016/680.*

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1. Human dignity: An introduction

Human dignity is a multifaceted concept. Such a term comes from the Latin “dignus”. In the legal field, as has happened in other fields, the meaning of the term dignity has evolved over time. Initially, its meaning was close to that of “merit” and was associated with a high status in some languages. For example, this is one of the reasons why in the US Declaration of Independence, adopted on 4 July 1776, the term “dignity” is not used.

Therefore, the meaning of the term “human dignity” changes over time. The significant historical evolution of the concept of “human dignity” is reflected in legal semantics. What happened during the Second World War, with unimaginable atrocities against civilian populations, thinking in particular of the Holocaust, brought this concept to the centre of the legal debate (Barak, 2015: 34-48). There is a need for the protection of human dignity both in times of peace and in times of war (Paşca, 2020: 116), and in any situation, including criminal trials.

For this reason, treaties and international documents began to speak explicitly of human dignity. This was an epochal transition.

This happened first with the Preamble of the Charter of the United Nations, signed on 26 June 1945, where faith in the word “dignity” was reaffirmed.

Afterwards, the Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 explicitly mentioned human dignity in the preamble¹ as well as in some articles². In particular, Article 1 provides that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

¹ The Preamble first specifies that the «recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, has evolved over the years». This Preamble also claims that «the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom».

² See Articles 1, 22, and 23.3. Article 22 provides that «Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality». Moreover, Article 23.3 provides that «Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection».

At the European Level, the Convention for the Protection of Fundamental Rights and Fundamental Freedoms (better known as the European Convention on Human Rights), which opened for signature in Rome on 4 November 1950 and came into force in 1953, did not mention human dignity.³ Nevertheless, this fundamental right is frequently recalled in judgements of the European Court of Human Rights (ECHR).

Instead, human dignity is claimed by the Charter of Fundamental Rights of the European Union (Charter), proclaimed on 7 December 2000. The Charter provides for the inviolability of this right. In particular, Article 1 states: “Human dignity is inviolable. It must be respected and protected”.

Human dignity is a fundamental right. It gives substance to the rights laid down in the Charter. As early as 2001 the Court of Justice of the European Union (CJEU)⁴ made clear that the right of human dignity is part of Union law.

However, the problem remained that the Charter did not have a binding force, but was only a source of “soft law” (Kostoris, 2018: 72).

The Treaty of Lisbon, which was signed on 13 December 2007 and came into force on 1 December 2009, provided that the Charter is a primary law of the Union, therefore assigning to the Charter the same legal status of the Treaties (6.1 TEU). Regarding this fact, Kostoris (p. 73) highlighted that “This is a crucial step that brought about significant consequences for the general framework of the multilevel protection of fundamental rights. Indeed, the Charter, enjoying now the status of primary EU law, is binding on both secondary EU law and Member States law. In addition, it must be stressed that the Charter not only has codified the fundamental rights that had been recognized exclusively by the case law of the Court of Justice but also includes a list of new rights, such as ‘human dignity’ (Art. 1 of the Charter)”.

Two consequences arise from the inviolability of human dignity.

First of all, no right recognized by the Charter can prejudice the dignity of another person. Furthermore, human dignity cannot be balanced with other rights, because it must always be protected and cannot be limited by other rights.

³ Pavlović Z. (2017) *The right to privacy – Challenges of new commitments*, Conference papers “Freedom security: The right to privacy”, Provincial Protector of Citizens – Ombudsman, Novi Sad

⁴ See CJEU, 9 October 2001, Netherlands vs. Parliament and Council, Case C-377/98, at grounds 70-77.

2. The Kantian categorical imperative as the kernel of human dignity

Human dignity is a fundamental right that guides the interpretation of other rights. This is testified by judgments issued by many national and supranational judges, even if the meaning of dignity varies significantly from jurisdiction to jurisdiction (McCrudden 2008: 655–724).

Nevertheless, some examples can be mentioned.

The United States Supreme Court stated that “the primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings” (*Furman v. Georgia* (1972), No. 69-5003).

The ECHR has established on several occasions that the detention regime must be such as to not violate human dignity (ECHR, *Yaroslav Belousov v. Russia*, no 2653/13 and 60980/14, 6 March 2017). Moreover, this Court ruled that human dignity and human freedom are the “very essence” of the Convention (ECHR, *Christine Goodwin v the The United Kingdom*, no 28957/95, 11 July 2002).

The CJEU also stated that human dignity imposes certain standards for the reception of applicants for international protection, in particular with regard to material conditions involving housing, food or clothing.⁵ The Court specified that a Member State cannot withdraw these standards even temporarily, not even in those cases where the person committed serious breaches of the rules of the accommodation centres or is characterised by seriously violent behaviour (CJEU, Grand Chamber, 12 November 2019, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, Case C-233/18).

These judgements are just a few examples involving the subject of human dignity, but they are more than enough to demonstrate how human dignity is a fundamental right underlying every other right. The *fil rouge* that connects these judgments seems to be the need to affirm that man can never be considered or treated as a thing.

After all, any legal system should apply the Kantian categorical imperative, which states that “Handle so, daß du die Menschheit sowohl in deiner Person, als in der Person eines jeden andern jederzeit zugleich als Zweck, niemals bloß als Mittel brauchest” (Act in such

⁵ Stevanović A., Grozdić B., (2018) *The idea of human rights as a means of change of the public moral*, Yearbook, Human rights protection “From unlawfulness to legality”, Provincial Protector of Citizens – Ombudsman, Novi Sad

a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end) (Kant, 1788: AA IV, 429).

3. Information technology and new challenges to human dignity: The case of judicial decision-making

The growing use of information technology (IT) poses new important challenges in terms of respect for fundamental rights and also for human dignity.

Technological development make possible the processing of a huge amount of personal data. However, there is the risk that the person is reified and considered a mere set of personal data to be marketed and exploited for the most varied purposes.

As a consequence, the protection of natural persons in relation to the processing of personal data is a fundamental right strictly connected to human dignity.

From a technological point of view, the processing of personal data is based on specific algorithms. In general, an algorithm is a set of instructions for carrying out a procedure or for solving a problem in a finite number of steps (see e.g. <https://www.merriam-webster.com/dictionary/algorithm>).⁶ It is important to underline that some artificial intelligence (AI) techniques, in particular deep learning which is currently undergoing great development, require that the machine learn from data. Therefore, there are some elements of the algorithm actually used in the processing whose values have not been chosen by a programmer, but which are instead the result of automatic learning by the machine.

In the legal field, the use of AI algorithms poses significant problems (Garapon, Lassègue 2018: 1-368; Quattrocolo 2020: 1-247). For this reason, the European Commission for the efficiency of Justice (CEPEJ) tried to provide guidelines by adopting the European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment (Strasbourg, 3-4 December 2018).

AI applied to criminal proceedings and criminal procedures is already a reality in the most diverse fields. For example, there are algorithms that perform profiling of potential

⁶ Kambovski, V., (2018), *Natural rights, legitimacy of laws and supranational basis of unlawfulness*, Yearbook Human rights protection "From unlawfulness to legality", Provincial Protector of Citizens – Ombudsman, Novi Sad

offenders or predict where a crime is likely to be committed. From this point of view, it has been noted that the use of algorithms can lead to an increase in proactive investigations. (Ferguson 2016: 731; Ligeti, 2019: 9).

Moreover, other algorithms evaluate the reliability of a witness in a criminal trial. The use of algorithms aimed at assessing potential recidivism risk is currently widespread.

There are also algorithms that allow lawyers to reasonably predict what the judgment will be.

The use of algorithms can go even further. A machine can come to serve as a judge by issuing judgments. Robot judges are, for example, being tested in Estonia where they operate only in civil matters and for cases of low value. However, they decide.

At the European level, the use of such algorithms is only apparently prohibited by Directive (EU) 2016/680 (directive on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data), as well as by Regulation (EU) 2016/679 (regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data; cd. General Data Protection Regulation - GDPR).

Regarding the criminal trial, Article 11 of Directive (EU) 2016/680 provides that “Member States shall provide for a decision based solely on automated data processing, including profiling, which produces an adverse legal effect concerning the data subject or significantly affects him or her, to be prohibited”. Therefore, any robotic decision would appear to be prohibited.

However, the same article establishes a relevant exception. In fact, it provides that the robotic decision is prohibited unless it is authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject. In particular, at least the right to obtain human intervention on the part of the controller must be safeguarded in all cases.

However, it is necessary to ask ourselves what “the right to obtain human intervention on the part of the controller” consists of. The risk to be avoided is that the Judge becomes a

mere ratifier of what the algorithm decides, on the basis of the alleged aura of infallibility that connotes IT.

In fact, IT is a human product and, therefore, it is fallible. Both programming and algorithm operating errors may occur. For example, recently two planes and more than 300 lives were lost due to a programming error which, combined with a sensor malfunction, caused the on-board computer to shut down the pilots' commands (Sumwalt, Homendy, Landsberg 2019: 1-13). Furthermore, the learning process of a machine can lead to errors. It is important to underline that the goal of deep learning is not to obtain a machine that responds exactly in all cases, but a machine that responds correctly almost always based on reasonable requirements, taking into account the fact that a 100% accuracy rate is not achievable.

4. The difficult relationship between the decision made by a machine and respect for human dignity

At the European level, both Directive (EU) 2016/680 and the GDPR allow exceptions to the prohibition of decision-making based solely on automated data processing, including profiling. However, it is necessary to ask whether, in criminal matters, the exceptions to the prohibition of decision-making based solely on automated data processing are or are not compatible with respect for human dignity.

The problem to be faced is different from that of establishing whether an algorithm (or a set of algorithms) is capable of issuing a reliable judgment or not. This different problem, which was mentioned in § 3, is extremely important, but it is relevant from the point of view of the Right to a fair trial instead.

This question is faced here: Is human dignity violated or not by the fact that it is a machine and not a man who issues the judgement?

It is true that at the European level it is provided that "the right to obtain human intervention on the part of the controller" is respected. However, this does not solve the problem. This can be illustrated by means of an example. Suppose a person is undergoing inhuman or degrading treatment.⁷ There would be a clear violation of both the prohibition of torture and human dignity. If that person at a later stage is treated in full compliance

⁷ Ćorić D, (2018), *The theoretical definition of the notion of unlawfulness - A step towards positive law*, Yearbook, Human rights protection "From unlawfulness to legality", Provincial Protector of Citizens – Ombudsman, Novi Sad

of all the rules and rights, the previous violation of the prohibition of torture and of human dignity would not disappear.

Similarly, if the robotic decision involved a violation of human dignity, this violation would not be remedied by any subsequent human intervention.

It is therefore essential to understand whether, in criminal matters, a robotic decision causes a violation of human dignity or not. In my opinion the answer is affirmative.

A machine that issues a judgement on a person actually decides on the basis of current and past digital information. In essence, man is reduced to a set of data, that is, to a thing.

One could object to this reasoning saying that, even in an ordinary trial, the judge decides on the basis of a set of information. However, there is a difference. In the case of the robot judge, the person is reduced to information itself. In the case of the human judge, this is not the case. Even in the case of judgments in absentia, the person is something more than the information available to the judge.

If the robotic decision reduces man to a set of information, it follows that man is treated as a thing. Human dignity instead requires that man must always be considered and treated as a person and never as a thing. For this reason, the robotic decision violates human dignity.

Ultimately, human dignity seems to dictate that every man must be judged by another man. A machine could possibly assist a judge, a prosecutor or an investigator and could pick up on elements that would be difficult for a man to detect, especially in the case where a large amount of data needs to be processed, but any decision in a criminal trial must be made only by a man or a panel of men.

5. Conclusions

Human dignity is inviolable. Its kernel meaning dictates that man can never be reified. A robotic decision, on the other hand, reduces humans to a mere set of data and, therefore, to one thing. For this reason, such a type of decision seems to conflict with human dignity.

It follows that it is possible to doubt the legitimacy of Article 11 of Directive (EU) 2016/680, in the part in which it provides that the robotic decision can be authorized by Union or Member State law.

It is also possible to dispel the unfounded myth of the perfection of algorithms. An algorithm is not perfect, nor can it be. Not even a human being is perfect, but he/she is not subject to the risk of programming errors or inadequate training problems in the case of systems that require learning. Furthermore, the algorithm does not consider the uniqueness of every human being, but brings every man back into standard types. It would be interesting to wonder what the algorithm would decide if a person not attributable to typified categories, such as Beethoven, Michelangelo, Leonardo da Vinci, were imputed.

It may also be mentioned that, as part of the update and enhancement of Israel's armoured forces, a new tank is planned in which the two crew members are joined by an additional virtual member. This virtual member integrates all current and previous information provided by sensors and maps, as well as historical information that may not be available to the human crew, analyses the situation and, using AI techniques, shows to the crew possible solutions to the tactical problem. The decision to engage the target is only up to the human crew, i.e. the system is of the "man-in-the-loop" type (Eshel, 2020: 90-92). Anyway, AI in warfare, if not tempered by a "man-in-the-loop" system, is believed to violate several principles, including the principle of human dignity (European Parliament, 2020: 64).

If the concept of "man-in-the-loop" is so important in war, where the decision time can be very short, is it not possible that it is at least as important in criminal procedure, where the decision time is not as short? AI can be useful to help the Judge reach a decision, but the decision must be only up to one or more human beings.

In conclusion, it seems necessary to recognise a new right: the right to non-automated judicial decision-making (Signorato, 2018: 99-103).

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Aleksandar Bošković*

QUESTIONING THE DEFENDANT VIA A VIDEO LINK – THE VIOLATION OF THE DEFENDANT'S RIGHTS OR NOT?

The state of emergency was declared in the Republic of Serbia on March 15, 2020, due to the coronavirus COVID-19 pandemic, which lasted until May 6, 2020. During the state of emergency, certain human rights were restricted and suspended, which are otherwise protected and guaranteed by the Constitution. One of the measures introduced by the state was the possibility for the defendant to attend the main hearing via Skype. The basic question is whether in this way some basic rules of criminal procedure are endangered and violated, as well as the right to a fair trial, since it is one of the rights that cannot be limited or suspended even during a state of emergency. In this regard, this paper addresses the national legal framework under which trials are permitted and conducted via Skype during a state of emergency, whether there was a violation of the principles of immediacy and publicity and relevant case law of the European Court of Human Rights regarding the possibility for the defendant to attend the main hearing without being physically present in the courtroom, as well as the issue of whether trials by Skype have led to restrictions and violations of the right to a fair trial.

Keywords: *defendant, principle of immediacy, principle of publicity, right to a fair trial*

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1. Introduction

The situation caused by the coronavirus COVID-19 pandemic has reached dramatic proportions worldwide. Since the beginning of the epidemic, over 32 million people have been infected across the world, and almost a million people have died from this virus so far (<https://www.worldometers.info/coronavirus/on> September 24, 2020). Bearing in mind all the consequences that occur with the spread of this dangerous virus, it is clear that many countries have resorted to various methods and applied various measures in order to combat the infection. As a last resort, a number of countries had declared a state of emergency in the fight against the coronavirus, given the level of the danger threatening the survival of the state and its citizens. The Republic of Serbia was one of those countries.

In the Republic of Serbia, the state of emergency was declared on March 15, 2020 by a joint decision of the President of Serbia, the President of the National Assembly, and the Prime Minister (*Decision on declaring a state of emergency, Official Gazette of the RS, No. 29/2020*). Declaring a state of emergency creates a possibility for restricting and suspending certain human rights for a certain period of time. Thus, the Constitution of the Republic of Serbia prescribes that by declaring a state of emergency, the National Assembly may prescribe measures derogating from the human and minority rights guaranteed by the Constitution (Article 200, paragraph 4). One of the characteristics of the state of emergency is that it allows for derogation from the regular human rights regime in order to overcome the extraordinary circumstances as effectively as possible and restore public order which has been disturbed (Simović, 2020). Given that the state of emergency was not declared by the National Assembly because the Assembly was unable to meet, measures derogating from human and minority rights may be prescribed by the Government, by decree, with the co-signature of the President of Serbia (Article 200, paragraph 6). The aforementioned constitutional provision has found its application. In other words, during the state of emergency in the Republic of Serbia, which lasted until May 6 2020,¹ measures derogating from human and minority rights were enacted by the Government, with the co-signature of President of Serbia.

Considering the rights guaranteed by the Constitution from which no deviations are allowed and the topic of this paper, our research addresses the national legal framework

¹ At the session held on May 6, 2020, the National Assembly of the Republic of Serbia enacted the Decision on lifting the state of emergency (*Official Gazette of the RS, No. 65/2020*), which entered into force on the day of its publication, that is, on the same day, while at a previous session held on April 29, 2020, the National Assembly passed the Decision on confirming the Decision on declaring the state of emergency (*Official Gazette of the RS, No. 62/2020*).

under which Skype trials are allowed and conducted during the state of emergency with special reference to the question of whether the principle of immediacy and publicity of criminal proceedings has been violated in this way. Also, our research will focus on analysis of the relevant case law of the European Court of Human Rights regarding the possibility for the defendant to attend the main hearing without being physically present in the courtroom, and the issues of whether trials by Skype have led to the restriction of the defendant's certain rights, which should not have been restricted even during the state of emergency and whether the right to a fair trial, as one of the defendant's basic rights, was infringed in this way, which cannot be restricted even during the state of emergency.

2. Questioning defendants via skype - national legal framework during the state of emergency

The defendant is a fundamental participant in a criminal process, who performs the function of defense and has the status of a party to criminal proceedings, who is under suspicion of having committed an offence and against whom criminal proceedings are conducted (Bošković, Kesić, 2015: 75). The questioning of defendants is a very important general evidentiary action in criminal proceedings, which is regulated by the provisions of Articles 85-90 of the Criminal Procedure Code of the Republic of Serbia (*Official Gazette of the RS, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, and 35/2019*). In terms of content, the hearing of the defendant consists in the defendant's giving a statement with respect to the criminal offense he/she has been charged with (the defendant's active defense) or in refraining from giving a statement (the defendant's passive defense), if he chooses to remain silent and not testify in his/her defense, after he/she has been warned of his/her duties in criminal proceedings, he/she has been given the opportunity to testify (Škulić, 2018: 202). However, the aim of our analysis is the questioning and attendance of the defendant at the main hearing conducted via Skype during the state of emergency, meaning the defendant was not physically present in the courtroom during the main hearing.

In addition to the provisions of the CPC, as the umbrella law in the state which regulates the rules of criminal procedure, other decisions important for the actions of courts and public prosecutor's offices were enacted during the state of emergency. As already mentioned, the state of emergency was declared on March 15, 2020, while on March 17, the Ministry of Justice issued Recommendations for the work of courts and public prosecutors' offices during the state of emergency (*Ministry of Justice, No. 112-01-557/2020-05 of March 17, 2020*). This act recommends, among other things, that in criminal cases the competent courts and public prosecutor's offices process criminal cases

in which custody is ordered or custody is requested, as well as criminal cases involving offenses of illicit trade (Article 235 of the Criminal Code), failure to act according to health regulations during epidemics (Article 248 of the Criminal Code) and transmission of infectious diseases (Article 249 of the Criminal Code). As regards other cases, the main hearings and the conduct of the pre-trial proceedings are postponed (*Recommendation of the Ministry of Justice, item 6*). In this way, the urgency of handling cases during the state of emergency is pointed out, especially regarding the aforementioned criminal offenses. These Recommendations are in a way confirmed by the Conclusion of the High Judicial Council (*Conclusion of the High Judicial Council, No. 119-05-132/2020-01 of March 18, 2020*) which stipulates that during the state of emergency only trials that cannot be postponed such as hearings involving the aforementioned offenses, while for all other offenses the main hearings are postponed. However, the issue of the attendance of the defendant at the main hearing via Skype was not in any way regulated by the Recommendations of the Ministry of Justice and Conclusion of the High Judicial Council.

With respect to the topic of this paper, a very important act to consider is a letter from the Ministry of Justice dated March 26, 2020, sent to the courts that are to conduct proceedings against persons who have violated self-isolation/quarantine measures, ordering them to conduct proceedings via video-link.² The courts were suggested to install the Skype application on to the computers, and, as specified, both the employees and those against whom the proceedings are being conducted would be thus protected (<http://rs.n1info.com/Vesti/a582123/Ministarstvo-pravde-zbog-koronavirusa-uvodi-sudjenja-putem-Skajpa.html>). Factually, with this letter, the Ministry of Justice recommends that the accused who is in custody not be brought to trial for violating self-isolation measures, but to remain in custody and communication with him/her shall be established via video link, that is, Skype.

The reason the Ministry of Justice enacted this act lies in the fact that during that period, a large number of people violated the self-isolation measure. Specifically, as of March 16, all persons returning to Serbia had been required to self-isolate (quarantine at home) and stay at home for a minimum of 14 days. Any person who violates this measure commits the offense of failure to comply with health regulations during epidemics (Article 248 of the Criminal Code) given the difficult epidemiological situation and the

² Note that this letter from the Ministry of Justice has never been made public.

state of emergency declared, a way to effectively conduct criminal proceedings regarding the violation of these measures was sought.³

Bearing in mind that this was a recommendation of the Ministry of Justice, it was clear that this was not an adequate legal basis for regulating trials via video link, not even in regular circumstances, much less during a state of emergency. Numerous discussions and various expert analyzes have been initiated on this issue, which will be discussed later. In any case, on the basis of the aforementioned letter from the Ministry of Justice, the first conviction was passed the next day, March 27, on the basis of a trial conducted via the Skype application. The verdict was passed by the Basic Court in Dimitrovgrad, during which a maximum sentence of three years in prison was imposed for the criminal offense of failure to comply with health regulations during epidemics (Article 248 of the Criminal Code) (<https://www.youtube.com/watch?v=4EWZTe6f7wc>).

A few days later, that is, on April 1, the Government of the Republic of Serbia, with the co-signature of the President of Serbia, passed a Decree on the manner the accused is to attend the main hearing in the criminal proceedings held during the state of emergency declared on March 15, 2020 (*Official Gazette of RS, No. 49/2020*) which fully, belatedly, complied with the provision of the Constitution stipulating that during the state of emergency, when the National Assembly is unable to meet, measures derogating from human and minority rights may be prescribed by the Government, by a decree co-signed by the President of Serbia (Article 200, paragraph 6 of the Constitution). The Decree contained only two articles, of which Article 2 referred to the question of its entry into force. The Decree stipulates that during the state of emergency declared on March 15, 2020, when the presiding judge or a single judge finds that securing the presence of the accused being in custody at the main hearing, in the criminal proceedings before the first instance court, is difficult due to the risk of infectious disease transmission, they may reach a decision that the defendant's attendance at the main hearing be ensured through audio-video electronic means, provided that audio and video technology to conduct hearings is available (Article 1 of the Decree).

An analysis of this Decree reveals several facts. First, the criminal offenses this Decree refers to are not defined, nor does the Decree itself refer to any previously enacted

³ On the day this decision was enacted by the Ministry of Justice of the Republic of Serbia, March 26, 2020, 108 people had been in custody in Vršac, Pirot, and Požarevac for violating self-isolation measures, of which 44 people had been held in custody in Vršac, 43 in Požarevac, and 21 in Pirot - <http://rs.n1info.com/Vesti/a582123/Ministarstvo-pravde-zbog-koronavirusa-uvodi-sudjenja-putem-Skajpa.html>. Accessed: 10 July 2020.

regulation. Therefore, if we consider the provisions of the previously presented acts, the Recommendations of the Ministry of Justice for the work of courts and public prosecutors' offices during the state of emergency of March 17 and the Conclusion of the High Judicial Council of March 18, it may be concluded that the application of this Decree is much broader and refers to all custody cases, and therefore to all criminal offenses rather than just to the criminal offenses of illicit trade (Article 235 of the CC), failure to comply with health regulations during epidemics (Article 248 of the CC), and the transmission of an infectious disease (Article 249 of the CC). However, this issue was resolved on April 9, when the High Judicial Council adopted the Conclusion (*Conclusion of the High Judicial Council, No. 021-05-00040/2020-01 of April 9, 2020*), which, in respect to the application of the aforementioned Decree, determined that the High Council found that it refers only to the accused persons held in custody for the offenses of illicit trade (Article 235 of the CC), failure to comply with health regulations during epidemics (Article 248 of the CC) and the transmission of infectious diseases (Article 249 of the CC), as well as that the application of the Decree should not be extended to other custody cases (*Conclusion of the High Judicial Council, No. 021-05-00040/2020-01 of April 09, 2020, paragraph II*).

Furthermore, it can be noticed that conducting hearing through audio and video technology such as live links is not obligatory. In other words, the presiding judge or a single judge may decide to conduct a trial in this way, but they do not have to. This issue is of a factual nature and judges should consider it on a case-by-case basis, but it depends on their evaluation whether securing the presence of the accused, who is held in custody, at the main hearing is hampered by the risk of infectious disease transmission. Finally, this concerns only the cases in which the accused is held in custody and questioned via video link from a custody facility.

Taking into consideration the aforementioned provisions of the Constitution, the Criminal Procedure Code, numerous bylaws enacted by the executive authorities during the state of emergency, as well as the entire national legal framework within which the government authorities took actions during trials by video link, it is clear that many controversial issues and doubts have arisen around the constitutionality and legality of these actions, which is discussed in more detail in the following section.

3. The violation of the principles of immediacy and publicity – yes or no?

Considering the provisions of the CPC regulating the questioning of the defendant at the main hearing at the first instance court, it can be noticed that the CPC insists that the

defendant be physically present while being questioned. Specifically, there is no legal possibility for the defendant, for example, to be interviewed through videoconference or other audio and video links at the main hearing. Such a possibility is envisaged for the examination of a particularly sensitive or protected witness⁴, but it is not envisaged for the questioning of accused persons. However, regarding the attendance of the defendant at the main hearing, that is, his physical presence in the courtroom, the CPC provides that the defendant may be removed from the courtroom under certain conditions. Specifically, if the defendant disrupts the trial by disobeying orders from the presiding judge or insults the dignity of the court, the presiding judge will warn him, but if the defendant continues his/her disruptive behavior, he/she may be fined (Article 370, paragraph 1 of the CPC). However, if these imposed measures are unsuccessful, the panel of judges may remove the defendant from the courtroom during the undertaking of certain evidentiary actions, and if upon returning to the courtroom the accused continues his/her disruptive behavior, the panel of judges may remove him/her from the evidentiary proceedings and order, if there is such a possibility, that the accused follow the course of the proceedings from a special room through audio-video electronic means (Article 371, paragraph 1 of the CPC). Therefore, regarding the first instance proceedings, we can conclude that the CPC does not provide for the possibility of questioning defendants through any audio-visual means. On the other hand, concerning the attendance of the defendant at the main hearing, it is possible, under the aforementioned conditions, to remove the defendant from the courtroom, who may follow the entire evidentiary proceedings from a special room through audio-video electronic means.

However, with respect to the second instance proceedings, the CPC is even more specific regarding the attendance of the defendant at the hearing before the second instance court and it essentially allows this possibility. Specifically, the hearing at the second instance court is held if it is deemed necessary to present evidence that had already been presented or rejected by the first instance court due to erroneously or incompletely established factual situation, and there are justified reasons not to return the case to the first instance court (Article 449, paragraph 1). The subpoena will warn the defendant that the hearing will be held in his absence, if he is duly summoned, but does not justify his absence, the court will then appoint a defense attorney *ex officio* for the defendant who does not have a defense attorney (Article 449, paragraph 3). As it can be seen, the aforementioned

⁴ For example, the CPC envisages that a particularly sensitive witness be examined through audio-video electronic means (Article 104, paragraph 2 of the CPC) or that a protected witness may be examined in a special room with a choice to modify the image of face of the witness and to change the audio feed of the witness's voice so that he/she is not identifiable (Article 108, paragraph 2 of the CPC).

provision of the CPC stipulates that the hearing before the second instance court may be held in the absence of the defendant if he/she is duly summoned but does not justify his/her absence, with the provision of *ex-officio* defense attorney. This possibility does not exist in the first instance proceedings. Furthermore, if the accused is in custody or serving a prison sentence, the presiding judge of the court of second instance shall undertake the necessary actions to bring the accused to trial, and when the panel finds that securing the presence of the accused is difficult for security or other reasons, the accused may attend the hearing through audio-video electronic means if it is possible to conduct a remote hearing (Article 449, paragraph 4). From the aspect of the topic of this paper, this provision of the CPC is very important because it enables the accused person to attend the hearing through audio-video electronic means. The reasons that may lead to this situation are of a security nature, but there can be other reasons if, in a given case, the panel concludes that the reason is of such a nature that it is better and more expedient for the accused to attend the main hearing via video-link, which represents a factual question. The fact is that the aforementioned provisions refer to the appeal proceedings, but it may be concluded that the attendance of the defendant at the main hearing through live link is not absolutely excluded, in other words, it is allowed under certain conditions.

Bearing in mind the aforementioned issues, we feel that the principle of immediacy was not violated during the trial via a video link. Specifically, the principle of immediacy means that the procedural actions necessary for the formation of a court decision must be presented in court that is competent to reach a decision. The court adjudicating in the immediate proceedings gains its impressions of the material to reach its decision through its own senses, rather than on the basis of the records formed by the procedural actions undertaken before another body in the same or other proceedings (Grubac, 2006: 210). Deviations from the principle of immediacy exist and are explicitly prescribed by the provisions of the CPC (e.g. in cases in which more complete explanations cannot be expected or are not required due to the nature of forensic expertise, the chamber may decide to examine the expert report and opinion submitted instead of summoning and examining the forensic expert, or the presiding judge of the chamber, when he/she deems it necessary, may briefly present their content or read them out loud – Article 403, paragraph 1 of the CPC).

On the other hand, the Code does not stipulate that the examination of a particularly sensitive witness through audio-visual electronic means constitutes a deviation from the principle of immediacy (Article 104, paragraph 2 of the CPC) or that a protected witness may be examined in a special room with a choice to change the audio feed of the witness's voice, that is, through audio-video electronic means (Article 108, paragraph 2 of the

CPC). Thus, questioning relevant persons through audio-video electronic means, by itself, does not constitute a deviation from the principle of immediacy. By questioning the defendant via a video link, the court directly gains insight into the evidence, that is, the statement of the defendant and actively participates in the undertaking of this evidentiary action. A deviation from the principle of immediacy would exist only if an earlier statement given by the defendant to the public prosecutor or the police in the early stages of the proceedings was read out before the court and if the court was unable to directly attend, direct and follow the questioning of the defendant.

Another contentious issue is whether such a procedure is contrary to the principle of publicity. Specifically, the principle of publicity means the right of every citizen, not only the parties, but also other persons who are not interested in the outcome of the proceedings to directly attend the undertaking of procedural actions or to be informed through the media about the actions undertaken (Skulic, 2017: 240). Additionally, the public is a key element of the right to a fair trial (Article 6, paragraph 1 of the European Convention on Human Rights), and “the system of rights under Article 6 of the European Convention rests on the idea of efficient legal protection of individuals before the court and other state authorities” (Simovic, Simovic, 2018: 184). Also, the principle of publicity is contained in the Constitution of the Republic of Serbia within the right to a fair trial (Article 32, paragraphs 1 and 3).

The principle of publicity is fully represented in the proceedings against adult perpetrators of criminal offenses at the main hearing. The main hearing is public and can be attended only by persons over the age of 16 (Article 362 of the CPC). The chamber may *ex officio* exclude the public from all or part of the trial, or at the proposal of the parties or a defense counsel, for reasons of morals, public order, national security; to protect the interest of juvenile persons; the privacy of participants in the proceedings or other legitimate interests in a democratic society (Article 363 of the CPC).

As it can be seen, the reasons for excluding the public do not include the risk of widespread transmission of infectious diseases. Otherwise, the so-called Skype trials were conducted by the judge, the public prosecutor, the defendant's defense counsel and the court reporter being present in the courtroom, meaning the public was not present. The defendant was in prison and followed the main hearing via a video link. Interestingly, “the Lawyers’ Committee for Human Rights inspected whether the standards regarding the right to a fair trial were met by observing the principle of publicity in trials and contacted numerous courts with a request to observe these trials. Some courts allowed the trial to be monitored via a video link, while others insisted on direct observation of the

trial. The direct observation of the hearings in these courts was not possible because the intercity traffic was suspended, and by allowing direct observation of the hearings, to many people would be allowed to be present in the courtroom, which was not in line with general principles of the preservation of public health in the fight against the epidemic” (YUCOM, 2020: 11).

It should also be pointed out that the CPC prescribes as a significant violation of the provisions of the criminal procedure if, contrary to the Code, the public was excluded from the main hearing. In accordance with the statutory rules, the decision to exclude the public is reached by the chamber and it must be reasoned and publicly announced (Article 365, paragraph 1 of the CPC). However, the public was not formally excluded from Skype trials, nor did the trial chambers issue a decision to exclude the public. There was a possibility that if interested parties wanted to follow the course of the main hearing and, as we have seen from the experience of the Lawyers’ Committee for Human Rights, in many cases the courts met such requests and allowed interested parties to follow the main hearing via Skype. On the other hand, personal presence was not possible because regulations were in force prohibiting indoor gatherings.

Finally, the principle of publicity is an integral part of the right to a fair trial, which means examining the fairness of the proceedings as a whole, in other words, it is a review of all stages in the proceedings, including the possibilities provided to the applicant, rather than the evaluation of an isolated procedural shortcoming itself.

4. Violation of the right to a fair hearing as an element of the right to a fair trial – yes or no?

One of the crucial questions is whether trials through audio-video electronic means during the state of emergency are legal? Is it allowed to conduct such trials in accordance with positive legal regulations and the case law of the European Court of Human Rights? It should be borne in mind that by declaring the state of emergency it is possible to derogate from the human rights guaranteed by the Constitution, with the exception of a certain range of rights that cannot be suspended or restricted even during the state of emergency. One of these rights is the right to a fair trial, so the essential question arises as to whether the right to a fair trial guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms is violated in this way (Ilić, 2020).

In considering this issue, different arguments and understandings are presented. Thus, some commentators point out that “even during the state of emergency, the CPC does not

provide for the possibility of derogating from the principle of immediacy and the principle of publicity, while the right of the individual who is on trial to attend the trial if he/she is available to government authorities and have a public trial is so important that it is guaranteed both by the Constitution of the Republic of Serbia and the Convention for the Protection of Human Rights and Fundamental Freedoms. It is not possible to limit these rights even during the state of emergency” (Milić, 2020). Furthermore, the Serbian Bar Association “opposes to the introduction of trials by video link, that is, Skype as a procedural possibility which is not envisaged by the law, representing a drastic violation of the defendant's right to a fair trial” (*Letter of the Serbian Bar Association, No. 303/2020 of March 30, 2020*). It is also pointed out that “the Government of Serbia has suspended the provisions of Article 33, paragraph 4 of the Constitution of the Republic of Serbia and Article 13, paragraph 1 of the Criminal Procedure Code, which stipulate that “anyone charged with a criminal offense shall be tried in his presence”, and “the defendant who is available to the court may be tried only in his presence, except when trial in absentia is exceptionally allowed by this Code, which has led to a flagrant violation of the Constitution and creation of the conditions leading to the violation of the right to a fair trial” (Todorović, 2020).

However, this issue is much more complex and in such situations it is necessary to consult the case law of the European Court of Human Rights (ECtHR), that is, to determine whether the ECtHR permits, under certain conditions, trials to be conducted via audio-video electronic means without the defendant being physically present in the courtroom, who is in a custody facility. In the case of *Marcello Viola v. Italy - Application no. 45106/04* (*Judgment 5.01.2007, available at <http://hudoc.echr.coe.int/eng?i=001-77246>, last visited July 10, 2020*), the question as to whether there was a violation of the right to a fair hearing was considered, as an element of the right to a fair trial, because the accused attended the main trial via video link. Specifically, the appellant did not complain that he was prevented from following the proceedings. Rather, he complained about the manner of the conduct of proceedings, that is, the proceedings conducted a video link which created problems for his defense (para. 64). Although the participation of the accused in the proceedings through videoconference is not in itself contrary to the Convention, the court is obligated to ensure that the use of this measure serves a legitimate purpose and that the presentation of evidence is in accordance with the *due process* requirement set out in Article 6 of the Convention (para. 67). Unquestionably, the transfer of prisoners, in the given case, meant particularly strict security measures, as well as the danger of escape and attack. It would also provide him with the opportunity to renew contacts with suspected criminal organizations he is suspected of belonging to (para. 69). Finally, it is

pointed out that the appellant's attorney had the right to be present at the place where his client was and conduct a confidential interview with him (para. 75). Finally, the Court found that the applicant's participation in the proceedings via videoconference did not place the defense in a subordinate position vis-à-vis the other party and that the defendant was given an opportunity to exercise his rights inherent in the concept of a fair trial, so there was no violation of Article 6 of the Convention (paras. 76-77).

At this point, it is useful to mention the position of the European Court of Human Rights in the case of *Sakhnovskiy v. Russia* - Application no. 21272/03 (Judgment November 2, 2010, available at <http://hudoc.echr.coe.int/eng?i=001-91130>, last visited July 12, 2020), according to which the use of video link, as a way of attending the proceedings, is not, as such, incompatible with a fair and public hearing, but the defendant must be allowed to follow the proceedings and be questioned without technical difficulty, as well as to be enabled to have confidential conversations with his legal representative (para. 98).

Thus, questioning the accused and monitoring the main hearing via video link, in essence, is not in contrary to the provisions of the Convention which regulate the right to a fair trial, that is, the right to a fair discussion as an integral part of the right to a fair trial. Certainly, holding trials by videoconference has its limitations and cannot become the standard in the regular conduct of criminal proceedings, beyond the state of emergency, therefore it is necessary to justify such an action with valid reasons. In this regard, "it is necessary to analyze the justification for the defendant's attendance at the main hearing through audio-video electronic means and explain why the defendant's attendance at the main hearing via video link does not diminish the guarantees contained in the right to a fair trial. It is necessary to consider the attendance of the accused at the main hearing via video link in the light of certain guarantees contained in the right to a fair trial in criminal proceedings and determine the criteria for evaluating difficulties in securing the presence of the accused at the main hearing" (Ilić, 2020).

Conclusion

The state of emergency was declared in the Republic of Serbia on March 15, 2020, due to the COVID-19 pandemic, which was lifted on May 6, 2020. Declaring a state of emergency creates the possibility of restricting and suspending certain human rights for a certain period of time only to the extent necessary. The Constitution of the Republic of Serbia exhaustively lists the guaranteed rights from which derogation are not allowed, among which is the right to a fair trial – the most controversial right with respect to the defendant's attendance at the main hearing via video link.

The letter from the Ministry of Justice dated March 26, 2020, which was sent to the courts that are to conduct proceedings against persons who have violated the self-isolation measure and ordering the proceedings to be conducted via live link was not an appropriate legal basis for holding trials by *skype* and this omission was eliminated on April 1 when the relevant Decree was enacted. Bearing in mind this omission, it should be assumed that all judgments of convictions rendered between March 26 and April 1, 2020, when the previously mentioned recommendation of the Ministry served as a legal basis, will be revoked on appeal.

Considering the national legal framework, we can see that the CPC does not provide for the defendant to be questioned via video link or the possibility for the defendant to follow the main hearing out of court through audio-video electronic means, regarding the first instance proceedings, while in the second instance proceedings, the CPC, in principle, allows this possibility. When it comes to the principle of immediacy by questioning the defendant via a video link, the court directly gains insight into the evidence, that is, the statement of the defendant and actively participates in the undertaking of this evidentiary action. A deviation from the principle of immediacy would exist only if an earlier statement given by the defendant to the public prosecutor or the police in the early stages of the proceedings was read out before the court and if the court was unable to directly attend, direct and follow the questioning of the defendant. On the other hand, when it comes to the principle of publicity, although the reasons for excluding the public do not include the risk of widespread transmission of infectious diseases, there was a possibility that if interested parties wanted to follow the course of the main hearing and, as we have seen in many cases the courts met such requests and allowed interested parties to follow the main hearing via Skype. Finally, the principle of publicity is an integral part of the right to a fair trial, which means examining the fairness of the proceedings as a whole.

The European Court of Human Rights essentially allows the defendant to attend the main hearing via videoconference, but in such a way which does not place the defense in an inferior position in relation to the other party and the defendant is given an opportunity to exercise his rights inherent in the concept of a fair trial. Holding hearings via videoconference has its limitations and cannot become the standard in the regular criminal proceedings, beyond the state of emergency. It is necessary to justify such actions with valid reasons of which security reasons are certainly one of the most important reasons.

Thus, it may be concluded that the attendance of the defendant at the main hearing via videoconference is not illegal or contrary to the principle of immediacy and principle of publicity as well as to the right to a fair trial guaranteed by the European Convention for

the Protection of Human Rights and Fundamental Freedoms and the Constitution of Serbia. On the other hand, the use of this possibility should be understood as extremely restrictive and should not become a common practice. During trials via videoconference, the guaranteed rights of the defendant must be respected, especially the right to confidentiality. However, one question arises as to whether it was so necessary and urgent to handle these criminal offenses that judgments were rendered within one or two days. It is well known that the criminal proceedings in the Republic of Serbia take long, therefore it was possible to conduct the trial for the defendant after the state of emergency had been lifted, while the dangers to health could be eliminated by applying some measures to ensure the defendant's presence in the criminal proceedings, primarily house arrest or, as a last resort, by imposing a custody.

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RESPECT FOR THE RIGHT TO HUMAN DIGNITY OF VICTIMS OF CRIMINAL OFFENSES DURING CRIMINAL PROCEEDINGS IN SERBIA

The criminal justice system in Serbia involves the participants in criminal proceedings, including the aggrieved party. The persons who are victims of certain criminal offenses are, on the basis of legal solutions, mostly denied certain rights in criminal proceedings. We point out the most important international documents that protect the rights of victims of crime and respect their right to human dignity. We present the adhering to this right in the domestic criminal legislation, the development of indirect legal protection of victims as well as certain services that provide them with support and assistance. We also point out some of the most relevant issues in that regard from the aspect of legal solutions, and a small number of court practice judgments regarding the protection of victims and respect for their right to human dignity through ensuring the protection of their property claims in criminal proceedings. The aim of this paper is for experts to recognize and pay much more attention to this problem in practice, as there are still no adequate legal solutions.

Keywords: crimes, victims, criminal proceedings, human dignity.

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1. Introduction

The first association when the word dignity is used in everyday speech is that this is a quality belonging only to humans, distinguishing it from all other living beings. Dignity is innate in every human being. It cannot be lost, it belongs to the unborn, but also to the deceased. In fact, human rights and human dignity are inextricably linked. Today, a large part of the political activity of almost all countries focuses on the issue of human dignity and its recognition, essentially or declaratively.

We can talk, write, discuss dignity from various points of view. Đurđić and Trajković state that human dignity is the basis of human nature (Đurđić, Trajković, 2010: 29-43). Some older authors also speak about human dignity and its attitude towards human freedoms and rights (Oklobdžija, 1989: 255-262).

Respect for human dignity is one of the basic principles in all the most important international documents after World War II, to this day. Respect for human dignity is also mentioned in certain international documents in the field of bioethics, adopted by UNESCO, which documents are accepted by most countries in the world. Such documents are the Universal Declaration of the Human Genome and Human Rights (1997), the International Declaration of Human Genetic Data (2003) and the Universal Declaration of Bioethics and Human Rights (2005) (Marjanović, 2013: 104). Some of these documents in the field of biotechnology have been ratified by the Republic of Serbia – such as the Convention on Human Rights and Biomedicine.¹

It is very difficult to talk about human dignity when the very idea of freedom is in peril. It is considered primarily from the aspect of the protection of basic human rights and freedoms of persons who come into conflict with the law, with their freedom being taken away. These involve those persons deprived of liberty - detained and convicted persons primarily in criminal proceedings, but also in misdemeanor proceedings in which the defendants were sentenced to imprisonment - detention or effective imprisonment. It is then that attention is most often paid to the connection between human dignity and freedom. Yet, regarding the aggrieved party or the victims in criminal proceedings, primarily those in the Republic of Serbia, the protection of their human dignity is still insufficiently considered in this type of proceedings.

¹Convention on Human Rights and Biomedicine, Off. Gazette of the RS – International contracts, no. 12/2010.

In a paper of limited scope, we have pointed out only selected, in our opinion, important international and domestic regulations that are relevant for the topic. We have no pretensions that it is possible to list and briefly present all the most important documents in this area, those adopted by the UN and certain institutions and bodies in Europe, where the Republic of Serbia is located. We put extra effort to indicate the extent to which the right to the human dignity of crime victims in court proceedings is respected before domestic courts and the relevant case law in this regard, and how victims of crime in criminal proceedings exercise or protect their rights, i.e. whether they must protect that right through other proceedings and what these procedures are.

2. The most important international regulations

The principle of human dignity is explicitly formulated in all international documents related to human rights “(especially those concerning the prohibition of torture, slavery, inhuman and degrading treatment, discrimination of all kinds, etc.).” This also applies to a significant number of constitutions, especially those adopted after the Second World War (Andorno, 2005:2).

The first international document that explicitly mentioned human dignity was the Universal Declaration of Human Rights adopted by the UN in 1948 (hereinafter: Universal Declaration).² The preamble to this declaration states that every member of the human race possesses “inner dignity” (*dignité inhérente*), and Article 1 explicitly states the following: “All human beings are born free and equal in dignity and rights.” With the advent of the Universal Declaration, the rights of the individual have received international recognition, given that before World War II only states possessed rights in international law. For the first time, individuals, regardless of their race, religion, gender, age, or other status, were given rights that they could use to pit against unjust state laws or repressive customs.

One of the most important documents in which the preamble mentions human dignity is the UN Convention on the Rights of the Child of 20 November 1989 (hereinafter: CRC).³ The preamble reminds that the UN in the Universal Declaration proclaimed that childhood deserves special care and assistance, believing that the child should be fully prepared to live independently in society and be brought up in the spirit of the ideals

²Universal Declaration of Human Rights, Off. Gazette of the FNR Y 0/48.

³The Law on the Ratification of the UN Convention of the Rights of the Child, Off. Gazette of the SFR Y – International contracts 15/90.

proclaimed by the United Nations Charter, especially in the spirit of peace, **dignity**, tolerance, freedom, equality and solidarity. This document goes a step further and in the provisions relating to children in conflict with the law it explicitly states that Member States recognize the right of every child who is accused or who has been found to have violated the law to be treated a way to foster his/her sense of **dignity** and worth, which strengthens the respect for human rights and the fundamental freedoms of others and takes into account the child's age and desire to improve reintegration and to take a constructive role in society (Art. 40 para. 1 CRC).

In addition to these important documents adopted by the UN, certain efforts are being made in Europe within the Council of Europe (hereinafter: EC) and the European Union (hereinafter: EU) to improve the protection of the rights of victims of crime.

In this regard, the EC had a more active role, enacting the Resolution on Compensation for Victims of Crimes from 1977, and the European Convention on the Compensation of Victims of Violent Crimes,⁴ which was open for signing on November 24, 1983, and entered into force on February 1, 1988. This convention was not signed by some EC members, including Serbia, nor all EU countries. In addition to the above documents, the EC has adopted a number of recommendations relating to victims and the improvement of their rights and protection in criminal proceedings.

The first mandatory decision aimed at harmonizing the criminal procedure legislation of the EU member states was brought in 2001. This is the Council Framework Decision on the standing of victims in criminal proceedings (hereinafter: Decision),⁵ which was passed on March 22, 2001. Among other provisions, this Decision emphasizes the need to protect the privacy and personal safety of victims in criminal proceedings which must be protected from secondary victimization. The elaboration of the mentioned Decision was awaited until 2012, when Directive 2012/29 of the European Parliament and Council was adopted on October 25, 2012, establishing minimum standards on the rights, support and protection of victims, replacing the Council Framework Decision (hereinafter: Directive).⁶ The mentioned Directive refers to special decisions made by the EU in certain

⁴European Convention on the Compensation of Victims of Violent crimes, no. 116, Council of Europe, Strasbourg, Nov. 24, 1983, uploaded on Aug. 27, 2020.

⁵Council Framework Decision on the standing of victims in criminal proceedings 2001/220/JHA (OJ (2001) L81/1).

⁶Directive 2012/29 of the European Parliament and Council from October 25, 2012 establishing minimum standards on the rights, support and protection of victims, replacing the Council Framework Decision 2001/220/JHA (OJ(2012)L315).

areas - human trafficking, protection of women from violence, prevention of domestic violence, sexual exploitation of children and pedophilia, terrorism, etc. This Directive sets out for the EU member states a number of obligations related to the improvement of the position of victims of criminal offenses in criminal proceedings. Part of these rules comes down to the so-called elements restorative justice (Škulić, 2017: 248).

The Republic of Serbia, i.e. the legal predecessor republics of our current state, have accepted most of the most important international documents related to the protection of human freedoms and rights, which explicitly mention human dignity and which were adopted by the UN and the EC.

3. The most important domestic regulations

The most important domestic legal act - the Constitution of the Republic of Serbia (hereinafter: Constitution), in Art. 19 emphasizes that the guarantee of inalienable human and minority rights serves to preserve human dignity, while Art. 23 states the following: "Human dignity is inviolable and everyone is obliged to respect and protect it."⁷ Having in mind the provisions of the Constitution, it can be unequivocally concluded that within the provisions relating to human rights and freedoms, the protection of persons deprived of liberty is provided through several provisions, while only through the provision of Art. 67 it is provided to everyone – thus also the aggrieved parties in the criminal proceedings are anteanted the same, under the conditions determined by the law, and the right to legal aid provided by attorneys-at-law as an independent and autonomous service, and legal aid services established in local self-government units, in accordance with the law.

The first domestic regulation that mentions, among other things, the protection of victims of crime is the Law on the Program for the Protection of Participants in Criminal Proceedings, which regulates the conditions and procedure for providing protection and assistance to participants in criminal proceedings and their relatives who, as a result of giving testimony or information relevant as evidence in criminal proceedings, are faced with a situation which is dangerous to their life, health, physical integrity, liberty or property. Participants in criminal proceedings in the sense of this Law include, among others, the aggrieved parties, whereby all participants in criminal proceedings are pertinent in terms of the relevant provisions of the Code of Criminal Procedure.⁸ Directly

⁷The Constitution of the RS, Off. Gazette of the RS, nos. 98/06, Art.19, Art. 23, Art. 67.

⁸Law on the Program for the Protection of Participants in Criminal Proceedings, Off. Gazette of the RS, no. 85/05, Art.1, Art. 3.

related to this law is the establishment of the Service for Assistance and Support to Victims and Witnesses in 2006 at the then District Court in Belgrade in the War Crimes Chamber, which had the task of providing support to all witnesses who testify before the Special Departments. Until the introduction of prosecutorial investigations in 2012, witnesses and aggrieved parties had the support of this service in the investigative proceedings and at the main trial, as well as in the appeals proceedings. With the introduction of the concept of prosecutorial investigation, continuity in providing support was lost and witnesses received support from the main trial phase. The procedural position of victims and witnesses was negatively affected by the insufficient knowledge of judicial officials and lawyers, the issue of prevention of secondary victimization as well as inconsistency in the application of procedural disciplines at the main trial.⁹

The assistance and protection of victims was envisaged in 2006. as a task in the Strategy for Combating Trafficking in Human Beings in the Republic of Serbia,¹⁰ and this is also stipulated in the new Strategy for Prevention and Suppression of Trafficking in Human Beings, especially Women and Children and Victims Protection 2017-2022 (hereinafter: Strategy).¹¹ The mentioned Strategy defines that the term victim in the sense of the stated provision and this strategy signifies any person who has been subjected to human trafficking. (Within the specific objectives, the Strategy envisages that comprehensive and effective protection of victims of trafficking will be provided in court proceedings through improved witness protection programs, legal protection of victims of trafficking, safety of victims, prevention of secondary victimization and an effective mechanism for compensating victims of trafficking.) This Strategy is especially important during the so-called migrant crises. The Republic of Serbia is a transit country through which columns of migrants, but also and refugees passed on their way to certain countries of the European Union, and a number of migrants or refugees remained due to the closure of borders by the countries of the European Union in our country. Refugees are usually victims of the asylum policies and the relations between refugee law and human rights law should be fixed in order to clear the obligation of the state and clear their position towards refugee and asylum seekers. There is, unfortunately, a gap between the written laws and the Conventions and the reality of migrant's lives who are vulnerable in terms of dignity and human rights (Tilovska-Kechedji, 2017: 194).

⁹National strategy for processing war crimes, Off. Gazette of the RS, no. 19/2016.

¹⁰Anti-trafficking strategy in the Republic of Serbia, Off. Gazette of the RS, no. 111/06.

¹¹Strategy for prevention and suppression of trafficking in human beings, especially women and children, and protection of victims 2017-202, Off. Gazette of the RS, no. 77/2017.

Persons who are victims of criminal offenses exercise certain rights through the provisions of the Code of Criminal Procedure which applies to regular courts from October 1, 2013 (hereinafter: Code),¹² where upon they appear as private prosecutors, the aggrieved party as prosecutors, or as the aggrieved party and as witnesses – the aggrieved party. We will only point out, in our opinion, the most important provisions with which the Code insults or disregards human dignity, which in criminal proceedings should be permitted to the aggrieved party in regards to their rights.

The provisions of the Code define the aggrieved party as a person whose personal or property rights have been violated or endangered by a criminal offense (Art. 2, para. 1, item 11), which definition was almost completely identical to that of Art. 221, item 6 from the previous valid Code of Criminal Procedure (hereinafter: previously CCP).¹³ None of these definitions recognize the notion of victim or address persons whose property and non-property rights have been violated.

The position of the aggrieved party in the Code has significantly deteriorated in relation to the provisions of the previous CCP. According to the provisions of the Code, the aggrieved party cannot take over the function of an authorized prosecutor if the public prosecutor rejects the criminal report for a criminal offense for which prosecution is undertaken *ex officio*, i.e. suspends the investigation or withdraws from criminal prosecution until the indictment is confirmed. In that case, the aggrieved party has only the right to file an objection directly to the higher public prosecutor (Art. 51 of the Code). Only in the situation when the senior public prosecutor accepts the objection of the aggrieved party is the first instance public prosecutor obliged to continue the criminal prosecution. Otherwise, the injured party is unable to take over or continue the prosecution. This solution is significantly worse in that part in relation to the solutions from the previous CCP, as well as the solution that refers to the provisions on the plea agreement.

The Code no longer informs provisions of informing the aggrieved party and their attorney about the hearing on deciding on the plea agreement (Art. 282v, item 5 of the previous CCP), i.e. that the plea agreement does not violate the rights of the aggrieved party (Art. 282v, item 8 of the previous CCP) or that it is not contrary to the reasons of

¹²Code of Criminal Procedure, Off. Gazette of the RS, 72/2011,101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/19.

¹³Code of Criminal Procedure, Off. Gazette of the SRY 70/01 dated Dec. 28, 2001, enacted on March 28, 2002, Off. Gazette of the SRY 68/02, Off. Gazette of the RS 58/04,85/05, 115/05,49/07,72/09 and 76/2010

fairness, which provisions have been in force since September 11, 2009, in which cases the court was authorized to issue a reasoned decision rejecting the plea agreement, and the confession of the defendant given in the agreement cannot be used as evidence in criminal proceedings.

Therefore, we believe that it is necessary in the coming period to make changes, above all, to the provisions of the Code, including those provisions relating to certain categories of aggrieved parties in criminal proceedings in order to improve the position of the aggrieved party in criminal proceedings, at least in the way it was regulated by the provisions of the previous CCP.

Although the aggrieved party may, in accordance with the provisions of the Code, file a claim for damages, in domestic court practice it is rare when such a claim is filed in criminal proceedings, and even rarer are situations where the court includes such a claim in a judgment. As a rule, the aggrieved parties are instructed to file a claim for damages in civil proceedings. The court usually states in the reasoning of the verdict that deciding on the request would lead to a delay in the criminal proceedings.

If the aggrieved party accepts the decision of the criminal court to pursue the claim for damages in civil proceedings, numerous problems arise.

The basic issue is the financial situation of the aggrieved party, whether they can finance the costs of litigation - pay the fees of hiring an attorney to represent them in the proceedings, pay the costs of expertise which are usually incurred in these proceedings, and after all, retain the hope that the procedure will be completed relatively quickly. If the aggrieved party is financially capable of bearing the costs of the litigation and then files a lawsuit for damages before the criminal judgment becomes final, the most common situation is to initially terminate the litigation until the final judgment in criminal proceedings, with reference to the provisions of the current Civil Procedure Code (hereinafter: CPC).¹⁴ When, after the final conclusion of the litigation procedure completed in their favor the aggrieved party receives a judgment approving the claim for damages, the issue of the debtor's solvency arises, i.e. whether the legally convicted person can compensate the aggrieved party for the damages incurred by the crime.

¹⁴ Civil Procedure Code, Off. Gazette of the RS 72/2011, 49/2013 (decision of the Constitutional Court), 74/2013 (decision of the Constitutional Court), 55/2014, 87/2018, 18/2020), Art.12.

At the time of the previous CCP, only the private prosecutor and the aggrieved party had the position of parties to the lawsuit in the criminal proceedings, and no other category of aggrieved parties - the aggrieved party which filed a property claim, the aggrieved party-witness and the aggrieved party with a motion to prosecute criminal offenses that are prosecuted ex officio. Having in mind the provisions of the previous CCP relating to the concept, position and procedural rights and obligations of the aggrieved parties in criminal proceedings, the Constitutional Court concluded that the right to a fair trial in certain cases must be guaranteed to the aggrieved party in criminal proceedings, as the aggrieved parties usually turn to this court in criminal proceedings within a reasonable time frame. Such an approach primarily arose from the understanding that the rights of the victims cannot be violated (Manojlović-Andrić, Četković. P., 2011:166). Such a position was also taken in the decision of the Constitutional Court of Serbia U-no. 452/09 dated August 14, 2011 which states the following: "The aggrieved party as a prosecutor, a private prosecutor and the aggrieved party may allege a violation of the right to a trial within a reasonable time in criminal proceedings in that part of it relating to deciding on a 'civil claim', i.e. from the moment they filed a property claim that is related to the material or non-material damage as a result of a criminal offense."

The right of the aggrieved party to a trial in criminal proceedings within a reasonable time was also indicated by the decisions of certain second instance courts during the validity of the previous CCP, and one decision states the following: "A person who has undergone damage as a result of property crime (damage in terms of Art. 221 item 6 of the previous CCP), who joined the criminal prosecution in the criminal proceedings and filed a property claim, has the right to have the criminal court decide on the subject of the charge within a reasonable time (right to a trial within a reasonable time), with all the legal consequences arising from a violation of that right."¹⁵

In 2003, the Republic of Serbia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention),¹⁶ which came into

¹⁵Decision of the District Court in Valjevo, Gž.1839/06 dated Nov. 30, 2006, unpublished.

¹⁶European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for certain rights and freedoms included in the Convention and the First Protocol thereto, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, Off. Gazette of Serbia and Montenegro - International Agreements 9/2003.

force in 2004. Although the Convention does not explicitly regulate the position of the victim and the aggrieved party in criminal proceedings, through its case law the European Court of Human Rights (hereinafter: European Court) has over time established the position that the aggrieved party's rights are declared by examining whether Art. 6 item 1 of the Convention was violated to the detriment of the aggrieved party (the applicant), proclaiming the right of access to a court within the framework of the right to a fair trial. The European Court fails to carry that out from the aspect of respecting the rights of the aggrieved party in the criminal proceedings (victim of crime), but limits itself to the civil aspect, examining whether the guarantees of the said article of the Convention are respected in the process of deciding on civil rights and obligations, i.e. regarding the exercise of the aggrieved party's right to initiate civil proceedings for damages under domestic law. After the beginning of the application of the Convention in relation to Serbia, the European Court, in the first years of its working on numerous petitions in the initial period regardless of whether the applicants were guilty or damaged in certain proceedings, began to rule against Serbia for violating the right to a fair trial within a reasonable time under Art. 6 item 1 of the Convention. The views of the European Court regarding the violation of the right to a trial within a reasonable time have been recognized and accepted in practice by the Constitutional Court of Serbia. In the UŽ-4077/2010 case, the Constitutional Court found that guarantees of the right to a fair trial can also be granted to the aggrieved party in criminal proceedings for violation of the right to life, although the aggrieved party did not file a property claim in criminal proceedings but within a special litigation process (Manojlović-Andrić, Četković, 2011:168-170). All this has led to a change in the current regulations.

The Law on Amendments to the Law on the Organization of Courts from 2013 brought a significant novelty to the domestic legal system - provisions that regulate the violation of the right to a trial within a reasonable time.¹⁷ These provisions determined the jurisdiction of the courts to act in these cases, within two-stage decision-making, compensation and urgency in acting with the appropriate application of the provisions of the Law on Non-Litigious Procedure. Shortly after these important innovations, the Supreme Court of Cassation (hereinafter: SCC) determined at its sessions the views of the civil and criminal departments regarding the trial within a reasonable time, which were submitted to all courts in the Republic of Serbia and were a guide for proceedings in these cases. In the views of the SCC, it was clearly stated that this request is to be submitted only in proceedings that are still ongoing, involving so-called 'living cases', and not requests

¹⁷Law on Amendments to the Law on Organization of Courts, Off. Gazette of the RS 101/2013 dated Nov. 20, 2013, enacted on Nov. 21, 2013, and applied from Jan. 1, 2014, Art. 8a, 8b and 8v.

submitted for finalized cases, as requests for such cases were deemed impermissible.¹⁸ All these provisions, although primarily in the function of protection of defendants in criminal proceedings, were also in the function of protecting the victims of criminal offenses, their rights and their dignity observed in general in criminal proceedings.

In some decisions, the SCC took the position that the aggrieved party was actively legitimized to seek protection of the right to trial within a reasonable time, provided that they filed a property claim within the criminal procedure (sentence from the decision of the SCC Ržk 32/2014 dated Nov. 24, 2014).¹⁹ An identical position was taken in certain decisions of first instance courts, where the inefficiency of the first instance courts was pointed out.²⁰ Also, the SCC took the position that the aggrieved party as a prosecutor in criminal proceedings was actively legitimized to file a request for protection of the right to trial within a reasonable time in court proceedings for revocation of a suspended sentence imposed by a basic court judgment, which request was filed before the legal finalization of the criminal procedure (sentence from the decision of the SCC Ržk 71/2014 dated Dec. 25, 2014).²¹ The same position was taken by the SCC regarding the filing of a new request for protection of the right to a trial within a reasonable time in criminal investigation proceedings by the aggrieved party (sentence from the decision of the SCC Ržk 139/2015 dated Sept. 30, 2015).²² Nevertheless, problems arose in practice, especially with regard to the amount of compensation awarded by individual courts, and in connection with that, the inequality and inequity of the parties (Učajev, 2015: 34-36).

A large number of proceedings for violations of the right to a trial within a reasonable time which were initiated mostly by defendants but also by aggrieved parties led to the recognition of the importance of this problem in practice, especially from the aspect of

¹⁸Decision of the High Court in Valjevo R 4 K. no.1/15 dated March 9, 2015, with the decision of the Supreme Court of Cassation, Rž K. 68/2015 dated May 13, 2015, unpublished.

¹⁹Sentences determined at the session of the Department for the Protection of the Right to Trial within a Reasonable Time of the Supreme Court of Serbia dated March 19, 2015, published in the Protection of the Right to a Trial within a Reasonable Time in Court Proceedings, the Supreme Court of Cassation and the Council of Europe, Belgrade, 2015, 47-48.

²⁰Decision of the High Court in Valjevo R4 K. no. 3/15 dated June 29, 2015 with the decision of the Supreme Court of Cassation Rž K. 118/2015 dated Aug. 12, 2015, unpublished.

²¹Sentences determined at the session of the Department for the Protection of the Right to Trial within a Reasonable Time of the Supreme Court of Serbia dated March 19, 2015, published in the Protection of the Right to a Trial within a Reasonable Time in Court Proceedings, the Supreme Court of Cassation and the Council of Europe, Belgrade, 2015, 81-82.

²²Sentences determined at the session of the Department for the Protection of the Right to Trial within a Reasonable Time of the Supreme Court of Serbia dated Nov. 27, 2015, published in Protection of the right to a trial within a reasonable time in court proceedings, the Supreme Court of Cassation and the Council of Europe, Belgrade, 2015, 81-82.

human rights protection and the right a fair trial according to Art. 6 item 1 of the Convention. As a result, the Law on the Protection of the Right to Trial within a Reasonable Time in 2015 was adopted, and it has been in force since 1 January 2016.²³

The Republic of Serbia has especially recognized the importance of protecting minors as victims of certain groups of crimes and protecting their human dignity, and in 2013 it adopted the Law on Special Measures for Preventing Crimes against Sexual Freedom Involving Minors (hereinafter: the Law), which stipulated that the Law be applied to perpetrators who had committed the 10 precisely stated criminal acts from the group involving sexual freedom.²⁴ Also stipulated was a ban on the mitigation of punishment and conditional release, a non-statute of limitations for criminal prosecution and the execution of punishment for perpetrators of these crimes, and the legal consequences of conviction, some of which last 20 years and relate to working with minors. Also, after serving a prison sentence, special measures are implemented for the perpetrators that can last up to 20 years, aiming at special prevention – the protection of minors from such previously convicted persons for crimes against minors.

One of the important steps undertaken by the state involving the protection of victims in criminal proceedings before regular courts is the establishment, in 2016, of the Service for Assistance and Support to Witnesses and the Aggrieved in Higher Courts, as well as in other courts designated by the High Judicial Council via amendments and addenda to the Rules of Procedure. The court is obliged to deliver a notice about the service for assistance and support to aggrieved parties and witnesses in the form of a note on the summons.²⁵ Also, in the previous period, the state had provided significantly better technical conditions in terms of material and technical equipment to all higher courts in the territory of the Republic of Serbia, by installing specially equipment in courtrooms with the technical means for image and sound transmission - so-called video conferencing. This is important for certain criminal proceedings in which the aggrieved parties or particularly sensitive witnesses appear before higher courts in accordance with Art. 103 of the Code. This prevents a confrontation between the aggrieved party and the defendant, thus preventing the secondary victimization of injured persons. If necessary, these premises are purposefully used by other judicial bodies for the examination of

²³Law on the Protection of the Right to a Trial within a Reasonable Time, Off. Gazette of the RS no. 40/2015.

²⁴Law on Special Measures for Preventing Crimes against Sexual Freedom Involving Minors, Off. Gazette of the RS 32/2013, Art. 3.

²⁵Amendments to the Rules of Procedure, Off. Gazette of the RS no. 39/2016 dated April 15, 2016, enacted on April 23, 2016, Art. 38a and 38b.

certain categories of aggrieved parties during the investigation or during the main trial phase. Therefore, through the provisions of the Code and with adequate material and technical equipment of judicial bodies, the protection of the human dignity of the aggrieved parties - victims of crimes is better provided for in relation to the time when the previous Code was applied in the practice of regular courts, as of September 30, 2013.

4. Court practice

The shortcomings in the provisions of the Code when it comes to the protection of the human dignity of victims of crime are undisputed. Until the provisions of the Code change through possible future amendments in the direction of improving the position of the victims in criminal proceedings, it is up to the court practice to try to enable this category of participants in criminal proceedings to protect their human dignity, to end the criminal proceedings as soon as possible and to make a decision on property claims in the procedure. This is especially important in having in mind that the aggrieved party is awaiting two more procedures after the final conclusion of the criminal procedure to eventually collect payment for the damage resulting from the criminal procedure, which was discussed in this paper.

With regard to respect for the right to human dignity of the victims, case law shows differences depending on which segment of their position is observed in criminal proceedings.

The position of victims and especially particularly vulnerable categories of victims such as victims of crimes involving sexual freedom - victims of rape, forcible intercourse against a helpless person, forcible intercourse by abusing of position or child rape as well as victims of hate crimes, regardless of whether they are adults or minors, has been significantly improved through certain solutions in the provisions of the Code which provide for the possibility of examining these categories of participants in the procedure by using technical means for image and sound transmission - video conferencing. This is to take place in their residence or another location or in an institution authorized for the examination of particularly vulnerable persons by using technical means so that there is no direct confrontation between the victims and the accused (Art. 104, para. 2 and 3 of the Code). These provisions prescribe a better protection of the dignity of this category of participants in the proceedings in relation to the previous CPC, which had no solutions in the provisions that refer to particularly vulnerable witnesses.

However, in court practice, there is still insufficient focus on those who are indirect victims of the most serious crimes - murder (the family of the victim) and other crimes that, in addition to property damage, also produce great non-material damage for the aggrieved party. These categories of persons are rarely ex officio assigned the status of the aggrieved party - a particularly vulnerable witness and they are rarely informed of the right to be granted the status of a particularly vulnerable witness.

In court practice, decisions to award damages to the aggrieved party, as allowed by the Code, are still rare, which is why we highlight certain decisions.

Even when the amount of the caused damage has been determined, the first instance courts usually instruct the aggrieved party to file a property claim in a civil procedure. In such a situation, the second instance courts take the correct position that it is not at the court's disposal to award the aggrieved party a property claim or to refer the aggrieved party to litigation but it is obliged to meet that request if the amount of damage was determined,²⁶ i.e. the court can refer the aggrieved party to realize their property claim in civil proceedings only if the data of the criminal proceedings provide an insufficient basis for determining the amount of damage.²⁷ For the second instance court, the first instance court's verdict finding the defendant guilty of the crime of theft in the part related to the property claim was correct, by which the defendant was obliged to pay the aggrieved party, regardless of the fact that the stolen item (a golden chain) was uninsured.²⁸ It is also irrelevant whether there are one or more aggrieved parties that had filed a property claim during the criminal proceedings in order for it to be awarded in full, but it is important that the criminal proceedings determine the amount of damage caused by the crime.²⁹ In the decision regarding the request for protection of legality according to the final judgment, the SCC took the position that the aggrieved party may be awarded legal default interest along with the property claim.³⁰

²⁶Decision of the Court of Appeals in Belgrade, Kž Po1. 12/18 dated Jan. 14, 2019, Intemex, Belgrade, court practice base.

²⁷Decision of the Court of Appeals in Novi Sad, Kž 396/17 dated April 10, 2017, Glossarium, Belgrade, court practice base.

²⁸Judgment of the High Court in Čačak, Kž 155/17 dated July 28, 2017, Glossarium, Belgrade, court practice base.

²⁹Judgment of the Court of Appeals in Nis, Kž1. 797/14 dated Aug. 14, 2014, Glossarium, Belgrade, court practice base.

³⁰Judgment of the Supreme Court of Cassation, Kzz 778/16 dated June 29, 2016, Glossarium, Belgrade, court practice base.

A decision to apply a temporary measure of securing a property claim in criminal proceedings at the request of the aggrieved party, which possibility is also provided by the provisions of the Code as well as the previous CCP, is rare. If the first instance court decides to do so, it may apply a temporary security measure on the movable and immovable property of the defendant. The precondition for the first instance court to apply a temporary measure of securing a financial claim during criminal proceedings is for the request to be filed until the stage of the criminal proceedings against the defendant and for the amount of the property claim to be determined.³¹ Also, an important precondition for the court to make a decision regarding a temporary security measure in the procedure of the realization of property law requires that the court before which the procedure is conducted has the obligation to examine the defendant about the facts stated in the proposal and to investigate the circumstances relevant for determining a property claim, and if it fails to do so, a significant violation of the provisions of the criminal procedure has been committed and the decision must be revoked.³²

When it comes to movable property, the second instance court takes the position that the fact that the defendant may not be registered as the owner of a certain vehicle when he stated before the court that he is the owner of those vehicles, is not an obstacle not to apply the temporary measure of prohibiting sale or securing the property claim of the aggrieved party.³³ In relation to real estate, the second instance court takes the position that the existence of a record of a dispute for determining the right to real estate for the purpose of determining the right of ownership cannot be equated with the existence of a temporary measure of securing a property claim and its effect in criminal proceedings, considering that the record does not signify an obstacle for the sale of the real estate, which purpose is achieved precisely by a temporary measure in the sense of Art. 257 of the Code of Criminal Procedure.³⁴

³¹Judgment of the High Court in Valjevo, Kv. 196/19 dated Dec. 27, 2019, unpublished.

³²Judgment of the High Court in Čačak, Kž. 16/16 dated Feb. 24, 2016, Intemex, Beograd, court practice base.

³³Decision of the Court of Appeals in Belgrade Kž2 319/20 dated Feb., 6, 2020, court practice selection 4/2020, Glossarium, Belgrade.

³⁴Decision of the Court of Appeals in Belgrade, Kž2. no. 15/18 dated Jan. 9, 2018 and the judgment of the High Court in Belgrade K. no. 483/17 – Kv. no. 3562/17 dated Nov. 24, 2017, High Court of Belgrade Bulletin, 89/2020, Intemex, Belgrade.

5. Conclusion

In the Republic of Serbia, the protection of the rights of victims of crime and their procedural status is still not recognized as such a significant problem that it should incur legal reform and the protection of victims to a fuller extent than in the current domestic legislation. In addition to other changes in relation to the aggrieved party, in order for their position to improve in the coming period and to at least revisit the solutions from the previous period, the Criminal Procedure Code specifically defines the rights of the victims of crimes, regardless of the aggrieved party's status.

There are significant obligations in terms of harmonizing regulations concerning justice on the way to joining the European Union, including harmonizing the protection of the rights of victims of crime with the most important standards of the Council of Europe and the European Union, but also raising the rights of victims and human dignity to a higher level and allocating a more active role to the state. In this regard, the work of the Service for Assistance and Support to Victims and Witnesses has been improved.

However, due to the length of these proceedings and the uncertainty regarding the recompense of various types of damage from the defendants in criminal proceedings, in the coming period it is necessary to find a way to compensate victims of crimes from public funds, as regulated by the legislation of Slovenia and Croatia, now a member state of the European Union with the same legal tradition as our country and largely similar regulations in many legal areas. Only in this way can respect for the right to the human dignity of victims of crime be adequately ensured, in accordance with the most important internationally accepted standards.

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CRIME VICTIMS AND THE RIGHT TO HUMAN DIGNITY - CHALLENGES AND ATTITUDES IN SERBIA -

From its very philosophical substance, through the religious, sociological and legal nature, the right to human dignity has passed the long way of developing its content and scope in its various meanings. Once proclaimed as the universal human rights value in 1948, the right to human dignity has been further elaborated through the number of universal and regional human rights instruments, with the different level of impact on the legislation and practices on the national level. In the context of criminal proceedings, initially, more focused on the procedural safeguards of accused and consequently of sentenced persons, the right to human dignity of crime victims slowly, but surely becomes the one of the main human rights values framing the content and scope of other crime victims' rights, rather than the stand-alone right. The paper is dedicated to the issue of protection of victims of crime and the necessity of standardization and a broader implementation of the right to human dignity of crime victims, through the analysis of the international and national normative framework and practice.

Keywords: *crime victims, human dignity, procedural safeguards, victims and media*

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1. A concept of human dignity

Human dignity, in contemporary discourse, is a generally accepted term which, in the broadest sense, means fundamental value of every individual or a basic principle that indicates the existence of freedom of individuals and basic human rights. The liberty of man and concept of basic human freedoms and rights are, indisputably, the basis (and in the function) of the protection of human dignity. However, although the term is used in all spheres of modern social life, defining the concept of human dignity and determining its content is not an easy task. On the contrary. Neither the legal definition of the concept of human dignity, nor the determination of the content of the concept in other scientific disciplines, provides a simple answer to the questions of what human dignity represents, what constitutes its content and how its protection is achieved. In the other words, human dignity is a very extensible concept subject to a wide variety of changes and applications; as well as law, it is easier to feel it, and it is incomparably harder to determine it (Mitrović, 2016: 25).

Difficulties in defining the concept of human dignity and determining its content stem from the fact that it represents the value of every human being. As pointed out in the literature, human dignity is an absolute intrinsic value that every human being possesses in the same way (Meyer-Ladewig, 2004: 143), while its significance stems from the fact that it is a vital element in defining the human being (Zajadlo, 1999: 41). If it forms the basis for defining a human being and is an indisputable intrinsic value of every human being, it can be stated that human dignity is innate, egalitarian, inalienable and indivisible. It can also be seen as a basic natural right of every human being acquired at birth. As something inherent to, and thus, inseparable from human beings, dignity is considered to be universal – all human beings are born equal in dignity, regardless of culture, regardless of time, regardless of level of development, physical or mental ability, or any other mutable human qualities (Piechowiak, 2015: 7).

Theories of human dignity have their origin in the antiquity. The idea of human dignity which was used to explain man's elevated position in the logos, was formulated by the Stoics of Greece in 128 B.C. It was transmitted as such in Roman society via the works of Cicero, the Roman jurist and philosopher (Steinmann, 2016: 29). Cicero believed that all human being were endowed with *dignitas*, and that therefore all mankind is worthy of respect for the sole fact of its existence. This attribute was universal because human beings possessed “superior minds” which gave them a capacity to think and be self-aware. Cicero articulation of dignity as an inherent quality was the minority view. More common view was that *dignitas* was an acquired trait, an indication of high social or political status.

Hence, Roman dignity was manifestation of personal authority which symbolized “majesty, greatness, decorum and moral qualities”. It was a characteristic typically ascribed for those in high office (Glensy, 2011: 74).

Dignity did not move from a feature of the privileged to as aspect intrinsic to everyone until the Renaissance. Picco dela Mirandolla de-coupled human dignity from social hierarchy and deemed that it was making’s free will and gift from God to all without regard to rank, that was to root of the inherent dignity of individual humans (Glensy, 2011: 75).

Many credit the philosopher Immanuel Kant with establishing contemporary understandings of dignity. Some argued that the ‘traditional’ philosophical paradigm of human dignity, an account stretching from Cicero to Kant, was that human dignity signifies the high rank and elevated position of the human being vis-à-vis the rest of nature (Sensen according to Zylberman, 2016: 203). Kant emphasized a person’s ability to engage in rational, autonomous, and self-directed thought and the capacity to make moral decisions and take moral actions. Together, these things highlighted the exceptional nature of humanity and the inherent dignity contained therein. Kant viewed dignity as an integral and central characteristic of what it means to be human, he also contended that dignity was without a price. This premise leads to Kant’s famous categorical imperative, which guides people to “act in such a way that you treat humanity, whether in your own person or in the person of any other, both in your person and in the person of each other individual, always at the same time as an end and never simply as a means” (Giannini, 2016: 47).

For Proudhon, the real content of justice and the principle of overall ethics is expressed in human dignity. In relation to one's closer, this feeling is generalized and rises to a sense of human dignity in general, which inevitably awakens in the mental being with the help of every other person, be it a friend or an enemy. It is selfless and exerts coercion that rules over all other feelings, which distinguishes it from love and all other inclinations. Everyone is given the right to demand from everyone else respect for human dignity in his person, and the duty is to compel everyone to recognize this dignity in others. (Djurdjić, Trajković, 2010: 36).

The influence of Kant's conceptions is evident in today's philosophical discussions, although human dignity is “the premier value underlying the last two centuries of moral and political thought” (Bedau, 1992: 145). Parent defines dignity as “negative moral right not to be regarded or treated with unjust personal disparagement and not to be subject to

or victimized by unjust attitudes or acts of contempt” (Parent, 1992: 751). Under this variant of dignity, all individuals should be treated equally under the law and be free from “arbitrary government action that demeans, humiliates or degrades” (Goldman according to Giannini, 2016: 48).

Also, it is necessary to distinguish human dignity, which is derived from human nature, from the social understanding of dignity, and both from legal dignity, which can be observed through natural law or positive law. It is also possible to distinguish Christian from Islamic or Confucian human dignity, humanistic-enlightenment from Marxist, systemic-theoretical or behavioral human dignity (Mitrović, 2016: 26). Human dignity in relation to the fact that it can be seen as unwritten basic principle of human rights law or as special human right of every human, can also be marked as “unspoken interpretive value (as a background interpretive norm or evolving beyond its unspoken role) or spoken and procreative power” (Giannini, 2016: 46-98).

Human dignity from the point of view of the victims of a crime is (still) an unspoken interpretive value, in most comparable criminal justice systems. It is indisputable, however, that the dignity of the victim must become a basic principle and a fundamental right of the victims of a crime.¹ All other rights of victims of crime must derive from the victim's right to human dignity.

2. International standards on the victims’ right to dignity

If look at the main international instruments in the field of victims’ rights, it is obvious that the right to dignity has been comprehensively recognized, despite the fact that its scope and content still have not been precisely determined. However, it is obvious that there is a still lack of coherence in terms of the way on how this right is defined in various instruments (fluidly as a value/principle, as an element of some other right of victims or as a stand-alone right).

¹ See more in: Kambovski, V. (2018) Natural Rights, Legitimacy of Laws and Supranational Basis of Unlawfulness, In: *Yearbook. No. 1 Human rights protection “From unlawfulness to legality”*, (pp. 31-49). Novi Sad: Provincial Protector of Citizens – Ombudsman, ISBN 978-86-89417-08-1 (PZG) ISBN 978-86-80756-14-1 (IKSI)

2.1 Universal human rights instruments

The main step in the promotion of the right to human dignity was the adoption of the **Universal Declaration of Human Rights**² which established this right as the one of the main, universal human rights values.³ Article 1⁴ of the Declaration brings the revolutionary provision saying that “all human beings are born free and equal in dignity and rights”, tracing the path for all the human instruments adopted so far to uphold and upgrade on this.

International Covenant on Civil and Political Rights,⁵ recalls the concept of human dignity as integrated in the Universal Declaration and declares that the rights guaranteed by the Declaration rights derive from the inherent dignity of the human person. In addition to this general concept, the right to dignity is also recognized as a frame of the treatment of persons deprived of liberty (art. 10).⁶ **UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**,⁷ also recalls that the rights guaranteed by the Declaration rights derive from the inherent dignity of the human person.

Probably the most comprehensive approach in terms of the right to human dignity as an universal value, but also as the framework of victims’ right, could be found in the

² Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A), available at: <https://www.un.org/en/universal-declaration-human-rights/index.html>, last accessed at September 5th 2020.

³ Preamble of the Declaration, among others says: ...” Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ...”...”Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,...”

⁴ Article 22 “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. Article 23, par. 3. provides for a favorable remuneration for all who works to ensure for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

⁵ International Covenant 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, in accordance with Article 49

⁶ “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

Convention on the Rights of the Child (hereinafter: CRC).⁸ The CRC defines the human dignity as the core value in its Preamble⁹, and further elaborates it through the ensuring proper life conditions for disabled children (art. 23); administration of school discipline in manner consistent with the child's human dignity (art. 28, par. 2); treatment of the children deprived of liberty (art. 37(c)) and accused of, or recognized as having infringed the penal law (art. 40)¹⁰ However, of the greatest importance for the scope of our analysis is the provision of the art. 39 which obliges the States Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. "Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child." From such a formulation, it is obvious that the CRC sees the right to dignity of a child victim as the wished and expected outcome of the adequate treatment. Despite the lack of the clear provision which inherently provides for the treatment of a child victim in a manner which foster preservation of his/her dignity, it is obvious that exactly this was the intention.

Adopted almost four decades since the Universal Declaration had proclaimed the right to human dignity as the universal value, **United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power** (1985)¹¹ introduced the right to dignity as an essential procedural right of crime victims, providing that under the heading access to justice and fair treatment, victims should be treated with compassion and respect for their dignity. "In fact, the first and most fundamental need for victims is recognition. Human dignity is a fundamental right. Treating victims with compassion and with respect for their dignity is a fundamental aspect of providing victims with justice. For many

⁸ Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

⁹ "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom..."

¹⁰ "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

¹¹ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), Adopted by General Assembly resolution 40/34 of 29 November 1985.

victims, it is important that they are recognized as a victim, and that their suffering as the result of a wrongful act against them is acknowledged.” Declaration also recognizes an importance of the right of victim to “be treated with dignity and respect in all interactions with the police or investigating authorities, legal professionals, judicial staff and others involved in the judicial process: procedures and communications should be ‘victim sensitive’ and those interacting with victims should seek to act with empathy and understanding for their individual situation.” However, the Declaration does not limit the validity of this right exclusively to these situations. Contrary, it provides that “the same applies in terms of the way in which victim support or social services should treat victims”, listing some examples of disrespectful treatment, e.g. setting a trial date without consulting the victim first so that it may be impossible for the victim to attend; not providing the victim with privacy during an examination; or questioning the victim in an inappropriate or blaming way. Respectful treatment is particularly important for vulnerable victims, including for: children; victims of sexual and gender-based violence; victims of domestic violence; the elderly; and disabled persons, for example. It is equally important that indirect victims, including family members, are treated with respect.

In the same spirit, but a specially adjusted to the needs of child victims is the content of the **United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime**¹² and the particular attention should be paid to its statement that “every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected”(par. 8(a)) as well as on the Section V, which rules the right to be treated with dignity and compassion and provides that: “Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity. Every child should be treated as an individual with his or her individual needs, wishes and feelings.” Defined like this the right to dignity should be understood like a manner of treating child victims.

The right to dignity has been incorporated also in some of new human rights instruments of a new generation, like the **International Convention for the Protection of all Persons from Enforced Disappearance (hereinafter: ICPPED)**.¹³ The Convention

¹² United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20, 36th plenary meeting 22 July 2005.

¹³ International Convention for the Protection of All Persons from Enforced Disappearance, Resolution 61/177 adopted by the General Assembly on 20 December 2006, [on the report of the Third Committee (A/61/448 and Corr.2)]

addresses the right to dignity in the several provisions, including those dealing with the collection, processing, use and storage of personal information, including medical and genetic data, which “shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual” (art. 19, par. 2), but also in the art. 24, par. 5(c) where the right to dignity is recognized as a form of reparation (modality of satisfaction) other than compensation for material and moral damages suffered from enforced disappearances, together with restitution, rehabilitation and guarantees of non-repetition.

In addition to the previously elaborated instruments, the right to dignity is incorporated also in the so-called UN soft law. **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**¹⁴ addresses it comprehensively, starting from the Preamble which reaffirms the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity. It also recalls the **Rome Statute of the International Criminal Court** which requires the establishment of “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”, and the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”

The Basic Principles also describes the gross violations of international human rights law and serious violations of international humanitarian as by their very grave nature, an affront to human dignity. In par.10 of this document, the dignity of victims is proclaimed as a general principle/value which frames the whole treatment of victims, prescribing that “victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. In accordance to this general approach, the Basic Principles includes the same approach to the restoration

¹⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, adopted by the General Assembly on 16 December 2005 [on the report of the Third Committee (A/60/509/Add.1)]

of dignity as modality of satisfaction, which fits to the understanding of dignity as a general approach. (par. 22(d)) The outcome of the whole procedure should be restoration of dignity, but also the manner in which this procedure is conducted.

2.2 European human rights instruments

Contrary to the UN instruments, a bit surprisingly, the European Convention on Human Rights (hereinafter: ECHR)¹⁵ does not recognize the right to dignity neither as a universal value, neither as a stand-alone right. The only place where the human dignity is mentioned is the Protocol No. 13¹⁶, which provides that “the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.”

Contrary to this, the **Charter of Fundamental Rights of the European Union**¹⁷ in its Preamble emphasizes that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.¹⁸

Member States shall ensure that victims are recognized and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings.¹⁹ Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognized and treated in a respectful, sensitive and professional manner without discrimination of any kind.²⁰

There is no doubt that the adoption of the **Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council**

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of the SaM – International Treaties, no. 9/03).

¹⁶ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances Vilnius, 3.V.2002.

¹⁷ Charter of Fundamental Rights of the European Union 2012/C 326/02

¹⁸ In the Article 1 of the Charter, human dignity is defined as inviolable and it must be respected and protected. In addition to this general principles, in the art. 25 the human dignity is recognized as the requirement in protecting elderly rights, while in the art. 31 it has been recognized as right of workers.

¹⁹ DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, (art.1)

²⁰ Par. 9.

Framework Decision 2001/220/JHA, was a kind of turning point in the introduction of the brand new EU concept of victims' rights. This Directive respects fundamental rights and observes the principles recognized by the Charter of Fundamental Rights of the European Union. In particular, it seeks to promote the right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of nondiscrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial. (par. 66)

In addition to this general approach, according to the Directive, "persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crime in a Member State of which they are not nationals or residents, should be provided with specialist support and legal protection. Specialist support services should be based on an integrated and targeted approach which should, in particular, take into account the specific needs of victims, the severity of the harm suffered as a result of a criminal offence, as well as the relationship between victims, offenders, children and their wider social environment. A main task of these services and their staff, which play an important role in supporting the victim to recover from and overcome potential harm or trauma as a result of a criminal offence, should be to inform victims about the rights set out in this Directive so that they can take decisions in a supportive environment that treats them with dignity, respect and sensitivity." (par. 38)

The Directive also recognizes an importance of protecting the right to dignity when implementing victims protection measures. "Measures should be available to protect the safety and dignity of victims and their family members from secondary and repeat victimization, from intimidation and from retaliation, such as interim injunctions or protection or restraining orders. (par. 58) Without prejudice to the rights of the defense, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimization, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members." (art. 18)

In addition to the general framework introduced by the Directive (2012)029EU, the right to dignity of victims is also recognized in some instruments dedicated to ensuring special

protection to specially vulnerable categories of victims, like victims of human trafficking. **Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims**,²¹ similarly to the Directive (2012)029EU, this Directive respects fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of slavery, forced labor and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.

It is important to mention that this document recognizes a serious violation of human dignity and physical integrity as a result of trafficking in human beings for the purpose of the removal of organs, as well as, for instance, other behavior such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings. (par. 11)

As earlier mentioned when analyzed the UN CRC, it seems that in the field of the child friendly justice, including child victims, the right to dignity has been recognized and developed more progressively than in others fields. **Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice** (hereinafter: Guidelines).²² Providing that “a child-friendly justice system must not “walk” in front of children, it must not leave them behind” the Guidelines emphasizes that it should treats children with dignity, respect, care and fairness. In attempt to define a child friendly justice, it refers to “justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and

²¹ DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

²² Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)

to integrity and dignity.” The right to dignity is also recognize as a criteria to be taken into account in assessing the best interests of the involved or affected children, where their views and opinions should be given due weight and all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times. This provision should be looked carefully, since it recognizes the right to dignity as a stand-alone right, not just as a framework of exercising other rights, especially in the context of the Section C of the Guidelines, which clearly define the dignity, that is kind of curiosity, having in mind all the earlier elaborated international standards that mostly address it superficially (if tackles it at all). Therefore, the Guidelines provides that dignity means that: “1. Children should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity. This treatment should be given to them, in whichever way they have come into contact with judicial or non-judicial proceedings or other interventions, and regardless of their legal status and capacity in any procedure or case. Children shall not be subjected to torture or inhuman or degrading treatment or punishment.” In the Explanatory memorandum following the Guidelines (par.39) it is underlined that “respecting dignity is a basic human rights requirement”. Defined like this, the right to dignity represent the procedural framework and manner of dealing with children in justice system, including child victims. Obviously, it might be a bit controversial in relation to the above mention recognition of the right to dignity as stand-alone right, but not necessary. Even if we treat it like a stand-alone right, this right should mean and imply, the manner on how the child (including child victim) is treated in justice system.²³ Therefore, it is a kind of hybrid human right.

3. ECtHR jurisprudence in relation to the victims’ right to dignity

As earlier mentioned, human dignity is not a stand-alone right protected by the European Convention on Human Rights, but it is, as a special value or a guiding principle, indicated in numerous judgments of the European Court of Human Rights. Before this Court, human dignity is patronized through the protection of the right to life, the prohibition of torture, the prohibition of slavery and forced labor, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, the freedom of thought, conscience and religion, right to an effective remedy, prohibition of discrimination and other rights proclaimed by the European Convention of Human Rights. Although in a

²³ Police should respect the personal rights and dignity of all children and have regard to their vulnerability, that is, take account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties. (par. 27)

large number of cases the basic human rights of defendants, accused, convicted persons and persons serving sentences are protected, having in mind the position and rights of suspects in relation to victims of crimes in modern criminal proceedings, we will try to summarize the case law of the European Court of Human Rights through cases in which, in addition to the protection of a particular right, the protection of the human dignity of victims of crime is emphasized.

For example, in the case of *Volodina v. Russia*,²⁴ in which the applicant alleged that the Russian authorities had failed in their duty to prevent, investigate and prosecute acts of domestic violence which she had suffered at the hands of her former partner and that they had also failed to put in place a legal framework to combat gender-based discrimination against women. The applicant complained that the domestic authorities had failed to protect her from treatment - consisting of repeated acts of domestic violence - proscribed by Article 3 of the Convention and to hold the perpetrator accountable. She also alleged a breach of Article 13 of the Convention, taken together with Article 3, on account of deficiencies in the domestic legal framework and of the absence of legal provisions addressing domestic violence, such as restraining orders.

Case fact: Valeriya Volodina, alleged that she had suffered a pattern of domestic violence perpetrated by her former partner, Mr. S. Over the course of three years, S. allegedly assaulted, kidnapped, stalked, threatened, stole from, and intimidated the applicant. One particularly hard punch, to her stomach, led to the termination of her pregnancy. S. also allegedly published the applicant's private photographs online and put a secret GPS tracker in her purse. The applicant's police complaints never led to a conviction or any protective measures; in 2018, she legally changed her identity in order to impede S. from finding her. In para 73. of the Judgement, Court, inter alia, stated "Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. An assessment of whether this minimum has been attained depends on many factors, including the nature and context of the treatment, its duration, and its physical and mental effects, but also the sex of the victim and the relationship between the victim and the author of the treatment. Even in the absence of actual bodily harm or intense physical or mental suffering, treatment which humiliates or debases an individual, showing a lack of respect for or diminishing **his or her human dignity**, or which arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, may be characterized as degrading and also fall within the prohibition set forth in Article

²⁴ Case of *Volodina v. Russia*, Application no. 41261/17, Judgement, 9 July 2019.

3. It should also be pointed out that it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others”. In para 75. Court repeated that “...publication of her private photographs further undermined her **dignity**, conveying a message of humiliation and disrespect”. Finally, Court finds that that there has been a violation of Article 3 of the Convention; that there is no need to examine the complaint under Article 13 of the Convention and there has been a violation of Article 14 of the Convention, taken in conjunction with Article 3.

In the case of *Hajdukova v. Slovakia*,²⁵ the applicant alleged that the domestic authorities had violated her rights under Articles 5 and 8 of the Convention by failing to comply with their statutory obligation to order that her former husband be detained in an institution for psychiatric treatment, following his criminal conviction for having abused and threatened her.

Case facts: On 21 August 2001 the applicant's (now former) husband, A., attacked her both verbally and physically while they were in a public place. The applicant suffered a minor injury and feared for her life and safety. This led her and her children to move out of the family home and into the premises of a non-governmental organization in Košice. On 27 and 28 August 2001 A. repeatedly threatened the applicant, inter alia, to kill her and several other persons. Criminal proceedings were brought against him and he was remanded in custody. On 29 November 2001 a public prosecutor indicted A. before the Košice I District Court. The indictment stated that the accused had been convicted four times in the past. Two of the offences had been committed in the last ten years and involved breaches of court or administrative orders. In the course of the criminal proceedings, experts established that the accused suffered from a serious personality disorder. His treatment as an inpatient in a psychiatric hospital was recommended. On 7 January 2002 the District Court convicted A. The court decided not to impose a prison sentence on him and held that he should undergo psychiatric treatment. At the same time, the court released him from detention on remand. A. was then transported to a hospital in Košice. That hospital did not carry out the treatment which A. required, nor did the District Court order it to carry out such treatment. A. was released from the hospital on 14 January 2002. After his release, A. verbally threatened the applicant and her lawyer and they filed criminal complaints against him. They also informed the District Court (which had convicted him on 7 January 2002) about his behavior and of the new criminal complaints they had filed. On 21 January 2002 A. visited the applicant's lawyer again and

²⁵ Case of *Hajdukova v. Slovakia*, Application no. 2660/03, Judgement, 30 November 2010.

threatened both her and her employee. On the same day he was arrested by the police and accused of a criminal offence. The District Court arranged for psychiatric treatment of A. in accordance with its decision of 7 January 2002. He was consequently transported to a hospital in Plešivec. On 7 March 2002 the applicant filed a complaint with the Constitutional Court. She alleged a violation of Articles 5 and 6 of the Convention and of Articles 16 (§ 1) and 19 (§ 2) of the Slovak Constitution, in that the District Court had failed to ensure that her husband be placed in a hospital for the purpose of psychiatric treatment immediately after his conviction on 7 January 2002. In its judgement, in para 22. cited Slovakian Civil Code which in article 11 predicts that “every natural person shall have the right to protection of his or her personal integrity, in particular his or her life and health, civil and **human dignity**, privacy, reputation and expressions of a personal nature”, and in para 39. referring to the earlier judgments of the Slovak courts observes that “...its inadmissibility decision in the case (...) on which the Government seek to similarly concerned circumstances in which a clear affront to the **applicant's dignity** or social standing could be identified, as the complaint in issue centered on Article 6 § 2 of the Convention and the applicant's right to be presumed innocent until proved guilty”. In this case, Court held that there has been a violation of Article 8 of the Convention.

In the case of *Valiuliene v. Lithuania*,²⁶ applicant alleged that the State had failed to protect her from acts of domestic violence. She also complained that the criminal proceedings she had instituted had been futile, given that the perpetrator of the crimes had been left unpunished. The applicant stated that between 3 January and 4 February 2001, she had been beaten up on five occasions by her live-in partner, J.H.L., a Belgian citizen. She submitted that she had been strangled, pulled by the hair, hit in the face and kicked in the back and in other parts of her body.

The applicant's injuries were documented by forensic expert examinations. Each time the experts concluded that the bodily injuries sustained were minor and had not caused any short-term health problems. She requested that the court open a criminal case against J.H.L. and that he be charged and punished under the above-mentioned provision of the Code. The applicant provided a list containing the names and addresses of five neighbors she wanted to call to the court as witnesses. 2005 the Panevėžys City District Court upheld the prosecutor's decision, dismissing the applicant's appeal. The court noted that, under Article 409 of the new Code of Criminal Procedure, a prosecutor had a right, but not an obligation, to initiate a pre-trial investigation. There was no information in the case file

²⁶ Case of *Valiuliene v. Lithuania*, Application no. 33234/07, Judgement, 26 March 2013.

to indicate that the case was of public interest or that the victim could not protect her own rights by means of a private prosecution. In this case, Court, by six votes to one finds that there has been a violation of Article 3 of the Convention and that there is no need to examine the complaint under Article 8 of the Convention. In his concurring opinion, judge Pinto de Albuquerque, inter alia, stated that “European Convention on Human Rights can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women’s lives. In that light, it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at. Physical pain is but one of the intended effects. A kick, a slap or a spit is also aimed at belittling the **dignity** of the partner, conveying a message of humiliation and degradation.”

Finally, in this short analysis of the European Court of Human Rights practice related to human dignity of a victims of crimes, the case of *Mraović v. Croatia* from 2020.²⁷ Case facts: 14 April 2005 I.J., a basketball player with the Gospić Women’s Basketball Club, reported to the police that the applicant had sexually assaulted her. The applicant was arrested on the same day on suspicion of rape. On 15 April 2005 the local police force gave a detailed statement to the media concerning the incident, in which they disclosed the personal details and identity of the victim. This subsequently gave rise to a successful action by I.J. for damages against the State. On 30 June 2005 the applicant was indicted in the Gospić County Court on charges of rape. The proceedings before the Gospić County Court were closed to the public at the applicant’s request, in order to protect the private life of both the applicant and the victim. On 1 December 2005 the Gospić County Court acquitted the applicant. Following an appeal by the relevant State Attorney’s Office, at a sitting held on 14 December 2006 the Supreme Court quashed the first-instance judgment and remitted the case. The public were excluded from the Supreme Court sitting following a request by the applicant, with a view to protecting the private and family lives of the accused and the victim in accordance with section 294(4) of the Criminal Procedure Act. Permission to attend, in accordance with section 294(2) of the Criminal Procedure Act was granted to representatives of the Organization for Security and Co-operation in Europe (OSCE), who had been instructed to keep the contents of the hearings secret. In the resumed proceedings, the case was transferred to the Rijeka County Court. At the first retrial hearing held on 13 September 2007, the applicant requested that the proceedings be conducted in open court. He argued that OSCE representatives had

²⁷ Case of *Mraović v. Croatia*, Application no. 30373/13, Judgement, 14 May 2020.

already attended the sitting before the Supreme Court, and that the victim had given numerous statements to the media concerning the case. He stressed that during the proceedings he had been “continuously stigmatized by the media due to the exclusion of the public” from his case and “the inability of the media to transmit the real and objective state of the presented evidence”. The trial court dismissed the applicant’s request for the proceedings to be heard in open court. The applicant then applied for the recusal of the president of the Rijeka County Court and of the trial judge, claiming that, by dismissing his request for a public hearing, he had been put in a procedurally unequal position in view of the public campaign against him orchestrated by the victim. Referring to relevant international law which proclaiming that “women subjected to violence are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting the privacy, identity and **dignity of the women**; ensure safety during legal proceedings”, “respect the security, **dignity, private and family life of victims** and recognize the negative effects of crime on victims”, “promote the right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of non-discrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial”, Court, inter alia, finds, in para 48, 49 and 53, that its task to “establish whether in the specific circumstances of the applicant’s case the exclusion of the public from the trial before the Rijeka County Court had been justified and necessary. In doing so, the Court is called upon to balance, on the one hand, the applicant’s right to be tried in public and, on the other, the protection of the private life of a rape victim, which includes protecting her **personal integrity and dignity**”, “the importance of the protection of the rights of sexual abuse victims in criminal proceedings. In that sense, the Court subscribes to the assertion that in criminal proceedings concerning such a serious and intimate crime as rape, in line with the applicable international and European Union standards, the exclusion of the public from part or from the entire proceedings may be necessary for the protection of rape victims’ private life, in particular their identity, **personal integrity and dignity**. This might be necessary not only to protect the victims’ privacy, but to protect them from secondary and/or repeat victimization. The foregoing is crucial in order to encourage the victims of sexual abuse to report the incidents and allow them to feel secure and able to express themselves candidly on highly personal issues – often humiliating or otherwise damaging to their **dignity** – without fear of public curiosity or comment”, and “the reasons given by the Rijeka County Court for the exclusion of the public had a clear basis in domestic law, namely section 293(4) of the Criminal Procedure Act, and were aimed at protecting the private life of I.J., in particular **her dignity** and

personal integrity”. Finally, by six votes to one, Court finds that there has been no violation of Article 6 § 1 of the Convention.

4. Serbian penal legislation and the victims’ right to dignity

Since an intensive development of the procedural rights granted to victims by the international treaties and other sources of standards started a few decades in comparison with the procedural rights of the accused, therefore their transposition and implementation in national legal systems still lags behind the rights of the accused. This is also visible from the following analysis of the Serbian penal legislation which comprehensively recognizes the right to dignity as a procedural right of the accused and of the convicted person, but not of the victim/injured person in the criminal proceeding.

Article 157 of the **Criminal Procedure Code** (hereinafter: CPC)²⁸ provides for the obligation of the police to perform the search carefully, respecting the dignity of person and right to intimacy, without unnecessary obstruction of the house rules of order. Article 217 which regulates the treatment of detainees, emphasizes that, during detention the personality and dignity of a detainee may not be insulted. In addition to the dignity of the accused/detained person, the CPC also recognizes the dignity of the court. In the article 370 it is provided that, if the defendant, defense counsel, injured party, legal representative, proxy, witness, expert witness, professional consultant, translator, interpreter or other person attending the trial disturbs the order by disregarding orders of the president of the panel to maintain order or by insulting the dignity of the court, the president of the panel will caution him, and if that person continues to disturb the order, will fine him up to 150,000 dinars.

The right to dignity of the accused is also recognized by the Law on juvenile criminal offenders and the **Criminal Law Protection of Juveniles** (hereinafter: Law on Juveniles). In the art. 89, par. 1 of this law it is stipulated that during enforcement of criminal sanctions the juvenile should be treated in a manner proportionate to his age, apparent maturity and other personal circumstances, with respect to the dignity of the juvenile, encouraging his overall growth and participation in his own re-socialization, adhering to contemporary pedagogical, psychological and penology skills and experience. In the same manner is the provision of the article 122 which provides that the

²⁸ Criminal Procedure Code, “Official Gazette RS”, Nos. 72/11 of 28 September 2011, 101/11 of 30 December 2011, 121/12 of 24 December 2012, 32/13 of 8 April 2013, 45/13 of 22 May 2013, 55/14 of 23 May 2014 and 35/19 of 21 May 2019.

manner of escorting the juvenile in the rehabilitation institution may not violate the juvenile's dignity. Similarly, the article 135 of the same law which regulates the remand of the juvenile to a special institution for treatment and acquiring of social skills stipulates that the manner of bringing and escorting may not violate the dignity of the juvenile.

Criminal Code (hereinafter: CC) recognizes the notion of dignity in its several provisions, not exclusively those that addresses the right to dignity of an accused or sentenced person, but also through the provisions aimed at the protection of the right to dignity of a victim.

In the general part of the Code, art. 52, par. 2, it is provided that "community service is any socially beneficial work that does not offend human dignity and is not performed for profit."

In addition to this, the CC protects this right in through the several provisions of the special part of the Code. Therefore, in the article 137 (Ill-treatment and Torture) it is prescribed that "Whoever ill-treats another or treats such person in humiliating and degrading manner, shall be punished with fine or imprisonment up to one year."²⁹ The Chapter "Sexual offences" provides also the protection of this rights through the provision of the article 182a (Sexual harassment), par. 3 which stipulates that "sexual harassment is any verbal, non-verbal or physical behavior that aims at or constitutes a violation of the dignity of a person in the sphere of full life, and which causes fear or creates a hostile, humiliating or offensive environment."

Finally, the CC recognizes the human dignity in the Article 406, par. 1 (Maltreating of Subordinate or Junior) which provides for punishing a superior officer who in service or in relation to service maltreats a subordinate or serviceman of junior rank or treats them in a way that offends dignity.

However, it is important to mention that, despite the fact that the CC does not include the Chapter "Crimes against the human dignity and moral"³⁰ introduces in our criminal

²⁹ Even the human dignity is not mentioned in this official translation available at: <https://www.propisi.pravno-informacioni-sistem.rs/?lang=en>, last accessed on September 16, 2020, in original, Serbian version of the text, it exists: "(1) Ko zlostavlja drugog ili prema njemu postupa na način kojim se vređa ljudsko dostojanstvo, kazniće se zatvorom do jedne godine." Therefore, the proper translation could be also: "Whoever ill-treats another or treats such person in a manner that insults his/her dignity, shall be punished with fine or imprisonment up to one year."²⁹

³⁰ SRB: Krivična dela protiv dostojanstva ličnosti i morala

legislation in 1951, since it has been renamed in “Sexual Offences”³¹ the Law on Contracts and Torts (hereinafter: LCT)³² has kept “the old” notion of dignity. More precisely, article 202 stipulates that a person who has been frauded, coerced or abused into a relationship of subordination or dependence on a punishable act or a criminal act of fornication, as well as a person against whom another crime against the dignity of person and morals has been committed, has the right to fair monetary compensation for mental pain.

To summarize, neither CC, CPC, Law on Juveniles, Law on Enforcement of Criminal Sanctions or the Law on the Prevention of Domestic Violence do not recognize the right to dignity of the victim in terms of its procedural rights, but exclusively through the criminal protection of the human dignity as a human right, through the very limited circle of the offences.

5. The right of victims to be publicly recognized as victims, media treatment and their right to human dignity

5.1 The right of victims to be publicly recognized as victims

The right of crime victims to be treated with due respect in a manner which does not jeopardize their human dignity is not exclusively associated with the way on how the authorities and other participants in criminal procedure should act. It is also closely connected with the right of victims to be publicly recognize in that status. While some of them prefer to enjoy this important part of non-material (symbolic reparations), some other rather chose to “close this life chapter” as soon as possible and to continue their previous life. In both scenarios, media plays an important role.

For victims of certain categories of crimes, such as war crimes, enforced disappearances, terrorism, politically motivated crimes, etc. public recognition and recognition of victim status is often more important than recognition of that status in criminal procedure. The reason for that could be found in the “true telling” approach to an epoch and/or events that marked it. This also well recognized by the Victims Directive (par.16) which, as earlier mentioned, underlines that “victims of terrorism have suffered attacks that are intended ultimately to harm society. They may therefore need special attention, support and protection due to the particular nature of the crime that has been committed against

³¹ SRB: Krivična dela protiv polne slobode

³² Law on Contracts and Torts, “Official Gazette SFRY nos. 29/78, 39/85, 45/89, 57/89, “Official Gazette SRY no. 31/93, “Official Gazette SM no. 1/2003

them. Victims of terrorism can be under significant public scrutiny and often need social recognition and respectful treatment by society. Member States should therefore take particular account of the needs of victims of terrorism, and should seek to protect their dignity and security.”

For others, such as victims of rape or domestic violence, media exposure in the context of victimization brings a long-standing stigma that is difficult to break. What further aggravates the situation is the fact that the victim his/herself often has almost no influence on the quality and quantity of media attention paid to the case that led to victimization, as information reaches the media from various sources, often by “leaks” from the police, judiciary, but also from health and social care institutions. Finally, the unwanted amount, but also the modality of the victim's media exposure, are often related to his/her ignorance of his/her rights and obligations in terms of communication with the media.

Whether a victim choose public exposure or privacy, the way on how the whole case and a victim itself is treated by media is of the crucial importance to save his/her dignity.

5.2 Media legislation and the right to dignity

The **Law on Public Information and Media** (hereinafter: LPIM)³³ stipulates in the Article 74 that “information from ongoing criminal proceedings may be published if presented in the main hearing or providing that it has been obtained or that it may have been obtained from a public governmental authority on the basis of the law regulating access to the information of public importance. In addition to this, in the Article 77, it is prescribed that with a view to protecting the free development of the personality of a minor, special attention must be paid so that the media contents and media distribution method do not harm the moral, intellectual, emotional or social development of minors. LPIM insists on the protection of human dignity of persons to which information pertains shall be legally protected and defines the human dignity as honor, reputation, i.e. veneration. The law prescribes that Publishing of the information whereby the honor, reputation or veneration is injured, i.e. a person is presented in a false light by ascribing the attributes or characteristics that he/she does not possess, i.e. by denying the attributes or characteristics that he/she possesses, shall not be permitted where the interest to publish the information does not outweigh the interest to protect the dignity and right to

³³ Law on Public Information and Media, “Official Gazette RS”, br. 83/2014, 58/2015 i 12/2016.

authenticity, and in particular where that does not contribute to a public discussion on a phenomenon, event or person to which the information pertains.

Dignity of the victim of violence must not be injured by displaying or describing the scene of violence in a medium or in the media contents. Caricatural, satirical, montage and other similar displaying of faces shall not be considered an injury to dignity, i.e. to the right to authenticity. (Art. 79)

The law regulates in detailed an issue of the protection of the information relates to the private life and private records (a letter, diary, note, digital record and the similar), a record of an image (photographic, drawn, film, video, digital and the similar) and a record of a voice (tape recorded, phonographic, digital and the similar), conditioning their publication with the consent of the persons to whom they relate³⁴, or other persons³⁵, prescribing a number of situations³⁶ when publication is possible without consent, of

³⁴ A piece of information from the private life, i.e. a personal record (a letter, diary, note, digital record and the similar), a record of an image (photographic, drawn, film, video, digital and the similar) and a record of a voice (tape recorded, phonographic, digital and the similar), may not be published without the consent of the person to whose private life such information pertains, i.e. of the person whose words, image,

³⁵ If the person referred to in Article 80, paragraphs 1, 2 and 4 of this Law died, the consent shall be provided by the spouse of the deceased, by the child from the age of sixteen independently, by a parent, brother, sister, legal person that the deceased participated in (a body, member, employee) where the information, i.e. record pertains to his/her participation in such a legal person or by the person that the deceased has designated for such a purpose.

The right of the participant in the legal person to whom the information, i.e. records pertains personally shall not terminate with termination of the legal person. It shall be considered that the consent has been provided as soon as it is provided by one of the persons referred to in paragraph 1 of this Article, irrespective of the refusal of other persons to provide it. (art. 81)

³⁶ Exceptionally, the information from private life, i.e. a personal record may be published without the consent of the persons referred to in Articles 80 and 81 of this Law if in the particular case the public interest in disclosure of the information outweighs the interest in preventing the publishing thereof. In particular, it shall be considered that the public interest referred to in paragraph 1 of this Article outweighs the interest to prevent publishing of the information from private life, i.e. of a personal record of the person: 1) if that person has intended the information, i.e. the record for the public, i.e. delivered it to the medium with the aim of publishing it; 2) if the information, i.e. record pertains to the person, phenomenon or event of public interest, in particular where it pertains to a holder of a public office or political function, and publishing of the information is in the interest of national security, public security or economic wellbeing of the country, for the purpose of preventing disorder or crime, protection of health or morality, or protection of other persons' rights and freedoms; 3) if the person has attracted the attention of the public by his/her public statements, i.e. behaviour in his/her private, family or professional life and has thus given rise for publishing of the information, i.e. record; 4) if the information has been communicated, i.e. if the record was made in a public parliamentary discussion or in a public discussion in a parliamentary body;m5) if the publishing is in the interest of judiciary, national security or public security; 6) if the person has not objected to acquiring of the information, i.e. making of the record, although he/she was aware that that was done for publication purposes; 7) if the publication is in the interest of science or education; 8) if the publication is necessary to warn against danger (prevention of a contagious disease, finding of a missing person, prevention of fraud, etc.); 9) if the record pertains to a multitude of images or voices (fans, concert audience, protestors, passers-by in a street, etc.); 10) if it is a record from a public gathering; 11) if the person

which, in terms of victims' rights, the most important is those related to the situation in which that person intended the information or record to the public, i.e. provided it to the media for the purpose of publication or if the person did not object to obtaining information or recording, even though he knew that it was done for publication. (art. 80)

In addition to the mechanisms related to the right of the persons whose right has been violated by the publication of information to request publishing of the correction (art. 88-100 LPIM) the Law regulates in detail the mechanisms related to the judicial protection in cases where by publication of the information, i.e. of a record the presumption of innocence, prohibition on hate speech, rights and interests of minors, prohibition of public displaying of pornographic contents, right to personal dignity, right to authenticity, i.e. right to privacy is violated pursuant to the provisions of the Law.

The following may be requested by a claim:

- 1) determining that a right, i.e. an interest, has been infringed by publication of the information, i.e. of a record;
- 2) a failure to publish, as well as prohibition of repeat publishing of the information, i.e. record;
- 3) handing in of a record, removal or destruction of a published record (deletion of a video record, deletion of an audio record, destruction of a negative, removal from publications, and the similar).

The following persons have an active legitimization to submit a claim:

- 1) A person who is personally injured by publication of a piece of information, i.e. of a record shall be entitled to file a claim referred to in Article 101.
- 2) A legal person whose business activity is aimed at protecting human rights in cases of violation of a prohibition of hate speech and rights and interests of

is presented as a part of a landscape, nature, panorama, inhabited place, square, street or as a part of similar scene. (Art. 82)

minors (the consent of the person to which the piece of information pertains only) (arts. 101-102 LPIM)³⁷

The person referred to in the information the publishing of which is prohibited in compliance with this Law, who has suffered damage due to the publishing thereof, shall be entitled to compensation of material and non-material damages in compliance with the general regulations and provisions of this Law, independently from other means of legal protection available to such a person in compliance with the provisions of this Law. The person to whom no reply, correction or other information, the publishing of which has been ordered by a decision of a court of relevant jurisdiction, has been published, and who suffers damage due to such non-publishing, shall also be entitled to compensation of damage. (Article 112 LPIM).

In 2009, self-regulatory mechanisms of the media were established, with the adoption of the **Code of Journalists of Serbia** (hereinafter: the Code)³⁸, as well as the establishment of the Press Council (hereinafter: the Council) and its Press Complaints Commission.

The Code significantly specifies the provisions on privacy, dignity and integrity of persons to whom the published information relates, giving specific guidelines for reporting accidents and crimes, while not allowing the publication of names and photographs of victims and perpetrators that clearly identify them. Also, it is not allowed to publish any data that could indirectly reveal the identity of either the victim or the perpetrator, before the competent authority officially announces it. "A journalist must have an awareness of the power of media, or the possible consequences for the victim or the perpetrator, if their identity is disclosed. They must take into account, in particular, the weight of the possible consequences in case of any errors / incorrect assumptions in

³⁷ The person whose right would be violated by publication of the information, i.e. of a record referred to in Article 101 of this Law may request that the court, through an interim measure, and until the final completion of the proceedings at the maximum, prohibit the editor in charge to re-publish the same piece of information, i.e. record. The person filing a claim must make plausible that there is concrete danger that the piece of information, i.e. the record be published again, as well as that by the repeat publication of such piece of information, i.e. of the record, his/her right or interest referred to in Article 101 of this Law would be violated. The court must decide on the motion for determining an interim measure without any delay, and within 48 hours from the submission of the motion at the latest. An objection against the decision on determining an interim measure shall be filed within 48 hours from the receipt of the decision, and the court shall decide on the objection within 48 hours. (Art. 104) In addition to the claim referred to in Article 101, items 2) and 3) of this Law, as well as in addition to the motion for temporary prohibition of re-publication of the information referred to in Article 104 of this Law, the court of relevant jurisdiction may be requested to threaten the editor-in-charge with payment of an adequate monetary amount to the plaintiff if he/she acts contrary to the court decision. (art. 105)

³⁸ Serbian Journalists' Code of Ethics available at: <http://www.savetzastampu.rs/english/serbian-journalists-code-of-ethics/105/2015/11/03/serbian-journalists-code-of-ethics.html>, last accessed on August 26th 2020.

reporting. Even if the relevant state authorities publish information which are in the domain of privacy of the perpetrator or the victim, the media must not transmit that information. The error of the state authorities does not imply “permission” for the violation of ethical principles of the profession.” (Chapter VII of the Code)

The Code especially raises an attention to the specificity of the conditions the specificity of the situation preceded by victimization, stating that, in reporting on events involving personal pain and shock, the journalist is obliged to adjust his questions to reflect the spirit of compassion and discretion, while photographers and cameramen are obliged to crimes, treats with consideration and compassion.

The Code also prescribes an obligation of a journalist to ensure that a child is not endangered or placed at risk due to the publication of their name, photograph or recording with their image, house, the community in which they live or recognisable surroundings. (Chapter VII, par. 4 of the Code) The Code here recognizes the problem of lack of knowledge about the influence of the media on the part of representatives of state and public institutions dealing with child protection, who are sometimes unaware of the influence of the media and the way they work. “The information that they provide to journalists often involves disclosure of the identity of juveniles. A journalist must not abuse their good intentions or ignorance. Information received from doctors, social workers, teachers, and so on, which directly or indirectly refers to the identity of juveniles, must not be published.” (Chapter VII, par. 4 of the Code)

5.3 The right of a victim (not) to communicate with a media

Often, the source of numerous “harmful” information about the circumstances of the crime and the victim him/her self, is the victim himself (and / or his family and other close persons). The initial vulnerability caused by a state of shock, pain and fear, as well as insufficient awareness of rights and duties, make the victim susceptible to abuse. Due to the lack of adequate knowledge on the part of journalists, or due to conscious manipulation of the race for exclusivity, the victims are not presented with the positive and negative sides of media appearance, both in terms of efficient criminal proceedings and the need for rehabilitation and the preservation of the privacy and dignity.

When it comes to journalists, the Code of Journalists of Serbia contains clear and specific provisions that indicate the need to protect the interests of victims. Chapter IV, par. 3 of the Code it is provided that “victims and suspects are often not aware of the power of the media. A journalist is obliged to take that into consideration, and not to abuse the

ignorance of their collocutors. If a victim of a crime consents to be interviewed, a journalist must not reveal the identity of the victim or a possible perpetrator, on the basis of that conversation.” The Code also prohibits a usage of inappropriate, disturbing, pornographic and other content that may have harmful effects on children.³⁹ “A journalist is obliged to respect and protect the rights and dignity of children, victims of crimes, persons with disabilities and other vulnerable groups.” (par. 4-5)

5.4 Some recent cases of the harmful reporting on victims which affected their human dignity

5.4.1. “The Malča Barber”⁴⁰

Case facts: Twelve-year-old girl M.K disappeared on December 20, 2019 at 7.28 minutes, exactly 8 minutes after she left her family home and headed to the next village for school. As every day, M.K. went to school alone, the same way. The girl's teacher from the school, who told the police that she saw M.K. that morning on the road she always walks, also testified about that. The recordings from the security cameras of one facility, which is located about 500 meters from the girl's house, also testify to that. The video also showed a suspicious car behind the girl. The girl walked further down the street, and as it is assumed on the part of the street about 100 meters long, where there are no cameras, there are high fences on one side, and on the other field, the girl was abducted. The following security cameras are located at the entrance to the village and they would have to record the girl if she had passed there, but she was not on those recordings. Because of all that, it was considered that someone kidnapped the girl and drove her away.

After ten days of extensive search, including a large mobilization of the police and military forces numerous associations and a self-organized groups of citizens, accompanied with an appeal for help from her family and numerous false reports, the girl was found. A week after she was found, man who had abducted her, Ninoslav Jovanović, was arrested. Since he is the multiple recidivist, this was the forth time he was arrested for similar crime. Moreover, his atrocities are well-known, to the extent that he got the

³⁹ See more in: Stevanović, I. (2017) THE RIGHT TO PRIVACY OF THE CHILD AND MEDIA IN THE REPUBLIC OF SERBIA In the context of the protection of children labour abuse and exploitation, In: *Freedom, Security: The Right to Privacy*, (pp. 265-288). Novi Sad: Provincial Protector of Citizens - Ombudsman, Institute of Criminological and Sociological Research, ISBN 978-86-89417-04-3 (PZG) ISBN 978-86-80756-07-3 (IKSI).

⁴⁰ SRB: Malčanski berberin

nickname “The Malča Barber” since his deviant fetish of hair cutting young girls prior to rape them.

Considering all of this, but also all the relevant international standards and domestic legislation, it was expected to have at least professional if not deeply respectful reporting on the case. In reality, the situation was totally different. It started with the media speculations that the girl “the girl must have run away to get married since she is Roma girl and they simply act in that manner.” Once the police announced that she was abducted, and the identity of the girl was publicly announced to foster the search, media started a vulturous hike to the victim’s home, neighbourhood, school, but also, to all the places where some of traces were found. This approach was followed by inappropriate description of the objects found and used to torture the victim. Finally, the situation culminated when girl was found and several tabloids published her photos from the ambulance, showing the injured, terrified, exhausted, with her hair dramatically cut off, followed by the scandalous headlines describing the number and modalities of rape and torture she suffered.

The public reaction was strong and immediate, starting from the ordinary citizens on social networks, via human rights defenders, academic community, media associations and politicians. Within a months, the Press Council received as many as 25 complaints, which were sent by the girl's parents, various organizations, but also citizens. The members of the Complaints Commission of the Press Council unanimously made the decision that five daily newspapers violated several provisions of the Code of Journalists of Serbia in their articles about the abducted girl. According to the members of the Complaints Commission, the dailies Alo, Kurir, Informer, Srpski Telegraf and Blic, as well as their portals, violated several points of the Code of Journalists of Serbia. In a series of articles about the abduction that stirred up the public, **journalists did not respect the dignity of children and victims of crime**, their integrity and the ban on revealing the identity of children. Several texts also violated the provision that refers to the abuse of other people's emotions by transmitting the statements of the kidnapped girl's family.⁴¹

5.4.2 The murder of Strahinja Stojanović

Case facts: On September 13th 2020, all the media promptly reported on the car explosion of the luxurious car on the street 15minutes after noon. It was reported that two persons were in the moving car in the moment of explosion. Shortly after the initial news the most

⁴¹ See more at: <http://www.savetzastampu.rs/english/minutes-of-session-of-the-commission>

of the tabloids reported that the driver Strahinja Stojanović (30) has just died in the hospital despite the great efforts of the medical team to save his life. Together with reporting on his name, the media reported that “Strahinja was well known to the police, and in the media he was associated with brothers Branislav and Slobodan Šaranović from Montenegro, who were liquidated in a brutal mafia war that has been raging for years between Montenegrin clans. Stojanović also appeared as a witness at the trial in the case of the murder of Nikola Bojović, Luka Bojović’s brother, who had been at war with the Šaranović for years.”⁴²

Similarly to the case of the Malča barber, scandalous headlines appeared, but this time immediately after the explosion occurred. The tabloids published the main facts on the explosion inviting readers, in the same text, to take a look at the news “to see the photo of dying Strahinja laying down the road and his girlfriend trying to save his life.” The same photo which included described content was published in all the tabloids, almost at the same time followed by the detailed description of the medical procedure conducted by the medical team (both legs amputation) prior to the death.

Contrary to the reasonably expected shock or protest of the public due to the fact that the moving car was remotely detonated in the middle of the day, where young man was killed and his girlfriend was injured, followed by the massive media attack on the victim’s dignity, the public reaction was completely opposite! Triggered and/framed by the promptly announced criminal background of the victim, it was almost impossible to found any public concern relating to abovementioned issues. Moreover, a dozens of comments were posted on the media portals and the social networks saying that “the members of mafia certainly deserve that” or commenting on the moral and ethical profile of the victim’s girlfriend and the family. None of media associations, neither the Press Council has reacted upon this.

6. Does the right to human dignity equally applies to all victims?

If we try to perceive the both cases in the light of relevant international standards addressing the human dignity of victims, but also in a view of the Serbian positive legislation (penal, but also those applying to media) it is not so hard to see that there is:

⁴² See more at: <https://www.en24news.com/2020/09/strahinja-was-the-owner-of-the-car-plot-not-a-criminal-sonja-told-at-the-hearing-what-was-happening-on-the-day-when-stojanovic-was-killed.html>, last accessed on September 15th 2020.

- An obvious gap in terms of the efficient and effective transposition and implementation of the relevant international standards in Serbian legislation. This gap is even a more problematic when it comes to the penal legislation compared with the media regulations and needs to be addressed as soon as possible to ensure a proper protection of human dignity for all victims in practice.

- A serious practice of the violation of the victim's right to dignity, followed by an absence of the reaction of the authorities in charge of criminal prosecution. This keeps the violations in the sphere of the professional code of conduct and eventually some monetary penalties, which are frequently perceived by the editors and the media owners as a "collateral damage" necessary to gain the highest possible circulation.

Finally it shows how much a selectiveness still appears in the public in terms of the perception of the victims' right to dignity, but also in terms of the victims' rights in general. A "freedom" of violating this right, but also the public perception of the need to react upon that are highly affected and determined by the personal characteristics of a victim and/or offender, including nationality, age, sex, family and professional background and a previous private life, despite the widely proclaimed principle of non-discrimination. This shows that the problem significantly surpasses a legal scope and requires a continuous and comprehensive social reaction, focused not only on adjusting legislation and implement it through the prosecution and a proper penalties, but also through the widest possible awareness raising activities aimed at changing a perception of victims and their rights in the society.

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Laura Stanila*

| THE RAPE CRIMES VICTIMS' RIGHT TO DIGNITY

With the present study the author aims to raise important questions on the right to dignity from a very specific perspective: that of the rape crimes victims. The rape crimes victims face a triple victimization process: as victims of a very serious crime – rape, as victims of the judiciary system, underpreoccupied by their rights and interests, and as victims of the society which, due its lack of culture and education, blames them for the crime.

In this context, the fundamental right to dignity appears as underpreserved and underprotected, with no serious preoccupation for a change in this perspective.

Several decisions of the ECHR emphasize the lack of the Romanian Courts' rationale marking a change of the victimization paradigm in the Romanian judicial procedure of indictment and conviction of the rapists.

Keywords: right to dignity, victimization, rape, victim, blame

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I. The right to dignity: is it still worth to talk about it?

Human dignity has been one of the most intriguing value, the foundational principle of choice of both international human rights law and domestic constitutional rights provisions since the end of the Second World War. Scholars have shown that, in spite of widespread international agreement on the importance of the principle, there is a significant degree of confusion regarding what it demands of law makers and adjudicators, and considerable inconsistency in its formulation and application in domestic constitutional law.¹

Viewed as the central value underpinning the entirety of international human rights law, human dignity is invoked in the Preambles to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention on the Rights of the Child (UNCRC), all these documents referring to as the foundation of freedom, justice and peace in the world, all rights deriving from the inherent dignity of the human person.

It is peculiar that human dignity is not expressly mentioned in the European Convention on Human Rights (ECHR) or the treaties of the European Union, still both ECtHR and European Court of Justice have managed to discuss and explain it in their caselaw. Human dignity has been stated to be “the very essence” of the ECHR² and to constitute the value underlying European Union equality legislation.

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. That is, a fully autonomous person has the freedom to develop physically, mentally, socially, and spiritually as he or she chooses and, conversely, this full development of the personality contributes to each person's autonomy.³

¹ Conor O'Mahony, *There is no such thing as a right to dignity*, *I*CON* (2012), Vol.10, no. 2, 551-574, doi:10.1093/icon/mos010, p. 551.

² *Pretty v. United Kingdom*, *Application no. 2346/02*, Judgment 29 April 2002, retrieved from [[https://hudoc.echr.coe.int/fre#{"itemid":\["001-60448"\]}](https://hudoc.echr.coe.int/fre#{)].

³ Madison McGuirk, Brianna Mills, *Climate Change and the dignity Rights of the Child*, The Dignity Rights Project, retrieved from [https://www.ohchr.org/Documents/Issues/ClimateChange/RightsChild/Dignity_Rights_Project.pdf].

If most of us can agree that human dignity is a very important value, why there is so little agreement on what the concept actually entails?

While the concept of human dignity as a fundamental and foundational value which acts as a source of and justification for human rights receives broad support internationally, the concept of dignity as a human right in itself is less enthusiastically embraced in domestic legislation and the doctrine.⁴

Oxford English Dictionary defines dignity as “*the state or quality of being worthy of honor or respect*”. The basic premise here is that there is something in our status as humans that makes us worthy of respect⁵.

Human Dignity was qualified as a “right to rights”⁶ a simple and frank image of its substance and meaning and accepting it as a foundation for all the human rights, dignity becomes a centerpiece of the fair trial, both for the suspect/indicted person and the victim.

And, as we are going to disclose in the following, in specific cases of rape, the dignity of the victim does not exist, making all of her/his procedural rights fade.

II. Dignity in the light of rape crimes: the Romanian victimization paradigm

In the autumn of 2016, the Târgu Bujor Court, from Galați County, sentenced a man to three years in prison for committing the crime of sexual intercourse with a minor. The victim was 11 years old, and the defendant was a relative of his mother.

Also in 2016, the Ploiești Court sentenced a 53-year-old man to five years in prison for having sex with a minor. The victim was 12 years old.

At the beginning of 2017, the Constanța Court changed the legal classification to sexual intercourse with a minor in the case of a homeopathic doctor sent to court for raping two girls, aged 11 and 13.

⁴ O’Mahony, cited, p. 561

⁵ Harvey Slade, *What is Dignity and What Does it Have to Do With Our Rights?*, EachOther 7 August 2017, retrieved from [<https://eachother.org.uk/what-is-dignity-and-what-does-it-have-to-do-with-our-rights/>].

⁶ Christoph Enders, *The Right to have Rights: The concept of human dignity in German Basic Law*, Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito 2(1): 1-8 janeiro-junho 2010, doi: 10.4013/rechtd.2010.21.01, p. 3.

In 2018, at the Târgu Jiu Court, a man was sent to trial for continuous rape, but ended up sentenced to three years in prison for sexual intercourse with a minor. Also at the Târgu Jiu Court, a 34-year-old teacher who sexually abused a 12-year-old student was convicted for the same crime: sexual intercourse with a minor.

Other and other cases in which acts of sexual abuse committed against children are being prosecuted with this classification through the courts: sexual intercourse with a minor.

In many of these cases, the Romanian Courts considered that victims aged 7, 9, 11 or 13 have given their consent to have sex with their abusers. If there are no traces of physical coercion to prove that the victim resisted, judges tend to adopt a legal framework based on the idea that there was a form of consensus between the abuser and the abused.

The trend can be seen in the statistics of the Romanian Superior Council of Magistracy: 2037 - this is the number of cases that have reached, in the last five years, in the Romanian courts regarding the crime of sexual intercourse with a minor, according to data obtained by the publication Dela0.ro. In almost half of them, the victims were under 15 years old. During the same period, 355 rape cases in which the victim was under 16 were decided⁷.

Sexual abuse (involving minors under the age of 15) allegedly consented to is three times more, in the same period of time, than those produced by coercion. This is, most of the times, the standard of judgment of the Romanian justice in such cases: if there are traces of physical coercion, it falls into rape, if not - to sexual intercourse with a minor. In a few cases, secondary factors are taken into account, such as the possibility of mental constraint or the victim's inability to fully understand the consequences of his decisions.

Romanian Courts seem to act with prejudice stating in their judgments either that the victim consented despite evidence of moral constraint, or that the victim accepted the defendant's affectionate statements, or that the victim did not oppose to the defendant acts.

It is a fact that minor/female victims are constantly humiliated by the judicial bodies, being blamed for their curiosity, independence or appearance and clothes. The acts of the

⁷ Diana Oncioiu, *Dreptate strâmbă: 3 din 4 cazuri de acte sexuale cu victime copii sunt judecate în instanțele românești ca fapte consimțite* [Crooked justice: 3 out of 4 cases of sexual acts with child victims are tried in Romanian courts as consensual facts], Dela0.ro, 19 November 2020, retrieved from [<https://beta.dela0.ro/acte-sexuale-victime-copii-judecate-fapte-consimțite/>].

was ashamed to talk about what happened and also afraid to tell her parents because she was threatened by J.V. that he would beat her if she would tell anyone. As a result of the sexual abuse, the applicant got pregnant and, following the decision of her parents, she was later subjected to a surgical interruption of pregnancy.

The applicant M.G.C. reported that the authorities violated their obligation to protect her from inhuman and degrading treatment and to protect her right to have her privacy respected, in a lawsuit involving a crime against sexual life. The Romanian courts have decided that she gave her consent for sex with a man who was almost five times her age.

J. V., the 52-year-old agresor was tried by the Deva Court for the crime of sexual intercourse with a minor, not rape, and was sentenced to three years in prison by the court of first instance.

Judges refused to change the indictment to rape because M.G.C. continued to go, after the first sexual contact, to the neighboring yard, instead of avoiding the meetings with the defendant, whom she knew would be there. In addition, according to the court, the victim did not say anything to the parents. "If the sexual intercourse had taken place by coercion or taking advantage of its impossibility to defend itself or to express its will, certainly the civil party would not have continued the same previous habits" noted one of the judges.

On appeal, the court decided to change the classification to rape and sentenced the man to four years in prison. The Hunedoara Court emphasized that in Romanian law the total lack of discernment up to 14 years was presumed. As a result, up to the age of 14, the minor could not express a valid consent, being unable to express his/her will.

However, the legal situation of the case was modified again by the Alba Iulia Court of Appeal. The judges considered that the presumption of lack of discernment applied only if minors under the age of 14 committed criminal acts, while, in the present case, the minor was not the perpetrator, but the injured party! Beyond this, the Alba Iulia Court also noted that the initiative for sexual intercourse was often taken by the 11-year-old, who was briefly dressed. Taking all these things into account, the Appeal Court returned to the decision given by the court of first instance - three years in prison for sexual intercourse with a minor.

The Romanian Government submitted a large number of judgments in order to illustrate the practice of the domestic courts in the matter of the crime of sexual intercourse with a minor: twelve domestic court judgments (adopted between 2009 and 2013) follow the

approach that the capacity to express valid consent on the part of a victim of sexual abuse who is a minor was to be determined in accordance with the particular circumstances of each case. In the majority of these cases, victims aged between eleven and fourteen years old were considered to have agreed to sexual acts with older men – including anal and oral sex – based on elements such as the fact that they had not told their parents, they had not screamed for help or that they had agreed to accompany the perpetrators to various places where the acts had taken place. In some of the cases discrepancies between the statements given by the victims at various stages of the proceedings were also considered to constitute an element proving their consent. In the two most recent judgments, the courts ordered psychiatric expert reports on responses to specific questions formulated in advance by the judges in order to assess the victim's capacity to express valid consent to the sexual act. In four domestic court judgments (adopted in 2012 and 2013) the courts stressed the fact that victims of six, eight, nine and twelve years old could not express valid consent to sexual acts due to their young age, and convicted the perpetrators of rape. For example, in the case of a twelve-year-old girl raped by her uncle, the Olt County Court stated "Even assuming that the victim ... agreed to the sexual acts, her consent was not valid because of her young age ...". The remaining sixteen judgments submitted by the Government concerned convictions of rape in cases where the perpetrators had used physical violence (in ten cases victims were hit or knives were held to their throat) or threatened the victims (in six cases there were threats that they would be killed or that their parents would be told that the victims allegedly agreed to have sex with the perpetrators). In four of these cases the victims' young age (between eleven and fourteen years old) was an additional element taken into consideration by the judges in determining the lack of valid consent to the sexual acts. In only five cases had the courts requested forensic or neuro-psychiatric evaluations of the victims.

In May 2015 the Romanian non-governmental organisation Center for Legal Resources (*Centrul de Resurse Juridice*) issued a report on the situation of children in the Romanian justice system (*"Justice in the interest of the child – perspectives and experiences of specialists from Romania, 2012"*). The report was drawn up following research and interviews conducted between 2013 and 2014 with people working within the justice system and concluded that children's rights were not adequately protected within the justice system in Romania. The report stated that children were often re-victimised and confronted face-to-face with the perpetrators, were not offered any psychological counselling, and their vulnerability and individual needs were not taken into consideration. Cases of humiliation of girl victims and offensive attitudes towards them during hearings were also reported. In this respect the report quoted: "Numerous

specialists from the social services reported cases in which adolescent victims of trafficking or sexual violence had been treated in a humiliating and aggressive manner by the prosecutors, the employees of the forensic institutes, or in court⁷⁹. Later in the report it was suggested that some of the judges sitting on the panels in the courts for minors had not necessarily had special training on how to deal with cases involving children.

The ECtHR found that in the trial of the case in which M.G.C. was an injured party, the courts lacked direct evidence and did not take into account the applicant's psychiatric assessment, which shows that the minor had difficulty in anticipating the consequences of her actions. Due to his young age, M.G.C. did not have enough discernment. Despite this psychiatric report, the courts chose to build the judicial truth only on the statements of the defendant and of the witnesses close to the defendant. Another finding made by the ECHR is related to the inability of the courts to have a child-friendly approach in the trial.

The Court noted from the examples of case-law submitted by the parties in the present case that the Romanian courts were united in the opinion that a minor victim's consent to sexual intercourse must be determined on a case-by-case basis. However, the issue lies with the courts' practice in analysing the existence of consent and their difficulties to adopt a child-sensitive approach in the assessment of the facts of the cases before them. More specifically, the majority of the convictions for rape were adopted in cases involving violence (see paragraph 35 above). In a significant number of cases, the victim's consent to the sexual acts was inferred from facts which were more akin to child-specific reactions to trauma, such as the fact that the victims did not tell their parents or did not scream for help (see paragraph 33 above). In less than half of the examples had the judges ordered psychiatric or psychological examinations of the victims in order to verify the existence of their capacity to give valid consent to the sexual acts (see paragraphs 33, 35 and 36 above). In very few of the cases submitted as examples – four, to be precise – did the courts consider that victims could not have expressed valid consent due to their very young age, ranging from six to twelve years old (see paragraph 34 above). In view of the above, it cannot be concluded that a settled and consistent practice had been developed by the national courts in order to clearly differentiate between cases of rape and those of sexual intercourse with a minor.

The Romanian authorities were confronted with two conflicting versions of the events and little direct evidence. The Court further observed that the domestic courts, more specifically the court of first instance and the court of final appeal, endorsed the reasoning put forward by the prosecutor without analysing the conclusions of the psychiatric report ordered during the preliminary investigation. In addition, without explaining why, the

domestic courts chose to attach more weight to the statements given by the defendant and certain witnesses, thereby concluding that it was the applicant who had provoked the defendant to have sex with her. The other alleged perpetrators were never heard as witnesses before the courts and hence the applicant's allegations that they had threatened to beat her and also threatened her with a knife, or that they might have had an interest in testifying for J.V. had never been examined. Furthermore, no consideration was given by the courts to the difference in age between the applicant and J.V. or the obvious physical difference between them. The courts also failed to examine whether any reasons existed for the applicant to falsely accuse J.V. of rape.

ECtHR also emphasized that the domestic courts failed to demonstrate a child-sensitive approach in analysing the facts of the case and held against the applicant facts that were, in reality, consistent with a child's possible reaction to a stressful event, such as not telling her parents. This approach was aggravated by the fact that no psychological evaluation was ever ordered by the domestic courts for the purposes of obtaining a specialist analysis of the applicant's reactions from the point of view of her age and to determine the existence of possible psychological consequences of the alleged abuse against her.

Thus the Court thus concluded that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the witnesses who had themselves been accused in the case or were related to those accused. While in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.

ECtHR concluded that there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention and awarded the applicant EUR 9,000 in respect of non-pecuniary damage.

2. Case IC v. Romania 2016¹⁰

On 13 January 2007 the applicant - aged fourteen years and four months at the time of the events - was attending a funeral wake in her village. At around 8 p.m. she went with two girlfriends, P.A. (ten years old) and Z.F.D. (fourteen years old) to fetch some drinking

¹⁰ Case IC v. Romania, Application no. 36934/08, Final judgment 24/08/2016, <https://hudoc.echr.coe.int/eng?i=001-163103#%7B%22itemid%22:%5B%22001-163103%22%5D%7D>.

water at a neighbour's house. On their way, three boys, M.I.C. (fifteen years old), M.S. (fifteen years old) and M.C.S. (sixteen years old), approached the girls. M.I.C. pulled the applicant's arm behind her back, grabbed her head and told her to go with him. The boys took her into the garden of a nearby deserted building, where a man, M.C. (twenty-two years old), was waiting. The three boys left and M.C. pushed the applicant to the ground, partially undressed her and had sexual intercourse with her. In the meantime, another man, A.C.L. (twenty-six years old), arrived at the scene and tried to have sex with the applicant, but was physiologically incapable. A third man, V.F. (thirty years old) was also there. He had also intended to have sexual intercourse with the applicant but finally decided to help her get up, clean and dress herself, and accompanied her back to the house where the funeral wake was being held. Twenty minutes later the applicant's father came looking for her and she told him that she had been raped. He immediately alerted the police.

The applicant underwent a forensic examination by a doctor on 14 January 2007. According to the subsequent forensic medical report, there were no signs of traumatic lesions on the applicant's body and no sperm could be found either. The forensic doctor found signs of pathology which could have resulted from sexual intercourse. Lastly, the doctor mentioned that the applicant was in a state of anxiety and fear, and he recommended psychological counselling and possibly a neuropsychiatric examination.

On 5 March 2007 an additional forensic medical report was issued at the request of the applicant's father. It stated that the applicant presented a psychological disorder caused by a physical and psychological trauma to which she had been exposed on 13 January 2007. The doctor held that, according to the documents presented by the Oradea Psychiatric Hospital, the applicant's condition had required fourteen days of medical care. No signs of pregnancy had been detected. The victim was further repeatedly hospitalised in the Oradea Psychiatric Hospital with an emotional disorder, a sleep disorder and anaemia, among other conditions.

The agresors were tried for sexual intercourse with a minor and attempted sexual intercourse with a minor. The court of first instance, gave the two suspended sentences of one year and four months, respectively one year. The judge justified her decision with the fact that the forensic report did not show any injuries on the victim's body, which could have indicated that she was opposed to the sexual act. Besides, she didn't even cry for help when the boys took her. Taking all these things into account, the court also rejected the moral damages demanded by the injured party. On appeal, the Bihor Tribunal

increased the sentences to three years and one year and six months and established moral damages of 2,000 lei (approx. 400 EUR).

ECtHR shows that the first instance reconstituted the events of that evening only on the basis of the statements given by the defendants and the men who were still in that group. The request of the injured party to investigate the act as rape was not even taken into account. Another thing that the courts involved did not take into account is the diagnosis made to the victim - a slight intellectual disability.

The judges did not take into account the three hospitalizations of the victim at the Oradea Neurology and Psychiatry Hospital. The hospitalizations were made with the diagnosis “anxious reaction to an important stress factor”. Diseases retained in medical records - emotional disorders following an episode of physical aggression, sad mood, easy crying, social withdrawal.

The Court noted that the authorities in the current case were confronted with two conflicting versions of the events. The applicant alleged that she had been raped on the evening of 13 January 2007. However, the six men involved in the incident claimed that she had consented to having sexual intercourse that evening. Therefore, the authorities’ central task in this case was to determine whether the sexual intercourse had been consensual.

In similar cases the Court had already held that the presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances, such as *M.C. v. Bulgaria*, § 177. That could be done by questioning people known to the applicant and the perpetrators, such as friends, neighbours, teachers and others who could shed light on the trustworthiness of their statements or by seeking an opinion from a specialist psychologist.¹¹ In this context, the authorities could also verify whether any reasons existed for the victim to make false accusations against the alleged perpetrators. However, the Court observed that none of the above was done at any stage of the investigation and trial in the current case.

The Court emphasized that failure to properly investigate or provide appropriate judicial response to complaints of sexual abuse against children or other vulnerable persons such as persons with intellectual disabilities created a background of impunity which may be

¹¹ The same approach was made in *I.G. v. Moldova*, § 43.

in breach of the State's positive obligations under Article 3 of the Convention. The applicant's intellectual disability, confirmed by medical documents, placed her in a heightened state of vulnerability and required both the investigative authorities and the domestic courts to show increased diligence in analysing the applicant's statements. Moreover, particular attention should have been also focused on analysing the validity of the applicant's consent to the sexual acts in the light of her intellectual capacity. However, it appears that none of the personal circumstances of the applicant, such as her age and her mental and physical development or the circumstances in which the incident took place – at night, in cold weather, as well as the number of men who took part in it – were considered by the prosecutors or the judges deciding on this case.

The Court concluded that the authorities put undue emphasis on the absence of proof of resistance from the applicant and they failed to take a context-sensitive approach in the current case. The authorities' conduct was aggravated by the fact that no psychological evaluation was ever ordered by the domestic courts for the purposes of obtaining a specialist analysis of the applicant's reactions from the point of view of her age. At the same time, the extensive medical evidence of the trauma suffered by the applicant following the incident at issue was not considered by the authorities at all.

Even if the Romanian Government claimed, among other arguments, that the applicant had given conflicting statements to the authorities, the Court noted that in the statements she gave throughout the investigation and trial, the applicant had merely clarified her initial statement, given immediately after the incident.

In view of the above, without expressing an opinion on the guilt of M.C., A.C.L. and V.F., the Court found that the investigation of the applicant's case fell short of the requirements inherent in the States' positive obligations to apply effectively a criminal-law system punishing all forms of rape and sexual abuse, concluding that there has been a violation of the respondent State's positive obligations under Article 3 of the Convention. The ECtHR awarded the applicant EUR 12,000 in respect of non-pecuniary damage.

3. Other ECtHR cases

3.1. *Aydın v. Turkey*¹² 25 September 1997

The applicant, a young Turkish woman of Kurdish origin (aged 17 at the relevant time) was arrested without explanation and taken, along with two other members of her family, into custody. She was blindfolded, beaten, stripped naked, placed in a tyre and hosed with pressurised water before being raped by a member of the security forces and then again beaten for about an hour by several people. A subsequent medical examination by a doctor, who had never before dealt with a rape case, found her hymen torn and widespread bruising on her thighs. The applicant further claimed that the family was intimidated and harassed by the authorities to coerce them into withdrawing their complaint before the European Court of Human Rights. The Court stressed that rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. This experience must have left the applicant feeling debased and violated both physically and emotionally. The Court found that both the accumulation of acts of physical and mental violence inflicted on the applicant while in custody and the especially cruel act of rape to which she had been subjected had amounted to torture, in violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention. In addition, an allegation of rape by an official in custody required that the victim be examined with all appropriate sensitivity by independent doctors with the relevant expertise. That did not occur, rendering the investigation deficient and denying the applicant access to compensation, in violation of Article 13 (right to an effective remedy) of the Convention.

3.2. *M.C. v. Bulgaria*¹³ (no. 39272/98) 4 December 2003

The applicant, aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was raped by two men; she cried during and after being raped and was later taken to hospital by her mother, where it was found that her hymen had been torn. Because it could not be established that she had resisted or called for help, the perpetrators were not prosecuted. The Court found a violation of Article 3 (prohibition of degrading treatment)

¹² [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-58371%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58371%22]}).

¹³ [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22003-883968-908286%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-883968-908286%22]}).

and Article 8 (right to respect for private life) of the Convention, noting in particular the universal trend towards recognising lack of consent as the essential element in determining rape and sexual abuse. Victims of sexual abuse, especially young girls, often failed to resist for psychological reasons (either submitting passively or dissociating themselves from the rape) or for fear of further violence. Stressing that States had an obligation to prosecute any non-consensual sexual act, even where the victim had not resisted physically, the Court found both the investigation in the case and Bulgaria law to be defective.

3.3. *Maslova and Nalbandov v. Russia*¹⁴ 24 January 2008

The applicant, who had been called in for questioning at her local police station, was coerced by police officers into confessing to involvement in a murder. One police officer put thumb cuffs on her, beat her, raped her and then forced her to perform oral sex. Subsequently he and another officer repeatedly hit her in the stomach, put a gas mask over her face, blocking the air to suffocate her, and ran electricity through wires attached to her earrings. When allowed to go to the lavatory, she tried to cut the veins of her wrists. Three prosecution officers, after interrogating her at the police station, Factsheet – Violence against women 6 drank alcohol and continued to rape her. The applicant filed a complaint alleging that she had been raped and tortured. A used condom found in the station was proven to have a 99.99% probability of having traces of her vaginal cells. Disposable wipes were found with traces of sperm and various items of clothing with traces of sperm and vaginal tissue of the same antigen group as the applicant. However, a court ruled that the evidence collected was inadmissible, as a special procedure for bringing proceedings against prosecution officers had not been followed. The case was finally discontinued for lack of evidence of a crime. The Court noted that there had been an impressive and unambiguous body of evidence in support of the applicant's version of events. It further reiterated that the rape of a detainee by an official of the State had to be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of his victim. The physical violence, especially the cruel acts of repeated rape, to which the applicant had been subjected had amounted to torture, in violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention. There had further been a violation of Article 3 of the Convention under its procedural limb, concerning the ineffective investigation.

¹⁴ [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-84670%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-84670%22]}).

3.4.P.M. v. Bulgaria¹⁵ (no. 49669/07) 24 January 2012

This case concerned the applicant's complaint that, raped at the age of thirteen, the Bulgarian authorities took more than fifteen years to complete the ensuing investigation and she had no remedies against their reluctance to prosecute her aggressors. The Court, finding that the investigation into the applicant's rape complaint had been ineffective, even though the facts of the case and the identity of the offenders had been established, held that there had been a violation of Article 3 (prohibition of inhuman and degrading treatment) of the Convention under its procedural limb. I.G. v. the Republic of Moldova (no. 53519/07) 15 May 2012 The applicant alleged that, at the age of fourteen, she had been raped by an acquaintance (a twenty-three-year-old man who lived in the same neighbourhood as the applicant's grandmother, whom she visited often). She complained in particular that the authorities had not investigated her allegations effectively. The Court held that the investigation of the applicant's case had fallen short of the requirements inherent in the State's positive obligations to effectively investigate and punish all forms of rape and sexual abuse, in violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention.

3.5.M. and others v. Italy and Bulgaria¹⁶ (no. 40020/03) 31 July 2012

The applicants, of Roma origin and Bulgarian nationality, complained that, having arrived in Italy to find work, their daughter was detained by private individuals at gunpoint, was forced to work and steal, and sexually abused at the hands of a Roma family in a village. They also claimed that the Italian authorities had failed to investigate the events adequately. The Court declared the applicants' complaints under Article 4 (prohibition of slavery and forced labour) inadmissible as being manifestly ill-founded. It found that there had been no evidence supporting the complaint of human trafficking. However, it found that the Italian authorities had not effectively investigated the applicants' complaints that their daughter, a minor at the time, had been repeatedly beaten and raped in the villa where she was kept. The Court therefore held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention under its procedural limb. The Court lastly held that there had been no violation of Article 3 in respect of the steps taken by the Italian authorities to release the first applicant.

¹⁵ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-3817886-4379056%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-3817886-4379056%22]}).

¹⁶ [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-112576%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-112576%22]}).

3.6. *P. and S. v. Poland*¹⁷ (no. 57375/08) 30 October 2012

The applicants were a daughter and her mother. In 2008, at the age of fourteen, the first applicant became pregnant after being raped. The applicants complained in particular about the absence of a comprehensive legal framework guaranteeing the first applicant's timely and unhindered access to abortion under the conditions set out by the applicable laws, and about the disclosure of information about the case to the public. They further complained that the first applicant's removal from the custody of her mother and placement in a juvenile shelter and later in a hospital had been unlawful, and submitted that the circumstances of the case had amounted to an inhuman or degrading treatment. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention, as regards the determination of access to lawful abortion, in respect of both applicants, and as regards the disclosure of the applicants' personal data. It further held that there had been a violation of Article 5 § 1 (right to liberty and security) of the Convention, finding in particular that the essential purpose of the first applicant's placement in the juvenile shelter had been to separate her from her parents and to prevent the abortion. Lastly, the first applicant had been treated by the authorities in a deplorable manner and her suffering had reached the minimum threshold of severity under Article 3 (prohibition of inhuman treatment) of the Convention, in violation of that provision.

3.7. *O'Keeffe v. Ireland*¹⁸ 28 January 2014 (Grand Chamber)

This case concerned the question of the responsibility of the State for the sexual abuse of a schoolgirl, aged nine, by a lay teacher in an Irish National School in 1973. The applicant complained in particular that the Irish State had failed both to structure the primary education system so as to protect her from abuse as well as to investigate or provide an appropriate judicial response to her ill-treatment. She also claimed that she had not been able to obtain recognition of, and compensation for, the State's failure to protect her. The Court held that there had been a violation of Article 3 (prohibition of inhuman and degrading treatment) and of Article 13 (right to an effective remedy) of the Convention concerning the Irish State's failure to protect the applicant from sexual abuse and her inability to obtain recognition at national level of that failure. It further held that there had

¹⁷ [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-114098%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-114098%22]}).

¹⁸ [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-111189%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-111189%22]}).

been no violation of Article 3 of the Convention as regards the investigation into the complaints of sexual abuse at the applicant's school.

3.8. *B.V. v. Belgium*¹⁹ (no. 61030/08) 2 May 2017

The applicant complained in particular that a full and comprehensive investigation had not been carried out and that she had not had an effective remedy by which to raise complaints of rape and indecent assault by a work colleague. The Court held that there had been a procedural violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. It found in particular that the applicant's allegations were arguable and could therefore be regarded as complaints of treatment breaching Article 3 of the Convention. Accordingly, in view of the State's obligation to carry out an effective investigation, the authorities should, as soon as she had lodged her complaint, have made prompt use of all the available opportunities to establish the facts and, as appropriate, the circumstances surrounding the alleged acts of rape and indecent assault. The investigation could therefore not, in such circumstances, be said to have been serious and thorough.

3.9.E.B. v. Romania²⁰ (no. 49089/10) 19 March 2019 (Committee judgment)

The applicant complained that the Romanian authorities had failed to investigate her allegation of rape properly and had breached their duty to provide effective legal protection against sexual abuse. She submitted that the authorities had also failed to protect her as a victim of crime as she had not had legal assistance or counselling and had been exposed to trauma which had violated her personal integrity during the criminal proceedings. The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) and of Article 8 (right to respect for private life) of the Convention in the applicant's case. It found in particular that the Romanian authorities had failed to carry out a proper investigation and had overly emphasised the fact that the applicant had not resisted her alleged attacker. In addition, owing to her slight intellectual incapacity, her case had required a context-sensitive investigation, but there had not been one. The Court also considered that the authorities' approach had undermined the applicant's rights as a victim of violence, had deprived domestic law of its purpose of effectively punishing and prosecuting sexual offences, and had raised doubts about the system put in place by the Romanian State under its international obligations.

¹⁹ [https://hudoc.echr.coe.int/eng-press#{%22itemid%22:\[%22003-5704871-7238960%22\]}](https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-5704871-7238960%22]})

²⁰ <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/EB%20v.%20Rumania.pdf>

In this case, there were some telling failures on the part of the State authorities to display sensitivity or ‘particular diligence’ for the victim in this case, and the Committee did not explicitly challenge them. First, there was no engagement with the fact that police officers had allegedly advised the applicant to withdraw her complaint given that there were no witnesses, “she was asking for it” and “it [presumably the rape] did her good”. Neither was there any meaningful criticism by the three-judge Committee of the domestic authorities’ emphasis on the applicant’s failure to ask for help while being accosted by T.F.S. on her way home, *before* she was raped. This should be called out for what it is, namely a form of victim-shaming. In any event, the “freeze” response is a well-known one for victims of sexual assault, and their credibility should not suffer for it. The Committee also ignored the respondent State’s arguments about the applicant’s failure to inform police about her disability, or that it had been compensated for by the presence of her husband, instead of explicitly countering them.²¹

IV. Conclusions

Scholars have shown that attitudes toward rape are important to understand how people react or behave toward victims and perpetrators of rape. These attitudes are often characterized by blaming the victim, minimizing the psychological impact and justifying the perpetrator and can be sustained by the perpetrators as well as the victims.²²

Empirical research has tried to determine the factors that make rape victim blame more likely. On one hand, factors related to the assault, such as the absence or presence of victim resistance or the relationship between the perpetrator and his victim have been shown to influence attitudes toward rape victims and perpetrators. The probability that a victim is held responsible for her victimization is higher when she was acquainted with therapist.²³

It is a fact that biased perceptions, reactions and decisions of the society are reflected in the decisions of the courts, as judges, who are only human, are “raised” in communities with strong patriarchal values and conservative view regarding promiscuous conduct. It is a sad fact that these decisional patterns are spread even in case of minor victims and it

²¹ Corina Heri, *Vulnerability, Rape, and Coercive Obligations: A Discussion of E.B v. Romania*, Strassbourg Observers, 12 April 2019, retrieved from <https://strasbourgobservers.com/2019/04/12/vulnerability-rape-and-coercive-obligations-a-discussion-of-e-b-v-romania/>.

²² Bettina Frese, Miguel Moya, Jesus L. Megias, *Social Perception of Rape*, Journal of Interpersonal Violence 19(2):143-61, march 2004, DOI: 10.1177/0886260503260245, p. 143.

²³ Idem, p. 144.

is almost uncomprehensive how women judges could reach decisions in which they presumed consent to a sexual intercourse of 8, 10, 11 or 13 old girls.

The interpretation of ECtHR in its caselaw regarding the importance of the analysis of the consent in cases of sexual abuse on children and women is enlightening, forcing national authorities to be more careful in cases of contradictory declarations of the rapists and victims, but, even its decisions bring a drop of justice to these victims, they do not wipe the shadows layed on their dignity.

The victims remain victims, defiled by their aggressors, offended by the authorities which failed to offer them protection and care. It is a paradigm of victimization, a stigma that does not fade, despite the flow of time or efforts of the ECtHR. Dignity should be a standard, both for the society and the judicial bodies.

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HUMAN DIGNITY AND LEGAL PROTECTION OF CHILDREN IN ADMINISTRATIVE PROCEDURES IN THE FIELD OF SOCIAL WELFARE

Dürig understands the concept of human dignity as an essential content of law, which is the basic subject of constitutional protection and a necessary complement to justice. On the other hand, human dignity is seen as a moral constraint on political power, while the preamble to the UN Universal Declaration of Human Rights speaks of innate dignity. Although the provisions on human dignity are primarily contained in the constitutional provisions of a number of legal orders, it should be noted that the special position of the right to human dignity is recognized by the German Grundgesetz (the Basic Law). The Croatian constitutionalist included the guarantee of respect and legal protection of dignity in personal rights according to Art. 35 of the Constitution of the Republic of Croatia. In the context of respecting the constitutionally guaranteed human dignity, the authors emphasize the importance of ensuring legal protection and the right to a declaration of the child, ie the child's participation in decision-making in selected special administrative procedures. Therefore, based on the normative analysis of the relevant procedural provisions of the GAPA (lex generalis), the Family Act and the Social Welfare Act (lex specialis), certain deviations and specifics are pointed out. Using the case method, the statistical data of SWC Osijek in the observed period are analyzed in relation to the imposition of emergency measures and warnings. The already demanding role of social workers as protectors of citizens' rights with numerous powers and duties, as well as the scope of SWC's actions, was further emphasized and a "special burden" was placed on it under the influence of the COVID-19 pandemic.

Keywords: human dignity, administrative procedures, legal protection of children, social welfare, Social Welfare Centre.

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Introduction

Initially the paper briefly presents the most important international documents, convention law and the legal framework at the EU level which regulates the right to human dignity in connection with the right of children to be heard and to have a voice in (administrative) proceedings. The constitutional provisions that represent the basis on which the Croatian constitution-maker guarantees respect and legal protection of dignity and promotes the exercise of the right to a dignified life are listed. Prominent personal and social rights are placed in the context of children's rights. Furthermore, the paper analyzes the legal provisions in relation to the right of children to express an opinion in special administrative procedures of family law protection of children when imposing measures and warnings by the Social Welfare Center (hereinafter: SWC).

The role of SWC in ensuring the legal protection of children is extremely important and refers to a number of areas in which SWC appears in the role of an initiator of proceedings-*ex offio* (adoption of protective measures) or as a subsidiary body of the court when submits findings and opinions on family circumstances ordered by the court. It was difficult to cover all the roles in which SWC acts and decides as a public body providing legal protection to children, therefore the emphasis is on measures of family law protection of children under the jurisdiction of SWC, which as a public body i.e. public institution, acts according to the provisions of the Family Act (hereinafter: FA)¹, the Social Welfare Act (hereinafter: SWA)² and the General Administrative Procedure Act³ (hereinafter: GAPA).

As these actions represent deviations from the provisions of the GAPA (*lex generalis*), we are going to point out certain exceptions regarding the manner and deadlines for making decisions, the urgency of the proceedings, the specifics of the non-suspensive effect of the appeal in this special administrative procedure. Furthermore, we are going to analyze the provided statistical data of SWC Osijek for the observed period from 1 January 2018 until 1 September 2020 in the imposition of emergency measures and warnings based on FA. The stated data are additionally supported by the distribution by sex and number of children who were covered by the imposed measures for the stated period. In the final part, the authors briefly look at the challenges posed by the COVID-

¹ Official Gazette RC, No. 103/15, 98/19 (hereinafter: FA).

² Official Gazette RC, No. 157/13, 152/14, 52/16, 16/17, 130/17, 98/19, 64/20 (hereinafter: SWA).

³ Official Gazette RC, No. 47/09 (hereinafter: GAPA).

19 pandemic in relation to administrative actions within the competence of the SWC, and especially relations within the family.

1. Briefly on the regulation of the right to human dignity in international documents

“All human beings are born free and equal in dignity and rights”

What the dignity⁴ is is an ethical question, but undoubtedly every man enjoys dignity (Hrabar, 2019: 7). Human dignity is the foundation of all human rights, and it is absolutely protected and inviolable. It is inherent and innate and is the sum of all human rights. Every human being (including a child) has human dignity. German legal theorist Dürig understands the concept of human dignity as an essential content of law that is the basic subject of constitutional protection and a necessary supplement to justice (Franeta, 2011: 829). On the other hand, human dignity is seen as a moral constraint on political power. The notion of human dignity is at the heart of the United Nations Charter.⁵ The preamble to the UN Universal Declaration of Human Rights speaks of innate dignity:

*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”*⁶*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”*⁷

Thus in accordance with Art. 8 para 1 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: EC)⁸ family life and personal rights of each person have special legal protection. The principle of non-interference of the state (government) in family life is also emphasized, i.e. exceptionally the state has the right to “intervene” in the family life of a person.⁹ The “*innate dignity of all human*

⁴ See more Tomuschat C. (2014). *Human Rights, Between Idealism and Realism*, Third Edition, Oxford: University Press.

⁵ Charter of the United Nations, Official Gazette RC, IA, No. 15/93.

⁶ Art. 1 of the Universal Declaration of Human Rights (UDHR), Official Gazette RC, IA, No. 12/09.

⁷ Art. 28 of the Universal Declaration of Human Rights (UDHR), Official Gazette RC, IA, No. 12/09.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette RC, IA, No. 18/97, 6/99, 14/02, 13/03, 9/05, 2/10 (hereinafter: EC).

⁹ “*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.*” Art. 8. para 2 of the EC.

beings” is also expressed by the Constitutional Court of the Republic of Croatia (hereinafter: CC RC), which in its Decision¹⁰ from 2017 recalls Protocol 13 to the EC. Furthermore, the CC RC in its prominent decision states that “*human dignity is absolute, non-derogable and incomparable and can be neither limited nor weighed*”.

In order to respect human dignity, it is necessary to establish effective law enforcement and enforcement at the national and international levels. Most states formally protect basic human rights through the Constitution and laws. If national authorities fail to respond to human rights or respond to human rights violations, legal protection is provided at the international level through mechanisms and procedures for individual lawsuits, all to ensure that international human rights standards are truly respected and enforced.

1.1. The UN Convention on the Rights of the Child

The legal framework for human rights and the protection of children's rights developed intensively after World War II within the United Nations, under the auspices of the Council of Europe, and later within the European Union. The crowning achievement of the promotion and protection of children's rights worldwide is the UN Convention on the Rights of the Child from 1989 (hereinafter: CRC).¹¹ We can say that the recognition of children's rights has gone from complete disenfranchisement to maximum protection.

Children and young people have the same general human rights as adults but also like vulnerable person they need more protection. With adoption of CRC and three Optional protocols¹² children are seen as individual rights holders, with every human right and fundamental freedoms as any other human being. CRC has the positive impact on international, regional, and domestic level. The recognition of rights of the child contributes to children's visibility both in legal and political systems. The Optional Protocol to the CRC on a Communications Procedure is very important for participation rights of children, which would allow children or their representatives to file individual

¹⁰ Decision of the Constitutional Court of the Republic of Croatia, U-I-60/1991 from 21 February 2017, Official Gazette RC, No. 25/17.

¹¹ Convention on the Rights of Child, Official Gazette RS, IC, No. 12/93 20/97 (hereinafter: CRC).

¹² Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, A/RES/54/263), Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, A/RES/54/263), Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, A/HRC/17/L.8) General Assembly resolution A/RES/66/138, available at: <https://www.unicef.org/child-rights-convention/children-human-rights-explained>, accessed on 16 September 2020.

complaints for violation of the rights of children. Optional protocol gives children the opportunity for individual complaints to Committee on the Rights of the Child (Poretti, 2015). The signatories of the CRC guarantee that children will be treated with respect and dignity everywhere. Art.16 of the CRC explicitly cites honour and reputation of the child, without imposing any additional conditions for the existence or protection.¹³

Children's rights can be identified in several categories. These rights have been categorized according to the "three ps", which represent the protection, provision and participation rights of children (Hammarberg, 1990). However, children's rights are indivisible and holistic and should not be seen separately or in isolation from each other (Sandberg, 2018).

1.1.1. The child is given a tool – the right to be heard

The child's right to be heard is a fundamental human right and one of the four general principles of the CRC. Children's right to express their views in all matters that affect them has both a substantive and procedural dimension (Krappmann, 2010). It ensures respect for the child as an actor in everyday life. Procedurally, Art. 12 CRC¹⁴ means to ensure further implementation of children's right in all matters affecting children, empowering them to act for their rights and challenge abuses (Parkes, 2010).

The idea of child-friendly justice highlights the child's right to be heard before a court. Also, children should be informed and asked for their opinion in all court proceedings concerning them. The terms "child-friendly justice" in General comment No. 12 refers to judicial (criminal) proceedings, but the part referring to their scope and purpose reveals that they should apply to civil and administrative proceedings too.¹⁵ It is considered that the child's right to participate includes also the rights under Art. 13-17 (freedom of

¹³ Art. 16 of the CRC: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks."

¹⁴ Art. 12 of the Convention:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

¹⁵ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: <https://www.refworld.org/docid/4ae562c52.html>, accessed on 3 September 2020.

expression; freedom of thought, conscience and religion; freedom of association; protection of privacy and access to relevant information), because these rights specify and help to implement the participation mechanism (Čorić, 2019).

2. Children's Rights in the European Union-right to human dignity

There are a few relevant documents concerning children's rights in the European framework, however, there are different legal powers and obligations. They are sometimes declaratory in nature and are only a recommendation to the state, as they should better ensure the protection of children's rights.¹⁶ According to Art. 1 titled "Human Dignity" (Title 1 Dignity) of the Charter of Fundamental Rights of the EU¹⁷: *"Human dignity is inviolable and it must be respected and protected. In the European Union human dignity is the first indivisible and universal value."*¹⁸

A child is a person with rights, including the right to be protected and to participate; to express her or his views; to be heard and be heeded. The recognition of the right to effective participation is also at the goal of the Council of Europe's Guidelines on child friendly justice.¹⁹ According to the Guidelines: *"Justice for children should be accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the right to due process, to participate*

¹⁶ In the Treaty on European Union establishes the objective for the EU to promote protection of the rights of the child, Art. 3.3. The Charter of Fundamental Rights of the EU guarantees the protection of the rights of the child by the EU institutions and by EU countries when they implement EU law. Art. 24 on the rights of the child and Art. 31 on the prohibition of child labor specifically cover children's rights. The central provision on children's rights from the Charter, Art. 24, provides as follows:

1. *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*

2. *In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*

3. *every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his and her parents, unless that is contrary to his or her interests*

¹⁷Official Journal of the European Union, C 83/389, 30. 3. 2010.

¹⁸ See also Decision of the Constitutional Court of the Republic of Croatia, U-I-60/1991 from 21 February 2017, Official Gazette RC, No. 25/17.

¹⁹ Council of Europe, Committee of Ministers (2010), Guidelines on child friendly justice, 17 November 2010, para. II. Ch, available at: <https://www.coe.int/en/web/children/child-friendly-justice>, accessed on 5 September 2020.

in and to understand the proceedings, to respect for private and family life and to integrity and dignity."²⁰

The term "child-friendly social services" refers to social services that respect, protect, and fulfil the rights of every child, including the right to provision, participation and protection and the principle of the best interest of the child. Minimum standards of protection are guaranteed by the EC. The protection of human rights and fundamental freedoms is an integral part of every modern and social legal system. Their implementation is monitored by the European Court of Human Rights (hereinafter: ECtHR). The ECHR does not explicitly mention the right of child to be heard. But it maintains that the right of children to be heard is incorporated into Art. 8 of the EC.²¹ In addition, right of children to be heard is incorporated in Art. 6 of the EC. The positive obligations inherent within Art. 6 and 8 as well as the case-law²² on hearing children to date, is to be argued that such a right can be derived under the EC (Daly, 2011). The EC can be seen as a skeleton that the practice of the ECtHR only builds on and complements (Vajić, 2001: 982). Therefore, the EC and its provisions should be applied by other bodies and courts of the signatory states of the ECtHR. This means that the task of national courts, including constitutional courts, is to use the existing case law of the ECtHR, which together with the EC constitutes the "*interpretative corpus of the EC*", in applying certain provisions of the EC (Omejec, 2013: 1013).

2.1. European Convention on the Exercise of Children's Rights on 1996

European Convention on the Exercise of Children's Rights (hereinafter: Convention)²³ on 1996 aims to protect the best interests of children. The Convention provides for measures, which aim to promote the rights of the children, in particular in family proceedings before judicial authorities. The court, other judicial body or special guardian appointed to act before a judicial authority on behalf of a child, has a number of duties designed to

²⁰ Council of Europe, Committee of Ministers (2010), Guidelines on child friendly justice, 17 November 2010, para. II. Ch, available at: <https://www.coe.int/en/web/children/child-friendly-justice>, accessed on 5 September 2020., par 2

²¹ According to which: "*Everyone has right to respect for his private and family life, his home and his correspondence*". Art. 1. of the EC.

²² Relevant decisions Sahin y Germany, No. 30943/96 (2003), *Affaire Iglesias Casarrubios et Contalapietra Iglesias v Espagne* No. 23298/12 (2016), *Neulinger v Switzerland*, No. 41615/07, (2010) *X v Latvia* No. 27853/09 (2013), available at: <https://hudoc.echr.coe.int/>, accessed on 6 September 2020.

²³ European Convention on the Exercise of Children's Rights, available at: <https://eur-lex.europa.eu/>, accessed on 5 September 2020.

facilitate the exercise of rights by children. Children should be guaranteed to exercise their rights either themselves or through other persons or bodies (Hrabar, 2002).

Family proceedings of special interest for children are those concerning custody, residence, access, questions of parentage, legitimacy, adoption, legal guardianship, administration of property of children, care procedures, removal or restriction of parental responsibilities, protection from cruel or degrading treatment and medical treatment (Župan, 2016). This Convention also applies in situations where child protection measures are imposed, where such measures limit parental care.

According to Hrabar, the fact that children's rights are violated in the EU on a daily basis, she believes that it is time to take a step further and to establish a separate European Court for the Rights of the Child. A specialized court for the rights of the child would certainly contribute to the formation of that European legal order, which should be enriched by the said new regulation on the rights of the child, because it would ensure uniform case law regarding children's rights (Hrabar, 2014). Same opinion have Stănilă, “ *creating a parallel Children's Rights Court, which could overcome all these obstacles and could provide better judgments which could observe all the factors involved in each case, safeguarding the rights of the children as the most important outcome of the decisions* “(Stănilă,2019.).

The child's right to participate is underlined and in the Recommendation²⁴ mostly coincides with Art. 12. CRC. This right should be integrated into the content of social welfare. According to Recommendation, children's participation is to take place in two main ways: participation in their own care and participation in the planning, delivery and evaluation of social services. This means the right of the child to be informed, to express views, to be heard, to give consent to decisions and to be informed on how his or her views have been taken into account – all in accordance with age, capacity, development and individual circumstances. In such processes, that should be ensured the child's right to freely express his or her views. The Recommendation calls on member states to adopt measures, protocols and procedures to implement the principle.

²⁴ Report on the implementation of the Council of Europe Recommendation on children's rights and social services friendly to children and families, Council of Europe, March 2016, available at: <https://rm.coe.int>, accessed on 15 September 2020.

3. Short overview of the constitutional provisions related to the social system in the protection and promotion of the dignity

Although the provisions on human dignity are primarily contained in the constitutional texts of many legal systems, it should be noted that the special position of the right to human dignity is recognized by the German Grundgesetz (Basic Law). It forms the unchangeable foundation of the constitutional order, and respect for human dignity is one of the fundamental principles of the constitution (Omejec, 2016: 4). The Croatian constitution-maker, on the other hand, included a guarantee of respect and legal protection of the dignity of every citizen in personal rights according to Art. 35 of the Constitution of the Republic of Croatia²⁵ (hereinafter: the Constitution). It is also worth mentioning the constitutional provision which regulates the responsibility and obligation of the state in the protection of children and youth to promote the exercise of the right to a dignified life and the creation of conditions for it.²⁶ The state has a fundamental obligation to change social patterns in order to preserve human dignity (Hrabar, 2018: 37). Furthermore, the family is under the special protection of the state²⁷ and it is the duty of all to protect children.²⁸ It belongs to the catalog of fundamental human rights and is classified as a personal and social right. The social welfare system is mostly related to second-generation human rights.

Social justice stands out as one of the constitutional values. In interpreting constitutional values and interpreting the Constitution, it should be noted that human dignity is a special segment that should be placed in relation to other constitutional values. In the context of the above, we would like to refer to the important CC RC Decision²⁹ of 2017, which emphasizes that dignity is “*a key factor in the concept of human rights and duties*” and that the “*Constitution provides protection and dignity as a property of every human being, but also its external subjective manifestation.*”

²⁵ Constitution of the Republic of Croatia, Official Gazette RC, No.55/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (hereinafter: Constitution).

²⁶ Art. 63. of the Constitution.

²⁷ Art.62. para 1 of the Constitution.

²⁸ Art. 65. para 1 of the Constitution.

²⁹ Decision of the Constitutional Court of the Republic of Croatia, U-III-1095/2014 from 21 September 2017, Official Gazette RC, No. 104/17.

4. Protection measures from scope of social services and Child participation

4.1. Child participation

Parents have a responsibility for the development of the child, for his full and harmonious development, in accordance with the dignity of the child and his well-being. It is best for a child's development to grow up in a safe and caring family environment, as set out in the FA's founding principles³⁰. Modern parenting takes place in the context of numerous social changes that pose many challenges to parents. Therefore, in fulfilling their parental role, the support of society is necessary, and one of the most important forms of that support is cooperation with experts who are able to empower parents who find themselves in crisis. This support may include measures that interfere with family life, but must then be necessary and justified.

In the Republic of Croatia there are 80 social welfare centres with 27 branch offices. These centres are governed by the SWA. The most of professional activities such as the protection of the child and the family, including preventive programmes and support programs take place through the network of social welfare centres.

The changes that are taking place in other developed countries, including the Republic of Croatia, are also affecting social welfare professionals. According to Ajduković, it is noticed that social services are increasingly dealing with crisis-reactive action on accusations of child abuse or endangering children's rights, while the procedures are becoming more demanding (professionally and in terms of time). Unfortunately, despite the declarative emphasis on the importance of early interventions, less and less time and money remain for preventive work, especially for providing support to high-risk families (Ajduković, 2008; Sladović & Ajduković, 2008).

One of the strategic goals of the National Strategy for Children's Rights in the Republic of Croatia for the period from 2014 to 2020³¹ is to improve the system and provide services adapted to children in five important areas of the child's life: justice; health care; social welfare; education; sports, culture and other leisure activities as well as ensuring

³⁰ Art. 6 of the FA: "Parents above all have the right, duty and responsibility to live with their child and take care of the child."

³¹ Nacionalna strategija zapravo djeluje u Republici Hrvatskoj razdoblje od 2014. do 2020. godine /National Strategy for the Rights of the Child in the Republic of Croatia for the period from 2014 to 2020 <https://vlada.gov.hr/pristup-informacijama/programi-strategije-planovi-i-izvjesca/strateski-dokumenti-vlade-rh/ministarstvo-za-demografiju-obitelj-mlade-i-socijalnu-politiku/17700>, accessed on 15 September 2020.

the active participation of children. The existing international and national legal framework for children's rights shows that they are guaranteed at the level of positive regulations, but sometimes they are neglected in application.

Judicial and administrative authorities should consider the child's best interests in any decision related to the child's right to respect for his/her family life.³²

In addition to the principle of the best interests of the child, administrative bodies (social services) must also respect the child's right to participate in proceedings concerning him or her. It is important to keep in mind that children are not as skilled and informed as adults and how actively a child will participate depends on the quality of the established balance between the adult's need to protect the child and to stimulate and encourage him in his developmental challenges (Pećnik, 2008).

4.1.1. Protection measures from scope of social services in Croatian Family Law

The principle of legality and legal certainty requires the precise definition of the preconditions for the imposition of certain measures, the time for which the measures are imposed and the extent of the narrowing of parental care. The system of measures for the protection of children's rights and welfare must be effective, but it also must respect the principles of legal security and must comply with the protection of civil rights. The competent authority conducting the selection procedure is guided by the principle of proportionality, which means that it selects an appropriate measure to protect the rights and welfare of the child. It is obliged to determine the measure that least restricts the right of parents to exercise parental care, and to protect the child with this measure.³³

FA prescribes in its Art. 86 (2), that in all procedures in which a decision relating to a child's right or interest is to be adopted, the child shall have the right to find out in an appropriate way about the important circumstances of the case, to be advised, to express his/her opinion in this respect and to be informed about the possible consequences of his/her opinion. Furthermore, the child's opinion should be taken into consideration in accordance with his/her age and maturity.

The right of the child to express his/her opinion in all decision-making procedures on measures protecting his/her rights and welfare is ensured, which includes the child's right

³² Art. 5 of the Family Act Official Gazette RC, No. 103/15, 98/19 (hereinafter: FA).

³³ Art. 128 of the FA.

to express his/her opinion and insight into the proposal and imposition of measures.³⁴ If the child's rights and welfare are endangered or, on the basis of expert assessments, the child's rights have been violated and/or the welfare, the competent court and SWC shall impose measures for the protection and welfare of the child. The rights and welfare of the child are endangered if there is a likelihood of violation of the rights and welfare of the child, if there is an improper development of the child due to insufficient care or certain psychosocial difficulties manifested through his/her behavior, emotional, school or other problems.

Protection measures from scope of social services are:³⁵

1. Urgent measure of separation and placement of the child outside the family
2. Warnings on errors and omission in child upbringing
3. Measures of professional assistance and support of the family in child upbringing
4. Intensive measures of professional assistance and support of the family in child upbringing

In the above procedures for imposing measures, the SWC acts in accordance with the rules of general administrative procedure. If necessary to protect the interests of the child when carrying out an urgent measure on the separation and placement of the child, SWC may seek the assistance of the police. An oral decision may be issued in the procedure of imposing a measure of urgent separation of a child from the family. When it issues an oral decision and takes the child away from the family on the spot, the SCW is obliged to issue a written decision on emergency separation and placement within 72 hours, which is delivered to the parents or another person caring for the child.³⁶ An appeal against the decision imposing this measure does not postpone the execution of the decision, and it is decided by the competent ministry.³⁷ Therefore, this is a particularly difficult situation when it is necessary to react without delay, because the child's rights to life and health are particularly endangered. Separation of a child from the family is determined only if it is not possible to protect the rights and welfare of the child by any milder measure.³⁸ In addition to making a written decision on the imposed oral measure of urgent separation of the child from the family, SWC must submit to the court a proposal requesting the

³⁴ Art.130 of the FA.

³⁵ Art. 134 of the FA.

³⁶ Art.137 of the FA.

³⁷ Art. 137 para. 3 of the FA.

³⁸ Art 129 para.1 of the FA.

imposition of a court measure on temporary entrustment of child care to a foster family, social welfare institution or other person brought in non-contentious court proceedings.³⁹ The short deadlines guarantee the legal protection of the participants in the procedure when pronouncing this measure in the form of an oral decision. The court is obliged to issue a decision⁴⁰ within 10 days of the submission of the proposal, and a special guardian is appointed for the child in court proceedings for the adoption of protection measures. The rights and interests of the child in the proceedings are represented by the special guardian.⁴¹ According to available data,⁴² the Independent Service for Second Instance Proceedings received 3,654 cases in 2019 (3,392 administrative cases and 262 non-administrative cases). From previous periods, 2952 administrative cases were transferred to 2019. A total of 6606 cases were pending in 2019 (6344 administrative cases and 262 non-administrative cases). In 2019, a total of 3,041 administrative cases were resolved. During 2019, there was no more acceptable shortening of deadlines for resolving second-instance cases. The length of the second-instance proceedings may lead to a threat to the rights of parents restricting parental care by imposing measures, and may lead to complaints of violation of the right to family life.

Other protection measures within the competence of the SWC are warnings on errors and omission in child upbringing, measures of professional assistance and support of the family in child upbringing, intensive measures of professional assistance and support of the family in child upbringing. Measures to help and support families in exercising parental care are more often imposed. The measures are imposed by the SWC in administrative proceedings. The adopted decision determines the type of measure, its duration and appoints the supervisor of the measure. Measures can be set at 3 or 6 months with the possibility of extension for another 6 months.⁴³ The supervisor of the measure must actively provide support to the family and submit Reports on the implemented measure.⁴⁴ Based on the Report, the SWC expert team decides on further protective measures.

³⁹ Art. 150 of the FA.

⁴⁰ Art. 138 para. 2 of the FA.

⁴¹ Art. 240 of the FA.

⁴² Godišnje izvješće o radu za 2019 godinu Ministarstva za demografiju, obitelj, mlade i socijalnu politiku.pdf, <https://mdomsp.gov.hr/>, accessed on 13 September 2020.

⁴³ Art. 147 of the FA.

⁴⁴ Art. 143 of the FA.

4.1.1.1. Deviations from the GAPA in the special administrative procedure- imposition of the measures SWC

Considering the urgency of the procedure,⁴⁵ the decision-making in oral form, although regulated by GAPA, is an exception.⁴⁶ The justification of the above is reflected in the normative regulation of making a decision in oral form due to taking urgent measures. It is also valid with regard to the deadlines for making a decision, given that according to the GAPA, deadlines of 30 and 60 days⁴⁷ are prescribed from the day of submitting a proper request of the party. The procedure for determining measures is initiated ex officio or at the request of the party (proposal of the child or parent). These methods of initiating the procedure are in accordance with the provisions of GAPA. Art. 137 para 1 of the FA explicitly regulates the competence of the SWC and that its decision-making and resolution is an administrative action.

In the analyzed special administrative procedures, the following principles of administrative procedure are particularly pronounced: proportionality in the protection of the parties' rights (Art. 6) and the public interest, and the party's right to a legal remedy (Art. 12). They are complemented by the principles of family law protection: the primary protection of the welfare and rights of the child, the proportionate⁴⁸ and mildest intervention in family life, and the urgency of action. It is necessary to emphasize especially important procedural rights in relation to the analyzed topic of work, and these are the right of the child to express an opinion,⁴⁹ participate in the procedure⁵⁰ and participate in decision-making.⁵¹

In relation to the regulation of the non-suspensive effect of appeals in pre-analyzed procedures, it is concluded that it represents a specificity in terms of the classic suspensive (deferral) effect of the appeal. In support of this we cite Art. 112 para 3 of the GAPA, which regulates the situations due to which the public law body can decide and explain

⁴⁵ Art. 10 of the FA.

⁴⁶ See Art. 97 para 2 of the GAPA.

⁴⁷ Art. 101 para 1 and 2 of the GAPA.

⁴⁸ See also Art. 128 of the FA.

⁴⁹ See Art. 86 para 2 of the FA.

⁵⁰ Art. 130 of the FA.

⁵¹ Art. 17 para 3 of the SWA.

in the decision that the appeal has no exceptional suspensive effect. We consider such a legal solution to be appropriate, given that it is an exception.

Finally, it should be concluded that the analysis of special procedural provisions of the FA (*lex specialis*) in relation to GAPA (*lex generalis*) indicates certain deviations and specifics in the implementation of a special administrative procedure within the competence of the SWC. Significant deviations (Ljubanović, 2010: 323) were observed in the field of family law protection, given the larger number of procedural rules contained in the FA in relation to the SWA.

4.2. Analyses of administrative practice of the SWC Osijek in selected administrative proceedings

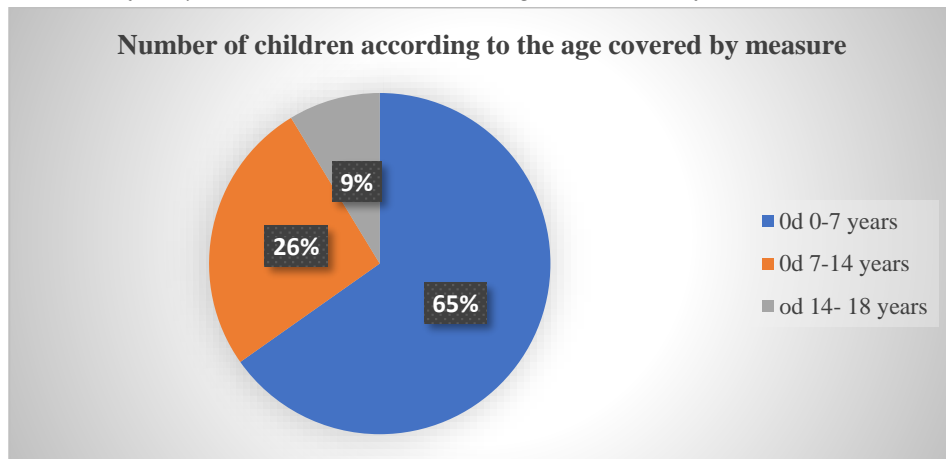
The data collected by SWC Osijek for the observed period from 1 January 2018 to 1 September 2020 on the imposition of emergency measures and warnings based on FA (family law protection) are briefly analyzed. The stated data are additionally supported by the distribution by sex of children and the number of children who were covered by the imposed measures for the stated period. The submitted SWC Osijek data were analyzed by the method of case and comparison and described by the descriptive method, and the analyzed data are presented in the form of tables and graphs.

Table No. 1 Data on imposed measures SWC Osijek for 2018

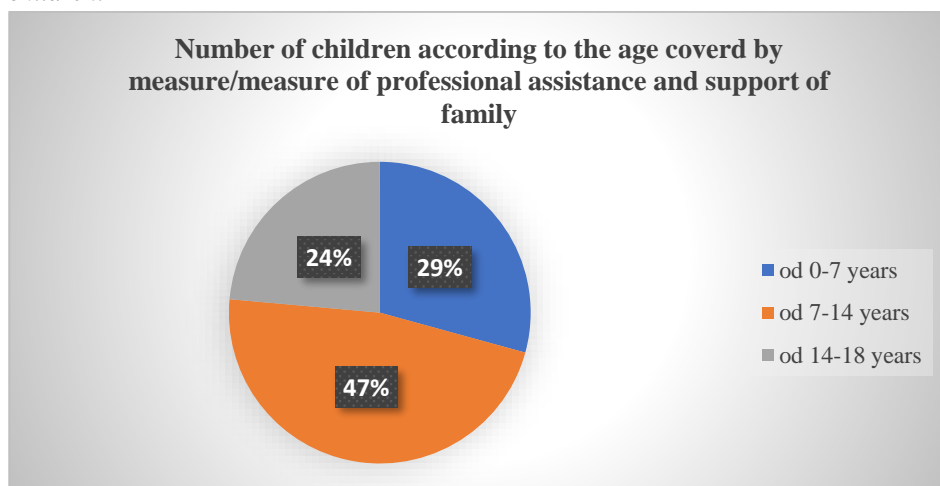
Type of measures	Number of measures
Urgent measure of separation and placement of the child outside the family	15
Warnings on errors and omission in child upbringing	12
Measures of professional assistance and support of the family in child upbringing	69
Intensive measures of professional assistance and support of the family in child upbringing	18

Source: processed by the authors according to the data provided by SWC Osijek

Picture No. 1 During 2018, the urgent measure of separation and placement of the child outside the family covered 23 children, including 5 male and 18 female children.



Picture No.2 During 2018, the measure-measures of professional assistance and support of the family in child upbringing covered 120 children, including 67 male and 53 female children.



Picture No. 3 During 2018, the measure- intensive measures of professional assistance and support of the family in child upbringing covered 30 children, including 14 male and 16 female children.

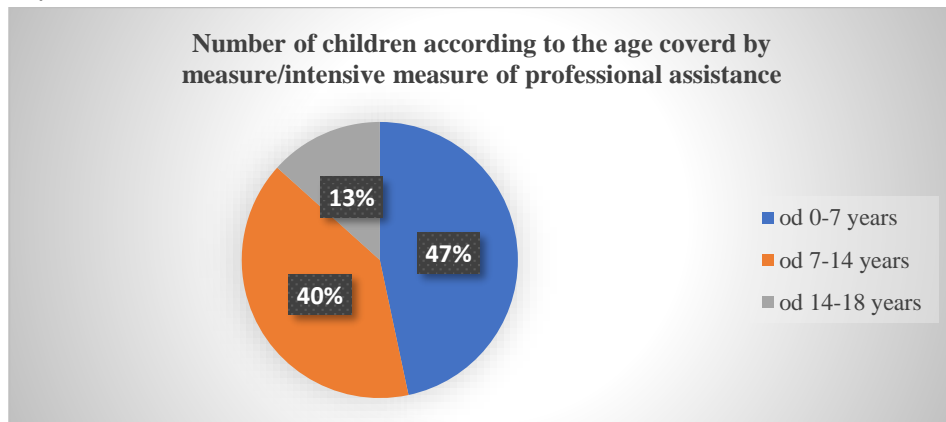
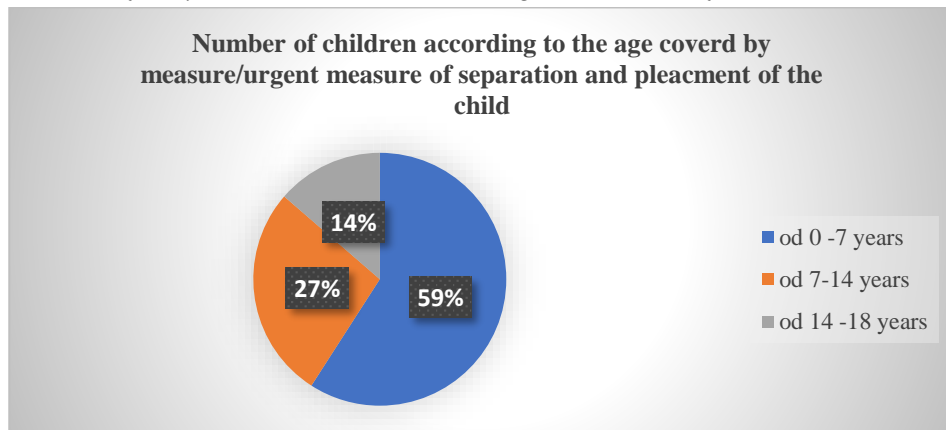


Table No. 2 Data on imposed measures SWC Osijek for 2019

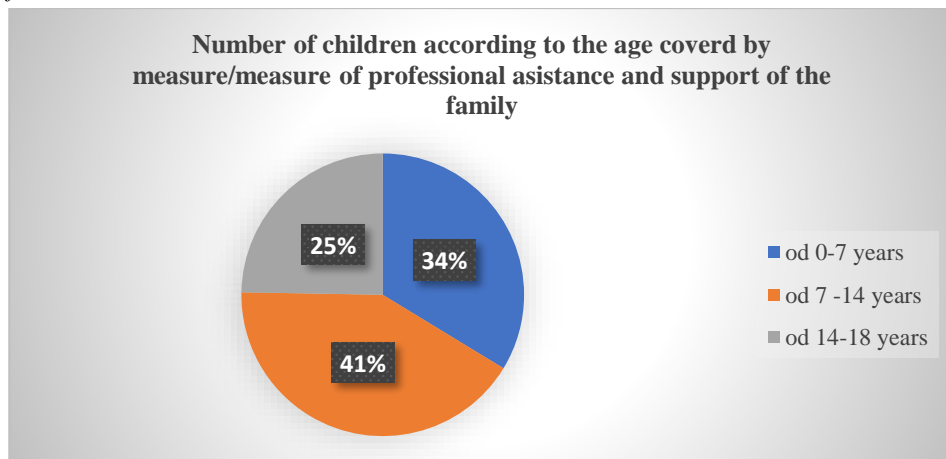
Type of measures	Number of measures
Urgent measure of separation and placement of the child outside the family	19
Warnings on errors and omission in child upbringing	6
Measures of professional assistance and support of the family in child upbringing	57
Intensive measures of professional assistance and support of the family in child upbringing	27

Source: processed by the authors according to the data provided by SWC Osijek

Picture No. 4 During 2019, the urgent measure of separation and placement of the child outside the family covered 22 children, including 10 male and 12 female children



Picture No. 5 During 2019, the measure- measures of professional assistance and support of the family in child upbringing covered 89 children, including 49 male and 40 female children.



Picture No. 6 During 2019, the measure- intensive measures of professional assistance and support of the family in child upbringing covered 35 children, including 20 male and 15 female children.

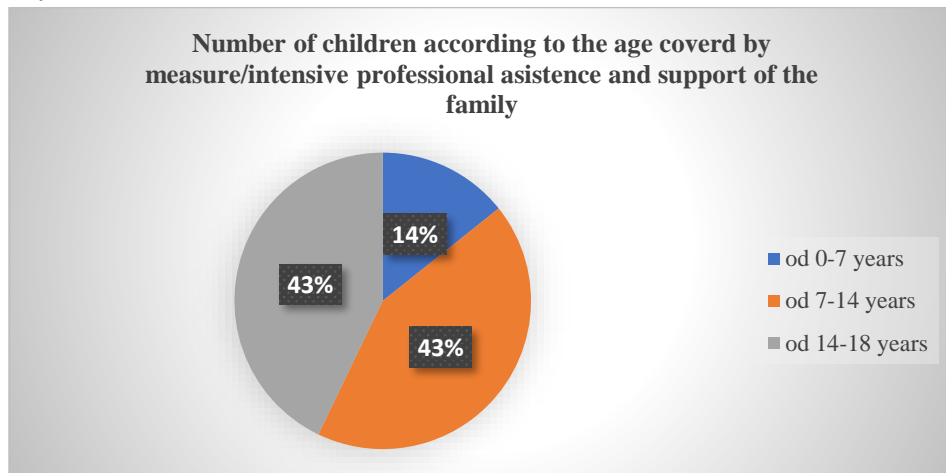


Table No. 3 Data on imposed measures SWC Osijek (1 January 2020-1 September 2020)

Type of measures	Number of measures
Urgent measure of separation and placement of the child outside the family	21
Warnings on errors and omission in child upbringing	7
Measures of professional assistance and support of the family in child upbringing	37
Intensive measures of professional assistance and support of the family in child upbringing	22

Source: processed by the authors according to the data provided by SWC Osijek

It can be noticed that during 2020, the number of imposed measures slightly increased compared to previous years. It is to be expected that growth will continue until the end of this year, especially if we take into account the two months of “closure” in which work was carried out with reduced intensity. As the courts did not work except for urgent hearings, so the Centers did not call the parties or issue decisions (impose measures/

warnings). According to the collected data, SWC Osijek in the observed period did not have a single appeal against the measure of urgent allocation.

Analyzed data indicate that the most pronounced measures are those of professional assistance and support in the realization of child care (milder measures), and in a smaller number of measures are those of urgent allocation. The data on 21 imposed emergency allocation measures for the period from 1 January 2020 to 1 September 2020 represent a significant increase compared to the previous years observed.

In relation to the collected data on the number of children, it is noticed that there is a high number of children covered by the measures imposed by the SWC in accordance with the provisions of the FA and GAPA. Although the FA does not prescribe (directly) that children be actively involved in the decision-making process (although the measure applies to them), we believe that by respecting children's conventions and FA principles, children should be included in the decision-making process. It should be done in a way that the child is informed about the procedure and the adoption of the measure, and that his/her opinion is adequately considered. Today's practice is that after the adoption of the measure, children are usually informed by the supervisor of the measure.

During the so-called "Lockdown" we are talking about the period from March to May 2020 and all the anti-pandemic measures that were in force at the time (staying at home, closing schools, institutions and many other restrictions), users turned to the competent SWC in large numbers to help personal relationships with minor children after divorce. Namely, some parents took advantage of the situation and continued with irresponsible parental behavior and manipulation of children, in a way that they prevented the other parent from establishing personal relationships, which are most often determined by a court judgment or agreement.

Also, the Recommendation⁵² of the competent Ministry in some way enabled the mentioned situation, because it was recommended that the parent assess the health danger for the child. Emphasis was placed on reaching an agreement and adjusting to the establishment of personal relationships and contact, and cooperation, where the protection of the health and safety of the child was never more pronounced than at the time of

⁵² PREPORUKA Održavanje osobnih odnosa djece s roditeljima i izvršavanje roditeljske skrbi u uvjetima pandemija, Ministarstvo za demografiju, obitelj, mlade i socijalnu politiku, 1 April 2020, available at: https://mdomsp.gov.hr/UserDocsImages/Vijesti2020//PREPORUKA_Odr%C5%BEavanje_osobnih_odnosa_djece_s_roditeljima_i_izvr%C5%A1avanje-_roditeljske_skrb_u_uvjetima_pandemija.pdf, accessed on 5 September 2020.

lockdown. In the then current situation, SWC employees tried to contact both parents and mediate in the interest of the child to resolve the situation. Since non-enforcement of parental care decisions is the responsibility of the judiciary, it can be assumed that this will also lead to an increased number of lawsuits.

The pandemic also entails an economic crisis, job losses, and reduced incomes, which will again affect a vulnerable group of poor and uncompetitive workers in the labor market. The emerging economic crisis will inevitably affect the development of children and their stable upbringing in the family. From interviews with SWC Osijek employees, it is learned that reports of domestic violence⁵³ (in relation to partners and in relation to children) are on the rise, and that there is a worrying increase in reports of sexual violence.

The actions of SWC Osijek under the influence of the COVID-19 pandemic took place under certain specific circumstances in a way that limited measures of family law protection and increased care and supervision were implemented. No personal contact was made (there were no visits to homes), but surveillance and measures were carried out through electronic media. Expert teams (lawyer, social caregiver and psychologist) functioned in two ways: distributed in groups and working from home (via telecommunication means and / or available electronic media).

Through such a division of work, they determined the dynamics of relationships within the family, given that supervisors did not go to the family, but made notes and forwarded them to colleagues (by phone and e-mail). Special emphasis was placed on SWC in providing advisory professional assistance. It is important to emphasize the importance of the conclusions of the expert team that precedes the decision on the imposition of measures. In such challenging occasions, the importance of achieving continuous cooperation and timely communication with other bodies (MIA, other centers, FINA, etc.) relevant to establishing the facts and resolving cases comes to the fore.

⁵³ <https://mdomsp.gov.hr/vijesti-8/priopcenje-o-postupanju-u-situaciji-pojacanog-rizika-od-nasilja-u-obitelji-i-zlostavljanja-i-zanemarivanja-djece-zbog-pojacanih-mjera-izolacije-radi-suzbijanja-epidemije-covid-19/12696>,

https://www.civilnodrustvo.hr/sef-un-a-zastrasujuce-je-poraslo-obiteljsko-nasilje-u-svijetu/?fbclid=IwAR2_vNrOarqf6Cylhlhj6s_6jzzPhNiDjdQknssHVXbYYUK5bB7mVHa-U_fc, accessed on 11 September 2020.

Conclusion

As already stated, the modern age poses new challenges to parents that are (perhaps) an obstacle to successful parenting. Therefore, society must provide accessible, professional and effective assistance to parents (families) and children in crisis situations.

The Coronavirus (COVID-19) has spread to all over the world. The global pandemic is primarily a health crisis. Nevertheless, it has undoubtedly impacted social and economic aspects of life too. All countries have temporarily closed schools and universities. We will see how this closure will affect the individual person and society as a whole, but it is certain that post-traumatic stress disorder will appear. Children are afraid of their health and the health of their family. Their basic right to education is in some way limited; their right to play and socialize with their peers is reduced.

Normative analysis of special procedural provisions of the FA (*lex specialis*) in relation to GAPA (*lex generalis*), indicates certain deviations and specifics in the implementation of a special administrative procedure under the jurisdiction of the SWC. Significant deviations were observed in the FA as it contained a larger number of procedural rules compared to the SWA. Certain exceptions and derogations are justified based on the reasons of urgency and protection of the welfare and interests of the child, which is required by this special administrative area. However, exceptions should also be explained in detail in Decisions, but they should not be abused in any way.

From the analysis of statistical data of SWC Osijek in the observed period, it can be concluded that the number of measures imposed in 2020 have increased compared to previous years. Measures of professional assistance and support in the realization of child care (milder measures) are mostly imposed, and to a lesser extent measures of urgent separation. Of particular concern is the high number of children covered by the measures and, in particular, the increase in domestic and sexual violence.

Under the influence of measures related to the prevention of the COVID-19 pandemic and during the so-called “Lockdown” actions of SWC Osijek take place in extraordinary and changed circumstances. The implementation of family law protection measures and increased care and supervision was limited, without establishing personal contact with beneficiaries. Communication was maintained through available electronic media and/or telecommunication means, while the work was organized through grouping into professional teams and work from home. Special emphasis was placed on reaching an agreement and adjusting the realization of personal relationships and contacts, as well as

cooperation, where the most important priorities are: protection of the health and safety of the child.

Finally, it should be noted that it is necessary to strengthen the capacity of professionals in the social welfare system in order to enable the implementation of effective measures in the family environment. This is necessary and justified in order to protect children from abuse, neglect or any other form of domestic violence and harassment. It is also worth emphasizing the importance of legal protection of social workers, especially in these challenging times, which require adjustments and quick reactions and major changes in the way we act and make decisions in relation to these very sensitive and vulnerable groups of users / parties.

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PROTECTION OF CHILDREN FROM SEXUAL ABUSE AND EXPLOITATION IN INTERNATIONAL, EUROPEAN AND NATIONAL LEGAL FRAMEWORK

Exposure of children to sexual abuse and exploitation is one of the most prevalent forms of criminal offenses against sexual freedom committed against persons below the age of 18 years. Bearing in mind that the prohibition of child sexual abuse and exploitation is recognized not only at the international and European level but also at the national level, the paper deals with the criminal law aspects related to this topic. In that regard, the paper provides an analysis of the relevant provisions concerning offences related to sexual abuse and exploitation at the level of the UN, the Council of Europe, the European Union and the Republic of Serbia. In that context, special attention is dedicated to the phenomenological analysis of the manifested forms of child sexual abuse and exploitation. The paper concludes that although the danger of child sexual abuse and exploitation for the proper development of children has already been recognized, in practice it is still noticed that there is an insufficient implementation of the adopted framework. Therefore, it is suggested that, in the context of its prevention, the most effective means is the early identification of sexual abuse and exploitation cases, thus avoiding the exposure of child victims to harmful consequences.

Keywords: children, sexual abuse, sexual exploitation, offenses, information technology, UN, Council of Europe, European Union, Republic of Serbia

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INTRODUCTION

There are many areas of concern for children's healthy development and well-being which may arise in connection with the digital environment (Council of Europe, 2018:19-20). One area of special concern is related to the issue of sexual exploitation and abuse. Children, all around the world, suffer sexual abuse and exploitation since individuals who seek them out realized that digital technology provides the ability for making profit from their's exploitation (International Centre for Missing & Exploited Children, 2016:3). Furthermore, it should be noticed that technological developments rapidly succeed one another, influencing the phenomenon of child sexual abuse and exploitation. This means that technological developments must be taken into account in legislation, policy and implementation. In other words, technological expertise must keep pace with legal developments in the digital domain (Dettmeijer-Vermeulen, 2012:3-4). However, the rapid development and tremendous growth in the use of electronic, computer-based communication and information have not been accompanied by adequate recognition of the dangers by child's wellbeing that may result from such technology (Stanley, 2001: 1-2).

In this sense, the important change at the level of the normative framework was introduced by the adoption of the UN Convention on the Rights of the Child from 1989 which in article 34 protects the child from all forms of sexual exploitation and sexual abuse.¹ Related to this is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted in 2000 which also prohibits *inter alia* child sexual abuse and exploitation.²

Followed by UN action on combating child sexual abuse and exploitation, the Council of Europe, as well as the European Union, have undertaken their responsibility in this area. In that context, the Council of Europe adopted Convention for the protection of children against sexual exploitation and abuse known as the Lanzarote Convention (hereinafter: Lanzarote Convention) in 2007.³ Together with this convention, the EU was adopted Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011, on combating the sexual abuse and sexual exploitation of children and child

¹ UN Convention on the Rights of the Child adopted by General Assembly resolution 44/25 of 20 November 1989.

² Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted 2000.

³ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25.X.2007, *Council of Europe Treaty Series* -No. 201.

pornography (Negredo, Herrero, 2016:218; Greijer, Doek, 2016:35).⁴ Finally, following the recognition of child sexual abuse and exploitation as a crime at international as well as the European level, the Republic of Serbia in Criminal Code from 2006 prescribes criminal offenses concerning child sexual abuse and exploitation.⁵

Therefore, the following lines will be dedicated to the analysis of the UN framework regarding offenses related to child sexual abuse and exploitation. Furthermore, special attention will be paid to the Council of Europe framework, including relevant provisions of Lanzarote convention as well as EU framework concerning offenses related to child sexual abuse and exploitation by considering the provision of Directive 2011/93/EU. Finally, the attention will be dedicated to the suitable provision at the national level linked to the offenses related to child sexual abuse and exploitation in the Criminal Code of the Republic of Serbia.

UN FRAMEWORK CONCERNING CHILD SEXUAL ABUSE AND EXPLOITATION

UN Convention on the Rights of the Child from 1989 represents the central international act providing the protection of children's rights. In the context of child sexual abuse and exploitation, this act has provided a broad concept in the field of protection of children against violence. According to the Article 19, States Parties should take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide the necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

More concrete protection of children against sexual abuse and exploitation has been referred to in Article 34 of the UN Convention on the Rights of the Child. In concordance with this article States Parties should protect the child from all forms of sexual

⁴ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *Official Journal of the European Union*, L 335/1.

⁵ Criminal Code, *Official Gazette of RS*, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

exploitation and sexual abuse by taking all appropriate national, bilateral and multilateral measures to prevent: 1) the inducement or coercion of a child to engage in any unlawful sexual activity; 2) the exploitative use of children in prostitution or other unlawful sexual practices; and 3) the exploitative use of children in pornographic performances and materials.

Furthermore, there is the protection of child against sexual abuse provided by Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereinafter: the Optional Protocol). According to Article 2 of the Optional Protocol, child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration. The Optional Protocol obliges State Party to ensure that, as a minimum, the offering, obtaining, procuring or providing a child for child prostitution are fully covered under its criminal or penal law.

From the abovementioned analysed UN Convention on the Rights of the Child, it can be noticed the fact that it does not make any difference between terms of sexual abuse and exploitation of children. In that sense, the UN Convention on the Rights of the Child suffers from the lack of difference between the list of criminal offences under the term of sexual abuse from the list of crimes under the term of sexual exploitation. Instead of this, the UN Convention on the Rights of the Child provides the concept of comprehensive protection of children against all forms of sexual abuse and exploitation. Therefore, the concrete and specified forms of unlawful sexual activity and sexual practices covered by Article 34 of the UN Convention on the Rights of the Child are related to both terms of sexual abuse and exploitation. On the other side, when it comes to the term of child prostitution defined by the Optional Protocol it must be seen that it is covered under this term the acts of offering, obtaining, procuring or providing a child for child prostitution.

COUNCIL OF EUROPE FRAMEWORK CONCERNING CHILD SEXUAL ABUSE AND EXPLOITATION

Bearing in mind the fact that in the context of child sexual abuse and exploitation at the level of Council of Europe the most important document is Lanzarote convention, adopted in 2007, in the following lines the relevant provisions of this international treaty will be considered. However, it should be observed that this Convention does not make difference between offences concerning child sexual abuse and exploitation in an explicit manner. On the other side, compared to the UN framework, the Lanzarote Convention has recognized this difference in an implicit manner. Thus, by Article 18 offences concerning child sexual abuse are prescribed in an explicit manner, while offences related

to sexual exploitation are prescribed in an implicit manner, divided in following two criminal offences: 1) offences concerning child prostitution, Article 19 and 2) offences concerning the participation of a child in pornographic performances, Article 21. To start with offences concerning child sexual abuse.

Offences concerning child sexual abuse

Concerning criminal offences of child sexual abuse Lanzarote Convention obliges in concordance with Article 18 Each Party to take the necessary legislative measures to ensure that the following intentional conduct is criminalised: 1) engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities; 2) engaging in sexual activities with a child where: a) use is made of coercion, force or threats; b) abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or c) abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.

When it comes to the act of engaging in sexual activities with a child the special requirement is that the victim of this crime can be the child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities. In this sense, this provision suffers from the lack of legal certainty since who can be the victim of this crime is left to decide each Party. Thus, each Party shall decide the age below which it is prohibited to engage in sexual activities with a child. Therefore, in this area, for the purpose of legal certainty, the requirement for all Parties is to define the age below which it is prohibited to engage in sexual activities with a child in a similar way as much as possible. Furthermore, the term of sexual activities is not defined since the negotiators preferred to leave to Parties the definition of the meaning and scope of this term. However, it should be underlined that the act of engaging in sexual activities with a child does not include consensual sexual activities between minors, even if they are below the legal age for sexual activities as provided in internal law. In this regard, it should be pointed out that there is no crime if it is about sexual activities between persons of similar ages and maturity who are discovering their sexuality and engaging in sexual experiences with each other in the framework of their sexual development (Council of Europe, 2007: 18-20).

Besides engaging in sexual activities with a child where use is made of coercion, force or threats, this criminal offence exists when there is the abuse of a recognized position of trust, authority or influence over the child. This type of abuse is referred to the situation

where the following conditions are met: 1) a relationship of trust has been established with the child; 2) the relationship occurs within the context of a fulfilling professional activity or within the family, 3) such relationships of trust are established between the child and the person who exercises control over the child such as the relationship between the child and his or her parents as well as foster or adoptive parents, or child and care providers in institutions, teachers, doctors, etc.; 4) there is unequal physical, economic, religious or social power between the victim and perpetrator which enables him or her to control the child. In this sense, it is worthwhile noting that the list of potential perpetrators is not exhaustive (Council of Europe, 2007: 18-19).

On the other side, engaging in sexual activities with a child could be committed by the abuse of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence. Disability includes children with physical and sensory impairments, intellectual disabilities and autism, and mentally ill children, while a situation of dependence refers not only to children with drug or alcohol addiction problems, but also to situations in which a child has become intoxicated by alcohol or drugs, whether through his or her own actions or by the perpetrator, and whose subsequent vulnerability is then abused. However, it should be mentioned that the list of situations covered by the term of dependence in the sense of this crime is not exhausted since also comprises other situations in which the child has no other real and acceptable option than to submit to the abuse, such as situations where acts are committed against children in the framework of activities within sects or situation of unaccompanied migrant minors. Like it was the case with the previously analyzed form of abuse covered by this crime, also in this case the reasons for creating the situation of dependence of the child may be physical, emotional, family-related, social or economic. As a result of this situation of dependence, the child may consent to the sexual relations, but his or her situation of vulnerability renders the capacity to consent invalid (Council of Europe, 2007: 19).

Offences concerning child prostitution

According to Article 19 of Lanzarote Convention, the term child prostitution means the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person. In the respect of offences concerning child prostitution this Convention obliges each Party to ensure that the following intentional conduct is criminalised: 1) recruiting a child into prostitution or causing a child to participate in prostitution; 2) coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes; 3) having recourse to

child prostitution (Council of Europe, 2012 :37). Therefore, it could be observed that this article establishes a link between demand and supply of child prostitution by requiring criminal sanctions for both the recruiters, profitters and users of a child exposed to prostitution. In regard to this crime it should be cleared that the perpetrators by the use of inducements and pressure push children into prostitution, taking advantage of their psychological and emotional distress as well as the lack of material or moral support (Council of Europe, 2007: 20).

Offences concerning the participation of a child in pornographic performances

In the view of offences concerning the participation of a child in pornographic performances in concordance with Article 21 of Lanzarote Convention each Party should ensure that the following intentional conduct is criminalised: a) recruiting a child into participating in pornographic performances or causing a child to participate in such performances; b) coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes; c) knowingly attending pornographic performances involving the participation of children (Pavlović, Paunović, 2019: 178). As it was the case with child prostitution, this provision establishes links between the supply and the demand by attaching criminal liability to the organiser of such pornographic performances as well as the customer (Council of Europe, 2007: 22). However, compared to offences concerning child prostitution where the definition of this term is provided, in the matter of this crime there is no definition of pornographic performances in this Convention.

**EU FRAMEWORK CONCERNING CHILD SEXUAL
ABUSE AND EXPLOITATION**

The EU legal framework in the area of child sexual exploitation was created in 2004, when it was adopted Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (Pisarić, 2012:475).⁶ However, this Decision is no longer in force since it was replaced in 2011 with Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (hereinafter: the Directive 2011/93/EU). Besides that, the Council framework Decision 2004/68/JHA did not make the difference between the crimes concerning sexual abuse and exploitation. It only recognized the crimes concerning sexual exploitation. That is the

⁶ Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, Official Journal of the European Union, L 13/44.

reason why in the following lines the relevant provisions of Directive 2011/93/EU will be analyzed.

According to Directive 2011/93/EU, offences concerning sexual abuse are prescribed in Article 3. In this regard, it defines child sexual abuse as: 1) causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual activities, even without having to participate; 2) engaging in sexual activities with a child where: a) abuse is made of a recognised position of trust, authority or influence over the child; b) abuse is made of a particularly vulnerable situation of the child, in particular, because of a mental or physical disability or a situation of dependence; c) use is made of coercion, force or threats; and 3) coercing, forcing or threatening a child into sexual activities with a third party (Scherrer, Ballegooij, 2017:25).

On the other side, the Directive 2011/93/EU prescribes in Article 4 offences concerning sexual exploitation. In this sense, it obliges the Member States to take the necessary measures to ensure that the following intentional conduct is punishable: a) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes; b) coercing or forcing a child to participate in pornographic performances, or threatening a child for such purposes; c) knowingly attending pornographic performances involving the participation of a child; d) causing or recruiting a child to participate in child prostitution, or profiting from or otherwise exploiting a child for such purposes; e) coercing or forcing a child into child prostitution, or threatening a child for such purposes; f) engaging in sexual activities with a child, where recourse is made to child prostitution (Jeney, 2015:14-15). This Directive provides the definition of the terms of pornographic performance and child prostitution. Thus the term of pornographic performance according to Article 2 paragraph e means a live exhibition aimed at an audience, including by means of information and communication technology, of either a child engaged in real or simulated sexually explicit conduct; or the sexual organs of a child for primarily sexual purposes, while the notion of child prostitution in concordance with the same Article paragraph d means the use of a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment in exchange for the child engaging in sexual activities, regardless of whether that payment, promise or consideration is made to the child or to a third party.

Analysis of the EU framework concerning child sexual abuse and exploitation has shown that at this level the difference between sexual abuse and exploitation is made. In that sense, the difference between the list of criminal offences under the term of sexual abuse

from the list of crimes under the term of sexual exploitation is recognized. Although there is a lack of definitions of used terms, it can be noted that under the notion of sexual exploitation it is referred to the offences concerning the participation of a child in pornographic performances as well as offences regarding the participation of a child in prostitution, while under the term of sexual abuse it is understood observing, engaging, coercing, forcing or threatening a child into sexual activities.

THE REPUBLIC OF SERBIA CRIMINAL LAW FRAMEWORK CONCERNING CHILD SEXUAL ABUSE AND EXPLOITATION

In the criminal law framework of the Republic of Serbia, there is no division on offenses concerning child sexual abuse and offences concerning child sexual exploitation expressed explicitly. However, implicitly it could be seen that there are some criminal offences in the group of crimes against sexual freedoms that may be understood as offenses concerning child sexual abuse and exploitation.

In that context of child sexual abuse offenses, Criminal code of the Republic of Serbia has prescribed several crimes, such as the following ones: 1) Rape and Prohibited Sexual Acts against a child-Article 178 and 182; 2) Sexual Intercourse with a Helpless Person-Article 179; 3) Sexual Intercourse with a Child -Article 180 and 4) Sexual Intercourse through Abuse of Position-Article 181.

The criminal offenses of rape and prohibited sexual acts against a child commits anyone who forces a child to sexual intercourse, an equal act or some other sexual act by use of force or threat of direct attack against the body of such or other person or under threat of disclosure of information against such person or another that would discredit such person's reputation or honour, or by the threat of other grave evil (Škulić, 2017: 418).

Sexual intercourse with a helpless child commits anyone who has sexual intercourse with child or commits an equal act by taking advantage of such person's mental illness, mental retardation or other mental disorder, disability or some other state of that person due to which the person is incapable of resistance (Škulić, 2018: 53). Sexual intercourse with a child commits anyone who has sexual intercourse or commits an equal act against a child. The aggravated forms of this criminal offence are the following: a) if the offence results in grievous bodily harm of the child against whom the act was committed or b) if the act is committed by several persons or c) the act resulted in pregnancy or d) if the offence results in the death of the child. However, it must be mentioned that an offender shall not be punished for this offence if there is no considerable difference between the offender

and the child in respect of their mental and physical development. Sexual intercourse through abuse of position against juvenile and child can be committed by a teacher, tutor, guardian, adoptive parent, stepfather or another person who through abuse of his position or authority has sexual intercourse or commits an act of equal magnitude a juvenile or child entrusted to him for learning, tutoring, guardianship or care. Aggravated forms of these criminal offences exist in the case if result in pregnancy or in the death of the child.

On the other side, the Criminal Code of the Republic of Serbia in the context of the crimes concerning child sexual exploitation prescribes the following two criminal offences related to child prostitution and one concerning pornographic performances: 1) Pimping and Procuring -Article 183; 2) Mediation in Prostitution -Article 184 and 3) Showing, procuring and possession of Pornographic Material and Juvenile Pornography -Article 185. Pimping and Procuring commits anyone who pimps or procures a minor for sexual intercourse or an equal act or other sexual act. Mediation in Prostitution against a minor commits anyone who causes or induces that minor to prostitution or participates in handing over that minor to another for the purpose of prostitution. In this sense, the Criminal Code of the Republic of Serbia is not completely in the line with Council Europe and EU framework since the acts of coercing or forcing a child into child prostitution, or threatening a child for such purposes as well as engaging in sexual activities with a child, where recourse is made to child prostitution are not recognized by this act.

The criminal offense of showing, procuring and possession of pornographic material and juvenile pornography commits anyone who: 1) shows to a child a pornographic performance 2) uses a minor to produce photographs, audio-visual or other items of pornographic content or for a pornographic show; 3) by the use of information technology makes access to pictures, audio-visual or other items of pornographic content resulting abuse of a juvenile. However, this criminal offense is not fully harmonised with the Council of Europe and EU framework since the acts of causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes, coercing or forcing a child to participate in pornographic performances, or threatening a child for such purposes and knowingly attending pornographic performances involving the participation of a child are not recognized by the Criminal Code of the Republic of Serbia.

CONCLUSION

The rapid development of information and communication technology has enabled a significant increase in the number of cases of child sexual abuse and exploitation, which consequently has required taking appropriate normative steps at the international, european and national levels. In this regard, firstly, it should be mentioned the 1989 UN Convention on the Rights of the Child which had underlined the need for prevention of children against sexual abuse and exploitation. However, the main limitation of the UN Convention on the Rights of the Child is reflected in the lack of difference between the list of criminal offences under the term of sexual abuse from the list of crimes under the term of sexual exploitation.

Furthermore, it should be noted the Lanzarote Convention introduced a wide range of offenses related to child sexual abuse and exploitation. On the one hand, it has recognized offences concerning child sexual abuse in an explicit manner, while on the other side it prescribed offences related to sexual exploitation in an implicit manner, divided into offences concerning child prostitution and offences concerning the participation of a child in pornographic performances. In the context of offences concerning child sexual abuse and exploitation, there are several limitations for the proper applicability of the principle of legal certainty. Firstly, the Lanzarote Convention leaves each Party to decide the age below which it is prohibited to engage in sexual activities with a child. Therefore, in this area, for the purpose of legal certainty, the requirement for all Parties is to define the age below which it is prohibited to engage in sexual activities with a child in a similar way as much as possible. Furthermore, the Lanzarote Convention leaves each Party to define the term of sexual activities, although it does not include consensual sexual activities between minors, even if they are below the legal age for sexual activities as provided in internal law. Finally, in the respect of the offences concerning child sexual exploitation although the Lanzarote Convention provided definition of child prostitution there is no definition of pornographic performances in this Convention.

Under the influence of the achievements accomplished in this area at Council of Europe level, the European Union has undertaken legislative action to improve its legal framework in the field of child sexual abuse and exploitation. Based on these efforts, in 2011, Directive 2011/93 was adopted recognizing both offenses concerning child sexual abuse and exploitation. Compared to the Lanzarote Convention, this Directive provides the definition of both terms of importance for offenses concerning child sexual exploitation - pornographic performance and child prostitution. On the other side, it can be noted that under the notion of sexual exploitation it is referred to the offences

concerning the participation of a child in pornographic performances as well as offences regarding the participation of a child in prostitution, while under the term of offenses concerning child sexual abuse it is understood the same acts as it was the case with the Lanzarote Convention.

In the context of the criminal law framework of the Republic of Serbia, there is no division on offenses concerning child sexual abuse and offences concerning child sexual exploitation although there are some criminal offences in the group of crimes against sexual freedoms that may be understood as offenses concerning child sexual abuse and exploitation. Regarding, child sexual abuse offenses, the Republic of Serbia by prescribing in Criminal Code crime of rape, prohibited sexual acts against a child, sexual intercourse with a helpless person, sexual intercourse with a child and sexual intercourse through abuse of position fully harmonised its criminal law framework with Council of Europe and EU legislation. On the other side, when it comes to the offences concerning child sexual exploitation Criminal Code is not completely in the line with Council Europe and EU framework since the acts of coercing or forcing a child into child prostitution, or threatening a child for such purposes as well as engaging in sexual activities with a child, where recourse is made to child prostitution are not recognized by this act. Furthermore, the acts of causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes, coercing or forcing a child to participate in pornographic performances, or threatening a child for such purposes and knowingly attending pornographic performances involving the participation of a child are not recognized by the Criminal Code of the Republic of Serbia.

Therefore, it can be concluded that the Republic of Serbia has mostly harmonised its criminal legislation with the legal framework at the level of UN, Council of Europe and the European Union. However, in the respect of offenses concerning child sexual exploitation, there is space for further harmonisation with achieved standards at the Council of Europe and the European Union level. Besides undertaking adequate legislative measures, it remains imperative in the field of combatting child sexual abuse and exploitation to detect the cases promptly in order to provide assistance and support to victims and to prevent harmful consequences that can result from these behaviours.

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Veljko Turanjanin*

**HUMAN DIGNITY AND DEFENDANT'S RIGHTS
IN THE CRIMINAL PROCEDURE – REFLECTIONS
OF BOUYID V. BELGIUM**

An author in this work deals with the human dignity through the human rights. Human dignity is very known term in the international legal documents. However, the European Convention of Human Rights does not define this term. Through the elaboration one of the recent cases, Bouyid v. Belgium, the author places violation of the human dignity in Article 3 of the Convention, as a form of the degrading treatment. This is particularly important judgment for the criminal procedure law, because it limits police power during the interrogation. Besides that, the author in this work divide the Article 3 at the substantive and procedural level, and explains violation of the both levels and consequently, violation of the human dignity.

Keywords: *human dignity, criminal procedure, defendant, police interrogation*

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1. Introduction

The concept of human dignity raises profound philosophical puzzles (Luban, 2007). The core idea of the human dignity we can find in the famous Pico della Mirandola's speech *On the Dignity of Man*. An idea of human dignity is that on earth, humanity is the greatest type of beings and that every member deserves to be treated in a manner consonant with the high worth of the species (Kateb, 2011: 3-4). It has many dimensions (Egonsson, 1998) and it is related with the numerous aspects of law, such as free speech (Heyman, 2008) or death with dignity (Coulehan, 2007; Banović & Turanjanin, 2014; Banović, Turanjanin, & Miloradović, 2017; Dimovski, Turanjanin, Kolaković-Bojović, & Čvorović, 2020; Turanjanin, Banović, & Čorović, 2018; Banović, Turanjanin, & Čorović, 2018; Dimovski, Turanjanin, Kolaković-Bojović, & Čvorović, 2020). Surveys through the world countries regarding human dignity are not so rare (Becchi & Mathis, 2019). It has specifically strong relation with criminal law as well as human rights (Turanjanin, 2020). Today we could say that the emergence of the notion of human dignity forces us once again to think about the nature of the good life for human beings, to clarify the role that the criminal law should play in securing that vision and to reconsider the relative value that the state should place on our welfare and autonomy interests and our shared desire to be respected by others as persons of equal dignity and worth (Davis, 2007: 171). Furthermore, human rights cannot be effective without criminal justice, while criminal justice cannot be justified in a convincing manner except as a means of protecting human dignity and human rights (Dearing, 2017). Even so, some authors set a question whether human dignity is the ground for human rights (Hartogh, 2014).

An article 3 of the European Convention on Human Rights provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.¹ This article enshrines one of the most fundamental values of democratic societies, which is emphasized in numerous judgments (Selmouni v. France, 1999: § 95, Labita v. Italy, 2000: § 119, Gäfgen v. Germany, 2010: § 87, (El-Masri v. the former Yugoslav Republic of Macedonia, 2012: § 195; Mocanu and Others v. Romania, 2014: § 315). Furthermore, unlike the most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions, and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (Mocanu and Others v. Romania, 2014: § 315). Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and

¹ Pavlović Z. (2017) *The right to privacy – Challenges of new commitments*, Conference papers "Freedom security: The right to privacy", Provincial Protector of Citizens – Ombudsman, Novi Sad

inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (*Chahal v. the United Kingdom*, 1996: § 79; *Georgia v. Russia (I)*, 2014: § 192; *Svinarenko and Slyadnev v. Russia*, 2014: § 113).

The prohibition of torture and inhuman or degrading treatment or punishment is a value of civilization closely bound up with respect for human dignity. However, in order to determine human dignity, it is necessary to start with the ill-treatment and degrading treatment in the ECtHR jurisprudence.² In the first place, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (*Ireland v. the United Kingdom*, 1978: § 162; *Jalloh v. Germany*, 2006: § 67; *Gäfgen v. Germany*, 2010: § 88; *El-Masri v. the former Yugoslav Republic of Macedonia*, 2012: § 196; *Svinarenko and Slyadnev v. Russia*, 2014: § 114). Further factors include the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3 (*V. v. the United Kingdom*, 1999: § 71; *Svinarenko and Slyadnev v. Russia*, 2014: § 114). Regard must also be had to the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions (*Selmouni v. France*, 1999: § 104; *Egmez v. Cyprus*, 2000: § 78). Additionally, ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also fall within the prohibition set forth in Article 3 (*Vasyukov v. Russia*, 2011: § 59, *Gäfgen v. Germany*, 2010: § 89; *Svinarenko and Slyadnev v. Russia*, 2014: § 114; *Georgia v. Russia (I)*, 2014: § 192). It should also be pointed out that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others (*Tyrer v. the United Kingdom*, 1978: § 32; *M.S.S. v. Belgium and Greece*, ECHR 2011: § 220).

The word “dignity” appears in many international and regional texts and instruments, which will be elaborated later. Although the Convention does not mention that concept,

² Kambovski, V., (2018), *Natural rights, legitimacy of laws and supranational basis of unlawfulness*, Yearbook Human rights protection “From unlawfulness to legality”, Provincial Protector of Citizens – Ombudsman, Novi Sad

the Court has emphasized that respect for human dignity forms part of the very essence of the Convention (*Svinarenko and Slyadnev v. Russia*, 2014: § 118), alongside human freedom (*C.R. v. the United Kingdom*, 1995: § 42; *S.W. v. the United Kingdom*, 1995: § 44; *Pretty v. the United Kingdom*, ECHR 2002 III: § 65). Nevertheless, this term appears in the Preamble to Protocol No. 13 to the Convention, concerning the abolition of the death penalty in all circumstances. There is a particularly strong link between the concepts of “degrading” treatment or punishment within the meaning of Article 3 of the Convention and respect for “dignity”. In 1973 the European Commission of Human Rights stressed that in the context of Article 3 of the Convention the expression “degrading treatment” showed that the general purpose of that provision was to prevent particularly serious interferences with human dignity (*East African Asians v. the United Kingdom*, 1973: § 192). The ECtHR, for its part, made its first explicit reference to this concept in the judgment in *Tyrer*, concerning not “degrading treatment” but “degrading punishment”. In finding that the punishment in question was degrading within the meaning of Article 3 of the Convention, the Court had regard to the fact that “although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity” (*Tyrer v. the United Kingdom*, 1978: § 33). Many subsequent judgments have highlighted the close link between the concepts of “degrading treatment” and respect for “dignity” (*Kudła v. Poland*, 2000: § 94; *Valašinas v. Lithuania*, 2001: § 102; *Yankov v. Bulgaria*, 2003: § 114; *Svinarenko and Slyadnev v. Russia*, 2014: § 138).

2. The concept of dignity through the main international legal documents

In the first place, it is important to determine the concept of dignity. The Preamble to the 26 June 1945 Charter of the United Nations affirms the determination of the peoples of the United Nations “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”. The concept of dignity is also mentioned in the Universal Declaration of Human Rights of 10 December 1948, the Preamble to which states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, and Article 1 of which provides that “all human beings are born free and equal in dignity and rights”. Numerous subsequent international human rights texts and instruments refer to this concept. We will briefly analyze the chronologically main legal documents in the further elaboration.

The UN Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person. The International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 in Preamble to which refers to that Declaration. Furthermore, the Preamble of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 state that the equal and inalienable rights of all members of the human family derive from the inherent dignity of the human person. Then, Article 10 of the former provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, while Article 13 of the latter states that the states parties recognize the right of everyone to education and agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 in Preamble emphasizes in particular that discrimination against women violates the principles of equality of rights and respect for human dignity, while the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 points out that the equal and inalienable rights of all members of the human family ... derive from the inherent dignity of the human person. The Convention on the Rights of the Child of 20 November 1989 states that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the UN Charter, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

The International Convention for the Protection of All Persons from Enforced Disappearance in Article 19 § 2 states that the collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual. Furthermore, Article 24 § 5 (c) points out that the right to obtain reparation covers material and moral damages and, where appropriate, other forms of reparation such as restitution; rehabilitation; satisfaction, including restoration of dignity and reputation and guarantees of non-repetition.

The Preamble of the Convention on the Rights of Persons with Disabilities states that discrimination against any person on the basis of disability is a violation of the inherent

dignity and worth of the human person and the aims of which include promoting respect for the inherent dignity of persons with disabilities (Article 1), this being also one of its general principles (Article 3 (a)). Additionally, important articles are Articles 8 (a), 16 § 4, 24 § 1 and 25.

The Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty of 15 December 1989 expresses the conviction that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights.³ The Optional Protocol to the Convention on the Rights of the Child on a communications procedure of 19 December 2011 reaffirms the status of the child as a subject of rights and as a human being with dignity and with evolving capacities. We should mention and The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 10 December 2008 and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 6 October 1999.

Several regional human rights texts and instruments also refer to the concept of dignity. Firstly, the American Convention on Human Rights of 22 November 1969 in Article 5 § 2 emphasizes that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment and all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Then, Article 6 § 2 refers to the fact that no one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner. Finally, in Article 11 § 1 this Convention states that everyone has the right to have his honor respected and his dignity recognized.

Principle VII of the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1 August 1975 stipulates that the States will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development. Article 5 the African Charter on Human and

³ Stevanović A., Grozdić B., (2018) *The idea of human rights as a means of change of the public moral*, Yearbook, Human rights protection "From unlawfulness to legality", Provincial Protector of Citizens – Ombudsman, Novi Sad

Peoples' Rights of 27 June 1981 lays down that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.

The Preamble of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of 4 April 1997 affirms, *inter alia*, the need to respect the human being both as an individual and as a member of the human species and the importance of ensuring his dignity. The Charter of Fundamental Rights of the European Union of 7 December 2000 confirms that being conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. Article states that human dignity is inviolable and must be respected and protected. Important is also Article 31 on fair and just working conditions, which states that every worker has the right to working conditions which respect his or her health, safety and dignity. Protocol No. 13 to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances of 3 May 2002 points out that the abolition of the death penalty is essential for the protection of everyone's right to life and for the full recognition of the inherent dignity of all human beings.

In the end, the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 emphasizes that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being. Article 6 stipulates that to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including research on best practices, methods and strategies; raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings; target information campaigns involving, as appropriate, *inter alia*, public authorities and policy makers; preventive measures, including educational programs for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being. Article 16 deals with the repatriation of the victims and states that the Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay. When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status

of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

We believe that it is important to briefly analyze the main documents of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). In a document entitled “CPT standards” (CPT/Inf/E (2002) 1 – Rev. 2015), the CPT stated the following: “Bearing in mind its preventive mandate, the CPT’s priority during visits is to seek to establish whether juveniles deprived of their liberty have been subjected to ill-treatment. Regrettably, deliberate ill-treatment of juveniles by law-enforcement officials has by no means been eradicated and remains a real concern in a number of European countries. CPT delegations continue to receive credible allegations of detained juveniles being ill-treated. The allegations often concern kicks, slaps, punches or blows with batons at the time of apprehension (even after the juvenile concerned has been brought under control), during transportation or subsequent questioning in law-enforcement establishments. It is also not uncommon for juveniles to become victims of threats or verbal abuse (including of a racist nature) whilst in the hands of law-enforcement agencies. In a number of [juvenile detention centers] visited by the CPT, it was not uncommon for staff to administer a so-called ‘pedagogic slap’ or other forms of physical chastisement to juveniles who misbehaved. In this regard, the CPT recalls that corporal punishment is likely to amount to ill-treatment and must be strictly prohibited.”

The CPT also noted the following in its ninth general activity report (CPT/Inf (99) 12), dated 30 August 1999 that in a number of other establishments visited (where juveniles were deprived of their liberty), CPT delegations have been told that it was not uncommon for staff to administer the occasional ‘pedagogic slap’ to juveniles who misbehaved.⁴ The Committee considers that, in the interests of the prevention of ill-treatment, all forms of physical chastisement must be both formally prohibited and avoided in practice. Inmates who misbehave should be dealt with only in accordance with prescribed disciplinary procedures. Furthermore, in its report to the Belgian Government on its visit to Belgium from 18 to 27 April 2005 (CPT/Inf (2006) 15, 20 April 2006) the CPT stated, among other things: “On the basis of all the information obtained during the visit, the CPT has come to the conclusion – as it did following its first three visits to Belgium – that the risk of a person being ill-treated by law-enforcement officers while in detention cannot be

⁴ Ćorić D, (2018), *The theoretical definition of the notion of unlawfulness - A step towards positive law*, Yearbook, Human rights protection “From unlawfulness to legality”, Provincial Protector of Citizens – Ombudsman, Novi Sad

dismissed. Accordingly, the CPT recommends that the Belgian authorities continue to be vigilant in this area and make a special effort in the case of juveniles who have been deprived of their liberty. The CPT further recommends that law-enforcement officers be given an appropriate reminder at regular intervals that any form of ill-treatment of persons deprived of their liberty – including insults – is unacceptable, that any information regarding alleged ill-treatment will be properly investigated, and that anyone responsible for such treatment will be severely punished. More specifically, concerning allegations of ill-treatment by law-enforcement officers when arresting a suspect, the CPT has repeatedly noted that this process undeniably represents a difficult and dangerous task at times, in particular when the person concerned resists or the law-enforcement officers have good reason to believe that the person poses an imminent threat. However, the use of force when making an arrest must be kept to what is strictly necessary; furthermore, there can never be any justification for striking apprehended persons once they have been brought under control.”

The CPT’s report on its visit to Belgium from 28 September to 7 October 2009 (CPT/Inf (2010) 24, 23 July 2010) emphasizes that in the course of its visits to police stations, the CPT delegation met only a few people who were deprived of their liberty. Nevertheless, while visiting prisons, it met a large number of people who had recently been in police custody. The majority of the detainees who spoke to the delegation did not report any instances of deliberate physical ill-treatment during their time in police custody. However, the delegation heard a limited number of allegations of excessive use of force (such as blows inflicted after the person had been brought under control or excessively tight handcuffing) in the course of an arrest (particularly in Brussels, Charleroi and Marcinelle). As the CPT has often acknowledged, arresting a suspect is undeniably a difficult and dangerous task at times, in particular when the person concerned resists or the police have good reason to believe that the person poses an imminent threat. Nevertheless, the CPT recommends that police officers be reminded that when making an arrest, the use of force must be kept to what is strictly necessary; furthermore, there can never be any justification for striking apprehended persons once they have been brought under control.

In its Recommendation Rec(2001)10 on the European Code of Police Ethics adopted on 19 September 2001, the Committee of Ministers of the Council of Europe stated its conviction that public confidence in the police is closely related to their attitude and behaviour towards the public, in particular their respect for the human dignity and fundamental rights and freedoms of the individual as enshrined, in particular, in the European Convention on Human Rights. It recommended that the governments of

member States be guided in their internal legislation, practice and codes of conduct of the police by the principles set out in the European Code of Police Ethics appended to the Recommendation, with a view to their progressive implementation and the widest possible circulation of the text. Additionally, the Code states in particular that one of the main purposes of the police is to protect and respect the individual's fundamental rights and freedoms as enshrined, in particular, in the Convention. In the section on "Guidelines for police action/intervention" it stipulates that the police shall not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances and that they may use force only when strictly necessary and only to the extent required to obtain a legitimate objective. In carrying out their activities, they shall always bear in mind everyone's fundamental rights and police personnel shall act with integrity and respect towards the public and with particular consideration for the situation of individuals belonging to especially vulnerable groups.

3. The facts of the case *Bouyid v. Belgium*

In this case the applicants are brothers who live with their parents, their brother and two sisters next to the local police station of *Saint-Josse-ten-Noode*. They both complained that they had been slapped in the face by police officers, one on 8 December 2003 and the other on 23 February 2004. They submitted that those events had taken place against a background of tense relations between their family and certain officers in the police station. The applicants submitted that on 8 December 2003 the first applicant had been standing with a friend in the street outside the door of the building where he lived with his family and, since he had forgotten his keys, had been ringing the bell so that his parents would let him in, when a plain-clothes policeman, A.Z., had asked him to show him his identity card. The first applicant had refused to comply, asking the officer to show him his credentials. The officer had then grabbed him by his jacket – tearing it – and taken him to the police station. The first applicant had been placed in a room and, while he was alone with A.Z., the officer had slapped him in the face as he was protesting about his arrest. The applicants provided a certificate that the first applicant had been in a state of shock and had presented erythema on the left cheek (disappearing) and erythema on the left-side external auditory canal. A.Z. had lodged a criminal complaint against the first applicant, alleging forceful resistance to a public officer, abusive behavior and verbal threats.

The applicants further indicated that on 23 February 2004, while the second applicant was at the *Saint-Josse-ten-Noode* police station and Officer P.P. was interviewing him about an altercation involving him and his mother together with a third party (and about which

the latter had filed a complaint), P.P. had slapped him in the face after asking him not to lean on his desk. He had then forced him to sign his statement by threatening to put him in a cell. The applicants provided a medical certificate issued on the same day by a general practitioner, who observed bruising on the left cheek of the second applicant.

In the applicants' submission, their family had been harassed by the *Saint-Josse-ten-Noode* police force. They stated that the problems had begun in 1999, when one of the officers had suspected N. of deliberately scratching his car. N. had subsequently been charged with threatening the same officer and committing robberies, on which charges he had been acquitted by the Brussels Youth Court on 21 April 2000. According to the applicants, the case against him had been entirely fabricated by members of the *Saint-Josse-ten-Noode* police force by way of reprisal. They added that on 24 June 1999 the first applicant, then aged 13, had been "beaten" by another police officer in the police station, where he had been taken following a fight in the street. He had sustained a perforated eardrum. His mother and one of his sisters, who had been in the waiting room, had been shaken and manhandled by police officers. On 25 November 1999 one of their sisters had been verbally abused by an officer of the *Saint-Josse-ten-Noode* police force, and on 11 March 2000 their brother, N., had been searched, jostled and verbally abused by police officers. They further stated that in 2000 a case initiated by the *Saint-Josse-ten-Noode* police force had been opened against N. and entrusted to an investigating judge, but the proceedings had been discontinued. In the same year the second applicant had been wanted for questioning and, even though the *Saint-Josse-ten-Noode* police force had announced on 23 July 2002 that he was being taken off the relevant "wanted" list, he had still had to make various applications to the prosecutor's office and wait until March 2005 for the process to be completed, causing him a great deal of inconvenience. On 6 April 2001 and 12 July 2001 respectively, N. and the second applicant had been verbally abused by officers of the *Saint-Josse-ten-Noode* police force. The applicants explained that they had systematically reported to the judicial authorities or police all the incidents of which they had been victims, and had filed complaints.

4. Violation of Article 3 of the Convention under its substantive head

In the first place, it is worthy to emphasize that in a case when an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (*Bouyid v. Belgium*, 2015: § 100). However, the term "in principle" cannot be taken to mean that there might be situations in which such a finding

of a violation is not called for, because severity threshold has not been attained. This term, according to the joint partly dissenting opinion of judges de Gaetano, Lemmens and Mahoney, implies that there are exceptions, that is to say, instances of interference with human dignity that nevertheless do not breach Article 3. The ECtHR further emphasized that any interference with human dignity strikes at the very essence of the Convention and for that reason any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question (*Bouyid v. Belgium*, 2015: § 101). In this case, each slap was an impulsive act in response to an attitude perceived as disrespectful, which is certainly insufficient to establish such necessity, so the ECtHR consequently found that the applicants' dignity was undermined and, accordingly, that there has been a violation of Article 3 of the Convention. Furthermore, the ECtHR emphasized that in any event a slap inflicted by a law-enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual's dignity. A slap has a considerable impact on the person receiving it. A slap to the face affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the center of his senses – sight, speech and hearing – which are used for communication with others (*Bouyid v. Belgium*, 2015: §§ 103-104).

We have to agree with the ECtHR in the view that that is particularly true when the slap is inflicted by law-enforcement officers on persons under their control, because it highlights the superiority and inferiority which by definition characterize the relationship between the former and the latter in such circumstances. In its joint partly dissenting opinion of judges de Gaetano, Lemmens and Mahoney, a slap by a police officer is unacceptable. Police officers who needlessly strike an individual under their control are committing a breach of professional ethics and in a democratic society it is only to be expected that such an act should also constitute a tort and a criminal offence. The fact that the victims know that such an act is unlawful, constituting a breach of moral and professional ethics by those officers also being unacceptable may furthermore arouse in them a feeling of arbitrary treatment, injustice and powerlessness (*Bouyid v. Belgium*, 2015: § 106). The fact that is particularly important for national criminal legislations is vulnerability of the arrested persons. In other words, persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities are consequently under a duty

to protect them, but in inflicting the humiliation of being slapped by one of their officers they are clearly disregarding this duty (*Bouyid v. Belgium*, 2015: § 107).

The next important fact is irrelevance of the provocative or disrespectful conduct of the victim. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. In a democratic society, ill-treatment is never an appropriate response to problems facing the authorities. According to the European Code of Police Ethics, the police, specifically, must not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances. Article 3 of the Convention establishes a positive obligation on the State to train its law-enforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no one is subjected to torture or treatment that runs counter to that provision, which is taken in *Davydov and Others* (*Davydov and Others v. Ukraine*, 2010: § 268).

Finally, very important fact that have a great influence to the vulnerability is the fact that one applicant was a minor. A concept of human dignity which discards or denies the dignity of the vulnerable and weak is at odds with the real human condition (Masferrer & García-Sánchez, 2016). Ill-treatment is liable to have a greater impact, especially in psychological terms, on a minor (*Rivas v. France*, 2004: § 42; *Darraj v. France*, 2010: § 44) than on an adult. The ECtHR emphasized that it is vital for law-enforcement officers who are in contact with minors in the exercise of their duties to take due account of the vulnerability inherent in their young age, so police behavior towards minors may be incompatible with the requirements of Article 3 of the Convention simply because they are minors, whereas it might be deemed acceptable in the case of adults. Therefore, law-enforcement officers must show greater vigilance and self-control when dealing with minors (*Bouyid v. Belgium*, 2015: § 110). In this case, the slap administrated to each of the applicants by the police officers while they were under their control did not correspond to recourse to physical force that had been made strictly necessary by their conduct, and thus diminished their dignity. This treatment cannot be described as inhuman or, *a fortiori*, torture, while the ECtHR found that this case involved degrading treatment.

5. Violation of Article 3 of the Convention under its procedural aspects

In order to explain violation of the Article 3 in the procedural aspects, it is important to start with the notion of the jurisdiction. According to the Article 1 of the Convention, the State has to secure to everyone within its jurisdiction the rights and freedoms defined in

the Convention. The provisions of Article 3 require that there should be some form of effective official investigation where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands, *inter alia*, of the police or other similar authorities (Bouyid v. Belgium, 2015: § 116). The key elements of the effective official investigation can be summarized as follows.

The essential purpose of such an investigation is to secure the effective implementation of the domestic laws prohibiting torture and inhuman or degrading treatment or punishment in cases involving State agents or bodies, and to ensure their accountability for ill-treatment occurring under their responsibility. Generally speaking, for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence. Whatever mode is employed, the authorities must act of their own motion. In addition, in order to be effective the investigation must be capable of leading to the identification and punishment of those responsible. It should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used force but also all the surrounding circumstances. Although this is not an obligation of results to be achieved but of means to be employed, any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of the required standard of effectiveness. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The victim should be able to participate effectively in the investigation. Lastly, the investigation must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation (Bouyid v. Belgium, 2015: §§ 117-123).

In this case, an investigation was initiated and the two police officers implicated by the applicants were charged with using violence against individuals in the course of their duties and, in particular, with intentional wounding or assault, and with engaging in arbitrary acts in breach of the rights and freedoms guaranteed by the Belgian Constitution. Consequently, the investigation was conducted in accordance with statutory requirements, under the authority of an investigating judge and it was under the control of an independent authority. We could say that there is nothing to suggest that the

applicants were unable to participate in it. However, the investigating judge failed to hold, or arrange for, a face-to-face confrontation between the police officers in question and the applicants, or to interview or order an interview of the physicians who had drawn up the medical certificates produced by the applicants, or of the person who was with the first applicant when Officer A.Z. had stopped and questioned him in the street. The investigation was therefore mainly confined to interviews of the police officers involved in the incidents by other police officers seconded to the investigation department and the preparation by those officers of a report summarizing the evidence gathered, once again, by police officers.

These factors tended to indicate that the investigating authorities failed to devote the requisite attention to the applicants' allegations or to the nature of the act, involving a law-enforcement officer slapping an individual who was completely under his control. Finally, this investigation without any reasonable explanation lasted almost five years. Although there may be obstacles or difficulties which prevent progress in an investigation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. So, the ECtHR concluded that the applicants did not have the benefit of an effective investigation and found a violation of the procedural head of Article 3 of the Convention.

6. Conclusion

Where is the limit of the police behavior during the interrogation? Through the rich ECtHR jurisprudence we can find numerous solutions. Article 3 of the Convention includes many aspects. For our considerations the key term is degrading treatment and its link to human dignity. To define what exactly the term degrading treatment means in the ECtHR jurisprudence is not an easy task. Judges de Gaetano, Lemmens and Mahoney believe that the treatment in this case was unacceptable, but they were unable to find that it attained the minimum level of severity to be classified as "degrading treatment" within the meaning of Article 3 of the Convention. Additionally, the fear that the judgment may impose an unrealistic standard by rendering meaningless the requirement of a minimum level of severity for acts of violence by law-enforcement officers. Police officers may well be required to exercise self-control in all circumstances, regardless of the behavior of the person they are dealing with, but this will not prevent incidents in which people behave provocatively towards them and cause them to lose their temper. It will then be for the appropriate domestic courts, where necessary, to determine whether the officers'

behavior may have been excusable. However, we believe that this judgment is a step forward in the limiting of the police behavior during the interrogation. It is true that such behavior is unacceptable, but it has to be determined as a degrading treatment, as it is done in this judgment.

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PROTECTION OF VICTIMS OF CRIME - THE CASE OF JAPAN -

This paper provides an overview and a brief analysis of victim protection in Japan. Although it has been said that victim protection in Japan lags behind that in Western countries, considerable progress has been made since the beginning of the 21st century. And further developments in accuracy are expected in the future. It is very desirable that the protection of victims be improved. At the same time, however, victim protection in Japan is often discussed in conjunction with severe punishment of offenders. This paper examines whether victim protection is inextricably linked to severe punishment of offenders.

Keywords: *Victims of crime, Japanese law, Criminal procedure, Penal theory*

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1. Introduction

1.1. The Significance of Victims

Here's a prominent sentence; "The victims were forgotten people". Almost every article on the victims in Japan begins with these words. I will begin this paper in the same way. What does it mean to be "forgotten"? It means that the victim had lost his or her place in the criminal justice system. To begin with, criminal law is a branch of public law. What is public law is one difficult question, but in its most general definition, it is the law that governs the relationship between the state and the individual. Criminal law is the law that governs the relationship between the state and the individual in the sense that the state recognizes and punishes the wrongdoing of criminals. Therefore, when the principle of public law is thoroughly enforced, there is no room for victims to come in. In other words, because the Criminal Code regulates wrongdoing, the victim (the injured party), is outside the protection of the Criminal Code. But the victims are real. Placed outside the protection of criminal law, they were not entitled to any protection other than that afforded by damages in civil matters.

1.2. Victim found

However, this is no longer the case in Japan today. A number of victims' support groups have been established and are working for their protection. Criminal legislation can no longer be enacted without taking the victim into account. Instead, victim support groups have begun to seek protection for victims, calling for harsher penalties and more severe punishment for the accused. For most of the victims, the perpetrators are unforgivable. In a sense, they are the enemy. The victims often resent the perpetrators deeply and call for severe punishment. For example, the current situation in Japan is such that it is difficult to say that the death penalty should be abolished if the criminal justice system seeks not to displace the victims. As they say, "Those who have never had a family member killed can't understand how they feel. The death penalty is necessary. Can those who support the abolition of the death penalty proudly say in front of victims that the death penalty should be abolished? Definitely not". It could be argued that a very different situation has arisen than when the victims feel that they are "forgotten" by the criminal justice system.

1.3. Issue of this paper

What has happened from the time when the victims were "forgotten" to the present? What has happened in the last few decades? This article examines various issues of victim

protection in Japan by tracing their historical development. Specifically, the protection of victims in criminal proceedings is the central topic of discussion.

2. The development process of victim protection

2.1. General Remarks

According to Japanese criminologist, Akira Segawa (Makoto Mitsui et al. 2020; p.318), the development process of Japan's victim support system can be divided into four periods. The first is the period when the victim compensation system was established (Phase 1), which is the period when the Crime Victims' Benefit Payment Act of 1980 was enacted. This was the first time that victims who had not previously received much attention received compensation under the legal system in Japan. The second was a period of stagnation (Phase 2), during which there was no significant movement of victim support in the decade following the enactment of the Crime Victims' Benefits Payment Act of 1980. The third was the period of “discovery of victims” in Japan (Phase 3), when a number of victim support groups were established and the status of victims was measured from 1990 onwards. In 1999, the Code of Criminal Procedure was partially amended to create specific provisions for the protection of victims when they take the stand in court. The fourth was the period in which the legal development took place (Phase 4). The two laws for the protection of victims of crime and the Basic Law for Victims of Crime were enacted. With the former, a more substantial system of protection for crime victims was created within the Code of Criminal Procedure. The latter law provided victims with strong support from the state.

After the above four phases, it can be said that since 2006, there has been a system of participation of victims of crime in criminal proceedings and financial support for further victims (Phase 5: current).

The following is an overview of these periods, following them chronologically.

2.2. Phase 1- Enactment of the Crime Victims' Benefits Payment Act

The system for the protection of crime victims in Japan began in 1980 with the Payment of Crime Victims' Benefits Act. Until then, victims were only compensated by the perpetrators on an individual basis in accordance with the Tort Law in the private sector. From the standpoint of the separation of public and private law, this system of compensation for damages is a correct way of thinking. However, in reality, the perpetrators are often not in a good financial position to provide adequate compensation

to the victims. Therefore, there is a need for a system in which the state provides financial compensation to victims.

Since the 1960s, Japan has been conducting research into the actual conditions of crime victims, and in several high-profile cases, victims were unable to receive adequate compensation (e.g., the Mitsubishi Heavy Industries case in 1974). These incidents led to a debate in the Diet about the need for a system to provide victims with compensation. In 1980, the Law on Crime Victims' Benefits was enacted. Under this system, crime victims have been able to receive monetary compensation, albeit to a certain extent.

2.3. Phase 2 - Stagnation period

After the enactment of the Crime Victims' Benefits Payment Act in 1980, victim protection in Japan entered a period of stagnation for almost a decade. There may have been some relief in the creation of a system for victim protection, albeit to a certain extent. Despite some sporadic research on crime victims, no new debate concerning the provision of greater protection for victims' human rights was sparked off.

However, it was acknowledged that monetary compensation alone was not sufficient to meet the real needs of victims. In 1990, a symposium was held to commemorate the 10th anniversary of the Crime Victims' Benefit Payment Act, and it is said that the symposium raised awareness of the need for psychological support for victims. This led to developments in the third phase of the 1990s.

2.4. Phase 3 - The Beginning of Victim Support

In the 1990s, as a result of the above, the movement to support crime victims began in earnest. In Japan, this stage is regarded as the stage at which the victims were found.

In 1990, the Society for Victims' Studies was established under the leadership of Koichi Miyazawa. Miyazawa and others conducted a large-scale research on crime victims, and the results were published in 1996. This research served as the basis for subsequent research on crime victims.

At the private sector level, crime victim support groups have begun to organize in earnest: the Crime Victims Network, established in 1998, is a nationwide support network of crime victim organizations in Japan. Eight support organizations that already existed in Hokkaido, Ishikawa, Tokyo, Ibaraki, Aichi, Wakayama, Osaka and Hiroshima collaborated in improving victim support.

In the legislation, some amendments were made to the Code of Criminal Procedure. These amendments were based on the three Anti-Organized Crime Acts of 1999. Restrictions have been placed on questioning of victims in court as witnesses, where the victim's safety is taken into account and the victim's usual location was identified.

2.5 Phase 4 - Legal Development

In the 2000s, specific legal developments took place in light of the above developments. First, in May 2000, two laws that sought to offer more protection to crime victims were enacted. This law created a victim protection system by amending the Code of Criminal Procedure. Specifically, they are as follows.

- Accompanying the witnesses during their examination
- Cloaking and video link method
- Elimination of the time limit for prosecution of sex crimes.
- Opinion polling system

In addition, in a special law, the following rights were given

- Right to file a petition for review with the board of public prosecutors
- The right to preferential court hearing
- The right to access the trial record
- Criminal reconciliation system

Next, in December 2004, the Basic Law for Crime Victims was enacted. This law establishes policies for the protection of basic rights of crime victims. Article 1 of this law stipulates the purpose of the law.

Article 1 This Act provides the Basic Principles of the measures for Crime Victims, clarifies the responsibilities of the State, Local governments, and citizens, and provides the basic matters of the measures for Crime Victims so that the measures for Crime Victims can be implemented comprehensively and systematically. The purpose of this Act is to promote and protect the rights and interests of Crime Victims.

And Article 3 presents the basic principles of the law.

Article 3 (1) All Crime Victims shall have the right to be respected for their individual dignity and to be guaranteed treatment befitting their dignity.

(2) Measures for Crime Victims shall be taken appropriately according to the situation and causes of the harm, the situation of Crime Victims, and other circumstances.

(3) Measures for Crime Victims shall be taken so that Crime Victims may receive necessary support without interruption from the time they are harmed until they are able to lead a peaceful life again.

Articles 11 to 23 also enumerate the basic measures that the State should take for victims of crime by this law.

- Provision of consultation and information
- Assistance with claims for damages
- Provision of welfare services
- Preventing re-injury and ensuring safety
- Stability of residence
- Guaranteeing jobs
- Development of a system for participation in criminal proceedings
- Protection of victims during the investigation and trial process
- Enhancing public understanding
- Promotion of research
- Assistance to private organizations
- Ensuring victims' opinions and transparency of information

With this, it can be said that the framework for crime victim protection in Japan has been established. Now, it is time to further expand the victim protection based on the above-mentioned legal system. Next, I will look at (1) the development of victim protection in the Code of Criminal Procedure and (2) the development of the protection of the fundamental rights of crime victims.

3. the development of victim protection in criminal proceedings

3.1. General Remarks

As mentioned above, a system of protection was created for victims who participate in criminal trials as witnesses, and in 2007, a system was created to further develop this system through a partial amendment to the Code of Criminal Procedure. This is known as the victim participation system in criminal trials (Sakamaki 2020; p.441). In this system, victims of crimes (including, for example, their legal representatives and attorneys commissioned by victims) participate in criminal trials as “victims’ intervenors”. In this case, the victim participating in the proceedings is not a party to the proceedings. It is a way of fulfilling the victim's request through the cooperation of the prosecutor. It is provided for under Article 316-33 of the Code of Criminal Procedure.

3.2. Victims who can participate in criminal proceedings

This system only allows certain victims of crime to participate in criminal trials. Those who can participate are victims of certain serious crimes, such as crimes causing death or injury to a person through an intentional criminal act; victims of certain sex crimes, negligent driving manslaughter victims, etc.

3.3. Rights afforded to victims

The key rights afforded to victims are as follows

- Attendance at the trial date
- Opinions on the exercise of the prosecutor's powers
- Examination of Witnesses
- Questions for the defendant
- Statements of opinion on the facts and application of the law

3.4. Theoretical Analysis

I would like to provide some theoretical analysis of this system. Essentially, it is a system that, by recognizing the rights of victims, demonstrates that they are not outsiders in criminal cases, and confirms that the criminal and criminal systems therein have a message function to send to victims that they have not been forgotten and that they will

not be forgotten. In this regard, what is particularly important in practice is the statement of opinion to the court . This could have an impact on sentencing.

There are no standards for sentencing in Japan in the Penal Code. Therefore, judges have formed that standard through case law. Basically, it is determined on the basis of the illegality and responsibility of the defendant's actions, taking into account the circumstances (Matsuzawa 2018: p.1). In that case, in Japan, sentencing by judges has been somewhat consistent, and the considering factors are fairly well-consolidated, even though the facts of the cases are quite different .

However, depending on the type of crime or special circumstances, the list of considering factors are not exhaustive. Therefore, it has been pointed out that the victim participation system may have a new impact on sentencing as these considering factors varies from case to case (Saeki 2020; p.222).

When it comes to victims' influence on sentencing, some have suggested that harsher penalties tend to be taken. On this basis, there is often a negative view of the victim participation system. However, given the importance of victims in criminal cases as a whole, this point does not hold true. Victims may benefit from being given the opportunity to participate in the criminal trial and to ensure that the criminal trial is conducted in a proper manner. In other words, it could be said that the victim participation system in criminal trials provides much consideration to victims and conveys the message that they are not forgotten and that the state cares about them (Hörnle 2006; s.950).

Many of the victims in Japan expect the criminal courts to reveal how the perpetrators are treated. It is more important to them that they are treated fairly in the Code of Criminal Procedure than that they are punished severely. Therefore, I believe that in Japan, the measurement of victim protection from procedural law is theoretically the right direction to take.

4. Development of basic rights protection for victims of crime

4.1. General Remarks

As mentioned above, the protection of the basic rights of crime victims is governed by the Basic Law for Crime Victims, which was enacted in 2004. This law requires the State to promote basic measures for the protection of crime victims in a systematic manner. Therefore, the Basic Plan for Crime Victims was formulated.

The Basic Plan for Victims of Crime was developed by the Cabinet in 2005, and since then, a new Basic Plan has been developed approximately every five years. The most recent Third National Plan for Crime Victims was formulated in April 2016.

4.2. Structure of the Basic Plan

The Third Basic Plan for Crime Victims consists of the following four basic policies, which have been followed in the previous plans, and five key issues, which must be solved with special emphasis in the Third Plan. This is a task that must be done, and it can be considered a more specific implementation goal.

Four Basic Principles;

- Guarantee the right of crime victims, etc. to be treated accordingly to their dignity
- Take each measure properly, mindful of individual victim's circumstance
- Provide a seamless and continuous support
- Progress while building the national consensus

Five Key Issues;

- Efforts to recover the victims' damages and to provide them with economic support
- Efforts for the Victims to Recover from or to Prevent Mental and/or Physical Damage
- Efforts to broaden the opportunity for victims to participate in criminal procedures
- Efforts to improve the systems to support crime victims, etc.
- Efforts to foster the understanding among citizens and to earn their consideration and cooperation

The Basic Plan for Victims of Crime is reviewed every five years. Therefore, the next plan (the Fourth Plan) is currently being formulated. The Fourth Plan is scheduled to be released in April 2021.

4.3. The Crime Victims' Benefit Scheme

Since the third plan was formulated, the crime victims' benefit system was expanded, and I will mention it here.

The victim benefit system is a system that provides direct financial relief to victims, and its expansion has been long awaited. This amendment expands, to a certain extent, what was previously deemed inadequate. However, even with these amendments, there are many opinions that the system is still inadequate. It is hoped that the fourth plan will further enhance the system.

There are four main amendments to the criminal damage benefit system.

- The amount of survivor's benefits was increased for cases where an orphan is still under 18 years of age after 10 years from the time the criminal act was committed.
- Prior to the amendment, the period of benefit for serious injuries and illnesses, which before the amendment was set at one year from the date of injury or illness caused by the criminal act, was extended to three years.
- The amount of provisional benefits (a system for provisionally granting a portion of the benefits in cases where an award cannot be made because some of the facts necessary for the award cannot be found) was capped at one-third of the amount of the benefit equivalent, but now the amount equivalent to the benefit can be paid.
- The grounds for reduction or disallowance of payments in relation to inter-family crimes were reviewed. Specifically, firstly, it was decided that if the kinship relationship is broken, no limitation of benefits will be imposed on the grounds of such kinship. Second, a special exception to the benefits for persons under 18 years of age was established. This includes the fact that when a person under 18 years of age is in a position to receive the Crime Victims' Benefit at the time of the criminal act, the payment shall not be restricted on the basis of the kinship between the person and the perpetrator.

5. Conclusion

5.1. *Last remarks*

Long “forgotten”, victims seem to be beginning to see the light of day in Japan. Of course, there are still many issues that remain to be addressed. For example, in some special crimes, the state may be the victim, but there is no discussion in Japan about victim protection in such cases (For example, see, Colojoară & Rakitovan 2018; p.469). Special considerations also need to be taken into account in criminal proceedings when children are victims (as is the case in Hungary, see, BÉKÉS 2019; p.317). Although Japan's victim protection system is still inadequate, we hope that this paper will inform readers that such a system is now in operation in Japan and awaits further development.

5.2. *Theoretical issues*

In this paper - which I have been unable to fully discuss - due to my own lack of research -I have found that the rationale for the system of victim protection in criminal proceedings is actually not very well understood. A policy that says victims should be protected in criminal proceedings must be justified by a rationale, even if it has public support.

The basic idea on this issue, as discussed in 3.4, is based on the function of the criminal justice system. It is that victim protection in criminal proceedings is guided by the ability of the criminal justice system to send a message to victims that you are not forgotten and that the state has not forgotten you.

The most detailed description of the message function of criminal law is the argument of the expressive function of punishment. The state's practice of imposing punishment functions as means to send a message of censure and disapproval to the accused, as well as a message to the victim that “the state has not forgotten you,” in addition to preventing crimes or imposing appropriate punishments. It seems to me that this may be something that should be extended to criminal justice as a whole, and not just in penal theory.

5.3. *Punishment as victim protection?*

However, a distinction must be made between protecting victims and imposing severe punishments on behalf of victims for the perpetrators. Even if a victim says what I wrote in section 1.2 of this paper, promoting victim protection and abolishing the death penalty are logically separate issues. Certainly, I understand the desire of victims to put their perpetrators to death. It is natural that the families of those whose family members have been killed in a brutal manner would feel this way. But criminal law is not a device for

revenge. It is a penal system in which the state humanely refines the reactive attitude of resentment and imposes a punishment deserved to the crime. There is theoretically no room in it for punishments that deprive people of life and bodily integrity.

The hope is that the system of victim protection will move in the direction of protecting victims in the original sense of the word, and that all the public will move away from the erroneous notion that heavier punishments are more protective of victims.

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Хилюта В.В.*

ПРИНЦИП РАВЕНСТВА И ПРАВА ЧЕЛОВЕКА В УГОЛОВНОМ ПРАВЕ БЕЛАРУСИ

В статье рассматриваются вопросы принципов уголовного права Беларуси в контексте понятий равенства и справедливости. Анализируется правоприменительная практика судов и прокуратуры Беларуси и правовые аспекты толкования уголовно-правовых категорий. Показаны несистемные подходы к конструированию уголовно-правовых норм и уход от принципа равенства всех перед законом на примере хищений и оснований освобождения от уголовной ответственности.

Ключевые слова: уголовный закон; справедливость; равенство; права человека; хищение

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

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

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

Хотя сегодня один из основополагающих принципов уголовного права – принцип равенства – говорит об обратном: не может быть никаких перегибов, потому как перед законом все равны (ч. 3 ст. 3 УК). Буквально это звучит следующим образом: “Лица, совершившие преступления, равны перед законом и подлежат уголовной ответственности независимо от пола, расы, национальности, языка, происхождения, имущественного и должностного положения, места жительства, отношения к религии, убеждений, принадлежности к общественным объединениям, а также других обстоятельств”. То есть перед законом все равны, независимо от имущественного и должностного положения.

Однако на деле все обстоит гораздо сложнее, причем сам уголовный закон как бы говорит о том, что между равными есть еще и равнее (во всех отношениях). Судите сами. Статья 50 УК, раскрывая содержания такой меры уголовного наказания как штраф, указывает, что размер штрафа определяется с учетом размера базовой величины, установленного на день постановления приговора, в зависимости от

характера и степени общественной опасности совершенного преступления и материального положения осужденного и устанавливается в пределах от **30 до 1000** базовых величин. Однако при этом за преступления против порядка осуществления экономической деятельности и против интересов службы штраф устанавливается уже в размере от **300 до 5000** базовых величин. Почему такая вдруг разбежка в наказании? Почему за эти две группы преступлений (преступления против порядка осуществления экономической деятельности и преступления против интересов службы) размер штрафа (а точнее его минимальные и максимальные границы) вдруг увеличивается в несколько раз? Как же здесь принцип равенства уголовной ответственности.

Выходит, что для предпринимателей, если они совершили экономические преступления, штраф гораздо выше, чем за любые иные. То есть если лицо, например, совершило одну из форм криминального банкротства (ст. 238-241 УК), то ему назначать наказание в виде штрафа будут в размере от тридцати до одной тысячи базовых величин, а если в его действиях усмотрят одну из форм хищения, то штраф уже составит от тридцати до одной тысячи базовых величин. Алогичность ситуации очевидна, потому что те же хищения по определению гораздо опаснее криминальных банкротств, но на деле размер наказания почему то здесь совсем другой. Казалось бы, все должно быть с точностью до наоборот, но – увы, закон отходит от принципа равенства. При этом, надо сказать что эти нововведения в размере штрафов в зависимости от совершенного преступления появились не так давно, и причем именно в тот период когда шла массовая декриминализация блока статей уголовного закона об экономических преступлениях.

Как здесь не вспомнить слова одного из древнегреческих философов, который о законах своей страны сказал следующее: “Наши законы – паутина, в которой вязнут мухи, но прорываются шмели”. Конечно, равенство всех перед законом не исключает наличия специальных прав и преимуществ для отдельных категорий лиц. Так, некоторые исключения предусмотрены самим уголовным законом в отношении женщин, мужчин пожилого возраста, несовершеннолетних (например, им не назначается смертная казнь и пожизненное заключение). Такие лица подлежат уголовной ответственности, а все преимущества основаны на законе и в равной мере применимы ко всем гражданам и соответственно не являются отступлениями от принципа равенства всех граждан перед законом.

Однако причем здесь имущественное и должностное положение? Неужели для этой категории лиц (для богатых и влиятельных) установлены привилегии? Тогда выходит, что равенство не ограничивается требованиями равной обязанности нести ответственность за совершенное преступление, а предполагает и равную возможность на законных основаниях избежать ее. Но на деле и здесь принцип равенства “не срабатывает”.

2. Подтверждением может служить тому ст. 88¹ УК, где речь идет об освобождении от уголовной ответственности в связи с добровольным возмещением причиненного ущерба (вреда), уплатой дохода, полученного преступным путем.

Итак, условия освобождения от уголовной ответственности данного вида, с учетом Положения о порядке осуществления в Республике Беларусь помилования осужденных, освобождения от уголовной ответственности лиц, способствовавших раскрытию и устранению последствий преступлений, утвержденного Указом Президента Республики Беларусь от 3 декабря 1994 г. № 250, состоят в следующем:

- 1) совершено преступление, повлекшее:
 - а) причинение ущерба государственной собственности или имуществу юридического лица, доля в уставном фонде которого принадлежит государству, либо
 - б) повлекшее причинение существенного вреда государственным или общественным интересам;
- 2) данное преступление не сопряжено с посягательством на жизнь и здоровье человека;
- 3) добровольно возмещен причиненный ущерб, включая расходы на восстановление нарушенных имущественных прав и неполученные доходы (упущенная выгода) от оборота имущества, вред, нанесенный государственным или общественным интересам; лицо способствовало устранению иных последствий совершенного преступления;
- 4) переданы в собственность государства принадлежащие виновному орудия и средства совершения преступления; вещи, изъятые из оборота;

имущество, приобретенное преступным путем, а также предметы, которые непосредственно связаны с преступлением;

- 5) лицо должно раскаться в совершенном преступлении и способствовать его раскрытию.

При соблюдении указанных условий освобождение от уголовной ответственности осуществляется Президентом Республики Беларусь.

Приведем типичный пример освобождения от уголовной ответственности по данному основанию.

Генеральной прокуратурой изучено уголовное дело № 16126000054, возбужденное 11.02.2016 в отношении С. по признакам состава преступления, предусмотренного ч. 3 ст. 424 УК. Установлено, что С., работая первым заместителем председателя, начальником управления сельского хозяйства и продовольствия Минского районного исполнительного комитета, являясь должностным лицом, занимающим ответственное положение, систематически злоупотреблял служебными полномочиями, оказывая незаконное содействие при производстве строительных работ на расположенных в д. Абрицкая Слобода Минского района земельных участках, зарегистрированных на своих сыновей. В период с марта по ноябрь 2015 г. С. при личных встречах, а также в ходе телефонных разговоров, не имея законных оснований, требовал от руководителей и должностных лиц курируемых сельскохозяйственных предприятий Минского района и предприятий, за деятельностью которых осуществлял контроль и общее руководство, предоставлять ему на безвозмездной основе строительную технику, транспорт, товарно-материальные ценности и направлять работников для выполнения строительных работ на указанных земельных участках. Своими действиями, совершенными из корыстной заинтересованности, С. причинил существенный вред государственным интересам, выразившийся в дискредитации, подрыве престижа и авторитета органов государственной власти, а также имущественный вред ГУП “М”, ОАО “Д”, ОАО “М”, ОАО “В” и ОАО “1” на общую сумму 1 791 рубль 92 копейки. Органом предварительного следствия С. предъявлено обвинение по ч. 3 ст. 426 УК. Обвиняемый свою вину не признал и показал, что не давал указаний должностным лицам предприятий, а высказывал просьбы о предоставлении строительных материалов, транспортных средств и выполнении работ, стоимость которых должны были оплатить его сыновья. Вина С. в инкриминируемом ему деянии подтверждается совокупностью собранных по делу доказательств.

Материальный ущерб возмещен полностью в сумме 1 791 рубль 92 копейки, за пользование чужими денежными средствами перечислено 159 рублей 54 копейки. В ходатайстве на имя Президента Республики Беларусь С. сообщает о деятельном раскаянии, добровольном возмещении причиненного вреда, готовности выполнить иные условия освобождения от уголовной ответственности. С учетом изложенного Генеральная прокуратура Республики Беларусь полагает, что имеются основания для освобождения С. от уголовной ответственности в соответствии со ст. 88¹ УК как выполнившего условия, предусмотренные Положением о порядке осуществления в Республике Беларусь помилования осужденных, освобождения от уголовной ответственности лиц, способствовавших раскрытию и устранению последствий преступлений, утвержденным Указом Президента Республики Беларусь от 03.12.1994 № 250.

Вопрос здесь не в том, что С. свою вину не признал, но возместил ущерб и написал ходатайство об освобождении от уголовной ответственности, что как бы ставит под сомнение добровольность деятельного раскаяния, а совсем в другом. Именно в принципе равенства, о котором уже шла речь.

Безусловно, концепция, развиваемая в рамках материально-правового института освобождения от уголовной ответственности в связи с устранением последствий преступления, необходима с точки зрения проводимой уголовной политики, и ее существование неизбежно для развитых правовых систем. То обстоятельство, что в республике в настоящее время наряду с классической схемой реакции государства на преступление, центральными элементами которой являются уголовное преследование и наказание (Головко, 2000: 41), развиваются и иные формы разрешения уголовно-правовых конфликтов, вполне естественно и отрадно. В этой связи вполне разумным выглядят меры по введению в уголовный закон дополнительных средств уголовно-правового реагирования, которые бы в значительной степени обладали экономическим характером.

Однако освобождение от уголовной ответственности в связи с деятельным раскаянием, а точнее его специальной разновидностью – в связи с добровольным возмещением причиненного ущерба (вреда), уплатой дохода, полученного преступным путем, на деле оказалось своеобразной индульгенцией для определенной категории лиц. Данное обстоятельство освобождения от уголовной ответственности в народе уже окрестили “откуп от правосудия”, когда совершив имущественные или экономические преступления в крупном или особо крупном размерах, достаточно возместить причиненный ущерб (при этом чуть больше того

размера, который был причинен¹), чтобы быть освобожденным от уголовной ответственности не доводя дело до суда (сегодня освобождение от уголовной ответственности на основании ст. 88¹ УК возможно только на стадии предварительного следствия). Как тут не вспомнить знаменитое выражение: “Если вы украдете кошелек, вас посадят в тюрьму, а если вы украдете железную дорогу, вас сделают сенатором”.

Если проанализировать категории дел, по которым чаще всего ставится вопрос об освобождении от уголовной ответственности в связи с добровольным возмещением причиненного ущерба (вреда), уплатой дохода, полученного преступным путем, то мы увидим, что чаще всего речь идет о мошенничестве в особо крупном размере (ч. 4 ст. 209 УК), хищении путем злоупотребления служебными полномочиями в особо крупном размере (ч. 4 ст. 210 УК), присвоении или растрате в особо крупном размере (ч. 4 ст. 211 УК), предпринимательской деятельности, осуществляемой без специального разрешения (лицензии) (ст. 233 УК), уклонении от уплаты сумм налогов, сборов (ст. 243 УК), злоупотребления властью или служебными полномочиями (ст. 424 УК), превышении власти или служебных полномочий (ст. 426 УК). Тем не менее, если же такие преступления (и чаще всего имущественные) совершаются в не крупном или не в особо крупном размере, вопрос об освобождении лиц, совершивших данные преступления, в связи с возмещением, например, похищенного у того же государства или где есть доля государства, никто не ставит.² Условно говоря, если похитил имущество на сумму в 400 рублей и погасил ущерб на сумму 600 рублей, лицо привлекается к уголовной ответственности. Конечно, можно сказать, что такие суммы “не рентабельны”, но как же принцип равенства граждан перед законом? Украл мешок картошки – в тюрьму, а если речь идет о миллионах, то все верни, и будешь на свободе!

Х., являясь должностным лицом – начальником отдела образования Глубокского районного исполнительного комитета, начальником отдела образования, спорта и туризма Глубокского районного исполнительного комитета, при пособничестве начальника хозяйственной группы отдела образования В. в период с 30.07.2012 по

¹ В соответствии с сложившейся правоприменительной практикой для освобождения обвиняемого от уголовной ответственности по ст. 88-1 УК необходимо возмещение суммы ущерба, увеличенной примерно в полтора раза. Однако имеют место и факты, когда в силу уважительных причин (заболевание, семейные обстоятельства) решение об освобождении от уголовной ответственности принималось без выполнения данного “внегласного” условия.

² Паўловіч З. (2017) Права на недатыкальнасць прыватнага жыцця - Выклікі новых абавязальстваў, Доклады на канферэнцыі “Бяспека свабоды: права на прыватнасць”, Правінцыйны абаронца грамадзян - амбудсмен, Новы Сад

30.10.2014 с использованием своих служебных полномочий совершил хищение денежных средств отдела образования в сумме 56 979 892 неденимированных рубля путем необоснованного начисления и выплаты денежного вознаграждения и иных выплат фиктивно принятому на работу в качестве сторожа своему брату, работу которого никто не выполнял.³ Органом предварительного следствия действия Х. квалифицированы по ч.3 ст. 210 УК. При производстве предварительного следствия Х. признал себя виновным, дал подробные показания об обстоятельствах совершения преступления, чем способствовал его расследованию. Вред, причиненный отделу образования противоправными действиями Х., составил 98 995 400 рублей, в том числе 82 629 700 рублей – средства бюджета, использованные с нарушением бюджетного законодательства; 14 497 700 рублей, 1 656 500 рублей и 211 500 рублей – проценты, начисленные в соответствии с п. 2 ч. 2 ст. 138 Бюджетного кодекса Республики Беларусь по ставке рефинансирования Национального банка Республики Беларусь. Вред возмещен в полном объеме путем добровольного перечисления 100 095 600 рублей (98 995 600 рублей внесено Х., 1 100 000 рублей – В.). Вышеуказанное свидетельствует о том, что Х. выполнил условия освобождения от уголовной ответственности, предусмотренные п. 25 Положения о порядке осуществления в Республике Беларусь помилования осужденных, освобождения от уголовной ответственности лиц, способствовавших раскрытию и устранению последствий преступлений, утвержденного Указом Президента Республики Беларусь от 03.12.1994 № 250.

В другом случае К. предъявлено обвинение в совершении преступления, предусмотренного ч. 1 ст. 14 и ч. 3 ст. 205 УК, в том, что он, работая в должности завхоза-водителя Посольства, в период с августа 2014 г. по март 2015 г., находясь в г. Пекине Китайской Народной Республики, а также в помещении Посольства и г. Минске совершил покушение на тайное похищение имущества в крупном размере. Так, он в один из дней августа–сентября 2014 г. в служебном помещении Посольства завладел чеком Посольства № 01450700, имеющим все необходимые реквизиты (за исключением указания суммы денежных средств), позволяющим получить предъявителю данного чека денежные средства в учреждении “Bank of China”, в котором открыт банковский счет Посольства. К. осенью 2014 года возле здания Посольства передал чек своим знакомым В. и Ка., не осведомленным о его преступном умысле, с просьбой самостоятельно указать в чеке сумму 40 000

³ Камбоўскі, В., (2018), Прыродныя правы, легітымнасць законаў і наднацыянальная аснова супрацьпраўнасці, Гадавік Абарона правоў чалавека “Ад незаконнасці да законнасці”, правінцыйны абаронца грамадзян - амбудсмен, Новы Сад

китайских юаней, получить эти денежные средства и передать их ему. Последние для получения денежных средств передали чек Вэ., которая также не была осведомлена о преступном умысле обвиняемого. Вэ. 27.03.2015 получила в отделении (офисе) учреждения “Bank of China” в г. Пекине по данному чеку денежные средства в сумме 40 000 китайских юаней, что по курсу Национального банка Республики Беларусь составило 93 312 400 неденоминированных рублей, и перевела их на открытый в г. Минске банковский счет К. Однако похищенные денежные средства он не получил по не зависящим от него обстоятельствам, поскольку факт хищения был обнаружен работниками Посольства. Обвиняемый К. полностью признал свою вину в предъявленном обвинении, в ходе предварительного следствия подробно изложил обстоятельства совершенного преступления, в содеянном раскаялся. Причиненный Посольству ущерб в сумме 92 312 400 неденоминированных рублей возмещен в полном объеме. К. обратился с ходатайством на имя Президента Республики Беларусь об освобождении его от уголовной ответственности на основании ст. 88¹ УК. Указанное ходатайство К. было рассмотрено, и Указом Президента Республики Беларусь от 29.12.2016 № 503-дсп он освобожден от уголовной ответственности.

Напомним, что впервые принцип равенства был провозглашен шедшей к власти буржуазии в борьбе с феодальным неравенством, и постепенно, начиная с Уголовного кодекса Наполеона 1810 г. принцип равенства граждан перед законом закреплялся во многих государствах. Однако на деле все же существовали и продолжают существовать социальные и классовые различия,⁴ связанные как теперь оказывается, с имущественным и должностным положением лица. Тем не менее, если в действиях лица имеется состав преступления, предусмотренный уголовным законом, то никакие данные его личности не могут воспрепятствовать привлечению этого лица к уголовной ответственности.⁵ И если сегодня мы констатируем, что обязанность понести наказание за совершенное преступление для всех одинакова, то должна быть такая же равная возможность быть освобожденным от уголовной ответственности. Причем для всех, независимо от

⁴ Здесь можно вспомнить, что по УК РСФСР 1926 г. (который применялся на территории Беларуси) обстоятельством, отягчающим ответственность, признавалось совершение преступления лицом, “в той или иной мере связанным с принадлежностью в прошлом или настоящем к классу лиц, эксплуатирующих чужой труд” (ст. 47). Напротив, как обстоятельство, смягчающее уголовную ответственность рассматривалось совершение преступления “рабочим или трудовым крестьянином” (ст. 48).

⁵ Стэвановіч А., Грозіч Б., (2018) Ідэя правоў чалавека як сродак змены грамадскай маралі, Штогоднік, Абарона правоў чалавека “Ад незаконнасці да законнасці”, правінцыйны абаронца грамадзян - амбudsмен, Новы Сад

размера похищенного или причиненного ущерба государственной или негосударственной формы собственности.

В принципе, здесь можно возразить, и сказать о том, что такая возможность предусмотрена ст. 88 УК (освобождение от уголовной ответственности в связи с деятельным раскаянием), если речь идет о том, что ущерб причинен юридическому лицу негосударственной формы собственности (или такому юридическому лицу, где нет доли государства). В данном случае решение вопроса об освобождении от уголовной ответственности принимается соответствующим органом уголовного преследования или судом. Но различия в этих подходах весьма существенны:

- а) если освобождение от уголовной ответственности по ст. 88¹ УК возможно при совершении преступлений любой категории (в том числе тяжких и особо тяжких), то по ст. 88 УК освобождение от уголовной ответственности возможно только лишь при совершении преступлений, не представляющих большой общественной опасности или менее тяжких преступлений;
- б) освобождение от уголовной ответственности по ст. 88 УК возможно только лишь если лицо впервые совершило преступление, а при освобождении от уголовной ответственности по ст. 88¹ УК такого условия нет (получается, что можно сколько угодно раз совершать преступление и при возмещении ущерба ставить вопрос об освобождении от уголовной ответственности);
- в) для освобождения от уголовной ответственности по ст. 88 УК необходима добровольная явка с повинной и активное способствование выявлению или раскрытию преступления, а в ст. 88¹ УК такого условия не содержится;
- г) одним из условий освобождения от уголовной ответственности по ст. 88 УК является внесение на депозитный счет органа, ведущего уголовный процесс, уголовно-правовой компенсации в размере пятидесяти процентов причиненного преступлением ущерба (вреда), но не менее тридцати базовых величин, а в ст. 88¹ УК такого обязательного условия также не содержится.

Очевидно, что принцип равенства не должен подменять собой принцип справедливости. Особый (привилегированный) порядок освобождения от

уголовной ответственности по ст. 88¹ УК (и чаще всего в зависимости от сферы совершения преступления) вступает в противоречие с конституционным положением, закрепляющим равенство форм собственности и провозглашающим их одинаковую защиту.

Безусловно, мы должны искать разумный баланс между совершенным преступлением и преступником, с одной стороны, и позицией потерпевшего (в данном случае только государства) относительно привлечения лица к уголовной ответственности, с другой стороны. Однако в ст. 88¹ УК сегодня заложено неоднозначное отношение к уголовно-правовому компромиссу с преступником. Все это превращается как бы “в торг с правосудием” и в конечном итоге это приводит к тому, что отдельные лица просто откупаются от уголовной ответственности (конечно же за счет серьезного ущемления своих имущественных прав!). Что скрывать, лицо, пострадавшее от преступления (а это государство), в настоящее время значительно больше заинтересовано в получении компенсации, возмещении причиненного ущерба, чем в лишении преступника свободы. Наверное, так и должно быть. Обоснование тому очень простое. Все это позволяет более дифференцированно подходить к применению мер уголовной ответственности, сокращает финансовые затраты по уголовным делам, обеспечивает получение государством социальной компенсации и причиненного ущерба, оказывает на виновное лицо более эффективное исправительное воздействие.

Законно ли это? Да, но вряд ли справедливо. Потому как закон должен одинаково применяться ко всем своим гражданам, независимо от имущественного и должностного положения. Суть принципа равенства именно в этом, а не в исключении из правила.

3. Еще один аспект принципа равенства можно проиллюстрировать на примере преступлений против собственности в уголовном праве Беларуси.

Так, в настоящее время размер причиненного ущерба в результате совершения хищения является обстоятельством, определяющим: а) вид хищения; б) степень его вредоносности. В условиях сложившихся товарно-денежных отношений стоимость похищенного имущества выражается в ценах на него, и в связи с этим при определении размера нанесенного ущерба решающим критерием выступает денежная оценка данного имущества. Стоимость похищенного имущества должна определяться по рыночным ценам с их документальным подтверждением. При

отсутствии цены или невозможности ее установления стоимость похищенного имущества может быть установлена на основании заключения экспертов.

Исходя из того, что действующая доктрина уголовного права в основу деления хищений на виды кладет размер причиненного ущерба (имущественного), отечественное уголовное законодательство позволяет выделить следующие виды хищений:

- а) мелкое хищение (административное правонарушение), т.е. хищение имущества путем кражи, мошенничества, злоупотребления служебными полномочиями, присвоения или растраты, а равно покушение на такое хищение (согласно примечанию к ст. 10.5 КоАП под мелким хищением понимаются хищение имущества юридического лица в сумме, не превышающей десятикратного размера базовой величины, установленного на день совершения деяния, за исключением хищения ордена, медали Республики Беларусь, СССР или БССР, нагрудного знака к почетному званию Республики Беларусь, СССР или БССР, а также хищение имущества физического лица в сумме, не превышающей двукратного размера базовой величины, установленного на день совершения деяния, за исключением хищения ордена, медали Республики Беларусь, СССР или БССР, нагрудного знака к почетному званию Республики Беларусь, СССР или БССР либо хищения, совершенного группой лиц, либо путем кражи, совершенной из одежды или ручной клади, находившихся при нем, либо с проникновением в жилище);
- б) простое хищение (совершение хищения имущества юридического лица путем кражи, мошенничества, злоупотребления служебными полномочиями, присвоения или растраты в сумме, превышающей 10 базовых величин или совершение хищения имущества физического лица путем кражи, мошенничества, злоупотребления служебными полномочиями, присвоения или растраты в сумме, превышающей 2 базовых величины, установленных на день совершения деяния и до размера 250 базовых величин);
- в) хищение в крупном размере (сумма похищенного на момент совершения преступления составляет более 250 и до 1000 базовых величин включительно);

- г) хищение в особо крупном размере (сумма похищенного на момент совершения преступления составляет более 1000 базовых величин).

Итак, в настоящее время размер ущерба, причиненного хищением, являясь существенным обстоятельством и определяющим степень его вредности, служит одним из оснований для дифференциации ответственности за хищения посредством закрепления его различных видов, выделяемых в зависимости от ценности похищенного имущества (Бойцов, 2002: 481).

Таким образом, законодатель сегодня дифференцирует уголовную ответственность в зависимости от стоимости похищенного и способа совершения преступления, административная ответственность установлена за мелкое хищение в форме кражи, мошенничества, злоупотребления служебными полномочиями, присвоения или растраты. Хищение же имущества юридического или физического лица путем грабежа, разбоя, вымогательства или путем использования компьютерной техники необходимо квалифицировать по соответствующим статьям УК, предусматривающим ответственность за данные преступления независимо от размера похищенного.

Смеем предположить, что, как и ранее, основанием для признания хищения именно мелким, помимо стоимости похищенного, послужил ненасильственный способ завладения имуществом. Нередко это объяснялось и объясняется тем, что при хищениях путем, например, грабежа или разбоя способ совершения преступления по сравнению с иными формами более опасен, и именно опасность подобных деяний в значительной степени обуславливается не только стоимостью похищенного, сколько способом его завладения, связанным с посягательством на телесную неприкосновенность и здоровье личности или особой дерзостью преступника.

Однако данное суждение вряд ли можно отнести к таким формам хищений как ненасильственный грабеж (ч. 1 ст. 206 УК) или хищение путем использования компьютерной техники (ст. 212 УК). Почему, например, открытое хищение признается более опасным, чем тайное? Только потому, что оно свидетельствует о повышенной опасности преступника его совершающего, но тогда непосредственно открытый способ хищения не увеличивает опасность деяния, а лишь опосредованно – через личность виновного. Следовательно, не сама открытая форма хищения (грабежа) опаснее тайной (кражи), а преступник, действующий открыто, опаснее преступника, действующего тайно. В такой ситуации кража будет

естественным образом отличаться и от мошенничества, и от присвоения либо растраты, и тем более от хищения путем злоупотребления служебными полномочиями, где личность преступника играет не второстепенную роль.

Так, Е. находясь в нетрезвом состоянии, зашел в продовольственный магазин и пытался открыто вынести бутылку вина. В другом случае К., находясь на остановке общественного транспорта, в присутствии прохожих открыл холодильник с прохладительными напитками, находящийся при киоске, и завладел двумя полтора литровыми бутылками кока-колы.

Как в первом, так и во втором случае лица виновны в совершении ненасиленного грабежа (ч. 1 ст. 206 УК). И хотя сумма похищенного имущества не превышает 10 базовых величин, они должны нести именно уголовную ответственность за совершенные деяния, по причине открытого способа завладения имуществом, который не подпадает под определение мелкого хищения. В то же время, следует сказать, что некоторые работники правоохранительных органов полагают, что подобного рода действия не обладают общественной опасностью присущей преступлению и в силу малозначительности (ч. 4 ст. 11 УК) такие уголовные дела подлежат прекращению.

Однако и здесь проблема состоит в том, что в случае освобождения в вышеуказанных примерах виновных лиц от уголовной ответственности в силу малозначительности совершаемых общественно опасных деяний, административная ответственность для них не наступает, в отличие от той же мелкой кражи, мошенничества, присвоения и т.д. Статья 10.5 Кодекса Республики Беларусь об административных правонарушениях устанавливает ответственность только за мелкое хищение имущества путем кражи, мошенничества, злоупотребления служебными полномочиями, присвоения или растраты. И если продолжить данную тему применительно к понятию мелкого хищения, то чем же тогда опаснее хищение путем использования компьютерной техники (ст. 212 УК) от, например, мошенничества (ст. 209 УК)?

Приведем в этой ситуации конкретный пример, когда за попытку хищения трех рублей (полтора доллара США) лицо было признано виновным и ему было назначено наказание в виде двух лет лишения свободы.

Г. была признана виновной в тайном похищении имущества (краже), совершенном повторно (ч. 2 ст. 205 УК) и в покушении на хищение имущества путем введения в

компьютерную систему ложной информации, сопряженном с несанкционированным доступом к компьютерной информации (ст. 14 и ч. 2 ст. 212 УК). Так, Г., имея умысел на тайное похищение имущества, находясь в состоянии алкогольного опьянения в квартире, путем свободного доступа, тайно, похитила принадлежащее Б. имущество – кошелек стоимостью 30 рублей, в котором находились денежные средства в сумме 200 рублей, 3 банковские платежные карточки. В этот же день Г., воспользовавшись ранее похищенной банковской платежной карточкой, являющейся платежным инструментом, обеспечивающим доступ к банковскому счету, получению наличных денежных средств и оплату в терминалах за приобретение товаров, находящейся в пользовании Б., и не являясь ее правомерным держателем, путем введения в компьютерную систему процессингового центра заведомо ложной информации об использовании банковской платежной карточки держателем Б., осуществила несанкционированный доступ к компьютерной информации о карт-счете Б., а именно, приложив указанную банковскую платежную карточку к бесконтактному терминалу ОАО “Банк” в магазине, пыталась произвести оплату приобретенного товара (бутылки пива). Тем самым Г. пыталась похитить денежные средства в сумме 3 рубля 47 копеек, однако не довела преступление до конца по не зависящим от нее обстоятельствам, поскольку операция была отклонена банком в связи с недостаточным количеством денежных средств на карт-счете. Действия обвиняемой Г. суд квалифицирует по ч. 2 ст. 205 УК как тайное похищение имущества, совершенное повторно и назначил наказание в виде лишения свободы на срок 2 (два) года; по ст. 14 и ч. 2 ст. 212 УК, как покушение на хищение имущества путем введения в компьютерную систему ложной информации, совершенное повторно, сопряженное с несанкционированным доступом к компьютерной информации и назначил ей наказание в виде лишения свободы на срок 2 (два) года без лишения права занимать определенные должности или заниматься определенной деятельностью.

Как видно, в данном случае лицо было признано виновным в попытке хищения трех рублей сорока семи копеек и понесло наказание в виде лишения свободы (2 года). Однако справедлива ли такая дифференциация? Ведь если бы это лицо похитило или пыталось похитить три рубля сорок семь копеек в форме кражи, мошенничества, присвоения или растраты, хищения путем злоупотребления служебными полномочиями, то оно было бы повинно в административном правонарушении, а не в преступлении. Вполне резонно здесь возникает естественный вопрос, почему такая разница и на чем она основана? Ведь тоже

хищение с использованием компьютерной техники (ст. 212 УК) – это также ненасильственное преступление. Лицо, его совершая, применяет как бы мошенничество, тот же обман, но обманывает не человека, а компьютер. Об этом, например, прямо говорится в п. 20 постановления Пленума Верховного Суда Республики Беларусь от 21 декабря 2001 г. № 15 “О применении судами уголовного законодательства по делам о хищениях имущества”. Так, согласно данному разъяснению “хищение путем использования компьютерной техники (ст. 212 УК) возможно лишь посредством компьютерных манипуляций, заключающихся в обмане потерпевшего или лица, которому имущество вверено или под охраной которого оно находится, с использованием системы обработки информации. Данное хищение может быть совершено как путем изменения информации, обрабатываемой в компьютерной системе, хранящейся на машинных носителях или передаваемой по сетям передачи данных, так и путем введения в компьютерную систему ложной информации”. Иначе говоря, компьютерные манипуляции есть в какой-то степени разновидность обмана. Однако почему же тогда хищение с использованием компьютерной техники приравнивается к разбою, вымогательству, грабежу. Разве это сопоставимые преступления? Очевидно, что нет. Если речь идет о насильственных формах хищения, то уж никак хищение с использованием компьютерной техники не должно быть в данном ряду и приравниваться к разбою, вымогательству и т.д. Вряд ли средство совершения преступления – компьютерная техника так опасна, что мы не должны учитывать минимальные границы стоимости похищенного имущества как в случае с мошенничеством, кражей, присвоением, растратой и т.д.

Причиной такого несоответствия объективной опасности содеянного и его уголовно-правовой оценки является несоблюдение в законодательной конструкции состава мелкого хищения субординации признаков.⁶ Здесь, в нарушении этого правила, основной признак – размер ущерба (стоимость похищенного) – выступает в роли вспомогательного, а вспомогательные признаки – форма хищения, совершение преступления группой лиц, с проникновением в жилище и т.д. – выделены в качестве основных.

Однако вряд ли в такой ситуации можно говорить о справедливости закона. Непоследовательность законодателя видится не только в нарушении принципа

⁶ Корыч Д. (2018), Тэарэтычнае азначэнне паняцця незаконнасці - крок да пазітыўнага права, Штогоднік, Абарона правоў чалавека "Ад незаконнасці да законнасці", правінцыйны абаронца грамадзян - амбудсмен, Новы Сад

дифференциации уголовной ответственности за ненасильственные формы хищений, но и в том, что отдельно взятые квалифицирующие признаки (отягчающие обстоятельства мелкого хищения применительно к физическому лицу) отражают более высокий уровень опасности содеянного в сравнении с административным проступком, а не в связи с основным составом преступления (Хиллута, 2014).

Затяжка в решении данного вопроса – установления единых мер юридической ответственности за мелкое хищение имущества вызвана не столько сложностью обозначенной проблемы, сколько недостаточным вниманием к такому свойству права, как его системность. Одним из вариантов разрешения поставленных вопросов, как нам представляется, могло быть следующее:

установление ответственности за совершение мелкого хищения ненасильственным способом (в форме кражи, открытого грабежа (ч. 1 ст. 206 УК) мошенничества, злоупотребления служебными полномочиями, присвоения или растраты, использования компьютерной техники);

наличие отягчающих обстоятельств при совершении мелкого хищения (кроме повторности) должно влечь уголовную ответственность независимо от стоимости похищенного имущества юридического или физического лица (или же вообще отказаться от усиления ответственности, т.е. перевода ее из административно-правовой в уголовную, при наличии квалифицирующих обстоятельств совершения мелкого хищения).

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THE PRINCIPLE OF EQUALITY AND HUMAN RIGHTS IN THE CRIMINAL LAW OF BELARUS

The article deals with the principles of criminal law of Belarus in the context of the concepts of equality and justice. The law enforcement practices of the Belarusian courts and prosecutors and the legal aspects of the interpretation of criminal law categories are analysed. Non-systemic approaches to the design of criminal law norms and avoiding the principle of equality of all before the law are shown on the example of theft and the grounds for exemption from criminal liability.

Keywords: *criminal law; justice; equality; human rights; theft*

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HUMAN DIGNITY AND PROTECTION FROM DISCRIMINATION

Human dignity is a term used to denote the right to respect and ethical attitude from birth. No human being can be dignified if he is not free. Also, human dignity is an internationally guaranteed category and is part of all acts regulating human rights. That is why every state must take care about dignity of its citizens.

Human rights constitute an integrated system for the protection of human dignity in which democracy and the rule of law play a key role. In this context, human dignity is absolute and non-derogable and cannot be limited. Obtaining evidence by violation of human dignity makes that evidence illegal. Deviation from this rule is not allowed because no other individual right or freedom, i.e. no general or public interest, not even the one aimed at successful prosecution of the most serious crimes, is allowed to compare or be given priority over human dignity.

Keywords: *human dignity, discrimination, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, Constitutional Court of Bosnia and Herzegovina.*

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1. Introductory remarks

There are several types of human dignity. Most important is natural human dignity, which is derived from human nature that is different from other beings. There is also legal dignity which, in a narrower sense, implies the dignity of the legal profession. Human dignity is a very complex concept that requires its distinction from what it is not.

When it comes to the meaning of human dignity¹, the provisions of Articles 1 and 3 of the United Nations Universal Declaration of Human Rights² adopted and promulgated on 10 December 1948 by the UN General Assembly, Resolution 217 A (III): All human beings are born free and equal in dignity and rights. They are endowed with reason and consciousness and should act towards one another in a spirit of brotherhood. Everyone has the right to life, liberty and security of person.

Article 1 of the Charter of Fundamental Rights of the European Union³, adopted in Strasbourg on 7 December 2000, states that human dignity is inviolable and must be respected and protected⁴. In the European Union, human dignity is the first indivisible and universal value.

The Treaty on European Union⁵ (as amended by the Lisbon Treaty⁶, which entered into force on 1 December 2009) provides that the fundamental principles of human rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷ constitute a part of European Union law and are mentioned in Articles 2 and 6 of this Treaty. The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of minorities. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which has

¹ Etymology suggests that the term dignity is derived from the Latin language, from the word *dignitas*, which translates as dignity, and is used to denote the honor and reputation of a person.

² Engl. UN Universal Declaration of Human Rights, french UN Déclaration universelle des droits de l'homme.

³ 2007/C 303/01. ravnopravnost.gov.rs/wp-content/uploads/2012/11/images_files_Povelja%20Evropske%20unije%20o%20osnovnim%20pravima.pdf, accessed on 5.7.2020.

⁴ See also Decision of the Constitutional Court of the Republic of Croatia, No. U-I-448/2009 et. al. of 19 July 2012 ("Official Gazette of the Republic of Croatia" No. 91/12).

⁵ 92/C 191/01. http://www.mvep.hr/custompages/static/hrv/files/EUugovori/11992M_Ugovor_o_EU-u_hrv.pdf, accessed on 10.7.2020.

⁶ Lisbon Treaty amending the Treaty of European Union and Treaty on Establishment of European Community (SL C 306, 17 December 2007).

⁷ Hereinafter: the Convention.

the legal force of a treaty. The fundamental human rights guaranteed by the Convention derive from the constitutional traditions common to the Contracting States and, as such, constitute the general principles of European law.

In this context, issues of crucial importance are also regulated by the provisions contained in Chapter V - Area of Freedom, Security and Justice - Part Three of Treaty on the Functioning of the European Union⁸, Politics and Internal Action of the Union, by Article 67 of Chapter 1: “The Union establishes the area of freedom, security and justice with respect for fundamental rights and different legal systems and traditions of the Member States”.

With respect to the prohibition of discrimination, the Convention provides in Article 14 that the enjoyment of the rights and freedoms recognized in this Convention shall be ensured without discrimination on any grounds such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

We should also recall Protocol No. 13 to the Convention on the “inherent dignity of all human beings”, and the fundamental premise of the European Court of Human Rights⁹ when interpreting human rights, which is contained in the case *Refah Partisi (Prosperity Party) et al. v. Turkey*: human rights constitute an integrated system for the protection of human dignity. In this regard, democracy and the rule of law play a key role here.

In addition, the legal position of the German Federal Constitutional Court that human dignity is a central point from which to start balancing all other constitutional values is also significant. This view is expressed in the *Lebach*¹⁰ judgment: “Both constitutional values must be balanced, as far as possible, in case of a conflict; if this cannot be achieved - then by taking into account the typical features and special circumstances of the individual case, it will be decided which interest must be relinquished. At the same time, both concerns of the Constitution, centered as they are on human dignity, must be

⁸ Article 2 1 of Lisboa Treaty amended the Treaty on Establishment of the European Community. New title is Treaty on Functioning of the European Union (http://www.azk.me/1/doc/Ugovor_o_funkcionisanju_EU.pdf, accessed on 2.7.2020).

⁹ Hereinafter: the European Court.

¹⁰ BVerfGE 35, 202 /Lebach/ - Urteil des Ersten Senats vom 5 June 1973 auf die mündliche Verhandlung vom 2. und 3. Mai 1973 - 1 BvR 536/72.

regarded as the nucleus of the system of constitutional concerns... Deviation from that rule is not allowed ...”.

Non-discrimination goes hand in hand with human dignity. An important characteristic of the prohibition of discrimination as a human right is that this right does not have an independent existence, as is generally the case with all other rights. The application of this right is always connected with the application of another right, i.e. with the violation of another right. In addition, the grounds on which discrimination can be committed are clearly not limited, but there is an open possibility for some cases that can be determined at a later stage.

According to the case law of the European Court, the right to non-discrimination under Article 14 of the Convention is an accessory right. This means that this article does not guarantee an independent and autonomous right to non-discrimination, but discrimination under this article may be invoked only in connection with the enjoyment of the rights and freedoms guaranteed under this Convention. Although the establishment of a violation of a guaranteed right is not a precondition for the application of Article 14 of the Convention, this Article will not be applicable unless the facts of the case fall within the “scope” of guaranteed right¹¹.

Article 1 of Protocol No. 12 to the Convention, signed at Rome on 4 November 2000, extending the scope of Article 14 of this Convention should also be added. Article 1 of Protocol No. 12, which entered into force on 1 April 2005, equalizes the scope of Article 14 of the Convention and Article 26 of the International Covenant on Civil and Political Rights. Until then, there was a significant difference. Article 14 of the European Convention referred exclusively to the rights and freedoms guaranteed by the Convention and did not produce an effect outside these rights and freedoms¹². It had the function of one additional opinion in addition to all the articles of the Convention which contained provisions on rights and freedoms. Article 14 was not applicable unless the facts in question fell within the scope of an article guaranteeing a right or freedom¹³. In such cases, if discrimination does not constitute dominant feature of the violation, the European Court is content to find that the right or freedom has been violated, without

¹¹ See European Court, *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A Number 291-B, paragraph 22.

¹² *Belgian linguistic case* (Application no. 1474/62), ECHR, Judgment of 23 July 1968, para. 9 i *Karner v. Austria* (Application no. 40016/98), ECHR, Judgment of 24 July 2003, para. 32.

¹³ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (Application no. 9214/80; 9473/81; 9474/81), ECHR, Judgment of 28 May 1985, para. 71.

examining whether an act of discrimination has been committed in relation to that violated right or freedom. However, if discrimination has particular weight in the context of the case, the European Court will investigate the matter and decide on the application¹⁴.

2. Case law of the European Court of Human Rights

In the Belgian linguistic case, the European Court extracted the content of the concept of discrimination from the legal case law of democratic states. Discrimination exists if different treatment has no objective and reasonable justification. The justification must be assessed in relation to the aim and consequences of the contested act. The legal principles prevailing in democratic societies need to be taken into account. In the same case, the European Court also says that discrimination exists if it is clearly established that there is no reasonable relationship of proportionality between the means used and the aim sought to be realized¹⁵. The Court further states that Article 14 does not prohibit distinctions in conducts which are based on objective assessment of substantially different objective circumstances and which, being based on the public interest, strike a fair balance between protection of the interests of the community and respect for the rights and freedoms guaranteed under the Convention¹⁶. A distinction is discriminatory if there is no “objective and reasonable justification”, i.e. if it does not achieve a “legitimate aim” or if there is no “reasonable relationship of proportionality between the means used and the aim sought to be realized”¹⁷. The State is expected to act equally in the same or similar factual situations, and the list of grounds for discrimination set out in Article 14 of the Convention is not exhaustive.

2.1. *Svinarenko and Slyadnev v. Russia of 17 July 2014*¹⁸

The applicants are Russian citizens who were charged in 2002 and 2003 with a number of criminal offenses committed as members of a particular group, including robbery. A. S. was ordered a detention, and V. S. was on parole for another criminal offense at that time, and he was ordered a detention for a new criminal offense. During the main hearing,

¹⁴ *Nachova and Others v. Bulgaria* (Application no. 43577/98 and 43579/98), ECHR, Grand Chamber, Judgment of 6 July 2005, para. 161.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Marckx v. Belgium*, ECHR, Judgment of 13 June 1979, para. 33; *Hoffmann v. Germany* (Application no. 34045/96), ECHR, Judgment of 11 October 2001, para. 55 i *Poirrez v. France* (Application no. 40892/98), ECHR, Judgment of 30 September 2003, para. 46.

¹⁸ Requests Nos. 32541/08 and 43441/08, Judgment of the Grand Chamber.

the applicants were placed in a 1.5m x 2.5m metal cage guarded by judicial police officers¹⁹.

The European Court has already examined similar cases in which it found a violation of Article 3 of the Convention because the use of metal cages in the courtroom could not be justified by security reasons such as the character of the defendant, the type of crime offence he was charged with or previous punishment and earlier behavior. The court considers that there is no reason that could justify the use of a metal cage, despite the contrary allegations of the Russian Government. The Court emphasized that the very meaning of the Convention lies in respect for human dignity, and that the purpose of the Convention, as an instrument providing protection of human rights, requires the practical and effective application of the provisions of the Convention. Keeping a person in a metal cage during a trial is, in itself, an attack on human dignity and a violation of Article 3 of the Convention, given the degrading effect that is inconsistent with the standards of civilized conduct that represents basis of a democratic society.

2.2. Bouyid v. Belgium²⁰ of 28 September 2015

The applicants are two brothers, S. B and M. B., who lived with their family near the Police Station in the town of Saint-Josse-ten-Noode. In the proceedings before the Court, both complained that they had been slapped by a Police Officer.

The European Court found that the Police Officers had slapped the applicants and that the applicants' injuries were the result of those slaps. The Court reiterated that when an individual is deprived of his liberty or, generally speaking, is confronted with Police Officers, any use of physical force that is not necessary endangers human dignity and in principle constitutes a violation of the rights guaranteed under Article 3 of the Convention. Any interference with human dignity violates the very essence of the Convention. Therefore, any Police action that endangers the applicant's human dignity constitutes a violation of Article 3 of the Convention. This applies in particular to situations in which the Police used physical force without it being necessary. In addition, the Court found that the Belgian Government had not proved the allegations that the slaps constituted a necessary use of force. Accordingly, the Court found that the applicant's

¹⁹In Russia, there is a practice whereby detainees are placed in metal cages while in the courtroom during the main trial. It is a practice that developed during the former USSR, and some member states (such as Armenia and Georgia) have stopped applying it. In Russia, however, it is still applied. Such a practice is prescribed by an unpublished Rulebook of the relevant Ministry, which, in itself, was questionable since a democratic society requires that legal regulations be made publicly available.

²⁰ Request No. 23380/09, Judgment of the Grand Chamber.

human dignity had been endangered and that there had accordingly been a violation of Article 3 of the Convention.

The court further pointed out that when Police Officers slap individuals who are completely under their control - there is a serious attack on personal dignity. A slap significantly affects a person, especially if it is directed at the face, because the face expresses uniqueness, manifests social identity, and represents the center of the senses for communication with others. It is sufficient for the Court the existence of degrading treatment under Article 3 of the Convention to consider the victim as humiliated. It is clear to the Court that even a slap that was not aimed at abuse and that did not cause long-term consequences - can be humiliating for an individual. This is especially so when a Police Officer slaps an individual who is under his control - since in such a case the individual is in a subordinate position in relation to the Police Officer. The fact that the victims knew that such treatment was illegal - can also cause them to feel injustice and helplessness. Moreover, such individuals find themselves in a situation where they expect the Police to protect them. By slapping the applicant, the Police Officers mocked their service. The Court noted that the fact that the Police Officers had slapped the applicants out of affection was irrelevant to the present case.

The Convention provides for an absolute prohibition of torture and inhuman and degrading treatment, regardless of the victim's behavior. In a democratic society, the competent authorities must not resort to abuse. Finally, the Court found that S. B. was 17 years old at the time in question, and that the abuse had more serious psychological consequences for the minor than for the adult. It is therefore crucial that Police Officers who come into contact with minors - take into account their vulnerability. In conclusion, the Court found that the slaps had endangered the applicant's dignity and that there had been a violation of Article 3 of the Convention.

2.3. Perinçek v. Switzerland, of 15 October 2015²¹

The applicant is a Turkish citizen, a doctor of law and the president of the Turkish Workers' Party. During 2005, the applicant participated in two conferences and one meeting in Turkey, at which he stated that the mass deportations and massacre suffered by the Armenian population in the Ottoman Empire during 1915 and the following years did not constitute genocide. He complained of a violation of the right to freedom of expression following a conviction handed down for his views on the 1915 events. He also

²¹ Request No. 27510/08, Judgment of the Grand Chamber.

complained of a violation of Article 7 of the Convention (no penalty without law), alleging that the provision of Article 261 paragraph 4 of the Swiss Criminal Code was not sufficiently clear.

The European Court has noted that there are differing views among Member States on the need for some form of responsibility for denying historical events. Some of them provide criminal liability for denying the Holocaust or crimes committed during Nazism or Communism, some for denying genocide, while some Member States do not provide for such criminal liability. Although Switzerland has provided for clear legislation, according to which the denial of genocide (whether or not the intention was intended to incite violence/hatred) is a criminal offense, the Court has concluded that different legislations between Member States cannot influence its decision in this case, because there were a number of other factors relevant for the decision.

Moreover, Switzerland is not bound by any valid international agreement that explicitly provides for the obligation to impose criminal sanctions in cases of genocide denial. The Court noted that Article 261 of the Swiss Criminal Code was enacted following Switzerland's accession to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). However, there is nothing to indicate that Article 261 paragraph 4, on the basis of which the applicant was convicted, arose from a CERD's or some other international document requirement. In addition, the Court noted that in other similar cases the interference consisted, for example, of restricting or preventing the disclosure of information. The fact that a conviction was handed down against the applicant is significant insofar as the verdict was passed for one of the most severe forms of interference with the right to the freedom of expression. The Court found that the imposition of a criminal sanction in order to protect the rights of the Armenian community was not necessary in a democratic society. Accordingly, the Court found that there has been a violation of Article 10 of the Convention and that there was no need to examine the other alleged violations of the Convention raised by the applicant in his application before the Grand Chamber.

2.4. Pranjčić M. Lukić v. Bosnia and Herzegovina²² of 2 June 2020

The applicant is Goran Pranjčić M. Lukić, a citizen of Bosnia and Herzegovina. He lives in Karlsruhe (Germany). The case concerned the applicant's complaint that the Police had taken him for a compulsory psychiatric and psychological examination during the

²² Request No. 4938/16.

criminal proceedings conducted against him. Taking into account the applicant's mental health, the fact that handcuffing was not imposed in connection with the lawful arrest or detention, and the absence of any previous behavior which would create serious grounds for fear of resorting to violence - the European Court considered that the use of handcuffs had not been necessary, having in mind the applicant's behavior. Handcuffing diminished and degraded the applicant's human dignity. The European Court also pointed out that the fact that the applicant was handcuffed in front of his parent could have caused humiliation in his eyes, which is another aggravating factor in that regard. It found a violation of Article 3 of the European Convention.

3. Human dignity and case-law of the Constitutional Court of Bosnia and Herzegovina

(1) In Decision No. **AP-4319/16**²³ of 19 December 2018 (LGBT), the Constitutional Court of Bosnia and Herzegovina²⁴ concluded that the treatment of the appellants must have caused feelings of fear, unrest and insecurity which were inconsistent with the respect for their human dignity, and has reached the threshold of severity within the meaning of Article II/3b) of the Constitution of Bosnia and Herzegovina and Article 3 of the Convention in relation to the right under Article II/4 of the Constitution and Article 14 of this Convention.

The Constitutional Court notes that the facts of the case indisputably show that during the attack on the appellants - natural persons, the attackers used particularly offensive language towards the participants and sympathizers of the International Queer Film Festival “Merlinka” on 1 February 2014²⁵, which promoted films dealing with LGBT topics, i.e. specific discussions, calling them gays and similar. The homophobic connotation of speech was also evident in acts of inventory destruction inside cinemas. In addition to these acts, the attackers threatened the participants and guests of the discussion, shouting: “Where are you, fagots”, “There will be no gays in Sarajevo”, “There will be no gay parade on May 1” and using other insulting statements, and one of the attackers attacked the appellant B, threatened to kill him. In addition, it follows that some participants of the Festival, fleeing the attack, hid in a room, as they described it, the size of a “meter by meter”, some of them managed to escape through another exit, while some of the appellants remained standing on the spot out of fear. In addition to the

²³ <http://www.ustavnisud.ba/dokumenti/AP-4319-16-1169789.pdf>, accessed on 10 June 2020.

²⁴ Hereinafter: the Constitutional Court.

²⁵ Hereinafter: the Festival.

aforestated, verbal attacks and the destruction of inventory were accompanied by specific physical attacks on appellants D., A. and B., while the other appellants watched it. Given that they were surrounded by attackers who used offensive language, and randomly resorted to physical attacks against participants of the Festival, thus showing the reality of the threats, the Constitutional Court notes clearly visible homophobic prejudice had an aggravating role, for which reason it indisputably concluded the situation was already a situation of intense fear and anxiety. According to the Constitutional Court, the aim of this verbal - and sporadic physical - harassment was obviously to intimidate the participants of the Festival to give up their public expression of support for the LGBT community, in this way as well. In such circumstances, the Constitutional Court considers that the applicants' feelings of fear, anxiety and inferiority must have been aggravated by the fact that Police protection promised to them before the Festival had not been provided in a timely and adequate manner.

(2) In Decision No. **AP-1020/11**²⁶ of 25 September 2014 (LGBT), the Constitutional Court emphasizes that, in principle, in certain democratic societies it may be considered necessary to sanction or even prevent all forms of expression that spread, encourage, promote or justify hatred on the basis of intolerance, provided that “formalities”, “conditions”, “restrictions” or “penalties” are proportionate to the legitimate aim sought to be realized²⁷. Furthermore, incitement to hatred does not necessarily involve an act of violence or other criminal offenses. However, even attacks on persons committed by insulting, mocking and slandering a particular group or part of the population - may be sufficient for the government to favor the fight against racial hatred in the form of freedom of expression when it is carried out in an irresponsible manner²⁸. In doing so, discrimination based on sexual grounds is just as serious as discrimination based on “race, origin and color”²⁹. Terms that constitute speech of hatred do not enjoy the protection of Article 10 of the European Convention³⁰. Finally, the effective prevention of serious offenses, when the essential aspects and the essence of guaranteed right are brought into question, may impose an obligation on public authorities to impose efficient provisions of criminal law that will deter such offenses through effective investigation and criminal

²⁶ http://www.ustavnisud.ba/dokumenti/_bs/AP-1659-06-143379.pdf, accessed on 10 June 2020.

²⁷ See the European Court, *Erbakan v. Turkey*, verdict of 6 July 2006, paragraph 56.

²⁸ See the European Court, *Féret v. Belgium*, application number 15615/07, paragraph s 73, 16 July 2009.

²⁹ See, inter alia, the European Court, *Smith and Grady v. United Kingdom*, applications Nos. 33985/96 and 33986/96, paragraph 97, ECHR 1999-VI.

³⁰ See *Gündüz v. Turkey* (Application no. 35071/97) Judgment, Strasbourg. 4 December 2003. FINAL. 14/06/2004, paragraph 41.

prosecution³¹. The Constitutional Court concludes that there has been a violation of the right to freedom of assembly under Article II/3i) of the Constitution of Bosnia and Herzegovina and Article 11 of the Convention when public authorities, in accordance with positive obligation under this Article, failed to take necessary measures to ensure peaceful gathering in accordance with the law, which led to violence between the opposing parties, and when they failed to provide a clear legal framework in order to act preventively in its prevention and deterrence from committing the same or similar offenses.

(3) In Decision No. **AP-1659/06** of 18 October 2007, assessing the circumstances of the specific case, the Constitutional Court concluded that the Supreme Court, in its reasoning of the challenged judgment, responding to the question why the case in question is not the case of defamation as it was found by the first-instance court but on insult, noted that the statements in question that the appellants were “spies, deserters, Balijas, scoundrels, abusers, attackers, slimes, assholes, intruders and spies” contained expressions that insulted dignity and honor of each person, and that, therefore, they contain insults, and not defamation from Article 4 item d) of the Law on Protection against Defamation of the Federation of BiH. It follows from the above stated that in deciding whether this was defamation or insult, the Supreme Court did not assess each of the terms used, giving clear and precise reasons why it considered the term used to be insult and not defamation. In particular, the Constitutional Court draws attention to terms such as “deserters, abusers and attackers”. According to the Constitutional Court, the Supreme Court did not state in its decision the reasons on which it based its decision, and on the basis of which a clear and unambiguous conclusion could be drawn that this particular case was about insult and not defamation. Accordingly, the Constitutional Court considers that the reasoning of the Supreme Court in the disputed decision did not satisfy the principle of a fair trial under Article 6 paragraph 1 of the European Convention.

Furthermore, the Constitutional Court finds that, even if it is accepted that this is an insult, the question arises as to why the Supreme Court did not decide on the appellants' claim, especially having in mind that the appellants explicitly sought damages for defamation and insults. The Constitutional Court finds that the appellants cited Articles 6 and 10 of the Law on Protection against Defamation of the Federation of BiH as basis for their lawsuit. However, taking into account Article 53 paragraph 3 of the Law on Civil

³¹ See, *mutatis mutandis*, *August v. United Kingdom*, (dec.), Application No. 36505/02, 21 January 2003 and *M. C. v. Bulgaria*, Application No. 39272/98, paragraph 150, ECHR 2003-XII.

Procedure of the Federation of BiH, it follows that the Court is not bound by the legal basis of the lawsuit in deciding the lawsuit, and that paragraph 4 of this Article stipulates that the court shall act on the lawsuit even when the prosecutor did not state legal basis for the claim. Therefore, it follows that the Supreme Court did not apply the provision of Article 53 paragraphs 3 and 4 of the Law on Civil Procedure of the Federation of BiH, but rejected the appellants' claim even though it found that the case in question was an insult. According to the Constitutional Court, the Supreme Court acted arbitrarily by not applying the above stated provision of the Law on Civil Procedure of the Federation of BiH, because it did not decide on the appellants' claim, which violated the appellants' right to a fair trial under Article II(3e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the Convention.

(4) In Decision No. **AP-1347/15**³² of 11 October 2017, the Constitutional Court concluded that the disputed decision violated the appellant's right under Article II(3f) of the Constitution of Bosnia and Herzegovina and Article 8 of the Convention because interference with the appellant's right to reputation and honor was illegal. The reason is the fact that the Cantonal Court failed to examine whether in the opinion of the defendant (Value Court) by which the appellant's doctoral dissertation was qualified as “linguistic and scientific garbage” contained elements of violation of reputation and honor within the meaning of Article 200 of the Law on Obligations, which was the obligation of the Court.

4. Examples from the case law of the Constitutional Court in cases of discrimination

In exercising its constitutional competencies and within the framework of abstract, normative control and appellate jurisdiction, the Constitutional Court issued a number of decisions, which raised issues of discrimination on various grounds. In its case law so far, the Constitutional Court has used the criteria for non-discrimination established by the European Court in relation to the limitations of the scope of application of Article 14 of the Convention on substantive rights protected by this Convention and the Protocols. However, in case U-9/09 of 28 September 2017, the Constitutional Court concluded that the rights from international documents on human rights listed in Annex I to the Constitution of BiH can be applied independently as a standard of control.

³² http://www.ustavnisud.ba/dokumenti/_bs/AP-1347-15-1097586.pdf , accessed on 24 June 2020.

In its case law, the Constitutional Court has found that there are several ways in which discrimination can arise: the law is *prima facie* discriminatory; the law, although *prima facie* neutral and applied in accordance with its presumptions, was enacted with the aim of discriminating which arises from the historical interpretation of the law; statements of the legislator, disparate influence of law or other circumstantial evidence of intent; the effects of previous *de iure* discrimination have been supported by appropriate public authorities at all state levels, not only by their actions but also by their inactions³³.

In accordance with the case law of the Constitutional Court following the case law of the European Court, an act or regulation is discriminatory if it makes distinction between individuals or groups in a similar situation, and if there is no objective and reasonable justification for that distinction, or if there was no reasonable proportionality between the means employed and the aim sought to be realized. Thus, according to the case law of the Constitutional Court, discrimination exists when the following elements are cumulatively met: similar and matching groups; treated differently; according to prohibited grounds and such treatment is not justified, i.e. there is a lack of proportionality between the aim sought to be realized and means employed.

Here are a few examples from the case law of the Constitutional Court related to discrimination on various grounds.

Discrimination regarding the payment of salary compensation. In the case of the Constitutional Court No. AP-98/03, concerning the payment of salary compensations, the appellant pointed out that in his case the regular court decided differently in relation to the same or similar claims for salary compensation for the period of temporary incapacity for work due to illness. In the said case, the regular courts dismissed the appellant's claim, holding that they were not competent to decide on the specific claim. However, as an argument on which he based his allegations, the appellant submitted several judgments of the same court that decided on identical cases, in which the defendant was obliged to pay the said compensation in terms of the relevant provisions of substantive law. Thus, in the appellant's case, the same court made a different decision. In the present case, the Constitutional Court, finding a violation of the appellant's right to non-discrimination under Article II/4 of the Constitution of BiH and Article 14 of the Convention regarding the right to a fair trial under Article II/3e) of the Constitution of BiH and Article 6 paragraph 1 of the Convention, stated the following: By a disputed decision, the appellant was undoubtedly placed in a legally uncertain position, different from the position of

³³ Decision No. U-5/98 III of 30 June 2000.

other employees of the same business entity in the same situation, because, having full right, and knowing about the previous case law, he addressed the court expecting the acceptance of the claim, as it was the case law in previous cases”.

Discrimination regarding the right to home. The case AP-534/06 concerned the purchase of an apartment in a residential building on which there was social ownership in the period when it was built, and the issue of delimitation of ownership over apartments in the said residential building, according to the invested funds, was never formally resolved. Four apartments in the said building were given for use to the workers, including the appellant. In the procedure of buying the disputed apartment, that right was challenged to the appellant, unlike the other three apartments, which were bought without problems and presenting any legal obstacles. Therefore, only in the appellant's case, the competent housing authority, which was confirmed by the regular courts, refused to give the consent for the purchase of the apartment. The Constitutional Court concluded that there was a violation of the right to non-discrimination under Article II/4 of the Constitution of BiH and Article 14 of the Convention in relation to the right to home under Article II/3f) of the Constitution of BiH and Article 8 of the Convention, when the appellant's right to home was interfered due to different application of the same regulations to the appellant in relation to persons in the same situation, and it has not been proven that such different treatment had a legitimate aim and reasonable justification for which reason there was no reasonable proportionality relationship between the means employed and the aim sought to be realized. The Constitutional Court decided to deal with the merits of this case, which otherwise exceptionally decides, and to submit the decision to the competent court in order to secure the appellant's constitutional rights.

Discrimination regarding the right to work. Case No. AP-1093/07 concerned the application of Article 143 of the Labor Law of the Federation of BiH, which regulated the status of employees who found themselves on hold during the war, and whose termination of employment mostly affected different ethnic groups. In the present case, the appellant addressed the defendant in written requesting that her employment status be restored and that the defendant return her to work. The defendant offered the appellant a return to work, conditioning her to withdraw her claim, after an agreement and mediation by the Ombudsman and a letter from the Ministry of Transport and Communications. During the procedure, there was reorganization of the defendant, and the appellant's working position, according to the organizational scheme, was moved out of the appellant's place of residence. The appellant (mother of three children, one suffering from “Down syndrome”) was unable to accept the defendant's offer to return to work, as in that case she had to travel to and from work from place to place on a daily basis.

The Constitutional Court held that the appellant had been brought in a different position in relation to other employees of the defendant in the same factual and legal situation, when the courts dismissed her claim requesting the defendant to return her to her work unconditionally under same conditions, in accordance with her previous employment and under the same conditions other employees working on similar positions had. The Constitutional Court concluded that the disputed decisions of the courts violated the appellant's right to non-discrimination under Article II/4 of the Constitution of BiH in connection with the right to work under Articles 6 and 7(a), (i) and (ii) of the International Covenant on Economic, Social and Cultural Rights and the right referred to in Article 5e) ii) of the International Convention on the Elimination of All Forms of Racial Discrimination. The Constitutional Court also decided on the merits in this case and ordered the defendant to immediately offer the appellant the possibility of returning to work under the conditions and in accordance with her previous employment and under the same conditions as other employees on similar tasks. He also ordered the competent court to decide on the appellant's request for salary compensation in an expedited procedure and in accordance with the legal opinion of the Constitutional Court. The decision was delivered to both, the defendant and the competent court, in order to secure the appellant's constitutional rights.

Discrimination regarding the right to property. In case number AP-4207/13, the decisions of the regular courts dismissed the appellant's claim requesting to establish that on the basis of extramarital union he was the legal heir after the deceased testator with whom he lived in extramarital union from the end of 2003 to the end of November 2007, in an apartment that was the testator's property. The regular courts rejected the claim on the grounds that the 1980 Inheritance Law, which did not recognize the right to inheritance to extramarital partners, was in force at the time of the disputable decisions were issued.

Given that the extramarital union of the appellant and the testator began at a time when the 2005 Family Law of the Federation of BiH was already in force, which not only took over the principle of equality of extramarital and marital union from the previous law, but also consistently equated these two communities in rights and obligations, that this community lasted until the testator's death, that the legislator himself during the adoption of the new inheritance law pointed out that the different treatment of extramarital and marital partners in the field of inheritance was discriminatory, the Constitutional Court held that the 1980 Inheritance Law was not applied with consistency in respect for the Family Law and equal treatment of marital and extramarital union. In addition, in a situation where the new law on inheritance of the Federation of BiH with the same goal was adopted almost 10 years later, the Constitutional Court considered that the appellant

could not bear harmful consequences because the relevant laws were not harmonized earlier, in order to consistently implement the determination of the legislator to eliminate discrimination in the treatment of extramarital and marital partners even in hereditary relationships. The Constitutional Court concluded that the courts, by applying the 1980 Inheritance Law from (without respecting the determination from the 2005 Family Law of the Federation of BiH on consistent equalization of extramarital union, which lasts for over three years, with marital union in all rights and obligations, including property rights, and by rejecting the appellant's request to be granted the right to participate in the probate proceedings as the heir of the first hereditary line), violated the prohibition of discrimination under Article II/4 of the Constitution of BiH and Article 14 of the Convention in relation to the right to property under Article II/3k) Of the Constitution of BiH and Article 1 of Protocol No. 1 to the Convention.

Discrimination in relation to access to court, on the basis of gender. The decision of the Constitutional Court No. AP-369/10 of 24 May 2013 concerned a situation in which the appellant's lawsuit for divorce was rejected as inadmissible under Article 43 of the Family Law of the Federation of BiH. Pursuant to the above provision, the husband is not entitled to a lawsuit for divorce during the wife's pregnancy or until their child reaches the age of three. In this case, the Constitutional Court considered that the provision of Article 43 of the Family Law of the Federation of BiH does not meet the required legal quality to the extent that the standards from Article II/4 of the Constitution of BiH and Article 14 of the Convention would be met in relation to access to court, as a part of the right to a fair trial. Considering other provisions of the Family Law, the Constitutional Court noted that, except for the disputed provision of Article 43 which makes difference between spouses, all other provisions equalize man and woman, both in terms of their rights and obligations and in terms of their rights and obligations towards children. Therefore, the Constitutional Court considers that the said provision leads to different treatment of man in relation to woman, i.e. according to gender, in relation to their right to access to court, without seeing any objective and reasonable justification for such different treatment. In this particular case, the Constitutional Court concluded that there was a violation of the prohibition of discrimination under Article II/4 of the Constitution of BiH and Article 14 of the Convention regarding the right of access to court, as a part of the right to a fair trial under Article II/3e) of the Constitution of BiH and Article 6 paragraph 1 of the Convention.

Having in mind conclusions in the mentioned decision, the Constitutional Court considered it necessary to take appropriate legislative measures, which will ensure the right of access to court for both spouses without discrimination on the basis of sex, and ordered the Parliament of the Federation of BiH and the Government of the Federation of

BiH to take appropriate measures, to ensure respect for the constitutional right of access to court, without discrimination on the grounds of sex within the meaning of this Decision and in all other relevant cases.

Discrimination in relation to the right to family life. In case no. AP-3557/08 of 9 November 2011, the appellant considered that the contested decisions of the regular courts, divorcing the marriage of the plaintiff and the appellant and determining that the joint minor child would continue to live with mother, who would exercise parental care as the child's legal guardian and the appellant as the child's father together with the mother would take care of the child's health and all important issues related to the child, with the obligation of the child's mother to inform the appellant of all significant changes related to the child - violated the right to non-discrimination in relation to the right to family life. In addition, the appellant considered that his right to equality of spouses under Article 5 of Protocol No. 7 to the Convention had been violated.

The Constitutional Court concluded that the appellant's right to non-discrimination under Article II/4 of the Constitution of BiH and Article 14 of the Convention in relation to the right to family life under Article II/3f) of the Constitution of BiH and Article 8 of the Convention had not been violated since there is objective and reasonable justification for different treatment of the plaintiff with whom the child lives and who exercises parental care in relation to the rights of the appellant, with whom the child does not live. The Constitutional Court also concluded that the contested provisions have not violated the appellant's right to non-discrimination in relation to the right to equality of spouses under Article 5 of Protocol No. 7 to the Convention, since from the linguistic interpretation of the relevant provisions of the Family Law, on which the contested decisions were based, follows different treatment of the parent with whom the child lives and the one who has the right to have personal and direct contact with the child, and which dysfunction is primarily caused following the interests of the child, which take precedence over the interests of any parent.

The Constitutional Court also dealt with an identical constitutional issue in case no. AP-4468/11 of 27 June 2012, but in which case the judgments of the regular court, rendered following the appellant's appeal, divorced marriage and established that three minor children were entrusted to custody and upbringing of the defendant - the father of the child. The appellant was ordered to provide a certain monthly amount as child support for each child, provided that the manner of maintaining the relationship and direct contacts of children with other parent - the appellant was determined. In this case, too, the Constitutional Court concluded that the appellant's right to non-discrimination in relation

to the right to family life had not been violated, nor the right to non-discrimination in relation to the right to equality of spouses under Article 5 of Protocol No. 7 to the Convention.

5. Examples of protection from discrimination within the framework of abstract jurisdiction of the Constitutional Court (review of constitutionality)

(1) Regarding the implementation of the discrimination test, the decision of the Constitutional Court in case **U-12/09** of 28 May 2010 is interesting. In the specific case, a request was submitted for the review of the constitutionality of Article 35 of the Law on Salaries and Compensations in the Institutions of BiH. According to the applicant, “with entry into force of the disputed law, the Ministry of Finance and Treasury of BiH issued an instruction to suspend the payment of compensation of benefits during maternity leave from the budget of Bosnia and Herzegovina to employed mothers residing in the Federation of BiH, which they were paid regularly by the employer. At the same time, mothers employees whose residence is in the Republika Srpska, the said compensation is paid in full from the budget of Bosnia and Herzegovina at the expense of the Public Fund of the said Entity. In the applicants' view, the application of the impugned provision caused discrimination and segregation of female employees within the same institution, as it prevented all female employees from the same institution of the same governmental level from enjoying employment rights equally. Employers, institutions of Bosnia and Herzegovina, pay salary compensation to female employees residing in the Republika Srpska, and female employees residing in the Federation of Bosnia and Herzegovina are not paid it or receive only a percentage, depending on Cantonal regulations, since in practice these provisions are interpreted in such a way that these female employees (with residence in the Federation of BiH) exercise their rights to compensation according to Cantonal regulations. In this way, according to the applicants, discrimination arose between female employees residing in the Federation of BiH, but also in different Cantons, given that some of the Cantons in the Federation of BiH do not pay social welfare during maternity leave.

The Constitutional Court found the existence of different treatment and concluded that the disputed provision did not pursue a legitimate aim. With regard to proportionality, the Constitutional Court concluded: “With regard to this principle (proportionality), the Constitutional Court notes that the same goal (ensuring social protection and equal maternity leave benefits) can be achieved in other way than by strictly relying on local regulations. The Law on Prohibition of Discrimination obliges all competent authorities in the state and the entities to harmonize all regulations in order to create conditions

without discrimination in the political, economic and social life in Bosnia and Herzegovina. The Constitutional Court sees no reason why state institutions are not able, in accordance with their financial capabilities, to directly pay compensation to female employees, in order to avoid any discriminatory treatment, given that the state is obliged to finance, *inter alia*, payments to female employees of institutions in BiH and that the payment in question does not affect any other additional benefits provided to employees by the entities.

(2) With regard to the constituent peoples in Bosnia and Herzegovina, in case **U-4/05** of 22 April 2005, the Constitutional Court declared unconstitutional the provision of the Statute of the City of Sarajevo which excludes Serbs from the City Council of the City of Sarajevo, i.e. does not provide to Serbs a guaranteed minimum of 20 percent of seats in the City Council of the City of Sarajevo, regardless of the election results, which is given to other constituent peoples - Bosniaks, Croats and a group of Others. The Constitutional Court found that the disputed provision is inconsistent with the last indent of the Preamble of the Constitution of BiH, Article I/2 and Article II/4 of the Constitution of BiH in conjunction with Article 5 paragraph 1 item c) of the Convention on the Elimination of All Forms of Racial Discrimination and the Decision on Constituency of the Constitutional Court No. U-5/98, because the disputed provision does not list Serbs as a constituent people, and because Serbs are not given the same guarantees as Bosniaks, Croats and a group of Others, that they will have a minimum of 20 percent of seats in City Council of the City of Sarajevo, regardless of the election results.

(3) In the context of the issue of discrimination, the Constitutional Court also dealt with the issue of representation of constituent peoples in public authorities in case **U-7/05** of 2 December 2005, in which a request for review of the constitutionality of the Statute of the City of East Sarajevo and the Decision on the election of councilors to the Assembly of the City of East Sarajevo was submitted. In connection with the request, the Constitutional Court found that by failing to prescribe provisions on the guaranteed minimum of representation of constituent peoples, Bosniaks and Croats were not discriminated against in the enjoyment of their political rights, given that the disputed statutes did not prevent them from enjoying political rights under Article 5 paragraph c) of the International Convention on the Elimination of All Forms of Racial Discrimination. Namely, Bosniaks and Croats, as well as Serbs, have the right to vote and run under equal conditions, as well as the right to participate in elections, on the outcome of which participation in government later depends. Failure to prescribe provisions on guaranteed minimum representation could potentially lead to any of the constituent peoples being in the absolute majority at the city government level, but this would always depend on the

outcome of the election results. In view of the above stated, the Constitutional Court considers that by failing to prescribe a guaranteed minimum representation regardless of the election results in the Statute of the City of East Sarajevo and the Statute of the City of Banja Luka, Serbs were not placed in a privileged position over Bosniaks and Croats, given that such a privileged position is not given in the disputed statutes to any of the constituent peoples.

(4) A number of conclusions regarding protection against discrimination were also issued by the Constitutional Court in Decision No. **U-9/09** of 26 November 2010, in which it assessed the constitutionality of the Statute of the City of Mostar and the Election Law of BiH. The Constitutional Court concludes that the provisions of Article 19.4 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute, which prescribe the lower and upper limit of representation of constituent peoples in the City Council, do not discriminate Croatian people in exercising their rights under Article II/4 of the Constitution of BiH in conjunction with Article 25b) of the International Covenant on Civil and Political Rights. On the other hand, the Constitutional Court upheld the applicant's request regarding: (a) the allegation that the provisions of Article 19.2 paragraphs 1 and 3 and Article 19.4 paragraph 1 of the Election Law due to which different numbers of voters in election units based in former urban areas in Mostar violates Article 25b) of the International Covenant on Civil and Political Rights, and (b) the allegation that the provisions of Article 19.2 paragraph 1 and Article 19.4 and Articles 2-8 which prevent voters from the Central Zone of the City of Mostar from electing councilors that would represent them in addition to councilors representing the city election area for the entire City of Mostar - violate Article II/4 of the Constitution of BiH in conjunction with Article 25b) of the International Covenant on Civil and Political Rights .

The Constitutional Court postpones further proceedings on this part of the *sine die* request until the amendments to the Election Law are adopted in accordance with this decision. The Constitutional Court instructs the City Council of the City of Mostar to report to the Constitutional Court within three months of the publication of the changes made by the BiH Parliamentary Assembly in the BiH Election Law in the "Official Gazette of BiH" - on steps taken to bring the Statute of the City of Mostar into line with the Constitution of BiH.

Finally, the Constitutional Court considers that the provisions of Article 19.7 of the Election Law, Article VI.C paragraph 7 of the Amendment to the Constitution of the Federation of BiH and Articles 44 and 45 of the Statute, according to which the citizens

of the City of Mostar elect the mayor in a different way than the citizens of the City of Banja Luka, in accordance with the rights of citizens of the City of Mostar guaranteed under Article 25b) of the International Covenant on Civil and Political Rights, and that they do not discriminate the citizens of the City of Mostar in the enjoyment of the said right contrary to Article II/4 of the Constitution of Bosnia and Herzegovina.

(5) Article 1 of Protocol No. 12 to the Convention was first addressed by the Constitutional Court in Decision No. **U-7/12** of 31 January 2013, in which it decided on the constitutionality of the provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina. The Constitutional Court found that the said law was not compatible with the provisions of Article I/2 of the Constitution of Bosnia and Herzegovina because it violated the principle of independence of judiciary as a fundamental guarantee of the rule of law. In addition, the Constitutional Court concluded that the said law has violated the provisions on the prohibition of discrimination under Article II/4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention. In this decision, the Constitutional Court emphasized that, having in mind the standards prescribed by international instruments concerning the status of judges and having the intention to bring the judicial system to the highest level, as well as the fact that the Constitutional Court could not find reasonable and objective justification in the disputed law for different treatment in relation to income structure (due to lack of compensation for transportation, hot meal and separate life), nor was such justification provided to him by the legislator - this law was not proportional to the goal sought to be realized during its adoption, nor with established European standards regarding the status of judges.

(6) The Constitutional Court pointed out the different treatment of persons with disabilities, without reasonable and objective justification for such treatment, in case **U-9/12** of 30 January 2013 - through the review of constitutionality of the provision of Article 18d paragraph 4 of the Law on Amendments of the Law on Basis of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children³⁴. The disputed provision stipulates that persons with disabilities which occurred after the age of 65, and whom, in accordance with the opinion of the Institute, have been determined the need to use the right to care allowance and assistance of another person, exercise this right in accordance with Cantonal regulations. According to the

³⁴ "Official Gazette of the Federation of BiH" Number 14/09.

Constitutional Court, it indisputably follows that the said provision makes distinction between persons with disabilities by age. Namely, this provision makes a difference between persons with disabilities whose disability occurred after the age of 65 in relation to persons whose disability occurred before the age of 65. Therefore, in the opinion of the Constitutional Court, the disputed provision in itself makes difference⁴ between persons with disabilities according to age group, from the aspect of the occurrence of disability. Ultimately, the Constitutional Court concluded that the disputed provision was contrary to Article II/2 of the Constitution of Bosnia and Herzegovina, in conjunction with Article 1 of Protocol No. 12 to the Convention, because it indicated different treatment of persons with disabilities without reasonable and objective justification for such treatment.

(7) Within the framework of abstract jurisdiction, the Constitutional Court also dealt with the issue of prohibition of discrimination in case **U-3/13** of 26 November 2015, which was much covered by the media in Bosnia and Herzegovina. In the mentioned case, the Constitutional Court dealt with the review of the constitutionality of the provision of the Law on Holidays of the Republika Srpska, which stipulates that one of the republic holidays is the Day of the Republic, which is celebrated on 9 January. The applicant alleged, *inter alia*, that Day of the Republic, which was celebrated on 9 January as a holiday, had been established by the “Assembly of the Serb People in Bosnia and Herzegovina” in 1992 without the participation of Bosniaks and Croats, and which undoubtedly indicates that Bosniaks and Croats in the Republika Srpska, but also Others, i.e. other citizens of Bosnia and Herzegovina – are treated differently in relation to Serbs in the Republika Srpska, contrary to Article 1.1 and Article 2a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination. The applicant refers in particular to Article 2d) and e) of this Convention, which, in his opinion, provides that effective “national and local policy” measures must be taken to repeal or annul any law or regulation aimed at unequal treatment or discrimination. . In connection with this request, the Constitutional Court pointed out that the practice of celebrating the baptism of the Republika Srpska on 9 January as an Orthodox religious holiday - established preferential treatment of Serbs as one constituent people in relation to Bosniaks and Croats as constituent peoples, Others and citizens of the Republika Srpska. Srpska, by which the public authorities of the Republika Srpska violated the “constitutional obligation of non-discrimination within the meaning of the rights of groups”. The Constitutional Court concluded that the disputed Article 3b) of the Law on Holidays, which stipulates that the Day of the Republic is celebrated on 9 January, establishes a privileged position of members of the Serb people in relation to members of the Bosniak and Croat people, Others and citizens of the Republika Srpska, due to the fact that this

date constitutes a part of the historical heritage of Serb people only, as well as due to the celebration of the baptism of the Republika Srpska, which is associated with the traditions and customs of Serb people only.

6. Instead of conclusion

Human dignity and non-discrimination are important social and legal values. They are proof of the civility and cultural development of human communities. Tolerance and respect for the equal dignity of all human beings are the foundations of a democratic and pluralistic society. Therefore, they should be carefully nurtured.

Discrimination is prohibited in the legal system of Bosnia and Herzegovina at the constitutional level, primarily by the Constitution of Bosnia and Herzegovina, the Convention, which has the force of a constitutional norm, various international human rights agreements and national legislation, including in particular the Law on Prohibition of Discrimination. All this shows an important position of the principle of non-discrimination in the legal order of Bosnia and Herzegovina, given the wide list of discriminatory grounds contained in these documents according to which it is prohibited.

The Constitutional Court, as the highest constitutional institutional guarantor for the protection of human rights and fundamental freedoms, through its practice, makes a significant contribution to the system of protection against discrimination in BiH. However, this is not enough, if at the same time it is not accompanied by an equally strong development of regular court case law. Therefore, through the joint action of several actors, a combination of various measures of legislative, educational and judicial nature - it will become possible to realize the full potential of protection that BiH society offers to victims of discrimination. In addition, given the orientation of Bosnia and Herzegovina to access the European Union, and insofar as the harmonization of the legal order of the future member state with the legal order of the European Union is a condition for membership in that Union, it is necessary to keep in mind the anti-discrimination law of the European Union and the approach it imposes.

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**THE RIGHT TO DIGNITY IN PRACTICE: A CASE STUDY ON
THE SOCIAL POSITION OF SERBS IN CROATIA**

The paper analyzes the social position of Serbs in Croatia and seeks to answer whether the life circumstances violate their right to dignity. The contextual framework of the analysis includes social events and legal frameworks within which the identity of Serbian minority has been developing. These contextual factors will clarify the social positioning practices and everyday life of Serbs in Croatia, with emphasis on those living in the area of Special State Concern they mostly inhabited until ethnic cleansing in 1995. The analysis will show that the right to a dignified life of the Serbian minority in Croatia has been violated as well as that numerous actors are involved in further deterioration of its social position and power.

Keywords: Serbs, Croatia, dignity, discrimination, marginalization

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Introduction

Human dignity is a concept that traces its philosophical history back at least 2.500 years. However, its legal tradition is not so long (Perović, 2013: 9; Marjanović, 2013: 97; Konstadinov, 2018: 1). In fact, dignity was introduced in law only after World War II. Today, in a large number of international documents and the constitutions of the modern states, it has such an important place that it represents the foundation of all fundamental human rights (Bogneti, 2003 according to Kostadinov, 2019: 152), especially those concerning prohibition of torture, slavery, inhuman and degrading treatment as well as discrimination of any kind (Marjanović, 2013: 101)

In fact, it turns out that many personal rights such as e.g. the right to life, health, physical and mental integrity, freedom, honor and reputation, personal identity, and others define (are included) the general concept of dignity (Marjanović, 2013: 97). It is further argued that freedom and dignity form humanity as a whole. (Perović, 2013) Also, there is no freedom without dignity or dignity without freedom (Oklobdžija, 1989: 256).

It must be said that neither its content, nor meaning is clear. In other words, dignity has numerous meanings in different legal regimes (Jeffreis, 2018: 119; Greve, 2014 according to Kostadinov, 2019: 152). In addition, its political usefulness has been recognized (Perović, 2013). Also, the social, anthropological, and moral dimension must be introduced into discourse about definition of the term/concept dignity. (Marjanović, 2013: 101).

Intrinsic dignity should be distinguished from social one as well. The first refers to the fact that all people should be equal, regardless of ethnic, racial, religious, class, and other differences between them, while the second reveals social inequalities: the life conditions, for example, will not allow everyone to enjoy the right to dignity (Marjanović, 2013, Ljubičić, 2019a).

This is the pessimistic attitude taken to its extreme: the historical moment, the political system and social environment in which a man was born, the family and the nation he belongs to will determine his future just as much as his 'inherited traits' (Oklobdžija, 1989: 257).

Take poverty, for example. This concept is usually associated with social disadvantage, destitution or deprivation. Poverty can be operationalized and measured as absolute and relative (Table 1). The United Nations use poverty indicators such as: availability of

electricity, sanitation, drinking water, possession of assets such as refrigerator, radio, television, telephone, bicycle, motorcycle, and others.

Table 1. Operationalization of relative and absolute poverty

People are poor if:		
Absolute	starvation standard	they have not enough to eat
	subsistence standard	they lack the means materially to sustain themselves
Relative	coping standard	they are not managing acceptably to 'get by' in society
	participation standard	they cannot play a full and active part in society

Source: George & Howards (1991: 3, according to, Hartley, 2016: 6)

In addition to material misery, poverty has its symbolic and moral meaning as well. Namely, it leads to a series of personal and family failures. The poor are seen as socially, temporally, and spatially distant people. The bearer of this role faces humiliation, discrepancy, shame and stigma, attack on dignity, fragility, the loss of right to vote. In a word, such an individual faces a denial of human rights (Lister, 2004, according to Hartley, 2016: 11; Stevanović, Grozdić, 2018). Düring's object-formula confirms that this thesis has a basis (Banović, 2016). In that equation, one of the statements for violation of dignity is life below elementary existential conditions. The second factor of key importance, besides the previously mentioned one for our further consideration of dignity and its violation, is mass exodus (and genocide).

Both factors from Düring's formula for *calculating* dignity are found in the reality of a number of Croatian Serbs. The historical, social, and political circumstances, they live in, represent (unfortunately) an excellent starting point for the analysis and search for an answer to the question whether such a context violates the right of the remaining Serbs in Croatia to dignity? At this point, we must underline that we are certain that an identical analysis could be conducted on members of another nation with a similar fate. We also believe that the findings would not be fundamentally different.

The ambition to deal with the position of Serbs in Croatia and their right to dignity has been motivated by the following facts: 1. there is an abundance of scientific and

professional material for the undertaken analysis, which has significantly facilitated this research; 2. the researcher is well acquainted with the social and historical context of the analysis - writing about Serbs in Croatia, is more familiar topic for the author than dealing with the position of an African tribe whose history, life and social circumstances can be learned second hand, thus run the risk to interpret the findings based on available, usually media, incomplete information; 3. it must be relevant - if for no other reason than for the assumption that one group of people is deprived of dignity - research of this kind is avoided by local scientists; and finally 4. the researcher is familiar with the methodological pitfalls she may fall into as well as the way to avoid them. This has been done by applying the principle of self-reflection which has enabled the researcher to become aware of the reasons for dealing with a certain topic, who would her answers either help or harm, to name just a few of the insights (Ljubičić, 2019b).

The next chapter will reveal the ways of conducting the analysis and what data sources were used.

1. Methodological notes

1.1. Research study, goals and questions

The research question, I have tried to give an answer to, is: can Croatian Serbs enjoy their right to a dignified life? The analysis had several goals. The first among them was to identify the socio-political-normative framework within which the Serb community members in Croatia live their everyday life; the second was to determine whether such life circumstances compromise their right to dignity, and the third was to draw the attention of local scientists to this forgotten subject matter.

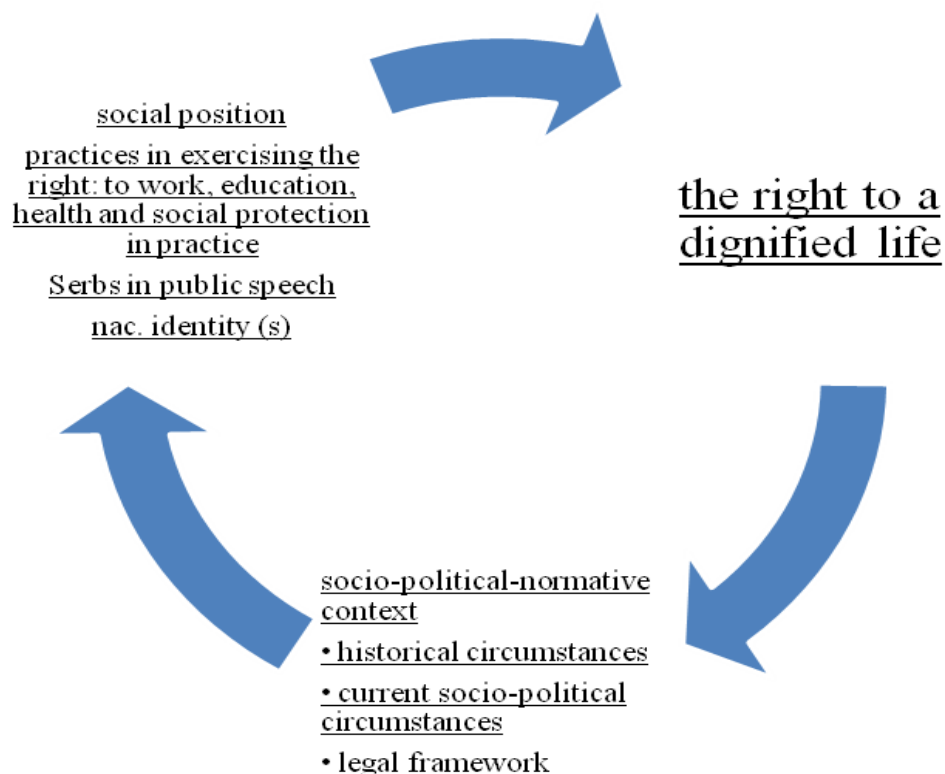
The theses have not been assessed, but the analysis was conducted and guided by the following research questions: 1. What socio-political-normative frameworks regulate the life of Serbs in Croatia? 2. What is their social position? 3. Do the context and their social position violate their right to a dignified life?

1.2. Operationalization of key concepts and data sources

We have described the socio-political-normative ambience by giving a brief overview: the historical events that marked the lives of Croatian Serbs and the legal frameworks that directly concern them. Indicators of social status are truly convenient. The point is that we could not operationalize the social position of Serbs in a different, but in the described way: with the help of indicators concerning the possibility of enjoying certain

constitutional and civil rights in practice (work, education, social and health care, identity, including their presentation in public speech) (Figure 2), since we used secondary data sources. The social position and life context of Serbs in Croatia are two key factors that should have helped us get an answer to the question: Do members of the Serb community live a dignified life in practice?

Figure 2. Contextual factors, social status, and dignity: indicators



For answering the questions raised in the analysis, the documentary material was used such as expert reports and scientific texts, by authors who deal with the position of the Serbian community in Croatia. Focus was on the material concerning the social status of Serbs from 1990 to present. The logic used for such time framing of the material lies in the fact that the socio-political position of Serbs was fundamentally changed in 1990 when the new Croatian Constitution “turned” the Serbs from a constituent people into a national minority. The strengthening of nationalisms: the attacking one and the other in

the service of defending one's identity and right to life, resulted in a civil war, which ended in 1995 with the ethnic cleansing of Serbs from Banija, Lika, Kordun, Western Slavonia, Eastern Baranja and Northern Dalmatia, and further degrading of the already poor position of the remaining Serb community in Croatia. Two methods for collecting material: 1. we searched the Hrčak portal, which publishes scientific and professional texts in the field of social sciences, and the website of the Serbian National Council. In addition, we applied clump sampling: we would find out from one report that a similar topic was being addressed by other authors, whose texts we would then search for and include in the analysis. The final analysis included ten reports published between 2005 and 2020. Access to education, training, and employment of ethnic minorities in the Western Balkans. Country Report Croatia (Petričušić, 2005), The Position of National Minorities in Croatia: Legislation and Practice (Erceg, 2005); Sustainability of minority return to Croatia (Mesić, Bagić, 2007), Minority return to Croatia - open process study (Mesić, Bagić, 2011), Minorities in Croatia (2013), War crimes against Serbs in Croatia 91-95. (2018), Historical revisionism, hate speech and violence against Serbs in 2018 (2019), Croatia 2019 Human Rights Report (2019), Fifth Report of the Republic of Croatia on the Implementation of the Framework Convention for the Protection of National Minorities (2019), Alternative Report on the Implementation of the Framework Convention for the Protection of National Minorities 2015-2019. (Mikic, 2020). We processed the data from the report using (qualitative) content analysis.

2. Research findings

2.1. What are socio-political-normative life circumstances for Serbs in Croatia?

Contextual plane

The socio-political and normative context of life for Serbian minority in Croatia has been described by a brief overview of the historical and social circumstances during civil war in Croatia (1991-1995), its immediate consequences, and the current socio-political situation. Since such social outcomes preceded it and largely defined and abolished the legal framework of the new Croatian state, we will be giving special attention to it during the analysis.

A large number of our contemporaries, whether working in the fields of history, political science or psychoanalysis (see: Ljubičić, 2019b), use speech, with signs of hate, to present Serbs in their works (see: Vuković, 2018). Of course, this statement also refers to Croatian Serbs, who, like their compatriots from the neighboring former republics of Socialist Yugoslavia, have been assigned the role of (exclusive) aggressor. Along with the process,

the revision of history goes hand in hand, especially the one concerning the suffering of Serbs during World War II and the civil wars fought on the territory of former Socialist Federal Republic of Yugoslavia. For example, a number of Croatian historians and certain wannabes deny the genocide that happened to the Serbian people on the territory of Independent State of Croatia. The Ustasha concentration camp in Jasenovac, where thousands of people lost their lives in the most horrific way, is spoken of as a labor camp, with only 1,000 “workers” killed (*Historijski revizionizam, govor mržnje i nasilje prema Srbima u 2018*, 2019). The official right-wing discourse, supported by the Roman Catholic Church, compares a suspicious number of Croatian victims of communist (in their interpretation-Serbian) terror to the suffering of Serbs, Roma and Jews and communists of Croatian nationality.

Bringing such confusion to foreign scientists, who are not sufficiently acquainted with the historical trends in this area, confirms the initial hypothesis - that Serbs are “bad guys”. However, ignorance of real historical facts does not absolve them from scientific bias. It should be known that Serbs lived in Banija, Lika, Kordun, Northern Dalmatia, Eastern Baranja, and Western Slavonia for centuries, that they had a significant historical role in the Austro-Hungarian monarchy. We can understand the motives of the Krajina Serb uprising in 1991 only if we know history well: the existential endangerment of the Serbian people in Croatia has been evident since the end of the 19th century. Genocide was committed against Serbs (along with Roma and Jews) in the Independent State of Croatia (hereinafter NDH; 1941-1945) (Goldstein, 2012). Then, during the 1970s, the “Croatian Spring” followed, with ideas not significantly different from those nurtured in the Independent State of Croatia. Only twenty years later, in an atmosphere of aroused nationalism, a civil war broke out. On one side stood Croatian nationalists led by Franjo Tudjman, the later president of the Croats whose blood and soil policy initiated the outbreak of war (Minorities in Croatia, 2013). On the other hand, there were Serbs with their experience of oppression and genocide committed against them by members of the Croatian nationality. Moreover, in 1990, they turned from a constituent people into a national minority (*Ustav Republike Hrvatske*, I. izvršne odredbe, 1990). The war, which had lasted since 1991, ended four years later, after ethnic cleansing (Koska, Matan, 2017: 129) with attacks on internationally protected areas (UMPROFOR) in the Flash (May) and Storm (August) operations, conducted by the Croatian army. These events resulted in a number of consequences. Let us pay attention to some of them. 1. Mass exodus of a people from their centuries-old homeland and numerous civilian casualties in war crimes. Some of the civilians have not been identified to this day; 2. Legalization of systemic discrimination against members of the Serb community, by introducing such laws that

repealed most of the provisions of the 1991 Constitutional Law on the Rights and Freedoms of National Communities or Minorities. Remember not to forget, that the provisions of the said law were violated especially in the case of Serbs even before 1995. (Erceg, 2005; *Minorities in Croatia*, 2013; *Ratni zločini nad Srbima u Hrvatskoj 91-95.*, 2018).

After the Flash and the Storm, such a practice with the ultimate goal to prevent the return of displaced persons to their home, received its legal basis. For example, Article 8. of the Civil Law Act stipulated that applicants for citizenship must be both loyal to the legal system and customs of Croatia and reside in its territory for a continuous period of at least five years. This law affected Serb returnees, who were thus denied a number of rights, including the right to vote and the right to much-needed social protection (*Minority in Croatia*, 2013).

There is also the Law on Renting Apartments in the Liberated Territory, which revokes the occupancy right of its holders if they do not use the apartment for more than 90 days. Of course, the expelled Serbs could not return in such a short time due to a number of administrative difficulties as well as due to the objective perceived life threat.

The Law on Temporary Takeover and Management of Certain Property is equally discriminatory since it enabled the placement of movable and immovable property of expelled Serbs under the temporary administration of the state. Further discrimination was reflected in the fact that the time to appeal against the decision to confiscate the property was absurdly short - eight days. Owners - Serbs could have right to their property only if they rented, sold or otherwise handed it over to Croatian citizens. Ethnic Croats were given an advantage in such business affairs (Erceg, 2005).

The Law on Areas of Special State of Concern does not differ from the previous three in any way, since it favored the settlement of Croats in houses that the Serb owners had to leave during the Storm. On the other hand, it must be said, that during the European Union accession process, Croatia, to some extent - at least on paper, facilitated the return of Serbs and protected their property (Erceg, 2005). However, as stated in the Alternative Report (Mikić, 2020: 9-10), 23 years after the end of the war, the largest number of complaints submitted by citizens to the legal department of the Serbian National Council concerns housing and renovation of housing. The housing situation of right-of-occupancy holders is quite difficult, especially for those living in larger urban centers (Zagreb, Rijeka, Dubrovnik, Split, and Zadar). Returnees to Banija, Lika, Kordun, Northern Dalmatia, Eastern Slavonia, and Baranja are facing yet another discriminatory practice.

When comparing priority need categories for housing, returnees are ranked much lower than “Homeland War” veterans for example, so this right can hardly be exercised.

In addition, judges have been shown to be strongly politically influenced (Helsinki Committee for Human Rights, 2002, according to Minorities in Croatia, 2013). Thus, the report of the United Nations Committee on Economic, Social and Cultural Rights (2001, according to Minorities in Croatia, 2013) states that over one million cases have been blocked before Croatian courts. This information might not be so disturbing, but please, post-war property claims were mostly made by Serbs. Moreover, the Organization for Security and Co-operation in Europe reports double standard applied to Serbs and Croats indicted for war crimes: the weight of evidence is measured differently in the case of accused Serbs and in the case of accused Croats. Mainly uniformed persons committed war crimes against Serbs but no one has been convicted yet (*Ratni zločini nad Srbima u Hrvatskoj 91-95.*, 2018). Moreover, despite the fact that there is a (only declarative) commitment to make the prosecution of crimes committed during the Storm a national priority, there are neither new investigations nor new indictments (Mikić, 2020: 11).

Finally, the Fifth Report of the Republic of Croatia on the Implementation of the Framework Convention for the Protection of National Minorities (2019: 49) concludes that Serbs do not have the equal access to their rights and justice as other citizens of this country.

2.2. Social position of Serbs in Croatia

The described socio-political and normative context points to the possibility that members of the Serb community have been discriminated on various grounds. We described the social position of Serbs in Croatia using indicators concerning the practice of the right to work, health and social protection, education, treatment of the Serb community in public discourse, as well as the way they relate towards their family and national identity.

When it comes to the right to work, it should be noted that all analyzed reports state that members of the Serb community are under-represented in state administration bodies, judiciary, and police (Erceg 2005; Mikić, 2020: 31), despite the labor law which is affirmative for national minorities. Mesić and Bagić (2011: 94) have found that, out of the total number of working respondents of Serb returnees, only 19% are legally employed and that this number has not changed significantly since 2006. These two authors state that the unemployment rate among returnees is as high as 68% and that it is 3.6 times higher than the national average. They state it can be concluded that the position

of returnees on the labor market is unfavorable, but they also doubt such a thing can be related to their ethnicity. But other authors have no such doubts. For example, Erceg (2005) provides data referring to the *Human Rights Watch: Broken Promises: Impediments to Refugee Return to Croatia* report that Serb returnees cannot get a job. It is common practice that job vacancies, Serbs apply for, are being annulled, especially if they are the only competent candidates. Even where they make the majority, Serbs are rarely employed. For example, in Dvor, Serbs make the majority of the population (60%), however, only seven out of 300 employees have jobs. Out of 2,000 returnees in Gračac, only one got a job in the state administration, and in Knin, Benkovac, Kistanje, Vojnić, and Daruvar and the surrounding municipalities there is not a single employee in local government, public services, and the judiciary (Erceg, 2005: 15). Petričušić (2005: 19) concludes that Serbs are exposed to discriminatory practices on the labor market and that it is almost impossible to get a job in the public services. It should be added that as many as 56% of members of the Serb community live in below-average developed local self-government units. The results of the research, conducted by the Serbian National Council in 2016 and 2017 in 31 returnee municipalities where 15% of the population are Serbs, showed that these areas are systemically neglected (Mikić, 2020: 35-37). Thus, we learn that it is necessary to rehabilitate as many as 2/3 of state roads in this municipality, that more than 60% of settlements do not have water connections, while around 80 settlements where only Serbs live do not have access to electricity. In both their reports (2007 and 2011), Mesić and Bagić found that a number of returnees (in 40% of households) did not have access to public transport and that one in three could not meet their health care needs.

The right to education in the language and script of the minority when it comes to Serbs seems to be systemically violated (Petričušić, 2005). It is stated that in areas with a majority or significant share of the Serbian population, it is still not possible to register institutions with classes conducted in the Serbian language and Cyrillic script, while in the History curriculum, Serbs are presented as aggressors. The part of Croatian-Serbian history where the first were the executioners of others is systematically omitted: who is responsible for the “policies of terror against citizens” of Serbian, Jewish, and Roma ethnicity during the Second World War is not mentioned (Mikić, 2020: 29). In addition, curricula that nurture the specificity of minorities (language, literature, history, geography, cultural creativity) have not been adopted (Mikić, 2020: 30). Petričušić (2005: 25) states that the Serbian minority does not enjoy the right to education in the mother tongue thanks to local governments which are not allowing such practice like in Knin and Knin-Šibenik county, for example. It should also be noted that peer violence in schools in Eastern Slavonia attended by children of Serbian and Croatian nationality is often

motivated by ethnic reasons (Petričušić, 2011: 671). In addition, it has been noticed that ethnic distance of students of Croatian ethnicity towards Serbs is enormous, that as many as 45% of high school students believe that they should be excluded from the Republic of Croatia (Turjačanin, 2014: 150).

Such a finding should not surprise us if we keep in mind what kind of discourse about Serbs and crimes committed against them is being built in public. In Croatia, there is a relativization and normalization of the suffering of Serbs during World War II and the so-called Homeland War. The key actors in this process are Croatian politicians, representatives of the Roman Catholic Church, war veteran and right-wing associations as well as Croatian radio and television (Historical revisionism, hate speech and violence against Serbs in 2018, 2019). The peculiar strategy of forgetting Serb victims is in progress along with cultivating the discourse that Croatia in the last war “was only defending itself, the crimes, if any, were sporadic and that it is necessary to think about the context in which they were committed” War crimes against Serbs in Croatia 91-95, 2018: 5). Such discourse was undoubtedly strengthened by the statement of the President of the Croatian Supreme Court Vuković that “a Croatian soldier cannot commit a crime” (War crimes against Serbs in Croatia 91-95, 2018: 5). In addition, Petrinja Mayor and Croatian Party of Rights President Gordana Dumbović’s stated that Serbs are not human beings, but a lower form of life than animals and she called Croats to prepare for arms (Minorities in Croatia, 2013: 28). Such open hate speech coming from government deputies and holders of judicial office - goes unpunished. It has also been found that the public service promotes hate speech and celebrates war criminals (Čolović, Opačić, 2017: 117; Minorities in Croatia, 2013: 28; War crimes against Serbs in Croatia 91-95, 2018: 14), as well as that the Roman Catholic Church actively participates in the process of revisionism (War Crimes against Serbs in Croatia 91-95, 2018: 11). Thus, in the immediate vicinity of the suffering of over a thousand Serbs in the Glina Orthodox Church during 1941, a memorial plaque was erected to their executioners - members of the armed forces of the Independent State of Croatia, who are now called “barehanded martyrs” (War crimes against Serbs in Croatia 91-95, 2018: 11). The Bishop of Sisak also attended the event.

Having said that so far, we will not be surprised by the finding that, from 2014-2018, the increased number of incidents was inspired by intolerance towards Serbs (Table 2). There has also been an increase in the number of physical incidents where Serbs were victims (Croatia 2019 Human Rights Report, 2019; Mikić, 2020: 15), certainly the higher number than the one stated in the report referred to by Mesić and Bagić (2007; 2011).

Table 2. *The number of outbursts motivated by national hatred in the period from 2014-2018.*

Number of outages	2014	2015	2016	2017	2018
graffiti and signs that contain hate speech and ethnic intolerance	8	14	26	35	33
hate speech and ethnic intolerance at sports competitions	4	8	20	14	12
hate speech and ethnic intolerance in the media	8	21	42	40	43
hate speech and ethnic intolerance on social media	5	10	28	31	38
public actions that have the characteristics of intolerance towards Serbs	9	31	53	53	52
ethnic intolerance and historical revisionism in the statements of public figures	9	37	42	52	56
insults and threats against Serbs and Serb institutions in the Republic of Croatia	7	20	62	107	105
physical attacks	5	9	16	11	5
damaged, destroyed and stolen property of private persons and Serbian institutions	6	9	17	16	15
destroyed anti-fascist monuments	7	13	17	17	19
damaged and destroyed bilingual boards	8	8	2	4	3
In total	82	189	331	393	381

Source: Historical revisionism, hate speech and violence against Serbs in 2018 (2019: 4-5)

The outcomes of such process are tragic for the Serb community in Croatia. Not only has the number of its members dropped significantly: from 12.2% (1991) to 4.4% (2001), but it is expected to continue to decline in the future, both due to the natural aging of the population and the unfavorable demographic structure, as well as due to forced-choice to conceal, partially or completely reject the Serbian national identity and replace it with the Croatian one for fear of discrimination and marginalization (see: Jović, 2011; Mikić, 2020: 12).

2.3. The right to a dignified life

Can Serbs in Croatia enjoy the right to a dignified life, guaranteed by the Croatian Constitution? If we try to answer this question by either applying only two factors of Düring's formula, or look at it through the prism of human rights, we come to an identical answer. The right to a dignified life of Serbs in Croatia is highly violated. Let's start with Düring: not only have Croatian Serbs been exposed to mass persecution and war crimes, but a good part of them, especially those who remained in, or returned to the war-torn area, live in extreme poverty - even if capable to work, they stay unemployed, in the places where they live there is a lack of infrastructure as well as the will to provide these people with electricity, access to drinking water, public transport, health care.

We get the same answer if we perceive dignity in the way it is defined in international documents on human rights. It includes, among other things prohibition of torture, slavery, degrading treatment, and discrimination of any kind (Marjanović, 2013: 101).

What is discrimination?

Petričušić states (2011: 662) that according to the Anti-Discrimination Act the term implies putting any person at a disadvantage, inter alia, on the basis of ethnicity, language, religion, political and other beliefs, national or social origin, material status.

When it comes to the Serb community in Croatia, it is easy to conclude, from what has been said so far, that Serbs are exposed to degrading treatment and long-term, repeated, and multiple discrimination: in the domain of exercising a number of civil rights. In addition, Article 4 of the Croatian Constitution does not apply to them.

Can positive developments be expected in the future?

Apparently not. Koska and Matan (2017) give a well-argued explanation for this anthropological pessimism. They analyze the Croatian Citizenship regime from 1990 onwards and recognize that citizenship policies, based both on the discourse of Croatia as a country of Croats and the realization of a centuries-old dream - of the state and the Homeland War, are actually a certain kind of ethnic engineering (Štiks, 2010, according to Costa, Matan, 2017). Such process develops uninterrupted even today and results in discriminatory citizenship policies and practices that primarily apply to Serbs (Koska, Matan, 2017: 124). Loosening of nationalist rhetoric in the process of creating the Croatian citizenship regime was present only when Croatia submitted a membership application to the European Union. Initial liberalism faded as soon as Croatia joined the

European Union (Koska, Matan, 2017: 124). In addition, the authors identified two key actors in this process. The first- Serbs who were deprived of their legal status as constituent people in 1990, and who were then given the role of a constructive enemy in relation to which the Croatian state and identity were defined (Koska, Matan, 2017: 132). The second one- the participants in the Homeland War. Their sacrifice was recognized and validated by the state in 1994 with the enactment of the Law on the Rights of Croatian Defenders from the Homeland War and the members of their families. With this law, they gained special rights and enormous socio-political power. It is manifested in their mass protests when someone dares to desecrate the dominant discourse about the war as a justified fight and victimized Serbs who, in fact, deserved suffering (Čolović, Opačić, 2017; Koska, Matan, 2017: 138). They are supported by the political elite because the rhetoric of Croatian nationalism - as authentic, true, natural (Čolović, Opačić, 2017: 117), is the only guarantee of the existing civil regime. Outcome of this whole process is the deepening of discrimination against Serbs (Koska, Matan, 2017: 121) as well as their placement on the social margin, turning them into clients who have neither the power of free choice nor the human freedom.

Instead of conclusion

Human dignity has an important place (on paper) in a large number of international declarations and conventions. Thus, it is mentioned as an inalienable right in the constitutions of many countries. Yet, some cannot enjoy this right. Our analysis shows that this is the case with Serbs in Croatia who have been threatened and denied numerous constitutional and civil rights. To make matters worse, the discrimination they are exposed to is systemic, coming from the top of the state. It is being supported by the Roman Catholic Church, associations of war veterans and the media, comes in the form of open hate speech, or through the covert obstruction of rights (to work, fair trial, education ...), Serbs should enjoy in their centuries-old homeland. It is alarming that the systemic marginalization and discrimination of one nation goes almost unnoticed not only by the European Union - Croatia is a member of (see: Jović, 2018; Koska, Matan, 2017; Mikić, 2020), but also by the scientific community, both in Serbia and in the world. Such lack of interest of scientists in the suffering of a nation in the 21st century speaks not only about the character of modern, postmodern society and man, but also potentially about the politicization of science (see: Ljubičić, 2019b).

Finally, it remains to recall two facts: 1. Besides Serbs in Croatia, there are other peoples in the world who did not deserve to be validated and punished for the systemic oppression that has been carried out against them for various reasons; 2. Only when members of the

human race stop being bitter for the injustices inflicted on them and start showing empathy and react to the troubles of others, the world has a chance to become a more pleasant place to live (Oklobdžija, 1989: 258). Until then – Let us hope not to become “Croatian Serbs”.

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RIGHT TO PEACEFUL ASSEMBLY FROM PERSPECTIVE OF HUMAN RIGHTS OMBUDSMEN OF BOSNIA AND HERZEGOVINA

From the “Yellow Vests” movement in France to anti-government protests in Hong Kong and from “One in five millions” in Serbia to general strike of teachers in Croatia, it can be observed that freedom of public assembly is becoming one of the pivotal citizens’ rights in global context, not least for the fact that citizens use this right as the most effective mean of expressing discontent with their position, status or specific acts of government.

Realization of this right entails positive obligations on states to protect and to facilitates, although states may impose limitations with respect to peaceful assembly under conditions set forth by legally binding regulations.

Right to peaceful assembly in Bosnia and Herzegovina is not necessarily being restrictively interpreted by the authorities, but it is important to insist that any limitations must be narrowly defined, because of the presumption of the legality of the assembly.

In examining whether response of the authorities was legitimate, there must be a justifiable balance between interests of those who want to enjoy the right to peaceful assembly and general interests of the community which is determined by applying proportionality test.

At the same time, in special circumstances such as in case of political manifestation in form of spontaneous protest, interruption of the existing protest exclusively for the lack of prior notification, while not accompanied by any unlawful behavior of participants, could represent disproportional limitation of right to peaceful assembly. It is necessary to underline that existing legal provisions apply exclusively to “peaceful” assemblies and gatherings, while assemblies with violent intentions or those whose aim is to cause civil unrest or violate rule of law, do not enjoy such level of protection. European Convention on Human Rights, affords states with wide margin of appreciation in order to respond to unrests, to prevent

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crime or to protect rights and freedoms of others and is contingent upon the phrase “necessary in democratic society.”

Keywords: *freedom of assembly, peaceful assembly, public gathering*

INTRODUCTION

Right to peaceful assembly, along with freedom of expression, represents one of the fundamental freedoms in every democratic society. Realization of this right entails positive obligations on states to protect and to facilitate, although states may impose limitations with respect to peaceful assembly under conditions set forth by legally binding regulations.

Assemblies can serve multiple purposes, including expression of different, unpopular or minority opinions.¹ Freedom of assembly is basic human right that can be enjoyed individually or as part of a group, unregistered associations, legal and corporate entities. This freedom can be one of the crucial tools for development of culture or preservation and protection of minority identities. Protection of right to peaceful assembly is of key importance for creation of tolerant and pluralistic society in which groups with different convictions, practices and political orientations can coexist.

In representative democracy, freedom of assembly is one of several means at citizens’ disposal when they want express ideas that are unpopular in given society. For some groups, holding of assemblies is strategic “Plan B” when other means of expression do not produce desired results. Legal authority in this field, John Inazu, called freedom of assembly “liberty’s refuge.”² Right to peaceful assembly is guarantee of humanity in every society because it promotes pluralism and strengthens the integrity of civil society. NGOs play an equally important role in initiating and influencing development and

¹ OSCE/ODIHR, (2011), Handbook on Monitoring Freedom of Peaceful Assembly, available at: <https://www.osce.org/files/f/documents/5/d/82979.pdf>, last visited on 16.09.2020.

² Inazu, J. (2012), *The Forgotten Freedom of Assembly*, Yale University Press, New Haven

enactment of international treaties, as well as in the implementation of these treaties in the national context and in monitoring the activities of States and non-state actors.³

Whether it involves students who challenge policy of university to use fossil fuels or protests of ethnic minorities who seek right to self-determination, all should be entitled to equal chances to effectuate changes, because right to freedom of assembly is unalienable.⁴ At the same time, right to freedom of assembly is closely connected to realization of other rights such as freedom of expression, freedom of association and freedom of opinion and religion.⁵

The goal of this article is to determine the state of realization and protection of freedom of assembly in Bosnia and Herzegovina, including the level of conformity of domestic legislation with international standards, to underline the key challenges faced by organizers, police and security agencies while holding public assemblies and to present findings and recommendations of the Ombudsmen Institution formulated with a goal of achieving greater level of freedom in this field.

Contribution of this scientific work is reflected by the fact that constituting elements and realities in implementation of this constitutionally guaranteed right are systematized and analyzed at one place, bearing in mind complex political and legal structure of Bosnia and Herzegovina, with many different legal acts permeating this field. Authors hypothesized that different regulation of this right does not *per se* represent an obstacle to its full realization in accordance with the highest international standards. In order to prove this, authors demonstrated that varying models of regulating the right to freedom of peaceful assembly must satisfy minimum standards applied to integral elements, such as: notion and definition of public assembly, types of public assembly, area designated for holding assemblies, report notification and permission to hold public assembly, duties and responsibilities of organizers and public authorities as well as standard of legal certainty. In this process, authors analyzed international standards, national legislation and records of practice of responsible agencies, highlighting their conformity to basic principles governing this area and their mutual codependence, which can serve as

³ Cerovic, I. (2019), *The role of non-governmental organizations in implementing the rights of child*, YEARBOOK HUMAN RIGHTS PROTECTION PROTECTION OF THE RIGHTS OF THE CHILD “30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”, Provincial Protector of Citizens – Ombudsman, Novi Sad, p. 285.

⁴ Larry, A. (1992), “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies”, *University of Pennsylvania Law Review*, 141: 149–219

⁵ For general discussion about interchangeability of individual rights and their origins in human dignity see Camataci, J.A., Zhao, B., et al, (2016), *Privacy, free expression and transparency*, UNESCO, Paris, p. 65.

guidance to legislators seeking to improve normative framework for realization of right to peaceful assembly.

ANALYSIS OF INTERNATIONAL STANDARDS

Right to freedom of assembly is guaranteed by international conventions that Bosnia and Herzegovina ratified and which form an integral part of its legal system. These are: International Covenant on Civil and Political Rights,⁶ International Convention on Elimination of Racial Discrimination⁷ and United Nations Convention on the rights of child.⁸

Institution of Special Rapporteur on the rights to freedom of peaceful assembly and of association as one of the United Nations special procedures was established by the Resolution 15/21 of the United Nations Human Rights Council from 2010, with mandate to investigate and report on specific themes of freedom of peaceful assembly and freedom of association in United Nations member states on these two freedoms.⁹

Working methods of the Special Rapporteur on the rights to freedom of peaceful assembly and of association include submitting annual reports to the United Nations General Assembly and Human Rights Council, organizing country visits,¹⁰ publishing urgent

⁶ Adopted on 16.12.1966. Currently, procedure on adoption of General comment 37 on Article 21 of the Covenant on civil and political rights is under way. Text of the draft comment is available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/DraftGC37.docx>, last visited on July 21, 2020.

⁷ Adopted on 21.12.1965.

⁸ Adopted on 20.11.1989.

⁹ Position of Special Rapporteur is honorary and he is not paid for his work. Council has extended mandate of the Special Rapporteur to additional three years on two occasions, in 2013. and 2016. United Nations Office of the High Commissioner on Human Rights, available at:

<https://www.ohchr.org/en/issues/assemblyassociation/pages/srfreedomassemblyassociationindex.aspx>, last visited on September 09, 2020.

¹⁰ So far, Special Rapporteur visited Chile, Georgia, Montenegro, Kazakhstan, Korea, Oman, Rwanda, United Kingdom and United States. Visit to Bosnia and Herzegovina is planned in next couple of years. United Nations Office of the High Commissioner on Human Rights, available at:

<https://www.ohchr.org/en/issues/assemblyassociation/pages/srfreedomassemblyassociationindex.aspx>, last visited on September 09, 2020.

appeals and letters to the United Nation member states, publishing press releases and participating in official events related to the mandate.¹¹

Report of the Special Rapporteur on the rights to freedom of peaceful assembly from May 2012¹² underlines the important role of the human rights institutions in monitoring and implementing realization of the right to peaceful assembly and association and in receiving and investigating individual complaints alleging human rights violations. In this document, UN Special Rapporteur called upon national human rights institutions that operate under Paris Principles to take lead role in following and public reporting on fulfillment of member states' obligations stemming from international human rights standards on right to freedom of peaceful assembly.

United Nations Human Rights Committee is another relevant body, composed of independent experts, founded by Optional protocol to the Covenant on Civil and Political Rights, with prime goal to monitor implementation of the Covenant, to publish General recommendations on interpretation and application of its provisions and issuing views on individual applications of citizens. Bosnia and Herzegovina has ratified Optional protocol on 01.03.1995. thereby accepting individual complaints mechanism of the Committee. In its General policy recommendation no. 37 from 2016,¹³ United Nations Human Rights Committee elaborates various aspects of the freedom of assembly and recommends concrete steps states ought to undertake with a goal of consistent implementation of Article 21 of the Covenant.

Right to peaceful assembly is also protected by Article 11 of the European Convention on Human Rights and Fundamental Freedoms, whose implementation Bosnia and Herzegovina, as Council of Europe member state and signatory to the European Convention, has a duty to secure. European Convention for the Protection of Human

¹¹ See, for example, "Note by the Secretary-General on Human rights defenders: Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms" (A/76/225 Sixty-second session).

¹² United Nations Office of the High Commissioner on Human Rights, available at: https://www.ohchr.org/Documents/Issues/FAAssociation/A-HRC-26-29_en.pdf, last visited on July 22, 2020.

¹³ United Nations Office of the High Commissioner on Human Rights, available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/MichaelHamilton.pdf>, last accessed on 22.07.2020.

Rights and Fundamental Freedoms together with national jurisdictions and the European Court of Justice, is one of the three keepers of human rights in modern Europe.¹⁴

States may introduce certain limitations on realization of the right to peaceful assembly, but such limitations must be:

- a. Prescribed by law,
- b. Necessary in democratic society,
- c. In the interest of national security or public safety, necessary to prevent unrest or crime, to protect public health or morals or rights or freedoms of the others.

Article 11 of the European Convention on Human Rights and Fundamental Freedoms not only protects individual right to peaceful assembly, but it also imposes positive obligations on state authorities to facilitate enjoyment of this right and enable peaceful organizations of assemblies.¹⁵

Article 11 of the European Convention on Human Rights and Fundamental Freedoms protects freedom of assembly, bearing in mind that this provision exclusively refers to peaceful assemblies. Although states are given wide discretionary right to deal with unrest or crime, in order to protect rights and freedoms of others, this freedom is fundamental and represents the cornerstone of democracy which can not be derogated except in case when it is necessary to react to the imminent threat of violence or unrest related to the concrete public gathering.¹⁶

From the jurisprudence of the international courts and UN Treaty Bodies, it can be observed that only necessary and proportional limitations on right to peaceful assembly are allowed, while any interference on the part of the state can principally be only related to the question of time, place and manner and not content or purpose of the public gathering. Each imposed limitation must be evaluated separately for each concrete case, while legislative framework should not impose blank (general) limitation on organization

¹⁴ Vuletic, I., (2017), *Criminal defamation and press freedom in jurisprudence of the European court of human rights*, Conference Papers, International Scientific Conference "FREEDOM, SECURITY: THE RIGHT TO PRIVACY" Novi Sad, p. 140.

¹⁵ Hoffman, D., Rowe, J., (2006), *Human Rights in the UK: An Introduction to the Human Rights ACT 1998* (2nd ed.), Harlow: Pearson Education Ltd, p. 106.

¹⁶ See, for example, *Djavit An v. Turkey* (2003), para 56

of public assembly. Limitations on the content or purpose of public assembly, while such assemblies are peaceful in nature, represent disproportional and unnecessary interference in right to freedom of assembly. No criticism of government policy or public officials should ever serve as a basis for imposing restrictions of freedom of peaceful assembly, as European court of human rights in its case law often affirmed that limitations of allowed criticism are wider in scope when directed at authorities rather than private citizens.

ANALYSIS OF DOMESTIC LEGISLATION

Constitution

Protection of human rights and fundamental freedoms is set highly in Constitution of Bosnia and Herzegovina. Formulated normative solutions are specific in many ways, not least for the fact that the Constitution of Bosnia and Herzegovina forms an integral part of the peace agreement, as one of its annexes. On one hand, this points to the fact that the highest legal act was not submitted to standard constitutional procedure, customary in the parliamentary democracies, and, on the other hand, to the fact that its violations do not only have repercussions in legal sphere but also in international law, as its due implementation enjoys guarantees of international community. Introductory part titled “Human Rights”, contains provision stipulating that Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.¹⁷

Furthermore, Bosnia and Herzegovina has committed to directly incorporate European Convention on Human Rights in its legal system. In line with that, Chapter “International standards” stipulates that:

*Rights and freedoms protected by the European Convention on Human Rights and Fundamental Freedoms and its Protocols are directly applied in Bosnia and Herzegovina. These acts shall have priority over all other laws.*¹⁸

Such normative solution entails string of consequences in practice, ranging from invoking provisions of the Convention and the case law of the Strasbourg Court in legal acts which are being drafted and used in legal transactions, to the obligation of harmonizing domestic norms with European standards of human rights protection.

¹⁷ Article II paragraph 1. of the Constitution of Bosnia and Herzegovina “Human Rights”

¹⁸ Article II paragraph 2. of the Constitution of Bosnia and Herzegovina “International standards”

In addition to the norm calling for direct application of international conventions in national legal setting, Constitution of Bosnia and Herzegovina individually enumerates rights that all persons under its jurisdiction should enjoy, although most of these rights are protected by the very European Convention on Human Rights and Fundamental Freedoms¹⁹. It is therefore clear that the intention of the contracting parties was to select certain rights as inalienable and inherent to the domestic legal system, regardless of international obligations of the states. Consequently, next paragraph defines that:

*All persons on territory of Bosnia and Herzegovina enjoy rights and freedoms from paragraph 2. of this Article, which includes: freedom of peaceful assembly and freedom of association with others.*²⁰

Finally, enjoyment of 13 individually enumerated rights and freedoms, as well as rights and freedoms protected by the European Convention on Human Rights and Fundamental Freedoms or by the international agreements mentioned in Annex I of the Constitution of Bosnia and Herzegovina is

guaranteed to all the persons in Bosnia and Herzegovina without discrimination based on gender, race, colour, language, religion, political or other opinion, national or social origin, connection to national minority, wealth, birth or other status. ²¹

According to the Constitution of Republika Srpska

*Citizens have a right to peaceful assembly and public protest. Freedom of assembly can be limited by law only for protection of citizens and property.*²²

Chapter II of the Constitution of Federation of Bosnia and Herzegovina, titled “Human Rights and Basic Freedoms” contains following provision:

Federation will secure application of the highest level of internationally recognizable rights and freedoms set forth by the acts enumerated in Annex.

¹⁹ See, for example, *Baczowski and Others v. Poland* (2005), para 25: “The Constitution clearly guaranteed the freedom of assembly, not a right. It was not for the State to create a right to assembly; its obligation was limited to securing that assemblies be held peacefully”

²⁰ Article II paragraph 3. of the Constitution of Bosnia and Herzegovina “Catalogue of Rights”

²¹ Article II paragraph 4. of the Constitution of Bosnia and Herzegovina “Non-discrimination”

²² Article 30. of the Constitution of Republika Srpska

All persons on the territory of Federation shall enjoy the right to:

1) basic freedoms: freedom of speech and press; freedom of opinion, consciousness and belief; freedom of religion, including private and public confession; freedom of assembly; freedom of association, including freedom to form and be member of syndicate and freedom not to join the syndicate; freedom of work.²³

Laws and bylaws

Right to freedom of peaceful assembly in Bosnia and Herzegovina is regulated by large number of normative acts, most notably by the laws on public assemblies at the level of Republika Srpska, Brcko District and cantons (there is 10 of them, having in mind that the procedure of adopting such law at Zenica-Doboj Canton is currently under way). During last two years, Federal Ministry of Interior has been working on draft Law on Public Assemblies of the Federation of Bosnia and Herzegovina. Since September 2019, pursuant to the decision of the Mayor of Brcko District, working group has been working on developing Law on Public Assemblies in Brcko District of Bosnia and Herzegovina, with the goal of achieving conformity with international standards. In the meantime, Ministry of Interior of Sarajevo Canton, in its letter to the Human Rights Ombudsmen of Bosnia and Herzegovina, has committed to adopting new law on public assemblies.

Above mentioned laws shall be analysed according to the constituting elements of the right to peaceful assembly, to assess the level of their conformity with adopted international standards presented in second chapter.

Notion and definition of public assemblies

Most of the laws in Bosnia and Herzegovina have rather complex definition of public assembly, which can be divided in three subtypes: a) peaceful assemblies and public protests, b) public performances and c) other types of public assemblies. Equally, introductory remarks referring to the subject usually state that the purpose of enacting the law is to regulate public assemblies, while they fail to mention that the law protects and facilitates peaceful assembly. Similarly, laws in countries from the region such as Serbia, Croatia, Montenegro and Slovenia contain similar provisions.

²³ Article 2 of the Constitution of Bosnia and Herzegovina

Types of public assemblies

Most of the laws in Bosnia and Herzegovina define every public assembly as “organized assembly of citizens which takes place at adequate location in order to exercise freedom of expression and promote political, social and other beliefs or interests.”²⁴ Exceptionally, Law on Public Assembly of Hercegovina-Neretva Canton defines public assemblies as protests, rallies and other similar gatherings of citizens in open or closed spaces, which are organized for the purpose of publicly expressing opinion or political views of citizens, as well as public gatherings organized for the purpose of entertainment, cultural, religious, sport or other interests of citizens.²⁵

All laws in Bosnia and Herzegovina recognize assemblies in their static form. Some of the laws explicitly mention public assemblies on the move,²⁶ while those that do mention it, define it as uninterrupted movement except for the beginning and the end of public assembly on the move.

Spontaneous gatherings are defined in several laws in Bosnia and Herzegovina,²⁷ bearing in mind that only the Law on Public Assembly of Tuzla Canton²⁸ does not require prior notice to responsible authorities for this type of gathering. However, such assemblies according to other laws have to be reported or authorities are allowed to ban the assemblies that they have not been notified of²⁹ while organizers may be sanctioned in

²⁴ Law on Public Assembly of Unsko-sanski Canton, Article 2 (1) and (3), Law on Public Assembly of Posavski Canton Article 2 (1) and 8 (1), Law on Public Assembly of Tuzla Canton Article 8 (1), Law on Public Assembly of Bosansko-podrinjski Canton Article 2; Law on Public Assembly of Zapadno-hercegovački Canton Article 2 (1) and 8 (1), Law on Public Assembly of Canton Sarajevo, Article 2 (1) and 8 (1), Law on Public Assembly of Canton 10 Articles 2 i 8, Law on Public Assembly of Republika Srpska, Articles 2, 8 (1), Law on Public Assembly of Brcko District of Bosnia and Herzegovina Article 6 (1) and 9.

²⁵ See Article 2. of the Law on Public Assembly of Hercegovina-Neretva Canton

²⁶ Law on Public Assembly of Bosansko-podrinjski Canton, Srednjobosanski Canton and Hercegovina-Neretva Canton do not recognize public assemblies on the move.

²⁷ Spontaneous public assemblies are not recognized by: Law on Public Assembly of Unsko-sanski Canton, Law on Public Assembly of Srednjobosanski Canton, Law on Public Assembly of Brcko District of Bosnia and Herzegovina

²⁸ Only Law on Public Assembly of Tuzla Canton prescribes that spontaneous assemblies do not have to be reported in advance, see Article 15.

²⁹ Law on Public Assembly of Unsko-sanski Canton, Article 11 c; Law on Public Assembly of Posavski Canton, Article 16 (1) c; Law on Public Assembly of Bosansko-podrinjski Canton, Article (6); Law on Public Assembly of Srednjobosanski Canton, Article 7, Law on Public Assembly of Zapadnohercegovački Canton, Article 15 (1) c, Law on Public Assembly of Canton Sarajevo, Article 16 (1) c, Law on Public Assembly of Canton 10, Article 17 (1) c, Law on Public Assembly of Republika Srpska, Article 13 (1) b, Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 15 (1) b.

cases of late or faulty notification.³⁰ Some laws favor solution according to which the location of spontaneous assemblies shall be determined by the act of municipal council or mayor.

Location of public assembly

Definition of location of public assembly in the laws of Bosnia and Herzegovina usually involves public space which is adequate and accessible or suitable for gathering of citizens whose number and identity is not determined in advance, where assemblies do not jeopardize rights or freedoms of others, public moral, health or safety of citizens, property or public traffic.³¹ Some of the normative solutions stipulate that public assemblies may jeopardize public moral.³² On the other hand, laws in force in Bosansko-podrinjski Canton and Srednjobosanski Canton do not include definition of accessible and adequate public space. In the laws on public assemblies of Republika Srpska, Brcko District of Bosnia and Herzegovina and Hercegovina-Neretva Cantonit, it is foreseen that the location suitable for public assemblies shall be determined by decision of municipal authorities³³, decision of mayor upon proposal of the chief of police³⁴ or by decision of competent body of local self-government.³⁵

Such laws usually include detailed list of the locations where public rallies may not be held, for example in vicinity of hospitals, educational institutions or kindergartens, elementary or high schools, in national parks or protected reservations, next to the national monuments, border crossings, at state, regional or local highways in manner that

³⁰ Law on Public Assembly of Unsko-sanski Canton, Article 27 (1) c, (2) and (4); Law on Public Assembly of Posavski Canton, Article 37 (1) a), (2), (4); Law on Public Assembly of Bosansko-podrinjski Canton, Article 16 (1); Law on Public Assembly of Srednjobosanski Canton, Articles 20 (1), 21 (1); Law on Public Assembly of Zapadnohercegovački Canton, Article 33 (1) a), (2), (4); Law on Public Assembly of Canton Sarajevo, Article 35 (1), a), (2) and (4); Law on Public Assembly of Canton 10, Article 37 (1) a, (2) and (4); Law on Public Assembly of Republika Srpska, Articles 31 (1) a), (2), and 32, Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 32 (1) a, (2) and (3).

³¹ Law on Public Assembly of Unsko-sanski Canton, Article 4 (1); Law on Public Assembly of Posavski Canton, Article 3 (1); Law on Public Assembly of Tuzla Canton, Article 3 (1); draft Law on Public Assembly of Zenica-Doboj Canton, Article 3 (1); Law on Public Assembly of Zapadno-hercegovački Canton, Article 3 (1); Law on Public Assembly of Canton Sarajevo, Article 3 (1); Law on Public Assembly of Canton 10, Article 3 (1); Law on Public Assembly of Republika Srpska, Article 3 (1), Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 7 (1) a).

³² See Law on Public Assembly of Posavski Canton, Republika Srpska and Brcko District of Bosnia and Herzegovina

³³ Law on Public Assembly of Republika Srpska, Article 3 (3)

³⁴ Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 7 (2)

³⁵ Law on Public Assembly of Hercegovacko-neretvanski Canton, Article 3 (3)

would affect the safety of the traffic or close to the institutions and buildings that are secured at certain perimeter (varying from 10, 20 to 450 meters).³⁶

Such restrictions are not found only in laws on public assemblies of Srednjobosanski and Hercegovacko-neretvanski Canton.

Reporting and permission to hold public assembly

Laws regulating public assemblies in Bosnia and Herzegovina request that organizers notify authorities of their intention to hold an assembly,³⁷ which is the requirement for giving authorization. Notice to hold public assembly has to contain specific elements, including program and purpose of the assembly, location, time and duration of the assembly, estimate on number of participants, information about organizers or their representative, including personal and contact details of the leaders, details about planned security measures and list of wardens with their personal and contact details, detailed route of movement if assembly is on the move, items that may be used by the participants such as posters, flags, masks, pyrotechnics, etc.).³⁸ Some laws require organizers to inform authorities about agency responsible for protection of citizens and property, if such agency was entrusted with securing peace and order.³⁹

Organizers have an obligation to request permission from the competent authority in accordance with the Law on the basis of traffic safety at roads in Bosnia and Herzegovina

³⁶ Law on Public Assembly of Unsko-sanski Canton, Article 10; Law on Public Assembly of Posavski Canton, Article 15; Law on Public Assembly of Tuzlanski Canton, Article 14; Law on Public Assembly of Bosansko-podrinjski Canton, Article 10; Law on Public Assembly of Zapadnohercegovački Canton Article 14; Law on Public Assembly of Canton Sarajevo, Article 15, Law on Public Assembly of Canton 10, Article 15; Law on Public Assembly of Republika Srpska, Article 13; Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 14

³⁷ Law on Public Assembly of Unsko-sanski Canton, Article 7; Law on Public Assembly of Posavski Canton, Article 10; Law on Public Assembly of Tuzlanski Canton, Article 10; Law on Public Assembly of Bosansko-podrinjski Canton, Article 12; Law on Public Assembly of Zapadnohercegovački Canton Article 10; Law on Public Assembly of Canton Sarajevo, Article 10; Law on Public Assembly of Canton 10, Article 10; Law on Public Assembly of Republika Srpska, Article 9; Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 11

³⁸ Law on Public Assembly of Unsko-sanski Canton, Article 8; Law on Public Assembly of Posavski Canton, Article 11; Law on Public Assembly of Tuzlanski Canton, Article 11; Law on Public Assembly of Bosansko-podrinjski Canton, Article 14; Law on Public Assembly of Hercegovacko-neretvanski Canton, Article 4 (4); Law on Public Assembly of Zapadno-hercegovački Canton, Article 11; Law on Public Assembly of Canton Sarajevo, Article 11; Law on Public Assembly of Canton 10, Article 11; Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 11, Law on Public Assembly of Republika Srpska, Article 9

³⁹ Law on Public Assembly of Bosansko-podrinjski Canton, Article 14 (1)

when assembly takes place fully in partially on the surface of public road in a manner that can disrupt or affect traffic.⁴⁰

The least demanding is the Law on public assemblies of Srednjobosanski Canton which stipulates that the notification to hold public assembly has to include time, place and purpose of holding of the public assembly, as well as measures that organizers shall undertake to maintain order during the assembly.⁴¹

Laws on public assemblies of Srednjobosanski and Hercegovacko-neretvanski Canton stipulate that police station shall issue decision allowing public assembly to take place.⁴²

Those laws on public assemblies that contain provisions about amendments and addenda to the notice, stipulate that any change of the given notice shall be treated as new one.⁴³

Deadlines for submitting notification are varying from two⁴⁴, three⁴⁵, five⁴⁶ to seven days before holding public assembly,⁴⁷ with the exception of allowing for 48 hours notice in case of necessity. Only Law on public assemblies of Brcko District of Bosnia and Herzegovina defines necessity as circumstances that “organizer cannot foresee”,⁴⁸ while

⁴⁰ Law on Public Assembly of Unsko-sanski Canton, Article 8 (4); Law on Public Assembly of Posavski Canton, Article 11 (4); Law on Public Assembly of Tuzlanski Canton, Article 11 (3); Law on Public Assembly of Bosansko-podrinjski Canton, Article 14 (4); Law on Public Assembly of Hercegovacko-neretvanski Canton, Article 4 (4) c; Law on Public Assembly of Zapadno-hercegovački Canton, Article 11 (4); Law on Public Assembly of Canton Sarajevo, Article 11 (4); Law on Public Assembly of Canton 10, Article 11 (4); Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 12 (3); Law on Public Assembly of Republika Srpska, Article 10 (3).

⁴¹ Law on Public Assembly of Srednjobosanski Canton, Article 3 (1)

⁴² Zakon o javnom okupljanju Srednjobosanskog kantona, član 18 (1) i Zakon o javnom okupljanju Hercegovacko-neretvanskog kantona, član 5 (1)

⁴³ Law on Public Assembly of Unsko-sanski Canton, Article 8 (6); Law on Public Assembly of Zapadnohercegovački Canton, Article 11 (7); Law on Public Assembly of Canton Sarajevo, Article 11 (7); Law on Public Assembly of Canton 10, Article 11 (7)

⁴⁴ Law on Public Assembly of Srednjobosanski Canton, Article 3 (1), Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 11 (3)

⁴⁵ Law on Public Assembly of Bosanskopodrinjski Canton, Article 12 (3), Law on Public Assembly of Hercegovacko-neretvanski Canton, Article 3

⁴⁶ Law on Public Assembly of Canton Sarajevo, Article 10 (2), Law on Public Assembly of Posavski Canton, Article 10 (2), Law on Public Assembly of Zapadno-hercegovački Canton, Article 10 (2), Law on Public Assembly of Republika Srpska, Article 9 (2), Law on Public Assembly of Unsko-sanski Canton, Article 7 (2)

⁴⁷ Law on Public Assembly of Tuzlanski Canton, Article 10 (4), Law on Public Assembly of Canton 10, Article 10 (2).

⁴⁸ Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 2 c).

other laws do not define them. Posavina Canton did not pass Law on public assembly and at the time of writing this article, such law was considered in its draft form.

Law on public assembly of Tuzla Canton stipulates that police station or police administration may issue decision prohibiting peaceful public assembly that can be appealed to Ministry of internal affairs. Same solution can be found in laws on public assemblies of Zenica-Doboj Canton, Bosansko-podrinjski Canton, Zapadnohercegovački Canton and Sarajevo Canton.

Responsibilities of organizers and competent authorities

In most of the laws regulating public assemblies in Bosnia and Herzegovina, responsibility of the state encompasses duty of competent police agency to prevent disturbance or interruption of peaceful public assembly which is taking place in accordance with the law and to maintain public peace and order in the area in close proximity to the location of the assembly.⁴⁹

Responsibilities of organizers, leaders and wardens are more numerous and include liability for the damage caused by the participants of the public assembly according to the rules of objective liability and obligation to duly notify authorities of the intention to hold and assembly, which is explicitly mentioned in most of the laws.⁵⁰ All laws, except Law on public assembly of Hercegovačko-neretvanski Canton impose duty on organizers to maintain peaceful and orderly conduct of the participants.⁵¹ Duty of organizers to take necessary precautions in health and fire protection can be found in all laws except Law

⁴⁹ Law on Public Assembly of Unsko-sanski Canton, Article 13 (6) and (7); Law on Public Assembly of Posavski Canton, Article 19 (6) and (7); Law on Public Assembly of Tuzlanski Canton, Article 20 (5); Law on Public Assembly of Bosansko-podrinjski Canton, Article 18 (6) and (7); Law on Public Assembly of Hercegovačko-neretvanski Canton, Article 8; Law on Public Assembly of Zapadno-hercegovački Canton, Article 17 (6) and (7), Law on Public Assembly of Canton Sarajevo, Article 19 (6) and (7), Law on Public Assembly of Canton 10, Article 20 (6) and (7), Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 18 (1) and (2), Law on Public Assembly of Republika Srpska, Article 16 (1) and (2).

⁵⁰ Law on Public Assembly of Posavski Canton, Article 6, Law on Public Assembly of Tuzlanski Canton, Article 6, Law on Public Assembly of Zapadno-hercegovački Canton, Article 6, Law on Public Assembly of Canton Sarajevo, Article 6, Law on Public Assembly of Canton 10, Article 6.

⁵¹ Law on Public Assembly of Unsko-sanski Canton, Article 13 (1); Law on Public Assembly of Posavski Canton, Article 19 (1); Law on Public Assembly of Tuzlanski Canton, Article 20 (1); Law on Public Assembly of Bosansko-podrinjski Canton, Article 18 (1); Law on Public Assembly of Srednjobosanski Canton, Article 10; Law on Public Assembly of Zapadno-hercegovački Canton, Article 17 (1); Law on Public Assembly of Canton Sarajevo, Article 19 (1); Law on Public Assembly of Canton 10, Article 20 (1); Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 18 (1); Law on Public Assembly of Republika Srpska, Article 16 (1).

on public assembly of Bosansko-podrinjski Canton.⁵² Some of the laws mention responsibility of organizers to ensure that participants in the assembly are not armed and to not cause any type of damage.⁵³

Law on public assembly of Srednje-bosanski Canton imposes duty on organizers to clean the area of the assembly within 24 hours, i.e. to bring it back to original state and fix any eventual damage made in the process.⁵⁴

Duties of wardens include protection of the participants and property in the area where assembly takes place,⁵⁵ sharing available information on individuals who violate public peace and order with police officials,⁵⁶ mandatory checks, control and search of individuals entering the area of the assembly⁵⁷ physical removal of individuals that violate

⁵² Law on Public Assembly of Posavski Canton, Article 19 (3); Law on Public Assembly of Tuzlanski Canton Article 20 (4); Law on Public Assembly of Bosansko-podrinjski Canton, Article 18 (3); Law on Public Assembly of Srednjobosanski Canton, Article 8 (1); Law on Public Assembly of Zapadno-hercegovački Canton, Article 17 (3); Law on Public Assembly of Canton Sarajevo, Article 19 (3); Law on Public Assembly of Canton 10, Article 20 (3); Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 17 (2); Law on Public Assembly of Republika Srpska, Article 15 (2).

⁵³ Law on Public Assembly of Unsko-sanski Canton, Article 13 (2); Law on Public Assembly of Posavski Canton, Article 19 (2); Law on Public Assembly of Bosansko-podrinjski Canton, Article 18 (2); Law on Public Assembly of Zapadno-hercegovački Canton, Article 17 (2); Law on Public Assembly of Canton Sarajevo, Article 19 (2); Law on Public Assembly of Canton 10, Article 20 (2).

⁵⁴ See Article 19 of this Law.

⁵⁵ Law on Public Assembly of Unsko-sanski Canton, Article 15 (2); Law on Public Assembly of Posavski Canton, Article 21 (2); Law on Public Assembly of Tuzlanski Canton, Article 24 (2); Law on Public Assembly of Bosansko-podrinjski Canton, Article 21 (2); Law on Public Assembly of Zapadno-hercegovački Canton, Article 19 (2); Law on Public Assembly of Canton Sarajevo, Article 21 (2); Law on Public Assembly of Canton 10, Article 23 (2); Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 21 (2); Law on Public Assembly of Republika Srpska, Article 19 (2).

⁵⁶ Law on Public Assembly of Unsko-sanski Canton, Article 15 (3); Law on Public Assembly of Bosansko-podrinjski Canton, Article 21 (4); Law on Public Assembly of Zapadno-hercegovački Canton, Article 19 (4); Law on Public Assembly of Canton Sarajevo, Article 21 (4); Law on Public Assembly of Canton 10, Article 23 (4); Law on Public Assembly of Brčko District of Bosnia and Herzegovina, Article 21 (4); Law on Public Assembly of Republika Srpska, Article 19 (4).

⁵⁷ Law on Public Assembly of Unsko-sanski Canton, Article 15 (5) a; Law on Public Assembly of Tuzlanski Canton, Article 24 (4)a; Law on Public Assembly of Bosansko-podrinjski Canton, Article 21 (5)a; Law on Public Assembly of Zapadno-hercegovački Canton, Article 19 (5)a; Law on Public Assembly of Canton Sarajevo, Article 21 (5)a; Law on Public Assembly of Canton 10, Article 23 (4); Law on Public Assembly of Republika Srpska, Article 19 (5)a.

public peace and order,⁵⁸ as well as duty to immediately report, detain or transfer to the police authorities potentially suspicious or dangerous participants.⁵⁹

Legal certainty

Laws on public assemblies of Brcko District of Bosnia and Herzegovina, Republika Srpska and Srednjobosanski Canton do not contain provisions requiring urgency in deciding upon appeal, meaning that such procedure is not treated exceptionally, while those laws that prescribe urgent procedure upon appeal require that the decision must be brought within 24 hours counting from the receipt of the appeal,⁶⁰ or 12 hours before holding public assembly.⁶¹

In Law on public assembly of Srednjobosanski Canton, deadline for filing an appeal with the competent authority is 8 days from the receipt of prohibition of assembly,⁶² while other laws in Bosnia and Herzegovina stipulate that the appeal shall be filed within 24 hours from the receipt of prohibition of assembly⁶³ (except laws in Hercegovacko-neretvanski Canton, Republika Srpska and Srednjobosanski Canton). Laws on public assembly of Republika Srpska and Brcko District of Bosnia and Herzegovina do not define deadline for filing an appeal.

⁵⁸ Law on Public Assembly of Unsko-sanski Canton, Article 15 (5) d; Law on Public Assembly of Tuzlanski Canton, Article 24 (4)d; Law on Public Assembly of Bosansko-podrinjski Canton, Article 21 (5)b; Law on Public Assembly of Zapadno-hercegovački Canton, Article 19 (4) d; Law on Public Assembly of Canton Sarajevo, Article 21 (5)d; Law on Public Assembly of Canton 10, Article 23 (5)d;

⁵⁹ Law on Public Assembly of Posavski Canton, Article 21 (3); Law on Public Assembly of Tuzlanski Canton Article 24 (3); Law on Public Assembly of Bosansko-podrinjski Canton, Article 21 (3) and Article 21 (5) e; Law on Public Assembly of Zapadno-hercegovački Canton, Article 19 (3) and 19 (5) e; Law on Public Assembly of Canton Sarajevo, Article 21 (3) and 21 (5)e ; Law on Public Assembly of Canton 10, Article 23 (3) and 23 (5) e;

⁶⁰ Law on Public Assembly of Brcko District of Bosnia and Herzegovina, Article 16 (4); Law on Public Assembly of Republika Srpska, Article 14 (4).

⁶¹ Law on Public Assembly of Unsko-sanski Canton, Article 12 (3); Law on Public Assembly of Posavski Canton, Article 17 (4); Law on Public Assembly of Tuzlanski Canton, Article 19 (4); Law on Public Assembly of Bosansko-podrinjski Canton, Article 17 (3); Law on Public Assembly of Zapadno-hercegovački Canton, Article 16 (4); Law on Public Assembly of Canton Sarajevo, Article 17 (4); Law on Public Assembly of Canton 10, Article 18 (4);

⁶² See Article 18 (4) of the Law on public assembly of Srednjobosanski Canton.

⁶³ Law on public assembly of Unsko-sanski Canton, Article 12 (1); Law on public assembly of Posavski Canton, Article 17 (1); Law on public assembly of Tuzlanski Canton, Article 19 (1); Law on public assembly of Bosansko-podrinjski Canton, Article 17 (1); Law on public assembly of Zapadno-hercegovački Canton, Article 16 (1); Law on public assembly of Canton Sarajevo, Article 17 (1); Law on public assembly of Canton 10, Article 18 (1).

All laws except the one in Bosansko-podrinjski Canton stipulate that the appeal on prohibition of the assembly does not stay its execution.⁶⁴ Only laws on public assemblies of Republika Srpska, Tuzlanski Canton, and Brcko District of Bosnia and Herzegovina foresee that the assembly can be held if the authority competent for deciding upon appeal does not reach a second instance decision within deadline.⁶⁵

Laws on public assemblies of Srednje-bosanski Canton and Tuzlanski Canton do not foresee possibility of judicial protection against second instance decision in administrative dispute.⁶⁶

CASES BROUGHT BEFORE HUMAN RIGHTS OMBUDSMAN OF BOSNIA AND HERZEGOVINA

As exemplified above, freedom of assembly in Bosnia and Herzegovina is human right guaranteed by the Constitution of Bosnia and Herzegovina, constitutions of entities and Statute of Brcko District of Bosnia and Herzegovina. In practice, right to freedom of assembly is often challenged and is not absolute, because it can be subject of certain limitations and challenges for the organizers and the responsible authorities alike.

Many of cases brought to the attention of the Ombudsmen Institution of Bosnia and Herzegovina have received significant publicity mainly from the aspect of security. Ministries of internal affairs play crucial role in facilitating freedom of assembly, but as an unwritten rule, all competent authorities treat it as security concern rather than basic human right. Institution of Human Rights Ombudsmen of Bosnia and Herzegovina receives, on average, several complaints related to freedom of assembly each year.

⁶⁴ Law on public assembly of Unsko-sanski Canton, Article 12 (2); Law on public assembly of Posavski Canton, Article 17 (3); Law on public assembly of Tuzlanski Canton, Article 19 (3); Law on public assembly of Bosansko-podrinjski Canton, Article 17 (2); Law on public assembly of Srednjobosanski Canton, Article 18 (5); Law on public assembly of Hercegovacko-neretvanski Canton, Article 5 (4); Law on public assembly of Zapadno-hercegovacki Canton, Article 16 (3); Law on public assembly of Canton Sarajevo, Article 17 (3); Law on public assembly of Canton 10, Article 18 (3); Law on public assembly of Brcko District of Bosnia and Herzegovina, Article 16 (3); Law on public assembly of Republika Srpska, Article 14 (3).

⁶⁵ Law on public assembly of Tuzlanski Canton, Article 19 (5), Law on public assembly of Brcko District of Bosnia and Herzegovina, Article 16 (5), Law on public assembly of Republika Srpska, Article 14 (5).

⁶⁶ Law on public assembly of Unsko-sanski Canton, Article 12 (5); Law on public assembly of Posavski Canton, Article 19 (6); Law on public assembly of Bosansko-podrinjski Canton, Article 17 (5); Law on public assembly of Zapadno-hercegovacki Canton, Article 16 (6); Law on public assembly of Canton Sarajevo, Article 17 (6); Law on public assembly of Canton 10, Article 18 (6); Law on public assembly of Brcko District of Bosnia and Herzegovina, Article 16 (7); Law on public assembly of Republika Srpska, Article 14 (7).

One such recent case demonstrated that public authorities were slow to issue a permit designating specific route of the protest march, which resulted in missing the deadline for reporting public assembly and consequently led to withdrawal of request by the organizers. In another case, Ombudsmen of Bosnia and Herzegovina opened *ex officio* investigation about events in village Kruscica, Vitez municipality, related to use of excessive force by the police officers of Srednjobosanski Canton in the context of the right to freedom of assembly.

In the process of organizing or following public assemblies, most of the problems are related to limiting the area where assembly takes place, engagement of police force against protestors including women and children, imposing additional obligations on organizers such as maintenance of security, detention of armed participants and their transfer to police authorities. Additionally, individuals and organizations are not always best informed about process of notification, public officials sometimes have different or arbitrary interpretations of the norms regulating this right, existing laws are not always in line with international standards, process of issuing permissions is bureaucratized, too much burden is placed on the organizers and citizens whose right to peaceful assembly is violated are not readily aided by authorities.

This can in turn lead to ambiguous interpretation of laws, i.e. misuse of laws on public order and peace and other laws regulating police conduct. Oftentimes, police authorities are more concerned about protection of private property over citizens' rights and tend to subjectively characterize non-violent protests as violent on the basis of harmless gestures such as hand raising. Equally, process of notification and authorization of public assemblies is inconsistent, police officers on the ground are not sufficiently educated and depend heavily on the instructions of their superiors, which can lead to breaches of the rights of citizens.

This is in part caused by the fact that laws on public assemblies are not precise enough, allowing responsible ministries to treat notifications on public assemblies as requests for permission to hold one, which is not in line with international standards. Therefore, cases where public assemblies are prohibited, even spontaneous ones, are mostly explained by the lack or omissions linked to the notification. Generally, communication between police authorities and organizers is poor and usually limited to the notification of public assembly, with the exception of first LGBT PRIDE, when regular meetings were held upon initiative of the organizers. However, it has not yet happened that the debriefings were held after the public assembly and coordinating meetings between organizers and police authorities are rather exception than general rule.

Concerning limitations and prohibition to hold public assemblies, attitude of competent public authorities is usually passive and it is not clear if the lack of authorization to hold public assembly can be interpreted as tacit permission. Most of the civil society organizations claim that rights to hold assemblies are being limited if the police limits area or routes where rallies are held, if the notice to hold assembly is required too much time in advance (ranging from 2 to 7 days), if such requirements are often being changed, which can all lead to prohibition of assemblies with the explanation that the authorities were not duly notified.

Limitations imposed by the municipal authorities are usually related to the location of the assembly whereby organizers are denied the *sight and sound* principle, by limiting the places for assemblies to one or two locations in given town or municipality. For example, peaceful assemblies in Banjaluka can be organized only on main square and in teh parc, while city of Prijedor limited public assemblies to nine locations. Public assemblies in Mostar may only be held in one location – university campus, while the Law on public assembeby of Sarajevo Canton stipulates that Cantonal Council shall confine areas for public assemblies organized by the organizers whose identity is not known.

Question of notification to hold public assembly represents a challenge because of lengthy and burdensome procedure, while disclosing the identity of the organizers can sometimes trigger security concerns. The very idea that protests have to be announced in advance limits the possibility to react in urgent situations. There are no clear criteria for risk estimate, police does not have to respond to the notification nor inform the organizers of the potential risks before or during the assembly, and participants claim that police officers are demeaning, threatening and insulting.

Contrary to the most laws regulating right to peaceful assembly in Bosnia and Herzegovina, laws in Canton 10, Posavski Canton, Bosansko-podrinjski Canton and Tuzlanski Canton do not foresee posibility of appeal aganist prhibition to hold assembly.

Some of the organizations addressing Ombudsmen Institution claim they are not in position to use legal remedies because of lack of financial means and human resources, especially in cases of non-profit organizations established with a goal of promoting human rights.

The content of the notification is well deifned, yet organizations claim that they are ocasionally requested to obtain permission from transportation authorities for any change

in traffic, which has to be approved by the Ministry of internal affairs, thus affecting or limiting assemblies on the move. Deadlines set by law are seen as rigid and disproportional, some laws do not recognize spontaneous assemblies and organizations consider obligation to present the plan, goals or number of participants of assembly superfluous, which is, for example, required by the Law on public assemblies of Republika Srpska.

When it comes to violence during the assemblies, response of police authorities varies, from escalation of violence and interruption of the assembly to the arrest of participants. In order to improve the current trends, civil rights organizations state it is necessary to bring the existing laws and regulations in line with international standards, to educate police officers on specific topics related to right to freedom of assembly, to establish effective and impartial internal control and complaint mechanisms when in case this right is breached. Some of the guiding principles can be found in the documents produced by OSCE/ODIHR or Venice Commission.⁶⁷

From the perspective of ministries of internal affairs, the most quoted reasons for prohibition of assemblies is untimely notification, organizing public assemblies in areas not designated for such purpose, omission of organizers to provide necessary information such as security plan, fire protection plan, health protection plan, approval of local community, details on leader of the assembly and designated wardens, approval for closure of traffic and participation of individuals who are indicted for crimes or other offenses. They equally recognize rigidity of existing laws and admit that organizers should be allowed to submit notification and other requested documents electronically, on standard form, and that subsequent communication of all services involved such as health or fire protection, should be conducted directly with the police. Police authorities, finally, claim that most of the assemblies have been conducted according to the intentions of organizers, that out of 16 811 reported assemblies only 29 have been prohibited, which amounts to 0,0017% and that they never charged organizers for providing extra security.

⁶⁷ OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly, 2010, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e), last accessed on August 14, 2020.

CONCLUSION

From the “Yellow Vests” movement in France to anti-government protests in Hong Kong and from “One in five millions” in Serbia to general strike of teachers in Croatia, it can be observed that freedom of public assembly is becoming one of the pivotal citizens’ rights in global context, not least for the fact that citizens use this right as the most effective mean of expressing discontent with their position, status or specific acts of government. Right to peaceful assembly in Bosnia and Herzegovina is not necessarily being restrictively interpreted by the authorities, but it is important to insist that any limitations must be narrowly defined, because of the presumption of the legality of the assembly. Authorities have a duty protect peaceful assembly while any restrictions placed on freedom of assembly must be proportional and applied only with legitimate aim. Proportionality test requires that limitations are examined in light of specific circumstances of each case, not allowing for general legislative bans.

European Convention on Human Rights, however, affords states with wide margin of appreciation in order to respond to unrests, to prevent crime or to protect rights and freedoms of others. This wide margin of appreciation given to authorities when applying proportionality test in accordance with Article 11 paragraph 2 of the European Convention on Human Rights is contingent upon the phrase “necessary in democratic society”, so the public authorities are bound to make preliminary assessment of urgent societal exigency that the terms “necessary” points to.⁶⁸

In that regard, reasonable procedures requiring notice or authorization of public assembly do not by definition represent breach of Article 11 of the European Convention on Human Rights, bearing in mind that the purpose of such provisions is to enable local authorities to undertake necessary preventive security measures in order to guarantee unimpeded organization of any assembly and to prevent unrest or crime.⁶⁹ In other words, there must be a justifiable balance between interests of those who want to enjoy the right to peaceful assembly and general interests of the community which is determined by applying proportionality test. Legitimacy as the criterion of the law can not be carried out only

⁶⁸ See *Handyside v. United Kingdom* (1976) para 48.

⁶⁹ See judgement of the European Court of Human Rights in case *Berladir et al v. Russia*, 34202/06, 10.07.2012, Paragraphs 40. and 41.

from its legality (the form of the law, adopted in the legal process of the legislator, etc.), and not on the basis of what it is, but from the “what should be”.⁷⁰

At the same time, in special circumstances when the direct reaction of authorities could be justified, as for example in case of political manifestation in form of spontaneous protest, interruption of the existing protest exclusively for the lack of prior notification, while not accompanied by any unlawful behavior of participants, could represent disproportional limitation of right to peaceful assembly.⁷¹ It is, however, necessary to underline that existing legal provisions apply exclusively to “peaceful” assemblies and gatherings, while assemblies with violent intentions or those whose aim is to cause civil unrest or violate rule of law, do not enjoy such level of protection.

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⁷¹ See *Bukta et al v. Hungary*, No. 25691/04, Paragraphs 35. and 36.

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**CRIMINAL PROTECTION OF HUMAN DIGNITY:
RACIST IDEAS, DENIALISM AND HATE SPEECH IN THE
ITALIAN LEGAL ORDER¹**

The protection of human person has acquired ever greater centrality in Italian criminal law as a response to the expansion of discrimination phenomena, perpetrated through the use and dissemination of racist and negationist expressions. From this derives the multiplication of crimes to protect human dignity which becomes a protected juridical asset. The paper will, therefore, be aimed primarily at verifying whether it is possible to give substance to the concept of dignity and fill it with contents in order to respect the principles of materiality and offensiveness of criminal law. To this end, it will be analysed the recent reform of Italian criminal law which introduced the articles 640 bis and ter in the Criminal Code, having particular regard to the methods of construction of the crimes almost entirely based on the scheme of the presumed danger. It will also take into account the recent legislative proposals aimed at expanding the field of application of the human dignity, noting in conclusion how the current criminal protection is based on a vague concept that tends to be protected absolutely by removing it from the necessary balance with other legal assets of equal rank.

Keywords: human dignity, offensiveness, denialism, hate speech, racist ideas

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1. Criminal protection of the person: the difficult balance between human dignity and freedom of expression

“The issue of the protection of the human person is one of the most fascinating places in the legal universe” (Palazzo, 2019: 1, translated by the authors)

In the evolutionary trends of current criminal law, we are witnessing a regained “centrality” of the person, which it translates into a quantitative increase in the cases set up to protect the person – to which corresponds their interpretation in an expansive way by the jurisprudence – and in a qualitative transformation of the protected legal assets. From this last point of view, criminal protection moves further and further away from the prevalently physical, corporeal and also psychological dimension of the person to privilege, instead, two other guidelines of protection: the freedom of self-determination and the dignity of the human being (Palazzo, 2019: 2-3).

The latter rises to a protected legal asset through different types of crimes placed in a sort of ascending progression.

In the first place, we have to consider those rules that indirectly protect dignity, the offense of which is added to that of the traditionally protected asset and determines an increase in criminal responsibility.

Secondly, there are some crimes focused only on offending the dignity of a well-determined person.

Finally, there is a growing number of cases that are not only based exclusively on the offense against dignity, but in which the latter is referred to the human being itself, thus leaving aside the presence of a specific physical person who is the recipient of the offense.

This last category of crimes is certainly the most problematic in terms of the materiality and offensiveness of the criminal behavior, which, most of the time, consists in the expression of denialist opinions or in the diffusion of the so-called hate speech, considered harbingers of racist and discriminatory trends.

Emblematic in this sense is the debate around the possible incrimination of the so-called denialism, referring to expressions that deny, grossly minimize or justify the historical circumstances related to the Holocaust, commonly judged bearers of racism, discrimination and anti-Semitism (Fronza, 2012:1; Visconti, 2008: 217).

The increasingly widespread diffusion of these phenomena has led to a reaffirmation of the debate on the use and limits of the criminal instrument as a means to limit the freedom of expression through the repression of the so-called “hateful” word, considered to be harmful to human dignity (Sabella, 2018: 1-22; Spena, 2007: 689; Picotti, 2006: 117; Padovani, 2006: 23; Pelissero, 2006: 13; Pulitanò, 2006: 745; Ivanoviæ, 2018: 405-418).

The same concept of dignity, however, has problematic profiles both due to the difficulty, as will be said later, to identify its materiality and concreteness, with the consequent repercussions on the level of offensiveness, and because it collides with another fundamental right such as the freedom of thought, thus highlighting the need to balance between constitutionally protected values and to assess whether or not the intervention of criminal law is necessary and to what extent.

Ultimately, it has to be decided whether speech is an instrument capable of damaging legally protected assets, which these legally protected assets are and whether the damage is such as to justify the intervention of criminal protection, which faces racial intolerance, freedom of expression, freedom of historical research and dignity, being the bearer of a shared public morality (Sabella, 2018: 3).

2. The European duties of criminalization for the violation of human dignity

In the analysis of the debate on the incrimination of the forms of manifestation of thought potentially harmful to human dignity, it needs to take into account the evolution of the European law, which has imposed on the Member States various duties of criminalization, expressing a preference in the use of criminal law for the repression of discriminatory and racist expressions (Mancuso, 2009: 645-655).

Emblematic of this trend, is the European legislation relating to the negationist phenomenon which has shown a strong symbolic and repressive trend.

First of all, we call out the Common Action 96/443/GAI of July 15, 1996, in which the European Council urged member states to repress the public denial of the crimes defined by art. 6 of the Statute of the Nuremberg Tribunal, insofar as it consists in a behaviour of contempt or degradation towards a group of people defined on the basis of colour, race, religion or national or ethnic origin.

Subsequently, the European Union intervened again on the repression of the denial phenomenon with the Framework Decision 2008/913/GAI, of 28 November 2008,

relating to the contrast to certain forms and expressions of racism and xenophobia by means of criminal law (Ambrosi, 2012: 205; Cajani, 2011: 19; Fronza, 2012: 69; Leotta, 2015: 26; Lobba, 2011: 109; Mancuso, 2009: 645; Moschetta, 2014: 26; Pech, 2011: 185; Scaffardi, 2009: 259).

As explained in the whereas of this Decision, racism and xenophobia are prosecuted as direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms, damaging to the dignity of the person, circumstance that justifies and legitimizes the choice of criminal law as a means of protection against those conducts. The latter, pursuant to art. 1 of the same Decision, are: publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin; (Article 1.1, letter a); the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material; (Article 1.1, letter b); publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court (art. 1.1, lett. C) and publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, (Article 1.1, letter d), directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

The art. 2 of the same legislative text also requires States to take the measures necessary to ensure that instigating the conduct referred to in Article 1, lett. c) and d) is punishable.

The Decision takes a position, therefore, also in the debate on denial expressions, requiring to the States to incriminate such conducts with reference not only to the Holocaust, but to all international crimes, with a penalty between at least one and three years of imprisonment. This disposition, in fact, built the base to the repression of denial conducts in various European countries including Italy (Mancuso, 2009: 645).

The above mentioned of criminalization made at the European level are then tempered by some significant exceptions, i.e. the possibility left to the Member States to only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting. In addition, through a statement made at the adoption of the Decision or later with which the member states make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes

referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.

The Decision also contains also several provisions concerning the protection of fundamental freedoms guaranteed in each Member State, pointing out how the Decision does not have the effect of requiring the Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular the freedom of the press and the expression's freedom in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability, thus trying to balance the protection of dignity with the free manifestation of thought (Picotti , 2006: 117).

Fears of excessively restricting freedom of expression have prompted the European legislator to surround the legislative text with a series of cautions and reservations, allowing each Member State to maintain the fundamental aspects of its own legislation on the subject, compromising, at least in part, the achievement of full criminal harmonization in these field.

It should also be noted that, referring to the balance between the protection of dignity and the free expression of thought, there is a contraposition between the European orientation, which expresses requests for criminalization aimed to standardize the minimum level of criminal protection against racism and discrimination, and the activity of the Strasbourg Court, which aims, through its decisions, to establish a different minimum standard, aimed to the protection of fundamental rights.

If, on the one hand, therefore, the States are called to extend the area of criminal law, on the other hand, they must respect the essential fulcrum of freedom of expression protected by the European Convention on Human Rights (*ex multis* ECHR, 17 December 2013, *Perinçek c. Swiss* no. 27510/08; ECHR, 3 November 2019, *Pastors c. Germany*; ECHR, 7 December 1976, *Handyside c. England*; ECHR, 8 January 2019, no. 64496/17; ECHR, *Witzsch c. Germany*, no. 41448/98, ECHR, 7 June 2011, no. 48135/08; *Vuletiæ* (2017):139-151).

3. Crimes against equality in Italy: the criminalization of denial and *hate speech*

The importance of the debate around the dignity and protection of the person has not left the Italian legislator indifferent, who, also in order to fulfill the aforementioned European obligations, through article 2, co. 1, lett. i), Legislative Decree 1 March 2018, n. 21 has included in Title XII (Crimes against the person), Chapter III (Crimes against individual freedom) of the Criminal Code section 1 *bis*, on “crimes against equality”.

The newly introduced section consists, in particular, of two provisions, article 604 *bis* entitled “propaganda and incitement to crime for reasons of racial, ethnic and religious discrimination” and article 604 *ter* containing an aggravating circumstance for crimes committed for the purpose of discrimination or ethnic, national, racial or religious hate, or in order to facilitate the activity of organizations, associations, movements or groups that have the same purposes among their aims, which are the reproduction of the legislation provided for by law 25 June, 1993, no. 205 (so-called Mancino Law) and by law 22 May 1975 no. 152 (so-called Reale Law), privileged regulatory referents in the field of discriminatory conduct, which implemented in Italy the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (Basile, 2019, 1-13).

The first one of the new crimes is aimed, first of all, at punishing the propaganda of ideas based on superiority or racial or ethnic hatred, or the instigation to commit acts of discrimination for racial, ethnic, national or religious reasons.

Paragraph 1, lett. b) of the same law punishes the conduct of instigation and provocation to violence for racial, ethnic, national or religious reasons, as well as the commission of acts of violence for the same reasons, while paragraph 2 sanctions the participation or assistance to organizations, associations, movements or groups that aim to incite violent or non-violent discrimination, for racial, ethnic, national or religious reasons and the promotion or management of such entities.

Regarding the article 604 *ter* Criminal Code, the provision, as anticipated, introduces a common aggravating circumstance with a special effect, with an increase of the penalty up to half, applicable for crimes punishable with a penalty other than that of life imprisonment committed for purposes of discrimination or ethnic hatred, national, racial or religious, or in order to facilitate the activity of organizations, associations, movements or groups that have, among the others, the same purposes.

The case law, raised after the introduction of the aggravating circumstance in question in the criminal code, has made it clear that the same is integrated not only in cases where the conduct is intentionally aimed at making perceptible to the outside and arousing in others a similar feeling of hatred and in any case give rise, in the future or immediately to a real danger of discriminatory behavior, but also when it reports, in current usage, to the prejudice of inferiority of a race (Court of Cassation, Sec. V, 7 May 2019, no. 32862). The consolidated case law, also finds that, in the case of recourse to conduct based on disregard racial mode, there are the purposes that characterize the aggravating circumstance regardless of the reason which has triggered the conduct, but with the clarification that this presumption cannot operate mechanically if the mode of realization of the offense does not reveal for itself the matrix on which the criminal law based the aggravating circumstance in question (Court of Cassation, Sec. V, 10 April 2018, no. 27462).

The second paragraph of the disposition in the comment also provides for an exception to the judgment of balancing between heterogeneous circumstances, establishing the prohibition of equivalence and prevalence of mitigating circumstances, other than that provided for by art. 98 of the Italian criminal code, on the aggravating circumstance in question, thus making it even more afflictive.

3.1. The aggravating circumstance of denial

Still having regard to the newly introduced crimes against equality in Italy, paragraph 3 of article 604 *bis* of the Criminal Code, which – in implementing article 3, co. 3 *bis*, Law no. 654/1975 introduced by Law no. 115/2016 – inserts the aggravating circumstance of denial into the criminal code, for cases in which propaganda or instigation and incitement, committed in such a way that there is a concrete danger of diffusion, are based in a whole or in part on denial, serious minimization or condoning of the Shoah or crimes of genocide, crimes against humanity and war crimes, as defined by article 6, 7 and 8 of the statute of the International Criminal Court.

This is a special and objective aggravating circumstance, not limited to the Jewish Holocaust alone, but extended to the denial of international crimes in general, which seems to fully incorporate the indications of the before mentioned European Framework Decision. The Italian legislator, therefore, took a position on the debate that saw the doctrine divided, incriminating the phenomenon of denial and introducing, also in this sense, a change of perspective.

Before the inclusion of this aggravating circumstance *ad hoc* in the body of anti-discrimination criminal law, in fact, almost all of the doctrine was strongly opposed to the criminalization of denial, deemed useless and dangerous, because it is symbolic and aimed at protecting historical memory, considered not capable of becoming a criminally protectable legal asset (Risicato, 2019: 1911; Canestrari, 2006: 139; Dolcini, 2009: 1017; Eusebi, 2007: 163; Fiandaca, 2007: 546; Pulitanò, 2006: 55; Romano, 2007: 493; Donini, 2010: 41).

“Denialism does not exist, it must not exist as a crime: either there is instigation, or historical criticism. *Tertium non datur* [...] Even the “historical memory” as such does not appear worthy of become a criminal legal right: it could be a “good”, in fact, but it is not a criminally protectable good (nor sanctioned *tout court* its endangered), as the only choice of the criminal and legal protection, in general would turn a scientific good of truth in a “taboo”, a truth withdrawn from scientific research, which by definition cannot receive State protection in its contents” (Donini, 2010: 41, translated by the authors).

The dominant doctrine believes that a sort of “historical truth of the state” cannot be imposed, attributing an essentially secular character to criminal law (Risicato, 2019: 1911; Canestrari, 2006: 139; Dolcini, 2009: 1017; Eusebi, 2007: 163; Fiandaca, 2007: 546; Pulitanò, 2006: 55; Donini, 2010: 41; Cavaliere, 2016: 1004; Cassano, 2013: 278).

Moreover, according to this doctrine, the criminalization of mere denial would contrast with the freedom of expression protected by article 21 of the Constitution: “cornerstone of the democratic order was born to cloak in lawfulness above all the speeches that express stinging concepts. And, since a) it would be a repression of the pure word, regardless of the modalities of externalization and b) the counter-interest considered would be historical memory, there is no reason to detach from this teaching even in the abstract” (Donini, 2010: 41; Insolera, 2018: 1-12; Di Martino, 2016: 193, translated by the authors).

However, following the already illustrated approach according to which with the new crimes against equality the legislator intended to protect human dignity, the perspective of the debate could be changed no longer considering historical memory as a protected legal asset, but rather equality as an expression of equal respect for all men and dignity. In this way, the concept of secularity of criminal law could also be understood differently, as means aimed to restore an unjustified situation of imbalance and discrimination (Puglisi, 2016: 1336-1339; Tesauro, 2013: 2).

3.2. The protected legal asset: from public order to human dignity

What has been written so far allows us to feel the change of perspective that characterizes the legislative reform mentioned with reference to protected legal assets.

In fact, the original setting of Law no. 654/1975 allowed to give primary importance to the protection of public order, which is also very questionable and vague (Fiore, 1980: 1092; Riccio, 1986: 729; Moccia, 1990: 3; Insolera, 2000: 207-208; Moccia, 1992: 238-239; Forti, 1999: 1030; Fiore, 1985: 280; Cavaliere, 2016: 1002) allowing to identify the legal asset protected in the good set-up and smooth running of civil life, which correspond to the communities opinion and the sense of peace and security (Visconti, 2009: 191).

However, a reconstruction of this type is not immediately coherent with the legal good affected by discriminatory manifestations, which do not actually re-discuss the political order or social peace, but, according to some authors, are a total denial of man's personality as a value in itself, so they would deserve the criminal sanction.

The current formulation and placement of Articles 604 *bis* and *ter* in the Criminal Code, in fact, lead to believe that the Italian legislator has emancipated himself from the mere protection of public order, which remains in the background, focusing attention on equality understood as the maximum expression of the dignity of the person to be identified as a main protected legal asset (De Francesco; 2013: 13). However, as will be observed below, human dignity escapes from a precise and definitive definition, being founded on a normative and axiological conception, which risks dissolving into a *quid* lacking of concreteness (Caterini, 2015: 645-649).

The concept of human dignity, indeed, is frequently used in the legislative and judicial practice as an "*omnibus* asset capable of providing axiological coverage and constitutional legitimation to almost all crimes in which issues relating to the moral-constitutional status of the person are intuitively involved", as "a vague replace parameter that operates in front of the lack of conceptualization of human rights" candidates for the criminal protection (Tesauro, 2013: 885; Habermas, 2010: 3-25) .

For a while, for the respect to the necessary offensiveness principle which bases the criminal law it is the necessary check whether the general concept of human dignity, far from being "a mere semantics abbreviation for the collection of an open and indeterminate series of more specific fundamental human rights, add something more than the ordinary techniques of person rights protection" (Feldman, 1999: 688).

Dignity, in fact, “to be substantiated by contents, needs to be nourished, implemented, modeled with the chisel of typicality, as it is evident that, like it, there would otherwise be the risk of legitimizing potentially uncontrollable repression” (De Francesco, 2013: 11, translated by the authors).

3.3 The vagueness and the presumed danger by racial or ethnic hatred

Taking in to account the analysis conducted so far, it can be said that the introduction of new crimes to protect equality marks an important step towards the criminal protection of human dignity from the spread of racist, discriminatory and hateful ideas, confirming the potential harm of speech and the need for criminal law intervention in this area.

The Italian legislator seems to follow the approach of the American *Critical Race Theory* (CRT) – a current of research that critically investigates the relationship between race, racism and law – according to which “words hurt and in the long run can make you mute” (Delgado, Stefancic, 2000: 37-49; Möschel, 2014; Thomas, Zanetti, 2005: 213; Crenshaw, 2002: 19, translated by the authors).

The manifestation of negationistic and racist thought, in fact, affects the identity of a minority group and hinders the communicative exchanges of individuals belonging to that group, producing a “gag effect” that “hinders or inhibits the members of the exposed group from the exercise of the right to be admitted as equal and reliable partners to the communicative exchanges that take place in the public scene on the dual field of social relations and political claims” (Tesauro, 2013: 889, translated by the authors).

The word, therefore, can be an instrument of direct offense towards individuals, targeted for the sole fact of their belonging to a racially connoted group or it can represent an instrument of defamation and discrimination of a group as a whole by means of the dissemination of disparaging judgments on that group or again it can be the tool to instigate others to violence (Pino, 2008: 293). The offense to the identity and dignity of the group became an offense also to the person who belong to that group (Flick, 2014: 1-36).

According to this approach, racist speech, in all its manifestations, produces significant damages that manifests itself both in the individual dimension of the victim and in the social dimension, influencing the way in which members of the minority targeted by the racist discourse can participate in the public speech; from this would derive the opportunity to repress all manifestations of racist thought.

However, applying this approach to criminal law means giving up to the selection of the punishable conducts and concretely offensive as a request by certainty and offensiveness principles.

In fact, the regulatory framework in question is characterized by the indeterminacy of the crimes which not only refer to the Statute of the International Criminal Court, but contain vague references such as superiority, racial or ethical hatred, propaganda and instigation conduct, whose meanings are difficult to enclose in an area of semantic certainty (Fronza, 2015: 648; Leotta, 2018: 476).

Besides the definitory difficulties, the mentioned crimes are also characterized by a structure that, in terms of offensiveness, allows to place them in presumed danger crimes. The injury to the protected legal asset, identifiable in human dignity, is, indeed, absent from the core of the crimes, given that the conduct of those who spread ideas based on superiority or racial or ethnic hatred actually consists in a simple manifestation of thought punished regardless of the occurrence of a result, even if only of danger, objectively appreciable.

Ultimately, the possible and concrete damage that a racist speech can cause, what are its effects that justify the intervention of criminal law and what types of racist speeches are able to produce those undesirable effects are not clear (Pino, 2008: 293).

The formulation of art. 604 *bis* Italian Criminal Code, indeed, with particular reference to the conduct of propaganda, if, on the one hand, it seems to be based on a limitation of the constitutional freedom of expression of thought (Manetti, 2006: 289), on the other side is also applicable to conducts that may not harm or endanger the interest that the criminal law would like to protect, leaving space for the presumed danger (Pavich, Bonomi, 2014: 26).

The same legal asset that claims to protect, namely the human dignity seems devoided of concreteness, representing a vague combination of collective reputation, public humiliation, individual feelings of equality and rejection of discrimination (Caterini, 2015: 645-649). “The vagueness of the concept means that it could be referred to applicative situations that are also very different and distant from each other. Human dignity is a good that is inevitably destined to lose for large parts its critical-limiting function” (Fiandaca, 2007: 559, translated by the authors).

The crimes in question would, therefore, typify conducts deemed suitable to offend the protected asset, always assuming that the danger of harm to this idealized concept of dignity-equality is immanent in the conduct.

An asset, thus reconstructed, of an exquisitely “intellectual” matrix, devoids of tangible, elusive and empirically not ascertainable reality, such as to make the supposed offense markedly evanescent. Always so “normatively” reconstructed, the offense is therefore presumed, and should not be subject to judicial assessment, also because the proof would be practically impossible, given the “intellectuality” of the offense and its dimension that transcends the individual to project itself also on a socio- systemic level (Caterini, 2015: 645-649; Tesauro, 2013: 63).

We are being faced with crimes where the offence is *in re ipsa*, for reasons somehow linked to an ideological-cultural identity. So, even if we want to access to the thesis according to which this presumption would be legitimized by the logic of the cumulative offense, in the sense that the harmful charge would not reside in the single conduct of propaganda of racial ideas, but in the serial stratification of many hostile messages (Pino, 2008: 287; Rossetti, 2009: 353 ss.). Therefore, the offense appears as the result of connected effects deriving from different behaviours, in relation to which it is difficult to ascertain the etiological link and so to respect the principle of personality and of offensiveness (Moccia, 1995: 343 ss.; Caterini, 2004; Caterini 2017: 95 ss.; Condemi, 2003: 977 ss.; Vassalli, 1982:650 ss.; Palazzo, 2005: 72 ss.; Dolcini, 1998: 211 ss.; Fiandaca, Musco, 2019, 119 ss.; Fiandaca, 2003; Zuccalà, 2004:855 ss.; Mantovani, 1998: 244 ss.; Manes, 2005; Bricola, 1973: 14 ss; Neppi Modona, 2004: 89 ss.; Gallo, 1969:8 ss.; Zuccalà, 1984: 1700 ss.; Fiore, 1994: 278 ss.; Cavaliere: 1998: 133 ss.).

If such a conclusion, on the one hand, would presuppose a verification of the empirical validity of such presumption of danger, on the other hand and upstream, the impression is that of the indictment of mere disobedience, where the individual is exploited for general prevention needs. In some ways the paradigm seems to be marked by an “author type”, presumptively considered dangerous not so much for what it has done, but above all for what it is, for a certain identity that characterizes it (Caterini, 2015: 645-649).

In the hypothesis of the propaganda of ideas based on racial or ethnic hatred, therefore, also aspects linked to the presumption of the dangerousness of an ideology, rather than to facts that are empirically offensive in themselves, converge.

The anticipation of the punishment threshold to the presumed danger derived from mere antagonistic verbal expressions, projects the criminal repression on a level that is not real but essentially symbolic and ideological.

In the absence of an ascertainable danger, the punishment can be exhausted in a cultural hostility, in the criminally guarded imposition of the anti-racist 'morality', in contrast with the liberal principles that inspire contemporary Western democracies (Taguieff, 1994: 463).

The diagnosis of the [presumed] dangerousness of hate speech, therefore, is based on arguments which, far from being ideologically neutral, are informed – according to eminently axiological-evaluative parameters – to an opposite ideology which, although acceptable, should not be imposed with the criminal sanction (Caterini, 2015: 645-649).

However, note that gives criminal relevance to negationism implies a judgment of non-worthiness of the counter-interest, which impose to the judge “to operate an interpretation of the legislation under consideration that values the real danger and offensiveness of conducts [...] in order to reach a satisfactory balance between the constitutional principles of freedom of expression and equal dignity and non-discrimination” (Pezzella, 2020: 1051, translated by the authors).

4. Recent Italian bills: gender discrimination

The already wide and vague dimension of the concept of dignity tends, however, to be further expanded in the recent legislative proposals formulated in Italy aimed to modify and in some ways extend the protection recognized by articles 604 *bis* and 604 *ter* of the Criminal Code on the push of the increasing importance assumed by the human person in the face of a wide diffusion of hateful and racist manifestations of thought.

Of particular interest is the bill currently under discussion in the Parliamentary Assembly (summary of five different proposals and, in particular, the C107 Boldrini, C569 Zan, C868 Scalfarotto, C2171 Perantoni and C2255 Bartolozzi), aimed, among other things, at extending the scope of crimes against equality, including violence and discrimination on the grounds of sexual orientation and gender identity.

The text of the proposal consists of ten articles by which, first of all, the crimes against equality under Articles 604 *bis* and 604 *ter* of the Criminal Code are modified, to add to

discrimination on racial, ethnic, national or religious the discriminatory acts based on sex, gender, sexual orientation or gender identity.

The novel, therefore, pursues the aim of incriminating a further *species* of the *genus* of *hate crimes*, that is those based on the sexual orientation or gender identity of the victim.

In extending the punishment, however, the reform also takes into account the balance with the free expression of thought, specifying, in art. 3, that “the free expression of beliefs or opinions as well as legitimate behaviour attributable to the pluralism of ideas and the freedom of choices are allowed”, substantially recalling what is expressed by the constitutional principle referred to in Article 21, first paragraph, of the Constitution.

On the subject, the Chamber's *dossier* reiterates that “in order to reason on the effective scope of a fundamental freedom, it is necessary to have regard to the modalities in which this freedom behaves in relation to the others: this is at the basis of the balancing of rights, through of which the Legislator, in compliance with the guiding principles of the Constitutional Charter, resolves the apparent conflicts between freedoms” (translated by the authors).

Therefore, as the Constitutional Court has repeatedly observed, the freedom of expression of thought may well meet a legitimate limit in protecting human dignity, in the safeguarding of the human person protected by the crimes in question (Constitutional Court, no. 86/1974; no. 368/1992; no. 92/1992; no. 112/1993; no. 153/1987).

The main concerns related to this bill derives, primarily, from a possible vagueness of the concepts and terms to introduce in the two articles of the Criminal Code and founding the punishment, aggravating the lack of certainty of the crimes object of modification.

The bill, in fact, when introducing the concepts of sex, gender, sexual orientation and gender identity does not specify the exact meaning of these.

On this point, the Dossier of the Deputies Chamber on the proposal tries to reconstruct the mentioned concepts, verifying how they are present both in the constitutional text and in the most disparate legislative provisions.

In particular, the expression “sex” identifies the complex of anatomical, morphological, physiological characters that determine and distinguish, between individuals of the same animal or plant species, males from females. This is a concept present both in articles 3

and 51 of the Italian Constitution and in the rules governing the rectification of the attribution of sex (law no.164 of 1982) or civil unions between persons of the same sex (law no.76 of 2016).

Even the expression “sexual orientation” is already used in Italian legislation – which, however, does not provide a definition of it – in various legislative texts such as the Privacy Code (Legislative Decree No. 196 of 2003, as amended by recent Legislative Decree no. 101 of 2018), Legislative Decree no. 165 of 2001 and Law no. 354 of 1975 on the penitentiary system, as recently amended by Legislative Decree no. 123 of 2018.

Similarly, the concept of “gender identity” is referred to both by the aforementioned law on the penitentiary system and by Directive 2011/95/EU implemented in Italy with Legislative Decree no. 18 of 2014, on the attribution of refugee status.

Likewise, the notion of “discrimination”, in addition to presenting a minimum semantic core that is easily recognizable in the context of the common language, can be found in multiple national and supranational provisions of law (*ex multis*: article 2 paragraph 1, Legislative Decree no. 216/2003, article 43 of Legislative Decree no. 286/1998, articles 10, 14 and 17 of the ECHR as interpreted by the ECtHR case law).

The Chamber's Dossier on this point also recalls the constitutional case law on the matter, which on several occasions refers to the concepts mentioned above, in order to proclaim the right to gender identity and not to be discriminated on the basis of sex.

From the *excursus* reconstructed above it would follow that, since the concepts referred to in the bill are already part of the legal system, it can be said to be sufficiently clear and determined. Nonetheless, the circumstance that a given concept is defined by the legal system or reconstructed at the jurisprudential level, does not seem in itself sufficient to guarantee the specificity of crimes, given that, on the one hand, the existing definitions appear in any case broad and nuanced and, on the other hand, the citizen and the interpreter would be required to carry out a reconstruction based on a regulatory and jurisprudential tangle that is difficult to disentangle and not a source of legal certainty.

In conclusion, the bill aims to further expand the protection of human dignity by introducing aspects related to life and sexual development, widening the area of punishment, but also the indeterminacy of the existing crimes.

5. Concluding remarks

What has been observed so far allows to affirm that, both at European and national level, the criminal instrument is used to protect human dignity, which rises to a legal asset worthy of protection, overshadowing the more traditional and controversial concept of public order.

Dignity is understood in a broad sense as also inclusive of equality, of the right to own sexual identity, but precisely this breadth makes the concept highly indeterminate.

It follows that, despite the defining attempts, the criminal protection of dignity is “genetically” vague.

This process of dematerialization of the criminal protection of the person does not fail to raise problems in the criminal system.

Indeed, moving away from anchoring to the specific person, the offensive content of the crimes tends to lose its certainty and materiality and to acquire a prevalently “ideological” consistency, with evident repercussions on the structure of the crimes and their procedural assessment.

The nature of protected legal asset requires that, as far as possible, descriptive and precise elements be used to preserve the critical-selective function of the punishable conducts. In contrast, the human dignity, as an imprecise and intangible abstract conceptual entity, “easily take the traits of an insatiable right: good “omnivorous” that, usually to be presented as an “absolute no balanced”, is due to its “hegemonic” vocation led to devour entirely and without exception the space contested with any other competing rights or principles” (Tesauro, 2013: 26, translated by the authors).

On the other hand, human dignity, like the other fundamental rights of the person, is characterized by a close link of conceptual interdependence with the other constitutional rights or principles that contribute to defining its profile. It is, therefore, a legal asset that, like the others, may need a balance.

“If it is clear, on the one side, that the expansion and intensification of the protection of the person follows a progressive affirmation of the personalistic principle, it cannot be denied, on the other side, that often this is done at the detriment of certain fundamental principles of liberal criminal law, which are also, perhaps understood more abstractly.

Ultimately, it seems that today are opposed two forms of personalism: that one made by guarantees of legality, definiteness, materiality, offensiveness of the crime, which has a clear political foundation and it is focused on an idea of person primarily designed in relationship with punitive power; and the other one, constituted by the emerging aspects of the person conceived essentially in his postmodern existential dimension of a free and equal human being, holder of his own primordial dignity. There is, therefore, in the criminal justice system a double and contradictory “personalism” by the difficult coexistence and where that of liberal matrix tends to give ground to that postmodern” (Palazzo, 2018: 1-12, translated by the authors).

Ultimately, dignity cannot always receive absolute protection, but it also presupposes a balance with other equally relevant principles, like freedom of expression (Popesku, 2018:155-170); so “say that human dignity is inviolable is only a rhetorical formula, if we do not clarify the circumstances in which we want to oppose the protection of the dignity to some other competitor interest: and when we dropped the abstract idea of dignity in the concrete circumstances, we will realize that situations, that could be evaluated as damaging to dignity, change” (Tesauro, 2013: 24, translated by the authors).

A greater determination of the crimes in this area can therefore be achieved only through a more careful selection of the punishable conduct, limiting the criminal intervention to those that are concretely offensive to a graspable and truly offensive legal asset, outlined not in its abstract dimension, but filled with concreteness, following the comparison and balancing with the other constitutional reasons at stake. “Only if the principle of human dignity is reserved to this restricted area it can keep its argumentative force intact, and allow to escape the ‘tyranny of dignity’” (Hassemer, 2015: 60).

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THE RIGHT ON HUMAN DIGNITY TROUGHT THE PRISM OF TRIAL WITHIN A REASONABLE TIME

The right to human dignity is the starting point for the protection and implementation of human rights. Human dignity is a special characteristic of human beings that includes several different segments in which freedom occupies a central place. There is an unbreakable link between human dignity and human rights, where human rights cannot be imagined without respect for human dignity, nor can human dignity be imagined without the human rights that guarantee its existence. Throughout history, human dignity has faced various challenges, ranging from slavery to various forms of discrimination. Today, human dignity goes through other types of challenges, because thanks to the existence of human rights, human dignity has been raised to a higher level, but with the modernization of society and social relations there has been a change in the way human dignity is endangered. The protection of fundamental human values and human rights loses all meaning if it is not timely. The right to a trial within a reasonable time is a precondition for respect for human dignity and human rights, because delayed justice can be fully equated with injustice.

Keywords: human dignity, human rights, trial within a reasonable time, justice

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INTRODUCTION

Human dignity is a set of human, special and invaluable values that are directly related to his mental, moral and ethical qualities that set him apart from other living beings. Human dignity is equal for every person, because people should be equal in their human rights. Human rights as basic human rights and freedoms are the phenomenon of a long process of development and materialization of great thoughts and ideas that have been legitimized through illegal and legal rules. The core of human rights is human dignity. Human dignity is inviolable, specially protected, and the task of every state is to respect and protect this basic right. The cornerstone of human community, peace, dignified work and living are democratic and inalienable human rights that are realized directly in accordance with human, moral and ethical principles that form the backbone of human dignity and dignified human life. It is considered that the best, but not the ideal rule of law is a certain type of Aristotle's policy, which ensures respect for human freedoms and rights with a special emphasis on human dignity. The importance of human dignity is also evidenced by the fact that the 1945 Charter of the United Nations states: "We, the peoples of the United Nations, are determined ... to reaffirm our faith in fundamental human rights, in human dignity and worth ...", while The Universal Declaration of Human Rights of 1948 envisages a world in which the dignity of every human being will be respected (Article 1 states: "All human beings are born free and equal in dignity and rights ..."). Other important international documents have a similar content (for example, the UNESCO Statute of 1945). We should also mention the Constitutional Agreement of the European Union from Maastricht from 1991 and 1993, in which of all basic human rights, human dignity, its respect and protection are placed in the first place. The mentioned documents are accepted and additionally elaborated by the most important constitutional regulations of modern states (Germany, Portugal, Greece, Switzerland, etc.), as well as the legal regulations based on them.

1. HUMAN DIGNITY THROUGH THE PRISM OF A TRIAL WITHIN A REASONABLE TIME

Human dignity is not only guaranteed by individual human rights, it is represented in all human rights, and the violation of human dignity violates the whole set of human rights. This tells us in another way how widely human dignity is and how much of its real impact is in the overall system of human rights protection. In addition to human value, human dignity also has exceptional legal value. Despite all the ways of protecting human dignity, through religious, moral, customary, ethical and legal norms, human dignity is often violated and violated. The ways and mechanisms of violation of human dignity are

different, and one of such ways is not to try within a reasonable time, that is, untimely action of the court, or action of the court when certain procedure loses its purpose and meaning, that is, when the verdict itself time distance has no original significance and does not produce legal effect. Failure by the court to act within the time limit unquestionably endangers human dignity, and it happens that certain people do not wait for their dignity to be protected or confirmed due to death. From the aspect of a trial within a reasonable time and human dignity, we must always look at the two sides, the plaintiff and the defendant, that is, the injured party and the defendant. In addition to the aforementioned parties, the court itself has a legal interest in protecting human dignity, so a trial within a reasonable time is in the interest of both the parties and the court. Certainly, the court should perhaps be the last resort in the protection of human dignity, because there are certain institutions and bodies that need to protect human dignity long before the court. However, even that final instance can very easily fail if we do not have a fair trial and a trial within a reasonable time. A trial within a reasonable time has a remarkable role to play in protecting human dignity. The right to a trial within a reasonable time is one of the basic human rights and belongs to all people without distinction. This right is of moral origin, ethical and political character and originates from the normative order because it is above the state which is obliged to provide effective protection mechanisms. "The basic premise from which the right to a trial within a reasonable time was established is the idea according to which slow justice is a circumvention of justice and the right to a fair trial, but also a significant violation of human dignity. Therefore, the right to a trial within a reasonable time is established both in the interest of the person whose rights and obligations are being decided or against when a certain procedure is being conducted (subjective component), and in the interest of legal security and rule of law in general (objective component). Thus, the slowness in the administration of justice can jeopardize trust in the entire legal system and the rule of law, which is one of the three pillars (democracy and human rights are the two remaining pillars) on which the system established by the European Convention for the Protection of Human Rights and Fundamental Freedoms rests. is contained as a principle in the Preamble and Article 3 of the Statute of the Council of Europe" (Carić, 2008:3).

The term "trial within a reasonable time", as well as the notion of human dignity cannot be precisely defined because it is not specifically defined by any legal act, however, its meaning can best be understood through case law. Article 6 Paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to a trial within a reasonable time: deadline before an independent and impartial tribunal, formed by law. The verdict is pronounced publicly, but the press and the public

may be excluded from all or part of the trial in the interests of morality, public order or national security in a democratic society, when the interests of minors or the protection of the party's private life so require. The problem of ending court proceedings within a "reasonable time" is a global problem faced by countries around the world, including the Republic of Serbia. Directly in this regard, we can also say that human dignity is a global problem because we do not have timely and adequate justice.

2. THE CONCEPT AND ELEMENTS OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

The right to a trial within a reasonable time is a legal standard, all provisions governing this area of international or national type lose their meaning if there are shortcomings and shortcomings in the procedure, because the rights must be effective and not just a dead letter on paper. Therefore, if the court procedure is not completed within a reasonable time, the causes of that problem are less important than the harmful consequences that occurred due to this shortcoming, because the fact is that the party in that case failed to protect its rights and interests. In addition to making a decision within an appropriate period of time, the court must ensure that a decision made within a reasonable time is fair and equitable because these principles of court proceedings must not be disregarded in an attempt to complete the proceedings as soon as possible. The right to a trial within a reasonable time is the right of a party to "an efficient and expeditious procedure, excluding unnecessary delay, while respecting the time limits set by national procedural law" (Palačković, 2009:682). The length of court proceedings has a great impact on the parties to the proceedings, violation of the right to a trial within a reasonable time and unjustified delay of the proceedings can deprive the parties of basic human rights, and loss of justice leads to destruction of the rule of law. Ensuring the efficient conduct of court proceedings not only protects the individual and his dignity, whose rights and obligations are decided in the proceedings, but also protects the entire legal order.

The right to a trial within a reasonable time is regulated by international, regional and national documents. The most important international act protecting this right is the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Službeni list SCG – Međunarodni ugovori" no. 9/03, 5/05 i 7/05-ispravka i "Službeni glasnik RS – Međunarodni ugovori", no.12/10) at the same time the most important mechanism for protecting this right is the European Court of Human Rights. and on the effectiveness of legal remedies that exist at the national level.

The statement made in the resolution of the Committee of Ministers of the Council of Europe speaks of the importance of a reasonable deadline: “excessive delay in the administration of justice is a significant danger, especially in terms of respect for the rule of law.”

When the proceedings are unjustifiably delayed, there is always a risk that justice will be denied, but also human dignity endangered, because over time certain interests may be exposed to negative effects, important evidence related to the proceedings may disappear, witnesses spoil and lose credibility, and all these facts they undoubtedly create new costs and lead to legal uncertainty. Reasonable time is a sensitive issue because it is difficult to strike a balance between efficiency and justice, on the other hand time is needed to clarify all legal and factual issues, to find a solution to the relationship between the parties and to reach a reasoned conclusion by the court.

The analysis of the legal systems of different countries has created concrete measures that can influence the shortening of court proceedings. The central role in the implementation of measures to shorten the procedure is played by the president of the court, who is obliged to make a work plan of the court on the basis of which delays in decision-making will be prevented and at the same time supervise during each individual procedure. The plan must primarily refer to the determination of precise time frames for the duration of the procedure, by analyzing each case where the deadlines will be determined on the basis of the complexity of the case. It is also necessary to categorize cases into simple and complex, where a time limit for taking litigation will be determined for each category. One of the duties of the president of the court is the efficient organization of court staff, where cases will be distributed to judges in the best way, where the responsibility for the procedure will be transferred to the acting judges. The last duty of the president of the court is to conduct education and training for judges and court staff for specific areas, which would help them decide on procedures and make court decisions faster with the help of acquired knowledge and skills (Fabri, Langbroek, 2003: 20).

Observance of the established time frames for undertaking civil proceedings by both the court and the parties to the proceedings is one of the most important elements that will contribute to the observance of the former at trial within a reasonable time. Effective implementation of this measure requires oversight, which may include the occasional visit of higher court judges to lower instance judges in order to review pending cases and the envisaged timeframe such as the practice in Germany or the application of the lower court reporting model to higher instances such as practice. in Hungary. In Lithuania, meetings are held once a month, attended by judges of one court, where this problem is discussed,

and in Norway, the president of the court has the authority to remove a judge from a case that takes too long and assign it to another judge (<https://wcd.coe.int/ViewDoc.jsp?id=1091057&Site=COE>, accessed on 03.09.2020).

Based on the above data, the problem of violation of the right to a trial within a reasonable time is one of the biggest problems of the judicial systems of many countries, the danger lies in the fact that if the situation does not improve in the future the role of the Court in human rights may be difficult. An analysis of the development of this problem over a long period of time indicates that it is not being solved or that attempts to solve it have been unsuccessful. In legal theory, there is an opinion that the violation of the right to a trial within a reasonable time is more pronounced in the countries of continental law than in the common law system, so the practice shows that in countries such as Greece, Italy, Hungary this problem has become systemic. This problem exists in the United Kingdom, the Netherlands and the Scandinavian countries, but it is not of a systemic nature (Carić, 2008: 32).

Every individual is guaranteed the right to a trial within a reasonable time, if there is a violation of this right by the state, there is a possibility to apply to the European Court, which can be submitted after exhaustion of domestic remedies to protect the right to a trial within a reasonable time. In addition to the parties, which in most cases are injured parties due to the excessive duration of the procedure, there are situations where the court itself suffers the damage because the parties are responsible for delaying the procedure. The analysis of court judgments before the ECtHR can identify certain causes of delays related to the parties to the proceedings but also the court itself, “delays attributable to local and other authorities, court inertia in conducting proceedings, involvement of expert witnesses, frequent delays in hearings, excessive intervals between hearings, as well as excessive delays before the hearing itself. When it comes to the period that comes after the closing of the hearing, there is a particularly problematic excessive time lag between making a court decision and informing the court registers and the parties” (<https://wcd.coe.int/ViewDoc.jsp?id=1073329&Site=DG1-CEPEJ>, accessed on 21.08.2020)

The criteria taken for the moment of completion of the procedure and the adoption of the judgment are different in all states that have signed the European Convention, some of them are:

- date of decision;
- date of delivery of the decision;

- the date on which the appeal was rejected;
- date of waiver of appeal;
- date of amicable settlement of the dispute.

In addition to all of the above, it is important to state that the most important element that is common to all criteria in all states in determining the moment of completion of the procedure is “ending the uncertainty of the person's initial position”(Dijk, van P., Hoof, 1998: 445).

3. SYSTEM OF PROTECTION OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME AT THE INTERNATIONAL LEVEL

3.1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in Resolution 217A (III) of 10 December 1948. This act is one of the most important international human rights instruments and is the basis of many other documents dealing with this matter in the 20th century. , in particular the International Covenant on Economic, Social and Cultural Rights. The date of adoption of this Declaration is December 10, which has also been declared International Human Rights Day. The Universal Declaration does not provide for a precise right to a trial within a reasonable time, however, Article 10 regulates the right to a fair trial, one of the segments of which is the right to a trial within a reasonable time. The Universal Declaration was adopted with goals based on the tradition of civil law, it is also a significant tool in applying diplomatic and moral pressure on the governments of countries that violate the provisions of the Declaration, among other things, UN member states must provide persons under their jurisdiction within a reasonable time as part of the right to a fair trial.

3.2. International Covenant on Civil and Political Rights

The International Covenant was adopted and opened for ratification by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966, and entered into force on 23 March 1976, when 35 States ratified or proceeded to implement this Act. The provisions of this Covenant establish individual and collective human rights of a legislative nature, in addition to which measures have been determined to monitor their observance and a Human Rights Committee has been established to oversee the implementation of the commitments made by the parties. Article 14 of the International Covenant on Civil and Political Rights provides: “All are equal before the courts and

tribunals of justice. Every person has the right to have his case tried fairly and publicly before a competent, independent and impartial tribunal, established by law, which decides on the merits of any charge against him in criminal matters or on the challenge of his civil rights and obligations. The exclusion of the public during the whole hearing or one part in the interest of morality, public order or national security in a democratic society may be ordered, or if the interest of the parties' personal life so requires, or if the court deems it absolutely necessary due to special circumstances. the public has harmed the interests of justice, yet any judgment rendered in criminal or civil matters shall be public, unless the interest of the juvenile requires otherwise, or the dispute concerns marital disputes or child custody.” This article clearly prescribes the obligation of a fair trial in civil proceedings, that fairness consists of equal treatment of every person, as well as the independence and impartiality of the court. In addition, the principle of publicity of the procedure is regulated, which is extremely important in exercising the right to fairness of the procedure. In addition to prescribing provisions, this Covenant also provides for the establishment of a Human Rights Committee, which will ensure respect for and promotion of human rights at the national level. Member States are required to report on the measures they have taken to promote the rights enshrined in the Covenant as well as the progress made in exercising those rights. Each State Party shall have the right to make a statement claiming that another State Party is not complying with its obligations under this Act, and that individuals have the right to submit petitions to the Committee to be considered and meet the conditions falling within the competence of those States. victims of violations by a State party of any right specified in the Covenant

3.3. American Convention on Human Rights and Duties

The American Convention on Human Rights and Duties was adopted on November 22, 1969, at the Conference of the Organization of American States in San Jose, organized by the states of North and South America. The Convention entered into force on July 18, 1978, it basically elaborates and guarantees civil and political rights, but also economic, social, cultural and other rights that are otherwise guaranteed by the Universal Declaration as well as the Covenants adopted within the United Nations. Article 8 of the US Convention on Human Rights and Duties provides for the right to a fair trial: “Everyone has the right to a fair trial, with reasonable assurance and within a reasonable time, by a competent, independent and impartial tribunal established in accordance with law. proceedings on a reasoned charge against him or for deciding on his rights or obligations of a civil, labor, fiscal or any other nature ...” It can be clearly concluded from this article that this act is crucial for guaranteeing the right to a fair trial. in the territory of the United States of America and that it is the basis for the protection mechanism of the right to a

trial within a reasonable time as part of the right to a fair trial in civil proceedings. The forerunner of this act was the establishment of the Inter-American Commission on Human Rights in 1959 with the aim of protecting and developing human rights.

3.4. African Charter on Human and Peoples' Rights

The system of human rights protection in Africa began to develop a little later than was the case in Europe and America. The Organization of African Unity, which was founded on May 25, 1963 in Ethiopia, was the first organized interstate organization in this area, it developed over time, so in 2002 it grew into the African Union. The African Charter on Human Rights and the Rights of the People was adopted in June 1986 by the Assembly of Member States of the Organization of African Unity, and entered into force on October 21, 1986. The Charter guarantees the right to a fair trial in Article 7, which stipulates: "Everyone has the right to legal protection. These include: The right to legal protection, exercised by the competent courts in the state, from all actions that endanger the basic human rights under an agreement, law, regulation or customary law ..." Mechanisms for protecting the right to a fair trial and thus the right to trials within a reasonable time are also defined by the Charter, and it provides for the establishment of the African Commission on Human and Peoples' Rights, which would take care of the protection and promotion of proclaimed rights. In addition, the African Court of Human Rights was established, which in 2004 established a regional court of the African Union of States, which has jurisdiction to try violations of human and people's rights in accordance with the Charter.

3.5. European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in Rome in 1950 and entered into force on September 3, 1953. It is one of the instruments that create and mark the European legal space (Varady, 2004: 34). Later in 1959, the European Court of Human Rights was established to protect the rights from the Convention, so the unification of European law is done through court decisions. The Convention contains a list of rights and guarantees applied by each member state of the Council of Europe by ratification into domestic law. The mechanisms of protection of the Convention in domestic legislation are national authorities, primarily national courts. If the rights of the Convention are not effectively protected in this way, the European Court of Human Rights shall ensure that the Contracting States respect their obligations under the Convention. The petitions initiate proceedings before the European

Court of Human Rights, the acceptance of which is provided for in Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In order for the petition to be accepted, it needs to be signed, which means that anonymous petitions will be rejected. Another important condition concerning the application is identity, which means that if the Court has considered a previously determined application, there is no possibility that it will be considered a second time. Identity also applies to the case of submitting the same application to another international instance. It can be concluded from the above that the petition must never be identical with another petition, because in that case the Court will not consider it (Popović, 2008:61).

The adoption of such a Convention was conditioned by the need to classify basic human rights where the basic guarantees for the individual in modern democratic societies will be listed in one place, at the same time a protection mechanism was needed in case of violation of these fundamental rights by states which makes this document one of the most important multilateral treaties of international law whose beneficiaries are individuals. The preamble of this act states that the foundations of peace and justice in the world are best protected by political democracy on the one hand, and on the other by mutual acceptance and respect for the human rights on which they depend (Gomien, 2005:11-12). In addition to all the above obligations that this document states for the countries that have ratified it, it also provides for the possibility that member states may, subject to certain conditions, make reservations to certain provisions. The main goal of the Convention is the preservation and further development of human rights and fundamental freedoms at the international level.

As one of the fundamental rights of every person before a court, when deciding on his civil rights or obligations, prescribing the right to a fair trial, the European Convention on Human Rights and Obligations proclaims the right to a trial within a reasonable time, Article 6, paragraph 1, prescribes the essential rules for ensuring fairness in the court decision-making process, where, among other things, it prescribes that the decision be made within a reasonable time. This article of the Convention clearly shows the commitment of the Convention to protect the individual from excessively long proceedings and the lack of promptness of state bodies in all types and stages of proceedings. In addition to prescribing and guaranteeing this right, the Convention also provides for the obligation for the High Contracting Parties to create legal mechanisms for the protection of prescribed rights. Article 13 provides for the right to an effective remedy: "Everyone whose rights and freedoms as set forth in this Convention have been violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". regulates a

remedy before national courts, but sometimes even that is not enough, so Article 19 of the Convention provides for the European Court of Human Rights where the Court will act in cases concerning the interpretation and application of the Convention in interstate disputes, as well as petitions, non-governmental organizations or a group of persons who claim that a right under the Convention or its protocols has been violated.

In view of all the above, it can be said that the Convention is one of the most important international acts in the field of human rights, which not only provides for the right to a trial within a reasonable time as one of the fundamental rights of every person in modern democracies. and the enjoyment of the right to a trial within a reasonable time.

3.6 Charter of Fundamental Rights in the European Union

The Charter of Fundamental Rights of the European Union was published in 2000 in Nice as a non-legally binding political declaration. Later in 2007, when the EU Treaty was reformed by the Lisbon Treaty, it was decided that the Charter would become legally binding for all member states by the end of 2009. The Charter of Fundamental Rights of the European Union, in Chapter 6, entitled “Justice”, regulates the right to a trial within a reasonable time: “The right to an effective remedy and a fair trial under Article 47: Everyone whose rights and freedoms guaranteed by Union law the right to effective legal protection before the courts in accordance with the conditions provided for in this Article. Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Everyone should be given the opportunity to be counseled, defended and represented. For those who do not have sufficient resources, legal aid must be made available to the extent necessary to ensure effective access to justice.”

It is interesting to mention Article 41 from the fifth chapter entitled “Civil Rights”: “Every person has the right to an impartial, fair and timely treatment of his or her affairs in the institutions and bodies of the Union.” Article 41 clearly indicates the importance of “timely” resolution of civil proceedings, as the same article regulates the issue of compensation for damage caused by the Community institutions, thus indicating the link between timely resolution of proceedings and the consequences if this provision is not complied with. protection of the right to a trial within a reasonable time to any person to whom this right has been violated.

4. RIGHT TO A TRIAL WITHIN A REASONABLE TIME IN THE REPUBLIC OF SERBIA

The right to a fair trial in our law was first proclaimed by the Charter on Human and Minority Rights and Civil Liberties, which is an integral part of the constitutional Charter of the State Union of Serbia and Montenegro. Article 17, paragraph 2 of the Charter provided that: “Everyone has the right to have his rights and obligations, as well as the charges against him, decided without delay by an independent, impartial tribunal established by law. The fact that the state union of Serbia and Montenegro lasted a very short time, this provision was not of major importance, and the body in charge of protecting the rights provided by the charter, the Court of Serbia and Montenegro did not achieve a special practice. In the judgment of *Matijašević c. Serbia*, this statement is confirmed by the European Court of Human Rights, which found that the remedy, which existed at the time as a mechanism to protect the right to a trial within a reasonable time before the Court of Serbia and Montenegro, was unavailable until 15 July 2005. and remained ineffective until the dissolution of the State Union of Serbia and Montenegro.

After Serbia ratified the European Convention on March 3, 2004, the courts had the opportunity and obligation to apply Article 6 of the Convention, thus preventing possible violations of the right to a trial within a reasonable time, which was an extremely rare case. In addition to these provisions, there were other provisions of procedural and substantive law that provided for the protection of the right to a trial within a reasonable time, but they were declarative in nature and did not provide for legal remedies that would substantially expedite the proceedings (Ramusović, 2015: 8).

That Serbia did not have an effective legal mechanism for the protection of the right to a trial within a reasonable time until the adoption of the new Constitution in 2006 is confirmed by the European Court of Human Rights in its judgment in the case of *V.A.M v. Serbia* where the Court has clearly pointed out that in Serbia there is no effective remedy to protect the right to a trial within a reasonable time, Serbia has lost several disputes before the European Court, because in other cases the Court relied on what it found in the *VAM* case, so something had to be done at the legislative level because the Court's recommendations also referred to the introduction of a new remedy aimed at speeding up the proceedings. The Constitution of Serbia dedicated the right to a fair trial to Article 32 (Obradović, 2007: 101).

The right to a trial within a reasonable time was not protected in Serbia until 2013, except for a constitutional complaint. The Law on the Organization of Courts and the Law on

Judges modestly mentioned this right. The legal remedies that could have been taken by persons who violated this right until 2013 were a constitutional complaint and a complaint, but these proceedings are almost unregulated. After losing numerous disputes before the European Court of Human Rights, Serbia is deciding to implement a reform of the judiciary in order to solve the problem of excessive length of court proceedings. In addition to amending the existing laws, Serbia has taken the most important step in the field of protection of the right to a trial within a reasonable time by adopting the Law on Protection of the Right to Trial within a Reasonable Time, which provides for preventive remedies. in progress. In that way, the mechanism of protection of this right is completed and completed.

The Constitution of the Republic of Serbia, as the highest legal act, regulates the right to a trial within a reasonable time, which means that this right is under constitutional guarantee, so Article 32 of the Constitution of the Republic of Serbia stipulates that “Everyone has the right to an independent, impartial and within a reasonable time, publicly discuss and decide on his rights and obligations” (Constitution of Republic of Serbia, “Sluzbeni Glasnik RS”, broj 98/06). This wording is almost entirely taken from the Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitution therefore prescribes: “Everyone has the right to judicial protection if a human or minority right guaranteed by the Constitution has been violated or denied, as well as the right to remove the consequences of the violation” (Article 22, paragraph 1 of the Constitution). This article guarantees judicial protection of the right to a trial within a reasonable time. The legal order of the Republic of Serbia has harmonized its provisions with the Convention, which, in addition to direct protection of this right, prescribes an effective remedy for those who have violated or denied a human or minority right before national authorities, which means that the Convention is part of the legal order. and a remedy for the violation of the right to a trial within a reasonable time which is considered a fundamental human right. “The Constitution guarantees, and as such, directly applies human and minority rights guaranteed by generally accepted rules of international law, confirmed by international treaties and laws. The law may prescribe the manner of exercising these rights only if it is explicitly provided by the Constitution or if it is necessary for the exercise of a particular right due to its nature, where the law must not in any case affect the essence of the guaranteed right” (Article 18, paragraph 2 of the Constitution).

The Constitution only in principle regulates the general norms of a certain area, however, their protection is achieved only by passing a law where the ways of that protection are specifically prescribed. The right to a trial within a reasonable time cannot be exercised

only on the basis of this constitutional norm, but the law must specify the mechanisms for the protection of this right. The Constitution provides for the right to appeal or other legal remedy against a decision deciding on his right, obligation or interest based on law. The appeal is a very important novelty of the Constitution, which provides every person with a legal remedy for the protection of human rights and freedoms, and thus the protection of the right to a trial within a reasonable time. Article 170 of the Constitution prescribes: “A constitutional complaint may be lodged against individual acts or actions of state bodies or organizations whose public authority has been violated, and which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if they are exhausted or no other legal means to protect them.” This provision means that a constitutional complaint for violation of the right to a trial within a reasonable time can be filed only if all legal remedies have been exhausted or if there are no other legal remedies for its protection.

Any natural or legal person who considers that an individual action of courts or other state bodies in which decisions on his rights and obligations have been violated violates the right to a trial within a reasonable time may file an appeal. On behalf of a person whose right to a trial has been violated within a reasonable time on the basis of a special authorization, another natural person, state or other body competent for monitoring and exercising human and minority rights and freedoms may file a constitutional complaint (Law On Constitutional Court, Sl. glasnik RS “ no.109/2007, 99/2011, 18/2013- odluka US u 40/2015-dr.zak.)

“When it comes to the conditions for filing a constitutional complaint due to the violation of the right to a trial within a reasonable time, they are, in a sense, specific in relation to other guaranteed rights and freedoms. These specificities arise both from the very subject of the constitutional complaint and from the purpose of guaranteeing the right to a trial within a reasonable time. Namely, the subject of the constitutional complaint due to the violation of the right to a trial within a reasonable time is an action, more precisely (non) action of courts and other state bodies in proceedings deciding on the rights and obligations of parties, while the purpose of this right is to proceedings against undue delays”, as well as to “emphasize the importance of obtaining justice without delay, which may jeopardize efficiency and credibility” (Plavšić, 2013: 6). If the Constitutional Court finds that the proceedings have lasted too long, it will accept the appeal and confirm the violation of the right to a trial within a reasonable time, if the proceedings are still pending, then the manner of eliminating the harmful consequences will be determined and the court will be ordered to take measures. to expedite the proceedings. Another decision that the Constitutional Court may make if it finds that in a particular case there

is no violation of the right to a trial within a reasonable time is the rejection of the constitutional complaint. If the appeal states a claim for damages, the Constitutional Court of Serbia must take into account the case law of the European Court of Human Rights in similar cases as well as the economic and social circumstances in the country when deciding on this issue (Plavšić, 2013: 8). The constitutional complaint adopted by the court is the legal basis for submitting a claim for damages to the Compensation Commission in order to reach an agreement on the amount of compensation, in case the Commission does not make a decision within 30 days from the date of filing, the complainant may submit to the competent court for damages. This solution is bad because after the already conducted and completed procedure before the Constitutional Court, a new procedure must be initiated, first before the Commission and then before the regular court if the Commission does not decide on the request within 30 days from the day of submitting the request. The Constitutional Court may assess that the adoption of a decision establishing a violation of the right to a trial within a reasonable time is in itself sufficient to achieve adequate fair satisfaction of the submitter of the constitutional complaint, and that he is not entitled to compensation for non-pecuniary damage (Pterušić, 2009:114).

The European Court in the case of *Vinčić and others v. Serbia* stated that the constitutional complaint for the protection of the right to a trial within a reasonable time “should, in principle, be considered an effective remedy within the meaning of Art. 35 § 1 of the Convention in respect of all applications submitted after 7 August 2008, as the date on which the first merits decisions of the Constitutional Court on the merits of the said complaints were published in the Official Gazette of the respondent State.” In the case of *Vidaković v. Serbia*, the Court upheld the same position.

The first decision upholding the constitutional complaint and finding that the right to a trial within a reasonable time had been violated was rendered by the Constitutional Court on 16 October 2008, which also established the right to compensation for the damage that the complainant could have exercised. By analyzing this decision Už-372/2008, it can be concluded that the Constitutional Court based its practice on the practice and criteria of the European Court of Human Rights. The period relevant to the decision is first determined, and then it is established when the procedure began as well as the moment when it is considered completed. Based on all this, the court identified the basic factors that affect the length of the proceedings and determine whether it was completed within a reasonable time or not: the complexity of legal and factual issues in a particular case, the conduct of the parties, the importance of the case for the complainant and the court's conduct. leading the proceedings (Carić, 2015: 73). After that, only by the end of 2008, three more decisions were made which accepted the constitutional appeals and found a

violation of the right to a trial within a reasonable time, as well as the applicants' right to compensation, all decisions were published in the "Official Gazette of RS". The following year, 2009, the court accepted as many as 68 appeals, of which the largest number, as many as 56, were found to violate the right to a trial within a reasonable time in civil proceedings. In determining these violations of the right to a trial within a reasonable time, the Constitutional Court in these decisions also determined the right of the submitters of constitutional complaints to compensation for non-pecuniary damage, in accordance with the provisions of Article 90 of the Law on the Constitutional Court. The measures still taken by the court were an order to the competent court before which the procedure was conducted to take all necessary measures without delay to end the procedure without delay if the procedure is ongoing or if the procedure is final, publishing the decision in the "Official Gazette of RS". in order to eliminate the harmful consequences in cases when the appellant did not request compensation for the damage. The case law of the Constitutional Court in the case of non-award of damages differs from the case law of the European Court of Human Rights.

After the Law on Amendments to the Law on the Constitutional Court entered into force in 2012, Article 90, which provided for the Commission for Compensation for Violations of Violated Human or Minority Rights, was deleted, and a provision was introduced which stipulates the obligation to state a specific request in the constitutional law. complaints as well as requests for compensation of material or non-material damage. The criteria by which the Constitutional Court is guided in determining whether the right to a trial within a reasonable time has been respected are as follows:

- existing practice of the Constitutional Court;
- the case law of the European Court of Human Rights in similar cases;
- economic and social conditions in the Republic of Serbia;
- the very essence of compensation for non-pecuniary damage by which the injured party is provided with adequate satisfaction (Popović, 2014:23)

This remedy was the only way to protect the right to a trial within a reasonable time until 2013. After the first decisions on constitutional appeals were made, it was clear that this mechanism of legal protection could not be maintained, although this legal remedy was considered effective, as evidenced by the fact that in just three years after the introduction of the constitutional appeal, 7,150 appeals arrived at the Constitutional Court (<http://www.ustavni.sud.rs/page/view/0-101278/najvise-zalbi-na-duga->

suenja?_qs=%D0%B4%D1%83%D0%B3%D0%B0%20%D1%81%D1%83%D1%92%D0%B5, accessed on 23.05.2020). Statistics show that since 2010, the number of appeals to the Constitutional Court has started to grow sharply, so that in 2010, out of a total of 249 decisions on the adoption of constitutional appeals, in as many as 126 violations of the right to a trial within a reasonable time were established. out of a total of 489 decisions on the adoption of constitutional appeals, 340 violated the right to a trial within a reasonable time, and in 2012, out of a total of 2,119 decisions on the adoption of constitutional appeals, 574 found a violation of the right to a trial within a reasonable time. In 2013, out of a total of 2,262 decisions on the adoption of a constitutional complaint, 848 found a violation of this right, and in 2014, out of a total of 1,500 decisions, 454 found a violation of the right to a trial within a reasonable time. 453,700 euros were awarded in the name of damages (Carić, 2015: 74).

By joining the Council of Europe, the Republic of Serbia signed the Convention on Human Rights on April 23, 2003, and ratified it in December of the same year. By ratifying international documents, the state undertakes the obligation to harmonize domestic legislation with the practice of international documents adopted by it, thus, international provisions take precedence over the provisions of national legislation. In the process of ratification, all aspects of the consequences arising from the application of international provisions must be considered, and the principle of a single legal order must be respected in order to avoid a conflict of laws. There are special cases that occur in those cases whose proceedings began before ratification and continue after ratification, the so-called transition cases. In these cases, the State should be responsible for the length of the procedure after ratification and in that sense has the obligation to take all necessary and effective measures to complete these procedures within a reasonable time provided by the Convention. However, the European Court of Human Rights will assess whether the duration of the court proceedings in these cases was “reasonable”, ie. whether the requirement of a reasonable time has been violated, take into account both the length and nature of the duration of the procedure before ratification (Milutinović, 2009: 1).

In Serbia, the right to a trial within a reasonable time in civil proceedings has been introduced by the Law on Civil Procedure since 2004 (Law on Civil Procedure, *Službeni glasnik RS*, br. 125/2004, br 98/2006). The situation in the judiciary was constantly deteriorating during that period, due to overcrowding of courts, inefficient work of judges and thus longer duration of proceedings, in addition, the number of petitions to the European Court regarding the right to protection of the right to trial within a reasonable time increased in 2011. A new Law on Civil Procedure was passed in 2006, one of the main goals of which was “protection of the right to a trial within a reasonable time as a

way of eliminating long-lasting and expensive litigation” (Živković, 2012:25). This law for the first time introduces provisions on the time frame so that the protection of the right to a trial within a reasonable time no longer ends with the mere proclamation that proceedings must be completed within a reasonable time. The time frame is the pre-planned time provided for court activity, the party and other participants in the procedure to which the appropriate stage in the development of the litigation should be completed.

The most important step of Serbia in the fight against the violation of the right to a trial within a reasonable time was the adoption of the Law on the Protection of the Right to Trial within a Reasonable Time (Law on Protection of the Right to Trial within a Reasonable Time, Sl. glasnik RS, no. 40/2015.), which entered into force on January 1, 2016. Due to the large number of accumulated cases, but also the increasing loss of disputes before the European Court of Human Rights, the reform of the judicial system was necessary. The regulation of the right to a trial within a reasonable time is guaranteed by Article 10 of the Law on Civil Procedure as well as the Law on Amendments to the Law on Organization of Courts (Law on Amendments to the Law on Organization of Courts-ZUS, Official Gazette of RS no. 101/2013) . The amendments came into force on 21 May 2014. According to the mentioned articles, a party in court proceedings who considers that his right to a trial within a reasonable time has been violated may immediately submit a request to the higher court for protection of the right to a trial within a reasonable time. With this request, the party may also request compensation for the violation of the right to a trial within a reasonable time. If the request refers to the procedure that is in progress before the Commercial Court of Appeals, the Misdemeanor Court of Appeals or the Administrative Court, the Supreme Court of Cassation decides on the request. The decision-making process is urgent. If the immediately higher court finds that the applicant's request is well-founded, it may order temporary compensation for the violation of the right to a trial within a reasonable time and set a deadline within which the lower court will complete the procedure in which the right to a trial was violated within a reasonable time. The fee will be paid from the RS budget funds allocated for the work of the courts within three months from the day of submitting the party's request for payment. An appeal against the decision on the request for protection of the right to a trial within a reasonable time may be filed with the Supreme Court of Cassation within 15 days. The provisions of the Law governing non-litigious proceedings shall apply accordingly to the procedure for the protection of the right to a trial within a reasonable time and the compensation for the violation of the right to a trial within a reasonable time (Salma, 2015:1006).

5. NATIONAL SYSTEMS FOR RESOLVING TRIAL PROBLEMS WITHIN A REASONABLE TIME

The problem of not respecting the right to a trial within a reasonable time is a global problem. Countries around the world are trying in different ways to regulate this area. The main difference in the way of regulation when it comes to the right to a trial within a reasonable time is the division into two systems of law, the Anglo-Saxon and the European continental legal system. It is stated that this problem is much less represented in the countries of case law, and that the violation of the right to a trial within a reasonable time has long been present in continental law and has a pan-European character (Harris, O'Boyle, Warbrick, 1995: 229). When it comes to solving the problem of a trial within a reasonable time, S. Carić states several stages of this process. The first phase is to notice the existence of this problem, where after the formation of awareness that there is no effective remedy at the national level that will regulate this area will begin to actively address it by adopting new legal provisions that will best provide legal protection to each individual and at the same time restore confidence in the justice system. The European Court of Human Rights in a large number of cases has the role of pointing out the existence of this problem in a particular country mainly after the submission of complaints for violation of this right by individuals. The second step in the process of resolving a trial within a reasonable time is to choose the system that is most effective for one state. Based on its characteristics, each state will choose the way of regulating and protecting this right in domestic law, what is very important is a kind of experimentation where if one system does not show a positive effect, it will be replaced by another system of regulation that will give better results than the previous one. which is also the third step that can be summed up by checking the system in practice. This part is entrusted to the European Court of Human Rights, which makes a decision on whether a certain state has regulated the protection of this right in the right way, will point out weaknesses, but also propose new solutions. The last phase is the corrective phase, which represents the correction and improvement of the system after the ECtHR gave its opinion, criticism, but also proposals for improving the protection of the right to a trial within a reasonable time.

Comparative legal analysis distinguishes three systems of regulation of this problem, namely: preventive system, compensatory system, combined system.

The preventive system for regulating the violation of the right to a trial within a reasonable time is characterized by the existence of means that have a preventive effect on this phenomenon, ie they try to prevent the violation of the right to a trial within a reasonable

time. In practice, this would mean that in the countries of the preventive system there is a legal remedy in the form of a request for acceleration of the procedure submitted to the competent authority. The answer to this type of request is usually a solution to the problem of unjustifiably long procedure, where the competent authority determines the deadlines within which certain procedural actions must be taken or another court is determined as competent in the procedure. When it comes to this system, it is very important to respond to the request for acceleration of the procedure as soon as possible in order to prevent the occurrence of harmful consequences for the parties in the procedure. The preventive system also does not exclude the possibility of claims for damages caused by the violation of the right to a trial within a reasonable time, but only allows the parties to take certain measures during the proceedings that can contribute to faster and more efficient decision-making.

The compensatory system solves the problem of violation of the right to a trial within a reasonable time by correcting the violation by paying compensation due to the long duration of the procedure. States belonging to this system consider that material compensation can correct the violation of this human right. It is very important to emphasize the difference between this type of compensation and the compensation realized in national law in some other situations and procedures. The European Court of Human Rights conducts supervision where it determines whether this area is regulated in accordance with the Convention, ie whether this way of regulating the violation of the right to a trial within a reasonable time is effective. In essence, in addition to the payment of material compensation, other facts related to the initiation of this procedure must be regulated so that this mechanism of protection of the right to trial within a reasonable time is available to any person whose right has been violated. method of payment of this type of fees.

A combined system for regulating violations of the right to a trial within a reasonable time is the most common system applied by states because it includes a system of prevention together with a system of compensation. There are many opinions that believe that the combined system is the most efficient and effective system for protecting the right to a trial within a reasonable time, because the combination of the means to speed up the procedure and then the means to pay compensation is the ideal solution to this problem. Any person who thinks that the procedure in which he participates lasts too long has a certain dose of legal certainty because he has two options, where if the request to speed up the procedure is not an effective remedy, then at any time there is another way to protect his endangered right.

In addition to these three groups to which the legal systems of certain states can be clearly attributed, which characterize the features of one of these systems regulating the protection of the right to a trial within a reasonable time, there are also states where this right is not regulated in one of these three ways. but some of them are also characterized by the European Court of Human Rights as countries that do not have an effective remedy to protect the right to a trial within a reasonable time.

CONCLUSION

Human dignity and the right to a trial within a reasonable time are in an inseparable cause-and-effect relationship. The lack of a timely trial and court decision calls into question the entire human rights system, but also human dignity itself. That is why it is extremely important that the right to a trial within a reasonable time becomes an essential institute and one of the rights with a special emphasis in every legal order. Based on a comparative legal analysis, we have determined that the position of this right varies from state to state and that there is no single system of its legal structure. It is extremely important to point out the fact that the norms of universal and regional international documents have significantly influenced the harmonization and implementation of this right in the legal systems of nation states. In traditional democracies, the right to a trial within a reasonable time has a long tradition, has been raised to the level of a constitutional norm and is guaranteed through a number of different legal norms. Young democracies apply this right much later, especially those that represent post-communist societies. In accordance with the above, human dignity is not at the same level in all countries, even if those countries are signatories to the same international agreements, members of the same international organizations and someone who respects the same legal standards. Precisely, the inefficiency of the judiciary, long court proceedings and delayed justice are the reasons why human dignity is not at the same level in all countries. We can conclude that the mere existence of a court and court proceedings is not enough for human dignity to be protected, it is necessary for the court to be up-to-date and efficient, and for court proceedings to be within a reasonable time.

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Yang Chao*

THE HUMAN RIGHT PROTECTION IN HKSAR NATIONAL SECURITY LAW

The HKSAR national security law is for safeguard China's sovereignty, security and development interests, which effectively uphold the constitutional order of the HKSAR established by China's Constitution and the Basic Law. The law is consisting with the standard of international conventions of human right protection, insure that the crack the criminal and protect the interests for most the residents in HK and maintain long-term prosperity and stability of Hong Kong.

Keywords: *HKSAR National Security Law; Human Right Protection; One Country Two System; Anti-Terrorism*

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1. Backgrounds for the Legislation

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region after deliberation by the 20th session of the Standing Committee of the 13th National People's Congress, and the promulgation and implementation of the law in the HKSAR after being listed in Annex III of the Basic Law of the HKSAR on June 30, 2020, with six chapters and 66 articles. The HKSAR national security law is a milestone for the “One China, Two System” framework, and with welcomed by many countries in the international community. After Cuba made a joint statement on behalf of the 53 countries at the 44th Session of the United Nations Human Rights on Tuesday, welcoming the adoption of the law on Safeguarding National Security in the Hong Kong Special Administrative Region (HKSAR) by China's top legislature, representatives from other over 20 countries also expressed their support for the passage of the legislation during the session¹.

The HKSAR National Security Law represents the firm determination that Central government to solve the chaos in the HK and defense the national security, in the past months in HK that disorder society made by the rioters, characterized by violence and vandalism. They vandalism of public transport infrastructure and public facilities, even attacks innocent residents, the polices on duty or off duty been attacked. These illegal behaviors are all organized and some of them are collusion with foreign governments, and lasting for months, which have transformed Hong Kong from a hub of global finance to a city without the normal order, a place that unpredictability, a society that habitants lose the safety, a city that other Hong Kong residents' human rights in a bad situation. Confront this situation, Central government adopted the HKSAR national security law, which has considered both the need to safeguard national security and the unique situation of Hong Kong. In particular, therefore, sufficient adjustment has been made in regard to the legal system and the actual situation of Hong Kong. The law will be a major measure to stay committed to and improve the “One Country, Two Systems” framework, and a fundamental way to preserve Hong Kong's prosperity and stability.

2. The General Principle of The HKSAR National Security Law

The HKSAR National Security Law has solid legal basis, the law obeys with the international convention and the legal system of HKSAR. From the point of the

¹ <https://news.cgtn.com/news/2020-07-03/More-countries-support-China-s-national-security-legislation-for-HKSAR-ROQbNU2PK0/index.html>, accessed on 7.8.2020.

sovereignty, the affairs related to national security in Hong Kong fall within the sovereignty of the People's Republic of China, and that the National People's Congress, the nation's top legislature, has the power to legislate on national security. From countries worldwide perspective, national security is within the authority of the state, with mandatory cooperation of regional governments.

The absence of a national security law is a loophole that harms the interests of the nation and those of the city, and this situation should be rectified. The HKSAR National Security Law will safeguard national security, plug loopholes in Hong Kong legal system imperative to establish, improve legal system and enforcement mechanism for safeguarding national security. Safeguarding national security legislation is the central government's responsibility, and any country will use all available measures to combat crimes that endanger its national security².

2.1 The Legal Basis of The HKSAR National Security Law

According to the national Constitution and the Basic Law, which both form the constitutional basis for the principle of "One Country, Two Systems". Hong Kong enjoys a high degree of autonomy as part of one country. The Constitution and the Hong Kong Basic Law serve as the legal basis for the central government to govern Hong Kong, represent a gross interference in China's internal affairs and run counter to the important principles of mutual respect for sovereignty and territorial integrity and non-interference in each other's internal affairs endorsed by the UN Charter. The HKSAR uphold the principle of the rule of law and respect human rights and protect Hong Kong people's legitimate rights, including freedom of speech, assembly and demonstration, and everyone will be presumed innocent until convicted by the judicial organs.

The article 1 of HKSAR National Security Law as stipulated, this Law is enacted, in accordance with the Constitution of the People's Republic of China, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, and the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region, for the purpose of: ensuring the resolute, full and faithful implementation of the policy of One Country, Two Systems under which the people of Hong Kong administer Hong Kong with a high degree of autonomy; safeguarding national security; preventing, suppressing and imposing punishment for the

² <https://news.cgtn.com/news/2020-06-08/National-security-law-for-HK-benefits-One-Country-Two-Systems-R9Zeq0Cyl/index.html>, access on 7.12. 2020.

offences of secession, subversion, organization and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security in relation to the Hong Kong Special Administrative Region; maintaining prosperity and stability of the Hong Kong Special Administrative Region; and protecting the lawful rights and interests of the residents of the Hong Kong Special Administrative Region.

Article 2 of the HKSAR National Security Law clearly stipulates that Article 12 and Article 123 of the Basic Law of the HKSAR are the fundamental provisions of the Basic Law of the HKSAR; any institution, organization and individual, when exercising their rights and freedoms, must not violate these two articles. This article imposes an obligation on companies and organizations conducting business in the HKSAR that they shall accept the HKSAR's status is as that stated in Article 1 and Article 12 of the Basic Law of the HKSAR and must not act against that principle.

According to this article, in the first place, the HKSAR National Security Law consist with the basic law, provides the fundamental protect for the human right that stipulated in the basic law. Second, by set an obligation for the individual, institution, company or any other form of the organization, which shall be obey with the HKSAR National Security Law. For the nature of this obligation, we should know that this restriction for the freedom and the right definitely is not against the standard of international human right convention for human right. On the contrary, it is an important way to protect human right for the residents in HK by legitimately adjust the law. In keeping with other international human rights documents, therefore, Article 19(3) of ICCPR envisages a threefold step for determining whether a restriction on rights is human-rights compliant. First, it must be prescribed by law. Secondly, it must serve one of the legitimate purposes in subparagraphs (a) and (b). Thirdly, the restriction must also be necessary³.

As we can see that, ICCPR allows the domestic law made a restriction on protect human right in the case that need. To avoid the restriction been misused by governments, ICCPR also made fully explanation on the restriction on human right, which need to strictly explicates by the law and has the fully legitimate purpose, more importantly this restriction only could use in the necessity occasions. Back to the HKSAR national security law, the restriction only used to those behaviors hamper the danger of the national security or involved with the terrorist actives that seriously danger the society. Therefore,

³ Cox, N. (2020) Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law. *Journal of Law and Religion*, 35(1), pp 33–60.

the obligation on human right in HKSAR national security law has the fully legal basis and conform with the international human right conventions.

In the process of formulation, the law, the top legislatures also consider the different views from diverse people, especially for the opinion from HK for the interests of HK residents. Opinions were solicited from all relevant sectors, in particular, those from the Hong Kong Special Administrative Region (HKSAR), during the formulation of the law on safeguarding national security in the HKSAR⁴. By collecting opinions widely, which is make sure the justice procedure of formulation of the law.

In general, the law places great emphasis on respecting human rights and the rule of law, as well as clear stipulations on protecting Hong Kong people's rights and freedoms entitled by the Basic Law.

2.2 The Specific Article of Protect Human right in the HKSAR National Security Law

Article 4 of the HKSAR national security law, Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law.

In this article, it is clearly set up the human right will be well protected in the HKSAR national security law, which explicit that human right protection is the general principle of the HKSAR national security law.

Firstly, the HKSAR national security law obey with the international human right convention, as we know since 2006, “ensuring human rights and the rule of law” has formed one of the four core pillars of the UN’s Global Counter-Terrorism Strategy. It is tempting to see incorporation of human rights-sensitive mechanisms as inevitable—especially given that the Security Council’s decisions must accord with UN principles,

⁴ <https://news.cgtn.com/news/2020-07-01/Official-National-security-law-for-HKSAR-is-a-milestone--RLvB2ipMXu/index.html>, accessed on 7.8.2020

one of which is to promote respect for human rights⁵. The law has fully respected the human right protection, compliance with international human right conventions, keep the balance of protect human right and the tackle with the offences that hamper national security and terrorism activities. Secondly, the law as well as obey with the national constitution and the basic law of HK. The legislation is in the framework of “One China Two system”, respect mutual the legal systems, follow the conceptions in the legal system of HK. Finally, the law will be establishing and improving at the state level a legal system and enforcement mechanisms for safeguarding national security in the HKSAR. The public in Hong Kong will be aware that the national security law neither will not undermine their rights nor their freedoms of region, speech and etc., but will benefit the city by ensuring the stability of Hong Kong and the safety of the people.

3. “Nulla Poena Sine Lege” The Principle of Legality

The characteristic of the unlawful act is that it must consist in violating a specific legal norm. Establishing unlawfulness is an inherent part of the process of determining the factual situation - what is the act, which is its objective and subjective elements, and through the procedure of its subsumption under the legal norm - the adoption of a conclusion about the existence of an unlawfulness or consent of the act with a legal norm . The legislation of HKSAR national security law complies with the Constitution and the Basic Law the HKSAR, and with international common practices and the rule of law principles. Combining the advantages of civil law and common law, clearly stipulates the jurisdictions, elements of offences, definitions and penalties of offences, compliance with the principle of legality. Also, it fully respects the high degree of autonomy of the HKSAR, and is in line with people's will and the reality in Hong Kong.

3.1 The Substantial Part

The Principle of legality means that in determining whether an act or omission constituted a criminal offence at the time of commission. Stipulates the principle of legality as the general principle of criminal code, is for realize the human right protection for citizens, by clearly knowing the specific articles of crimes and the elements of commit crime, avoid to committing crime.

In the Article 3 of Criminal code of China, for acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law;

⁵ Hamilton, C., Lippert, R. (2020) Governing Through Human Rights in Counter-terrorism: Proofing, Problematisation and Securitization, *Critical Criminology*, 28, pp127–145.

otherwise, they shall not be convicted or punished. And in the Chapter III of HKSAR national security law stipulates the offences and Penalties, which are clearly explicit the elements of crime and the relevant penalties, compliances with the standard of international conventions of principles of legality. As mentioned in the ECHR relied on international human rights principles, particularly the right to life but also the right to leave any country, in reaching this conclusion. The ECHR went on to hold that the criminal convictions were foreseeable and that the law under which they occurred was accessible. The HKSAR national security law by stipulates the elements of crimes, which made the crime and penalties have fully foreseeable, and in the provisions that limited of fixed-terms prison sentences or/and be imposed with a criminal fine, it is predictable.

The penalty imposed by the HKSAR national security law is consist with the criminal code of China, for the four types of crimes have the same fixed-terms prison sentences. Similarly, in Italy criminal code, the article 241 stipulates the crime of hampering the integrity, independent and uniform of the county shall be sentenced by imprisonment not less than 12 years, which means the crime of hampering the security or sovereignty of country belongs to the felony.

3.2 The Procedure Part

The doctrine of legality calls for law to be unambiguous, accessible, and non-retrospective. This principle has been “justified on several grounds, most often on the principles of fair notice and protection against arbitrary judicial action. The HKSAR national security law is organically combine central governance with a high degree of autonomy, as well as combine with the substantial part and the procedure part.

The international doctrine⁵ distinguishes between two forms of the principle of legality of incrimination: formal legality, which encompasses all criminal and procedural rules and substantive or substantive legality, which has the meaning of law quality, in terms of accessibility and foreseeability. As in the procedure part of HKSAR national security law, it is still compliance with the principle of legality, which is the decision of the court in criminal proceeding is the consequence that is foreseeable and exclusive the possibility of arbitrary decisions. It is shows that the law adheres to the principles of the rule of law recognized by the international community. ▯

Chapter 4 of the HKSAR national security law refers to the jurisdiction, Applicable Law and Procedure, articles 40 to 47, which are stipulate the scope of the jurisdiction, it has the strict limits on the target. In article of 55, it stipulates that in specific and rare

circumstance that the central government could exercise the jurisdiction, apply with the Criminal Procedure Law of the People's Republic of China.

Refers to the human right protection in the Criminal Procedure Law of the People's Republic of China, which fully implements the constitutional principle of respecting and safeguarding human rights by the state, attaches importance to safeguarding human rights. Since the Criminal Procedure Law has been administered for forty years, the value choice of criminal procedure in China has not only focused on the fight against crime, but also on the protection of human rights, especially the human rights of the accused.

The criminal procedure law of the people's republic of China has been adjusted in the past years, the judicial protection system of human rights has been improved. In 2004, the fourth amendment of the Constitution added the state respects and safeguards human rights to the Constitution, and established the constitutional principle of human rights. In 2012, the second revision of the Criminal Procedure Law, included respecting and guaranteeing human rights. In 2018, the third revision of the Criminal Procedure Law further deepened and implemented the provisions guaranteeing judicial human rights. Including adds the principle of leniency of confession and punishment as the basic principle, stipulates that legal aid institutions may assign lawyers on duty to people's courts, detention centers and other similar places. The right of the defendant that knowing, defending, appealing, objecting and making a final statement in the procedure shall not be decreased even in absence of the trial. These improvements show that the criminal justice of China has comprehensively establishes an effectively, impartially and diligently protection for the human rights.

4. Retroactive

By prohibited retroactive the behaviors before the law, it establishes the fundamental ways to protect human right and forms a basic principle of a law. According to the article 39 of the HKSAR national security law, this Law shall apply to acts committed after its entry into force for the purpose of conviction and imposition of punishment.

On the basis of this article, the HKSAR national security law only has the jurisdiction on the behaviors that happens after the law adopted, must not have the jurisdiction on the behaviors before the law. On the retroactive issue are consistent with the usual provisions of international criminal law and conforms to international practice, that is, non-retroactivity, which is clear and shows that the law follows the modern principle of rule of law.

Article 12 of Criminal Code of the People Republic of China, if an act committed after the founding of the People Republic of China and before the entry into force of this law was not deemed a crime under the laws at the time, those laws shall apply. If the act was deemed a crime under the laws in force at the time and is subject to prosecution under the provision of Section 8, Chapter IV of the general provision of this law, criminal responsibility shall be investigated in accordance with those law. However, if according to this the act is deemed a crime of is subject a lighter punishment, this law shall apply.

Based on the Chinese judicial practice and subject to the principle of legality of the concept of human rights protection, establish the principle of apply with both the older laws and lighter punishments that will benefits the defendant. It is also show that the function of any criminal law has two main ways: one which to punish crime by stipulate the elements of the crimes and set the retroactive issue to protect human right and another which under the obligation to take measures to prevent similar offences being committed in the future.

5. Jurisdiction

As seen above, The HKSAR national security law has the specific targets, which only on a tiny group of criminals who endanger national security. The law has clearly amid to again terrorism and keeps national security.

5.1 The Specific Targets for HKSAR National Security Law

The Hong Kong National security law makes clear provisions to protect and safeguard human rights. It bans such criminal activities and protects the rule of law in Hong Kong and legitimate rights and freedoms of the people there. The Law is highly targeted, which is regulates four offences and their corresponding penalties prescribed in the law, namely, secession, subversion, terrorist activities, collusion with foreign countries or external elements to endanger national security. In the HKSAR National Security Law articles 20 to 30, which specify the elements of each offence and the relevant penalties.

First of all, the law stipulates that the HKSAR exercises jurisdiction—including investigation, monitoring and trial—over criminal cases. Considering some extreme cases, the law also stipulates that “under specific circumstances” the office and related organs of the central authorities could exercise jurisdiction over a tiny number of criminal cases that jeopardize national security. It is stipulated under the HKSAR National Security Law [Article 21 and Article 23] that whoever incites, assists in, abets, or provides

pecuniary or other financial assistance or property for the commission by other persons of the offences of Secession and Subversion shall be guilty of an offence. If the circumstances of the offences are of a serious nature, the person shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; if the circumstances are of a minor nature, the person shall be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction.

Secondly, considering the financial assistance also another common way to assist terrorism activities around the whole world today. Aim to cut the financial assistance or other economic ways to assist the terrorism activities.

Under Article 26, whoever provides support, assistance or facility such as training, weapons, information, funds, supplies, labour, transport, technologies or venues to a terrorist organization or a terrorist, or for the commission of a terrorist activity; or manufactures or illegally possesses hazardous substances or uses other means to prepare for the commission of a terrorist activity.

Thirdly, in particular for the business activities involved with the activities that will hamper the national security in HKSAR. On basis of article 26, comm2, For the purpose of carrying out business activities in the HKSAR, companies, organizations and individuals are advised to pay special attention to the pecuniary or other financial assistance or property they provide to others to ensure that such assistance will not be used for the acts and/or activities which would endanger the national security.

Considering the physical person that may involve with the illegal activities that may harmful to the national security, this article stipulates that the physical person shall take the criminal responsibility as well as fiscal person. For the nature of the physical person, the legislation establishes a well-round sanction system, not only for stipulates the financial sanction, but also impose suspend the license in order to the prevent commit crime again in the future. By freezing property, deprivation of qualifications, suspension of licenses and other penalties with the effect, the implementation of the principle of the guilt commensurate with the punishment.

5.2 The Exclusive Jurisdiction for Central Government in Certain Conditions

In the worldwide, it is common that many countries that stipulate the protective jurisdiction in criminal code, which to provide the legal protection for any citizenship or

any assets avoid to suffering the illegal offences, particular the attacks form terrorism activities.

The German Basic Law stipulates that it is unconstitutional to intend to endanger the existence of the Federal Republic of Germany. The German Federal Constitutional Court further pointed out in its judgment that if members of Parliament intend to endanger the sovereignty of Germany, this is contrary to the basic political will of the people, and therefore cannot meet the help to form the political will of the people, members of Parliament should be disqualified and should not stay in Parliament any longer.

The Spanish Penal Code defines the crime of terrorism as acts committed with the aim of subverting the constitutional order and seriously undermining public order. In EU Directive 2017/541 issued in 2017, the European Union also defined seriously undermining or destroying the basic political, constitutional, economic or social structures of a State or an international organization as a terrorist crime.

Judging from the legislative practice of European countries, the crackdown on acts of subverting the existing constitutional order is very strict, not only depending on whether the act contains the political factors or not, but also on the means and consequences of the act, no matter for any reason and no matter what the underlying purpose is, if the act is aimed at seriously intimidating the public, hampering the behavior of the government or international organizations, or undermining the constitution, politics, economy, law enforcement, etc.

According to the HKSAR national's security law, the HKSAR will be responsible for conducting daily national security work, especially case jurisdiction, whereas the central government will only handle very few special cases. Jurisdiction will be exercised on a small number of offences that seriously jeopardize national security. Central office will only exercise its jurisdiction on the above specific occasions.

The specified circumstances are: the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the HKSAR to exercise jurisdiction over the case; a serious situation occurs where the HKSAR Government is unable to effectively enforce the HKSAR National Security Law; or a major and imminent threat to national security has occurred. Article 57 The Criminal Procedure Law of the People's Republic of China and other related national laws shall apply to procedural matters, including those related to criminal investigation, examination and prosecution,

trial, and execution of penalty, in respect of cases over which jurisdiction is exercised pursuant to Article 55 of this Law.

When exercising jurisdiction over cases pursuant to Article 55 of this Law, the law enforcement and judicial authorities referred to in Article 56 of this Law shall exercise powers in accordance with the law. The legal documents issued by these authorities on their decisions to take mandatory and investigation measures and on their judicial decisions shall have legal force in the Hong Kong Special Administrative Region. The institutions, organizations and individuals concerned must comply with measures taken by the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region in accordance with the law.

The reason for stipulate this article, as already mentioned, is that in the past months, constantly illegal riots in HK, which seriously disturber the normal society and the threaten the resident's safety and assets in HK. To attach the goal of keep safety in HK, the national security law made this, as a supplement jurisdiction as well as the exclusive jurisdiction in the same time, the central government will not exercise jurisdiction over HK criminal cases in ordinary, which means HK still has the high degree autonomy, no matter to the jurisdiction or the administration. In other word, the cases may cause the central government exercise jurisdiction over HK only has the seriously impact for the society or led to an emergency situation that the HK cannot exercise jurisdiction, for any national government shall has the power to exercise jurisdiction in order to protect the sovereignty.

Conclusion

Hong Kong belongs to China. Hong Kong affairs are definitely China's domestic affairs. The Chinese government and people are fully determined to safeguard national sovereignty, security and development interests, and to oppose external interference into Hong Kong affairs⁶. HKSAR National Security Law targets a very few criminals but protect the vast majority of Hong Kong people, the law repeatedly emphasizes the principle of respecting human rights and obeying the rule of law in order to reiterate the idea of the rule of law as well. HKSAR National Security Law compliance with the principles of the rule of law, the principle of legality, the principle of the presumption of innocence, full guarantees of the right to a defendant and protection from double jeopardy, these principles and related systems and rules fully show that the Law on Safeguarding

⁶ <https://mp.weixin.qq.com/s/NBRAugSf0YpaWg3jYro1OA>, accessed on 7.8.2020

National Security in the Hong Kong Special Administrative Region is not only a sanction law, but also a guarantee law. In the meantime, People with different political views and positions will continue to exist in Hong Kong, the freedom and basic human right for HK residents will not be weakened by the national security law, otherwise, it only will serve as a guardian of prosperity and stability in Hong Kong.

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István László Gál*

CRIMINAL LAW PROTECTION OF CLASSIFIED INFORMATION IN HUNGARY

In the age of the information society, our world is highly dependent on the proper functioning of various information systems, and one of the most valuable parts of those systems is classified data. The number of attacks against such data shows an increasing trend, and the misuse of classified data attacks the legal order and violates or endangers the state order. That is the main reason why intelligence organizations operate in all developed states. In this paper, the author analyzes the criminal law protection of classified information in Hunarian legal system, classifies the perpetrators and the legal objects of the crime, and presents the four possible offenses against the misuse of classified information.

Keywords: *classified data, secrets to protect, criminal offenses with classified information, unauthorized acquisition and use, security services, Hungarian Criminal Code*

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1. Introduction

The growing importance and value of information is the most important reason why intelligence organizations operate in all developed states. Among the national security services, there are some who deal with intelligence, so in the case of Hungary one of the main drivers of the establishment and operation of the Information Office and the Military National Security Service is the fact that they do not want to share information with us.¹ This is completely natural. At the same time, Hungary also has secrets to protect, and of course we want to keep secret the methods and sources by which we obtain such information. These are protected by the national security services dealing with prevention in the first place, in Hungary by the Constitutional Protection Office and the Military National Security Service. One of the means of protection is Hungarian criminal law, with the the misuse of classified information and the facts of various types of espionage. It is also essential for the smooth operation of state bodies and other bodies performing public tasks that certain data related to their operation should not be disclosed or made known to unauthorized persons. These data may be of different significance and should be taken into account when providing criminal protection.²

Nowadays, both Hungarian legal regulations and developed Western legal systems use the category of “classified data” instead of the concept of state secrets. Classified data is, in the most general terms, any information that a state or group of states considers to be sensitive in some way and which is therefore subject to an obligation of confidentiality based on national, regional or even international security needs. Access to classified information is restricted by law or regulation, and misuse can often result in criminal sanctions. A security certificate is usually required to manage or access classified information. This can typically be issued after a person’s security check. Classified data typically has several hierarchical levels in each legal system, and access to them usually requires different levels of security requirements. The classification level of the data is determined in the framework of the qualification procedure.³ These characteristics are usually found in the regulations of all countries, but the specific practice and terminology of course differs from country to country. In order to one of the secret type can be classified as classified information today, you must:

¹ Lowenthal, Mark M.: Hírszerzés. A titoktól a politikai döntésekig Antall József Tudásközpont Budapest, 2017. p. 31

² Földvári József: Büntetőjog Különös rész Tankönyvkiadó, Budapest, 1978. p.143

³ <https://www.definitions.net/definition/classified+information> (2020.04.21.)

- there is at least one public interest that can be protected by the rating and in the course of the procedure the rating agency has ascertained that the misuse of the data in question directly harms or threatens the public interest that can be protected by the rating,

- conducted by an authorized person,
- a qualification procedure that fully complies with the formal requirements,
- which qualifies the data for a specified period of time. ⁴
- The appearance of classified information may also vary in practice:
 - classified data recorded or transmitted on a data carrier;
 - written information, classified data;
 - an object, object or technical device carrying classified information;
 - classified information, procedures or knowledge presented in an intangible form;
 - finally, there is classified information provided orally.⁵

According to the tasks of the application level of information protection, the protection system of classified data includes the following elements: physical protection, hardware and software, as well as encryption, IT protection of transmission paths, protection against compromising radiation, document protection, personal protection, and procedure protection as well. ⁶

The characteristics of classified information to be protected in the broadest sense may be the following:

- confidentiality (information can only be accessed by an authorized person);
- authenticity (the characteristic of the information that represents the originality);
- availability (those entitled to it will have access to the information in accordance with the provisions of the relevant regulations);

⁴ Szőke Gergely László: Gondolatok a hazai titokvédelmi szabályozás rendszeréről (=JURA 2018/2. p.253)

⁵ Kuris Zoltán – Pándi Erik: Komplex információbiztonság megvalósítási lehetőségeinek megközelítése (=Hadmérnök 2009. No. 2. p. 312)

⁶ Kassai Károly: Az információvédelem rendszerszintű feladatai (<http://193.224.76.2/downloads/konyvtar/digitgy/20014/tartalom.html> – 2020. 04. 30.)

- integrity (a properly functioning information system represents the data in an appropriate form).⁷

2. Current regulations on the Criminal Offenses with Classified Information

The current Criminal Code regulates the facts of a Criminal Offenses with Classified Information as follows:

- (1) Any person who:
 - a) obtains or uses any classified information;
 - b) discloses any classified information to an unauthorized person, or withholds such information from a competent person;
 - c) is guilty of criminal offenses with classified information.
- (2) The penalty shall be:
 - a) custodial arrest for a misdemeanor where the information is classified as restricted data;
 - b) imprisonment for a felony not exceeding one year where the information is classified as confidential;
 - c) imprisonment not exceeding three years where the information is classified as secret;
 - d) imprisonment between one to five years where the information is classified as top secret.
- (3) Where criminal offenses with classified information are committed by a person authorized for using classified information under the strength of law and it involves information classified as restricted, confidential, secret or top secret, such person is punishable by imprisonment not exceeding one year or two years, or between one to five years or two to eight years in accordance with the distinction made in Subsection (2).
- (4) Any person who engages in preparations for criminal offenses with classified information as under Paragraphs c)-d) of Subsection (2), shall be punishable for

⁷ Kuris Zoltán – Pándi Erik: Komplex információbiztonság megvalósítási lehetőségeinek megközelítése (=Hadmérnök 2009. No. 2. p. 312)

a misdemeanor by imprisonment not exceeding two years, or for a felony by imprisonment not exceeding three years in accordance with the distinction made therein.

- (5) * Where a person authorized for using classified information under the strength of law engages in preparations for criminal offenses with classified information as under Paragraphs c)-d) of Subsection (2) shall constitute a felony punishable by imprisonment not exceeding three years or by imprisonment between one to five years in accordance with the distinction made therein.
- (6) Any person authorized for using classified information under the strength of law, who commits the criminal offense defined in Subsection (2) by way of negligence shall be punishable for misdemeanor by custodial arrest, or by imprisonment not exceeding one year, two years or three years in accordance with the distinction made therein.

Section 266

- (1) Protection under criminal liability shall also apply - for a period of thirty days from the time when classification is requested - to any data recommended for classification, where the classification procedure is pending at the time when the act was committed, and if the perpetrator is aware thereof.
- (2) *

Under criminal law, the perpetrator of a criminal offense of Criminal Offenses with Classified Information can be anyone, but we will see that the Criminal Code make a differences: in addition to the general subject, a special subject commits the punishment of a breach of secrecy within a more severe penalty. A typical perpetrator in a criminological sense, in my view, is a person who has a definite motive for committing a crime. This motive can be material (the breach of secrecy is made for consideration), political (disagrees with the current Hungarian political system,⁸ or sympathizes with the direction of government policy, possibly with a different ideology), violent (terrorist motivated perpetrator), but can be motivated by some personal reason. also (e.g. revenge,

⁸ Or even the opposite: the perpetrator may also think he favors the existing political system or the government in power by disclosing a particular classified information.

ambition, etc.), eventually there may be cases where the motif is completely missing. The latter is a typical case of negligent misconduct.

The subject of the crime may be a legal or criminal object. A legal object is a social relationship that the legislature seeks to protect that is offended or threatened by the offender's conduct. The object of an offense is always a specific thing of physical existence on which the crime is committed. Because of this, not all crimes are the subject of a crime. Without a legal object, there is no danger to society, and without a danger to society, there can not be a crime, so the existence of a legal object is an essential condition for the realization of a crime, due to its connection with society. If an conduct is so dangerous to society⁹ that the sanctions provided by other jurisdictions do not appear to be sufficient, the legislature responds by creating a crime for it in the Penal Code. József Földvári put it this way in his textbook, which has now become a classic: "The legislature assesses the danger of an act to society when deciding whether or not to criminalize certain conduct. In the same way, danger to the objective society guides the legislature in deciding whether or not to discontinue the criminal assessment of certain behaviors. Danger to the objective society also plays a role in determining the sanction for each crime: the more dangerous a crime is to society, the more severe the penalty is allowed by the legislature."¹⁰ Béla Blaskó carries on the same way: "For the legislator, the recognition of the danger of types of acts to abstract society serves as a guideline for declaring a crime as a crime. We can say that the danger of a type of behavior to an abstract society is the reason for declaring it a crime. A particular type of behavior can be dangerous to society even if it is not recognized by the legislator. Danger to society does not depend on the will of the legislator, objective category " ¹¹ As with all criminal offenses, the misuse of classified data attacks the legal order as a general object, and out of the five special objects, it violates or endangers the state order of Hungary according to the Basic Law. Its unique legal object is the uninterrupted operation of the Hungary, the interest in the secrecy of classified data, which is important for the security of the state, ie ensuring the smooth operation of the Hungary and its bodies free from unauthorized external influences. József Földvári rightly points out that while espionage is an attack on the existence of the state, the misuse of classified data (the violation of state secrecy in the age of putting the author's thoughts on paper) should be assessed as

⁹ "Danger to society is perhaps the most controversial element of the concept of a crime in the Penal Code." (Kóhalmi László: A társadalomra veszélyesség fogalma a büntető anyagi kódexekben Büntetőjogi Szemle 2012/2. p. 15)

¹⁰ Földvári József: Magyar büntetőjog Általános rész Osiris Kiadó Budapest, 2002. p. 81

¹¹ Blaskó Béla: Magyar büntetőjog Általános rész Rejtjel Kiadó, Budapest-Debrecen, 2017. p. 145

an act that interferes with the functioning of state bodies and institutions.¹² It is important to emphasize that the connection between the misuse of classified data and crimes against the state is also indicated by its place in the law, as Act C of 2012 regulates the crime providing the highest level of legal protection of Hungary secrets immediately after Chapter XXIV on crimes against the state. Its legal subject matter is therefore not the same as its crimes against the state, but it has similar features.

Nowadays, however, our concept of classified data, which is already very precisely delineated, interwoven with guarantee elements and surrounded by the strict requirements of the rule of law, also allows us to break down the legal subject into elements on the basis of the damage-based classification system. In our opinion, the legal object of the crime can be further grouped on the basis of the types of public interests that can be protected by classification, which according to Mavtv are protected by the Hungary by classifying data protected at each classification level. the possibility of an adverse change (depending on this, it is appropriate to use one of the four rating levels). Hungary is a public interest that can be protected by certification¹³

- a) sovereignty, territorial integrity,
- b) its constitutional order,
- c) defense, national security, law enforcement and crime prevention activities,
- d) judicial, central financial, economic activities,
- e) foreign or international relations,
- f) to ensure the smooth operation of its public body free from unauthorized external influences.

¹² Földvári József: Büntetőjog Különös rész Tankönyvkiadó, Budapest, 1978. p. 143

¹³ Mavtv. 5. § (1)

Ad a) Sovereignty¹⁴ and territorial integrity¹⁵ include two of the three components of the concept of state (territory, population, sovereignty), i.e. the existence of the state depends directly on the integrity of these values.

Ad b) The constitutional order means the regular, undisturbed functioning of the values and social relations according to the constitutional law.

Ad c) The defense, national security, law enforcement and crime prevention activities of the Hungary include the most important activities of a defense nature from the point of view of state security.

Ad d) Judicial, central financial, economic activity, in particular the regular operation of the judiciary as an independent branch of power, free from disturbances and external interference, the smooth functioning and independence of monetary policy and the functioning of economic policy free from external interference.

Ad e) In the interests of the inviolability of external sovereignty and the external security of the state, our foreign and international relations are in the public interest underlying classified information about the secrets of our foreign policy and intelligence abroad.

Ad f) “Ensuring the smooth operation of a public body free from unauthorized external influence” as a public interest that can be protected by classification means, at the end of the list, practically a “other” category which may include any public interest other than those listed in the previous five points. and deserves protection.

According to some authors, misuse of classified information has no object. According to other authors, such as Paul Sinku, the subject of the crime is national and foreign classified data. ¹⁶ In our view, the question of the existence of the object of the offense

¹⁴ Two types of sovereignty can be distinguished in the literature: external and internal. External sovereignty (state sovereignty) is when a state has its own independent statehood and the exercise of state power takes place without any external influence or control. Internal sovereignty means who in the state decision-making mechanism is the sovereign, that is, who was the main power, and who is the ultimate custodian of power. The internal sovereignty of the state is universal, as its power extends to both its territory and its population. (Halász István: Alkotmányjog Dialóg Campus Kiadó, Budapest, 2018. pp. 54-55)

¹⁵ The territory of the state includes the territorial framework for the exercise of state power, between the planes defined by the state border, the airspace above the territory and the depth below it.

¹⁶ Belovics Ervin – Molnár Gábor Miklós – Sinku Pál: Büntetőjog II. Különös rész hvgorac Kiadó, Budapest, 2015. p. 400

must be based on the concept of the object of the offense itself.¹⁷ The object of the offense, according to the literature, is “the physical object, the spatial and temporal thing that is directly harmed or endangered by the perpetrator”. According to this definition, misuse of classified information has an offense in some cases but no in some cases. As technical conditions evolve, as more and more classified information exists in electronic form, it is less and less likely that a crime will be committed for a specific object of offense, a thing of physical existence.¹⁸

It should be noted that the Hungarian Criminal Code. extends the legal subject matter of the offense for 30 days to data for which the classification has been initiated but the classified data has not yet been created (if this medium also appears in the form of a physical object such as a sheet of paper, we can at least potentially speak of an offense.) However, the offender must be aware of this fact. That is, you need to be exactly aware of that the classification of that data has already been initiated, and the qualification process is still ongoing, and more than thirty days have not elapsed since the data was initiated.

An error in any of the above circumstances precludes intent and, in our view, it is only possible to establish negligence. However, if the perpetrator is not aware that the classification of the data was initiated by anyone at all, then, in my view, a negligent offense cannot be established either. Any other interpretation of the law could lead to serious injustices in practice.

There are four possible offenses against the misuse of classified information.

The first is unauthorized acquisition: in this case, the law therefore criminalizes illegal acquisition, it can only be realized through active behavior, so it cannot be committed by omission. If someone accidentally came into possession of the secret (e.g., “someone threw it into their mailbox,” this is typically what the perpetrators successfully defend themselves with, or someone accidentally hears classified information during a conversation) is not punishable. Acquisition is always an intentional act, an act specifically and specifically aimed at obtaining classified information (in the old term:

¹⁷ Kádár Miklós – Kálmán György: A büntetőjog általános tanai Közgazdasági és Jogi Könyvkiadó, Budapest, 1966. p. 260

¹⁸ However, this will undoubtedly be achieved if a page containing classified information is unlawfully stolen by the perpetrator, for example by not grinding the document in the destruction report in accordance with the regulations at a Hungarian embassy, but handing it over to a foreign acquaintance. That is, in some cases, the crime may still be the subject of a crime today.

'intrusion into the secret'). Acquisition is, in practice, the theft, copying, photographing, etc. of a document or other medium containing classified information. Unauthorized acquisition of classified information may otherwise be effected by any of the senses. We agree with the position of József Földvári, according to whom this secret crime can be realized by obtaining certain data through sight or hearing, and by engraving them in memory.¹⁹

The second offense is unauthorized use. This means that the offender uses classified information that has been lawfully or accidentally in his possession without permission or for a purpose other than its intended purpose, for his own or another benefit, for personal, business or other illegal purposes.²⁰

The third offense is making it available to an unauthorized person. In this case, either through active or passive behavior (i.e. omission), the classified information becomes available to an unauthorized person. A person who does not have the authority to get acquainted with the classified data in accordance with the Mavtv is considered unauthorized. Based on. Disclosure is disclosure, but it is also communication to only one person. It is not necessary for the unauthorized person to actually have possession of the classified data, so in a criminal sense, it is not a result, only a threat is realized, but it is important to examine the unauthorized person's abilities (for example, the person does not commit the offense).

A fourth and final offense is to make classified information inaccessible to a competent person. This is one of the classified data protection principles in breach of the principle of availability. In this case, the right of at least one specific, individually identifiable person with a valid right to use the classified information to dispose of the classified information shall be permanently or temporarily terminated. That is, the authorized person will not have access to the classified information for at least a specified period of time in connection with the active or passive conduct of the offender. This offending conduct therefore presupposes that the offender is in possession of the classified information and, at the same time, excludes at least one authorized person from accessing it. In practice, this is typically accomplished by the perpetrator either destroying or hiding

¹⁹ Földvári József: Büntetőjog Különös rész Tankönyvkiadó, Budapest, 1978. p. 147

²⁰ Belovics Ervin – Molnár Gábor Miklós – Sinku Pál: Büntetőjog II. Különös rész HVGORAC Kiadó, Budapest, 2015. p. 402

the media containing the classified information or deleting the classified data from an electronic database.

The subject of a crime can be anyone who meets the general requirement of becoming a subject: that is, he or she has reached the age of fourteen and has the ability to set off. However, there is also a special subject in the facts: misuse of classified information is more serious if the perpetrator has a special characteristic. This special feature can be established if the offender is a person legally entitled to use the classified information.

The general case is if the person has:

- with a valid personal security clearance corresponding to the classification level of the data used (subject to a valid, non-risky national security check),

a statement of confidentiality, and

- with user permission.

However, the above conditions are not always necessary to speak of a special subject. If, for example, classified information is also someone's personal data and access to it is permitted, then the data subject is Mavtv. is entitled to access his nationally classified personal data on the basis of an acquaintance permit issued by the certifier, but also without a personal security certificate. In such cases, however, the data subject shall make a written declaration of confidentiality before accessing the national classified information and fully comply with the rules on the protection of national classified information during the access and thereafter. However, some users do not need to have any of them. The Mavtv. Pursuant to Section 13 (3) for the performance of a state or public task

- a) the President of the Republic,
- b) the Prime Minister,
- c) members of the Constitutional Court,
- d) the Speaker of the National Assembly,
- e) the President of the Curia, the President of the National Courts Office,
- f) the Attorney General,
- g) the Commissioner for Fundamental Rights,

- h) the President of the National Data Protection and Freedom of Information Authority,
- i) the President of the State Audit Office

Without national security clearance, personal security clearance and a declaration of confidentiality and user authorization, they shall have the right to inspect and exercise the rights of disposal of classified information falling within their mission and competence.

The members of this group of persons therefore commit the more serious form as perpetrators if they misuse classified information, ie they also qualify as a special subject. However, it is very important that, taking into account the principle of *in dubio pro reo*, the person legally entitled to use the classified information can only be the person who is entitled to use the classified information to which the user's authorization applies or who would otherwise have access. or could use. In our view, therefore, the fact that someone qualifies as a special subject in a given category, ie for certain classified information, will not become a special subject for all national and foreign classified information.

The offense can only be committed intentionally in relation to the general subject, the perpetrator's consciousness must embrace that he is committing the offense against classified information (he must not know the exact definition of classified information, he must merely understand his awareness that it is sensitive data), and also desires or settles for his own conduct and the possible consequences of his action. We agree with Pál Sinku: since acquisition is a specifically purposeful activity, it can only be done with direct intent.²¹

With regard to the misuse of classified information committed by a special subject, the legislator has set stricter requirements, they can be punished in case of intentional and negligent offense. The reason for this provision of the Act is that persons authorized by law to use classified data must exercise a much higher degree of care in the course of their work when working with such data. They also have a much better understanding of what classified information means, what classification levels there are, and what harm can result from the misuse of classified information. Regarding the verifiability of negligence, we quote Paul the Angel again, as his position may still be relevant today: unauthorized.

²¹ Belovics Ervin – Molnár Gábor Miklós – Sinku Pál: Büntetőjog II. Különös rész hvgorac Kiadó, Budapest, 2015. p. 402

Furthermore, in the event of negligence on the part of the knower or holder of the secret which renders the secret accessible to an unauthorized person.’²²

The offense ends with the certification of the offending conduct, i.e., at the time of unauthorized acquisition, use, and unauthorized access to and inaccessibility to a competent person. An attempt must be made, in my view, if the perpetrator commits a factual offense, that is to say, deliberately engages in conduct with the aim of committing one of the offenses. For example, you take possession of a medium that may contain classified information and at least settle for it (possible intent). The preparation of a criminal offense is punishable only in the case of classified and top-secret data. Preparations should be established, for example, if the offender agrees with someone to purchase such classified information. However, great care must be taken to consider whether, in such a case, other, even more serious, offenses, such as espionage, may be committed instead of (in an apparent set) or in addition to (in an actual set). However, this already takes us to the next issue, the problem of unity and set.

3. Conclusion

By 2020, we are already living in the age of the information society, and our world today is highly dependent on the proper functioning of the various information systems, and the existence and smooth functioning of individual states depends on the amount and, above all, the quality of information. Heads of state, policy makers, can only make effective and sensible decisions if they are well-informed, rely on credible and reliable information to assess their situation, know the relevant circumstances influencing their decisions, the aspirations of others and predict the consequences of their planned actions.²³ So information has become invaluable these days: it has also become one of the critical elements of public governance systems.²⁴ And one of the most valuable parts of these systems is classified data, that is, state secrets. Nowadays, not only has the weight of the importance of this data increased significantly, but the number of attacks against it has also increased exponentially and is on an ever-increasing trend.²⁵ The cross-border information economy has now become an indispensable part of modern politics, and the

²² Angyal Pál – Isaák Gyula: A Kihágási Büntető Törvénykönyv, Budapest, 1941. p. 631

²³ Izsa Jenő: Nemzetbiztonsági alapismeretek (A titkosszolgálatok működése) ZMNE Budapest, 2009. p. 24

²⁴ Sobczyński, Tomasz – Listewnik, Karol: The principles of classified information security management system organisation within the realisation of European Defence Agency research projects (=Zeszyty Naukowe Akademii Marynarki Wojennej Scientific Journal of Polish Naval Academy 2015. 3. pp. 63-64)

²⁵ Jobbágy Szabolcs – Sándor Miklós: A minősített adatok védelmének jogi szabályozása (Hirvillám 2010. No 1, p. 190)

dynamics triggered by cross-border information processes have redefined security in a radical, sometimes awkward way.²⁶ This is another reason to consider the possibilities and limitations of criminal protection.

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²⁶ Farrell, Henry – Newman, Abraham L.: Magánszféra és hatalom Pallas Athéné Könyvkiadó, Budapest, 2020. pp. 211-212

Dragan Stanar*

THE RIGHT TO DIE WITH DIGNITY: SOLDIERS IN POST-MODERN WARFARE

This paper aims to explain how the development of modern technology, especially long-range and autonomous weapons may violate human dignity, in particular the right to die with dignity. Dehumanization, a necessary part of killing via post-modern military technology, implies reduction of human beings to lesser entities (inanimate objects, animals, etc.) and thus negation of their inherent human dignity, which elevates them above all other entities. Being the basis for human rights, human dignity must not be protected at all costs, especially in morally challenging times such as in war. Soldiers, the greatest and most tragic victims of wars, must be at least granted with the right to die with dignity, by the same civilization they fight for to protect. Therefore, the author asserts that an explicit moral condemnation, and perhaps legal prohibition, of dehumanizing weapons must be implemented in order to secure the soldier's right to die with dignity.

Keywords: *dignity, dehumanization, war, death, technology.*

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1. Introduction

If we are to believe Pinker (2018), and he does make a very strong case, we are currently living in the best of all worlds. Just to make it clear, we are not talking about the Leibnizian idea of the best of all possible worlds, in which God, as an omnibenevolent being solves the problem of evil. Rather, we are referring to Pinker's views on the current state of humanity and civilization, in comparison to all "worlds" of previous generations. In a nutshell, the picture drawn by the renowned Harvard professor is a picture of an upward trajectory of general progress of human kind, in which every new generation is being introduced in a world slightly better than the world that welcomed their ancestors. Indeed, we have travelled a long way since the first glimpses of civilization and the first hints of organized society. Human curiosity, ingenuity and perseverance enabled us to develop such amazing technology, to make leaps and bounds in communication and the use of machines, to tame nature and all other creatures on our planet. Moreover, it enabled us even to leave our own home and explore outer space and the universe. The aforementioned Pinker's case resides on powerful methodology and serious scientific approach, in which many aspects of human life and existence are measured and compared, but also taking into account our inherent inclinations towards subjective pessimism and warped perspective of objective reality which causes "progressophobia" (Pinker, 2018: 39). Regardless of how we feel about our world, the facts are pretty much conclusive – our generation enjoys an unparalleled level of life quality, in virtually all aspects of human existence – health, sustenance, wealth, peace, inequality, etc. Our claim is that the single most important factor in the objective overwhelming improvement of human life quality is not of a material nature – it is not communication technology nor robotic automatizations. What makes our lives so incomparably better than those of our fellow humans who lived in the past is the development and recognition of fundamental human rights, applicable to all human beings.

The respect of basic human rights, which we surely take for granted today, is the necessary precondition of all human progress and all improvement of life quality. These rights were not "invented" in the Age of Enlightenment, just like gravity wasn't "invented" by Sir Isaac Newton. To invent something implies that it did not previously exist, that it was pulled into existence by someone. Basic human rights were always "here", and all human beings were always entitled with these rights. What happened in the Enlightenment was that humanity reached a stage in its development in which basic human rights were finally explicitly formulated and established as a necessary normative condition of civilization, as natural rights became "the secular religion" (Kambovski, 2018: 34) It is of the outmost importance to underline the normative nature of these rights

– rights are prescriptive rather than descriptive. Humanity has travelled a long way since, and today we can speak of defined, though still prescriptive, inviolable human rights, which make up the foundation of modern civilization. Today we have entire global and supranational institutions and organizations which focus solely on development and protection of human rights. Human rights are at the core of all political and social discourse both in domestic and foreign policy. The entire narrative of international politics basically rests upon pillars of human rights implementations and protection. It is truly remarkable to witness and live in such a humancentric period in history, in which all things are, at least manifestly, weighted against human rights and their normative inviolability. One particular aspect of the entire phenomenon of human rights and is extremely important to understand properly, even today in the developed world governed by human rights – the right to human dignity.

2. The Right to Human Dignity

Not many things in the entire discourse of human rights are so difficult to define, to the extent that they become controversial. What exactly is human dignity and how it differs from other, not so controversial, basic human rights? The very notion of dignity is derived from the Latin term *dignitas*, meaning nobility or worthiness. But the content of the notion of human dignity is often discussed, and there is a clear “lack of clarity about what human dignity actually is” (Sharkey, 2019: 80); moreover, there is even a lack of basic convergence of thought on whether it can even be defined. There are authors who consider it to be no more than a “deceptive *façade*... an empty space open to exploitation” (Ulgen, 2016:3), a „heavily contested multifaceted and ambiguous concept” (Werner, 2014: 343), etc. Perhaps the main reason behind such criticism is the misconception that dignity ought to be observed and perceived just as another human right. But dignity is not just a human right, “it is different from human rights in a much more fundamental sense” (Duwell, 2014: 29), as it represents an overarching principle from which all human rights actually derive¹. It is the basis of human rights, a fundamental principle which differentiates humans from other living beings, and other forms of intelligence. And *vice versa*, “the justification for human rights is that they are meant to protect human dignity” (Margalit, 1996: 24). Human dignity is inherent and intrinsic to all human beings, regardless of their race, age, culture, life choices, etc. It is both “*universal* in the sense that it applies to all human beings... [and] *egalitarian* insofar as each human being is equal with regard to his dignity” (Duwell, 2014: 27), and therefore it is inseparable from human existence. In

¹ Some authors claim that “only a minimum of each right is covered by human dignity” (Sharkey, 2019: 82).

accordance with its pivotal place in the entire context of human rights, it comes as no surprise that human dignity is a “pervasive idea in international human right law and many constitutions... the very *raison d’être* of international humanitarian law and human rights law...” (Ulgen, 2016: 3). *Universal Declaration of Human Rights* even states, in its *Preamble*, that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Having in mind the described utmost importance of human dignity, we must explore its limits and boundaries, in the sense of its relevance after human life has ended.

2.1. Dignity Lost and Dignity Denied

If human dignity is defined as an inherent, intrinsic and inviolable characteristic of every human being, why are mainstream discussions and arguments about dignity oriented towards its protection and preservation? Can dignity be lost, or can someone be denied of dignity in practice? It has been much debated, even by the most prominent sages who wrote and spoke of dignity, whether one can lose his dignity by committing inhuman acts or by behaving deeply immorally or criminally. One of the most significant thinkers in the history of human civilization, Immanuel Kant, presented a notion of human dignity that is “inclusive and does not admit distinctions or exclusions on the basis of wrongdoing” (Ulgen, 2016: 4) meaning that every human being remains “worthy of dignity” regardless of his actions or deeds. It is precisely Kant’s notion of dignity, as an integral part of his pivotal concept of categorical imperative, that best explains the special status of human dignity. Kant writes that all things in his famous kingdom of ends have either value or dignity. And while all those things that have value can be replaced by something of an equivalent value, a human being is “above all value, and therefore admits of no equivalent, has a dignity” (Kant, 2008: 82). For the giant German philosopher, dignity is what differentiates us from the rest of nature, what makes us worthy of having all other rights, and what basically cannot be taken from us, simply because it cannot be replaced by anything else. Having in mind all that has been said about the nature of human dignity, it can be asserted that the answer to the question how can dignity be denied and taken from a human being lies in Kant’s categorical imperative. The only way to deny one’s dignity is to perceive and treat him as a non-human through “instrumentalization of human beings, to treat them (people D.S) as mere objects” (Duwell, 2014: 24). In Kantian terms, to treat someone as an object² is to treat him only as a means, not as an end in itself – completely opposed to the categorical imperative and Kant’s formula of humanity.

² Not just as an object, but also as an animal, as anything that is sub-human.

Objectivization, and thus indignation of humans, is therefore possible only via dehumanization. Simply put, if one cannot take dignity from a human being, one can instead make the being “less human” by reducing it to an object, animal, number, pixel, etc. Any form of dehumanization is “against the dignity of humanity as a species” (Birnbacher, 2016: 109), because human beings are elevated by their reason and autonomy of will above all other entities in nature.

2.2. Dignity and Dehumanization

Much has been said and written about the evident upwards trend of dehumanization in modern society, which increasingly relies on machines, technology and minimal human interaction. When human beings are reduced to numbers and statistics of consumers and labour force, it seems difficult to acknowledge human dignity. In the said Kantian context of dignity, modern man witnesses constant attempts to replace human dignity with something of “equivalent” value, mostly money and material wealth. In such attempts, people are humiliated, and thus dehumanized, reduced to a sub-human level of existence, in exchange for money. Critics of capitalism as an economic system often assert that humiliation of human beings, compensated with salaries or social welfare checks, is the core of capitalism, and that it is inseparable from this system. Arguably, any form of humiliation, especially social humiliation can basically be seen as dehumanization, as humiliation is precisely reduction of the object to an undignified being, i.e. less-than-human. As Margalit (1996: 12) writes, “protection of human persons from humiliation is the core concept of human dignity”, and thus the right to human dignity implies the “moral right not to be demeaned” (Balzer, Rippe, Schaber according to Birnbacher 2016: 116), humiliated, and dehumanized.

Although the question of humiliation and dehumanization of human beings in modern day developed high-tech capitalism is of extreme importance and interest, this paper aims to investigate the possibility of infringement of the *post-vitae* right to human dignity, i.e. the right to die with dignity. More precisely, the paper explores how dehumanization affects the soldier’s right to die with dignity in post-modern war and armed conflict.

3. Dignity in Death

Concepts of life and death are not without profound interaction, despite being mutually exclusive and simply opposite, to the extent that one is defined by the other. Death is necessarily defined as absence of life, while life represents the period of existence before death, or as the ancient Stoics wisely coined it “where we are there is no death, where

death is there is no us". The notion that the concept of human dignity extends beyond life, to include both the process of dying and death, is neither new nor undeveloped. The idea that one ought to die with dignity has been elaborated extensively, perhaps even excessively in contemporary thought, as "a succession of writers has lamented that a society which has the highest standard of living should also have the lowest standard of dying" (Dunea, 1976: 824). Today, we have at our disposal "an immense amount of literature on this topic, often just fashionable scholastic regurgitation" (Бабић, 2018a: 149), with little left to be said. In this tedious repetition of axiomatic assertions regarding death with dignity, this phrase "found its way into circulation without having much sense behind it" (Coope, 1997: 37), as many seem to think that "death itself is by definition undignified" (Allmark, 2002: 255). Unlike mainstream topics³ in the discussion regarding dignity in death which are focused on determining whether life can become deprived of dignity before death, following Seneca's thought that "wise men live as long as they should, not as long as they can", we are more interested in an exception to death, "where death is deliberately brought about" (Coope, 1997: 37). When death is "delivered" by intentional killing, it requires a completely different approach and logic of both death and dignity. And there is no field more fruitful for exploration of intentional killing and death and its relation with dignity than war, as "in times of war, in this world of violence, the dignity of human life is ignored" (Cassidy, 1994: 45).

3.1. Death, War, and Dignity

Perhaps the main characteristic separating war from peace is the drastic presence of killing and deliberate death. Albeit the risk of death is also present in peace⁴, it is incomparably higher in war. Moreover, along with the risk of being killed in war, human beings who find themselves in roles of combatants also accept the risk of deliberately killing someone⁵, whom they probably don't know or have any personal issue with. War represents a state in which "normality", articulated through laws, customs and other social norms, is temporarily suspended. Such a drastically different state demands different norms and rules, as it is in its own nature substantially different from "normality". In accordance with different natures of war and peace, "in a war zone, the interpretation of dignity is likely to be quite different" (Sharkey, 2019: 81). However, this assertion does not necessarily imply that the right to human dignity is absent in war - it is just manifested

³ Authors focus mostly on problems of suicide, assisted suicide, involuntary euthanasia, abortion, etc. See more in (Đurković, 2018).

⁴ Many activities in peace entail certain risk of dying – driving a car, fixing electrical issues, working on a construction site, etc.

⁵ This risk is virtually non-existent in peace, for the overwhelming majority of citizens.

differently, especially in regards to the soldier's right to die with dignity. After all, it is precisely human dignity that is at the core of International Humanitarian Law, as aims to "attain and maintain respect for the dignity of human life in the disarray of war" (Chavannes, Arkhipov-Goyal, 2019: 36).

Combatants in war lose their right not to be attacked and killed, not because they are guilty of something, but rather because they pose a threat to the enemy. In the logic of war, by attempting to intentionally kill his enemy a combatant relinquishes his right to live. In this context, "the right to a dignified death, to an extent to which it is possible, is a part of the right to live" (Бабић, 2018a: 151). But combatants are still human, and as human beings they cannot be denied of their rights to dignity, both the right to be treated with dignity in life and the right to die with dignity. Perhaps it may strike some as idealistic or even foolish, but we argue that even the tragic mass killing in war, which has been omnipresent in every single armed conflict in human history, must not be done without respect for human dignity and the right of soldiers to die with dignity. It is even more important in war than in peace, to respect one's right to die with dignity, as combatants on all sides are primarily innocent⁶ victims, who are thrown into a reality they cannot escape, and whose lives are taken for granted and sacrificed in great numbers. Fighting in war is not morally wrong, but war is a moral evil. Therefore, "human dignity requires the abrogation of war" (Hasenclever, 2014: 439).

3.2. Post-modern Wars and Dehumanization

It has become clear in the past century that soldiers were extremely inefficient in wars. Research published after World War II, Korean War and Vietnam came as a surprise to everyone, as they showed that human beings have an innate inhibition against intentionally killing members of their own species. Even though this noble characteristic of ours is extremely praiseworthy and valuable in peace, it represents a serious obstacle in war, in which one must be ready to kill when ordered. After this "problem" of human nature was "addressed"⁷ by entire military machineries in all developed societies, modern armies became extremely efficient in killing, but at a very high cost. In order to maximize

⁶ Innocence here is used in the context of peace, meaning that they are not guilty for the war or their situation. Innocence in war means something completely different. Namely, to be innocent in war means to be non-threatening, not non-guilty. In that sense, combatants are not innocent, as they are effectively threatening to their enemies (McMahan, 2009: 7-15). The very human right to innocence is explored to some length by Stevanović and Grozdić (2019: 85-93).

⁷ Entire doctrines of training and warfare were seriously impacted by the said research, and it resulted in a major overhaul in approach to war. Human nature was successfully bypassed by conditioning, deindividuation, dehumanization, etc. (Stanar, 2020).

the rate of killing, we had to do everything to dehumanize our enemies. Dehumanization is simply reduction of human beings to lesser entities, and as such it directly challenges human dignity. As Livingstone Smith (2011: 8) writes, dehumanization enables soldiers to more easily kill “beings that lack that special something that makes us human”; that special something is precisely human dignity. As we previously stated, all dehumanization is indignation, and the significance of its implications are exponentially more important in war.

Post-modern times we live in are times of post-modern, new wars. Contemporary warfare is incomparable with all the epic wars of mankind’s history, both in its form and nature. Natural “transformation of war”⁸ in the past century was primarily propelled by leaps and bounds made by technology and science, which always find their first application in the so called “defense industry”. From the perspective of our inquiry into dehumanization and the violation of human right to die with dignity, technology of war has produced two main issues in post-modern wars – ability to kill from extremely long distances, thus eliminating risk involved in killing virtually completely for one side and “extracting” one side completely from the theatre of battle; ability to “delegate” the entire process of killing to military machines, robots and “electronic intelligence”. In both cases, it seems as though no thought was given to the significance of human dignity of soldiers and other combatants in war, i.e. is riskless and human-less killing in war compatible with the right to die (be killed) with dignity.

3.2.1. Riskless Long-Range Killing

There isn’t anything inherently wrong with killing from distance (in comparison to killing at an arm’s length). Besides, this effort to expand the space between us and our “prey” has been a hallmark of the entire history of military technology, “from the invention of the sling and crossbow until today, our goal was to create a weapon that allows us to kill our enemy from distance” (Stanar, 2021: 7). But in our pursuit of distant, and thus safe, killing, we have recently crossed an imaginary line at which risk is no longer just lessened and diminished, it is completely eliminated for one side. Today, developed armies of the world possess ballistic missiles that can be launched thousands of kilometres from their targets, armed unmanned drones which are operated by a new generation of soldiers who sit in comfortable air-conditioned rooms deep inside their own territory, completely isolated from the battlefield, etc. This elimination of risk creates a

⁸ War has been changing and evolving along with the rest of civilization since the dawn of time. From both strategic and technical standpoint, contemporary wars look nothing like wars fought centuries ago. See more in (van Kreveld, 2010).

unique disparity and asymmetry of not only risk, but also of dignity, as one side keeps its “human status”, while its enemies are treated as “cockroaches on the receiving side of pest control” (Steinhoff, 2013: 207).

What morally permits a combatant to kill his enemy in war is the fact that they are mutually threatening each other – they both have the same right to kill, they both have risk involved in their actions, and thus their lives are normatively valued equally. But to eliminate risk completely for one combatant, and still allow him to kill his enemy is to create a type of a hierarchy of human value, in which one life is more valuable than the other, and thus it is exempt from risk of combat. Accordingly, this also creates a hierarchy of human dignity, as the two are basically unequal and “certain humans are deemed more valuable and priceless than others” (Ulgen, 2016: 6). When combatants are extracted completely from the battlefield, their enemies are no longer “as-human” as themselves. They are dehumanized and reduced to pixels on the screen, figures in post-op reports, etc. The people they kill are completely abstract notions of “targets” and “objectives” that are not killed but rather “neutralized”, “eliminated”⁹, etc. This represents an obvious example of treating other people as objects, or in Kantian terms, as pure means not as ends with inherent value. Thus, to be killed in such a way, as a helpless and unaware object, an animal¹⁰, a pixel on the screen, is to be denied equal value and basic human dignity. If we live in the proverbial kingdom of ends, no man deserves to be killed in such a way, even in war.

3.2.2. Autonomous Weapons Systems

The only logical step after full elimination of risk from killing in war via distance was complete elimination of human combatants from the very process of killing. Taking man entirely “out of the loop of decision making” (Wagner, 2011: 155-165) represents the final step in the process of objectivization and dehumanization of belligerent soldiers, as the entire killing process is delegated to machines. In his *Report* to the General Assembly of the United Nations, Special rapporteur on extrajudicial, summary or arbitrary executions, Cristof Heyns (2013: 17) concludes that the “decision to use lethal force... cannot be delegated to an automated process” because “delegation of this process dehumanizes armed conflict even further”. Obviously, there are evident implications of

⁹ Euphemization in long range killing plays a major role in dehumanization, “therefore, in an effort to objectivize human enemies, military discourse is full of term with neutral moral connotations” (Stanar, 2020: 13).

¹⁰ Killing by Unmanned Aerial Vehicles (UAVs), or armed drones has more in common with “with hunting with modern technology than with war”, and even the infamous Reaper drones are referred to as “hunter-killer systems” (Stanar, 2021: 13).

such delegation of decision making on human dignity and the soldier's right to die with dignity as "human dignity is undermined if machines effectively have the last say in who lives or dies – be it on purpose or by accident" (Chavannes, Arkhipov-Goyal, 2019: 45).

Just to be clear, autonomous weapons do not require any decision making whatsoever to be performed by a human operator - they are fully capable of making "detection and targeting as well as the firing decision, wholly independent from human intervention" (Wagner, 2011: 160), meaning that they become sole "rulers" of human destiny on the battlefield. All dignity in death is stripped from humans in such a scenario, because robot killers "devalue humanity by treating humans as disposable inanimate objects rather than ends with intrinsic value... no value is placed on the life taken" (Ulgen, 2016:10). Therefore, Heyns (2014: 22) explicitly stated in his next *Report* to the UN in 2014 that the use of autonomous weapons has "far-reaching potential implications for human rights, notably the right to life and human dignity", while we would add also the right to die with dignity. Human Rights Watch *Report* from the same year supports Heyns's view stating that "fully autonomous weapons could undermine the principle of dignity" (HRW, 2014). Many an author strongly believe that human dignity, the foundational concept behind all human rights, would be seriously jeopardized by killer robots in post-modern warfare.

Besides the obvious issue of responsibility and accountability involved in the use of autonomous weapons¹¹, it seems as though being killed by a machine, "a lesser entity would be against the conception of human dignity" (Sharkey, 2019: 80). From a Kantian perspective, human autonomy of will and reason elevate human beings above all other entities in nature, and to be deliberately killed by such a lesser entity would undermine the right to die with dignity. Moreover, killing human beings using killer robots or autonomous weapons could be "a modern-day example of Kant's 'disgraceful punishment' amounting to 'outrages upon personal dignity'" (Ulgen, 2016: 9). Such outrages upon personal dignity are explicitly banned by Article 3, Provision 1 (c) of the Geneva Conventions, which prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment"¹². There aren't many things in war more degrading

¹¹ A robot or a machine cannot be held responsible for its actions, including killing of human beings. Who can we then hold responsible for intentional killing of human beings when it is performed by autonomous machine, with no human involvement in the process of decision making – programmers, commanders, engineers?

¹² This article refers even to the bodies of those who were killed, which must not be desecrated or mistreated, out of respect precisely for the dignity of the dead.

for a soldier than being executed by a lifeless, emotionless, and reasonless peace of metal, regardless of how technologically complex it may be.

4. Conclusion

Undoubtably, war is one of the most devastating and abhorrent phenomena in human existence, and it has been the proverbial dark horseman of the apocalypse since the dawn of human civilization. Even though not a single element of society is spared from the horrors of war, the greatest victims of this moral cataclysm are precisely soldiers, i.e. those men and women who actually fight in wars. Perhaps it seems counterintuitive at first glance, but soldiers are human beings who are inculpable for wars but still forced to kill and be killed in them; they are people who are both forced into waiving their right not to be attacked and into killing other equally inculpable people; they are individuals of whom society demands not only to risk their lives, but also their souls and salvation. Despite the uniquely tragic position of soldiers in war, their lives are taken for granted by the same societies for which they lay their lives down. We argue that the very minimum that soldiers deserve for their unparalleled sacrifice is to be guaranteed a dignified death, or at least death without indignity. They have the right to die with dignity.

In post-modern wars, this is of particular importance, as armies around the world work day and night to find new ways of dehumanization of their enemies, which necessarily leads to infractions of human dignity. Outstanding development of military technology in past decades enabled armies to push the boundaries of what *can* be done in war, but without ever thinking about what *should* be done in war. Implementation of technology and natural sciences have surpassed that of social sciences and humanities, which by their nature serve to “tell us what is actually good and morally justified in the realm of what is naturally and socially possible” (Бабић, 2018б: 59). High-end military technology enables us to kill people at long range, so long that they are deprived of their humanity and dignity as they are reduced to pixels and abstract figures. Moreover, it even allows us to completely extract ourselves from the process of killing, by letting autonomous weapons to kill our enemies. Naturally, we should never fall in the perilous trap of “idealization of human warfare” (Birnbacher, 2016: 121), but post-modern high-tech warfare creates such an asymmetry¹³, that it directly endangers basic human dignity, especially the right to die with dignity.

¹³ Physical, military, legal, moral, even ontological asymmetry between belligerent sides.

Not all is fair in love in war, as centuries of just war tradition and laws prove. Currently, we have few straws to grasp at, in our pursuit to morally and legally limit such manners of war which are clearly outrages upon personal dignity. Often, authors rely on the *Martens Clause* which prevents “the assumption that anything not explicitly prohibited is permitted” (Chavannes, Arkhipov-Goyal, 2019: 43, and is perceived as “an effective means of addressing rapid evolution of military technology” (Ulgen, 2016:3). But, when faced with weapons that dehumanize human beings to such an extent that they are completely stripped of any sort of human dignity, we can’t wonder but ask our selves is this really enough? When the very basis of human rights - inherent human dignity, an attribute of humanity that is almost a *differentia specifica* of our species, is so profoundly violated, that human beings are denied of their right to die with dignity, then a much more explicit condemnation is direly needed. Perhaps even deeming the use weapons which kill in such an undignified way as *mala in se* crimes of war?

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Sladana Jovanović*

| THE RIGHT TO DIE WITH DIGNITY IN SERBIA

The author poses the questions: Who is entitled to the right to life: an individual or, society/state has some share in it, especially considering the right to choose when and how to die? Do terminally ill patients have an obligation to live in pain and suffering, losing self-esteem, and dignity? They need to commit suicide, or there should be more appropriate way to die with dignity (especially, when they are not capable to end life by themselves, due to severe, terminal illness)? The paper deals with the end-of-life issues such as (assisted) suicide and euthanasia, emphasising the state of play in Serbia, especially the Civil Code Draft provisions on right to dignified death. Author points out that despite raising awareness that there is a real need to regulate end-of-life issues, it is obvious that states (like Serbia), and international institutions keep on avoiding clear answers. These problems remain covered by silence and widespread but ungrounded fear of abuse, along with secret practice. The gap between present ineffective prohibitions and actual uncontrolled practice ought to be overcome by improved legislative solutions. The paper has made a small step forward on the way of making euthanasia legal in Serbia, thus offering to those who suffer to die with dignity (preventing “death tourism”, suicide, and different illegal practices).

Keywords: right to die with dignity, (assisted) suicide, mercy killing, euthanasia, Draft Civil Code of the RS

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1. Introduction

Right to life (and its protection) is an issue inevitably related to vast array of emotionally charged questions. The right to death (with dignity), (assisted) suicide, and euthanasia are the topics that have been sparking debates for decades. Possible answers reveal complexity of the relation and balance between state paternalistic approach and individual fundamental rights, as well as between the right to life, on the one side and the right to self-determination, to privacy, and even to protection from inhuman and degrading treatment, on the other side.

Whenever the right to life comes into a focus, the most of the authors emphasize its supremacy, and its qualities such as inalienability, inviolability, and even holiness, while the necessity of protection and the most severe sanctions for violators are not questioned. What, however, if such a precious possession loses its value for the one to whom it belongs (due to a severe, incurable illness)? Or maybe the problem is in the “ownership” concept? Are the society/state and the individual some kind of co-owners, with insufficiently clearly defined shares in the highest value, or is it a question of choosing the best model of protection, which is created by the society, and which may include protection from the holder? When the prevailing attitude was that human life belonged to God, things were clearer. By destroying the life given to an individual, the suicide destroyed someone else's property and was punished for it, even (absurdly) by death if he/she remained in the attempt. Nowadays, the act of suicide is not punishable (due to recognition of the individual's right to self-determination), but the act (of accomplished suicide, or its attempt) is usually evaluated negatively by society, and the sanction is (not confiscation of property as it used to be long time ago) but confiscation of intangible values of a suicide and his/her family members – the reputation or belief that he/she is a mentally healthy person who has the right to decide (Jovanović, Simeunović-Patić, 2006: 262).

What happens, however, when an individual cannot end his life on his/her own (when the life has lost its meaning for him/her or represents unbearable suffering). Then, the choice narrows drastically. Calling for help is (most often) inciting to the commission of a crime (even when the act was done out of mercy and compassion due to the great suffering of the other human being). In the latter case (when the other individual is asked for help), the arguments relating to the right to self-determination, to autonomy of the individual, and the right to privacy could not cope with the right to life as the supreme value, so the others have to restrain from taking part in ending someone else's life, even at his request and with altruistic motives. The explanation is usually very short – the dying/suicidal

persons are not completely mentally competent, and it is necessary to prevent possible abuse and misuse.

To the question “what accompanies the right to life: the obligation to live or the right to die?” (Vodinelić, 1995: 29), it seems that we have to say that the first offered answer prevails, because the “right to die” and its “legalization” have been maintaining dramatic tension between proponents and opponents for decades, making debates more and more fierce due to moral and religious judgments related to the sanctity of (the right to) life, autonomy and dignity of an individual (and his/her mental competency), and unavoidable “slippery slope” argument.

The authority such as the European Court of Human Rights has no dilemma - the right to die is not accompanied by the right to life¹, but it did not engage in confronting the right to life with other fundamental human rights. Fortunately, there are legislators (in Europe, too) that dare to specify the relationship between the most important human rights, and have opted to enable the individual to make an informed decision, when life becomes a burden for him/her. He/she could choose to die with dignity in an appropriate procedure, under strictly specified conditions (with an expert /medical practitioner involved). The Republic of Serbia isn't among them.

2. Suicide and Assisted Suicide

The first (but not always dignified) way to end life due to the unbearable suffering that the disease brings (or for the other reasons) is suicide. There are few countries still incriminating suicide attempt², but moral and social stigma often accompanies this act, shifting focus of condemnation from suicide as a sin or crime, to the mental disorder of a suicide. Suicide/attempted suicide in Serbia, is not criminalized, but incitement to suicide

¹ The applicant was dying of motor neurone disease, a degenerative disease affecting the muscles for which there is no cure. Given that the final stages of the disease are distressing and undignified, she wished to be able to control how and when she died. Because of her disease, the applicant could not commit suicide alone and wanted her husband to help her. But, although it was not a crime in English law to commit suicide, assisting a suicide was. As the authorities refused her request, the applicant complained that her husband had not been guaranteed freedom from prosecution if he helped her die. The Court held that there had been no violation of Article 2 (right to life) of the Convention, finding that the right to life could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die. *Pretty v. the United Kingdom* (application no. 2346/02), available at: <http://hudoc.echr.coe.int/eng-press?i=003-542432-544154>, accessed on 17. 9. 2020.

² On attitudes towards suicide, its criminalization and decriminalization: Jovanović, Simeunović-Patić, 2006.

and aiding in it are, so the one who cannot deprive himself of life have to incite another individual to commit a crime.

The incrimination of incitement to suicide and aiding in suicide in Serbian criminal law has not been substantially changed since the Penal Code of the Kingdom of Yugoslavia entered into force (in 1930). It has also been envisaged by the Draft Criminal Code of the Kingdom of Serbia (1910) in Art. 134 (Lopičić, 1975: 456). The current incrimination is envisaged in Art. 119 of the Criminal Code of the Republic of Serbia³ (hereinafter: CC) and it reads:

- (1) *Whoever incites another to suicide or aids in committing suicide and this is committed or attempted, shall be punished with imprisonment of from six months to five years.*
- (2) *Whoever assists another in committing suicide under provisions of Article 117 hereof, and this is committed or attempted, shall be punished with imprisonment from three months to three years.*
- (3) *Whoever commits the act specified in paragraph 1 of this Article against a juvenile or person in a state of substantially diminished mental capacity, shall be punished with imprisonment from two to ten years.*
- (4) *If the act specified in paragraph 1 of this Article is committed against a child or mentally incompetent person, the offender shall be punished in accordance with Article 114 hereof.*
- (5) *Whoever cruelly or inhumanely treats another who is in a position of subordination or dependency and due to such treatment the person commits or attempts suicide that may be attributed to negligence of the perpetrator, shall be punished with imprisonment from six months to five years.*

The offence under paragraph 2, and actions representing aiding in the act of suicide are in the focus of this paper. The provision on aiding and abetting from the general part of the CC (Article 35) is important for understanding what acts shall be considered as aiding (in suicide): giving instructions or advice on how to commit a suicide; supply of means for committing a suicide; creating conditions or removal of obstacles, etc.

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

The acts under paragraph 2 constitute lesser criminal offence (judging by the envisaged punishment) because the perpetrator assists another (seriously ill adult) at his/her serious and explicit request. The perpetrator's motive has to be mercifulness, compassion due to serious illness of another that determines the ethical appropriateness of assisted suicide. Thus, the main actor is, in fact, a person who commits suicide, while the role of the (merciful) other is secondary (he/she supplies, for example, means for committing suicide, but the means is applied by the suicide). Assisting a suicide of a child or mentally incompetent person is punishable as aggravated murder (CC, Art. 114). It should be noted here that in its revision of criminal offences that protect life from the most serious injury, the legislator has envisaged the murder of a child as aggravated murder (Article 114, paragraph 1, item 9), but mentally incompetent persons have obviously been forgotten (even though they are protected within the scope of the Article 119, paragraph 4 as the children are). This inconsistency could be considered as a big gap in the legislator's intention to provide more adequate protection of the right to life of vulnerable categories such as children and mentally incompetent persons (from the assisted suicide).

The offence of incitement to suicide and aiding in suicide has no special share in the structure of crime in Serbia. Last year, there were six criminal complaints for this offence (Statistical Office of the Republic of Serbia, 2020: 3), and one person sentenced to suspended sentence (*Ibid*: 8). In 2018: all criminal complaints (there were four complaints) were dismissed, due to the lack of grounds for suspicion/inexpediency of criminal prosecution (Statistical Office of the Republic of Serbia, 2019: 14). The situation was similar in previous years: there were two complaints in 2017 (one rejected; no charges) (Statistical Office of the Republic of Serbia, 2018: 14); three criminal complaints in 2016 (two dismissed on the basis of conditional opportunity and due to lack of grounds for suspicion /inexpediency of criminal prosecution; one sentence of imprisonment ranging from three to five years (Statistical Office of the Republic of Serbia: 2017: 12.61). In 2015, there were five criminal complaints (four were dismissed - in two cases the offence was not considered as criminal offence, and in two other cases - due to the lack of grounds for suspicion; in one case a rejecting judgment was rendered due to *non bis in idem* principle (Statistical Office of the Republic of Serbia, 2016: 12,35)). It should be noted that it is unknown whether the issue of interest (related to Article 119, paragraph 2) was among the abovementioned criminal complaints, or judgments. So, it seems that form of the offence does not exist at all in official statistics, or the number of the offences is negligible and /or represents a dark figure. It would be worthwhile to undertake research in this field.

The action of another person, which represents the prevention of another from committing suicide, and especially the application of coercive measures in that case, is also very intriguing (in relation to the right to life (and its protection) v. the right to self-determination) The obligation to intervene in an acute life-threatening situation is based on the general obligation to provide assistance to a person in an imminent danger to life, especially since at the time of danger it couldn't be known whether the exposed person voluntarily or otherwise entered it (Horvatić, 1989: 34). Paternalistic intervention finds its essential justification in the "fact" that suicide is not "rational" act, that it is usually performed in a state of excluded or compromised ability of the suicidal person to assess and realize his own interests (Biro, 1983: 30). In professional (especially medical) circles, there is very strong resistance to the idea of suicide as a "rational" and firm decision to end one's own life. As a rule, it is pointed out that the suicidal impulse is short-lived, ambivalent, and generated by a temporary or permanent mental disorder (usually depression), or acute mental imbalance. Thus, the protection of the suicide's interests is justified by interventions in suicide prevention, and the incrimination of both active contribution to the suicidal act and passivity in relation to such an act is considered justified - failure to provide assistance to a person in imminent danger to life, or failure to provide medical attention to help a person who needs such help (*Ibidem*).

Finally, when the interests of society are seen as predominant over the individual autonomy of the suicidal person, the admissibility of the intervention could extend even to a hypothetical case in which it would be reliably known that suicide is a conscious and voluntary act of a mentally competent person. Horvatić points to the common understanding that suicide is not only an individual phenomenon, but also a sociopathological phenomenon that requires an adequate social reaction, and that "society has to do its part" to prevent suicide in the interest of the suicide, his relatives and society (Horvatić, 1989: 35).

Preventing suicide in the interest of society raises the question "what is really the social harmfulness of suicide?" In addition to the loss of human life, a member of a social community (thus losing his "contribution to society"), the risk of imitation (the so-called "Werther effect") or fear of behavioral "infection" are losses that authors usually explicitly or implicitly referred to. But does society that has not "done its part" to prevent or at least mitigate the effects of social and other factors behind suicide, has the moral right to coercively prevent "in the public interest" the suicide of a person whose life in that society has become unbearably painful, chronically hopeless, or perhaps irreversibly meaningless? (Jovanović, Simenunović-Patić, 2006: 268).

A survey conducted at the Belgrade District Public Prosecutor's Office in relation to suicide cases and suicide attempts committed in 2005 shows that in the group of completed suicides, motivation related to difficulties due to a serious or incurable disease is more common (35%) compared to cases of attempted suicides (10.9%). Suicides committed due to severe illness are mostly completed (87.5%)⁴.

People who completed suicide without a history of previous attempts, mostly committed it in the darkness of their basements and attics, away from the eyes of others and the opportunity to be saved, while those with a history of previous attempts acted more often in a public place or in the presence of others. In addition, suicide victims without a history of previous attempts are more likely to opt for "more efficient" means of execution (shooting 33.3% and hanging 37.5%), while those with a history of previous attempts are more likely to choose poisoning (29%), high jump (29%), and cutting /stabbing with sharp objects (12.8%). Finally, 43% of people who have completed suicide have never attempted suicide before, nor have they ever undergone any psychiatric or psychological observation or treatment (Ibid, 269-271). The latter, of course, does not speak in favor or against any assumption about the state of their sanity at the critical time, much less about the presence /absence of mental health in the medical sense, but it certainly indicates that a significant number of suicides still eludes professional observation. Are at least some of their acts so-called "rational" suicides?

2.1. Assisted Suicide in Switzerland

An unavoidable topic related to assisted suicide is the "Swiss model" of incriminating assisted suicide, thus in fact legalizing euthanasia (in a broader context). Assisting in suicide is a criminal offence under the provisions of Art. 115 of the Criminal Code if done out of selfish/base motives. In other words, if the assistance in suicide is motivated by altruistic motives (such as mercy due to serious illness of another person who asks for help in dying) would be no crime of assisted suicide. The specificity is reflected in the fact that the helper could be any person, not just a medical practitioner, and the condition is not even that the passive subject is an incurably ill or dying person. In short, the element that makes the difference is only the motive, and the person who wants to die must

⁴ About suicide epidemiology in Serbia (and Belgrade, for the period 1997-2008), and similar findings, and observations regard to seriously ill persons (especially elderly): Knežić, Savić, 2010: 69-80.

undertake the act of killing him/herself (the doctor prescribes a lethal dose of sodium pentobarbital)⁵.

The Swiss Academy of Medical Science (SAMS) adopted in 2005 the medical ethics guidelines on the care of patients at the end of life, emphasising that “doctor has to check the following preconditions: the patient’s disease justifies the assumption that he is approaching the end of life; alternative possibilities for providing assistance have been discussed and, if desired, have been implemented; the patients is capable of making the decision, his wish has been well thought out, without external pressure, and he persists in this wish (this has been checked by a third party, who is not necessarily a doctor); the final action in the process leading to death must always be taken by the patient himself” (SAMS: 2013: 9).

The (physician) assisted suicide is considered morally more acceptable form of euthanasia (in broader sense), due to the fact that dying person performs the act by him/her self. But, what if dying person can not perform the act on his/her own?

3. Mercy Killing

Mercy killing is the most common synonym for (“real”, voluntary active) euthanasia, as opposed to assisted suicide, because its determinant must be taking an action aimed at depriving another person of life (e.g. a physician who injects a lethal injection) (Đerić, 2013: 257). As expected (bearing in mind that aiding in suicide is incriminated), this form of euthanasia is incriminated in Serbia. Namely, Art. 117 of the Criminal Code incriminates deprivation of life out of mercy: *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.*

The same punishment is prescribed for the one who aids another in committing suicide, and it is at least attempted (CC, Article 119, paragraph 1), as for the one who plays the key role in depriving another person of life, who undertakes the act of execution, under certain circumstances (mercifulness as a motive, and at an explicit and serious request of seriously ill adult). “Mercy killing”/voluntary active euthanasia, is part of a broader

⁵ About „Swiss model“, its history, and about the case Gross v. Switzerland before the European Court for Human Rights which has sparked the debates (the applicant, an old lady, was unsuccessful before the competent Swiss authorities to reach a positive response to her request – prescription for the lethal dose of sodium pentobarbital due to non-existent terminal disease, and refusal of medical practitioners to provide her with wanted drug): Strážnická: 2018: 163-170.

context of assisted dying. Anyone can be the perpetrator, but it is expected that it will be someone who is close to the victim (family member). However, it could be also a physician who treats the patient. In this regard, it should be noted that according to the actual regulations (that will be discussed later), the patient may refuse to start or continue medical treatment, even one that would prolong his life. In such a case (so-called *passive euthanasia*) there is no responsibility.

The Criminal Code of the Kingdom of Yugoslavia envisaged the murder at the explicit and serious request “due to pity for the miserable condition of this person”. A miserable condition meant a condition that one’s illness is incurable or some other hopeless condition combined with great pain and suffering for which there is no help. Feeling someone else’s pain as one’s own was considered pity (Živanović, 1935: 31).

The claims that Serbian legislation suffered from historical setback after the Second World War⁶ seem justified (Petrović, 2018: 183), because there was no mention of this privileged form of homicide, until 1998, and the Draft Criminal Code of the FRY⁷, which has envisaged it in Art. 143. In actual CC the name of the incrimination has been changed into “deprivation of life out of mercy”. The mere renaming of the act indicates a change in the attitude of society or, more precisely, the attitude of the legislator towards this type of assisted dying, which implies the key role of another person. Thus, the act has been freed from the stigmatizing connotation, the seriously ill are granted the right to receive a help of a person who, according to the law, shall not be called a murderer. However, that person will have to think very carefully whether to respond to the dying person’s request (of course, serious and explicit). His/her compassion must overcome the fear of punishment, his humanity must fulfill the emptiness that the state was not ready or was not able to fill by legalizing euthanasia. Why? Due to principal reasons such as sanctity, and inviolability of human life, and due to practical ones - possibilities of abuse and misuse. What is the purpose of this incrimination? To say that there is a readiness to treat unequivocally differently, and to privilege the one who, under precisely defined conditions, shows compassion for the dying person, and at the same time to remain on the line of defending the right to life (by punishing the merciful perpetrator).

⁶ Such attitude towards this offence (as well as towards euthanasia) could be linked with actual argument related to possibilities of abuse, and reminding of Hitler’s „euthanasia program“ which, having in mind its well-known characteristics, shouldn’t be named „euthanasia“ at all in contemporary notion (making this argument completely meaningless).

⁷ Federal Ministry of Justice. Draft Criminal Code of FRY. Belgrade, 1998, p. 63.

There is explanation (of the Draft Criminal Code) that a new incrimination has been prescribed, because lack of it had created difficulties in court practice in which the circumstance of the victim's consent could be considered only as mitigating in sentencing, while the perpetrator's action had to be qualified as murder⁸. It is more likely that it is a matter of simply taking over comparative legal provisions (which have been on trial for a long time showing their weakness in practice), rather than the need to respond to the requests of court practice (no research on the case law done on this topic is available in Serbia).

It is difficult to expect many cases of this offence (in the last five years, judging by the official data of the Statistical Office of the Republic of Serbia, there was not a single one) due to the difficulties in detecting this type of crime, and due to the problems with the interpretation of the incrimination. There are also the possibilities of abuse, especially regarding the request of the dying person, determining its existence and interpreting the circle of possible perpetrators (Lazarević, 365-369). Exactly the same arguments are used by the opponents of the euthanasia legalization, so the question remains: what is the real purpose of this incrimination?

In summary: there should be no call for help when life as the greatest value ceases to be such a value for the one who is the most concerned - an individual. If he/she is not able to throw off the burden of the greatest value - life, there is no other choice, because asking another for help is, in its essence, an act of incitement to commit a crime. In both cases, it is difficult to speak of dignity in dying - because someone else will suffer the consequences of the dying person's decision - the one who helped him/her to kill him/herself or killed him/her. The terminological difference - "deprivation of life" in relation to homicide/murder is a weak consolation. It seems to be an expression of the hypocrisy of the legislator not daring to provide a better solution to those who suffer, and their loved ones. Awarding perpetrators of a criminal offence by promising short-term imprisonment is a performance of a hypocritical society that protects the right to life at all costs, but also (more declaratively) understands the needs of those who want to die (due to a serious illness, expressing serious and explicit request), and need someone's help.

⁸ Government of the Republic of Serbia: *Draft Criminal Code*, 2005, 4912004.131/33, p. 8.

It is also hypocritical that “letting” a patient die⁹, at his request, is considered as more morally acceptable act (even permitted by legal regulations) than taking an action that leads to the death of a dying person. Isn’t pulling the plug of the machine keeping the patient alive an action? It is certainly not an omission. Researches show that these widely known facts of medical practice are usually confined to the shadows of discretion or secrecy, and although illegal in most Council of Europe states are rarely punished (Marty, 2003). Isn’t it better to regulate the euthanasia procedure than to close eyes to reality?¹⁰

4. Euthanasia – Right to Dignified Death

The following section is about euthanasia as a “good, easy dying”, but in a modern, most common, more precise conceptual definition as a deliberate deprivation of life of an incurable patient, at his/her valid request. Some authors add that it also represents a release from mortal painful agony or unbearable pain, which the existing medical therapy fails to alleviate (Avramidis, 2017: 20), which is an element that narrows the field of the right to autonomy when deciding on one's own death. Refusing medical intervention and artificial prolongation of life is a patient's right, considered as a (morally and legally accepted) type of passive euthanasia. So, the subject of interest and heated debates is certainly “active euthanasia” (and its legalization) which should not be confused with assisted suicide (also, more acceptable procedure)¹¹.

It has already been pointed out that there is no agreement on the issue of euthanasia legalization. However, as the development of civil rights and freedoms moved away from the concept of criminalization of suicide, so the number of countries that legalize euthanasia is increasing. The rich, developed countries with well-regulated health care systems within which palliative care¹² is well organized and widely available have legal euthanasia procedure. The practice of (active) euthanasia legalization has begun within the Anglo-Saxon legal systems, and in Europe it has been done by the Netherlands

⁹ Dying in such cases is not often easy and dignified, which is why the consideration of such procedure as “euthanasia” is questioned (Garrard, Wilkinson, 2005: 64).

¹⁰ As Kambovski put it: “The law illegalizes the lawlessness, but does it illegitimize it?...There is always a conflict between the universalism of lasting values and the particularism of the real and concrete interests of individuals and the possibilities for their realization” (Kambovski, 2018: 33).

¹¹ On the different conceptual definitions of euthanasia: Đerić, 2013.

¹² About the need for palliative care and its availability in the world, more in: World Health Organization, Palliative Care: Key Facts (2020) available at: <https://www.who.int/en/news-room/fact-sheets/detail/palliative-care>, accessed on 1. 9. 2020; About Serbia ranking in that context: Worldwide Palliative Care Alliance, World Health Organization (2014) Global Atlas of Palliative Care at the End of Life, available at: <http://www.thewhpc.org/resources/global-atlas-on-end-of-life-care>, accessed on 1. 9. 2020.

(2001)¹³, Belgium (2002), and Luxembourg (2008)¹⁴. In Serbia, all of us are witnessing the poor functioning of the health care system as a whole, so it is unnecessary to talk about the system of palliative care. That is why the Draft Civil Code, which opened the door to the legalization of euthanasia, has surprised us all.

The Article 92, paragraph 1 of the Draft¹⁵ reads: *The right to euthanasia, as the right of a natural person to a consensual, voluntary and dignified end of life, can be exceptionally realized if the prescribed human, psycho-social and medical conditions are met.*

The Commission for the Civil Code Drafting (in its explanation of the Draft) invoked the constitutional right to dignity of a person when introducing the right to euthanasia – the right to dignified death (which emphasizes the autonomy of will in exercising the right to life). However, the Commission immediately emphasizes that it is an exceptional solution, and that fulfillment of humanitarian, psycho-social and medical conditions (specified by a special law) is necessary (if the proposal based on comparative legal solutions would be accepted at all). The imposition of criminal sanctions for the abuse of the right to euthanasia, and changes in criminal legislation are also emphasized, as well as the fact that a small number of European countries have legalized euthanasia, and that the future of the proposal made in Draft is depending on public debate (Commission for the Civil Code Drafting, 2015: 685). Judging by the text of the explanation, it seems that the creators of the above-mentioned proposal have been indecisive, divided, and the provisions in the Draft have made very timid, uncertain step towards regulating the right to a dignified death. Thus, the future of legal euthanasia in Serbia seems to be uncertain from the very beginning. The Commission hasn't forgotten to emphasize possible abuses, especially "obtained unlawful material gain or other benefits" which must be accompanied with criminal liability.

It should be noted that judging by the results of the survey "Are you for or against euthanasia legalization in Serbia?" there are 3/4 of those who have said yes on September

¹³ The legal debate concerning euthanasia in the Netherlands took off with the "Postma case" in 1973, concerning a physician who had facilitated the death of her mother following repeated explicit requests for euthanasia. While the physician was convicted, the court's judgment set out criteria when a doctor would not be required to keep a patient alive contrary to their will. This set of criteria was formalized in the course of a number of court cases during the 1980s. (Rietjens, J.A.C., et al. 2009)

¹⁴ About different models and historical perspective: My death – my decision, available at: <https://www.mydeath-mydecision.org.uk/info/assisted-dying-in-other-countries/>, accessed on 1. 9. 2020.

¹⁵ <https://www.mpravde.gov.rs/files/NACRT.pdf>, accessed on 13. 9. 2020.

8, 2020 (out of 1797 respondents)¹⁶. However, the proposal has provoked heated debates and division in medical circles, which has resulted in a joint statement of the Medical Chamber of Serbia and the Serbian Medical Association of May 24, 2016¹⁷, proposing the deletion of the Art. 92, referring to the Hippocratic Oath, Code of Professional Ethics of the Medical Chamber of Serbia, unethical performance of such treatment (but still respecting the patient's desire to indulge in the natural course of the disease in the terminal phase of the disease), provisions from some (legally non-binding) documents of the Council of Europe, emphasizing the sanctity of life and its inviolability regardless of its duration and quality. At the very discussion, there was debate about the dangerousness of abuse (patients would abuse the right and demand death for reasons other than medical!); physicians do not want to be “doctors of death”, but there was also a remark that Orthodox countries are explicitly against the legalization of euthanasia¹⁸ (Popović, 2016). The proponents pointed out that the prevalence of passive euthanasia in practice justifies the legalization (*Ibidem*).

We are all witnesses (directly or by hearsay) of the presence of a special type of passive euthanasia in Serbia - social euthanasia. It involves releasing incurable and elderly patients from the hospital earlier and leaving them to the family for further care. This reduces their intensive care to a minimum, which accelerates dying (Šantrić, Šantrić: 2016: 356). The lack of resources, small number of palliative care beds, the limited time for having dying patients in hospitals are not valid arguments for euthanasia legalization? Is it hypocrisy of a system that cannot provide an alternative in the context of well-organized palliative care, and proper functioning of other forms of the health care system? It could certainly be considered as an attack on the dignity of patients, and eventually, on their lives. So much praising the sanctity of life, worrying about the possibilities of abuse, and unethical actions seem also very hypocritical. On the other hand, less hypocritical and well-developed societies with good health care system, and palliative care, have gone a step further by offering one more option for a person who chooses to die with dignity.

¹⁶ Are you for or against euthanasia legalization in Serbia? (on September 8, 2020) 76.96% yes (1383) and no 23.04% (414), available at: <https://mondo.rs/Magazin/Zdravlje/a1190201/Eutanazija-legalizacija-u-Srbiji.html>, accessed on 8. 8. 2020.

¹⁷ <http://www.lks.org.rs/obavestjenja-za-lekare/cid71-746/zajednicko-saopštenje-lekarske-komore-srbije-i-srpskog-lekarskog-drustva-u-vezi-eutanazije>, accessed on 1. 9. 2020.

¹⁸ This argument should be considered as a strong one in Serbian society due to the fact that religion is being more and more displaced from the private life of an individual into the public sphere, thus making the re-politicization of religion very influential in legislative process (Simović, Petrov, 2017: 80).

Indeed, according to the Law on Patients' Rights¹⁹, a patient in Serbia has the right to freely decide on everything concerning his health and life. It means - no medical measure can be taken on him/her, without consent, which is a confirmation of the principle of autonomy, instead of (abandoned) paternalistic approach (Mujović-Zornić, 2015: 306). The exceptions exist in justified cases, when the principle of presumed consent is applied. The patient can also appoint a person who shall give consent on his/her behalf; who will be informed about taking medical measures in case of inability to make a decision on consent. What is the form of the appointment, who can be that person, etc. is not clear, but it seems to be a hint of an institute of the comparative law - *healthcare proxy* (acting in the interest of the patient if he/she is not able to decide, and decide on all or specified medical treatments, in accordance with patient's instructions²⁰).

In comparative law, there is also the possibility of compiling a living will or advanced directives²¹ for medical decisions in end-of-life situations when patient can't speak for him/herself. This solution should also contribute to the realization of individual autonomy in specific situations, but it is not known to Serbian law. Undoubtedly, the paternalistic approach to end-of-life situations in Serbia is still persistent, while opposite trend is evident in European countries.

Thus, the patient has the right to refuse treatment that saves or prolongs life, if he/she is capable of reasoning and is adequately informed of the consequences of decision. The patient gives a written statement which is kept in the medical documentation, and if he refuses to give a statement, an official note is made about it. Clearly, the refusal of medical treatment is also a choice, but it does not always mean a dignified dying.

In anticipation of the debate that will finally determine the future of Article 92 of the Draft Civil Code, the Dutch legal model of euthanasia will be presented in short lines (as a model that has been functioning very well in practice (Rietjens, J.A.C. et al., 2009).

¹⁹ Law on Patients' Rights (Art. 15-17), Official Gazette RS, no. 45/2013, 25/2019

²⁰ Stony Brook Medicine, Health Care Proxy/Living Will, available at: <https://www.stonybrookmedicine.edu/patientcare/livingwill#decisions>, accessed on 3. 9. 2020.

²¹ Some European countries attach a prominent value to patient autonomy and to the possibility of making advance directives, while others, which rely more on paternalistic decision-making structures, are still reluctant to legislate in this field (Serbia is among them). Nevertheless, all countries seem to agree that advance directives could eventually play a positive role in health care practice, for instance, in order to prevent futile or disproportionate treatments. More about advanced directives in European countries: Andorno, 2008.

4.1. Dutch Model of Euthanasia

On April 1st, 2002, the *Euthanasia Act* came into force to regulate the ending of life by a physician at the request of a patient who was suffering unbearably without hope of relief. The criteria for due care require a physician to assess that: 1) the patient's request is voluntary and well-considered²²; 2) the patient's suffering is unbearable and hopeless; 3) the patient is informed about his situation and prospects; 4) there are no reasonable alternatives, 5) Another independent physician should be consulted; and the termination of life should be performed with due medical care and attention.

The Act officially legalized euthanasia, but in effect it mainly legalized an existing practice. Most physicians think that the Act has improved their legal certainty and contributes to the care with which euthanasia and physician-assisted suicide are practiced (*Ibidem*).

Finally, the legislation offers an explicit recognition of the validity of a written declaration of will regarding euthanasia. The presence of a written declaration of will means that the physician can regard such a declaration as being in accordance with the patient's will. The declaration has the same status as a concrete request for euthanasia. Both oral and written requests allow the physician legitimately to accede to the request. However, he or she is not obliged to do so. And he or she may only accede to the request while taking into account the due care requirements mentioned in the Act. The due care requirements must be complied with, regardless of whether it involves a request from a lucid patient or a request from a non-lucid patient with a declaration of will. In each case the doctor must be convinced that the patient is facing interminable and unendurable suffering. If he or she believes that this is not so, he or she may not accede to the request for euthanasia, no matter what the declaration of will states (Marty, 2003: 9-10).

5. Concluding Remarks

Attitudes towards sanctity of life, and its inviolability clash with those demanding a re-examination of existing legal solutions that protect the metaphysically interpreted sanctity of life. The new reflections also insist on the sanctity of life, but in its secular form, from the aspect of the individual, the "life owner" and his/he fundamental rights, balancing the power of the right to life and other rights. After all, ending one's life before the natural

²² Children of 16 and 17 can, in principle, make their own decisions. Their parents must, however, be involved in the decision-making process regarding the termination of their life. For children aged 12 to 16, the approval of the parents or guardian is required.

end is not necessarily an insult to life's values, but can also be their reaffirmation in the case when a person is reduced to a pale shadow of what he once was.

Despite raising awareness that there is a real need to regulate end-of-life issues, it is obvious that many states and international institutions keep on avoiding clear answers and bringing these issues within their scope. Thus, these problems remain covered by silence and widespread but ungrounded fear of abuse, along with extensive secret practice. The gap between present ineffective prohibitions and actual uncontrolled practice ought to be overcome by improved legislative solutions: even if abuse would not disappear with legislation, we could expect it to be remarkably reduced. Such attitudes also shake the criminal law foundations of protection of the right to life in Serbia, relativizing the prohibition of participation of others in deprivation of life, if it is the choice of an individual, presenting that act as an act of exercising the right to life, i.e. the right to (dignified) death.

The brave step should be taken towards elaboration of the Draft Civil Code provisions on euthanasia as the right to dignified death. The models from the Netherlands, or even Switzerland, can be very helpful in drafting new, specific provisions on euthanasia in Serbia. Isn't it hypocritical to hide for so long behind sanctity of life, Orthodoxy, bad memory of the Nazi euthanasia program, etc. knowing that people have been left to die due to lack of hospital beds, devices, appropriate medicines, and procedures, that seriously ill patients have been discharging from hospitals, because they are incurable? Isn't hypocritical to turn a blind eye to daily practice of passive euthanasia, or to promise shorter imprisonment to those who help another human being in great suffering to reach wanted death? It is about time to stop resisting legalization of euthanasia persistently with timeworn arguments.

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| RIGHTS OF THE ELDERLY TO LEAD A LIFE OF DIGNITY

Dignity has been central to definitions of humanity and human rights throughout millennia, and its protection in modern societies is guaranteed by both moral codes and binding international regulations. Despite such guarantees, older persons across the world have been traditionally neglected and denied equal dignity. Shedding light on the various failures of society to protect the dignity of older persons is therefore of utmost importance. In this work, I attempt to spotlight some of the failures by: providing a historical perspective of dignity and the right to dignity; examining domestic (Serbian) and international regulations that aim to protect dignity, with a special focus on legislations that explicitly concern older persons; focusing on two case studies of older persons' care institutions in Serbia and the U.S.; delineating specific violations of older persons' dignity; and finally, outlining a set of concrete actions that we can undertake to remedy these violations. While this report does not feature primary research data, it is meant to review and bring to light the illicit prejudice, injustice, and outward discrimination against older persons.

Keywords: human rights, dignity, social services, aging, discrimination.

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1. Introduction

Dignity and the right to a dignified life are terms that are used almost every day, yet their exact meaning and implications have been debated for centuries. What is dignity? Does dignity begin to exist before birth? Do we carry it with us as we die? When we talk about the dead, are we honoring their dignity? What exactly is the right to a dignified life? Does that right change over time or is its nature the same across different periods of life? As we age, how should our dignity be honored in everyday challenges that we face?

2. Dignity

The term dignity has over the years been rooted in various philosophical, moral, religious, and political traditions. Marcus Tullius Cicero, a Roman statesman and orator (106-53 BC), defined dignity as an inherent quality of human beings and popularized its use as a reflection of one's social status. Thomas Aquinas (1225-1274), one of the greatest theologians and philosophers of the Medieval Period, claimed that "dignity is a good in its own right," while Francis Bacon (1561-1626), an English philosopher and statesman, characterized dignity as an essential human value (Rozen, 2015: 29-33). The father of German Idealism and one of the most influential philosophers of the Western world – Immanuel Kant (1724-1804) – went a step further and argued that dignity is unequivocal in its value to human existence. His respect for dignity was so great that he held that even making comparisons to other human qualities and values would be unworthy of dignity (Kant, 2020:82).

The term dignity comes from the Latin word *dignitas*, which is commonly used to indicate one's honor and prominence. In formal discussions of morality and ethics, *dignitas* has been central to the view that the right to honorable and ethical treatment of human beings begins at birth (Diaz, 2017, no page).

Dignity has also been viewed as an irrevocable and all-encompassing compilation of qualities inherent to humans living in organized societies that has to be protected both by moral imperatives and legal decrees (ibid.).¹ Based on such widely held views, we can conclude that dignity is an omnipresent, if not universal, quality of human societies and that the right to dignity is immutable under all circumstances. Indeed, because of its ubiquity and essence to functional human societies, the right to dignity is recognized

¹ Zoran Pavlović, (2017) *The right to privacy – Challenges of new commitments*, Conference papers "Freedom security: The right to privacy"

internationally as its own category in all acts that are relevant to human rights. With such clear and binding international legislation, individual countries are compelled to ensure that all of its citizens are treated with dignity, including older citizens who often require significant attention and special regulations to ensure that their right to dignity is not neglected.

3. International legal framework

Although its historical and philosophical dimensions have been evolving for centuries, dignity as a legal right did not achieve such formal stature until the mid-20th century. It was only after World War II that dignity came into the focus of international legislature and became cemented in the legal framework via an array of declarations, conventions, resolutions, charters, and other international legally binding documents. Besides the Charter of the United Nations, foremost among such legislations is the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly on the 10th of December 1948. According to the Universal Declaration of Human Rights, all human beings are born free with equal human rights, including dignity, and should treat fellow humans with good conscience at all times.² The Universal Declaration of Human Rights encapsulates humans of all ages and so its civil and political guidelines along with provisions on economic, social, and cultural rights apply regardless of one's age.

In Europe, The Charter of Fundamental Rights of the European Union (adopted in 2000) additionally reinforces human rights and carries significant weight in the realm of human rights. This Charter categorizes all human rights in 6 distinct groups: dignity, freedom, equality, solidarity, citizenship rights, and justice. The first among them – dignity – is considered close to sacrosanct and, therefore, must be honored and defended under all circumstances. In a special chapter, the Charter stipulates that the European Union recognizes and honors the rights of older citizens to a life of dignity and independence, as well as continued involvement in social and cultural spheres.

4. Domestic legal framework

Similar to international legislations on human rights, the legal framework that defines and protects dignity in the Republic of Serbia can be readily found in the highest legal

² Solarević M., Pavlović Z., (2018) *Aging and human rights: human dimension of statistics and legislation in Serbia*, Yearbook, Human rights protection "From unlawfulness to legality"

documents. For instance, the Constitution of the Republic of Serbia³ protects dignity both in fundamental decrees and separate amendments reserved for legal protection of human rights and freedoms.

Constitutional protections of human and minority rights aim to preserve human dignity and foster unconditional freedoms with the goal of establishing a just and democratic society. Not only does the Constitution protect the basic rights of individuals, but it also prohibits any form of discrimination by explicitly defining that all citizens are equal before law and deserve impartial legal treatment. While both direct and indirect discrimination are legally condemned by the Constitution, some of the specific examples that are outlined include: racial, sex-based, national, ethnic, birthplace, religious, political, material, cultural, language, age-based, and both mental and physical disability discrimination.

The section of the Constitution of the Republic of Serbia which guarantees dignity and unimpeded personal growth also stipulates that human dignity is inviolable and obliges all citizens to honor and protect it.

The right to a life of dignity within a family structure is regulated by the Family Law of the Republic of Serbia⁴ which specifies family as a lawfully protected institution and guarantees that all citizens have the right to those protections.⁵ Specific protection of the right to dignity in family structures can be found within the Family Law in the form of articles that regulate domestic disputes, including violence and financial support, which are especially pertinent to ensuring that older citizens' right to dignity is not breached.

The Family Law regulates financial support as the right and duty of all family members. The article 156 of the Family Law states that a parent, unable to work and without financial stability, has the right to financial support from the adult child or other blood relative in the first degree, as well as from the child who is under the age of 18, who either works or receives financial royalties from assets. The support amount is defined proportionally to the income of the payer, such that the supporting responsibilities are within reason and don't harm the financial stability of both parties.

³ "Sl. glasnik RS", no. 98/2006

⁴ "Sl. glasnik RS", no. 18/2005, 72/2011 - and no. 6/2015

⁵ Kambovski, V., (2018), *Natural rights, legitimacy of laws and supranational basis of unlawfulness*, Yearbook Human rights protection "From unlawfulness to legality", Provincial Protector of Citizens – Ombudsman, Novi Sad

The article 197 of the Family Law defines domestic violence as behavior by which one family member endangers safety, mental health, and serenity of another family member. Thereby, domestic violence especially includes: infliction of bodily injuries; instigation of fear by threatening violence; coercion into sexual intercourse; suggestion of sexual intercourse with the child who is under the age of 14 or a feeble person; restriction of movement or communication with other people; verbal abuse, as well as any other insolent, reckless or malicious behavior.

The Domestic Violence Prevention Act⁶ aims to put in order the operations of government authorities and institutions in a general and unique way to allow effective domestic violence prevention and emergent, prompt, and beneficial protection of the victims of domestic violence. It also stipulates that domestic violence prevention must contain a set of procedures that trigger facile identification of persons who are in imminent danger, as well as a set of defined actions that are implemented when imminent danger is identified.

The protection of rights to a dignified life is one of the objectives of the Criminal Code of the Republic of Serbia⁷. In the section of the Code that defines violent and life-threatening criminal acts, article 126 identifies abandonment of a helpless person as one of those criminal acts. Abandoning a helpless person that is in legal custody of the perpetrator and exposing them to conditions that endanger their health and life carries a prison sentence of at least 3 months and not more than 3 years.⁸ If serious bodily injuries or severe health issues arise from the abandonment, the perpetrator shall be punished by a sentence of at least 1 and not more than 5 years in prison. Death as a result of abandonment is the most serious outcome and therefore carries a prison sentence of at least 1 and not more than 8 years in prison.

Within criminal acts against freedom, human, and civil rights, the article 137 of the Criminal Code classifies abuse and torture as a serious crime. According to this regulation, physical abuse and acts that violate dignity of another person are punishable by a prison sentence of up to 1 year. If a public servant commits such crimes during active service, they can be imprisoned for at least 3 months and not more than 3 years. Additionally, use of force, threats, or similar banned techniques that cause pain and severe suffering to extract information from another person or a person related to them carries a

⁶ “Sl. glasnik RS”, no. 94/2016

⁷ “Sl. glasnik RS”, no. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019

⁸ Stevanović A., Grozdić B., (2018) *The idea of human rights as a means of change of the public moral*, Yearbook, Human rights protection “From unlawfulness to legality”

prison sentence of at least 6 months and not more than 5 years. The above rule and sentencing guidelines also encompass attempts to intimidate, illegally punish, and abuse citizens in a discriminatory way. A public servant who commits such crimes while on active duty can be sentenced to at least 2 and not more than 10 years in prison.

The portion of the Criminal Code that focuses on family law contains important regulations and stipulations of punishments that pertain to matters of domestic violence (Article 194), withholding of financial support (Article 195), and violations of familial responsibilities (Article 196).

Article 196 of the Criminal Code states that any person who avoids or violates legally determined familial responsibilities and thereby neglects a dependent family member shall be imprisoned for at least 3 months and not more than 3 years. If such neglect leads to a seriously jeopardized health of the dependent, a prison sentence of at least 1 but not more than 5 years shall be imposed. Further, if neglect results in death of a dependent, a prison sentence of at least 1 but not more than 8 years is warranted.

The official Act that prohibits any form of discrimination⁹ defines terms “discrimination” and “discriminatory behavior” as any unjust and unequal treatment or exclusion of individuals, their family members, and close relatives, both overtly and covertly, based on their race, skin color, ancestry, citizenship, nationality, ethnicity, language, religious and political leanings, sex, gender identity, sexual orientation, financial status, genetic traits, health status, ability, marital status, age, looks, membership in political or social organizations, and all other outward and perceived characteristics. According to the Act, all citizens are equally entitled to just treatment, both socially and legally, regardless of their characteristics. In addition, the Act specifically condemns the discrimination based on age and stipulates that older persons are equally entitled to resources that permit a life of dignity as other persons, especially those public resources that protect them from abuse and neglect.

The Social Protection Law¹⁰ is another important legal document that describes social protection as a societal responsibility whose goal is to ensure that individuals and families have the necessary resources to lead an independent and productive life that reinforces social inclusion. The specific goals of the Social Protection Law are:

⁹ “Sl. glasnik RS”, no. 22/2009

¹⁰ “Sl. glasnik RS”, no. 24/2011

- 1) Achieve and maintain the minimal financial security and independence of individuals and their families necessary for meeting basic human needs;
- 2) Provide access to services that enforce individuals' rights to social protections;
- 3) Create equal opportunities for independent living and promote social inclusion;
- 4) Preserve a healthy family environment and promote intergenerational solidarity;
- 5) Prevent abuse, neglect, exploitation, and ameliorate their consequences.

The goals listed above are achieved via the various services and activities dictated by the Law and designed to lessen dependence and accomplish independence of individuals and families from social services.¹¹ Any individual or family who requires support to overcome social difficulties that prevent them from satisfying basic human needs are entitled to social protection, which includes designed social protection services and material support.

Social protection services are tailored to each age group and contain specific programs designed for children, young adults, adults, and older persons with the intention of preserving each person's integrity and dignity in the context of familial relations.¹² Those services are divided into the following categories:

- 1) Evaluation and planning: evaluation of current financial state, needs, strengths, weaknesses, and risks; evaluation of guardians, support providers, and adopters; creation of an individual or family plan with social protection services that best fit their needs;
- 2) Daily services in the community: daycare, house help, inns for temporary housing, and other relevant services that support the family structure outside of the household;
- 3) Support services for independent living: housing support, personal assistance, guidance on how to achieve independence, and similar help in becoming an active participant of the community;
- 4) Counseling and educational services: emergency services for family crises, parental counseling and support; support for families caring for disabled

¹¹ Article 3

¹² Čorić D., (2018), *The theoretical definition of the notion of unlawfulness - A step towards positive law*, Yearbook, Human rights protection "From unlawfulness to legality"

dependents; mediation of maintenance and reestablishment of familial relations; counseling and support in instances of domestic abuse; family therapy; conflict resolution; other services based on individual needs;

- 5) Housing services: coordination of relocation to extended family households, foster families, or similar environments for adults and older persons; temporary dormitory housing; emergency housing in shelters and similar institutions.¹³

Social protection services listed above are available to any individual or family who encounters difficulties in satisfying basic human needs and thereby cannot maintain the necessary quality of life, either due to the lack of or insufficient income. Minors and adults younger than 26 are encouraged to use these services if their family conditions are such that they jeopardize their health and pose a clear risk of stifling the optimal level of development. Adults older than 26, including older persons, can access the social protection services in cases where age, disability, health disorders, or other conditions outside of their power threaten their financial stability, safety, and ability to lead a productive and dignified life.

5. Aging and old age

“In the broadest sense, aging can be viewed as part of a natural process that consists of two phases: the first phase (evolution) comprises growth and development while the second phase (involution) begins with the weakening of physical functions and results in the final period of life – old age. Definitions of aging differ depending on the scientific field that studies it and so the main influences on the definition of aging can be categorized as biological, psychological, and sociological. However, the general public typically defines aging as processes that begin after the age of 65, which is a heavily debated number in the scientific and professional literature” (Milanović-Dobrota, 2017:125-144).

Although the exact definitions of aging elude even the experts, there is little doubt that at least some form of the aging process begins with the moment we are born. Old age, on the other hand, is a distinct period of life that is characterized by a continuous series of losses – loss of hearing, memory, best friends... – that perniciously chip away at the happiness of older citizens and eventually lead to feelings of sorrow, pain, boredom, loneliness, and rejection. It is no surprise then that such a state can lead to a loss of self-perceived dignity as older individuals begin feeling inadequate and heavily dependent on

¹³ Article 40

others even in tasks they easily performed until recently. Receiving help and care in a family setting may ameliorate such feelings; however, it can also lead to misunderstandings and feelings of rejection due to generational gaps that cement the preconceived notions of the loss of dignity and stand in the way of reestablishing a life of dignity with the help of family members.

Attempting to remedy the potential loss of dignity in older populations, the General Assembly of the United Nations on December 14th, 1990 passed a resolution that established October 1st as the International Day of Older Persons. It was hoped that such recognizable action would bring forth conversations about the living conditions of older populations and encourage member countries of the UN to enact regulations that protect their dignity. By celebrating the International Day of Older Persons every year, the international community has been using this occasion to evaluate successful frameworks that have enabled dignity in older persons while also illuminating common pitfalls and unaddressed problems in such frameworks.

6. Institutional protection of older persons

Regardless of whether they live independently or in family households, a certain proportion of older persons eventually requires care that can only be provided by institutions that are specialized for such purposes. In those cases, the overwhelming barrier to seeking specialized care has been the commonly accepted, albeit wrong, view that only extremely incapacitated individuals without families to look after them and their dignity find themselves in these essential institutions. Such prejudice indicates that most people do not recognize specialized institutions for care of older persons as an essential societal resource that preserves their dignity. As a matter of fact, seeking specialized care for an older person who is unable to live independently or requires assistance outside their family may well be one of the only practical ways to respect and protect their dignity.

“The problem with medicine and the institutions it has spawned for the care of the sick and the old is not that they have had an incorrect view of what makes life significant. The problem is that they have had almost no view at all. Medicine’s focus is narrow. Medical professionals concentrate on repair of health, not sustenance of the soul. Yet—and this is the painful paradox—we have decided that they should be the ones who largely define how we live in our waning days.” (Gawande, 2014: 128)

According to the data from the Serbian Bureau of Statistics, on July 3rd, 2019, there were 6,982,604 citizens in the Republic of Serbia. Of those, 1,408,336 people were older than

65, comprising 20.17% of the total population (RZS, 2019, no page). The trend of older population comprising an increasingly larger proportion of the population in Serbia is further escalated by a recent surge in departures of young entrepreneurs, academics, and skilled workers. This situation has created a pressing need for more social institutions that care for older persons in the absence of families that traditionally filled that role. In addition to caring for older persons who are no longer able to live independently, many institutions are seeing an increased demand by the elderly who suffer from loneliness due to a loss of partner or inability to fulfill their social needs as their families move farther away abroad.

An increasingly older population and the globalization of many industries that has led to mass emigration from Serbia have left the social services and its institutions with a pressing need for increased capacity. The current Social Security Law, as well as its preceding legislation, allows any citizen of Serbia, in addition to legal entities of the Republic of Serbia, Autonomous Province, or local government, to establish an institution for the care of older persons.¹⁴ Care centers founded by individuals outside of government organizations are typically located in home settings and in turn have smaller capacity and a more intimate treatment that resembles family care. Such centers are notable for providing a warm, family atmosphere to older persons, and because their social interactions with peers who have similar interests and needs are fostered, their quality of life and dignity are significantly improved. An additional advantage of the low occupancy family-style centers is that they avoid the perils of generational gaps between residents that exist in family settings, so that their residents feel minimal rejection and can instead cultivate their cultural, social, and spiritual interests.

6.1. Gerontological Center, Zrenjanin

The early beginnings of dedicated care centers for ill and older persons in the city of Zrenjanin can be traced back to 1902 when the local government secured a housing facility on Nikola Pasic street. The institute that was housed at this location was insensitively named “The Home of the Miserable”. In 1923, the city government of Veliki Bečkerek (previous name for Zrenjanin) allocated a newer property for purposes of care for older persons and this location has housed the renamed “Center for Gerontology” to this day. From its founding until 1983, the center was fully managed by the School Sisters of St. Francis. During this period, the center changed many names, and it wasn’t until 1987 that “The Home for Older Persons Mila Kolarov” fulfilled the requirements to

¹⁴ The Social Protection Law, Article 10

become a certified center for gerontological needs. In its present form, the center was established on September 25th 1991 by the Government Act that established a formal network of government-funded institutions that would fulfill the pressing social needs of older persons. Finally, on April 17th 2002, the Executive Branch of the Autonomous Province of Vojvodina passed an act that allowed it to take on the full responsibilities and rights to manage the “Gerontological Center of Zrenjanin”.

Throughout its history, “Gerontological Center of Zrenjanin” has been at the forefront of quality care for older persons and, because of such dedication and expertise, it has been instrumental to shattering the stereotype that the government-owned institutions of care are “Homes of the Miserable”. Not only has the Zrenjanin center refined its policies to provide attentive and respectful care, but it has also played a central role in the research that informs regional policies aimed to protect older persons. Its two-pronged approach has allowed it to develop institutional and at-home care services of the highest standard.

The institutional services feature dedicated housing units for independent, semi-dependent, and fully dependent adults. Applications for housing in one of the units are available via a recommendation from the Center for Social Work in the municipality where the applicant resides. Each application for one of the 319 spots is reviewed by the admission committee and, after the applicant undergoes a thorough evaluation, they make a decision on which available unit is most appropriate for the applicant. Unit “A” is typically reserved for providing a high quality of life to fully independent and functional applicants in private dormitories or shared one-bedroom studios. In certain scenarios, such housing arrangement can be made available to less independent persons as well. Unit “B”, on the other hand, usually houses semi-dependent and fully dependent adults; due to higher demand and limited resources, the housing in this unit features three -or more- bed shared dormitories.

To fit the needs of an even larger population of older persons who may not require care in a dedicated facility, the Zrenjanin center provides several forms of non-institutional care. Among these are any services within the resources of the center that allow both the older individual and their family to continue having a high quality of life for as long as possible. The most notable such services are the “Club for Older Persons” and in-home care.

The Club for Older Persons (also known as the Gerontological Club) provides its members help with accessing social services, preventative health care and hygiene programs, and other activities suited for each person’s needs. One of the most used social

services that members have access to is a dedicated space in the Club's headquarters on 11 Nikola Pasic St, where they can participate in cultural and leisurely activities, which include regular gatherings for national and religious holidays, birthdays, music and book showings, art shows, and sports events. As part of the health care and hygiene programs, members have frequent presentations on appropriate medical care as well as periodic physical examinations provided by the City Healthcare Center. To ensure appropriate hygiene is available to older persons, the Club provides complimentary laundry, ironing, and barber services. Starting in 2009, the Club began offering a service that provides one cooked meal every day to members whose nutritional habits are declining.

In addition to the Club for Older Persons, the Gerontological Center of Zrenjanin also offers some in-home care services. While these services are being elaborated every year, they are currently available on a case-to-case basis and are performed by traveling nurses and "geronto-house-helpers".

6.2. Benedictine Health System, Duluth, MN, USA

In addition to government organizations and individual businesses, various organizations participate in building systems of care for older persons across the world. For instance, the Benedictine Health System (BHS), founded by the Benedictine Sisters of the St. Scholastica Monastery in Duluth, MN, comprises a large network of institutions for care of older persons. "[BHS] is a Catholic, faith-based organization entrusted with advancing the life-enhancing senior care ministry of the Benedictine sisters of Duluth, Minnesota. We witness to God's love by creating compassionate communities providing support to those we serve to live fully and live well with special concern for the underserved and those in need" (Benedictine, 2020, no page). Although the Benedictine care institutions have the greatest presence in their home state of Minnesota, their care centers can also be found in North Dakota, Missouri, Wisconsin, and Illinois. The central values that guide the leadership of the system – hospitality, stewardship, respect, and justice – are based on the Gospel and Chapter 36 of the Rule of St. Benedict.

The Benedictine Health System's primary goal is to provide care and support to older persons and enable them to lead an independent life full of dignity whenever possible. Visitors and clients of the BHS, therefore, receive both encouragement and concrete help that reinforces their independence and quality of life. Such professional and positive reinforcement approach is exemplified by the patience, empathy, and openness of the caretakers while they empower older persons to continue leading a vibrant life. Their return or continuation of activities that are challenging infuses them with confidence and

by extension dignity. One intriguing parallel of the BHS approach to the Zrenjanin center one is their focus on providing access to leisurely, everyday activities to older persons. Similar to the Gerontological Club in Zrenjanin, BHS provides a location within their facilities where their independent members can socialize with peers, participate in cultural activities, and access other need-based services.

While BHS provides in-patient services to dependent individuals, their out-patient service is the one that promotes dignity of older persons to the largest extent. These services are available to any dependent individuals living at home and, in addition to the standard assistance with care, they include mental health maintenance and physical rehabilitation programs. Physical rehabilitation is one of the major focuses of the BHS out-patient program as it aims to help clients return to activities that they are no longer able to perform but that are integral to their mental health and dignity. Such rehabilitation, if successful, can lead to vastly improved quality of life outcomes and happiness levels in older persons. In cases where medical or spiritual rehabilitation is difficult to take place in an out-patient setting, such as in late-stage or chronic diseases and especially disorders of the nervous system, BHS is equipped with in-patient facilities that are specialized in advanced and palliative care of older persons.

In addition to long-term care services, the Benedictine Health System also provides short-term care options to older persons after surgeries, injuries, and trauma in general. They are available in both an out-patient and in-patient format, similar to the long-term services.

7. Violations of older persons' right to dignity

Despite the many international acts and local legislations that stipulate equal rights regardless of age and specifically protect older persons rights, older citizens' rights across the world are still being violated and in the process their dignity is undermined. Foremost among the violations pertains to the financial stability of older persons. Having low or no income at all means that older persons may experience insurmountable difficulties in securing basic necessities that are needed for a dignified life. Such necessities include but are not limited to food, clothing, participation in cultural activities, vacation, healthcare, preventative and non-essential medical treatments. Faced with such difficulties, older persons resort to family members, social security services, and even volunteer organizations. The dependence on financial help from others, which is usually charitable, means that older persons fulfill their basic needs in a modest and minimal way that is not conducive to a life of dignity. To illustrate how financial instability results in a violation

of dignity, we turn to healthcare. Older persons without income have to rely on government-sponsored healthcare programs, as they cannot afford private insurance or any out-of-pocket costs. For this reason, they are relegated to infinitely long waitlists for even the simplest medical procedures; for instance, a hip surgery that would allow an older person to have a life of significantly higher quality may not be available to them for years. Physical therapy services that would benefit the older population are usually not covered by the government-sponsored programs, so older persons cannot access them. The inability to access medical treatments propagates into all spheres of older persons' lives, and they begin losing touch with social, political, and cultural events, which in turn directly impacts their mental health negatively.

According to the data in the 2019 Annual Report of the Protector of Citizens published by the Serbian Ombudsman, in the Republic of Serbia there is a clear lack of services for older persons, specifically the services that provide help in the household, which are most needed by the older citizens who live alone (Zaštitnik, 2020: 51). The lack of such services is especially felt in rural parts of the country and in households spearheaded by older women. Older women in rural areas are at risk particularly because they usually don't own property or other assets, don't have stable income, and don't have appropriate access to essential services.

The most commonly violated rights of older persons in the Republic of Serbia include the right to social and healthcare services, protection from domestic violence, stipend for care and support of another citizen, and the right to financial independence. The most striking example of the disparity in the just treatment of older persons in Serbia can be found in their legal underrepresentation. Despite the known violations of older persons' rights, only 6.67% of lawsuits that the Protector of Citizens has so far brought up include these violations. Domestic violence and abuse of older persons, according to the same Annual Report, are still inadequately handled by the Serbian government: the Report cites that the infrastructure for reporting domestic abuse against older persons is either physically inaccessible or does not provide sufficient support for older persons to report their abusers (usually their children).

The abuse of older persons is a clear case of violation of basic human rights. World Health Organization estimates that around 16% of persons above the age of 60 are being abused. Recognizing the magnitude of this abuse, the General Assembly of the United Nations, with the Resolution 66/127, declared June 15th as the Day against the abuse of older persons. On that day, people around the world show support to older persons and fight against their abuse (ibid.).

8. Possible actions to promote the dignity of older persons

To better the position of older persons and honor their right to dignity, both the individuals and societies must make a substantial effort to reform the current broken practices. Such reform should initially take form of improved economic measures that protect the financial stability of older persons. One possible economic solution would entail the government (or a group of governments) determining a monthly monetary sum that satisfies all the basic needs and enables a dignified life and supplementing the income of all persons above the age of 65 to reach that predetermined sum. Another realistic course of action would call for restructuring of the established government-funded social security services. For instance, the social services programs could be expanded to coordinate affordable health care for older persons that help them with out-of-pocket costs for procedures performed at privately-owned clinics and hospitals.

While most proposed reforms of the societal treatment of older persons necessitate large government actions, there also exist concrete steps that local governments and social institutions could contribute to. Similar to some of the services that the Gerontological Center of Zrenjanin and the Benedictine Health System offer, other local institutions could also offer out-patient health checkups and treatments to older persons who live independently. Such initiatives need not come from local authorities, however; I argue that they are essential requirements of any functioning society, both from a moral and legal perspective, and should thus be promoted at every level of government and society.

After the basic economic and healthcare needs of older persons are met, the society can then refocus on other aspects of living that are synonymous with dignity and happiness. Access to affordable mindfulness activities and rehabilitation centers, such as spas, outdoor programs, and physical therapy, via government subsidies for example, should be among the imperatives of this second stage of reform. Good mental health and quality of life are correlated with the level of social activity among the older populations. Therefore, our society should ensure that older persons have adequate opportunities to socialize with peers, attend cultural events, and participate in workshops that teach a variety of skills, such as computer programming, painting, dancing, or learning a language. The challenge to achieving such social immersion – lack of dedicated spaces and communication channels – is luckily one that can be overcome easily: local community organizers can provide an easily accessible space (church, school, office building) and use proven strategies to inform older persons of the events (newspaper ads, pamphlets, word of mouth).

Preservation of older persons' dignity can also be achieved by ensuring that they have access to mental health and household support services. Professional associations of therapists and clinical psychologists could be incentivized to provide free or affordable services to older citizens, thereby contributing to improved mental health of the older population. Businesses, such as grocery stores, landscapers, and cleaning companies, could be engaged to promote the well-being of their local older persons communities by offering free grocery delivery, yard work, and discounted cleaning services. Finally, none of the outlined actions for bolstering older persons' dignity will be sufficient for this task if we don't recognize and condemn the pernicious abuse against older persons that is discrediting their dignity.

9. Instead of a conclusion

The right to a life of dignity is a basic human right. Human rights are those rights that belong to all humans from the moment they are born, regardless of their age, citizenship, nationality, race, ethnicity, language, sex, sexual orientation, or ability. Human rights are universal, ubiquitously accepted, and essential to our understanding of humanity (United Nations, 2017, no page). As such, there is no doubt that they belong to older persons as much as they belong to a toddler or an adolescent. Individual humans and the societies they belong to, therefore, have a responsibility to ensure that all people, older persons included, are treated according to their human rights and dignity.

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József Hajdú*

DIGNITY OF ELDERLY PERSONS AND DIGITALISED SOCIAL CARE

The main theme of the article – robocare and patients’ dignity – is a probably dumbfounding and even extravagant idea in many traditional societies. However, there are some (not so numerous) countries where the demographic and labour market supply problem makes it happen in everyday practice. Traditionally, the role and responsibility for taking care of old family members were the moral and legal obligation of the family. Lately, on a residual basis the church, the state and NGOs entered in, and nowadays private for profit business organizations also entered this “business”. The main focus point of this article is whether the AI and its manifestation, the robots, will be able to replace or complement the human social carers.

Keywords: dignity, right to social care, elderly care, nursing home care, home care, artificial intelligence, robot, robocare, digitalised social care.

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1. Introduction

Artificial Intelligence (hereinafter: AI) and robot technology are expected to be a theme in many upcoming research and policy papers on adult social care (<https://researchbriefings.files.parliament.uk/documents/POST-PN-0591/POST-PN-0591.pdf> (04.09.2020)). A wide range of robotic technologies can be used in social care from automated vacuum cleaners to robots resembling humans or animals. Robotics can provide physical, social, and cognitive assistance and a small number of studies report positive impacts on users' mobility, mental health, and cognitive skills. However, ethical, legal, and regulatory issues include impacts on users' autonomy and privacy and questions over the use and ownership of data (McManus: 2019). There is growing interest among care providers, charities, and academics in using robotics to improve the quality of care and ease pressure on the elderly social care system (Hurst (February 2018). Japan lays the groundwork for boom in robot carers. *The Guardian*. Accessed 02/10/2018). We call this development briefly robocare.

In the future, presumably IoT (Internet of Things) and robots may help older individuals in their everyday routines, household management, social care, learning new skills, managing finances, and remembering to take their medication, among other things. A robot may be especially effective for these types of activities because it can be a socially engaging and intelligently dynamic device (Breazeal, 2003:167), (Matsumoto et. al. 2007:990), (Ueda, et. al, 2007).

While much has been written about the potential uses of such technology, the development and use of robotics in social care is still relatively new and, as yet, there is limited evidence of robotic technology being used in social care outside of some small-scale trials (Southend-on-Sea to use robot in social care (<https://www.ukauthority.com/articles/southend-on-sea-to-use-robot-in-social-care/>) (20.07.2020) & CARESSES Testing and Evaluation Phases (CARESSES) (<https://clinicaltrials.gov/ct2/show/NCT03756194>).

As it will be discussed later, there are many pros and cons of robocare, but one of the critical points is the dignity (both in ethical and legal context) in human-machine relations (sometimes even "cohabitation").

2. Dignity is a human or humanoid value

The word dignity comes from the Latin word, dignitas, which means “worthiness.” Dignity implies that each person is worthy of honor and respect for who they are, not just for what they can do. In other words, human dignity cannot be earned and cannot be taken away. It is an inalienable gift given by God, and every other good thing in life depends on the safeguarding of human (beings’) fundamental dignity. As the Universal Declaration of Human Rights puts it, “recognition of the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world (<https://agingwithdignity.org/what-is-human-dignity/> (20.07.2020)).”

In the former centuries inevitably and naturally human dignity was a central ideal and value (right) of law and interlocked with human beings and among human beings (<https://merionwest.com/2019/07/09/preview-human-dignity-and-the-law/> (21.07.2020)). Dignity could be seen as the fundamental “mother right” from which many of the other human rights were originated. These are both different ways of expressing the point that protecting and amplifying human dignity is the central moral ideal of law.

The goal of a moral approach to jurisprudence should be amplifying the dignity of individuals. This is consonant with the Kantian position: retaining a moral right to sovereignty should be conditional on state institutions maintaining a “rightful condition” for the positive development of all people living within their territory. A state can achieve this moral ambition by making the amplification of human dignity the central ideal of law (Ripstein, 2009:1).

The often mentioned and most common response people offer is that dignity is about respect. To the contrary, dignity is not the same as respect. Dignity is the human beings’ inherent value and worth as human beings (everyone is born with it), while respect, on the other hand, is earned through one’s actions (<https://www.psychologytoday.com/us/blog/dignity/201304/what-is-the-real-meaning-dignity-0> (21. 07. 2020)).

Relating to this issue, one of the most important questions is whether artificial intelligence (and robots) can have artificially built in manner to acknowledge dignity or not, and provide social (elderly) care services with dignity (<https://link.springer.com/article/10.1007/s10676-014-9338-5> (20.07.2020)). According to Amanda Sharkey (Stahrkey, 2014:63) (<https://link.springer.com/article/10.1007/s10676-014-9338-5> (20.07.2020)),

the effects of robot elder care on dignity is formulated under three category headings: (1) assistive robots^{1,2,3} (2) monitoring⁴ and supervising robots and (3) companion robots.⁵

¹ Assistive robots are robots designed either to help older people to overcome some of the problems of aging, or to help the carers of older people. Examples of assistive robots include the Japanese Secom “My Spoon” automatic feeding robot, and the Sanyo electric bathtub robot. The ‘My Spoon’ robot can enable people with limited motor control to feed themselves. The bathtub robot provides an automatic washing facility. The robot for interactive body assistance (RIBA) developed by Riken is a large robot with a teddy bear face that can pick up and carry humans from a bed to a wheelchair. The EI-E robot can be instructed to perform various tasks such as picking up objects, or opening drawers. Further recent examples include the Panasonic hair washing robot, which has two hands and 24 fingers to massage the scalp, and Panasonic’s bed which transforms into an electric wheelchair (<http://panasonic.co.jp/corp/news/official.data/data.dir/en110926-2/en110926-2.html>). (20.07.2020)

² Another important branch of assistive robotics is that of *exoskeletons*. Exoskeletons could improve the mobility of frail older people, or could help their carers to have the strength to lift and move them. A number of different companies have produced exoskeletons: the Cyberdyne hybrid assistive limb (HAL) suit is available for rent by medical and welfare facilities in Japan, and is probably one of the most well known. The HAL exoskeleton uses electromyography sensors to record the electrical activity across a muscle, and then activates the exoskeleton in a scaled response to the human muscle activity. Honda has also developed a number of walking machines: the Stride Management Assist, and the ‘Walking Assist’ devices (New Scientist online, November 2008). Other examples include the ReWalk, the eLEGS, and the Rex exoskeletons. A recent addition to assistive robotics that should increase mobility is Hitachi’s ROPITS car (Robot for Personal Intelligent Transport System), developed for older and disabled drivers. It is designed to travel on pavements and footpaths, and to autonomously transport the user to given (nearby) locations (<http://www.guardian.co.uk/artanddesign/architecture-design-blog/2013/mar/27/driverless-robot-car-elderly-disabled-mobility>). (20.07.2020)

³ Assistive robots for elder care could also provide benefits to carers and to care workers. Assistive robots that help with the heavy work involved in lifting older people could alleviate some of the burden of carers and care workers.

⁴ Monitoring robots can be seen in a positive light as expanding the range of capabilities for seniors, where their effect is to increase their ability to have good health. There are many examples of monitoring and supervising robots that are being developed for the care of frail older people. Tele-operated robots are being used in hospitals and residential facilities: for instance, RP-7 (Intouch Health) is a tele-operated robot that has been used to facilitate doctor-patient interactions at the Silverado Senior Living Aspen Park. Gecko Systems are developing the CareBot™, a personal robot that can follow an older person in their own home, and that is capable of delivering medicine, remote video monitoring, and the delivery of verbal reminders at predetermined dates and times.

The EU project Companionable is developing HECTOR, a mobile companion robot that interfaces with a smart home, and offers care support facilities that include fall detection, diary management and reminders about taking medicines, as well as being able to provide remote video-conferencing with family members.

⁵ There are a growing number of ‘companion’ robots. These are usually smaller and more affordable, although some of the monitoring robots are also intended to double as companions. For instance, the Gecko CareBot is described as ‘a new kind of companion that always stays close to the care receiver, enabling friends and family to care from afar’. There are several examples of robot pets of which the seal-like Paro robot is probably the best known. The Paro is covered with anti-bacterial fur, and is about the weight of a human baby. Its sensors enable it to respond to being stroked, and it can express ‘emotions’ in response to its treatment by moving its tail, and body and blinking its eyes. It was designed as a therapeutic robot for use with older people, and its behaviours are intended to encourage nurturing behaviour. Other robot pets include the Sony AIBO dog, the Pleo dinosaur, and Omron NeCoRo, a robotic cat. Primo Puel is an interactive doll that has proved popular with older people in Japan. Babyloid is a robot baby developed in Japan. It indicates moods by means of LED lights, and has a round face with two eyes and a mouth - when crying blue LED tears it can be rocked back to sleep.

This paper tangentially considers the ways in which robot care for older people could impact on their dignity. However, it is important to undertake such a consideration because of the risk of developing robotic ‘solutions’ to the problems of aging that result in a reduced rather than in an improved quality of life for older people (<https://link.springer.com/article/10.1007/s10676-014-9338-5> (20.07.2020)).

3. Protection of elderly persons’ human rights

Despite the existence of the Universal Declaration of Human Rights (1948), older people are not recognised explicitly under the international human rights laws that legally oblige governments to realise the rights of all people.

The Universal Declaration on Human Rights states in Article 1 that ‘all human beings are born free and equal in dignity and rights’. This equality does not change with age: undoubtedly, older men and women have the same rights as people younger than themselves.

However, there are two international (one is a European regional and one is a European supranational) human rights conventions – namely CoE’s European Social Charter (1961, 1996) (hereinafter: ESC) and Charter of Fundamental Rights of the European Union – which mention elderly persons as a particular human rights holder (Solarević & Pavlović, 2018:53).

There are some ‘soft’ laws guiding the treatment of older women and men, including the UN Principles for Older Persons (1991) (<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx> (20. 07. 2020)) and the Madrid International Plan of Action on Ageing (MIPAA 2002) (<https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html> (20. 07. 2020.)). Although human rights underpin the recommendations in these soft laws, they are not legally binding. States are under a moral rather than a legal obligation to follow their recommendations (<https://social.un.org/ageing-working-group/documents/Coalition%20to%20Strengthen%20the%20Rights%20of%20Older%20People.pdf> (23.07.2020)).

3.1. Article 23⁶ of the ESC: Every elderly person has the right to social protection

Article 23 of the European Social Charter was the first human rights treaty provision to specifically protect the rights of the elderly. It established a fundamental right of elderly persons to social protection, which responds to an increased need on account of the ageing of the population (Kambovski, 2019:34). The measures envisaged by this provision, by their objectives as much as by the means of implementing them, point towards a new and progressive notion of what life should be for elderly persons.⁷

One of the primary objectives of ESC Article 23 is to enable elderly persons to remain full members of society.⁸ The expression “full members” means that elderly persons must suffer no ostracism on account of their age. The right to take part in society’s various fields of activity should be granted to everyone active or retired, living in an institution or not.

Non-discrimination legislation should exist at least in certain domains protecting persons against discrimination on grounds of age. Article 23 requires States Parties to combat age discrimination in a range of areas beyond employment, namely in access to goods, facilities and services.

Article 23 requires States Parties to take appropriate measures against *elder abuse*. Elder abuse is defined in the WHO Toronto Declaration on the Global Prevention of Elder Abuse (2002) (https://www.who.int/ageing/publications/toronto_declaration/en/ (10. 08. 2020)) as “a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”. It can take various forms: physical, psychological or emotional, sexual, financial or simply reflect intentional or unintentional neglect. The World Health Organization (WHO) and the International Network of the Prevention of Elder abuse (INPEA) have recognised the abuse of older people as a significant global problem. Hundreds of thousands of older people in Europe encounter a form of elder abuse each year. They are pressed to change their will, their bank account is plundered, they are

⁶ Appendix: For the purpose of the application of this paragraph, the term «for as long as possible» refers to the elderly person’s physical, psychological and intellectual capacities.

⁷ Conclusions XIII-3, Statement of Interpretation on Article 4 of the Additional Protocol (Article 23)

⁸ However, Article 23 overlaps with other provisions of the ESC which protect elderly persons as members of the general population, such as Article 11 (Right to protection of health), Article 12 (Right to social security), Article 13 (Right to social and medical assistance) and Article 30 (Right to protection against poverty and social exclusion). Article 23 requires states to make focused and planned provisions in accordance with the specific needs of elderly persons.

pinched or beaten, called names, threatened and insulted and sometimes they are raped or sexually abused otherwise. States must therefore take measures to evaluate the extent of the problem, to raise awareness on the need to eradicate elder abuse and neglect, and adopt legislative or other measures.⁹

Article 23§(1a) guarantees adequate resources enabling old persons to lead a decent life and play an active part in public, social and cultural life. Inevitably, the primary focus of the right to adequate resources is on pensions. Pensions and other state benefits must be sufficient in order to allow elderly persons to lead a ‘decent life’ and play an active part in public, social and cultural life, including affording necessary elderly care.¹⁰

Although Article 23§(1b) only refers to the provision of information about services and facilities, it presupposes the existence of services and facilities and that elderly persons have the right to certain services and facilities. In particular, information is required on the existence, extent and cost of home help services, community based services, specialised day care provision for persons with dementia and related illnesses and services such as information, training and respite care for families caring for elderly persons, in particular, highly dependent persons, as well as cultural leisure and educational facilities available to elderly persons.¹¹ However, insufficient regulation of fees for services may amount to a violation of Article 23.¹²

The final part of Article 23 deals with the rights of elderly persons living in institutions. In this context, it provides that the following rights must be guaranteed: the right to appropriate care and adequate services, the right to privacy, the right to personal dignity, the right to participate in decisions concerning the living conditions in the institution, the protection of property, the right to maintain personal contact with persons close to the elderly person and the right to complain about treatment and care in institutions.^{13,14}

There should be a sufficient supply of institutional facilities for elderly persons (public or private), care in such institutions should be affordable and assistance must be available to cover the cost. All institutions should be licensed, and subject to an independent

⁹ Conclusions 2009 Andorra Article 23.

¹⁰ Conclusions 2013, Statement of Interpretation Article 23.

¹¹ European Committee of Social Rights (ECSR) Conclusions 2003, France (Article 23).

¹² The Central Association of Carers in Finland v. Finland Complaint No. 71/2011 decision on the merits of 4 December 2012.

¹³ ECSR Conclusions 2003, Slovenia (Article 23).

¹⁴ ECSR Conclusions 2003, France.

inspection regime. Emphasis is put on the importance of a truly independent inspection body.¹⁵

3.2. The Charter of Fundamental Rights of the European Union

Article 25 of the Charter deals with “The rights of the elderly”. The European Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. This Article draws on Article 23 of the revised European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. Of course, participation in social and cultural life also covers participation in political life (<https://fra.europa.eu/en/eu-charter/article/25-rights-elderly> (09.08.2020)).

In sum, all of the human rights relating to elderly people must be recognised and respected by either human being carers or humanoid robocarers as well.

4. Robots and elderly social care

4.1. Outline of elderly care

In general, social care for elderly persons is part of a complex system of public and private services (for profit or non-profit) to provide support for people who require assistance with daily living. Essentially, families also provide unpaid care (<https://www.kingsfund.org.uk/projects/what-is-social-care> (10. 08. 2020)).

Elderly care, often referred to as senior care, is specialized care that is designed to meet the needs and requirements of senior citizens at various stages. As such, elderly care is a rather broad term, as it encompasses everything from assisted living and nursing care to adult day care, home care, and even hospice care (<https://www.seniorcare.org/elder-care/#:~:text=Elder-care-often-referred-to-as-senior-care-,day-care-home-care-and-even-hospice-care.> (09.08.2020.)).

Elderly care is not always an absolute; in fact, some senior citizens never require any type of care to live independently in their later years. However, elderly care often becomes an issue when an old person begins experiencing difficulty with activities of daily living

¹⁵ ECSR Conclusions XX-2 (2013) Czech Republic.

(ADLs), both safely and independently. ADLs may include cooking, cleaning, shopping, dressing, bathing, driving, taking meds, etc.

The need for elderly care may also happen quickly, as is the case if an elderly person is recovering from a broken hip or recently had a stroke and is still suffering the cognitive and/or physical effects. What is constant, however, is that elder care may be needed when a health condition – whether physical, cognitive, or even emotional – hinders the ability to safely complete activities of daily living.

Many seniors deny the existence or severity of emotional problems, which makes the thoughtful observations of physicians and family members all the more important (<https://www.seniorcare.org/elder-care/> (23.07.2020)).

4.2. Traditional edlerly care is at the crossroads

At least the following four basic factors might be mentioned to support the alternative usage of robots in elderly care (robocare).

4.2.1. Demography

Worldwide, the proportion of people aged 60 years and over is growing and will continue to grow faster than any other age group due to declining fertility and rising longevity.¹⁶ At the same time, the number of ‘older old’ persons (80 years and over persons) in the developed world will reach unprecedented levels. The demand for, and cost of, social care is expected to rise as the number of users increases and their needs become more complex.¹⁷ Furthermore, the higher number of women living into very old age also presents a major challenge for policy-makers (<https://social.un.org/ageing-working-group/documents/Coalition%20to%20Strengthen%20the%20Rights%20of%20Older%20People.pdf> (23.07.2020)).

¹⁶ The number of older people over 60 years is expected to increase from about 600 million in 2000 to over 2 billion in 2050. This increase will be the greatest and the most rapid in developing countries, where the number of older people is expected to triple during the next 40 years. By 2050, over 80 per cent of older people worldwide will be living in developing countries.

¹⁷ Source: Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, World Population Prospects: the 2008 Revision: <http://esa.un.org/unpp> (24.07.2020)

4.2.2. Family types and dynamics

Gone are the days when extended families¹⁸ (two or more generations lived together) or even nuclear families (mother, father + one or more kids) were considered the norm in many industrialised countries. These days, different family types¹⁹ are not only common but also much more accepted than they were in the past. It is not uncommon to be raised by a single mother or be part of a mixed family. It seems more uncommon to live in a household where both parents are married.

The vital questions are: 1. family dynamics²⁰ and 2. the importance of the family for many reasons, but perhaps the most important reason is that it is a support (care) network. For example, grandparents will help children any way they can. Children will help their parents as well if they need it, etc (<https://www.originsrecovery.com/family-dynamics/> (25.07.2020)).

The main problem is that family dynamics, geographical distance, two wage earner type households, weakening values and kinship, etc. might hamper the fulfilment of the natural way of the caring obligation to elderly family members in need. However, in some countries,²¹ there is a legal obligation to provide such care (<https://www.betterhelp.com/advice/family/there-are-6-different-family-types-and-each-one-has-a-unique-family-dynamic/> (24.07.2020)). Mainly three opportunities are foreseeable: 1. strengthening traditional family values and ties and/or 2. expansion of long-term social care and LTC insurance and/or 3. deploying robots for caring elderly persons.

¹⁸ Traditionally, in many societies extended families were much more common and were around for hundreds of years. Extended families are families with two or more adults (e.g. grandparents and parents) who are related through blood or marriage, usually along with children. From this article's point of view, such kind of a family structure inevitably invoked and provided child care by grandparents and elderly care by parents.

¹⁹ There are six main ones that people agree on: 1. nuclear family, 2. single parent family, 3. extended family, 4. childless family (DINKs society: double income, no kids.), 5. step or blended family (When two separate families merge into one. This can go several different ways, like two divorced parents with one or more children blending families, or one divorced parent with kids marrying someone who has never been married and has no kids.) 6. grandparent family (A grandparent family is when one or more grandparents are raising their grandchild or grandchildren.)

²⁰ Family dynamics refers to the ways in which family members relate to one another. Because humans are capable of change, and family members take part in different experiences, the dynamics within a family never remain the same. People often look at family dynamics in the context of what makes a family dysfunctional. (<https://oureverydaylife.com/explain-family-dynamics-2099636.html>) (23.07.2020)

²¹ For example, in Hungary.

4.2.3. Funding and shortage of human resources

Among society's most pressing questions regarding the aging of the population is who will help the growing numbers of the frail elderly with routine tasks at home, such as cleaning, bathing and dressing, taking medicines and cooking. Families often take on these caregiving responsibilities, but the job is not practical for many working boomers and Gen Xers, families with far-flung children, widows and widowers and the childless elderly. That is why the need is so great for professional home care workers. The demand for home care workers — also known as the “direct care” workforce — is expected to increase dramatically in coming years (<https://www.forbes.com/sites/nextavenue/2018/04/18/the-shortage-of-home-care-workers-worse-than-you-think/#349a60453ddd> (24.07.2020)).

In addition, nursing home care is something many families must eventually face.²² Due to advances in medicine, people are living longer. This also means that some form of assisted living may become necessary as minds and bodies age.

To add to the concerns many families face on how to pay for long-term care, the average nursing home cost continues to rise at alarming rates.²³

At the same time, social care is facing challenges in recruiting and retaining staff and from reduced funding (<https://researchbriefings.files.parliament.uk/documents/POST-PN-0591/POST-PN-0591.pdf> (05.08.2020)).

In sum, compounding the problem is that the cost of elder care is becoming incomprehensible and uncontrollable. This growing financial burden, coupled with the shortage of caregivers, proves the need to find a more efficient way to care for the world's elderly population (<https://waypointrobotics.com/blog/elder-care-robots/> (05.08.2020)). The question is very clear: how will the world solve this expected shortage of caregivers in the coming years?

²² For example, in the USA estimates predict a person who turns 65 has almost a 70% chance of needing long-term care in some form. 20% of those people may need long-term care for more than 5 years.

²³ Analysts say that nursing home costs are increasing due to factors such as: 1. Shortage of skilled workers; 2. Higher minimum wages; 3. Difficulty in finding and keeping qualified workers; 4. Increased need for specialized care and 5. in many countries the increasing rates of Alzheimer's disease.

4.2.4. Nursing Home Abuse

Beyond financial concerns, nursing home abuse – either mental or physical – may make it hard for families to afford elderly care. The causes of nursing home abuse are known²⁴ and are a sad reality that many elderly people face ([https://www.nursinghomeabuse.org/nursing-home-abuse/causes/\(07.08.2020\)](https://www.nursinghomeabuse.org/nursing-home-abuse/causes/(07.08.2020)) & [https://www.nursinghomeabusecenter.com/nursing-home-abuse/causes/\(07.08.2020\)](https://www.nursinghomeabusecenter.com/nursing-home-abuse/causes/(07.08.2020))). It is critical to carefully monitor loved ones who are living in nursing homes (Malmedal et. al, 2015). As the elderly become weaker, they become more vulnerable to wrongdoing ([https://www.nursinghomeabusecenter.com/blog/affording-nursing-home-costs/\(07.08.2020\)](https://www.nursinghomeabusecenter.com/blog/affording-nursing-home-costs/(07.08.2020))). This situation also requires swift and substantive settling. Besides traditional answers, robocare is one of the possible new types of solutions.

4.3. Robots as a potential option for the future of elderly care

Researchers all around the world are proactively striving – as one of the possible alternatives – to help solve the above-mentioned problems and are independently working to create autonomous robots²⁵ that are capable of performing similar, if not the exact same, tasks as caregivers.

A world in which robotic caregivers are looked upon to help with the world's greying population is gradually becoming very much a reality. It is not a question of if, but when. The idea behind elder care robotics has been around for years. Its relevancy, however, has become increasingly more apparent as the gap between the number of available caregivers and the world's aging population²⁶ continues to widen (<https://waypointrobotics.com/blog/elder-care-robots/>).

²⁴ These are some of the top reasons why experts feel that nursing home abuse occurs: 1. Staffing shortages, 2. Lack of staff training and experience, 3. Underpaid staff, 4. Poor supervision, management and accountability, 5. Individual caregiver issues and 6. Individual resident risk factors.

²⁵ For example, companies like Jibo are leading the charge to integrate social robots into our home lives. Designed as an interactive companion and helper to families, Jibo is considered to be the “world’s first social robot for home.” However, Jibo is not a mobile robot, and lacks the complex physical and mechanical parts to truly serve as an elder care robot. It is more of a social and emotional robot solution.

Companies like Waypoint Robotics and sister R&D company Stanley Innovation are working on optimizing the mobility part of autonomous elder care robotics by creating mobile robotic platforms that are adaptable and scalable. Waypoint’s solution represents a high power density, fielded propulsion system that has been tested to transportation standards and mass-produced for over a decade.

²⁶ This population problem is already very real in countries like Japan, where there will be an estimated shortage of 1 million caregivers by 2025. The U.S. is facing a similar dilemma — as the percentage of people aged 65 or older is expected to rise to roughly 26% by 2050.

Caregiving robots would be considered desirable. As robots have become more capable of interacting both verbally and physically with humans, a wealth of possible new applications have opened up. Caring for the elderly, as well as those with neurological diseases such as dementia, is one obvious use. This is especially true of societies in which birth rates are slowing, while people are simultaneously living longer. It is no accident that much of the innovation has taken place in Japan: a country which has led the way in robotics research and acceptance, but does not have enough young people to adequately care for its elderly population.²⁷

As a mainstream of robocare usage trends the caring robots might be used primarily for five purposes: 1. housekeeping (e.g. robot vacuum cleaner, etc.) 2. affective (<https://www.digitaltrends.com/cool-tech/robots-caregiving-for-the-elderly/>)²⁸ 3. rehabilitation²⁹ 4. to help the caregiver^{30,31} and 5. communication (<https://news.medill.northwestern.edu/chicago/japan-uses-robots-in-nursing-home-care-an-example-for-america/>).³²

²⁷ Silver Wing Social Welfare Corp., a Tokyo-based nursing home operator, fueled by a 5.2-billion-yen fund provided by the Tokyo metropolitan government for robot use, is one of the leaders in nursing home robotic innovations.

²⁸ “Affective” robots such as Wandakun the robot koala and Paro the robot seal. Such robots cannot carry out physical tasks like preparing meals or fetching items on command. Instead, they are designed to provide emotional support. Paro is able to make eye contact by sensing where a human voice is coming from. It is also able to sense touch and, based on how it is stroked, change how it responds.

²⁹ Rehabilitation robots, like the Honda Walking Assist Device, allow a strapped-in patient to walk and do other forms of physical therapy. Panasonic Corp. provides a robot that assists a patient in moving from a bed to a wheelchair, helping not only the patient but also the caregiver, since this maneuver assisted only by a caregiver can result in back injuries, a frequent occupational hazard for that profession.

³⁰ Robots could also support caregivers, in addition to the people being cared for. This could mean helping out with physical tasks, thereby freeing up more of their time and energy to spend interacting with the people they are looking after. It could also mean supporting the mental health needs of caregivers who may be struggling to cope with family members or other loved ones with dementia.

³¹ For example, Silver Wing nursing home uses robots to improve patient safety. Robots like the Paramount Bed Co. Ltd. Sleep Management System are designed to monitor the condition of a patient in bed. A screen display tells a caregiver if the patient is sleeping calmly, is agitated or is attempting to rise. This can tip off a caregiver that a patient needs help. Other robots replicate cell phones and allow a patient to communicate with the robot and with a caregiver, or monitor the vital signs of patients, providing real-time warnings to caregivers of critical problems that could require an ambulance to a hospital.

³² Communication-oriented robots interact orally with patients and lead them through a variety of recreational activities, which is particularly beneficial for Alzheimer’s and dementia patients who are prone to feelings of isolation and can benefit from mental stimulation.

In sum, while the research is already taking place, it is clear that the only way elderly care robots will become commonplace in society is if the states,³³ as well as private investors, get involved in funding further research.

While it is not entirely certain what the future will hold in terms of elder care robotics, ongoing industry trends indicate that future projects will involve robots capable of being interconnected with appliances and home automation, and that are able to use telepresence technology that allows loved ones to check in from afar.

Future elder care robots will also more than likely have the ability to take on medical diagnostics, as well as use facial recognition algorithms to determine how someone is feeling.

But despite all of this future capability, there still exists a dichotomy of things that robots can do way better than humans and things they simply cannot do at all. For instance, an elder care robot in the future may easily be able to find and retrieve a pill box from another room, however, without an excellent mobility system, it will be stopped dead in its tracks should it get caught on something along the way (<https://waypointrobotics.com/elder-care-robots/> (13.08.2020)).

4.4. Pros and Cons of robocare

The use of robots in social care will have manifold implications for the cost, quality, legal responsibility, skills of human workforce of social care. There are some – not exhaustive – lists on the pros and cons of robocare.

4.4.1. PROS for robocare

1. *Acceptance attitudes.* Studies report mixed – slightly more positive – attitudes towards the acceptability of using robots in social care amongst users and caregivers (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4288776/> (13.08.2020)) & (Papadopoulos 2018: 425). Inevitably, there are many potential benefits of assistive robots in the home for older adults, however, older individuals might not be as accepting as younger adults of such a device in their homes. On the one hand, older adults may be especially concerned about how difficult a new device will be to learn (Demirirs et. al. 2004:87). On the other hand, they appear willing to accept technology if it allows them to live

³³ For example, in Japan, companies are leading the development of a humanoid solution called Carebots, which are specifically designed robots for elder care. The Japanese government is doing its part by reportedly subsidizing a large chunk of this research.

independently in their home (Sharit et. al. 2004: 81). Consequently, if older adults perceive a robot in their home as helpful rather than intrusive, they may be just as accepting of it as younger adults.

Despite the growing interest in developing robots for older adults, few studies have investigated this age group's acceptance of robots. The studies have generally measured responses of older adults to specific robots with limited functionality (Bickmore, 2005, 711) & (Rantz et al, 2005:40). For example, older adults expressed excitement with a nurse-robot that helped them navigate through a building (Montemerlo et. al, 2002:587). These studies provide evidence that older adults may accept certain robots in certain situations. They do not, however, reveal more general attitudes and perceptions older individuals have about robots, which could be used to predict acceptance for a wider variety of robot types in the context of the home.

2. *Provide assistance.* Robotics can support caregivers or those receiving care and might enhance the efficiency of elderly care. Most robots provide a range of types of assistance. In particular, many robots offering cognitive assistance³⁴ do so alongside other support, such as social³⁵ or physical³⁶ assistance (<https://researchbriefings.files.parliament.uk/documents/POST-PN-0591/POST-PN-0591.pdf> (13.08.2020)).

3. *Improve productivity.* In 2018, the UK Institute for Public Policy Research indicated that the use of robotic and other technology could improve productivity in the adult social care sector through increased automation of mainly administrative tasks.³⁷

4. *Improve the qualifications and skills of the social care workforce.* Increasing the use of robotics in social care will require training for current staff to be able to work alongside the technology (Dahl & Boulos, 2014:1). It may also increase jobs in other sectors, such as for those with skills in robotics including data analysts, and programmers

³⁴ Robots have been developed to support people to perform cognitive tasks, such as improving users' memory and supporting people with dementia.

³⁵ For example, robots such as 'Paro', a robot in the form of a baby seal, 'Pepper', a humanoid robot, and MiRo, a robot resembling a rabbit or small dog, have been trialled with people with dementia, children with disabilities, and in care homes. Robots such as GiraffPlus provide remote health monitoring ('telehealth') and connect users with family and friends.

³⁶ Wearable devices, like the currently available 'REX' and 'ReWalk', can assist with rehabilitation for walking and personal use, or 'Robear' is a robotic device being developed to help with lifting patients, etc.

³⁷ The Lord Darzi Review of Health and Carefinal Report: Better Health and Care for All A 10-Point Plan For The 2020s Institute for Public Policy Research Lord Darzi June 2018 (<https://www.ipprr.org/files/2018-06/better-health-and-care-for-all-june2018.pdf>) (13.08.2020)

(<https://ieeexplore.ieee.org/xpl/conhome/6476064/proceeding> (13.08.2020)).³⁸ However, this may have knock-on effects if the social care sector is required to buy-in such skills given potential salary differentials, raising the question about whether this outweighs any efficiencies created by the use of robotics (<https://researchbriefings.files.parliament.uk/documents/POST-PN-0591/POST-PN-0591.pdf> (13.08.2020)).

5. *Cost of social care.* Using robotics could reduce social care costs by enabling older people to stay in their homes for longer rather than going into residential care; preventing hospitalisation through falls, illnesses, and keeping people healthier for longer; and reducing staffing costs by automating a greater number of tasks (Tiwari et al., 2010:1). A 2014 review found that assisted living technologies (such as sensors that can monitor the health and safety of users remotely) reduce costs. However, it noted the limited data available, much of which was deemed to be of poor quality (Tiwari et al., 2017:49).

6. *Autonomy and independence.* Robotics has been suggested as a way to increase users' autonomy and dignity (<https://www.housinglin.org.uk/Topics/type/Robotics-in-Social-Care-A-Connected-Care-EcoSystem-for-Independent-Living/> (13.08.2020)) & (Prescott et al, 2012) & (Sharkey, 2014:63) (See other considerations under subchapter CONS.)

7. *Privacy.* Robots may be seen as more objective than human caregivers, which may promote users' privacy (Draper and Sorrell, 2017:49). (See other considerations under subchapter CONS.) Robots might help to avoid nursing home/nursing care abuse.

4.4.2. CONS of robocare

The evidence base on robotics in social care currently suffers from a number of limitations:

1. *Limited focus.* Most of the focus has been on how technology can aid social care for older people, and fewer studies have looked at care for children or those with lifelong learning disabilities.³⁹

³⁸ The NAO models for the elderly (<https://ieeexplore.ieee.org/document/6483564>) (13.08.2020)

³⁹ Scoping study on the emerging use of Artificial Intelligence (AI) and robotics in social care. Published by Skills for Care, West Gate, 6 Grace Street, Leeds (2018) (<https://www.skillsforcare.org.uk/Documents/Topics/Digital-working/Robotics-and-AI-in-social-care-Final-report.pdf>) (15.08.2020)

2. *Methodological limitations.* Many studies have small sample sizes and the findings are not generalizable to other contexts (Abdi et. al. 2018).

3. *Context specific.* Many studies have been conducted in Japan (Ishiguro, 2018:256),⁴⁰ which has a different social care system and different cultural values around care. These factors may shape the acceptance and effectiveness of the technology in different societies (Bruno et. al., 2020).

4. *Limited availability of technology.* Some robots are commercially available (such as robot vacuum cleaners). However, much robotic technology is being trialled and is not widely used within the social care sector.⁴¹

5. *Knowledge gaps.* Few studies have explored the effects on the social care workforce or the cost-effectiveness of using robotics in social care (Knapp et. al, 2016).

6. *Cost.* Potential savings are weighed against the costs of introducing robotics technology.^{42,43} Robots can be expensive, which may present a barrier to their wider use in social care (Cavallo et. al., 2018:127).

There was considerable information from a nursery home survey,⁴⁴ which says that the use of robots has not resulted in cost savings, although this may change, as costs of robot production diminish and artificial intelligence technologies continue to improve. Nor has the use of robots reduced the need for caregivers, since robots were generally used in conjunction with caregivers. However, by providing more readily available data about patients, robots undoubtedly enable caregivers to better focus on keeping patients safe – their most important responsibility. It is also possible that as technology improves in the future, robots will be able to operate more independently, freeing up caregiver time

⁴⁰ International Federation of Robotics. World Robotics Report 2016. (<https://ifr.org/ifr-press-releases/news/world-robotics-report-2016>) (15.08.2020)

⁴¹ Scoping study on the emerging use of Artificial Intelligence (AI) and robotics in social care. Published by Skills for Care, West Gate, 6 Grace Street, Leeds (2018) (<https://www.skillsforcare.org.uk/Documents/Topics/Digital-working/Robotics-and-AI-in-social-care-Final-report.pdf>) (15.08.2020)

⁴² The Lord Darzi Review of Health and Care Final Report: Better Health and Care for All A 10-Point Plan For The 2020s Institute for Public Policy Research Lord Darzi June 2018 (<https://www.ippr.org/files/2018-06/better-health-and-care-for-all-june2018.pdf>) (13.08.2020)

⁴³ A fork in the road: Next steps for social care funding reform. The costs of social care funding options, public attitudes to them - and the implications for policy reform, May 2018 (<https://www.health.org.uk/publications/a-fork-in-the-road-next-steps-for-social-care-funding-reform>)

⁴⁴ Silver Wing Nursery Home in USA.

(<https://news.medill.northwestern.edu/chicago/japan-uses-robots-in-nursing-home-care-an-example-for-america/> (15.08.2020)).

7. *Autonomy and independence.* For example, there are some relating concerns about: the degree to which robots could prevent people from engaging in risky behaviours like smoking; the extent that robots could make users do something if they did not wish to, like take scheduled medication; and the potential that users may become dependent on robots, undermining their ability to do things for themselves and reducing independence (Draper & Sorrell, 2017:49) & (Wu et al. 2014:801). It is also unclear how vulnerable social care users, such as old bedridden persons may be able to give informed consent to the use of robotics (Leenes et al, 2017:1).

8. *Privacy.* AI and robots are capable of accessing the internet, and recording large amounts of data raises questions over privacy and security (Denning et. al. 2014:105). Clarifying ownership of data collected by robotics has been highlighted as an issue of concern.⁴⁵ Data gathered from robots may be beneficial to roboticists in developing the technology, improving AI, and for machine learning, but in social care this may include personal or sensitive data (<https://www.machinedesign.com/automation-iiot/article/21837140/why-data-ownership-matters-in-the-age-of-ai> (19.08.2020)). Therefore, in the European Union Member States the AI processed personal data is subject to regulation under the EU General Data Protection Regulation (GDPR), which requires ‘privacy-by-design’, whereby data protection safeguards are built into technology early on (<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/> (19.08.2020)).

9. *Cyber security.* Robots with poor security could be vulnerable to hacking, and could, potentially, be controlled remotely by an attacker.⁴⁶

10. *Responsibility.* In legal terms, the key problem is that where AI systems make choices, there is no established framework for determining who or what should be held responsible for any harm caused. It might be the designer, owner, operator, a combination of the above, or perhaps none of this list. Established legal concepts such as vicarious liability

⁴⁵ Scoping study on the emerging use of Artificial Intelligence (AI) and robotics in social care. Final Report, May 2018, Skills for Care 2018 (<https://www.skillsforcare.org.uk/Documents/Topics/Digitalworking/Robotics-and-AI-in-social-care-Final-report.pdf>) (15.08.2020)

⁴⁶ Körtner (2016). Ethical challenges in the use of social service robots for elderly people. *Zeitschrift für Gerontologie und Geriatrie*, 49: 303-307

and negligence are likely to become increasingly stretched as AI becomes yet more independent and unpredictable. The original designer may be able to argue that the AI's subsequent development, perhaps in combination with data fed into it by a third party, represents an intervening act.

Two features of AI compound the difficulty of simply blaming the programmer. First, AI is becoming more independent; some AI systems are now able to develop new AI. Secondly, the barriers between programmers and users are being broken down as AI becomes more user-friendly. Think of training a dog rather than writing code.

If AI is incorporated into a product which causes damage, then this might be governed by the EU Product Liability Directive 1985, but it remains uncertain whether the Directive applies where AI does not take a physical form, such as cloud-based services, or a robot, which is physical hardware (plastic and metal) but more software (AI algorithm).⁴⁷

Summary

Robotic technology has gradually penetrated – and will continue to do so – both personal and professional aspects of human lives, including elderly care. Taking into consideration mechatronics, industrial robots, and futuristic humanoids, the robotic field of technology seems to be an extensive field of human endeavors. The usage of service robots has been recently growing in nursing or care homes in most advanced and elderly societies. For example, across Japan, there are about 5,000 nursing care homes testing robots for use in nursing care due to the declining number of human nurses to care for aged people (above 65 years of age) who are more than a quarter of the population.

As for regulation, it would be preferable for governments to work proactively, together with companies, academia, jurisprudence and the public to lay down rules tailored to AI, namely robocare. This could be done by amendments to existing rules, or by creating entirely new ones.

Besides engineers and IT experts, lawyers will have a key role to play in shaping its relationship with society. In the absence of many regulations on AI at present, there is an important opportunity to build a new system.

⁴⁷ <http://disputeresolutionblog.practicallaw.com/responsibility-for-robots/> (04.09.2020)

The aim of this article was factfinding and opening eyes on new development, however, at this stage we have more questions than answers.

Appendix

Appendix 1

OPEN LETTER TO THE EUROPEAN COMMISSION ON ARTIFICIAL INTELLIGENCE AND ROBOTICS

We, Artificial Intelligence and Robotics Experts, industry leaders, law, medical and ethics experts, confirm that establishing EU-wide rules for Robotics and Artificial Intelligence is pertinent to guarantee a high level of safety and security to the European Union citizens while fostering innovation.

As human-robot interactions become commonplace, the European Union needs to offer the appropriate framework to reinforce Democracy and European Union values. In fact, the Artificial Intelligence and Robotics framework must be explored not only through economic and legal aspects, but also through its societal, psychological and ethical impacts. In this context, we are concerned by the European Parliament Resolution on Civil Law Rules of Robotics, and its recommendation to the European Commission in its paragraph 59 f):

“Creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently;”

WE BELIEVE THAT:

1. The economical, legal, societal and ethical impact of AI and Robotics must be considered without haste or bias. The benefit to all humanity should preside over the framework for EU civil law rules in Robotics and Artificial Intelligence.

2. The creation of a Legal Status of an “electronic person” for “autonomous”, “unpredictable” and “self-learning” robots is justified by the incorrect affirmation that damage liability would be impossible to prove.

From a technical perspective, this statement offers many bias based on an overvaluation of the actual capabilities of even the most advanced robots, a superficial understanding of unpredictability and self-learning capacities and, a robot perception distorted by Science-Fiction and a few recent sensational press announcements.

From an ethical and legal perspective, creating a legal personality for a robot is inappropriate whatever the legal status model:

a. A legal status for a robot can’t derive from the Natural Person model, since the robot would then hold human rights, such as the right to dignity, the right to its integrity, the right to remuneration or the right to citizenship, thus directly confronting the Human rights. This would be in contradiction with the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms.

b. The legal status for a robot can’t derive from the Legal Entity model, since it implies the existence of human persons behind the legal person to represent and direct it. And this is not the case for a robot.

c. The legal status for a robot can’t derive from the Anglo-Saxon Trust model also called Fiducie or Treuhand in Germany. Indeed, this regime is extremely complex, requires very specialized competences and would not solve the liability issue. More importantly, it would still imply the existence of a human being as a last resort – the trustee or fiduciary – responsible for managing the robot granted with a Trust or a Fiducie.

Appendix 2.

**THE TORONTO DECLARATION ON THE GLOBAL
PREVENTION OF ELDER ABUSE**

Abuse of older people has only recently been recognised as a global problem. INPEA's advocacy work and the emphasis given to elder abuse prevention by the World Health Organization have contributed significantly to raising awareness worldwide. Academic institutions, around the world, have also substantially contributed to enhancing understanding and raising awareness and have developed methodological tools to study the problem. However, much is still to be done.

On one hand more research is needed – for instance, along the lines of the seminal joint project “Global Response to Elder Abuse” which resulted in the publication “Missing Voices-Views of Older Persons on Elder Abuse” and on the other hand practical action at local, regional and national levels.

Twenty or thirty years ago, societies throughout the world denied the existence of violence against women and child abuse. Then, through research, came the evidence. As a result the civil society exercised the appropriate pressure for action from governments. The parallel with elder abuse is clear.

This declaration is a Call for Action aimed at the Prevention of Elder Abuse.

Points to be considered:

- •Legal frameworks are missing. Cases of elder abuse, when identified, are often not addressed for lack of proper legal instruments to respond and deal with them.
- •Prevention of elder abuse requires the involvement of multiple sectors of society.
- •Primary health care workers have a particularly important role to play as they deal with cases of elder abuse regularly – although they often fail to recognise them as such.
- •Education and dissemination of information are vital – both in the formal sector (professional education) and through the media (combating the stigma, tackling the taboos and helping to de-stereotype older people).

- •Elder abuse is a universal problem. Research conducted so far shows that it is prevalent in both the developed and the developing world. In both, the abuser is more often than not well known to the victim, and it is in the context of the family and/or the care unit that most of the abuse happens.

“Elder Abuse is a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”. It can be of various forms: physical, psychological/emotional, sexual, financial or simply reflect intentional or unintentional neglect.

- •A cultural perspective is mandatory in order to fully understand the phenomenon of elder abuse – i.e. the cultural context of any particular community in which it occurs.
- •Equally important is to consider a gender perspective as the complex social constructs related to it help to identify the form of abuse inflicted by whom.
- •In any society some population sub-groups are particularly vulnerable to elder abuse – such as the very old, those with limited functional capacity, women and the poor.
- •Ultimately elder abuse will only be successfully prevented if a culture that nurtures intergenerational solidarity and rejects violence is developed.
- •It is not enough to identify cases of elder abuse. All countries should develop the structures that will allow the provision of services (health, social, legal protection, police referral, etc.) to appropriately respond and eventually prevent the problem.

The United Nations International Plan of Action adopted by all countries in Madrid, April 2002, clearly recognises the importance of Elder Abuse and puts it in the framework of the Universal Human Rights. Preventing elder abuse in an ageing world is everybody's business.

“In Ontario elder abuse will not be tolerated. That is why we are launching our comprehensive provincial strategy to combat elder abuse”. (Minister De Faria, Ontario's Minister Responsible for Seniors)

This declaration was devised at an expert meeting, sponsored by the Ontario Government in Toronto, 17 November 2002.

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**FREEDOM OF EXPRESSION WITHIN THE EMPLOYMENT
RELATIONSHIP - BETWEEN DIGNITY AND DUTY OF THE
EMPLOYEE¹**

This paper deals with the issues of freedom of expression at the workplace in European and comparative labour law and practice. The authors start from the fact that the right to freedom of expression is guaranteed to all citizens with restrictive possibilities to limit that right. The paper acknowledges the fact that employment implies a certain set of rights and obligations of the employer and the employee that shapes the exercise of the right to freedom of expression at the workplace. For this reason, an evolutionary overview of the development of the employment concept was given. It was pointed out that broad restrictions should not be accepted as justified while particular importance was given to the issue of protecting the efficiency of the employer work organization and work process. This criterion should be taken into account when balancing the employee's right to freedom of expression and protection of the legitimate interests of the employer. The paper discusses the numerous case law material of the European Court of Human Rights, as well as the case law of the highest courts within several important national legislations.

Keywords: : freedom of expression, employment, workplace, human rights

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Introductory considerations

Freedom of expression² is one of the fundamental rights in a democratic society. According to some authors, it is characterized by a dual function in the sense that it is both the goal and the instrument for the realization of many other proclaimed rights that are considered important achievements of civilization heritage (Alaburić, 2002: 1). In addition to the doctrine of philosophical, political, sociological and many other social sciences that put freedom of expression at the very center of the corpus of basic human rights, it should be noted that it is not an absolute right that cannot be limited, ie. public discourse, even in the most democratic and liberal countries, is conditioned by respect for the rights and freedoms of the others. This principle is codified in one of the fundamental acts proclaiming basic human rights, *The Universal Declaration of Human Rights*, so the Article 19 of the Document states that: “Everyone has the right to freedom of opinion and expression, which includes the right not to be disturbed because of opinion, as well as the right to seek, receive and disseminate information and ideas by any means and regardless of borders.”

Since 1970, many entities have entered the human rights space. Human rights principles appear in instruments of several supra-national bodies while on the other hand some of them are laid down at regional level. Yet the the scope of the right and the circumstances in which it can be exercised, have to be fully determined (Vickers, 2002: 1). For this reason, it was said in the literature that the essence of the legal problem of the conflict between personality rights and the freedom of expression is the identical legal power of rights in conflict (Popescu, 2018: 159). The previous statement, however, is valid only when the public display of certain content or information by the employee violates the personal rights of the employer such as reputation and honor. On the other hand, such statement can not be taken into account when it comes to disclosing information that may harm the employer's business reputation, working processes market power etc. In any case, it is important to strike a balance between the interests of the employer and the guaranteed human rights of all citizens, including those employees, who on that basis are the subjects of specific labor rights and obligations.

The limits to the freedom proclaimed in the aforementioned article of the Universal Declaration are set out in its Article 29: “In exercising their rights and freedoms, everyone may be subject only to such limitations as are prescribed by law solely for the purpose of

² By this term we mean freedom of speech, but also the other types of expression of the state of soul and consciousness, which can be verbal, real, symbolic, etc.

securing the necessary recognition and respect for the rights and freedoms of others, as well as meeting the just demands of morality, public order and general welfare in a democratic society.”

It is therefore indisputable that normative practice, at the supranational and national level, recognizes certain restrictions on the right to freedom of speech and expression. Thus, the main point of contention and essence of the issue of the right to freedom of expression is the scope and mechanism of its limitations. This issue is especially more complex when viewed in the context of the employment relationship, which implies a system of mutual rights and obligations of the employer and the employee, including specific obligations of a personal legal nature, among which we will consider the so-called. “the obligation of loyalty to the employer.” The key question that needs to be answered in the context of the topic of this paper is how far freedom of speech may be curtailed in the context of employment relationship (Barendt, 2009: 486)? In other words, it is necessary to determine whether the right to freedom of expression in the workplace can be treated as *ius cogens* within the set of human rights, ie if the certain restrictions are already envisaged due to the needs of the employer and work organization, it should be analyzed and determined in detail.

1. General remarks on the right to freedom of expression

The freedom of expression right was proclaimed by the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and other important international and regional documents that are guaranteeing fundamental political and civil rights. In addition, not only in the Republic of Serbia, but also in almost all other countries, the right to freedom of expression was provided in the provisions of the constitutional acts. Freedom of expression is one of the most important rights in a democratic society and according to some authors, it is characterized by a dual function in the sense that it is both a goal and a means of exercising many other proclaimed rights that are today considered important civilizational achievement (Alaburić, 2002: 1). Such approach indicates the dual character of the right to freedom of expression, which viewed as a goal *per se* expresses its subjective character, while the socio-political character of that right prevails if it is seen as a instrument for exercising other rights.

Expression includes different types of manifestation of the state of consciousness, but regardless of the form, the main classification of the expressed content makes a difference between value of judgments and statements. In the first case, it is about the content that

is objectively verifiable and that can be proven, while on the contrary, in the latter case it is about content that is not verifiable and that cannot be proven, or content that represents a value of judgment (opinion) about the event, appearances, things or persone. The distinction between potentially provable claims and value judgments that cannot be the subject of proof was particularly important in the jurisprudence of the ECtHR, that was based on the rule set out in *Steel and Morris v. UK* case, according to which the requirement to prove value judgments, especially if they are based on sufficient factual material, would lead to a violation of the right to freedom of expression (Ilić, 2018: 38).

The European Court of Human Rights in the judgment in *Handyside v. United Kingdom* case states that the protection of freedom of expression extends even to information which content may be offensive, harassing or in some way harassing to individuals. This view was later confirmed several times in a number of judgments, such as the *Castells v. Spain* in 1992 and *Vogt v. Germany* from 1995. The doctrinal starting point for this attitude of the court is found in the prevailing thesis that freedom of expression is important for the enjoyment of democracy and its values within society (Milo, 2008: 62). In that sense, the importance of “circulation and flow of information” from the political spectrum is especially emphasized and recognized in the landmark decision of the US Supreme Court, *Hustler Magazine Inc. v Falwell*, as the heart and essence of the First Amendment to the US Constitution (Milo, 2008: 67).

According to the above stated, the right to freedom of expression serves the intellectual and spiritual development of the individual as a person, ie his self-affirmation within society, while respecting his special cultural and psychological characteristics. On the other hand, the political character of the right to freedom of expression is reflected in the contribution to the public debate on topics and issues of general importance.

The enjoyment of the right to freedom of expression is basically proclaimed and guaranteed in a way that it is exempt from the interference of state and non-state entities. Such interference generally constitute a violation of the right to freedom of expression, however, in certain situations and under certain circumstances, the right to freedom of expression may be limited. When considering the violation of the right to freedom of expression, the European Court of Human Rights, without exception, applies the control test known as the “*tripartite test*” (Alaburić, 2002: 31). In order to justified certain restriction on the right to freedom of expression in accordance with the mentioned test, it is necessary for the restrictions to be cumulatively provided by law, prescribed for the protection of a legitimate aim and necessary in a democratic society.

As for the first condition, ie the first phase of the test, it produces the least problems in practice, so it is enough for the restrictions to be provide in a clear and unambiguous way. The protection of a legitimate interest does not create significant difficulties in practice either, since the protection of national security, public budget, public health, environment and the like, unequivocally appear as justified and legitimate interests to restrict freedom of expression when they are threatened by its exercise, respecting the principle of restrictive and *ultima ratio* restriction. The last phase of the tripartite test, as a rule, is the most complex because it implies a flexible notion of what is necessary in a democratic society. This flexible term should actually further narrow the scope of the restriction, however, quite the opposite, it often happens that it expands its scope, since the interpretation of the term necessary in a democratic society largely depends on historical, political, cultural and situational factors.

The constitution guarantees of freedom of opinion and expression (“to seek, receive and otherwise disseminate information and ideas through speech, writing, painting or otherwise”), which may be restricted by law, if necessary to protect the rights and reputation of others ... ”, is traditionally limited by labor legislation to protect the rights of the employer. Thus, for a long time in labor law (court practice) it was considered that an employee who critically relates to the practice of the employer in terms of the organization of work and the like, violates the obligation of loyalty (duty of trust and fidelity), so disciplinary sanctions were considered justified (Willey, 2009: 54).

2. Freedom of expression and employment

Freedom of expression in the workplace is an integral part of the right to dignity of every person and mentioned right undoubtedly has the *ius cogens* characteristic. The United States Supreme Court in the judgment of *Cohen v. California*, points out that the constitutional guarantee of freedom of expression stems from “the belief that no other right is linked to the principle of dignity and free choice of each individual, on which the American political system rests.”

During the course of the 1990s, the characterization of the key worker rights involved began to move from ‘labor standards’ to ‘human rights at work’ (Bellace, 2014: 177). The term ‘labor standard’ conveys an image of a technical issue; for instance, whether workers should have a break after working, while on the other hand the term ‘human rights at work’ includes something of fundamental moral importance that is owed a human being at all times and in all places (Bellace, 2014: 177).

The exercise of the right to freedom of expression by an employee in employment and in connection with work is primarily viewed in the context of the justification of the dismissal for exercising that right. Of course, all other types of disciplinary sanctioning of the employee should also be considered.

The legal and economic relationship between the employer and the employee is reflected in the light of the existence of an employment relationship. The International Labor Organization (ILO) defines an employment relationship as a relationship between an employee and an employer in which an employee performs work under certain conditions, receiving wages in return.³ In addition to subordination, which is the central concept of employment and labor law in general, the relationship between employer and employee is based on mutual loyalty, which is reflected in the obligation of cooperation and loyalty to the employer and labor organization (Kovačević, 2011: 221). However, the obligation of loyalty is not considered to be the main element of the employment relationship, which is otherwise characteristic of contracts that are concluded with regard to the personal characteristics of the contractor. Regardless of the additional character of the obligation of loyalty to the employer, it cannot be reasonably claimed that it does not permeate the relationship between employer and employee, at least through the principle of conscientiousness and honesty, which is one of the fundamental principles of contract law and labor law. For that reason, it is necessary to look at the nature and significance of that obligation when it is based opposite to the freedom of expression in every single case.

Employees who exercise the right to free speech may face many potential difficulties at workplace. It is a generally accepted view that an employer may take advantage of the employment relationship to censure a free speech at workplace within a work based penalty. This is the case regardless of the fact that speech shames employer, interferes with work organization or if an employer disagrees with the sentiment expressed (Vickers, 2002: 2).

The starting point is that the right to freedom of expression is a conventional and constitutional right that the state, due to its positive obligation, is obliged to provide to every citizen. Such an attitude is in the judgment in the ECtHR case of *Fuentes Bobo v. Spain*, accepted by the European Court of Human Rights. However, comparative practice shows that courts attach special importance to employment as an important socio-

³ The employment relationship, International Labour Conference, 95th Session, International Labour Office, 2006.

economic category. Thus, for example, a German court confirmed (the same stand point was taken by the European Human Rights Commission) dismissal in one case⁴ explaining that by entering into contractual obligations vis-à-vis the employee accepted a duty of loyalty towards the employer which limited his freedom of expression to a certain extent, adding that the courts were not required to protect the applicant (employee) as he had accepted limitations of his freedom of expression in his employment contract. It follows that courts in both the European legal environment and the USA (*Pickering* case)⁵ attach particular importance to protecting the efficiency of the employer work organization and work process and that this criterion should be taken into account when balancing the employee's right to freedom of expression and protection legitimate interests of the employer.

2.1 General remarks on the employment relationship - an evolutionary view

In Ancient times, the work of slaves was dominant, so there were no individual labor rights that need protection by the state interventionism. The work, which implied increased intellectual capacity and engagement, was not charged and was performed on a voluntary basis, which did not lead to the regulation in a way that it was done in modern legislation. During the Middle Ages, the new feudal socio-political, economic model entered the scene and was proclaiming the work of dependent peasants - serfs who did not consider themselves workers. Until the period of the Bourgeois Revolution in 1789, serf labor was dominant in Europe, with a noticeable maturation of the elements of capitalism and its inherent processes. Among the most important features of serf labor is strict personal dependence on the employer, which according to the doctrine has its roots in "paternal authority" as manifested in ancient Rome in the processes of work within a family household by *pater familias* (Horvat, 1954: 128). Therefore, the traces of paternal, ie domestic authority were also manifested in the medieval world of work, in the relations between masters and journeymen or apprentices, especially when they lived in the households of their masters. This is because the power of the master over the workers was understood as a kind of extension of the paternal power over the members of the household (Kovačević, 2013: 126).

The personal component has remained in the new century, when it comes to influencing the concept and manifestation in the practice of employment. In that sense, we can talk about the state of affairs in German doctrine, where over the time, a radical variant of the

⁴ Rommelfager (1990) 62 D & R 151.

⁵ Pickering 391 US 563, 568 (1968).

status concept of labor relation was developed, in which the employment relationship is understood as a purely personal relationship that does not spring from a contract. In that hypothesis, the actual joining and belonging of the worker to the company becomes a true source of employment, so that, instead of in the contract, the worker is in a status position. This conception experienced a renaissance in the 1930s, when, in the light of National Socialist conceptions of society and social organization, the community of employees and employers was viewed as an integral part of the national community (Kovačević, 2013: 79).

The strong influence of the status concept of employment, in which personal relations between the employee and the employer dominate, was present in the jurisprudence of French courts until the 1990s, so they accepted the view that an employer could terminate an employment contract because he lost trust in the employee. The turn was made by the verdict in which the Social Department of the Court of Cassation decided that the loss of trust (which would correspond to the violation of the principle of the obligation of loyalty) does not itself constitute a justifiable reason for termination of employment contract (Kovačević, 2013: 103).

Since 1970, many entities have entered the human rights space. Human rights principles appear in instruments of several supra-national bodies, such as the UN's Human Rights Council's Guiding Principles on Business and Human Rights (UN Principles), the OECD Guidelines for Multinational Enterprises as well as the UN Global Compact (UNGC). Furthermore, over the last two decades companies have come to accept that they have an obligation to act responsibly, a concept often called Corporate Social Responsibility (CSR). (Bellace, 2014: 176). This state of affairs had its roots in abandoning the status concept of employment that was taken over by the institutional and contractual concept of employment.

The institutional approach, which over the time gained a dominant position in the construction of the concept of employment, starts from the need to limit the power of the employer in proportion to the needs of the work process. It should be noted that some proponents of the institutional conception of labor relations, above all the father of modern French labor law, *Paul Durand*, define the content of labor relations in the light of its comparison with the relationship between the state and the individual. In that sense, the similarity between the company, as a hierarchically organized community, and the state is pointed out, while in the analysis of the functions of the employer's government certain, true, only rough, similarities between the normative power of the employer and the legislative state power, ie between the governing power of the employer and the

executive state authority, or between the disciplinary authority of the employer and the judiciary. Recognition of the similarities between the company and the state does not end, however, with the comparison of different functions of government, but also the employees in the company are compared with the citizens. In the French doctrine, such an approach has resulted in the concept of “citizenship in the company”, which implies that employees qualify as “citizens of the company” (Kovačević, 2013: 33).

In comparative labor law, especially within the European social model, the affirmation of the concept of employee-citizen led to the legal recognition of the individual employee's right to freedom of expression in the workplace, not only in relation to working conditions, but also in relation to work organization and production at the employer (Lubarda, 2012: 80). Finally, the Council of Europe, ie the European Convention on Human Rights, guarantees the right to express an opinion (Article 10), which “represents one of the essential foundations of a democratic society, one of the basic conditions for its development and for the development of every human being.” The right to freedom of expression is thus most closely connected with modern constitutions guaranteed by the right to free development of personality and dignity (Article 23 of the Constitution of Serbia), as well as the right to work and the right of employees to express opinions at work and outside the employer (Lubarda, 2012: 80).

When it comes to ILO normative framework, we single out that Director-General *Michel Hansenne* identified four fundamental values which flowed from several core ILO conventions, all concerned with the protection of basic human rights at work. *Hansenne* aimed to achieve a consensus among the ILO's tripartite constituents on what rights would be deemed ‘fundamental’ and equally important, what conventions would be termed ‘core’ conventions (Bellace, 2014: 178). In June 1998, the ILC adopted a ‘Declaration on Fundamental Principles and Rights at Work,’ setting out four rights, ‘the principles concerning the fundamental rights which are the subject of those Conventions,’ namely:

- a) freedom of association and the effective recognition of the right to collective bargaining;
- b) the elimination of all forms of forced or compulsory labor;
- c) the effective abolition of child labor; and
- d) the elimination of discrimination in respect of employment and occupation.

In the context of freedom of expression in the workplace, this determination of fundamental labor rights is important because the right to freedom of expression in certain segments is inextricably linked to the freedom of the right to collective bargaining and the elimination of discrimination in respect of employment and occupation. In the first case, the collective bargaining is inconceivable without an open exchange of ideas and views, even publicly, while the prohibition of discrimination certainly applies to those who themselves publicly state the reason concerning their political beliefs, sexual orientation, ethnicity, etc., and which may be grounds for discriminatory treatment. In this sense, the right to freedom of expression became fundamental values in labor law more than two decades ago.

Two ILO's conventions are of relevance when it comes to the issue of freedom of expression at the workplace. The first one is Convention NO 158 on the Termination of Employment in which is laid down the requirement that the dismissal could be justified only with the good cause. The second one is Convention NO 111 that obliges the state to ensure the measures to protect workers against any type of discrimination.

Work within the employment relationship was one of the key factors of the economy of the 20th century and an element that served to neutralize social and economic inequality in the relations between employees and employers. In the last few decades, radical changes have happened in the labor market that have affected the social and economic pillar on which labor law is based. First of all, technological changes have led to a change in the process of production and work in general, which has caused the emergence of new flexible forms of work and thus actualized the discussion on employment and the circle of those entities to which labor legislation applies. Such a state of affairs in the labor market was accompanied by ILO regulation (Recommendation No. 198) in order to provide a wider range of persons covered by labor legislation, from employees to workers outside such a relationship. The European Court of Justice reasoned similarly, defining the term worker in order to expand the application of the institute of labor law of the Union. Thus, only activities that can be considered extremely marginal and auxiliary are excluded from the domain of personal application of labor law. The reasoning of supranational institutions was followed by many national legislations and gradually expanded the field of application of labor legislation.

The dramatic change in employment has been the sharp increase in the number of domestically owned companies in Asia and South Asia that produce goods purchased by companies in Europe and North America. Besides directly owning and operating factories, companies increasingly use two other global supply chain models. In one

model, a company makes nothing in its home country but simply brands products made in other countries by its suppliers. Nike epitomizes this model. In another model, a retailer sources goods from the lowest cost suppliers and, as a result, buys most of its products from suppliers outside its home country. The products may or may not be sold under the retailer's brand name by the retailer. Walmart and H&M are examples of this model. Traditionally, companies adopting these two models had not paid attention to labour policies at the suppliers' factories since they did not view themselves as employers, but merely buyers of finished products (Bellace, 2014: 176).

Finally, since 1990, there has been a growing concern about the impact of increasing globalization on workers. The processes of globalization led to the flexibility of the employment relationship, and the creation of new forms of work that were less rigid. This also means that the personal labor law component was increasingly becoming the less important element and that the elements of the above-mentioned status concept of work performance, among which the most important is the obligation of loyalty to the employer, are slowly being pushed into the background.

2.2. Employees's forms of expression at the workplace

In general, according to the functional criterion, we can distinguish at least three different forms of expression of the employees. First, we could think of situations in which the employee publicly, in a formal or informal way, expresses feelings, emotions and attitudes, which in any sense may be contrary to the structure and functioning of employer's work organization. In the second case, it comes to the situations when the employee publicly expresses dissatisfaction or views concerning the work process and working conditions. Finally, the third type refers to the disclosure of information important for the public interest, which directly affects the employer, ie which occurred in the process of work. In that sense, we will particularly explain whistleblowing as a typical example for this form.

In the case when the employee expresses feelings, emotions and attitudes, the principle is that he is free to do so, with possible limitations on that right only when they prevent the employee to perform work efficiently for the employer due to the presented content. Thus, for example, the United States Supreme Court concluded in the *Pickering* case⁶ that the primary interest of the employer is to ensure efficiency in performing work within its activity (Barendt, 2009: 491). This is actually one of the most important criteria in

⁶ *Pickering* 391 US 563, 568 (1968).

assessing whether the interest of the employer has been violated in every particular case. In this regard, the stated position, regardless of whether the speech is related to religious, national security or other issues, should be interpreted in the context of the possibility of further work with the same employer with the aim of efficient organization and work process. However, case law has shown that interpretations of this criterion can be diverse and conditioned by different cultural, political and psychological grounds.

In the *Rommelfanger* case⁷, the European Human Rights Commission took the stand point that the Catholic Hospital, as an employer, justifiably terminated the employment contract of an employed doctor who publicly stated for *Der Stern* his positive attitude towards the medical procedure of abortion, which is essentially contrary to socio-political and religious position of the Hospital - the employer. The Commission justified its decision by stating that the employer is an organization based on certain convictions and value judgments which it considers essential for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer. An employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of employment as well as the importance of the issue for the employer. The Commission also notes that by entering into contractual obligations *vis-à-vis* his employer the applicant accepted a duty of loyalty towards the Catholic church which limited his freedom of expression to a certain extent.

On the other hand, we could hypothetically consider an example that would illustrate the position on the allowed sanctioning (dismissal, reduction of salary, etc.) of an employee for expressing his views and ideas and the like, only when it contradicts the efficiency of the work organization, process of work and organization of the employer. Let's assume that in our example one person works in a Catholic general school. Let's assume also that "our employee" at one point publicly states that he is an atheist. If the same person in our hypothetical school teaches physical education, we could justifiably doubt whether the termination of the employment contract would be adequate and in accordance with the right to freedom of expression, having in mind the mentioned criterion of work efficiency.

⁷ Rommelfanger (1990) 62 D & R 151.

It would be a completely different situation if the same person teach religious studies or sociology at the same school.

When it comes to the expressions and views concerning the work process and working conditions, French labor legislation (laws from 1982 - general regime and 1983 - public sector) introduces the right of the employee as an individual right that is directly exercised in the workplace during working hours, by expressing opinions, giving suggestions to superiors in the hierarchy with the employer, ie management of the company. For the sake of saving time, the varieties of exercising this right of the employee (citizen) are determined in such a way that collective meetings (meetings) are provided for more employees at workplaces during working hours.

The legislator envisages the obligation to negotiate for the employer when representative trade unions (trade union sections) are established in order to conclude a special type of collective agreement with the employer – “agreement on expression of opinion” (*les accords d'expression*), whose mandatory content includes: level of organization, schedule and duration of meetings (in practice often three to four meetings per year, at least six to eight hours per year); the manner of expressing opinions and their transmission to the employer; measures that will enable the unions and the employees' council (company committee) to get acquainted with the opinions, requests and proposals presented at those meetings. Of course, the law stipulates that employees enjoy immunity, that is, that they cannot invoke (disciplinary) liability for an opinion expressed or fired (except in the case of abuse or offensive proposals that are not related to the subject of the right to express an opinion) (Lubarda, 2012: 78). In this regard, there is a specially protected category of employed trade unionists who cannot suffer harmful consequences from the employer due to their trade union activism, and thus the expression of views and ideas. This is, after all, the position of Serbian Labor law (Article 188). In addition, in our opinion, it should be considered affirmatively the legal stand point of the Supreme Court of Cassation of Serbia when dealing with expressing employee dissatisfaction with working conditions and low wages in media. The Court found that the expressing employee dissatisfaction with working conditions and low wages into the media does not represent a violation of the employer's reputation or a reason for dismissal due to violations of work discipline.⁸

Finally, a number of the authors define whistleblowing as the detection of illicit acts at work, by employees or former employees (Lewis, 1995: 208). For instance, crimes

⁸ Sentence from the judgment of the Supreme Court of Cassation Rev2 1186/2015 of 24.12.2015. year, determined at the session of the Civil Department on 31.5.2016.

characterized by a huge dark, hidden or grey figure (Stevanović, Cvetković, 2019: 48) or crimes undertaken in a conspiratorial alliance of powerful state and non-state actors (Stevanović, 2018: 120) are easier to detect within the system, while on the other hand, the system and its leaders are able to respond to whistleblowing by retaliating against the “insider”, unjustifiably restricting or depriving him of his rights within that system. Regulations dealing with whistleblowing are aimed to protect the employed (hired) whistleblower who notices and then reveals the illegalities of his employer or another person within that system who is in a superior position in relation to the whistleblower.

In order to characterize an action taken by a one person as whistleblowing, it is necessary that the information disclosed indicates that the public interest is endangered. The judicial protection could be given if the harmful action has been taken against the whistleblower in relation with the whistleblowing. As we have previously pointed out that the work environment is the most common forum where employed “insiders” can detect well-concealed illegalities, particularly corruption, it follows that the damage they suffer due to possible retaliation concerning the violation of the employment status and the violation of the rights from work and on the basis of work.

Having in mind the obligation to report criminal acts to the competent authorities from the aspect of criminal responsibility of a person who fails to report (Article 331 and 332 of the Criminal Code of the Republic of Serbia), it should be noted that the obligation of loyalty to the employer is not a basis suitable to exclude illegality as a constitutive element of the crime. In this regard, although from the ethics point of view, the question of the employee's motive for whistleblowing may be raised, we believe that it is not of particular importance for the subject matter. This because important information for preventing damage to human health by a pharmaceutical company will not be less useful or less important, only because it was published in revenge to the owner or director of that company for moving to a lower paid job position.

Based on the previously elaborated obligation to blow a whistle – to report (report the act and the perpetrator) if other preconditions are met, which as a rule refer to the severity and threatened punishment for a specific act, we conclude that the issue of whistleblowing exceeds the employment relationship and balancing between employee and employer interests. Thus, when the head of the press service of the Public Prosecutor discloses evidence indicating the influence of high-ranking state officials on a current criminal procedure, and is therefore dismissed, it will be considered that his employment position has been endangered as a direct consequence of disclosing information of public importance. This position was confirmed by the ECtHR in the case with the described

factual situation, *Guja v. Moldova* from 2008. It is the same in the situation when a geriatric nurse publishes data on inadequate care for the elders within the hospital, which puts people's health as a top public interest in question. This state of affairs was confirmed by the ECtHR in the judgment *Heinisch v. Germany* case from 2011. In both cases, the stand point is that publishing information of public interest takes precedence over the interests of the employer, ie that it goes beyond the scope of the loyalty obligation. In that sense, it can be concluded that whistleblowing can be justified only when it is aimed to defend values that are more important than loyalty values, such as public health, human safety, the environment, etc. (Kovačević, 2013: 106). When it comes to special labor law clauses such as the business secrets clause, the same rule needs to be applied.

The mechanism of protection of the whistleblower is realized particularly in the system within he came to the disputed data. As a rule, this system is the working environment of whistleblowers for the reasons we have previously pointed out. The system of labor law provides the basics, principles and procedure for protection from the employer's harmful actions, so such protection can be requested from the court or other competent authority by any employee if he considers that his right has been violated. For example, every employee can successfully challenge the employer's decision on dismissal with a lawsuit if, for example, it does not state the grounds for dismissal. On the other hand, the managerial authority of the employer, which undoubtedly includes the right of discretionary decision-making, allows him to organize the work process in accordance with the law, which in practice is manifested in issuing general and individual acts determining and deciding on the rights, obligations and responsibilities of employees. The importance of protecting whistleblowers is reflected in the fact that the process of issuing these acts, especially individual ones, can be legally perfect from the formal aspect of view, however, the whistleblower could point out in a labor dispute the fact that his transfer to another place of work for example, although in accordance with the legal procedure, in fact formally disguised retaliation by the employer for whistleblowing.

2.3. Employees in the public and private sectors in the context of the right to freedom of expression

The jurisprudence of the courts in the US, due to the supremacy of the principle of protection of private capital, which is most pronounced there, makes a significant difference in terms of employees in the public and private sectors in the context of the right to freedom of expression at the workplace. In this regard, the courts in the US recognize the right to legal protection for employees in the public sector for expressing their views or allegations that harm the interests of the employer, while they do not

recognize the same right for employees of private employers (Barendt, 2009: 486). This state of affairs can be explained by the position of a number of authors according to which the relations between the employee and the employer in the private sector is regulated by the contract as opposed to the administrative act-decision, which has this function in terms of public sector employees.

Such situation is quite the opposite when it comes to the countries of the continental legal systems, where we particularly refer to the judgments of the ECtHR, ie the judgments of the highest court instances of numerous European countries, with the indisputable existence of various deviations and exceptions. Thus, the ECtHR in the case of *Fuentes Bobo v. Spain* noted the existence of a positive state obligation to protect the right to freedom of expression even in relations between private individuals, having in mind the conventional and constitutional rank and character of the right to freedom of expression.

However, it must be taken into account that civil services have certain characteristics that in special cases can expand the field of restrictions on freedom of expression, in contrast to the private sector. This often implies the application of other important legal standards that correct and concretize the right to freedom of speech. Thus, when considering the case of the civil servant – a teacher who was member of extremist political party,⁹ ECtHR did hold that state is free not to give permanent employment to mentioned probationary teacher. It is important to note that the Court treated this case in the light of the right of access to the civil service which is not guaranteed by the ECtHR. The same Court in landmark case *Vogt v. Germany* developed a *fair balance test* under which the civil servant's freedom of expression should be weighed against the state's interest in achieving the important aims (Barendt, 2009: 489).

Furthermore, the literature has even accepted the position that public servants, unlike those employed in the private sector, have an obligation to take care of their behavior, as well as what and to whom they speak, in order to preserve the integrity and authority of the state body they work for. Such duty should be present even out of the regular workplace. Corrective factor to such obligation should be taken into account that public officials should not be subject to a broad ban that would negatively affect their private life and personal development. For example the Serbian Law on Civil Servants and the Law on Employees in Autonomous Provinces and Local Self-Government Units prescribe public employees' labor rights and obligations. In accordance with national legislation of the Republic of Serbia, a public employee is obliged to follow an oral order

⁹ *Glaserapp v. Germany* (1987) 9 EHRR 25.

from his/her superior, except when he/she believes that such order is contrary to the regulations or the rules of the profession or that his/her actions on executing the order could result in a violation, which he/she is obliged to communicate to his/her superior. If such an order is repeated, the public employee is obliged to execute it and inform the manager accordingly. However, he/she is also obliged to refuse to execute an oral or written order if such an act would constitute a criminal act and to inform the manager, i.e., the authority that supervises the work of the state authority if the order was issued by the manager, in writing (Kostić & Matić Bošković, 2019).¹⁰

Public employers may also argue that restrictions of freedom of speech of their staff are necessary to ensure their political neutrality, particularly in line with European political tradition. However, in Canada,¹¹ restrictions which banned all public employees irrespective of their position, from engaging in any type of political speech were held too broad (Barendt, 2009: 492). This is not to say that some posts may not require the staff to be politically neutral. Restrictions on the ground of expressing political opinion would be justified for jobs which involve high level of responsibility for policy making (Vickers, 2002: 66). Finally, it should be noted that the ILO has criticized certain laws that provide for a ban of employment in the public service only on the basis of political and ideological views (Stevanović, 2018: 113).

Freedom of speech could be especially limited when it comes to members of the armed forces who have special obligations to preserve national security and order. US Supreme Court accepted approach that only a low degree of freedom of speech is justified for the members of armed forces (Barendt, 2009: 494). Such low degree as a rule implies a prior approval from the superior.¹² In contrast, ECtHR took the legal approach which is preferable to that of the US Supreme Court. In the ECtHR jurisprudence, in determining whether the restrictions are necessary to achieve for instance national security aim, the Court examines the character of the speech and whether it could objectively be considered a serious threat to discipline and order among the armed forces. Thus, in *Gubi v. Austria* case the Court found that Austria was in breach of Article 10 when a soldier had been prevented from distributing in army barracks copies of a soldier's association magazine,

¹⁰ Article 18. of the Law on Civil Servants. The obligation of such conduct exists when it comes to suspected superior order execution is a criminal offense and when there is a suspicion that the compliance with such an order is misdemeanor. Article 31. of the Law on Employees in Autonomous Provinces and Local Self-Government Units provides the same obligation for employees in their organizational units.

¹¹ *Osborne v. Canada* (1991) 2 SCR 69.

¹² *Brown v. Glines* 444 US 348 (1980).

emphasizing the fact that the critical aspects of military life contained in the magazine did not urge disobedience.

Finally, it should be stated that civil servants have in some certain circumstances obligation to inform the superior or manager if in relation with the work find out that an act of corruption has been committed by an official, civil servant or employee of the state body in which they work (Article 23a Law on Civil Servants of the Republic of Serbia). In light of this, we could refer to the rule that the disclosure of information important for the public interest must be treated as an obligation for every person, and particularly for an employee in the public service. That obligation is prescribed also for internal auditors in public sector. According to the Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector, an internal auditor who, in the course of the audit procedure, “identifies indicators of fraud” is obliged to terminate the audit procedure and notify the Internal Audit Manager immediately, who should in turn inform the manager of the public funds beneficiary institution (Article 20 of the Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector). That means that when the internal auditor establishes that there are grounds for suspicion that a crime has been committed, he/she is obliged to inform the above persons accordingly (Šuput: 2012). The obligation to express their opinion in their public reports exist for supreme auditors, bearing in mind that they can contribute not only to the detection of criminal acts, but also to the acquisition of the evidence necessary for the initiation of criminal proceedings and the insurance of the final judgement (Šuput: 2014).

Concluding remarks

The employment relationship is marked by duty of mutual trust and confidence of employee and employer. On the other hand, it must be noted that freedom of speech as a fundamental human right includes a freedom of speech at the workplace. In determining whether the restrictions to the freedom of speech made by employer is in line with principles of the labor law and human rights law, it is important to strike a balance between the interests of the employer and the guaranteed human rights of all citizens, including those employees, who on that basis are the subjects of specific labor rights and obligations. Of course, this is not always an easy task, since it implies reliance on various political, economic and cultural factors. However, the fact that prohibitions must not adversely affect the private life and personality development of employees, should be

taken into account in policy making processes in order to deal with issue of freedom of speech at the workplace.

Numerous case law in this area still cannot establish general rules that would be applicable in each specific situation, but it is important to always keep in mind as a corrective factor, the principle of the *least possible encroachment on the right to freedom of expression*, which is one of the most important human rights, not only for the reason of enjoyment that right but also for the exercise of other guaranteed human rights such as the right to life, a healthy natural environment and the like, through the right to freedom of expression.

Working conditions in global supply chains more than ever demand coordinated action based on shared understandings of what fundamental rights mean. There is now an urgent need for governments, employers and workers to confirm that internationally recognized human rights, as expressed in the core conventions, apply universally. After considering the relevant normative framework, we pointed out that the right to freedom of speech of employees is *ius chogens* in labor law and one among many, manifestation of the right to freedom of expression as a fundamental, universal human right.

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Elena Tilovska-Kechedji*

HUMAN RIGHTS IN TIMES OF PANDEMIC

We live a fast paced of life, the world is moving fast through globalization and we have the rise of technology, we are socializing, traveling around the world for work or leisure, we are living a modern life. And in January 2020 all of this stopped. The world stopped due to a virus. A virus that spreads within the second and affects us all, young, old, healthy or weak, all human beings. And in order to stop the spread of the virus we need to be socially distanced from our friends and families. We can not go to work or school, we have to stay home, our right to move, to travel is limited. Our right to health and adequate standard of living is limited. Therefore, the human rights which we inherit when we are born are threatened. And these threat should be neutralized. We should finally realize that human rights are our essence and we should respect and acknowledge them of their worth.

Keywords: *Human rights, pandemic.*

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1. COVID 19 and its influence on human rights

The COVID-19 pandemic hit the world in a fast paced and the world was not prepared for it. It influenced all segments of our lives and our fast forward lives were put on stand buy. The world stopped.

The COVID 19 is a global health crisis, with 32,029,704 infected and 979,212 deaths and the numbers are growing more every day.¹ Even the most advanced health-care systems are failing or are overloaded, and struggle to provide adequate care. The pandemic did not only weaken the health care system, it weekend political systems.² It influenced and weakened even the most developed economies and social aspects of life.

The pandemic weakened human rights as well. All over the globe, countries have placed certain restrictions in order to stop the spread of the virus and protect the right to health, which is a priority. These restrictions are placed on the right to movement, the right to association, public gatherings, the right to work, family life and many more. These restrictions affected people's every day lives. Therefore, guaranteeing human rights poses a great challenge, because women, men, children, older persons, refugees, migrants, poor people, people with disabilities, minorities, LGBTI people are all affected differently from the pandemic. Human rights are a guide for States on how to use their power in order to protect human beings. The instability and fear from the pandemic is raising human rights concerns, like discrimination of certain groups, hate speech, xenophobia, mistreatment of migrants, sexual violence, violence, gender inequalities. And now is the time for human rights to be protected and empowered in order to focus on repairing the world (economically, socially and politically).³

¹ "WHO Coronavirus Disease (COVID-19) Dashboard". World Health Organization. 25/09/2020 Retrieved from: <https://covid19.who.int/>

² Salvador Santino F. Regilme Jr. "Opinion – COVID-19: Human Dignity Under Siege. Amidst Multiple Crises". Jun. 12, 2020. Retrieved from: <https://www.e-ir.info/2020/06/12/opinion-covid-19-human-dignity-under-siege-amidst-multiple-crises/>

³ "COVID 19 and Human Rights:We are all in this together". UN. April, 2020. Retrieved from: <https://unsdg.un.org/sites/default/files/2020-04/COVID-19-and-Human-Rights.pdf>

2. International Human Rights

Human rights are a set of principles, standards and norms that were created in order to protect human kind, its dignity and its living.⁴ Human rights are the rights that were defined in the UN Charter and the Universal Declaration of Human Rights. Acceptance and respect of the *erga omnes* principles is acquired from treaties and international law and the violation of these principles can be sanctioned by the UN Security Council, by international organizations and states.⁵ States should proclaim, guarantee and protect human rights and freedoms, this is their sovereign duty.⁶

Human rights must be at the center of this pandemic in order to protect public health and to prevent, contain and treat the virus. But, many of the measures presented by States to contain the spread of the virus, have been proposed and implemented without consideration of the consequences and effects they will have on human rights. States are obligated to guarantee civil, cultural, economic, political and social rights and respect for human rights is essential and required by human rights law.⁷

The 1946 Covenant of the World Health Organization points out that health is one of the fundamental rights of every human being. Furthermore, Article 25(1) of the Universal Declaration of Human Rights points out that all human beings have the right to a standard of living with health and medical care. But, the health and well-being of individuals only points out the need for adequate diagnostics, and treatment, and the synonym for public health refers to disease prevention which requires restricting individual's rights.⁸ Therefore, international human rights law guarantees the right of health and obligates governments to prevent health threats but it also acknowledges that when there is a serious health threat, restrictions on some rights should be made and they are justified, but only

⁴ Dragica Popesku. "CONFLICT BETWEEN PERSONALITY RIGHTS AND FREEDOM OF EXPRESSION". YEARBOOK HUMAN RIGHTS PROTECTION "FROM UNLAWFULNESS TO LEGALITY" 2018

⁵ Zoran Pavlović. "THE RIGHT TO PRIVACY – CHALLENGES OF NEW COMMITMENTS". Međunarodna naučna konferencija „SLOBODA, BEZBEDNOST: PRAVO NA PRIVATNOST“ 2017

⁶ Ievgen Streltsov. "REGULATION OF PRIVACY IN PUBLIC LAW". Međunarodna naučna konferencija „SLOBODA, BEZBEDNOST: PRAVO NA PRIVATNOST“ 2017

⁷ "RESPONSES TO COVID-19 AND STATES' HUMAN RIGHTS OBLIGATIONS: PRELIMINARY OBSERVATIONS". AMNESTY INTERNATIONAL PUBLIC STATEMENT 1 12 March 2020 Index Number: POL 30/1967/2020 Retrieved from: <https://www.amnesty.org/download/Documents/POL3019672020ENGLISH.PDF>

⁸ Sarah Jackson and David Griffiths. "Inequality and Austerity: Our Weak Links in Countering COVID-19". May 2020. Ethics and International Affairs. Cambridge University Press. Retrieved from: <https://www.ethicsandinternationalaffairs.org/2020/how-inequality-hurts-us-all-in-the-pandemic-response/>

for a limited period, and should be respectful of human dignity. And COVID-19 pandemic is a public health threat and restrictions on certain rights are justified.⁹

The 1966 International Covenant on Civil and Political Rights (ICCPR) identified which rights can be restricted in emergency situations. But, as soon as governments presented emergency declarations, it appeared the need for guidance. That is why the Siracusa Principles were created on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. They provide legal framework to evaluate restrictive measures. They were adopted in 1984, and clarified the restriction of human rights and when such measures should be undertaken and they are:

- responsive to a pressing public need (for example, protecting public health);
- deemed necessary and proportionate to a legitimate aim;
- prescribed by law and not imposed arbitrarily; and
- applied as a last resort using the least restrictive means available.¹⁰

3. International Health Regulations (IHR)

The International Health Regulations have changed over the years in order to respond effectively to the challenges posed by infectious diseases. In 1951 the WHO adopted the International Sanitary Regulations and in 1969 renamed them the “International Health Regulations”, that bound all WHO member states to monitor outbreaks of diseases. While providing an international framework for disease control policies, they had narrow scope and were inadequate and negligent of human rights. Because states were unable to respond to emerging diseases in 1995 the World Health Assembly begun to revise the IHR, but the revision process progressed slowly until the SARS emerged as a new infectious disease. The ineffective response to this outbreak showed the incapability of the IHR and once again needed new revisions so in 2005 WHO released a new revised

⁹ “Human Rights Dimensions of COVID-19 response”. MARCH 2020. Human Rights Watch. Retrieved from: <https://reliefweb.int/sites/reliefweb.int/files/resources/Human%20Rights%20Dimensions%20of%20COVID-19%20Response.pdf>

¹⁰ Benjamin Mason Meier, Hanna E. Huffstetler, and Roojin Habi. “Human Rights Must Be Central to the International Health Regulations”. August 26, 2020. Health and Human Rights Journal. Retrieved from: <https://www.hhrjournal.org/2020/08/human-rights-must-be-central-to-the-international-health-regulations/>

draft of the IHR, which incorporated human rights and it was adopted by the World Health Assembly.¹¹ But were all of these revisions enough?

The COVID-19 pandemic has presented other weaknesses in the IHR, like rights violations and the need for further reforms in balancing public health and individual rights and reinforcing the connections between global health law and human rights law.¹² It is crucial that states respect, protect, and fulfill human rights during pandemics, but there is a need to effectively balance between public health and human rights in future IHR revisions. In order to reconcile public health and human rights under global health law, the IHR need to outline in detail human rights responsibilities during health emergencies. The IHR wants to limit restrictions on individual rights but it gives no guidance on whether, when, and how to resort to public health measures. Drawing from the Siracusa Principles, future revisions of the IHR must align human rights law with global health law, these reforms will ensure state accountability for their responses to the pandemics.¹³

4. The right to health and the health system

Under the International Covenant on Economic, Social and Cultural Rights, which most countries have adopted, everyone has the right to health. The United Nations Committee on Economic, Social and Cultural Rights, which monitors state compliance has stated that the right to health is dependent upon other human rights, including the rights to food, housing, work, education, human dignity, life, equality, the prohibition against torture, privacy, access to information, the freedoms of association, movement and many others. The right to health provides the excess to health facilities, goods, and services. Any measures that limit people's rights and freedoms must be lawful and necessary.¹⁴ The right to health is part of several international human rights treaties, and most countries have ratified at least one treaty that requires them to respect the right to health.¹⁵ Health

¹¹ Benjamin Mason Meier, Hanna E. Huffstetler, and Roojin Habi. Human Rights Must Be Central to the International Health Regulations. August 26, 2020. Health and Human Rights Journal. Retrieved from: <https://www.hhrjournal.org/2020/08/human-rights-must-be-central-to-the-international-health-regulations/>

¹² Ibid

¹³ Benjamin Mason Meier, Hanna E. Huffstetler, and Roojin Habi. Human Rights Must Be Central to the International Health Regulations. August 26, 2020. Health and Human Rights Journal. Retrieved from: <https://www.hhrjournal.org/2020/08/human-rights-must-be-central-to-the-international-health-regulations/>

¹⁴ "Human Rights Dimensions of COVID-19 response". MARCH 2020. Human Rights Watch. Retrieved from: <https://reliefweb.int/sites/reliefweb.int/files/resources/Human%20Rights%20Dimensions%20of%20COVID-19%20Response.pdf>

¹⁵ "RESPONSES TO COVID-19 AND STATES' HUMAN RIGHTS OBLIGATIONS: PRELIMINARY OBSERVATIONS". AMNESTY INTERNATIONAL PUBLIC STATEMENT 1 12 March 2020 Index

strategies should address medical dimensions, treatment and should be available to everyone, including the most vulnerable and marginalized.¹⁶

States have a duty to protect human life. The right to health is inherent to the right to life. The pandemic has tested States' ability to protect the right to health. The under investment in health systems has weakened the ability of States to respond to this pandemic as well as provide other essential health care. COVID-19 is showing that health must be a priority. Health-care systems all around the world even those best equipped are being overwhelmed, with some at risk of collapse.¹⁷ All of these shows that we should finally see what our priorities should be, and those are health and well being of all human kind.

5. The right to movement and quarantine

The restriction of freedom of movement was crucial in order to control the virus, and protect the right to life. The first health measure taken by States against COVID-19 has been restricting the freedom of movement. This measure is practical and necessary in order to stop the virus transmission, prevent health-care to become overloaded. But this measure had impact on jobs, live, access to services, including health care, food, water, education and social services, adequate standards of living and family life. Freedom of movement is a crucial right that facilitates many other rights. Although international law permits certain restrictions on freedom of movement, these restrictions should be strictly necessary, and non-discriminatory.¹⁸ Quarantines, lock-downs, and travel bans, isolation of symptomatic people should comply with the norms of International human rights law, and the International Covenant on Civil and Political Rights (ICCPR). Quarantines and lock-downs are difficult to enforce uniformly therefore they are often arbitrary and discriminatory. For example, in China, the government imposed a quarantine with little respect for rights. In mid-January, China quarantined close to 60 million people in two days in order to limit transmission from Wuhan in Hubei province. Many people in quarantine had difficulties obtaining medical care and other necessities. A boy with cerebral palsy died because no one took care of him because his father was quarantined. A woman with leukemia died after being turned away by several hospitals. A man with

Number: POL 30/1967/2020 Retrieved from:
<https://www.amnesty.org/download/Documents/POL3019672020ENGLISH.PDF>

¹⁶ "COVID 19 Guidance". UN Human Rights office of the High Commissioner. 13 May 2020. Retrieved from: https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf

¹⁷ "COVID 19 and Human Rights: We are all in this together". UN April, 2020. Retrieved from: <https://unsdg.un.org/sites/default/files/2020-04/COVID-19-and-Human-Rights.pdf>

¹⁸ Ibid

kidney disease committed suicide after he couldn't get access to hospital for dialysis. Authorities arrested people for refusing to wear masks. Italy also imposed a lockdown but with greater respect for individual rights. It adopted slowly restrictive measures, so people had time to prepare. The government quarantined ten towns in Lombardy and one in Veneto. On March 8, Italy imposed new measures and put more severe restrictions on movement and basic freedoms. The next day, the measures were applied in all of Italy. Measures included restrictions on travel except for health reasons, it closed all cultural centers, canceled sports events, public gatherings, it closed bars, restaurants, and stores except food markets and pharmacies across the country. People who disobeyed the restrictions without a valid reason were fined up to 206 euros and face a three-month prison term.¹⁹

Quarantines impact individuals' freedom of movement and depending on how they are implemented, can also lead to deprivation of liberty. For example, people faced barriers like accessing basic needs such as food, hygiene supplies and health care, and experiencing impacts on their jobs because they cannot go to work. Furthermore, quarantines can impact people in poverty the most because they may not have sufficient resources to buy food and other supplies. They may also have limited savings to last the unpaid leave.²⁰ Therefore, quarantine restrictions affect different rights unequally.

Many governments have presented quarantine and restriction of movement in order to slow the outbreak for for the health system to be able to cope with the crisis. Until an effective vaccine is developed, and tested, the only way to live is through 'social distancing'. Global health-care systems would collapse if this is not respected.²¹ But still when restricting the right to movement and quarantine, governments did not consider all side effects and all groups of people that will be affected. Therefore, again human rights specifically the right to movement even do legitimately used in this pandemic it still hearting human rights.

¹⁹ "Human Rights Dimensions of COVID-19 response" MARCH 2020. Human Rights Watch. Retrieved from: <https://reliefweb.int/sites/reliefweb.int/files/resources/Human%20Rights%20Dimensions%20of%20COVID-19%20Response.pdf>

²⁰ Amnesty International Public Statement. "RESPONSES TO COVID-19 AND STATES' HUMAN RIGHTS OBLIGATIONS: PRELIMINARY OBSERVATIONS". 12 March 2020. Index No. POL 30/1967/2020. Retrieved from: <https://www.amnesty.org/download/Documents/POL3019672020ENGLISH.PDF>

²¹ Institute for Human Rights and Business, "Respecting Human Rights in the Time of the COVID-19 Pandemic: Examining Companies' Responsibilities for Workers and Affected Communities" (April 2020) Retrieved from: <https://www.ihrb.org/focus-areas/covid-19/report-respectinghuman-rights-in-the-time-of-covid19>

6. Freedom of expression and information

Under international human rights law, governments have an obligation to protect the right to freedom of expression, including the right to seek, receive, information of all kinds. Governments should provide information necessary for the protection of human rights. The Committee on Economic, Social and Cultural Rights regards as an obligation of governments to provide education and information about the main health problems, including methods of preventing and controlling. In a number of countries, governments have failed to uphold the right to freedom of expression, taking actions against journalists and health-care workers. For example, China's government withheld basic information about the corona virus, under reported the cases of infection, did not present the severity of the infection, and dismissed the likelihood of transmission. They also detained people for reporting on the epidemic on social media and internet. In early January, Li Wenliang, a doctor in Wuhan, was stopped by police for presumably telling rumors after he warned of the new virus online. In Iran, due to government mistrust Iranian authorities struggled to assure the public that government decision-making around the COVID-19 outbreak has been in the public's best interests. In Thailand, whistle blowers of the health sector and online journalists have faced lawsuits from authorities due to criticizing government. Only few countries prioritized open communication and transparent reporting.²²

7. Right to water and sanitation - Adequate standard of living

The rights to water and to sanitation are part of the right to an adequate standard of living, and related to the right of health which is affirmed by the UN Committee on Economic, Social and Cultural Rights. Billions of people do not have access to safe drinking water. WHO noted the provision of safe water, sanitation, and hygienic conditions as essential to protecting human health during the COVID-19 pandemics. Lack of water and sanitation at home, school, or in health-care facilities will make life difficult and in some cases, it may be the center for the spread of the disease. Venezuela's health-care system is so weak that even hand washing is difficult, soap and disinfectants do not exist in their hospitals. Patients and personnel bring their own water for drinking.²³ And this is only one example of how the health care system and the right to life and the right to health are

²² "Human Rights Dimensions of COVID-19 response MARCH 2020. Human Rights Watch. Retrieved from: <https://reliefweb.int/sites/reliefweb.int/files/resources/Human%20Rights%20Dimensions%20of%20COVID-19%20Response.pdf>

²³ "Human Rights Dimensions of COVID-19 response MARCH 2020. Human Rights Watch. Retrieved from: <https://reliefweb.int/sites/reliefweb.int/files/resources/Human%20Rights%20Dimensions%20of%20COVID-19%20Response.pdf>

affected by the right to water and sanitation. One affects all, and it hearts the basic human rights and needs.

8. Vulnerable groups

Vulnerable groups are divided by gender (women and LGBTI+ persons); age (children and the elderly); other specific conditions (such as disability, chronic illnesses, or lack of resources, homeless persons); or status (prisoners, detainees, refugees, asylum seekers, ethnic/national minorities, and indigenous peoples). All of these vulnerable groups have been affected by COVID-19, for instance by domestic violence, sexual violence, more work shifts, restrictions in education, access to health systems, accessibility, closing of borders, detention, discrimination and many more. Also, the pandemic, has created vulnerability for groups that are not part of the above vulnerable group, such as health workers, essential workers, workers in the food industry, and journalists. The pandemic and the restrictions on certain human rights has enlarged existing inequalities like social, economic, and impacted vulnerable groups.²⁴

8.1 Discrimination

While the IHR require health measures to be applied equally to all, many national responses to the pandemic are racist and xenophobic. Non-discrimination is a foundation principle of international human rights law, where all people are entitled to the equal rights, but many governments used the pandemic to invoke nationalism which resulted in stigma, discrimination, and violence.²⁵ For example, there have been racist and xenophobic attacks on Asians, over fears of spreading the disease. Also individuals infected by the virus, or assumed to be affected, have been treated with discrimination and they deserve protection from hostility and human rights abuses.²⁶

8.2 Poverty

²⁴ Liliana Lyra Jubil, Christina M. Cerna. "Opinion – Impacts and Restrictions to Human Rights During COVID-19". June 30, 2020 E-International Relations Retrieved from: <https://www.e-ir.info/2020/06/30/opinion-impacts-and-restrictions-to-human-rights-during-covid-19/>

²⁵ Benjamin Mason Meier, Hanna E. Huffstetler, and Roojin Habi. Human Rights Must Be Central to the International Health Regulations. August 26, 2020. Health and Human Rights Journal. Retrieved from: <https://www.hhrjournal.org/2020/08/human-rights-must-be-central-to-the-international-health-regulations/>

²⁶ Institute for Human Rights and Business, "Respecting Human Rights in the Time of the COVID-19 Pandemic: Examining Companies' Responsibilities for Workers and Affected Communities" (April 2020) Retrieved from: <https://www.ihrb.org/focus-areas/covid-19/report-respectinghuman-rights-in-the-time-of-covid19>

Poor people are more exposed to this virus because they have no excess to adequate standard of living. In informal settlements people cannot afford clean water and sanitation. In Kenya's capital, only 50 percent of people have piped water. Physical distancing is impossible in situations where large, poor, families live in crowded conditions. Staying home hits the poorest the most and it widens inequality. Furthermore, informal workers, people on zero hours contracts, or those who are laid off, have no income and lead to poverty.²⁷ Therefore, in impoverished places social distancing cuts off access to wages, food, and water.²⁸ So poverty brings additional barriers to the impoverished in adequately protecting themselves from the virus. Therefore, states response to the virus should have been conscious of this specific groups and ensure that their needs are met.²⁹ People with lower incomes and marginalized groups face greater challenges in accessing the health care, and under the right to health, health care goods, facilities and services should be available within the state and accessible to everyone without discrimination.³⁰

Conclusion

The international legal order is structured around the principle of state sovereignty and their independence. Therefore, state authorities have the authority on the legitimate use of force or restrictions, but their powers are not without limits. International human rights treaties impose conditions under which the derogation of human rights by states can be justified. The implementation of these measures needs to meet certain criteria. States cannot derogate some rights, like the right to life, prohibition of torture, ill treatments, prohibition of slavery.³¹ Although this is true, and the measures and legislature do exist, still during this pandemic it was clear that human rights could not be respected by states, authorities and even human beings themselves.

²⁷ Sarah Jackson and David Griffiths. *Inequality and Austerity: Our Weak Links in Countering COVID-19*. May 2020. Ethics and International Affairs. Cambridge University Press. Retrieved from: <https://www.ethicsandinternationalaffairs.org/2020/how-inequality-hurts-us-all-in-the-pandemic-response/>

²⁸ "Human Rights Abuses in the Enforcement of Coronavirus Security Measures". May 25, 2020. The National Law Review Retrieved from: <https://www.natlawreview.com/article/human-rights-abuses-enforcement-coronavirus-security-measures>

²⁹ Amnesty International Public Statement. "RESPONSES TO COVID-19 AND STATES' HUMAN RIGHTS OBLIGATIONS: PRELIMINARY OBSERVATIONS". 12 March 2020. Index No. POL 30/1967/2020. Retrieved from: <https://www.amnesty.org/download/Documents/POL3019672020ENGLISH.PDF>

³⁰ Ibid

³¹ Audrey Lebre. "COVID-19 pandemic and derogation to human rights". May 4, 2020. *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Retrieved from: <https://doi.org/10.1093/jlb/lsaa015>

All human rights are interrelated to one another. The right to life is interrelated to the the right to health, to the right of adequate standard of living. We can not have one or the other. If one is respected the other one will be too. The Corona virus has shown us that no matter how much we grow and we become modernized, the essence of our being is still weak. The human rights are still broken, weak and disrespected whether by entities or by beings. We should finally realize that we are all the same and we should respect what is our by birth and that is our right to life which interrelates to all other right. Human rights are still our weak point and we should work hard to empower them because they are the most important. These rights are what holds us together as human beings and they should be unbreakable.

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ПАНДЕМИЯ И КОРРЕКТИРОВКА КОНСТИТУЦИОННЫХ ПРЕДЕЛОВ ОГРАНИЧЕНИЯ ПРАВ ЧЕЛОВЕКА: РОССИЙСКИЙ ОПЫТ

В предлагаемой к ознакомлению статье авторами предпринята инструментального осмысления вопросов правоограничений граждан в условиях пандемии, вызванной COVID-19, с позиций уголовного и административного законодательства Российской Федерации. Предметом рассмотрения стали нормы Уголовного кодекса Российской Федерации (далее – УК РФ), Кодекса об административных правонарушениях Российской Федерации (далее – КоАП РФ) и нормативно-правовые акты, которые отнесены авторами к специфической категории “чрезвычайных”. В качестве предмета рассмотрения выступают положения отечественного уголовного и административного законодательства в историческом преломлении, относящиеся ко времени СССР. Делается вывод, что современная пандемия породила опасную тенденцию по ограничению конституционных прав граждан, что, прежде всего, выразилось в низком качестве законотворческой работы, а равно обнажило застарелые проблемы организации законотворческой и законодательной деятельности в Российской Федерации.

Ключевые слова: пандемия, кризис управления, патернализм, свобода слова, свобода передвижения, общественный интерес, общественный запрос.

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Введение

Настоящую статью нам бы хотелось начать словами Верховного комиссара ООН по правам человека Мишеля Бачелете: “COVID-19 является тестом для нашего общества, мы все учимся и адаптируемся, реагируя на вирус. Человеческое достоинство и права должны быть в центре этих усилий, а не тем, о чем вспомнят в последнюю очередь”¹.

Развивая данный тезис, заметим, что пандемия коронавируса, стремительно ворвавшаяся в наше общество подобно комете, сформулировала, как нам кажется, основной вопрос, стоящий перед современным миром: не находится ли система прав и гарантий прав человека в кризисе? Всегда ли мы можем обеспечить соответствие декларируемых положений важнейших документов нашей повседневности? Готово ли государство, испытывая финансовые и экономические затруднения, вызванные общими турбулентными явлениями мировой экономики, соблюдать взятые на себя обязательства по обеспечению тех самых прав и свобод человека и гражданина в конкретно взятый момент исторического развития? Представляется, что пандемия 2020 года, еще не закончившаяся и таящая в себе угрозы как медицинского, так и гуманитарного толка, не только обострила проблемы, проистекающие из поставленных вопросов, но и дает нам шанс сделать некую остановку для осмысления уже пройденного в области защиты прав и свобод человека и гражданина. Представляется, что неспроста во время пандемии мы наблюдали и ряд социальных взрывов, где катализаторами выступали как раз ограничения прав и свобод граждан².

¹ Права человека во время распространения пандемии коронавируса: <https://un.by/novosti-oon/prava-cheloveka/4951-prava-cheloveka-vo-vremya-rasprostraneniya-koronavirusa>. Дата обращения: сентябрь 2020 года.

² К примеру, пережитки религиозного сознания ряда групп населения в Индии, которые приводили к нападению на медицинский персонал, совершающий противоэпидемиологические мероприятия, что потребовало жесткой реакции со стороны органов государственной власти, приведших к появлению самостоятельных составов преступных деяний, направленных на недопущение повторений подобных случаев. Или пример Украины, где население отдельных областей, узнавая, что к ним придут их же соотечественники для прохождения карантинных мероприятий, превращались в зверей и совершали нападения на автобусы, перевозившие указанных больных.

Также нельзя забывать и о психическом здоровье лиц, которые находятся в условиях принудительного ограничения в форме карантина и самоизоляции под жестким, если не жестоким контролем государства *Carmen Moreno, Til Wykes, Silvana Galderisi, Merete Nordentoft, Nicolas Crossley, Nev Jones, Mary Cannon, Christoph U Correll, Louise Byrne, Sarah Carr, Eric Y H Chen, Philip Gorwood, Sonia Johnson, Hilkka Kärkkäinen, John H Krystal, Jimmy Lee, Jeffrey Lieberman, Carlos López-Jaramillo, Miia Männikkö, Michael R Phillips, Hiroyuki Uchida, Eduard Vieta, Antonio Vita, Celso Arango*, 2020: 813-824].

И здесь, как нам кажется, основными факторами, повлиявшими на повышение градуса напряженности и уровня агрессии в обществе, стало пробуждение, казалось бы, забытых, изжитых в большей части мирового сообщества явлений как коллективный страх и коллективное же невежество.

И если о коллективном страхе мы еще можем сформулировать представление, опираясь на исторические процессы его формирования у народов на всех этапах развития, то в XXI веке, веке прогресса, говорить о коллективном невежестве представляется странным и фантазмагоричным, но, к сожалению, приходится констатировать наличие такого явления. Во главе данной проблемы стоит кризис знания: современное общество больно с позиции невозможности проведения анализа получаемой информации. Отсюда мы видим масштабные фальсификации, которые стыдливо называют “fake news”, используя их в политической борьбе и решая внешнеполитические задачи. Но, как нам известно, весь дьявол кроется в мелочах: используя этот мерзкий и недозволенный прием ведения переговоров в узконаправленных областях, куда простой человек или не был включен, или был включен весьма дозированно, в XXI веке мы получили эпидемию, которая страшнее коронавируса: эпидемию вселенской глупости. Совершенно прав коллега Николс, говорящий, что: “растет количество непрофессионалов, которым не хватает базовых знаний и которые к тому же отвергают очевидные факты и отказываются учиться рассуждать логически” [Николс, 2019 : 10]. В информационном обществе, где поиск и нахождение информации не является уже архисложной задачей и доступно если не любому лицу, почти каждому, теряется ценность приобретаемой и получаемой информации: человек снова становится союзником “призрака театра” [Бэкон, 1935 : 126]. Отсюда мы можем выделить и второй слой проблема: ситуация, когда в казалось бы, демократическом государстве, у граждан формируется рабский менталитет, который не позволяет гражданам действовать по собственному разумению: “Новые безграмотные будут рабами в том, что касается ключевых вопросов самоуправления” [Holton, 1996 : 51; Штер, 2019 : 410-415]. Изначально не находя возможности самореализации в обществе и происходящих политических процессах, граждане начинают находить и занимать области, которые, будучи приближенными к повседневной жизни общества и затрагивающими интересы таких же граждан, как и он сам, пытаются добиться там признания, примеряя роль сведушего человека, находя в ней отдушину и удовлетворение своих потребностей в области социальной самореализации.

Дабы не быть голословными и не отдаляться от заявленной темы, мы можем привести примеры, которые начались задолго до пандемии, но связаны напрямую с ней. Позволим напомнить ситуацию, сложившуюся в области всеобщего вакцинирования населения: идея, являвшаяся долгое время незыблемой и аксиоматичной, положительно зарекомендовавшая себя и позволившая победить многие болезни (врожденная краснуха, дифтерия, корь, коклюш, столбняк и т.п.) [Шах, 2020], в XXI веке стала подвергаться сначала сомнению, а далее приобрела формы общественных движений антипрививочников (антивакцинаторов) [Мац А.Н., Чепрасова Е.В., 2014 : 111-115]. В указанной ситуации государство стало перед выбором: сохранить ли право граждан на создание указанных объединений и проповедование своих идей (зачастую, антинаучных) с привлечением все новых и новых членов в свои ряды. Представляется, что именно в ситуации указанного выбора, государство снова вспомнило как о правах человека, так и о своем предназначении: на весы был положен концепт общественной безопасности и концепт права лица на следование своим убеждениям и свободу распространения таких идей³. И в этой ситуации, на удивление, государства не выступили единым фронтом, самоустранившись от решения проблемы, приняв соломоново решение, состоявшее в введении системы штрафных санкций только в ситуации, если произойдет заражение окружающих лиц от указанного заболевания. Представляется, что такой подход неверен: чем отличается ситуация запрета на распространение экстремистских взглядов и идей, связанных с превосходством одной расы над другой или призывающей к уничтожению той или иной социальной группы, от ситуации, когда в государстве существуют объединения граждан, которые призывают к схожему: не делайте прививки, не водите своих детей на плановые осмотры к врачу, природа сама сделает всю работу. Такая эгоистичность и социальный инфантилизм, по нашему мнению, недопустимы в обществе XXI века.

Другим примером, имевшим место в период активной фазы пандемии, является идея о т.н. “технологическом заговоре” мировых телекоммуникационных и информационных корпораций, которые через вышки связи, поддерживающие стандарт передачи данных 5-G, облучают население и тем самым увеличивают число заболевших коронавирусом. Кажущаяся комичность даже отдаленной возможности такой схемы в реальности, между тем, привела не только к

³ Примечательным является опыт Австралии, и мы отсылаем к диссертации Judy Wilyman, досконально исследовавшей политику австралийского правительства в области прививочной и эпидемиопрофилактической деятельности [Judy Wilyman, 2015].

разрушению оборудования и трансляционных вышек указанных корпораций, но и в некоторых странах приостановила процесс введения указанных систем и стандартов передачи информации.

Пусть мы и привели эти два наиболее ярких примера современности, но, как нам кажется, они характеризуют общую ситуацию в мире, которая получает выражение и в более радикальных формах, таких как движение BLM и т.п.

Описанные вопросы не стали исключением и для Российской Федерации. Ниже мы рассмотрим на положениях отечественного уголовного и административного законодательства примеры ограничения конституционных прав граждан, точнее, ту модель репрессивно-запретительного характера, выбранную российскими властями. В качестве примера мы возьмем ситуацию, связанную с ограничением конституционного права на свободу мысли, слова и свободу их выражения во вне [Pavlović, 2017 : 218; Solarević, Pavlović, 2018 : 51].

**Право на свободу слова и выражения мнения:
уголовно-правовые и административно правовые аспекты**

В соответствии с положениями ст. 29 Конституции Российской Федерации, каждый имеет право на свободу мысли и слова, а равно свободу в распространении мысли и слова, цензура запрещена.

В 2020 году, в текст УК РФ были внесены изменения, которыми в главе 24 появились две новые статьи: 207.1 и 207.2, посвященные вопросу предупреждения распространения заведомо ложной информации⁴.

В отечественной истории мы уже имели опыт уголовно-правовой регламентации вопросов, связанных с предупреждением распространения недостоверной и опасной информации. Прежде всего, это опыт времен Великой Отечественной войны — положения Указа Президиума Верховного Совета СССР от 06.07.1941 г.⁵, который предполагал наказание в виде лишения свободы на срок от 2 до 5 лет за действия, связанные с распространением в военное время ложных слухов,

⁴ Федеральный закон от 01.04.2020 № 100-ФЗ “О внесении изменений в Уголовный кодекс Российской Федерации и статьи 31 и 151 Уголовно-процессуального кодекса Российской Федерации”.

⁵ Ведомости ВС СССР. 1941. № 32.

возбуждающих тревогу среди мирного населения⁶. Но стоит особо подчеркнуть, что это законодательство чрезвычайного времени, которое дополняло действующий блок уголовно-правовых норм, направленных на защиту интересов общества и государства, к примеру, положения законодательства об уголовной ответственности за контрреволюционные преступления.

Оценивая в целом положительно предпринятую попытку, позволим себе выделить отдельные положения указанных норм, которые могут привести к проблемам при их правоприменительной практики в будущем.

Следует обратить внимание на соотношение уже существующего административного законодательства в указанной области и новых положений уголовного закона.

До введения в УК РФ данных статей, вопрос регламентации ответственности за распространение заведомо общественно значимой информации закреплялся в ч.9 – 11 ст. 13.15 КоАП РФ. При этом, обязательным условием наступления административной ответственности является наличие угрозы охраняемым объектам (жизнь, здоровье граждан и т.п.)⁷. Ответственность же устанавливается относительно распространения заведомо “недостоверной общественно значимой информации”, т.е. информации, которая “создает угрозу причинения вреда жизни и (или) здоровью граждан, имуществу, угрозу массового нарушения общественного порядка и (или) общественной безопасности либо угрозу создания помех функционированию или прекращения функционирования объектов жизнеобеспечения, транспортной или социальной инфраструктуры, кредитных организаций, объектов энергетики, промышленности или связи”⁸. При этом, ч. 10 ст. 13.15 КоАП РФ устанавливает ответственность за правонарушение, когда

⁶ Применение положений данного Указа должно быть именно в ситуации неосторожности, когда лицо действует без умысла на возбуждение тревоги среди населения. Тогда как умышленные действия должны квалифицироваться уже как контрреволюционные преступления (ст. 58¹⁰ УК РСФСР) [Утевский, 1941 : 12-14]. Тогда как в современных статьях необходимо установить наличие умысла на совершение преступления.

⁷ Стоит также отметить, что практики по данной статье нет, кроме одного решения мирового судьи: Мировой судья судебного участка № 157 района “Хорошево-Мневники” г. Москвы / Дело № 5-1191/19 от 16.12.2019 г.

⁸ ч.1 с. 15³ Федеральный закон от 27.07.2006 № 149-ФЗ “Об информации, информационных технологиях и о защите информации”.

действия по распространению недостоверной общественно значимой информации повлекли определенные последствия⁹ в виде помех.

Зеркальная норма в уголовном праве установлена в ст. 207² УК РФ, предполагающая также наступление последствий в виде вреда здоровью человека, смерть человека и иные тяжкие последствия. Возникает вопрос: какого рода общественно опасные последствия могут быть отнесены к области уголовно-наказуемого деяния? Представляется, что указание на наступившее последствие или на угрозу наступления такого последствия, которое текстуально пересекается с положениями административного законодательства, может привести к существенной проблеме в будущем. К примеру, гр. А. на личной странице в социальной сети размещает информацию о том, что в городе М. будет введен карточный режим распределения продуктов, у граждан будут изымать источники передачи информации, а также введут дополнительные сборы на столование медицинских работников. Подписчики гр. А., прочитав данную информацию, принимают решение покинуть город на поезде. Приехав на вокзал, они не могут приобрести билеты и начинают стихийный митинг с требованием выпустить их из города, перекрывая железнодорожные пути, чтобы не пропустить идущий поезд в иной город. Анализируя ситуацию, краеугольным для нас становится оценка последствий: если последствия создали *“помеху”*, то действия гр. А. попадают под действие ч.10 ст. 13.15 КоАП РФ, а если же такое блокирование приводит к *“прекращению функционирования объектов транспортной инфраструктуры”*, то можно говорить об *“ином тяжком последствии”* в контексте ст. 207² УК РФ. Вместе с тем, такой подход законодателя небезупречен: стремление перенести формулу ч.10¹ и 10² ст. 13.15 КоАП РФ, где к ответственности возможно привлечение только юридических лиц, на почву уголовного закона приводит к излишнему усложнению правовых конструкций. Также этим решением нарушается логика, которая была присуща при конструировании административно-правовой нормы: физическое лицо не может своими действиями привести к прекращению функционирования объектов и т.п. Оно может своими действиями создать временные трудности, нарушить нормальную работу, в отличие от крупного печатного издания или СМИ, которое, имея большой охват аудитории, ресурсы, своими действиями приводит именно к окончанию функционирования той или иной отрасли хозяйства или схожего объекта, описанного в норме. Также к иным последствиям могут быть

⁹ “повлекшее создание помех функционированию объектов жизнеобеспечения, транспортной или социальной инфраструктуры, кредитных организаций, объектов энергетики, промышленности или связи”.

отнесены и иные “классические” их виды, к примеру, самоубийство лица или группы лиц¹⁰.

Статья 207¹ УК РФ является специальной уже по отношению к 207² УК РФ в части предмета: информация об обстоятельствах, представляющих угрозу жизни и безопасности граждан, является составной частью общественно значимой информации. Но конструкция ст. 207¹ УК РФ не содержит последствия от публичного распространения такой информации¹¹. Представляется, что решение законодателя в указанной части небезупречно: фактически, устанавливается зеркальная норма ч.9 ст. 13.15 КоАП РФ. Внутреннее же дробление в структуре уголовного закона на два самостоятельных состава (207¹ и 207² УК РФ) небезупречно именно по той же причине: если Верховный суд РФ презюмирует¹², что оба предмета преступления соотносятся как “часть-целое”, то неясен мотив криминализации деяния в пределах ст. 207¹ УК РФ? Это ставит также вопрос и об объективной стороне деяния. Законодатель указал, что виновное лицо может быть привлечено к уголовной ответственности за распространение информации о принимаемых мерах по обеспечению безопасности. Следует ли расценивать такую информацию исключительно в негативном ключе?¹³. Представляется, что появление самостоятельного состава преступного деяния в рамках ст. 207¹ УК РФ выглядит как избыточная уголовно-правовая регуляция.

Также необходимо отметить и вопрос, связанный с субъективной стороной деяния: как надлежит квалифицировать действия лица, которое передает информацию, которая не является для него на 100% достоверной, но полученной из источника, вызывающего доверие? К примеру, информация приходит гр. Б. от гр. В., который работает в правоохранительных органах и является его старинным другом, о том, что в ближайшее время сотрудники полиции оцепят район и будут проводить

¹⁰ К примеру, гражданин Г. сообщает, что уровень зараженных в г. М. достиг 10 миллионов человек и вскоре власти начнут насильственное уничтожение как зараженных и членов их семей, так и соседей по лестничной клетке. Гражданин А., услышав об этом, совершает самоубийство, оставив предсмертную записку с указанием своего мотива. Вместе с тем, если гр. Г. изначально планировал, что его действия по распространению информации приведут к самоубийству, то деяния можно было бы квалифицировать по ст. 110² УК РФ при дополнении ситуации некоторыми условиями.

¹¹ Ранее расположенная статья – 207 УК РФ – сконструирована существенно лучше, учитывая, прежде всего, мотивацию лица на совершение деяния и как возможные, так и реальные последствия.

¹² “Обзор по отдельным вопросам судебной практики, связанным с применением законодательства и мер по противодействию распространению на территории Российской Федерации новой коронавирусной инфекции (COVID-19) № 2” (утв. Президиумом Верховного Суда РФ 30.04.2020).

¹³ К примеру, лицо говорит о том, что Правительство РФ будет выплачивать каждому гражданину 10.000 \$ США. В чем заключается общественная опасность указанного деяния?

сплошные проверки в рамках мероприятий по ликвидации ЧС. После этого гр. Б. передает информацию гр. Д. Спустя какое-то время, становится известно, что указанная информация является недостоверной. Допустимо ли привлечение гр. Б. к уголовной ответственности за преступление, предусмотренное ст. 207¹ УК РФ? Представляется, что нет, потому что мы не можем установить его умысел на распространение такой информации.

Заключение

Проведенное изучение вопроса о пределах ограничения конституционных права граждан в условиях пандемии показало, что модель, выбранная отечественным законодателем нарушает ряд законов, связанных с правильностью и точностью излагаемого нормативного материала, недопущению двусмысленности излагаемых положений закона, а также привело к образованию правовой коллизии между положениями уголовного и административного законодательства, что существенным образом сказывается на охране прав и законных интересов лиц при применении к ним мер государственной репрессии со стороны уполномоченных органов государственной власти, создавая искусственную конкуренцию между нормами указанных отраслей права, что, свою очередь, также вызывает к жизни проблемы коррупционного поведения должностных лиц при принятии решения о привлечении лица к ответственности. Представляется, что появление указанной нормы свидетельствует о низком качестве законотворческой деятельности в Российской Федерации, хотя исторический пример – годы Великой отечественной войны – показали, что в еще более суровых условиях, возможно создание норм права, исключаящих двойное толкование и проблемы в правоприменительной деятельности. Также хотели бы отметить, что появление т.н. “спящей” нормы в тексте УК РФ показывает отсутствие системного подхода при законотворческой работе. Помимо низкого качества законотворческой работы, действия органов государственной власти продемонстрировали опасную тенденцию, когда в целях охраны прав и законных интересов неограниченного числа лиц (прежде всего, жизнь и здоровье), происходит принятие норм, направленных на искусственное правоограничение конституционных права граждан, в частности, на свободу выражения мнения и свободу слова. Указанные параллельные изменения содержат те же дефекты, которые описаны выше, а также обладают высоким оценочным потенциалом, что может привести к злоупотреблениям в конкретной правоприменительной деятельности.

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PANDEMIC AND ADJUSTMENT OF THE CONSTITUTIONAL LIMITS OF HUMAN RIGHTS RESTRICTION: RUSSIAN EXPERIENCE [IN RUSSIAN]

In the article proposed for review, the authors undertake an instrumental understanding of the issues of legal restrictions of citizens in the context of a pandemic caused by COVID-19, from the standpoint of the criminal and administrative legislation of the Russian Federation. The subject of consideration was the norms of the Criminal Code of the Russian Federation (hereinafter referred

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to as the CD of RF), the Code of Administrative Offenses of the Russian Federation (hereinafter referred to as the Code of AO of the RF) and regulatory legal acts, which are classified by the authors as a specific category of “emergency”. The subject of consideration is the provisions of the domestic criminal and administrative legislation in the historical context, dating back to the time of the USSR. It is concluded that the current pandemic has generated a dangerous tendency to limit the constitutional rights of citizens, which, first, was expressed in the low quality of legislative work, as well as exposed the long-standing problems of organizing legislative and legislative activities in the Russian Federation.

Keywords: *pandemic, crisis of governance, paternalism, freedom of speech, freedom of movement, public interest, public inquiry.*

Dušan Ilić*

Vojislav Dedanski**

THE RIGHTS OF MIGRANT CHILDREN DURING PANDEMIC IN SERBIA***

The COVID-19 pandemic has affected the whole world and thus affected all spheres of society. Among the most affected parts of the population are migrants, and a particularly vulnerable group are migrant children. Intensive migrations were difficult during the pandemic, and a part of the migrant children remained stationed on the territory of Serbia. The corpus of rights of migrant children is realized in the corpus of fundamental human rights. Some of them, such as the right to education or the right to health care, are less available during a pandemic, not only in Serbia, but in general. Nevertheless, thanks to the inclusive legal framework, migrant children in the Republic of Serbia enjoy all the rights that other children enjoy. The main problems that these children face are the new environment and ignorance of the Serbian language on the one hand, but also the general epidemiological situation on the other. The aim of this paper is to analyze the existing system of protection of the rights of migrant children in Serbia, their adaptation to that system, as well as solving the problems that migrant children face, especially during the pandemic.

Keywords: *Migrants, Serbia, children, pandemic, inclusion.*

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INTRODUCTION

Migrations as a phenomenon have existed since the earliest beginnings of human civilization. They are always present, sometimes to a lesser and sometimes to a greater extent. Traditional causes in the form of war destruction, economic problems, repressive regimes, etc. in the last decade, they have not only acquired, but also provoked global migration movements that pose a serious challenge to the international order. What started at the end of 2010 with protests and the overthrow of the regime in Tunisia, and later spread to large parts of the Arab world (Libya, Egypt, Syria, Iraq),¹ was called the so-called the Arab Spring, it represented the initial capsule for the beginning of massive migrations from the demographically expansive areas of the Middle East and the Maghreb to the increasingly demographically weaker European continent. The establishment of the so-called Islamic State, under the control of a militant group of Islamic fundamentalists of Salafist provenance. (Mijalković, Petrović, 2016: 4) However, not so insignificant migrations took place in Europe as well, primarily with the flare-up of the Ukrainian crisis (2014-2015), and the mass outflow of the population of the Balkan Peninsula towards the more economically developed countries of the European Union.

The area of the Republic of Serbia, which is located in the central and geostrategically most important part of the Balkans, since ancient period represents an area that in every sense (traffic, security, geopolitical, cultural) connects Europe and Asia. As, especially in the last five years, the number of migrants from the Islamic world has increased dramatically, the fact that migrations happen almost always in one direction, towards Europe, is not surprisingly very important. Balkan migrant route, which largely passes through the territory of the Republic of Serbia. "Serbia is not spared from migration, although they certainly do not belong to countries that represent the final destination for migrants but only a transition country." (Turanjanin, 2019: 391)

Otherwise, migrations represent temporary or permanent, voluntary or forced relocation of a certain population either within one state (internal migration) or from one state to another (international migration). When it comes to international migration, it is the case that migrants move from one country (country of origin), which is also called the emigration area, to another country (country of destination), which is considered an immigration area. During the movement, these persons pass through the territories of third countries, which are considered transit areas, and here they have the status of migrants in

¹ See more: Tilovska-Kechedji E. (2017). A Migrant is a Human Being Too. Conference Papers. International Scientific Conference "Freedom, Security: The Right To Privacy". Novi Sad. 186.

transit (Mijalković, Petrović, 2016: 2). In this regard, for the majority of migrants from the mentioned regions to Western Europe, Serbia is mainly a country in transit.

When we talk about the conceptual apparatus, it is necessary to distinguish certain categories of persons who participate in migration processes. The reason for this is that the precise differentiation of individual categories presupposes and determines a certain status in advance (Carens, 2008). In the domestic public discourse, the term migrants is most often used, as a collective for persons of different status, coming from other countries, but very often one can hear determinants: irregular/illegal migrants, immigrants, asylees, asylum seekers, refugees (see also: Bobić & Babović, 2013: 210; Belgrade Center for Human Rights, 2015: 55–60). Although one often gets the impression that these are synonyms, they are essentially different terms, which determine a qualitatively different legal status. Nevertheless, despite the fact that it is not easy to distinguish these terms most clearly, migrations of population are caused by various factors, and they are rarely homogeneous phenomena, ie they increasingly take on a mixed character (Feller, 2006: 515). Different legal treatment of the same categories depends on the regulation of their legal status. For example, the indistinguishability of migrants from refugees can greatly threaten the status of these two categories, which enjoy different levels of protection under international law (see also: Feller, 2006: 515–518).

At the international level, there is no universally accepted definition of the term migrant (IOM, 2011; Metcalfe-Hough, 2015). As some authors note, “migration is a modern, global phenomenon that signifies any permanent change in the place of residence of individuals or social groups, or any form of temporary or permanent movement of individuals in space” (Krstić, 2012: 11). In this regard, this term generally includes all cases in which the decision to migrate was made freely, for personal reasons and not under the influence of external factors (pressures) (European Migration Network, 2014: 187).

The Serbian Law on Migration Management 2012 (Official Gazette of RS, No. 107/2012) recognizes two categories of migrations, depending on the factors that lead to them. Thus he acknowledges the voluntary and the forced on the one hand, and the internal and external, on the other. In the case of external voluntary migrations, this act distinguishes between two categories of persons: foreigners, ie foreign citizens who reside in another country on various grounds (on the basis of work, education, marriage, etc.) and persons who have not resided in their country for a long time reasons to return to it voluntarily. If a foreigner resides on the territory of the state without an appropriate legal basis, he is classified in the category of illegal migrants.

Migrations as a phenomenon can be viewed through three different points of view. On the one hand, as a means of development, and not as a threat to the sovereignty of states (development-migration nexus), on the other in the context of security threats and challenges (security-migration nexus), but also in the context of asylum, ie mixed migration flows, which, among other things implies the revitalization and strengthening of strategies for providing protection to refugees (asylum-migration nexus) (Levy, 2010: 93).

THE RIGHTS OF MIGRANT CHILDREN

When we talk about the mechanisms of protection of the rights of migrants and refugees in international law, this area is regulated by numerous international legal documents, both at the UN level and at the EU and Council of Europe levels, primarily instruments of protection under international human rights law and international humanitarian law. (Senovilla, Lagrange, 2011; UNHCR, UNICEF, 2014; Jelačić Kojić, 2016; Ćopić, Sanja, Ćopić, Slobodan, 2016; Jovanović, 2016; Radojković, 2017; Krstić, 2018; Netkova, Smilevska-Kčeva, Đan, 2018).

However, when we talk about the protection of the rights of migrant and refugee children, the basic document is the UN Convention on the Rights of the Child.² In addition, it is worth mentioning the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,³ as well as the Optional Protocol on the Participation of Children in Armed Conflict.⁴ Article 22 of the UN Convention on the Rights of the Child provides for the obligation of States parties to take adequate measures to protect the rights of a child seeking refugee status or who has already been granted that status. Migrant and refugee children must be protected from any kind of violence, exploitation, neglect, inhuman treatment, punishment or any kind of behavior that may endanger the right of children to life, survival and development (Ćopić, Ćopić, 2019: 52). On the other hand, States parties have an obligation to ensure the recovery and reintegration of children who have been victims of violence or exploitation. There is also an obligation to respect the children's right to participation, which includes the children's right to freely express his

² Law on Ratification of the UN Convention on the Rights of the Child, Official Gazette of the SFRY, International Treaties, No. 15/90 and the Official Gazette of the FRY, International Agreements, No. 4/96 and 2/97.

³ Law on Ratification of the Optional Protocol on the Rights of the Child on the sale of children, child prostitution and child pornography, Official Gazette of the FRY, International Treaties, No. 7/2002.

⁴ Law on Ratification of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Official Gazette of the FRY, International Agreements, No. 7/2002.

opinion when determining the measures to be applied, which includes respect for his opinion, but also the option for the child to be heard in court and other actions concerning him (Vlašковиć, 2017).

However, when we talk about the corpus of children's rights, among other rights that equally concern adults, one of the basic ones is the right to education. This right is one of the most important, given that it is regulated in numerous international conventions and charters. It is one of the fundamental human rights guaranteed by the Constitution in the Republic of Serbia. It explicitly stipulates that everyone has the right to education,⁵ which in fact implies the absence of any discrimination, even those based on citizenship. Primary education is compulsory and free, while secondary education is free but not compulsory.

The Serbian Law on Foreigners defines a foreigner as any person who does not have the citizenship of the Republic of Serbia.⁶ At the same time, the Law on the Fundamentals of the Education System stipulates that a foreign citizen, a stateless person and a person seeking citizenship have the right to education under the same conditions and in the manner prescribed for citizens of the Republic of Serbia.⁷ This provision applies to stateless persons and applicants for citizenship, as well as to the migrant population in general.

The inclusion of migrant children in the educational system of the Republic of Serbia began in 2017 when the Ministry of Education, Science and Technological Development issued a binding professional instruction for the inclusion of all children in the education system,⁸ which further regulates the way students will enroll, and the manner of providing measures to support inclusion in the educational process. The adoption of this instruction was an important step in the process of inclusion of migrant children, especially due to the fact that a certain number of migrant children are on the territory of Serbia. This instruction has its legal basis in Articles 28 and 29 of the UN Convention on the Rights of the Child,⁹ as well as in Articles 3, 6 and 7 of the Law on the Fundamentals of the

⁵ Article 71, Constitution of the Republic of Serbia, Official Gazette of RS, No. 98/2006.

⁶ Article 3, paragraph 1, Law on Foreigners, Official Gazette of RS, No. 28/2018, 31/2019.

⁷ Article 3, paragraph 5, Law on the Fundamentals of the Education System, Official Gazette of RS, No. 88/2017, 27/2018.

⁸ No. 301-00-00042/2017-18, 05.05.2017.

⁹ Articles 28 & 29, Law on Ratification of the UN Convention on the Rights of the Child, Official Gazette of the SFRY, International Treaties, no. 15/90 and the Official Gazette of the FRY, International Treaties, No. 4/96 and 2/97.

Education System.¹⁰ As migrant children passing through the territory of Serbia mostly come from war-affected countries or countries that do not consistently apply the signed Convention, it is very often the case that these children do not have certificates of previous education in the form of certificates or other documents. Therefore, special tests of previous knowledge must be organized for this group in Serbian educational system.

Considering this circumstance, at the level of each school, a special professional team for inclusive education has the obligation to make a plan to support the school for the inclusion of pupils. In the case of migrant children, this plan may, among other, include, in accordance with the financial possibilities, the engagement of translators for a language that the child understands and other professionals. The same plan can determine the preparatory classes for the mentioned children for two weeks to two months in order to gradually adaptation, the program of intensive learning of the Serbian language, individualization of teaching activities and inclusion in extracurricular activities (Tošković, 2017: 43).

In 2016, the Ministry of Education, Science and Technological Development of the Republic of Serbia passed the Regulation on detailed criteria for recognizing forms of discrimination by an employee, child, student or third party in an educational institution. At the beginning, the Rulebook defines discrimination in education as “any unjustified discrimination or unequal treatment or omission (exclusion, restriction or preference), in relation to a person or groups of persons, as well as to members of their families or persons close to them in the open, or covert means, based on race, color, ancestry, nationality, migrant or displaced person status, nationality or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, property status, social status, and cultural origin, birth, genetic characteristics, health status, developmental and disability, marital and family status, conviction, age, appearance, membership in political, trade union and other organizations and other real or assumed personal characteristics”.¹¹

Among other things, this Regulation prevents discrimination against all types of migrants, asylum seekers and refugees. It stipulates that discrimination is considered to be the non-existence of conditions that would enable every child or student to achieve the best results, regardless of personal characteristics, which means adapting the teaching process to the

¹⁰ Articles 3, 6 & 7, Law on the Fundamentals of the Education System, Official Gazette of RS, No. 88/2017, 27/2018.

¹¹ Article 2, Regulation on more detailed criteria for recognizing forms of discrimination by an employee, child, student or third party in an educational institution, Official Gazette of RS, No. 22/2016.

needs of students, ie with regard to their personal characteristics and status.¹² The next article prohibits discrimination in enrolling children in the sense of requesting documents that are not provided by law or bylaw, as well as when the lack of documents or bylaws is used as a reason to exclude children and students (eg lack of citizenship).¹³

As a particularly intense form of discrimination, this Regulation emphasizes segregation, which occurs when children or students in an institution or in connection with the work of an institution, due to their personal characteristics, are unjustifiably separated from other children or students, then when separate classes are formed. or groups for reasons that are not in accordance with the law, as well as when the structure of children or students in a group, class or institution, in terms of belonging to different ethnic and other vulnerable groups, drastically deviates from the structure of children or students from the institution, unless it is a consequence of the specificity of the institution in accordance with the law.¹⁴

According to the new Law on Foreigners, in case a foreigner stays illegally on the territory of Serbia, the competent authority will be obliged to make a decision on his return, and a deadline is set in which he is obliged to leave Serbia. Within this period, the alien is provided with the right to emergency medical care, and in the case of a minor, the right to education.¹⁵ Also, these rights belong to those foreigners who receive a decision on postponing forced eviction.¹⁶

When it comes to health care of the migrant population, it is regulated primarily by the Law on Health Care, which, among other things, stipulates that foreigners, regardless of their status, are guaranteed the right to health care in the way health care is provided to citizens of Serbia.¹⁷ This means that regardless of whether they enjoy the status of migrants, asylum seekers, refugees or others, foreigners are provided with one of the fundamental human rights - the right to health care (Milojević, 2019: 20). This legal act regulates not only the right to health care of foreigners, but also the ways, ie. sources of

¹² Article 13, paragraph 2, Regulation on more detailed criteria for recognizing forms of discrimination by an employee, child, student or third party in an educational institution, Official Gazette of RS, No. 22/2016.

¹³ Article 14, paragraph 2, Regulation on more detailed criteria for recognizing forms of discrimination by an employee, child, student or third party in an educational institution, Official Gazette of RS, No. 22/2016.

¹⁴ Article 20, Regulation on more detailed criteria for recognizing forms of discrimination by an employee, child, student or third party in an educational institution, Official Gazette of RS, No. 22/2016.

¹⁵ Article 77, paragraph 6, Law on Foreigners, Official Gazette of RS, No. 24/2018, 31/2019.

¹⁶ Article 84, paragraph 4, Law on Foreigners, Official Gazette of RS, No. 24/2018, 31/2019.

¹⁷ Articles 236-240, Law on Health Care, Official Gazette of RS, No. 25/2019.

financing the same. It stipulates that health care institutions that provide health services to asylum seekers, registered aliens who have expressed their intention to apply for asylum, persons included in the voluntary return program and aliens residing in Serbia at the invitation of state authorities, and do not meet the conditions for acquiring the status of compulsory insured in accordance with the law governing health insurance, foreigners who have been granted asylum in the Republic of Serbia, if they are financially insecure, as well as foreigners who are victims of human trafficking, pay compensation from the budget of the Republic a favor.¹⁸

The Law on Health Insurance stipulates that compulsory health insurance must be considered, among others, by foreign citizens who work for domestic legal entities in the territory of the Republic of Serbia on the basis of special agreements on exchange of experts or agreements on international technical cooperation, as well as foreign citizens during education or professional training on the territory of the Republic of Serbia until the end of the school year, ie the end of the academic year in which they completed their education, but not longer than 26 years of age.¹⁹

Certain bylaws also regulate this matter. The most important is the Regulation on medical examinations of asylum seekers upon admission to the Asylum Center or other accommodation facility for asylum seekers.²⁰ This Regulation “regulates in more detail the manner of conducting basic health examinations, which, among other things, should serve as a kind of medical screening, on the basis of which health workers can undertake further treatment, if necessary” (Milojević, 2019: 21).

EDUCATION DURING THE PANDEMIC

During COVID-19 pandemic, education in the world faced serious challenges. Due to the rapid spread of COVID-19, schools were closed in most countries. Distance learning was organized, which was conducted in different ways. Many scientists around the world have dealt with this serious problem, which consisted of a number of minor problems:

- 1) How to organize classes?

¹⁸ Article 239, Law on Health Care, Official Gazette of RS, No. 25/2019.

¹⁹ Article 11, paragraphs 27-28 Law on Health Insurance, Official Gazette of RS, No. 25/2019.

²⁰ Regulation on medical examinations of asylum seekers upon admission to the Asylum Center or other accommodation facility for asylum seekers, Official Gazette, No. 57/2018.

- 2) What communication systems to use for cooperation between teachers and students?
- 3) How to facilitate quarantine for students?
- 4) How to help students successfully master the material provided by the curriculum?

The first and basic question was how to protect students? The main protection is frequent hand washing and wearing masks (Chen et al., 2020; Leung, Lam, Cheng, 2020), and in conditions of greater spread of the epidemic and quarantine (Masonbrink, Harley, 2020).

Modern education has faced great challenges. It is becoming increasingly difficult to set tasks, monitor the progress of technology and put it in the function of education (Sorak, 2020). During the pandemic, online teaching proved to be a good solution (Mehić, Hadžić, 2020). In Serbia, classes are organized in such a way that students follow the classes through the program of the Radio Television of Serbia. They communicated with teachers through various online platforms that teachers chose themselves. The biggest problems of online teaching are:

- 1) Insufficient socialization of students
- 2) Inability to monitor students' independent work
- 3) Difficult communication between teacher and parent

All this is even more difficult if we keep in mind that migrant children do not have enough knowledge about digital technologies, do not know enough Serbian, and they are denied the opportunity to socialize with local children.

The COVID-19 pandemic further reduced the ability of migrant children to progress in education and negatively affected their development.

MIGRATIONS THROUGH SERBIA

One of the fundamental human rights is the right to education. It was introduced by the 1951 United Nations Convention on Refugees, and the 1989 Convention on the Rights of the Child. It is considered that education is one of the most important factors of human transformation, which enables him to positively influence society and achieve social, economic and general well-being. For that reason, it is necessary, when planning the

migration policy, that the main part be dedicated to education and inclusion of children in the existing educational system (Solarević, Pavlović, 2018).

Migrations are becoming more frequent, especially forced ones. According to UNHCR research, out of 68.5 million people who were forced to leave their homes, 25.4 million were refugees, of which over 7 million were school children (Đorđević, Šantić, Živković, 2018).

According to the level of education, the inclusion of migrant children in education also differs. Of the 7 million migrant children, as many as 4 million did not attend school. 61% of migrant children are included in primary education, which is significantly below 91%, which is the number of children included in education at the global level. Only 23% of refugees are included in secondary education, and only 1% in higher education.

Analyzing the statistical data on asylum seekers in the Republic of Serbia, it can be concluded that the number of asylum seekers has multiplied in the past few years. The highest number was reached in 2015, 577,955 people sought asylum. The number of children of asylum seekers varied, from 15% in 2013, over 30% in 2015, and after 2016 it was constant, around 40%.

The education system of the Republic of Serbia received the first migrants in 2013 in a primary school in the settlement of Bogovađa, municipality of Lajkovac. The following year, seven more students were enrolled, and in the first half of 2015, another thirty students.

During the activities of the Balkan Migration Route (2015-2016), the retention of migrants on the territory of the Republic of Serbia was very short, so the inclusion of children in the educational system was impossible. After the closure of the route, in March 2016, the stay of migrants on the territory of the Republic of Serbia became significantly longer, so the integration of children into the educational system became more accessible.

Many authors emphasize the importance of integrating migrant children into the education system of the country they come to. They believe that the education of these children is very important, not only because it is prescribed by law (the above-mentioned conventions), but also because it allows to reduce the risk of various forms of exploitation (Volarević, 2017). On the other hand, if the inclusion of migrant children in the education system fails, we come to the conclusion that these children remain on the margins of society, and thus remain unable to provide a normal life, while society can not use all

their potential (Sengupta & Blessinger , 2017). It is important to mention that the term “black box” was then introduced into science for those children who did not go to school in their home countries (Dryden-Petersen, 2015 according to Đorđević, Šantić, Živković, 2018).

The Balkan migration route was closed in March 2016, and since then the stay of migrants in the territory of the Republic of Serbia has been extended from several months to one year (Đorđević, Šantić, Živković 2018, according to Šantić et al., 2017; Umek et al., 2018 ; Minca et al., 2018).

Of the total number of migrants who stayed longer in Serbia, 30% were children under 14 years old. Integration into the education system could not begin immediately. First, children had to be cared for and subjected to adequate protection and care, and then they were provided with access to education through reception centers and centers for asylum seekers.

After that, the gradual inclusion of migrant children in the educational system of the Republic of Serbia began, with the main goal of acquiring knowledge and skills and training for life.

THE MIGRANT QUESTION IN SERBIA

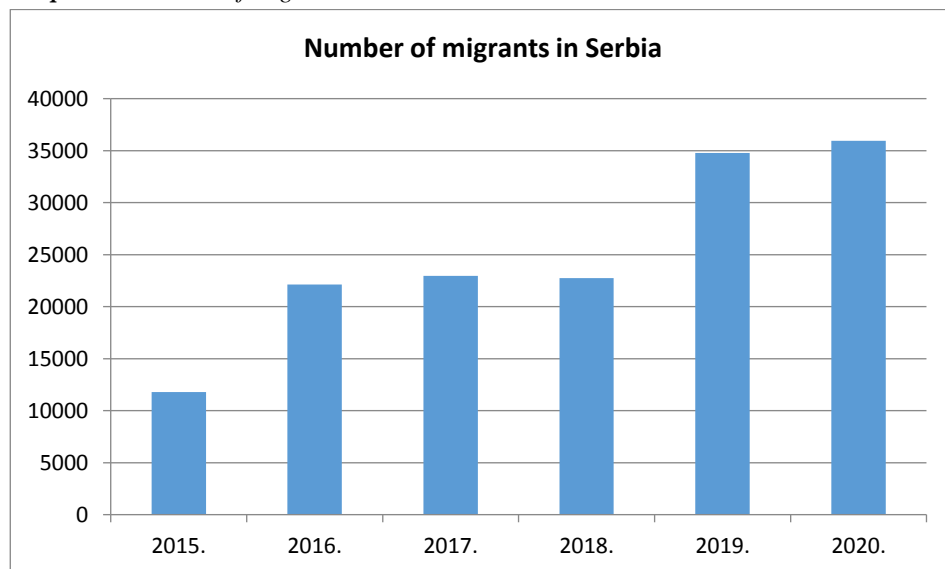
The migrant crisis began in 2015. Serbia, as a country located on the Balkan Peninsula, was the main part of the so-called Balkan migration routes (Simović, 2016: 210). The aim of the migrants is reaching the member states of the European Union through the Balkans. There are two main reasons why migrants leave their own country:

- 1) Wars, mostly civil, that take place in those territories
- 2) The search for a better life (more economically acceptable)

In this part of the paper, the emphasis will be on the migrants themselves and on the countries they come from. The time period of the research is 2015-2020. while the territorial aspect of the research covers the territory of the Republic of Serbia.

According to data from the period 2015-2020. year, 150,360 migrants entered the Republic of Serbia.²¹ The largest number of migrants arrived from Afghanistan (58,197), Pakistan (26,413), Syria (19,298), Iraq (13,149), Bangladesh (8,791) and Iran (8,208). All these countries are characterized by an unstable political and economic situation. Some of these migrants remained living on the territory of the Republic of Serbia and are in the status of asylum seekers (Galijaš, 2019: 75-109).

Graphic 1. *Number of migrants in Serbia*



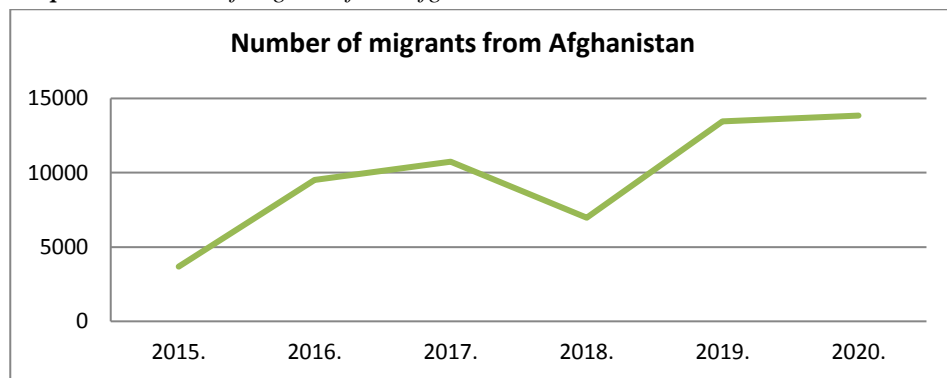
Source: Commissariat for Refugees of the Republic of Serbia

Afghanistan is a country in Southwest Asia. The political situation in Afghanistan has been unstable since the 1970s. The geographical position conditioned Afghanistan to be the so-called a buffer zone between American and Soviet influences, resulting in a civil war between the Taliban and the Communists. Later, it was believed that the infamous Al Qaeda organization had its headquarters in Afghanistan. All this prompted a large number of residents to look for a new place to live, most of them in Pakistan and Iran,

²¹ There is a difference between the number of enumerated migrants and those who passed through the Republic of Serbia, because migrants who passed through 2015 and in a large part of the following year, ie. during the so-called Balkan route did not go through regular procedures and statistics because it was not kept in the same way as today, because it was physically impossible to achieve with those capacities: as a result, hundreds of thousands of migrants from those two years, who were in transit, here are not presented.

and then in European countries. The largest number of migrants in Serbia are migrants from Afghanistan.

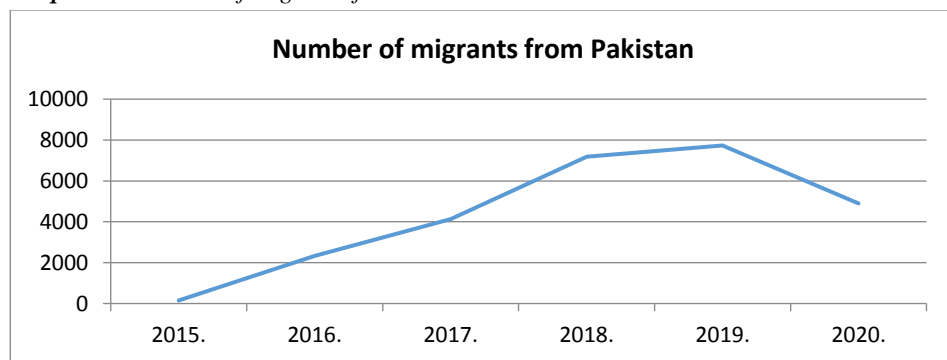
Graphic 2. *Number of migrants from Afghanistan in Serbia*



Source: Commissariat for Refugees of the Republic of Serbia

Pakistan is a country of South Asia. It is shaken by numerous conflicts, so the security situation is very complex. The most significant is the conflict in Balokistan, between the state and representatives of local authorities over the exploitation of natural resources and the potential autonomy of this area. Mention should be made of the decades-long conflict between Pakistan and India over Kashmir, a region divided between India, Pakistan and China, although the Indian authorities do not recognize that division. For that reason, Pakistan is one of the countries with the most negative migration balance, it is estimated that in the period 2015-2020, 1.1 million more people left the country than immigrated (UN Data, 2020). Most Pakistanis go to Saudi Arabia and India.

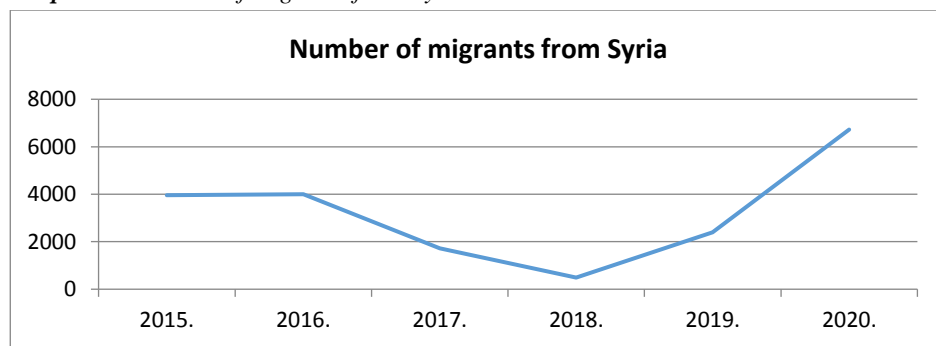
Graphic 3. *Number of migrants from Pakistan in Serbia*



Source: Commissariat for Refugees of the Republic of Serbia

Syria is a country in Southwest Asia. It is one of the most unstable areas in the world. The civil war has been going on for several years, and according to the latest data, the net migration balance is negative and amounts to - 3,266,243 people. The citizens of Syria mostly go to the surrounding countries (Turkey, Jordan, Lebanon) and then to the countries of Western Europe in search of a better and safer life. A part of this population also passes through the territory of the Republic of Serbia because it represents the closest way to the countries of the European Union.

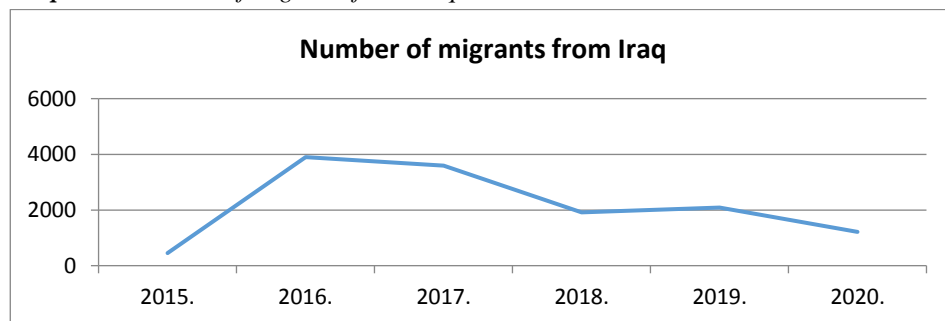
Graphic 4. *Number of migrants from Syria in Serbia*



Source: Commissariat for Refugees of the Republic of Serbia

Iraq is a country in Southwest Asia. The security situation is not favorable, because the civil war in this country has been going on since the overthrow of Saddam Hussein. After that, in recent years, Iraq has been facing members of Islamic State, which further worsened the situation in this country (Mijalkovic, Petrovic, 2016; Pasic, 2017). Jordan, Germany, Iran and Sweden are the main destinations for migrants from Iraq.

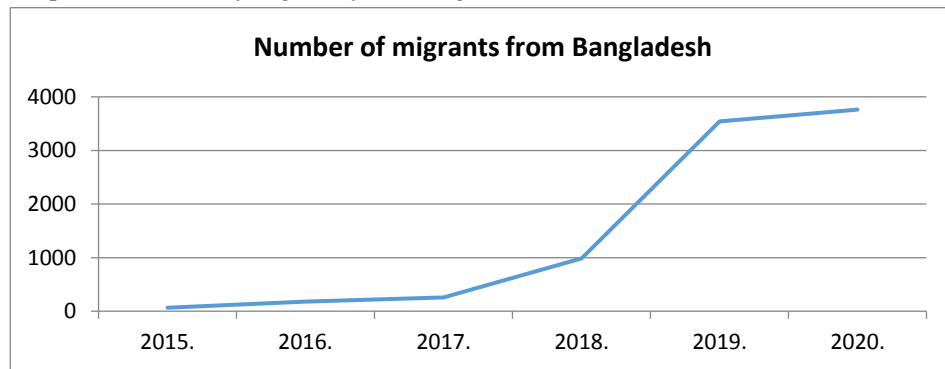
Graphic 5. *Number of migrants from Iraq*



Source: Commissariat for Refugees of the Republic of Serbia

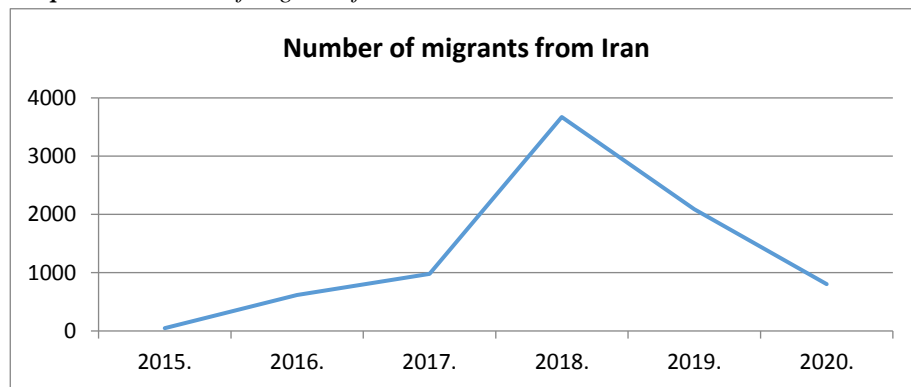
Bangladesh is a country in South Asia. It is characterized by high population density, as well as an unstable economic situation, and is one of the poorest countries in the world. For that reason, the population is leaving the country. Most of them goes to India (3.2 million), Saudi Arabia (1.2 million), UAE (million) (UN data, 2020). Some of them emigrate to European countries, and some number remained in the Republic of Serbia.

Graphic 6. *Number of migrants from Bangladesh in Serbia*



Iran is a country in Southwest Asia. It is characterized by political instability and dependence of the economy on oil exports. It has a positive migration balance, primarily due to the large number of refugees from neighboring Afghanistan. Residents of Iran emigrate mostly to the United States, Germany and Canada. Also, until recently, Serbia was a popular destination for Iranian emigrants. They did not need a visa to enter Serbia, which they used to reach the countries of Western Europe through Serbia.

Graphic 7. *Number of migrants from Iran*



Source: *Commissariat for Refugees of the Republic of Serbia*

Asylum is the provision of protection to persons persecuted for political reasons (Ćopić, Ćopić, 2017). This right is regulated at the state level by laws, which allow to some persons to remain in the country which they have come, without being forced to return to their country.

According to data from the period 2015-2020. year, 2027 persons applied for asylum in the Republic of Serbia. Of these individuals, it is estimated that one third are children. The largest number of asylum seekers are from the following countries: Afghanistan (341), Syria (333), Iran (303), Iraq (225), Pakistan (146) and Somalia (129).

MIGRANT CHILDREN AND EDUCATION

Forced migrations make education significantly more difficult or completely impossible. Children face the great problem of dropping out of school, which makes it impossible for them to get involved in educational processes at the appropriate age. Another problem is that a certain part of the population does not look favorably on migrants (Ivanović, Čudan, 2019).

In the first years, from 2013 to 2015, the education of migrant children was at an informal level and took place mainly in reception centers (Stojić-Mitrović, 2018). The activities included learning foreign languages, then various creative workshops that aimed to help children cope with stressful situations. Civil society organizations also assisted parents in enrolling their children in primary schools in Bogovađa (Lajkovac), Banja Koviljača and Belgrade. However, schools were not prepared to adapt teaching and lecturing materials to pupils because they do not know the language of lecturing, so the effect was minimal and the attendance period was very short. The exceptions are children who have been involved in the process of seeking asylum and granting refugee protection. As early as the next school year, a plan for including migrant children in the education system of the Republic of Serbia was made. In February 2017, ten schools from the territory of Belgrade and Lajkovac were sent for training for accepting migrant children. In May of the same year, the Ministry of Education, Science and Technological Development issued instructions for the inclusion of refugee students in the education system. This instruction stipulates that children who do not have proof of previously acquired education enroll in school according to the previous knowledge test conducted by the competent school team. The application for enrollment must be submitted by a parent or legal representative. After that, the professional team tests the students and, based on the results, assigns the students to a certain age group.

At the beginning of the 2017/18 school year, 442 students were enrolled, who were distributed in 17 settlements. In addition, 83 migrants attended classes at centers in Subotica, Sombor and Kikinda. Teachers from local primary schools taught in the centers. At the same time, 25 children were enrolled in high schools. However, the practice of enrolling high school children in adult education institutions has also been noted (Kozma, 2018).

Table 1. *Number of migrant pupils according to the place of school attendance in 2017*

School attendance	Adaševci	Banja Koviljača	Bogovađa	Bosilegrad	Bujanovac	Vranje	Divljana
Number of pupils	55	23	20	5	16	21	23

Dimitrovgrad	Krnjača	Pirot	Preševo	Principovac	Sjenica	Tutin	Total
12	134	36	43	25	22	7	442

Source: Commissariat for Refugees of the Republic of Serbia

These settlements can be divided into three groups:

- 1) Settlements located near the borders of the Republic of Serbia (Adaševci, Banja Koviljača, Bujanovac, Divljana, Dimitrovgrad, Pirot,)
- 2) Large reception centers (Krnjača)
- 3) Settlements inhabited by a predominantly Islamic population (connected by the same religion) (Sjenica, Tutin, Preševo)

In addition to schools, the children listened to classes in the reception centers, where they were taught by teachers from nearby primary schools. In the following school year, 348 migrants were enrolled in primary schools, and during the year that number increased to 360. A novelty in this school year is the enrollment of children in kindergarten and the preparatory preschool program. In September 2018, the Ministry of Education, Science and Technological Development, in cooperation with the Commissariat for Refugees and Migration, began the process of enrolling children aged 6 in preschool education programs in preschool institutions.

A total of 47 children were enrolled (21 in kindergarten and 26 in the preparatory preschool program). 40 children are enrolled in secondary schools in the following schools: High school (Banja Koviljača), Secondary Technical School Lajkovac, High school Bosilegrad, Secondary Vocational School “Sveti Sava” - Medical Department (Bujanovac), School of Economics (Vranje), High school Kikinda, Beauty care school - male hairdresser (Krnjača), Secondary technical school Pirot, High school “Sava Šumanović” Sid, Technical-agricultural school (Sjenica), Secondary school “Sveti Sava” (Sombor), Technical school - IT department (Tutin). At the end of this year, during which the children listened to online classes for almost the entire second semester, due to the pandemic, we also got the first students who completed some level of education. In total, 43 migrant children completed primary education, namely: Sid-15, Banja Koviljaca-2, Vranje-11, Krnjaca-12, Bosilegrad-3 (Commissariat for Refugees, 2020).

The main problem noted is the ignorance of the Serbian language by migrant children. For this reason, the Ministry of Education, Science and Technological Development issued a “Handbook for schools in the implementation of professional guidance for the inclusion of refugee students / asylum seekers in the education system” in December 2017, as part of the project “Support to refugee students / migrants in territory of the Republic of Serbia” conducted by the Center for Educational Policies in partnership with UNICEF and the Ministry of Education, Science and Technological Development. One of the components of the handbook is the publication “From Serbian as a Foreign Language to Serbian as the Language of the Environment and Education: A Framework for Language Support Programs” published by the Faculty of Philology, University of Belgrade, and supported by UNICEF and the Danish Refugee Council. The publication is intended for teachers of Serbian language and literature in order to be more methodologically efficient when they start teaching Serbian to migrant students, considering that Serbian is a foreign language for them, especially during their stay in Serbia, the language of the environment and education, while for domicile children, Serbian is their mother tongue. The organization of classes was also one of the problems. In the previous school year, teachers and professional staff had dilemmas as to whether it was necessary and expedient for migrant children to attend all classes according to the class schedule, as well as to be given homework. In practice, the students most often attended three regular classes, most often skills (music, art, and physical education), Serbian language, mathematics, computer science, and less often biology, physics, geography classes, and after that they would have a separate Serbian language class. Later, it was switched to online classes. Another problem is that teachers mainly practice frontal teaching, which makes it difficult to monitor classes for migrants, and much less

interactive teaching with the aim of involving all students in teaching. Also, the relative majority of teachers do not design separate teaching materials that are adapted to the knowledge of migrant children. The teachers also emphasized that this is the most difficult part of preparing the lecture, as well as that their priority is the socialization of children, and not the acquisition of school knowledge.

During the pandemic, other problems arose. The first problem is the closure of borders, which meant that migrants had to stay in the country where they found themselves at the time of the pandemic. Another problem is the fact that schools in Serbia have been closed, and the online teaching system has been switched, as well as the monitoring of classes through the programs of the Radio Television of Serbia. This made it much more difficult for children to follow classes, socialize, master the material, and slowed down their development.

CONCLUSION

The coronavirus pandemic has affected the whole world and thus affected all spheres of society. She did not bypass the Republic of Serbia in the least. In addition to numerous health, economic and security challenges, one of the more serious problems is the problem of migrations. This problem came to the fore especially during the closing of borders, and the slowing down of people due to the global pandemic. Migrants are one of the most affected parts of the population due to the spread of coronavirus. A particularly vulnerable category is migrant children, who, even outside the current epidemiological context, have problems exercising fundamental human rights. Intensive migrations, which were significantly slowed down due to the pandemic, had the consequence that a part of the migrant children remained stationed on the territory of the Republic of Serbia. The corpus of rights of migrant children is realized in the corpus of fundamental human rights. Some of them, such as the right to education or the right to health care, are less available during a pandemic, not only in Serbia but also in other countries. Nevertheless, thanks to the tolerance of Serbian society, but also to the inclusive legal framework, migrant children in the Republic of Serbia enjoy almost all the rights that other children enjoy. The main challenges that these children face are the new environment and ignorance of the Serbian language on the one hand, as well as the general epidemiological situation on the other.

In the first few years, the education of migrant children in Serbia was at an informal level and took place mainly in reception centers. Serbian educational institutions were not prepared to adapt classes and teaching materials to students due to their ignorance of the Serbian language, so the performance was at a minimal level, and the period of attending

classes was very short. The exception was children who were involved in the process of seeking asylum and granting refugee protection. For these reasons, a plan was made to include migrant children in the education system of the Republic of Serbia. That is how it was in February 2017, ten schools from the territory of Belgrade and Lajkovac were sent for training for accepting migrant children. In May of the same year, the Ministry of Education, Science and Technological Development issued instructions for the inclusion of refugee students in the education system. This instruction stipulates that children who do not have proof of previously acquired education enroll in school according to the previous knowledge test conducted by the competent school team.

Thanks to that, already at the beginning of the 2017/18 school year, 442 students were enrolled, who were distributed in 17 populated places. In addition, 83 migrants attended classes at centers in Subotica, Sombor and Kikinda. Teachers from local primary schools taught in the centers. At the same time, 25 children were enrolled in high schools. This practice continued in the following period, and was not interrupted during the pandemic. During the state of emergency, 43 migrant children completed primary education in the Republic of Serbia. Also, during the pandemic, a high level of health care was maintained for this population, which can be seen in the small number of people infected with the COVID-19.

Finally, we can state that the Republic of Serbia, respecting international legal norms, as well as conventions and charters on the protection of fundamental human rights, has largely ensured the protection of the rights of migrant children on its territory, regardless of numerous epidemiological, security and economic problems. which the COVID-19 pandemic brought with it.

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Ralf Thomas Heberling*

HUMAN DIGNITY DURING THE PANDEMIC: THE CASE OF NON-WESTERN MINORITIES IN NORWAY

The purpose of this article is to review the impact of the pandemic in spring 2020 on ethnic minorities in Norway. Here covid-19 has hit especially hard immigrants from Africa, Asia and the Middle East. Rates of infection and mortality for this group are far above average of the population. The article attempts to elucidate factors triggering and contributing to this situation, as well as reactions by concerned authorities and civil society.

The author contests the common notion that language is the main problem and command of it the remedy. Good communication is necessary but not sufficient to improve the situation. The author argues the need for a comprehensive and coherent policy to create resilience among minorities and concludes that the crisis created by covid-19 is too complex to be left to health-authorities and economists. There is an urgent need for political intervention, based on research by social scientists.

Keywords: BAME; Immigrants; Pandemic; Covid-19; SARS-CoV-2, Norway, Mortality

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1. Introduction

This article is written in summer of 2020 and represents the state of knowledge up to this point. Main focus is on the developments of spring 2020. Numbers and statistic are given in the most updated version, as available at the time of writing. All weekly rapports by Folkehelseinstituttet (Norwegian Institute of Public Health) are available at FHI (2020). For links to all So-Med-sites, videos and similar mentioned in the text please view the reference-section by source.

In the following, I make use of the acronym BAME to delineate Black, Asian and other non-white immigrants born in other countries than Norway. The term captures well the focus of my research; like similar concepts, it is both debated and used regularly (Wikipedia 2020 July 19). In recognition of the danger of generalization, I point out that BAME-migrants are not a uniform group: there is large variation, both individual and collective. As there obviously are features these immigrants have in common and that distinguish them from the rest of the population.

2. Background

The outbreak of covid-19 started in the city of Wuhan in China in winter 2019. January 7, 2020 Chinese health authorities identified as the cause of the disease a new kind of coronavirus, named SARS-CoV-2, also known as covid-19. On January 23, Wuhan's eleven million inhabitants were ordered into lock-down. This was the start of a pandemic that reached all continents, and by March 11, 2020, the WHO had to declare a global pandemic (WHO 2020).

2.1. The global pandemic

The covid-19 pandemic in spring 2020 has affected everyone everywhere. Some may remember Madonna's post on social media on March 23, declaring covid-19 to be "the great equalizer". On March 31 the Governor of New York, Andrew Cuomo, repeated the message on Twitter: "It's the great equalizer". Prevailing consensus at the time was that pandemics hit blind, affecting poor and rich alike. This equalizing effect has shown not to be the case. While it is true that everyone can be infected, there is a large difference in who is likely to get sick, end up in a ventilator or even dead.

Reports from abroad all show higher than average rates of hospitalization and mortality of members of ethnic minorities. In the USA mortality from covid-19 among Afro-Americans is stated to be 2.3 times higher than for Caucasian citizens (APM 2020) and

death rates have also been disturbingly high among Native Americans (*ibid*). In the UK the death-rate among black Africans was 3.7 times higher than might be expected, and 2.9 times higher for Pakistanis, according to the British Institute for Fiscal Studies (Platt & Warwick 2020). These findings are confirmed by Aldridge *et al.* (2020) and further sources.

In the Swedish capital Stockholm numbers, adjusted by age and gender, show a significant excess risks for those born in Somalia, Syria, Lebanon and Turkey (Lager *et al.* 2020 tab. 3). A report by the Demography Unit of the Stockholm University concludes that “being male, having less disposable income, a lower education level, not being married, and being an immigrant from a low- or middle-income country all independently predict a higher risk of death from COVID-19” (Drefahl *et al* 2020). This description fits the situation in Norway as confirmed by findings by Statistics Norway (SSB) and Folkehelseinstituttet (FHI). There is clear evidence of excess vulnerability to covid-19 in certain groups of society. The poor are hit hard, and in Norway non-western minorities were affected hardest during spring 2020.

2.2. The pandemic in Norway

Covid-19 reached Norway simultaneous with the rest of Europe north of the Alps. The agency responsible for the national monitoring and combating of covid-19 is the Folkehelseinstituttet. FHI started testing for covid-19 by January 23; the first cases in Norway were confirmed on February 26 (FHI 2020). Those cases consisted mainly of well-off city-dwellers who had spent holidays skiing in the Alps. The first death in Norway was reported March 12. By that time the authorities moved to contain the pandemic. On March 12, the Norwegian government established lock-down¹, and on March 27 the parliament adopted a “Corona-law” extending the powers of government for two months.

Covid-19 quickly spread in all cosmopolitan cities, in Norway mainly in the capital Oslo. While the pandemic started in well-off suburbs, it rapidly moved into quarters inhabited mainly by immigrants from Africa, Asia and the Middle East. Many of those have a relatively short duration of residence in the country.

In week 14/2020 the number of covid-19-cases born outside Norway amounted to 37% (397) of all cases reported (FHI 2020). Place of birth was Somalia (108), followed by

¹ For details see Wikipedia (2020, July 18)

Pakistan (23), Iraq (21), the Philippines (17), Afghanistan (17), Morocco (17) and Sri Lanka (14). Thus, one out of ten persons diagnosed for covid-19 in week 14 came from Somalia.

By week 27, out of 8 732² confirmed covid-19 cases, 2 449 (28%) were born outside Norway. Most came from Somalia (483), followed by Pakistan (197), Afghanistan (113) and Iraq (111). In that week 27 the share of those hospitalized born outside Norway was at 54% (FHI 2020). Among patients hospitalized with covid-19 up to July, 410 were born outside Norway (*ibid*). Again, relative most cases were from Somalia (93). Also over-represented were Pakistanis (48), Iraqis (24), Philipinos (16) and Turks (15) (*ibid*). Foreign-born make up 14.7% of the population (Statistics Norway 2020), but 35% of covid-19 in-patients registered up to week 27.

During weeks 27–30 the proportion of cases among foreign-born immigrants was 49%, and during weeks 31–34 it was 39%, according to the latest available rapport by FHI for week 35. FHI states here that of the 10 220 confirmed covid-19 cases with known country of birth, 30% (3 033) are born outside Norway. Yet again, most of the affected are from Somalia (499), from Pakistan (235), Iraq (141), the Philippines (137) and Afghanistan (134).

3. Reasons why

There is no doubt that members of black, Asian, and Middle Eastern minorities are at increased risk of infection and higher mortality by covid-19. Even though the number of afflicted was in decline for a period, this pattern continued into summer. The question is why this is so.

Many are of the opinion that “those people” become sick because they ignore information and good advice given by the authorities. Reality may not be that simple. Lack of language skills and of trust makes migrants vulnerable to the spread of covid-19. Culture has its part, and preexisting health issues dispose migrants unfavorably towards serious consequences of an infection. In addition, there is heightened exposure and less ability to protect oneself and others, due to socio-economic conditions. Here housing and occupation seem to be crucial factors.

² These numbers are for the 98% of cases where country of birth is known.

3.1. Information and Communication

Clear information on covid-19 and on measures to be taken by the whole population is essential in combating the pandemic. To start with, the picture was ambiguous and messages vague. By March 12, the population was alerted through a variety of platforms, not least national media. However, the BAME-minorities did not seem to take any of the warnings serious.

The obvious explanation was that essential facts failed to reach the BAME-community. Information was in Norwegian only, and newly arrived migrants may not have understood it, due to their insufficient language skills. Indeed, even if one masters a language, medical and technical concepts may be difficult to understand. Still, considering that most immigrants manage daily life in Norway quite well, this explanation seems simplistic. More important is what kind of information a person accesses and where it comes from.

Not unlike the Norwegian majority, most migrants show little interest in events in far off China, and initially most did not perceive covid-19 as an imminent threat against their own health. The difference to native Norwegians mainly lies in the patterns of media-consumption. The more people follow national news, the more are they inclined to accept government measures as necessary, effective and therefore meaningful.

Migrants show less than average interest for Norwegian newscasts and for news in general (Alghasi 2012). Many prefer soaps, series and movies for entertainment. For information immigrants often depend on sources from their former homeland, broadcasting in their native language. Media in Africa, Asia and the Middle East initially seem to have under-communicated the threat the pandemic posed.

One can also assume that immigrants rely more on social media, where conversations move in closed circles, facts are selectively chosen and epidemics not a comfortable topic. Reliability is further compromised by false theories, ‘fake news’ and conflicting assessments. A multiplicity of transnational media thrive on the internet, offering their alternative stories, providing “gossip, and even deliberately constructed false news” (Ivanović & Randelović, 2019). Thus information is fragmented, and not all voices are rational or constructive. Whom to trust?

Trust is a salient point in itself in assessing the lopsided impact of covid-19. Societies with less trust in authorities are known to have more spread of the virus. Immigrants trust authorities significantly less than average Norwegians do (Statistics Norway 2019).

While the common view among Norwegians is that the state offers services they need, and that the authorities will come to their assistance should the need arise, this is not the case for an immigrant from Africa or Asia. And if BAME-persons neither trust the authorities nor the media, they do not trust health-authorities either and tend to avoid contact with them. For lack of trust, immigrants heed warnings and look for advice from authorities to a lesser degree than other citizens do.

This connects to a pattern of cultural behavior in social interaction. Native Norwegians usually keep social distance, and many thrive in solitude. Physical contact in the public sphere is not common, and few shake hands, hug and kiss in greeting acquaintances and strangers.

Persons with a primary socialization in another society will behave differently. BAME-migrants in general are associated with a culture of communal thinking and acting. Live is conducted face to face, in a close network of extended family, friends and acquaintances. Somali culture, as many others in Africa and the Middle East, is a contact culture. Social relations are most important, to interact and to visit each other, especially the sick, is imperative. Friends stand close, “breath the same air”, hug and touch. To keep distance is offensive. Social distancing is anathema under such norms of physical closeness.

3.2. *Health issues*

Reinforcing the points above, BAME-immigrants are more vulnerable by their prior state of health, which deviates in a negative way from the majority. Not only are they more predisposed to infection, they are harder afflicted when infected. BAME-immigrants to Norway experience a decline in health at younger age than others do, and many of the pre-existing health conditions that increase the risk of severe infection are more common. They are, *inter alia*, prone to diabetes, overweight, cardiovascular conditions, asthma and COPD (FHI 2018). All these chronic diseases are linked to higher rates of covid-19. Ironically, the longer migrants live in Norway, the more they are affected by risk factors and chronic illnesses. Life style, diet and lack of physical activity seem to play an important role in this.

Thus, typically an elderly immigrant with a BAME background will be in less good health than an ethnic Norwegian of the same age, and less resilient to infection. There seems to be no compensation in the fact that foreign born migrants are younger than the average population, they still are more affected. Even when one controls for health-related factors,

migrants run a greater risk of infection, hospitalization and death by covid-19. There must be more to this.

3.3. The socio-economic situation

Where and how people work and live matters a great deal for the impact an infectious disease will have. When it comes to occupation, BAME-migrants are far more exposed than those born in Norway. They also are more at risk than migrants from the West and from Central Europe. Western white-collar workers stay at home, do their work on digital platforms and continue to earn their salaries. Migrants from Central Europe, mostly Polish, often work outdoors, as builders, in industry and shipyards. BAME-persons typically hold jobs in service industries, and their kind of work is menial, insecure and often temporary.

In Sweden the highest relative prevalence of covid-19 between March 13 and May 27 was found among taxi drivers, 4.8 times higher compared to other occupational groups, followed by those baking pizza and by bus and tram drivers (Folkhälsomyndigheten 2020). Exposure is even higher for staff working in health and social care, as doctors, nurses and nurses aids.

It is reasonable to believe that the situation is similar in Norway. BAME are those driving taxis and busses, cooks, cleaning staff, working at supermarket counters, in delivery-services and as security-guards. They usually are in close contact with customers and hence disproportionally exposed to contamination. The Somalis initially infected were the taxi-drivers who transported diseased ski-tourists returning from Italy and Austria. Moreover, while after March 12 everyone is advised to avoid public transport, urban residents in low paid jobs are significantly more reliant on busses, metro and trams than the white middle-class.

A secondary effect of the pandemic is economical. Similar to other countries, Norway faces a severe recession. A survey for weeks 12-20/2020 (Bratsberg *et al* 2020) shows that those born outside Norway are particularly at risk. Among those who lost their jobs in this period the proportional highest number came from outside the Western world (*op.cit.* tab. 38 and 39). 13.7% of migrants were out of work by May, twice as much as 3 months before (Aamodt 2020).

Also self-employed workers and small business ventures experienced a sharp drop in income; many of the migrants' family-run shops had to either close down or face

exposure. Meanwhile, earnings and resources run low, and BAME are the ones lowest on fortune, income and salaries.

Among the consequences of their socio-economic situation is, *inter alia*, inferior housing. Poor housing has a significant detrimental impact on health in itself. BAME-migrants are more likely than any other group to live in a multi-generation household and with a greater number of children (Statistics Norway 2014). They have less space available than average Norwegians or Western migrants. This translates into urban areas with crowded housing conditions where there is no room for keeping distance, implementing quarantine or self-isolation.

Before the pandemic the limited availability of space resulted in migrants spending much time in the public sphere, in the streets, squares, cafes – “hanging out” is a popular pastime especially among the male section of BAME-minorities, while women will meet in private circles. None of that is save behavior during a pandemic. Protective measures are hard to adhere to under these circumstances; closed schools and work-places worsened the situation during lock-down.

4. Remedies attempted and applied

No one saw this coming. Health authorities were unprepared for the pandemic and strove to handle the spread of the virus. Initially focus was on those returning from abroad, and it took some time to realize the dire situation of minorities.

By middle of March concerned journalists took action to alert BAME-migrants on covid-19. March 20 the national broadcaster NRK issued essential information in five foreign languages³ (Bakken 2020), and on April 8 the NRK published several videos in minority-languages (Jørnholt *et al* 2020). These were presented by prominent second-generation BAME-persons, and widely shared on social media. “Bydelsmødre”⁴, an organization by women from ethnic minorities, started spreading information in 22 languages by word of mouth and on a helpline. The Directorate of Integration and Diversity (IMDI) quickly established a website linking to multilingual information by the FHI. The FHI has by now published 15 videos on YouTube, and information about quarantine and isolation in 40 languages (FHI 2020, updated 17. July).

³ In addition to 3 indigenous sami-languages

⁴ The name roughly translates as “neighborhood mothers”.

Religious leaders involved themselves and emphasized the importance to follow guidelines. Muslim clerics cancelled communal Friday-prayers and recommended strongly not to gather in great numbers to celebrate the festival of Id, which fell on May 23 and which traditionally is an occasion for socializing. This was also the case with Id al-Adha, July 30. The same applies for all religious services, marriage celebrations and funerals, which were downscaled or postponed.

The Islamic Council of Norway (IRN) established on April 15 a webpage giving advice on covid-19 and published videos in several languages, instructing the Muslim community to adhere to the recommendations of the FHI. During week 15/2020 their volunteers distributed up to 10 000 brochures with information in selected districts of Oslo.

Much has been done by many to spread information on covid-19 among BAME-migrants. Following this a decline in cases among foreign-born was noticeable. In general, in July the number of cases of covid-19 fell to the lowest point so far since the start of the pandemic. By summer 2020 everybody knows the basic rules of infection control; key workers are shielded by physical barriers and protective equipment. Some economic measures in support of those who have lost their job and income because of the pandemic are implemented. But still the share of foreign-born afflicted is far out of proportion to their share of the population. There is urgent need to build resilience among minorities. Good information obviously is not enough.

5. Follow-up

Up to now the plight of foreign born immigrants has been given little public attention. And there are no policies targeted specifically on BAME-minorities, economically or otherwise.

There should be, as there is reason to worry. Economists are dire about unemployment figures. Historians say fear of infection may turn into xenophobia and scapegoating. Social scientists point out that a combination of these factors will worsen existing inequalities, leading to more conflict in society, less stability, more sickness. Meanwhile epidemiologists talk about the danger of a second wave and of local “hot spots” flaring up. The pandemic is still present.

What can be done? To effectively reduce the impact of covid-19 on BAME-minorities one has to address all the factors mentioned above: communication is important, but also

to create trust, to better health, and to improve their socio-economic situation: occupation, living and housing.

5.1. Information and communication

Flow of information is a key issue. Broadcasting information is necessary but not sufficient; to disseminate facts is not enough. As a basic rule, the message should be adapted to the receiver. The FHI's videos posted by IRN on July 18 may serve as example of a rather clumsy effort. Simply subtitling a message in a foreign language and posting it on YouTube does not suffice. A message like this should include culturally specific imagery and content. The statement has to be credible and it should come from someone known and trusted. And the most effective approach yet might be low-tech, information by word of mouth rather than by digital messages.

Data from spring 2020 show that information is of some avail, especially when it comes from inside the group, but also show that this only goes so far. Even if information is given clearly, understood correctly and trusted by the recipient, the prerequisites for complying with advice still are different. Accordingly, the authorities' task is not only to inform on evidence and rules, but to help transform this information into protective societal action.

5.2. Health matters

Health-services must monitor and record origin and occupation for all mortality to establish a clear pattern. By summer 2020 those numbers were not obtainable in Norway. Available data give sufficient reason to initiate and implement targeted programs to improve health among minorities, by promoting healthy diet, weight-reduction, physical activity, smoking cessation and effective management of chronic conditions. In addition, universal health coverage needs to include all migrants regardless of their legal status. But this is not only a question of health and medical intervention. Who in a population is most at risk depends on socio-economic status.

5.3. Socio-economic resources

The circumstances of foreign-born immigrants are fundamentally different from native-born Norwegians; and, alas, good communication is no remedy for socio-economic imbalances. BAME-migrants have been at the frontline fighting covid-19, in the health-services and other key worker roles. Ironically, while in fact contributing greatly to keep society running, they are perceived as potential spreaders of disease. Authorities should

publicly salute the contribution of all performing essential work. And certainly all ought be remunerated fairly for their effort. This will provide the BAME-community with added social and economic resources. The symbolic significance of such acclaim cannot be underestimated. It will create trust on all sides, and enable members of minorities to perceive themselves as part of the larger community.

Measures to include immigrants into the housing- and labor market must be part of a long-term policy to address structural inequality. Research is needed to understand the socio-economic factors for prevalence of covid-19 in BAME-communities; such projects should be initiated. Here the participation of BAME-researchers and the inclusion of the community is crucial.

5.4. The role of civil society

Money is scarce, and there is only so much authorities can do to promote equality for minorities. Their most important task might be to supply social capital, so to strengthen resilience in the next phase of the pandemic. Authorities must seek ways to use culture and faith as an asset; measures need to be culturally informed and adapted to the recipients.

To achieve that, one has to cooperate with the affected communities. Spring 2020 shows that the most effective action was taken by the groups themselves and by key-persons within. Equals deliver the most credible message, and achieve best communication. Therefore the voices of second-generation members of the community are most useful in public messaging. Although different in socialization and education from foreign-born migrants, they still are accepted and trusted as “one of us”. Hybrid identities enable them to bridge the gap between norms on both sides, and they are skilled at translating messages between cultures.

Participation and empowerment may work best to counter the adverse factors exposing BAME to covid-19. Voluntary organizations have played an essential role in engaging and supporting local BAME-groups and helped build resilience to the pandemic. This role can be strengthened by initiating projects for self-reliance and for augmenting the resources of exposed minorities. Specifically, women in the BAME-community may be empowered by raising their competence in health-matters. This will lend them power and status while providing the community with expertise and giving authorities a point of contact and communication. Education in general is known to be an important factor in coping with health-problems and diseases.

Faith leaders are a trusted source of information for many BAME-persons and need to be better involved in efforts to inform and guide in times of crisis, in tackling myths and misinformation. Faith communities also may provide voluntary support services, and are valuable due to their ability to pinpoint and reach the most vulnerable members of their group.

5.5. Possible consequences

Why should we bother? Because it makes a difference for everyone. For the sick covid-19 is a matter of life or death; human dignity is at stake and weighty ethical issues that concern us all. No member of society should be in distress, get sick or die if that can be prevented.

Beyond individuals suffering, the whole BAME-community is in danger of being stigmatized. Pandemics will create a feeling of being powerless on all sides, a climate of fright and suspicion. In the past pandemics have resulted in fear of strangers, ghettos, even pogroms. This one reinforces existing trends toward inequality and enhances exclusion among BAME-immigrants. Stigma and high unemployment utterly reduce opportunities for jobs and housing and thereby reinforce trends toward segregation. This may create a situation where migrants neither can nor will contribute to society and economy. If many become dependent on welfare this in its turn will increase polarization in society and reinforce a rising populism among the majority.

Such developments will endanger the stability, the trust and solidarity crucial in this situation; as we know now, societies with high inequality and low trust are more exposed to covid-19. And as long as parts of society are vulnerable to the pandemic, there always is a likelihood of spread to the general population. To protect the weakest is to protect all of society. To quote Soltvedt & Heberling (2018): “Maltreatment of any minority hurts all of society and strikes at the roots of democracy and human rights”.

6. Conclusion

Is there a lesson to be learned so far? The main message is that covid-19 exerts an unequal burden on the most disadvantaged and vulnerable members of society, in Norway on those born in Asia, Africa and the Middle East. The fate of these BAME-persons depends not on language, but rather on their position in society. They are disproportionately affected by covid-19 because of their poverty, exposed jobs and crowded housing. At the

root is a widening gap we must not ignore, between the well-off majority and the most exposed among immigrants.

To improve the situation it is clearly not enough to supply information; there is urgent need for a coherent socio-economic policy towards BAME-communities. Therefore, the handling of this crisis and its aftermath cannot be left to health-authorities, welfare services and economists; social sciences must be involved to aid policy makers in developing targeted interventions by social as well as medical indications. A good start would be exploratory research in the manner conducted by Solarević & Pavlović (2018) on aging. Ultimately, politicians must step up efforts to amend the causes of inequality, while society in general ought to address issues such as structural racism and discrimination. This requires an active role of the state and of civil society.

Alas, none of this is unique to Norway. Prospects for the future look dire for the most exposed and vulnerable all over the globe. Inequality is on the rise and the potential for conflict with it, both within and between societies. A conscious effort is needed to create more coherence and equality between people, thereby to save lives and reduce human, financial, and political costs.

We cannot change covid-19, but we can choose how we respond to it. To create societies that are healthy and well we must share the pandemics' burdens on more equal terms, using this crisis as an opportunity to develop our sense of solidarity and community.

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Andrej Kubiček*

SOCIAL ASPECTS OF COVID-19 PANDEMIC IN INFORMAL ROMA SETTLEMENTS: SPECIFIC CHALLENGES AND SOLUTIONS

Pandemic of Covid-19 of 2020 has qualitatively changed lives of many individuals. Yet, for those who are marginalized, such as members of the Roma community, change was rather quantitative, because level of their already existing everyday hardships multiplied. Impact of virus epidemic on one specific segment of population has ran over boundaries of epidemiological domain and enveloped all aspects of their social life. Health isn't the only concern of those struck by pandemic, which affected their economic status and employment chances; education of their children and overall social status. Article explores specific problems faced by Roma community in Serbia, and different answers and solutions provided by various stakeholders (government, international organizations, NGOs and local activists). Presented data was gathered from media reports and interviews with experts and actors in the field who have planed, organized and participated in these activities in different municipalities in Serbia.

Keywords: Roma people, marginalized groups, epidemics, Covid-19, social security

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1. On social and physical distance

In Serbia, as well as in rest of the world, expression “social distance” (Serbian “*socijalna distanca*”) is still uncritically used in both everyday speech and expert’s narratives. True reason for this preference can only be guessed, but conformism in language usage is a part of explanation. It comes to no surprise that in situations of great peril and danger, such as Covid-19 pandemic, people aren’t paying attention to lexical and semantic details. Still, there is one more latent fact worth of noting here. Misuse of term “social distance” instead of more appropriate expression “physical distance” implies that majority of people were, and still are, unaware of social reality behind this concept.

Keeping physical distance in context of hygienic measures against airborne microbes is profoundly simple spatial arrangement between individuals who are at least 1.5 to 3 meters apart. On the other hand, social distance is primarily a symbolical phenomenon with many different consequences. As classical sociologist Georg Simmel stated in his short, but very influential essay *The Stranger* (Jovanović Ajzenhamer, 2019: 677-680): “The unity of nearness and remoteness involved in every human relation is organized, in the phenomenon of the stranger, in a way which may be most briefly

formulated by saying that in the relationship to him, distance means that he, who is close by, is far, and strangeness means that he, who also is far, is actually near” (Simmel:1950: 402).

Elaborating this short, yet heuristically rich quotation, Simmel adds that symbolic distance is connected with with spatial dimension, because different symbolic evaluations can only occur in physical proximity. Space itself is socially mediated concept, which is even more evident in contemporary era. Internet and extensive air travel can make someone who is spatially very far away to appear close. On the other hand, people sharing same streets may look as individuals with whom none symbolic ties are shared. In that sense, strangeness isn’t absence of psychical contact, but one special case of it. In order to have someone stigmatized as stranger, those who are stigmatizing him must be aware of his presence. Vice-versa, in order for stigma to have an effect on any individual, it must be applied by people with whom one is sharing social ties (Elias, Scotson: 1994; Kubiček, 2018a).

Considering this from the micro social perspective of epidemiology, symbolic (social) distance can cause physical distance. People who are considered as strangers are distrusted, and barely approached in everyday life. Since social ties serve as pathways for

sharing all kinds of material and non-material contents – including viruses – lack of these bonds means lack of risk for disease containment. Mutual closeness and recognition are normally needed to share infection with someone, along the pleasant time which is spent together (Kubiček, 2020).

In this sense, “Roma” in this article will not include all individuals who share Roma national identity. Roma people living in formal settlements who are integrated in wider society aren’t affected in any way which is specific to them, and not to non-Roma. Simply put, focus of this article is set upon social situation, not an ethnic self-identification¹.

As in any topic concerning Roma people living in informal settlement, precise statistical data about number of infected or deceased individuals is lacking (in fact, keeping any kind of this statistical data concerning this topic would be illegal, and would present a form of discrimination). That is the reason why quantification concerning impact of Covid-19 pandemic on Roma population are highly speculative (Gecková Madarasová et. al, 2014: 58). Still, qualitative data and information collected from interviews and field experiences of experts are realistic. Covid-19 was definitively present in informal settlements, and sadly, there were cases of people dying from it. Only in city of Niš it is estimated that around 10 people have deceased from this disease. It is especially sad that there were cases of brave and selfish individuals who contacted virus during their humanitarian efforts. One of them, who was dedicated and diligent Roma activist, even passed away, which is both a tremendous loss and warning about danger which Covid-19 presents. Still, what forms the base of vulnerability to virus of marginalized groups? How it is generated, and how it effects both medical and social status of informal Roma settlements inhabitants?

2. Specific problems in Roma settlements

At the first glance someone may think that Roma population living in informal settlements has one big demographic advantage against Covid-19 – their average age, since their population is one of the youngest among all ethnic communities (according to 2011. Census in Serbia, average for Roma is 28.31 years²). Higher than average birthrate isn’t the only cause of this demographic outcome, because sadly, life expectancy among Roma

¹ It is possible that some inhabitants of informal settlements actually don’t identify themselves as “the Roma”, but rather as members of ethnic majority (Serbs, Romanians, Albanians...), or some other ethnic minority group (Ashkali, Egyptians, Muslims...) (Kubiček, 2018a).

² Veroispovest, maternji jezik i nacionalna pripadnost Popis stanovništva, domaćinstava i stanova 2011. godine u Republici Srbiji Knjiga 4, RZS.

is drastically lower than in other segments of population (including both ethnic majority and other minorities). Studies show that it is as low as 62.2 years, which is 12.4 years less than the average (Raković, 2015: 18). Also, most of inhabitants of Roma settlements have overall health which is lower than usual. Harsh living conditions, which include working in the open, contact with dangerous materials and substances, insufficient diet, lack of sanitation, heating, exposure to smoke, moisture, pests and other risks usually affects one's medical status severely – especially concerning respiratory, cardiovascular and malignant diseases, as well as defensive capabilities of the immune system. All these factors are cumulatively contributing to emergence and presence of illnesses which aren't common in general population, such as tuberculosis, HIV, parasites and severe allergies (Molnár et. al, 2012: 11; Sepkowitz, 2006). Among different conditions present in the settlements, most are identified as being connected with developing of severe or fatal Covid-19 outcomes: coronary artery disease, obesity, hyperlipidaemia, and diabetes mellitus compared with the majority population, and experience more frequent occurrence of health problems/complaints (Gecková Madarasová et. al, 2014: 58). Most striking data indicates that people living in Roma settlements in Serbia are 30% more likely to die from cardiac failure, and four times (300%) more likely to have fatal outcome of chronic lung diseases (Raković, 2015: 18).

Also, some of the Roma settlement's inhabitants don't have medical assurance, and even those who have it, usually face different obstacles in realization of this right. Some settlements are located far away from medicinal facilities and aren't easily accessible, especially during the pandemic. Other forms of discrimination, past and present, have caused distrust towards health institutions among people who have limited insights and information about nature of this system.

Population in Roma settlements is highly mobile and follows recurrent migratory patterns directed to more developed European countries (Germany, Austria, Sweden, Belgium, France...). Income from family members living abroad is sometimes substantial for many settlement's inhabitants. Sudden return of Roma who couldn't find employment anymore in their destination countries had at least two consequences. First, it reduced family budget, but also potentially exposed neighbors to virus contamination, and people who returned in Serbia had to be in quarantine. Furthermore, fear from spreading disease has crossed boundaries of marginalized settlements and fortified already existing stereotypes, making scapegoats out of their inhabitants and blaming them for spreading of Covid-19. There were no reported cases of these or similar racist phenomena in Serbia, neither by

state institutions, self organized groups or in media, in the way it was happening Bulgaria, Romania, Slovakia and Ukraine³.

3. Hygiene and health-related issues

In the context of Covid-19 pandemic, diverse hygienic measures are both advised and enforced by the authorities. Some of these practices were considered common before pandemic (washing of hands and clothes), while some are novel for most individuals, wherever they live (wearing masks and gloves, use of different means of disinfection). Yet, for Roma living in the settlements fundamental human right to healthy environment (Batrićević, 2018: 316-317) is systematically denied.

First problem which appears is that even getting information about advised measures posed problem for many families, because they lack access to nationwide media (newspapers and TV), and in some cases because of lack of advanced language competencies. In these situations it wasn't uncommon for inhabitants to misunderstand scarce information, which made them distrust governmental institutions all the more. Even better off Roma respondents describe their visits to medicinal facilities as “embarrassing” and “confusing” (Belak, 2018; Belak, 2019).

It is a notorious fact that Roma settlements lack running water and stable/safe access to electricity. Most informants from the field have stressed out this basic fact, because without these two preconditions, most of advised hygienic measures are impossible to be implemented. One can't wash his hands with water which is neither clean, nor warm, neither he can wash his clothes regularly without a laundry machine. Lack of sanitation is another problem, since most household aren't connected to sewage system either. In the most extreme cases, some settlements doesn't even have access to natural flowing watercourses (rivers and streams), and all waste water is deposited in still ponds. Also, many more problems are present in the field, which were negatively affecting life of Roma settlements inhabitants before Covid-19 pandemic. For example, garbage disposal, which is barely functioning in the ordinary situations, was almost impossible in some settlements, because people were unable to dispose waste during the lock downs. One should also be aware that most Roma settlements are located far away from grocery

³ https://ergonetnetwork.org/wp-content/uploads/2020/04/ERGO-input_impact-section-in-specific-MS.pdf, accessed on 5.9.2020.

stores, pharmacies, markets and other locations which grew even more important during the pandemic.

In the situation in which even better off citizens were struggling to find face masks, liquids for disinfection and gloves, it comes as no surprise that inhabitants of Roma settlements could barely find any of these. Scarcity of these goods which demand plummeted increased prices in the manner which was unaffordable to people who barely can satisfy their basic needs. And these basic needs also include other commonly used hygienic means, such as soaps, detergent, etc.

Finally, keeping of distance was made almost impossible by numerous families living close to each other, sharing common yards and other spaces between houses. Also, it isn't unusual that more than two generations share the same home or even rooms, as well as small number of everyday utensils, which also presents risk on its own (especially concerning trans-generational contamination from younger/healthier individuals to older ones, or those with poorer health). Some studies show that average number of persons who inhabit room is 2.5, and that many respondents feel bad because of lack of privacy and personal space (Monasta et. al, 2008: 2038).

In context of Covid-19 pandemic, fact worth noting is that Republic of Serbia employs Roma Health Mediators (serb. *romske zdravstvene medijatorke*) since 2008. In these 12 years, these women drafted from within the Roma community had made enormously positive breaches in the field of medical protection. They helped people from the settlements to be formally recognized by the medical system of Serbia and to have medical assurance; to be vaccinated and to go to different medical examinations; they were also providing basic health education and promoting healthy lifestyles. Still, their role was marginalized during Covid-19 pandemic by the Ministry of Health, in which frame they operate. Roma health mediators were not allowed to enter health facilities, nor to officially work in settlements. Reasons for this decision remain unknown, although it may be deduced from strict hygienic measures in all health facilities.

4. Economic problems

Since all types of Roma settlement's inhabitants professions have similar characteristics, pandemic of Covid-19 had profound and devastating effects on their status. First of all, most of them are self-employed, which means that they didn't had any kind of security or support from state which was provided to the formally employed citizens. Nature of informal and self-organized work means that payments are made only when particular

operation is completed. These small and usually daily payments need to be frequent in order to provide bare existence. In this context, only kind of support Roma in settlements have, besides welfare, are their cash savings and help from family members.

Second, most of their professions include services which are provided to people outside of their communities: craftsmanship, petty trade, manual labor (construction, agriculture, cleaning...), music and entertainment, gathering of secondary materials etc. While the demand for most of these employments went down dramatically, other were made basically impossible because of lock downs (secondary materials, trade and agriculture), but also because of reduced general production, which provides raw material for recycling. It should be remarked as well that pandemic of Covid-19 has stigmatized very materials which many Roma from the settlements collect and sell – metal. Media reports have claimed that “new virus” simply “loves metal surfaces”, and that it can survive on them for many days.

Thirdly, most of these professions are exercised in the family’s circles. Sons are working with their fathers, and cousins are sharing their workplace. This means that economic income of families living in Roma settlements aren’t diversified, and loss of it can hardly be substituted by any means of income different then already described. Also, since living in improvised or devastated buildings means that inhabitants must leave their settlements from time to time in order to find different materials needed for household maintenance or for heating, these activities were also affected during the lock downs and police hour. For example, Roma from Čukarica municipality had problem, because they were unable to get wood to fuel their stoves.

Since considerable number of Roma are users of different welfare programs, lock downs again made access to facilities in which these services are provided very difficult and complicated. This problem was especially apparent in concern with delivery of food in Red Cross’s and other meal centers. Situation was dire, because people living in severe poverty didn't have, and couldn’t provide any kind of food stockpiles. Roma from Niš and Belgrade were literary afraid from starvation, and quality of interpersonal relations in some settlements was on the verge of physical clashes. Sadly, one man was beaten to death in Belgrade during the month of March in the mass fight in one settlement.

5. Education

Attending, completing and achieving favorable results in formal education is one of the most important problems of Roma settlement communities. This is even more evident if

the fact that children are one of the most vulnerable social groups, and in the high risk of absolute poverty (Ljubičić, 2019: 121) is taken into account. Elementary school degrees (in Serbia first 8 years) are usually completed nowadays, but high school (second 4 years) are very rarely finished.

Transition to teaching at distance using digital technologies prove to be very challenging for students who already faced hardships in their ordinary education. First of all, many of them didn't had any access to TV and Internet, or devices needed for this mode of learning (cellphones, laptop or tablet computers). In the most severe cases - some didn't even had access to electricity. This problem was even more severe concerning the fact that many families in settlements also have more than one or two children attending school, making it even more difficult for them to catch up with this novel approach (practically, one digital device or one TV receiver is needed for each child). Also, learning on distance demanded lot of support from parents, both in organizing time and schoolwork, and in helping their children with lessons – activities which inhabitants of these settlements were unable to provide, since they lack needed skills. Beside that, many parents from general population found very difficult to substitute teacher's expert educational skills, having to tutor only one, or two to three children. Homeschooling more that three children would be impossible even for parents who have higher education.

Some schools and local municipalities provide meals for Roma students between classes, which is highly valued and relieves family budget. Without physical presence in schools, this mean of support was canceled as well, and children were deprived of that one meal they would normally count on.

Since formal education is one of few social frames in which deprived Roma children have chance to experience life outside their closest surrounding, being unable to attend it affected them more severely than other children, because it only further marginalized them from their non-Roma peers.

Finally, considerable percentage of students from these settlements attend individualized educational programs (IOP – *“individualni obrazovni program”*), which by definition demand individual work with student. It is obvious that this form of work can be hardly realized without personal contact with the student.

As it was already mentioned in the beginning of this article, many of these described obstacles were already present, and pandemic of Covid-19 severely aggravated them. Yet, in the field of education, role of pedagogical assistants (originally Roma pedagogical

assistants) had positive impact, since they supported Roma and (from 2009.) all other students who needed additional help (Milivojević, 2015: 4). Besides supporting children, PAs also provided help to teachers and to school's psychological/pedagogical stuff; they cooperated with students parents and families, local and government and institutions. In the context of Covid-19, pedagogical assistants were involved in every aspect of educational process, and had to improvise and think quick solutions in order to overcome ever emerging problems in the field. As one PA explained in the interview, she managed to substitute lack of Internet using phone call, or direct communication with children and parents. Also, students who couldn't do their homework using digital means of communication would receive and send back their learning materials in psychical, paper form. Needless to say, facilitation of this activity was not at all a small feat.

During the summer school brake, in August 2020, new systematization of work for pedagogical assistants came out, foreseeing that in order to be employed, each PA needs to have at least 50 students who need special support. Association of Pedagogical Assistants estimated that around 60 out of 220 in total will lose their job, and that their students will lose support they previously had⁴. Even thou in the end this quota was revised and lowered to 20 students in September, these events caused much uneasiness in whole Roma community.

6. Measures taken in order to aid Roma community

Roma activists involved in providing help and support in the field stressed out that agile and proactive approach has proven to be crucial. From the before mentioned description of situation, it is clear that time was of utmost importance, since Roma living in informal settlements needed even the most basic things. In fact, Roma NGOs and organized members of community were the first to give the needed impulse. During the month of Mart, most Roma from the settlements would go back and forth between local centers for social care and Red Cross offices, without receiving any help. Governmental and international organization (UN and EU) made the great impact, since they have largest capacities, especially concerning budget and material means. Local crisis headquarters, which were organized in every municipality, usually supervised distribution of aid (which some activists perceived as bureaucratic obstacle), and also have managed to disinfect Roma settlements and supply water tanks and electricity where it was needed. Religious

⁴ Facts worth noting here also are that it is unrealistic that one PA can provide proper support to 50 (or more) students. Also, this systematization would possibly force PAs to persuade parents to register their children as students who are educated according to individual plans, which would both decrease quality of education and future chances for children who actually don't need this kind of support.

organizations which are most active in Roma communities – Muslim and Evangelical Christian – have also organized both distribution of basic goods and provided information about Covid-19 (Marinković, 2020). Activists also stressed support from diaspora, who also provided support. It is hard to list all individuals, groups and organizations (both national and international, governmental and non-governmental) which were, and to this day still are, involved in providing different means of support. Since most of the modes of provided help and support are similar, this isn't a goal here. Presented data should be rather understood as examples of good practice.

First response to fast and unpredictably emerging humanitarian and epidemiological crisis included distribution of packages with basic everyday needs: food, bottled water and hygiene kits. Social Inclusion and Poverty Reduction Unit (SIPRU) of the Government of the Republic of Serbia has visited around 14.000 Roma households, donating more than 13.000 packages, plus 11.000 face-masks and gloves until May 15. Also, similar packages were donated by Roma National Council in Serbia and many other organizations.

Standing Conference of the Roma Association of the Citizens (*SKRUG*), an organization which includes many Roma NGOs from whole Serbia, successfully coordinated their work through monthly and weekly meetings. Mutual sharing of relevant information between stakeholders and connecting local communities with donors on national and international level had great beneficial impact. Also, diffusion of informations about Covid-19, proper procedures against it and other relevant advises in the settlements was recolonized as one of the top priorities by *SKRUG*. They employed all means to achieve it, including face-to-face contacts, social and conventional media, printed notices etc. Also, this association formed a team in order monitor possible appearance of the hate speech about Roma in context of pandemic in the media (which wasn't the case up to this day in Serbia, unlike in some other European countries).

Concerning education, besides support which was provided by pedagogical assistants⁵, situation demanded innovative approaches as well, because it was estimated that 17% of Roma students were not included in teaching process in any way. Many NGOs and other stakeholders had to provide digital teaching devices besides traditional didactic material they provided before. Center for Interactive Pedagogy (CIP) from Belgrade distributed

⁵ According to data gathered by the Ministry of Education, Science and Technological Development, during the temporary suspension of teaching in schools, the support of a pedagogical assistant covered 68% of the total of 9,335 students belonging to the Roma national minority, who receive this type of support in 194 primary schools in regular conditions.

tablet and laptop computers, printers and other equipment in 10 schools, as well as providing Internet access for 424 families together with Digital Serbia Initiative. Large quantity of tablet computers and SIM cards needed for web connection (500 in total) were also supplied by Roma Education Fond, and assigned to schools by Center for Education of Roma and Ethnic Communities (CEREZ). In the framework of this project, selected school stuff was trained in using digital equipment, in order to be able to further educate students and their parents as final beneficiaries.

Probably the most positive example is left for the end. During the whole Covid-19 crises 65 young Roma volunteers, previously supported by the UNHCR and UNDP, were active in the local communities, and have cooperated in delivering emergency packages, giving health care and advises, providing access to drinking water or helping people to obtain personal documents necessary for obtaining health insurance or applying for social assistance⁶. Many of them are well educated and very successful individuals in their different professions (music, literature and medicine, among others), proving the great potential of their community.

7. Conclusion

It is hard to evaluate precise epidemiological impact of Covid-19 on Roma settlements in any quantitative manner. Still, data from the field show that pattern of virus spreading follows trends in general population: there were cases present in larger cities, while settlements in smaller towns, villages and remote areas were spared to some extent. Although disease doesn't choose between established and marginalized groups, social and economic consequences aren't spread equally. Physical distance between people who are considered as strangers and general population wasn't an effective barrier for the pandemic which is crossing all borders known to humanity. Social distance in it's true meaning and cumulative effects of exclusion have had catastrophic effects on the most vulnerable settlements in Serbia, almost leading to humanitarian crises – crises about most of public was unaware off.

Still, in the time of great challenges, Roma community in Serbia, as well as it's diaspora, has shown capacity to aid their less fortunate members. On all levels, as individual, self-organized volunteers, activists of NGOs, employees and officials of municipal and

⁶ https://www.rs.undp.org/content/serbia/sr/home/stories/un-volunteers-during-covid19-.html?fbclid=IwAR3IVWBhz6xOO7LRQFqjn8ggT5VfyZCrEEW-ENd15-p6Wo_y7hr3EgrimQ, accessed on 22.9.2020.

governmental institutions, they have promptly and efficiently alleviated critical and complex situation. Through linking people affected by the pandemic with different benefactors, investigating their needs and determining best means to fulfill them, meticulously planing and coordinating actors in the field, a different segments of Roma population have presented itself in non-stereotypical light. Instead of being passive recipients of charity, in the absence of many modes of support – which were denied because of these prejudices and lack of consciousness – they have recruited all their resources to overcome challenges of global pandemic and to provide solutions.

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Vida Vilić*

ISOLATION DURING COVID-19 PANDEMIC: A TRIGGER FOR DOMESTIC VIOLENCE

The coronavirus pandemic has brought a new reality to people around the world. People are facing uncertainty and fear of illness. Sudden change of habits and lifestyle is a stressful situation. Physical distance, social isolation, restriction of freedom of movement, lockdown, obligatory self-isolation and other health measures that state authorities proposed during this pandemic resulted in increase of negative consequences for mental health, because people become worried and irritable through negative emotions. Domestic and partner violence became even more intense. Lockdown, isolation and the impossibility of leaving the home that you share with your partner, provided great opportunities for exercising all forms of gender-based violence against women. The aim of this paper is to point out that social isolation is a significant factor in the manifestation of gender-based domestic violence, and to provide basic guidelines for providing assistance and support to victims of domestic violence, in order to help them to overcome difficulties in combating this negative phenomenon during the pandemic.

Keywords: coronavirus, social isolation, domestic violence, gender-based violence against women

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1. Introduction

One of the necessary health measures to combat the coronavirus pandemic is to reduce or even completely avoid social contacts and to stay at home, isolated from other people. The health professionals, state authorities and institutions have paid full attention to find the most effective measures to combat the unknown virus that takes human lives. Meanwhile, the serious consequences that may occur during the isolation and lockdown has been completely ignored. One of these consequences is an increase of gender-based domestic violence. Like structural differences in society, social isolation makes certain groups of women who became particularly vulnerable, such as women with disabilities, statelessness women, refugees and displaced persons, migrants and women who seek exile, older women, Romani women, women from rural areas etc.

Violence against women in a partner relationship is like a pandemic - a global phenomenon. According to existing statistics, before the pandemic one in three women experienced violence during their lifetime (UN Secretary-General's policy brief: The impact of COVID-19 on women, 2020). Every third woman in their reproductive age has suffered physical or sexual violence by her partner, and more than a third of all femicides are committed by an intimate partner (Stöckl et al., 2013: 859). Many of these women, who were victims of violence by their partner or husband before the pandemic, are now trapped in their homes with their abusers, without the possibility to even report the violence.

Various international organizations urged for the use of gender perspective in order to mitigate the risk of the effects of the pandemic, including actions to prevent gender-based violence. According to data released by UN Women, before the outbreak of the pandemic, in 2019, 243 million women and girls worldwide experienced sexual and / or physical violence by their intimate partner (How COVID-19 impacts women and girls violence against women, 2020). There are no official statistics on the prevalence of psychological violence. After the outbreak of the pandemic and the introduction of social isolation measures, the violence intensified. According to the same data, the number of reports of domestic violence and helpline calls in a large number of countries has increased by 25% since social distancing measures were proposed (How COVID-19 impacts women and girls violence against women, 2020). Gender-based domestic violence has a wide range of disturbing consequences (from immediate injury to long-term trauma, from physical to psychological effects that affect the survivor, her family members, and even might have inter-generational consequences), which is quite important because the violence which

occurs within the family rapidly spreads to relationships outside the family (Delibašić, 2018: 511).

In this paper, we present data about the connection between social isolation during the pandemic and gender-based violence against women within the family context, the prevalence of gender-based violence during pandemic in the world and in Serbia, and provide basic guidelines given by Council of Europe that may be applied during the pandemic, in accordance with the provisions of the Istanbul Convention. Given that the time of the coronavirus pandemic is still ongoing (according to a study from Harvard, measures of social distancing will certainly be necessary by 2022), and that social isolation, despite the end of the lockdown in many countries, is still recommended as a safe measure against the coronavirus, it is very important that state authorities and institutions recognize gender-based domestic and partner violence as a great danger and to urgently take all necessary measures to help and support women victims of domestic and partner violence.

2. Social isolation - a risk factor for domestic violence

Social distance, lockdown and isolation are a specific form of health epidemiological measures that are applied in order to prevent the spread of infectious diseases among people. The necessity of these measures for both individual and collective protection against the virus is undoubted, but it should be clear that the use of these measures affects the physical and mental health of people and their behavior. While the health professionals and scientist are still not entirely clear how the coronavirus works, they are quite clear for a long time that social isolation has far-reaching and severe consequences. Fear of uncertainty about when and how the pandemic, which has took almost a million of lives so far will end, leaves people in a panic while trying to adjust to the new everyday life. Due to closed schools, cafes, cinemas, lockdowns and the ban on common gatherings, more and more people spend time indoors, in their homes. Spatial congestion, lack of privacy, lack of intimacy and financial losses can lead to aggression and violence.

Psychiatric and psychological literature stated that in cases of social isolation each person reacts differently. Anxiety, worry or fear may occur on an individual level, there is a feeling of hopelessness, uncertainty or frustration, loneliness, anger, boredom, ambivalence, increased use of alcohol or psychoactive substances, and in some cases worsening of the somatic or mental illness (Pantić, 2020). Social isolation can be a catalyst for many psychological problems, even in people whose mental and physical health has been good before. The consequences of social isolation include acute stress,

irritability, anxiety, sleep disorder, sudden mood swings, fear, panic, loneliness (Bai et al., 2004: 1055).

Domestic violence is a worldwide known phenomenon, regardless of the time distance and social organization. Violence against women, especially partner violence, is a manifestation of patriarchal social structures and power imbalances between men and women. For a long time, this form of deviant behavior whose victims are most often women and children, was not socially perceived correctly. It was generally considered that family relations are “a private matter”, that violence is a legitimate way of resolving partner disagreements and that the state should not interfere, regardless of the fact that these were dysfunctional families. This situation has changed mostly by engagement of women's groups and the feminist movement, so the domestic violence is nowadays considered as a criminal act in many countries, including in Serbia.¹ However, despite of the legislation and the declarative social consensus that violence against women is unacceptable, the stereotypical perceptions and prejudices of most people, including professionals in government agencies and institutions which deal with domestic violence and gender-based partnerships, have not changed, because they often ignore and relativize violence, by justifying the perpetrator and / or shifting responsibility to the victim of violence.

From a number of researches it is known that the situations of social and economic crises are a trigger for significant increase of violence against women and domestic violence. During the pandemic, measures as restriction of movement, isolation, lockdown and curfew, significantly reduced the possibility of spreading the infection, but they also led to a worsening of the position of victims of domestic violence. Domestic violence has many forms of manifestation, one of the forms is psychological violence, which is sometimes accompanied by physical violence, but in a large number of cases it appears as an independent form of violence. Psychological violence consists of insulting, vilification, threatening to use force, threatening to take away children, underestimation, mocking, abuse of trust, etc. (Konstantinović Vilić, Petrušić, Becker, 2019: 51). Besides, psychological violence can manifest itself in the form of isolation and taking control of the victim, as blocking of contacts, prohibition of movement and socializing with family and friends, taking control of correspondence, telephone conversations and mobile phone. This means that isolation, as a form of psychological violence in dysfunctional families,

¹ The criminal act of domestic violence was introduced in Serbian law for the first time as a specific criminal offense in 2002, by corresponding amendments and supplements to the prevailing criminal legislation. See: Bošković, Risimović, 2018: 390.

manifests itself in everyday life, regardless the pandemic, exist or not. In conditions of pandemic, when the state determines health isolation measures to prevent infection, there is an even greater possibility that the perpetrator has take control over the victim, and prevents the victim from seeking help by using the coercive methods. For women who suffer domestic violence, isolation due to the coronavirus means not only that they cannot physically escape from the abuser, but also that they are left without resources that can help protect themselves and their children, who are often silent witnesses of violence. Restrictive economic measures have led to more layoffs and unpaid leaves from work, making women more economically vulnerable. In families in which dysfunctional patterns of behavior manifested before the pandemic, there are even greater possibilities for more dangerous forms of violence in conditions of social isolation. Measures of social isolation made it difficult or impossible not only to contact relatives and friends, to whom the victim could be educated and ask for help, but also made difficult the contact the competent state authorities, services and institutions, which should professionally provide assistance and support to the victim. Therefore, social isolation at the time of coronavirus should be perceived as a significant risk factor for the manifestation and / or escalation of domestic violence.

Judith Lewis Herman, a renowned trauma expert at Harvard University Medical School, found that violent methods used by abusers to control their partners and children “have a lot in common” with kidnappers’ methods used for control of hostages and with repressive regimes used to break the will of political prisoners. “The methods that allow one person to control another are extremely consistent”, she wrote in a widely quoted 1992 article. In addition to physical violence, which is not present in every violent relationship, common means of abuse include isolation from friends, family, and absence from work; constant monitoring; strict and detailed rules of conduct; and restrictions on access to basic necessities such as food, clothing and sanitation utilities. Social isolation, as important as it is for the fight against the pandemic, gives even more power to the abuser, said Dr. Lewis Herman. “If people suddenly have to be at home,” she said, “it gives the abuser a chance to say what the victim should do or should not do.” Isolation has also shattered support networks, making it much more difficult for victims to help or escape (Taub, 2020).

3. Prevalence of domestic violence during the state of emergency worldwide and in Serbia

One of the widespread misconception about domestic violence is that it is not large-scale, and therefore does not require social mobilization and action, in terms of its prevention

and suppression (Petrušić et.al, 2019: 51). UN Women, a United Nations entity dedicated to gender equality and women's empowerment, pointed out that during the crisis due to the COVID-19 pandemic, domestic violence is growing, becoming “The Shadow Pandemic”. Women's rights activists around the world are reporting a significant increase in calls for help due to domestic violence. Collective efforts and actions at the global level are needed to stop this sudden increase in domestic violence. The workload of health services and shelters for victims of domestic violence is huge, helplines are overloaded too, which is why a public awareness campaign was launched about the alarming increase in domestic violence during COVID-19, with the message that all people should support and help women victims of violence if they know or suspect that they have been exposed to some form of violence (UN Women - The Shadow Pandemic: Violence against women during COVID-19, 2020). Measures of preventing the spread of COVID-19 have had a social impact that has severely affected women, and UN Women warns that “in this extraordinary context, the risk of violence against women and girls, especially domestic violence, increases due to tensions (and isolation of women) in their homes. Survivors of violence may face additional obstacles to flee violent situations or access life-saving protection orders and essential services due to factors such as movement restrictions or quarantine.” (Unwanted Effects Of The COVID-19 On Violence Against Women, 2020).

The United Nations says that the coronavirus affected women three times: for health, for domestic violence and for caring for others. Restrictive measures taken worldwide to combat COVID-19 increase the risk of domestic violence and increase the workload at home. (Unwanted Effects Of The COVID-19 On Violence Against Women, 2020).

The European Parliament issued a press release stating that “we will not leave Europe's women alone” and called on member states to increase support for victims of domestic violence during the pandemic (European Parliament - COVID-19: Stopping the rise in domestic violence during lockdown, 2020).

Although there are still no official data on the extent of domestic violence in some countries in the world and in Serbia, it is possible to gain insight into the prevalence of domestic violence, based on the reports of organizations involved in providing assistance and support to women victims of domestic violence. This is the brief overview based on the so far published data.

On May 19, 2020 in Austria was published that since the beginning of the crisis there has been an increase of 9% in the number of reported domestic violence (UNDP - Amidst Coronavirus pandemic, UNDP rings the alarm on domestic violence, 2020). By analyzing

the number of calls between March 12 and April 7, 2020, the Flemish Helpline in Belgium noted that in the third week of the lockdown there was a 70% increase in domestic violence reporting, compared to the first week of the lockdown, as well as that these calls show that the number of (potential) victims of domestic violence has doubled (Zeventig percent meer oproepen over geweld bij hulplijn 1712 sinds lockdown, 2020).

In Italy, reports of domestic violence warned of an increase in domestic violence, but also stated that women victims of violence could not leave their homes while the violence occurred. Shelters could not accept them because of the risk of the infection. Thus, the government said that the local authorities should request some of the hotel rooms to be available and to serve as emergency shelters for the victims to be safe and quarantined. Also, the Italian authorities have made an application which made possible for victim to request help from domestic violence without a phone call (Talmazan et.al, 2020). The unions demanded that during the pandemic, the perpetrator should be displaced from home, not the victim (Ghoshal, 2020).

French police reported an increase in domestic violence of about 30% during the lockdown (The Financial Express - Domestic violence during lockdown, 2020). The French government has launched an initiative to help victims of domestic violence by introducing new telephone lines and a web portal for reporting violence.² The French government also presented the possibility of reporting domestic violence via a code that would be communicated to pharmacy workers who would immediately report the violence to the police (Euronews - Domestic violence cases jump 30% during lockdown in France, 2020). This system of reporting domestic violence cases during the lockdown was, after France, taken over by Spain and the Canary Islands (Abueish, 2020). Namely, when a woman asks the pharmacist for “Mask-19” (Spanish: Mascarilla-19), it is a code that she urgently needs help from domestic violence, and the pharmacist immediately calls the police (Burgen, 2020).

In Spain, with the help of several women’s associations, the New York Times contacted women who had experience with domestic violence and who were now in social isolation with a violent husband or partner, and conducted interviews using WhatsApp. The number of calls for help through telephone helplines increased by 18% in the first two

² Christophe Castaner, the French Minister of Interior, said that the number of cases of domestic violence in Paris increased by 36% when people started working at home. The government has announced that it will pay for 20,000 nights in hotel rooms for victims of domestic violence and also open counseling centers in supermarkets. See: Kottasová, Di Donato, 2020).

weeks of home isolation comparing to the same period a month earlier; in the first two weeks of April the domestic violence helpline received 47% more calls than in the same period in 2019., while the number of women reporting violence via email or social media was 700% higher (Borgen, 2020). The increased number of calls has clearly shown that social isolation and lockdown affects the manifestation of violence.³

In the United Kingdom, a project of monitoring cases of domestic violence against women announced the result that between 23 March and 12 April 2020, 16 women were killed in domestic violence, which is twice the average of the previous 10 years (Grierson, 2020). Of these 16 victims, at least seven were killed by a current or former partner, and three of them were killed by their fathers during domestic violence (*Ibid.*). The number of contacts referred to the National Domestic Abuse Helpline increased by 25% in calls and in online messages (Graham-Harrison et al., 2020). Calls were made by women who had access to a mobile phone, who could leave the house briefly or provide a private space in their homes from which they could make a call. ⁴

Australia has reported that the number of calls through helplines has increased significantly, and according to ABC News-Australia, some perpetrators even use COVID-19 as a psychological tool against their “victims”: they tell their wives / victims that [they] are infected with virus and that they should not leave the home, or the victims are threatened with infection if they do not stay at home (CARE International - Sector-specific approaches to prioritize, adapt, and maintain programming in Covid-19 response, 2020). It is interesting that the government has introduced a US\$ 150 million package to support victims of domestic and sexual violence due to coronavirus (Kingkade, 2020).

In the United States, 22 police units were interviewed by NBC News in early April 2020, and 18 of them confirmed that there was a visible increase in reported cases of domestic violence, in comparasion to March 2020 ('My fiancé just busted my mouth': Georgia's domestic violence calls during shelter-in-place, 2020). The Governor of the State of Georgia, Brian Kemp, addressed the nation on April 11, 2020 with a report from an Atlanta hospital, stating that there had been an increase of 15% in cases of domestic

³ “We’ve been getting some very distressing calls, showing us clearly just how intense psychological as well as physical mistreatment can get when people are kept 24 hours a day together within a reduced space,” said Ana Bella, who set up a foundation to help other women after surviving domestic violence herself. See: Taub, 2020.

⁴ The case of world boxing champion Billy Joe Saunders is very interesting. His boxing license was suspended on March 20 by the British Boxing Board of Control, after he recorded and shared a video on social media, in which he showed (on a boxing bag) how men can hit their partners during the lockdown if they start “giving you a mouth”. See: “Billy Joe Saunders has boxing license suspended after domestic abuse 'advice' video” - BBC Sport, 2020.

violence and all cases were taken care of at this health facility ('15% increase of domestic violence cases in their facilities'). A total number of 951 calls were made to the National Domestic Violence Hotline (Fielding, 2020) during the period of lockdown from March 10 to 24, 2020. According to the reports of non-governmental organizations dealing with domestic violence in Iran, in the period from March to May 2020, 35.8% more cases of domestic violence were reported compared to the previous three months, and reports were submitted by phone or e-mail (Yaron, 2020).

In PR China, police records of domestic violence reported that domestic violence tripled during the epidemic (Zhang, 2020). In Jianli County, Hubei Province of China, police reported that cases of domestic violence tripled during February 2020 in comparison to February 2019, estimating that this increase was in most of the cases (90%) related to the COVID-19 pandemic (Allen-Ebrahimian, 2020). To examine the problem of increase of domestic violence, feminist activists in China have teamed up to form online support groups for women, launching an activist campaign called "Anti-Domestic Violence Little Vaccine", in order to raise public awareness of domestic violence and women's rights.⁵

In Brazil, according to the National Ombudsman for Human Rights (ONDH) and Ministry for Women, Family and Human Rights (MMFDH), in period of March 1 – March 25, 2020, there was an 18% increase in the number of women who complained of domestic violence by contacting SOS telephones (Rocha et.al, 2020). That is why the BR application for human rights and the website <https://ouvidoria.mdh.gov.br/> were launched: through this application and web site victims, family members, neighbors or even non-related people can send photos, videos, audio recordings and other types of documents contained situations of domestic violence and other human rights violations (Rocha et.al, 2020).

In Mexico, organization named "Brujas del Mar" used the social media to help women victims of domestic violence by using digital communication: women who had to walk

⁵ The campaign is led by Guo Jing, a feminist and social worker from Wuhan, who highlights the gender impact of this pandemic. Trapped in a cramped physical space for a long periods of time, many men use their family members to vent their frustrations. Women living in abusive relationships are particularly vulnerable, because when domestic violence occurs, women usually have no way out due to the quarantine situation. The "Anti-Domestic Violence Little Vaccine" campaign called on women to come forward and to raise public awareness through cases of domestic violence by writing an open letter to the public, urging the public to end domestic violence, encouraging people to copy or print an open letter and to post it in public. In just a few hours, several thousand people voluntarily became a "small vaccine" (meaning volunteers) that made visible the call for stopping the domestic violence - many people posted an open letter in their neighborhoods, and some even redesigned the open letter and converted it to a beautiful poster. See: Bao, 2020.

alone - unaccompanied for work (mostly during the curfew hours) were offered digital monitoring during their stay outside, as well as the “digital companion” to make them less afraid of being alone on the street (Janetsky, 2020). Another similar organization, “Gendes”, focused on working with men instead of opening new lines for reporting violence, believing that it is better and more efficient to talk to men until they become violent and that this is a manner of replacing in-person anti-machismo therapy (*Ibid.*).

India’s National Commission for Women (NCW) recorded more than a twofold increase in gender-based violence during the social isolation and lockdowns in India (Roy, 2020): between March 23 and April 16, 2020, the organization recorded 587 reports of domestic violence, which is an increase of 45% compared to the previous month (“Locked down with their abusers: India’s domestic violence surge”, 2020; The Economic Times - India witnesses steep rise in crime against women amid lockdown, 587 complaints received: NCW, 2020) and The Childline India helpline received more than 92,000 calls for protection from domestic violence in period March 20 – March 31 (The Economic Times - Govt helpline receives 92,000 calls on abuse and violence in 11 days, 2020). It is interesting to note that the police showed great inattention and apathy towards women who reported domestic violence, with the excuse that “they were very busy with the control of the lockdown orders so that they could react” (Chandra, 2020).

The situation in Serbia does not differ much from the rest of the world. The state of emergency and lockdown in Serbia was introduced on March 15, 2020 and ended on May 6, 2020 (Odluka o ukidanju vanrednog stanja “Sl.glasnik RS” br. 65/2020). During all that time, an epidemiological measure of social isolation and physical distancing was applied. There is no publicly available data about the number of criminal and misdemeanor cases related to domestic violence initiated during a state of emergency and lockdown. During the mid-April 2020, the Autonomous Women’s Center issued a statement that three times more women than usual called the SOS telephone for help (Autonomni ženski centar, Saopštenje za javnost: Zaštita i podrška ženama žrtvama nasilja tokom prvih mesec dana vanrednog stanja, 2020). Most of the reported cases were related to psychological violence, but economic violence was also manifested mostly through non-payment of alimony. Data concerning the increased number of reports submitted via telephone helplines and through safe houses were also delivered by other non-governmental organizations, as well as by media, which reported on drastic number of cases of violence and femicide. On April 18, 2020, specialized women's NGO's that provide assistance and support to women victims of violence submitted a proposal to the Government of Serbia to amend the measures from Decision on the declaration of the

state of emergency⁶. The amend should be made in the part which is related to the lockdown during curfew hours: in case of acute domestic violence, women and girls can leave their home without the fear that they will be punished for it. This initiative, as well as other initiatives with recommendations and appeals to facilitate the reporting of domestic violence during the lockdown and social isolation, have not been adopted. The competent state authorities, however, informed the media that police officers performed all their regular activities, that victims have the opportunity to report any case of violence, but that victims of violence and the society as a whole, should be encouraged to report violence and that the state will not tolerate any form of violence against women and children. However, women who reported domestic and partner violence to the competent institutions, assessed that they did not receive adequate protection, which was the reason to turn to specialized organizations, because the perpetrators were only verbally warned by the authorities (Pajvančić et al., 2020: 106). Regarding the manner of processing cases of domestic and partner violence during a state of emergency and lockdown, we should mention the *Recommendation for the work of courts and public prosecutor's offices during a state of emergency* (Ministarstvo pravde Republike Srbije: Preporuke za rad sudova i javnih tužilaštava za vreme vanrednog stanja, 2020.) issued by the Ministry of Justice which recommended, among other things, that competent courts and public prosecutor's offices must handle the criminal cases related to domestic violence and also in cases that are resolved in proceedings that are considered urgent by law. For victims of domestic violence who were forced to live in the same household with the perpetrators during the lockdown, besides the inability to report violence, there was a problem of accommodation in safe houses, given the lack of space in safe houses during the given epidemic measures and difficulties in implementing self-isolation for safe house users and their children.

4. Guidelines of the Council of Europe on preventing and combating violence against women and domestic violence during the COVID-19 pandemic

Experiences gained in previous epidemics have clearly shown that the health crisis always leads to a recession in gender equality. The necessary restrictions implemented by the European Union to prevent the spread of coronavirus led to some effects that were immediate and alarming. The most relevant consequence was an increase in the number of cases of domestic violence (Tolleret, 2020). We have already stated that since the outbreak of the pandemic, there has been a dramatic increase in reported cases of violence

⁶ "Sl.glasnik RS"/ "Official Gazette of RS" br. /no. 31/2020, 36/ 2020, 38/ 2020, 39/ 2020, 43/ 2020, 47/ 2020, 49/ 2020, 53/ 2020, 56/ 2020, 57/ 2020, 58/ 2020, 60/ 2020.

against women and domestic violence, both around the world and in Council of Europe member states. The Committee of the Parties to the Istanbul Convention adopted the Declaration of the Committee of the Parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) on the implementation of the Convention during the COVID-19 pandemic (Declaration of the Committee of the Parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) on the implementation of the Convention during the COVID-19 pandemic, hereinafter Declaration), which called on states that have ratified the Istanbul Convention to use the standards and recommendations of the convention as guidelines for activities and measures taken by states during the pandemic. Examples of how to respond to the increase in cases of violence against women are largely derived from the initiatives currently being implemented by States Parties to the Istanbul Convention, as presented in the Annex to the newly adopted Declaration, titled *“Possible action and measures to take during the COVID-19 pandemic under select provisions of the Istanbul Convention”*.

The Declaration states that violence against women and girls, as well as domestic violence, tend to increase in times of crisis and that the new data show an alarming increase in the number of reported cases of certain types of violence around the world and in many Council of Europe member states. Measures taken as epidemiologically justified, in particular lockdown and isolation, increase the risk of all forms of gender-based violence, including sexual and domestic violence. Therefore, the obligation of the signatory states of the Istanbul Convention is to continue with due diligence the work on prevention, protection and prosecution of all acts of violence provided by the Convention, in accordance with the European Convention on Human Rights. Also, the position of states that seek and apply innovative ways of adapting institutional responses to violence during a pandemic in accordance with the provisions of the Istanbul Convention, is supported. In this context, it is necessary to share experiences and cooperation between members and observers of the Committee of the Parties to the Istanbul Convention, in order to address the long-term impact and any omissions due to this crisis on victims of violence against women and domestic violence, in order to guarantee the rights of victims of violence and their human rights in general. The Annex to the Declaration lists activities and measures that can be taken during the COVID-19 pandemic, in accordance with certain provisions of the Istanbul Convention: integrated policies, prevention, protection, prosecution and risk assessment.

Integrated policies (Articles 6, 7, 8 and 11) confirm the obligation of States Parties to include a gender perspective when devising and implementing strategies to combat the

COVID-19 pandemic. This would imply evaluating the potential impact of measures taken on women and girls and their exposure to the risk of the various forms of gender-based violence, such as intimate partner and domestic violence, stalking, sexual harassment, forced marriage and sexual violence, including technology-facilitated violence, as well as the potential impact on children witnessing such violence. In addition, States Parties must, as much as possible, maintain and reinforce inter-institutional co-ordination mechanisms in the development and implementation of policies to curb violence against women during the pandemic. Multisectoral process must ensure the participation of all relevant actors, including civil society organizations and women's rights organizations, to help national, regional and local authorities assess the needs of victims, the capacity of service providers and to determine whether additional funding is needed. In the new circumstances, States Parties must consider whether the financial and human resources allocated to service provision, including services carried out by NGOs, continue to be appropriate or need to be reinforced in order to respond to the current situation. It is important to collect data, including administrative data and data from special support services, such as telephone helplines, as well as to monitor the growing trend of domestic violence and violence against women in a pandemic through different researches.

Prevention (Articles 12-17) refers to taking appropriate measures (press releases, television, radio or social media campaigns), aimed at making the general public aware of the increased risk of violence against women and girls during the pandemic and disseminating as widely as possible information about possible avenues where victims can address for support. It is necessary to distribute as much information material as possible (brochures and leaflets), in places that are not affected by restrictive measures, such as supermarkets and pharmacies. Information must be available in different languages, in order to reach particularly vulnerable categories of women. Prevention also includes training of experts and professionals who work in the most important sectors (health, justice, police) about the impact of certain measures (such as physical distance, isolation and curfew, economic and social measures) on women and children living in violent relationships and / or a violent environment. It is also necessary to promote and implement a program of preventive intervention and a program for working with perpetrators of violence at the state level. Programmes which are available online and/or through telephone helplines might be particularly suitable under the current injunctions to practice social distancing. The role of the private sector and the media should be encouraged to form partnerships with national and local authorities, to intensify reporting

on the increased violence against women during a pandemic and to provide information on available support, which should not be neglected in preventive action.

Protection (Articles 19-24) refers to information and general support services. For victims of violence in self-isolation and/or living with their abusive partners/family members, accessing information on available support services and legal measures is likely to be an issue. In order to safeguard victims' right to access information, states parties should develop targeted information campaigns. It is important to introduce additional measures to develop support and protection services for victims of violence (introduction of helplines with a chat system and counseling platform for providing social support and psychological assistance to victims using modern technologies). Attention must also be given to the need of financial support which many women will depend on after relocating to a shelter for victims of violence.

The Prosecution section (Articles 49-52) covers general obligations (relating to reporting violence online, using "safe words" in pharmacies that would further report partner violence and / or domestic violence during curfew); immediate response, prevention and protection (priority for police and judicial authorities is the safety of the victim, which means immediate court proceedings, adequate and urgent protection against the risk of violence); risk assessment and risk management (assessment of the severity of the victim's situation and risk of repeated violence; providing protective measures, pretrial detention in high-risk cases); emergency barring orders and restraining of protection orders (victims access to emergency barring, restraining and protection orders).

5. Conclusion

Millions of people around the world have to stay locked up in their homes during a pandemic, because of the risk of the coronavirus virus. Their own home is the best place to protect against the virus, but, as the data so far show, for many people exposed to domestic violence their own home is not a safe place. In this regard, it is possible to conclude that COVID-19 presents a great danger for victims of gender-based violence, because many women have to be quarantined with their abuser. Living in social isolation, families in which dysfunctional patterns of behavior manifested before the pandemic, showed even greater possibilities for violence to take on some more dangerous forms. Social isolation made it difficult or impossible not only to contact relatives and friends, who could educate and help the victim, but also to make contact with the competent state authorities, services and institutions, which should professionally provide assistance and support to the victim. Therefore, social isolation at the time of coronavirus should be

viewed as a significant risk factor for the manifestation and / or escalation of domestic violence.

Given the prevalence of domestic violence during the pandemic in all countries of the world, the Declaration of the Committee of the Parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) on the implementation of the Convention during the COVID-19 pandemic called on states that have ratified the Istanbul Convention to use the standards and recommendations of the convention as guidelines for activities and measures taken by states during the pandemic. The Declaration emphasizes the obligation of the signatory states of the Istanbul Convention to continue with due diligence the work on prevention, protection and prosecution of all acts of violence provided by the Convention, in accordance with the European Convention on Human Rights. Also, the position of states that seek and apply innovative ways of adapting institutional responses to violence during a pandemic to the new circumstances, in accordance with the provisions of the Istanbul Convention, is supported.

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Zorica Mršević*

PROTECTION OF WOMEN'S DIGNITY DURING THE COVID 19 PANDEMIC

The subject of the paper is the escalation of violence against women in the social and political context of deterioration the economic (labour and professional) position of women. These are the two basic areas of possible violation of the dignity of women during the Covid19 pandemic in Serbia, both of which relate to the very basic of human existence. The aim of this paper is to, through the analysis of endangering and diminishing the dignity of women in the current moment of the pandemic crisis, simultaneously identify possible answers and measures to protect the dignity of women. The focus is on necessity of protection against gender based violence, women's human rights, institutional responses, solidarity, security and good communication. Attention will be paid to both domestic and international sources and examples of good practice, especially from the region and Europe, from the OSCE, Council of Europe, the EIGE, European Institute for Gender Equality, to maybe most interesting campaign led by the FIFA. The future is still seen by all the mentioned actors as uncertain.

Keywords: gender based violence, escalation during pandemic measures, deterioration of gender equality, uncertain future

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1. Introduction

This pandemic increases all existing inequalities and seriously affects those who are already vulnerable and endangered. It is well known through history, that very crisis affects women like a big wave, which throws them miles back. (Radić, 2020). Everything that has been won in terms of gender equality, including protection against gender based violence, begins to disappear the moment the crisis brought women back home and brought them duplication of working hours and obligations. Moreover, people most of them women, who live and work on the margins of society are exposed to the highest risk of infection and difficulties and are additionally stigmatized. We are facing individually and together with an unprecedented health, humanitarian and socio-economic crisis. A large number of LGBT people who already live in fear for personal safety, significantly reduced movements, communications, educations and professional aspirations, while conducting a “double life”, and fearing of future victimization, are now particularly vulnerable (Mršević, 2017: 201). Thus the World Victimology Society is also aware of growing patterns of victimization, including cases of abuse of power in the context of particularly marginalized communities and vulnerable groups and individuals (Peacock, 2020).

The increase in violence against women should be given the most attention, because women are more exposed to the risk of domestic and other forms of gender based violence. All regional and domestic women's organizations, which were consulted, were seriously concerned because social distance and limited movement raised an additional risk of domestic violence. The home is not always a safe place for women, who are particularly at risk during restraint measures, as domestic abusers cannot be avoided and it is difficult, or impossible, to call the police due to the proximity of the abuser (UN Women, 2020). In short, the current situation is especially dangerous for women and children, who share their home with a bully (European Feminist Working Group, 2020). They warned that availability of support services for victims of violence has been reduced. We believe that it is important to react on behalf of all women and girls with the experience of domestic-partner violence, whose home has become a home cage, during curfew, every day and during the holidays for a continuous many hours. Victims of gender-based domestic-partner violence - must stay at home because of the coronavirus - at the same time they are forbidden, even in conditions of acute violence, to enter the public space, with the threat of drastic fines.

2. Increase of gender based violence during pandemic

Since the lockout measures of pandemic began (in Serbia since 15. March), the police, women's shelters and NGOs have reported an increase in domestic violence, especially violence against women. People go out much less, many have lost their jobs, housing conditions are aggravated, multi-member, multi-generational families are cramped in a small flat, there is a general feeling of frustration, insecurity, increased anxiety, which all leads to conflicts in relationships between partners and other relationships. women, children, old parents are beaten.

The increase in violence against women should be given the most attention because women are more exposed to the risk of domestic violence. All regional and domestic women's organizations, which were consulted, were seriously concerned because social distance and limited movement raised an additional risk of domestic violence. Already at the very beginning of this great health crisis in the world, it has been shown that pandemics, that is, measures taken differently affect women and men. Domestic violence against women increases in times of crisis: women spend longer periods of time with violent partners at homes, so they are more exposed to violence. The home is not always a safe place for women, who are particularly at risk during restraint measures, as domestic abusers cannot be avoided and it is difficult, if not impossible, to call the police, the SOS phone, or anybody, to report the violence and ask for assistance, due to the proximity of the abuser (UN Women, 2020). In short, the current situation is especially dangerous for women and children, who share their home with a violent perpetrator (European Feminist Working Group, 2020).

When the crisis is over, it will be even harder for them to leave the bully, due to the financial insecurity that will follow. In this case, relatives and neighbors can play a big role, they can report violence if they suspect that women are exposed to violence, especially if the woman is not able to call for help (FemPlatz, 2020, 3-4). Stressful situations, such as those being experienced during the Covid-19 pandemic and economic instability, exacerbate the risk. Moreover, the current distancing measures in place in many countries make it harder for women and children to reach out to family, friends and health workers who could otherwise provide support and protection.

3. International actors condemned gender based violence

International governmental organizations¹ as well as international non-governmental organizations² already at the very beginning of pandemics were among the first who warned to increased exposure of women to situations of gender-based violence. We mention public announcements and appeals issued by the OSCO, the UN WOMEN, the Council of Europe, the World Health Organization for Europe, the FIFA, the European Commission and World Health Organization, the EIGE, the World Society of Victimology. It is important to mention also, that all international organizations usually have somewhat slow flows of bureaucratic, hierarchically strictly defined decision-making procedures. As a result of slow procedures, any expressing a public stand, not to mention condemnations or warnings, usually takes a long time. But when it came to risks of gender-based violence during the pandemic, clear warnings came very quickly, already at the beginning of pandemic measures, really at the right time, and moreover, from the highest positions. It is important that these international actors came out publicly condemning gender-based violence, starting in April 2020, meaning at the very beginning of the global introduction of anti-pandemic measures. These organizations are often partners of national and local authorities in Serbia and certainly have an impact on their policies. It is also worth mentioning that Serbia accepted the obligation to harmonize national law with the EU law, meaning to Endeavour to ensure full alignment of the existing and future legislation and its true implementation and enforcement (Mišćević, 2018: 335). In addition, these international organizations can also influence domestic non-governmental organizations, media, expert groups, research entities and individuals through various forms of partnership, funding and cooperation.

Because of all this, we believe that it is important to look at this type of protection of the dignity of women from gender-based violence.

¹ International governmental organizations are non-territorial subjects of international law in permanent institutional form of cooperation between member states in achieving common goals. The founding act of international governmental organizations is a multilateral treaty and by it the member states transfer part of their sovereign powers to the international organization. At the same time, the founding agreement has the characteristics of a constitutional act of the organization and it prescribes, among other things: the goals of establishment, competencies of the organization, organization and rights and obligations of bodies, conditions for acquiring and losing membership, method of financing ...

² International non-governmental organizations are an institutional form of international cooperation whose subjects are not states, and the founders are individuals, groups, associations or institutions from different countries in various fields of human activity, with the aim of achieving common interests.

2.1. The Organization of Security and Cooperation in Europe - OSCE

We emphasize the reaction of the Organization for Security and Cooperation in Europe, which has been the source of reactions to gender-based violence since the beginning of April 2020. The Organization for European Security and Cooperation was the first to respond concretely by press releases and especially by appeals to the governments of the member states (OSCE, 2020, April 2). Protection from domestic violence urgently needed for women and children under stay-at-home orders, a statement issued by the OSCE officials at the Vienna/ Copenhagen/ Warsaw meeting (OSCE, 2020, April 6). A warning was issued about the increase of gender-based violence, the competent government bodies were called upon to react, the media to inform about the possibilities of protection, as well as non-governmental organizations to stay available to provide assistance to those with experience of gender-based violence. “State of emergency might cause a rise in the number of domestic violence cases. We call upon all competent institutions to treat the calls related to domestic violence as their highest priority, and to take all measures to protect the victims. In these hard times, the media needs to intensify reporting about the risks of domestic violence, and highlight existing support services so that victims can learn where they can turn for help.” “It is important for civil society organizations to remain available to potential victims, and for state institutions, including police and centers for social work, to work to reduce the risks of domestic violence by conducting information campaigns and keeping services open during the crisis.” “Women and children, but also other family members, are subjected to mental, physical and sexual violence. In situations of stress and home isolation, this can further escalate. The Government has increased the availability of services for victims around the country”, said Head of the OSCE Mission to Skopje, Clemens Kojan.

Persistent gender inequality might worsen due to the impact of the pandemic caused by the corona virus if not properly addressed from the beginning. The participants emphasized the importance of collaboration between rule of law authorities and protection service providers as well as the need to secure increased funding and support for local organizations providing support to victims of gender-based violence. Noting a troubling rise in domestic violence in relation to the Covid-19 pandemic lockdowns and self-isolation guidelines in many countries, OSCE leaders called today for measures to be taken by governments to protect women and children. Home is not always a safe haven, women and children cannot live free of violence in times of families finding themselves in self-isolation. “Some governments are already taking measures to counter domestic violence during the lockdown, which we hope can serve as best practices for others (OSCE Secretariat 2020, April 8).” World Society of Victimology issued the statement

of Victimological impact and consequences of Covid-19 (WSV, 2020, March 30.) warning that we are confronted individually and collectively with an unprecedented health, humanitarian and socio-economic crisis. The WSV is aware of rising patterns of victimization including instances of abuse of power within the context of especially marginalized communities and vulnerable groups and individuals. Since the restrictions on mobility were imposed all over Europe, intimate, sexual and reproductive violence has been increasing, affecting women and children in their homes as well as LGBTIQ+ persons living in homophobic households.

2.2. Council of Europe

Council of Europe (FoNet 2020, April 20), The Committee of the Council of Europe adopted the Declaration on the implementation of the Istanbul Convention during the corona virus pandemic. The importance of respecting all its standards and recommendations in activities during the corona virus pandemic was emphasized. It has been observed that violence against women and domestic violence tend to increase in times of crisis and that new data show an alarming increase in the number of reported cases of certain types of such violence. The introduction of isolation measures has increased, as statistics from a large number of countries show, the number of cases of domestic violence. Victims now have even fewer ways to turn to someone for help. The approach of those states that seek innovative ways to adapt their institutional responses to violence is welcomed. The approach to such violence is victim-centered and based on human rights.

2.3. World Health Organization for Europe

World Health Organization for Europe (WHO Europe Statement on Interpersonal violence during Covid-19) Copenhagen, Denmark. Statement to the press by dr Hans Henri P. Kluge, WHO Regional Director for Europe (Kluge 2020, May 7). Violence remains preventable, not inevitable! Member States are reporting up to a 60% increase in emergency calls by women subjected to violence by their intimate partners in April this year, compared to last. Online enquiries to violence prevention support hotlines have increased up to 5 times.

The WHO Europe president sent 3 main messages: 1) to governments and local authorities: to make sure services to address violence are available and resourced, and expand hotlines and online services; 2) to communities and the public: stay in touch, contact and support your neighbors, acquaintances, families and friends. If you see something, say something; 3) to those experiencing violence: violence against you is

never your fault. It is never your fault. Your home should be a secure place. Get in touch -safely- with family, friends, shelters or community groups that have your safety and security at heart.

2.4. The European Institute for Gender Equality - EIGE

The European Institute for Gender Equality - EIGE. Rapid action taken by several countries shows the understanding that violence in the home is a problem which crises can exacerbate. The most wide-ranging measures to prevent domestic violence are laid out in the Istanbul Convention, which has been signed by all EU Member States and ratified by 21. Following this guidance remains the best way to protect women – in crisis times and beyond. Creativity and adaptability are key. Over the last few months, governments, support services and private companies have worked together to create digital tools that facilitate reporting and provide hotel rooms for those fleeing violence. Pharmacists and delivery personnel have been trained to assist victims. What did we get right and what will we need to do better to protect women from violence? EIGE will provide answers in a special study on Covid-19 and violence against women, to be published later this year (EIGE 2020, June 9).

2.5. The FIFA Fédération Internationale de Football Association³

The special global attention is to be drawn to the very clear engagement of the FIFA (FIFA 2020), the WHO and the European Commission who have joined forces, to launch the #SafeHome campaign to support women and children at risk of domestic violence. The campaign is a joint response from the three institutions to the recent spikes in reports of domestic violence as stay-at-home measures to prevent the spread of COVID-19 have put women and children experiencing abuse at greater risk.”Together with the World Health Organization and the European Commission, we are asking the football community to raise awareness to this intolerable situation that threatens particularly women and children in their own home, a place where they should feel happy, safe and secure,” said FIFA President Gianni Infantino. “We cannot stay silent on this issue that negatively affects so many people. Violence has no place in homes, just as it has no place in sports. Football has the power to relay important social messages, and through the #SafeHome campaign, we want to ensure that those people experiencing violence have access to the necessary support services they need. Joint News Release. #SafeHome campaign to support those at risk from domestic violence. (FIFA European Commission

³ English:International Federation of Association Football

and World Health Organization 2020, May 26).” Almost one in three women worldwide experience physical and/or sexual violence by an intimate partner or sexual violence by someone else in their lifetime. In a majority of cases, that violence is committed by a partner in their home - indeed, up to 38% of all murders of women are committed by an intimate partner. It is also estimated that one billion children aged between two and seventeen years (or half the world’s children) have experienced physical, sexual, or emotional violence or neglect in the past year.

There are many reasons why people perpetrate domestic violence, including gender inequality and social norms that condone violence, childhood experiences of abuse or exposure to violence and coercive control growing up. Harmful use of alcohol can also trigger violence. Stressful situations, such as those being experienced during the COVID-19 pandemic and economic instability, exacerbate the risk. Moreover, the current distancing measures in place in many countries make it harder for women and children to reach out to family, friends and health workers who could otherwise provide support and protection.

“Just as physical, sexual or psychological violence has no place in football, it has no place in the home.” said Dr Tedros Adhanom Ghebreyesus, Director-General of the World Health Organization. “We are so pleased that our partners today are joining us to draw attention to this critical issue. As people are isolated at home because of COVID-19, the risks of domestic violence have tragically been exacerbated.”

“Violence has no place in our societies,” said Mariya Gabriel, Commissioner for Innovation, Research, Culture, Education and Youth. “Women’s rights are human rights and should be protected. Often abused women and children are afraid to talk because of fear or shame. This ‘window’ to speak-up and seek help is, during confinement, even more restricted. As a matter of fact, in some countries, we have seen an increase in reports of domestic violence since the outbreak of COVID-19. It is our responsibility as a society, as institutions to speak up for these women. To give them trust and support them. This is the purpose of this joint campaign which I am honored to be part of.”

“We call upon our member associations to actively publish details of national or local help lines and support services that can help victims and anyone feeling threatened by violence in their locality,” added the FIFA President. “We also call upon our members to review their own safeguarding measures using the FIFA Guardians toolkit to ensure that football is fun and safe for everyone in our game, especially the youngest members of the football family.”

The five-part video awareness campaign features 15 past and present footballers who have stressed their support to addressing this critical issue.⁴ The campaign is being published on various FIFA digital channels, with #SafeHome also being supported with multimedia toolkits for the 211 FIFA member associations and for various media agencies to help facilitate additional localization and to further amplify the message worldwide.

3. Uncertain future

We live in one of the greatest social experiments we will ever attend. Crises can lead societies to do things that were previously unthinkable. Neither international nor domestic actors, in addition to their condemnations of gender-based violence and the rise of discrimination and inequality, offer nor solutions neither any vision of the near future. For anti-discrimination activists, what governments will do in the next few months and years is practically crucial. We are entering the new state of general insecurity, but we should have on mind that between moral system and security there is strong interdependence (Stevanović, 2017: 107-109). They decide whether the burden of the recession will be carried by the rich, or the afflicted middle class and the poor (BBC, 2020). That is why it is extremely important that measures that take into account the gender impact are introduced now, and that perspective must be used to find appropriate solutions for the current situation.

No one can yet predict the real consequences of the crisis, but they may be the result of views that indicate that the epidemic is an essential product of “the greed of our civilization, because it was entered from an abnormal global situation, pollution, abuse, senseless consumption.” unfairly distributed opportunities”(Ćuk 2020, 14). Historian and philosopher Juval Harari is on the same line of reasoning, warning that the greatest danger is not the virus itself. Humanity has all the scientific and technological tools to overcome the virus, so that the much bigger problems of humanity are “their own inner demons, hatred, greed and ignorance” (Carthaus, 2020). French philosopher and sociologist Bruno Latour e.g. it even appeals not to rush into a normal life before the restrictive measures that caused the economic blockade. He urges that instead of a hasty return to “business as usual”, in order to revive the economy stopped by the corona virus pandemic, countries

⁴ Álvaro Arbeloa, Rosana Augusto, Vítor Baía, Khalilou Fadiga, Matthias Ginter, David James, Annike Krahn, Marco Materazzi, Milagros Menéndez, Noemi Pascotto, Graham Potter, Mikaël Silvestre, Kelly Smith, Oliver Torres and Clementine Touré

should build a new norm in which the fight against climate change would be the most important task (Van Overstraeten, 2020).

This is followed by the question of Nobel laureate Olga Tokarchuk: Hasn't the global pandemic crisis actually brought us back to the normal rhythm of life? Isn't it wrong to accuse the virus of disturbing the norm, on the contrary, wasn't the previous, pre-viral hectic world abnormal? (Politika, Kulturni dodatak, 2020) Arundati Roy, a writer and human rights activist, thinks similarly, writing recently that the virus is a portal between two worlds: the old, once abnormal "normality" and the potential for us not to agree to it. Now that choice is up to each of us (Golubović-Trebješanin, 2020), and it depends on the duration and possible second wave of the epidemic, which we cannot predict. There is also a warning from Michael Houellebecq, a French novelist and poet, that we will not wake up in a new world after isolation. Everything will be the same, only a little worse (Houellebecq, 2020). Perhaps the only thing that is certain, as George Soros believes, is that we will not return to where we were when the pandemic began, because it is an unprecedented event, which probably never happened in this combination, which completely disrupted human lives and forced us to a rather different behavior. And it really threatens the survival of our civilization. A bad variant of future expectations is if the current situation continues and if the restrictions are partially lifted, and then reintroduced due to another wave of corona virus (Milošević 2020: 33).

4. Conclusion

This crisis, however, offers a chance to think about the type of world we want to live in, world without gender based violence, where people and solidarity are priorities over capital and corporate interests. It may already be the preparation of a great battle for a new reality, which we cannot even imagine, but we are slowly realizing that nothing will be the same as it used to be. That is why it is necessary to get the best out of this crisis, which is a kind of crisis of humanity. It is inevitable that the consequences of the pandemic will be visible in all areas of society. It is clear: there is one big test in front of everyone. In addition to disinfecting hands and space, it is time to disinfect concepts, strategies, and even thoughts themselves (Hrnjak, 2020).

This crisis, however, offers a chance to stop and to think about the type of world we want to live in, where people and solidarity are priorities over capital and corporate interests. It may already be the preparation of a great battle for a new reality, which we cannot even imagine, but we are slowly realizing that nothing will be the same as it used to be (Politika 2020). That is why it is necessary to get the best out of this crisis, which is a kind of crisis

of humanity. It is inevitable that the consequences of the pandemic will be visible in all areas of society. It is clear: there is one big test in front of everyone. In addition to disinfecting hands and space, it is time to disinfect concepts, strategies, and even thoughts themselves (Hrnjak, 2020).

More than ever, there is a need for awareness that equality and the empowerment of women have immeasurable positive effects on society as a whole. Progressive forces, from parties to unions, academia and research bodies, human rights and feminist organizations, are now set to their biggest rehearsals - whether they will be able to discuss solutions during and after COVID-19. Legal regulation and legal protection of the sphere of private life nowadays require not only a professional but a creative approach to the development of a system of legislation that can introduce an adequate legal basis (Streltsov, 2017: 57). If not, it would mean renouncing the centuries-old struggle of generations of women for equality, social justice, democracy and human rights. Women and men deserve better. A better legacy must be left for generations to come (CEE Gender Network Newsletter 2020). A possible way out and hope is in women who support each other, because today, more than ever, feminist principles are needed, a human ethic of caring for oneself and others, with much-needed publicity of work, with solidarity and cooperation.

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HUMAN DIGNITY DURING THE COVID-19 PANDEMIC - GESTALT PSYCHOTHERAPY NARRATIVES

Gestalt psychotherapy narratives are based on the relational nature of human beings and the importance of being in contact with each other. During the COVID-19 pandemic, the “social distancing” and “new normal” concepts have been created and widely implemented across the world, shifting people’s experiences of themselves, others and life in general. Unpredictability and surveillance are becoming daily experiences in people’s lives, leading to a significant increase in mental health issues. Psychotherapy delivery formats are rapidly changing, with the therapeutic relationship being conducted through various virtual health platforms. The aim of this paper is to show that the therapeutic relationship can be a crucial process in preserving human dignity during the pandemic. The therapeutic relationship will be defined through various psychotherapy modalities, focussing on the process of rupture and reparation. The therapeutic presence during the pandemic will also be considered from the perspective of phenomenology and Gestalt therapy, together with potential impacts of COVID-19 on this important element of psychotherapy.

Keywords: Gestalt therapy, COVID-19, therapeutic presence, therapeutic alliance

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The world shaped by the COVID-19 pandemic is experienced as unpredictable and unsafe. People are instructed to practice social distancing to help flatten the curve and stop the spread of the deadly virus that is affecting more than 213 countries (Worldometers 2020). Social media constantly provide updates about the novel coronavirus, often provoking people's anxieties, fears and suspicions, while governments change policies and develop new ones; close schools, shops and sport centres; and restrict people's travelling. Wearing masks has become mandatory in many cities. Companies are directed to allow their employees to work from home, and children's schooling is being conducted primarily online. Families are staying together in their homes for longer periods of time, and many people are experiencing increased tensions, conflicts and disagreements as a result. Due to the developing pressure to continue life as the so-called new normal, in which the basic human need to connect with other human beings is cut off and defined as unsafe, many people are reaching out to mental health support services. People's sense of belonging and connection with others are changing with self-isolation and quarantine, and those with severe mental health diagnoses suffer the most (Oliffe et al. 2019). During this pandemic, some basic human rights are being challenged, especially human dignity. The right to human dignity represents a special type of personality right as stated in Popesku (2018): "Personal dignity is the basis of all other personality rights, and thus the right to preserve the physical integrity of the person (prohibition of beating, physical punishment), mental integrity (prohibition of insulting, humiliation, discrimination), the right to freedom and security (prohibition of slavery, servitude and forced labour), the right to respect for private and family life, the right to free development of personality, etc." (p. 158). The emotions triggered by the pandemic, along with various changes that have been imposed on people through government policies, have led to a mental health crisis. Mental health clinicians are experiencing a rapid increase in clients presenting with various issues, as well as dealing with changes in their service delivery. Many therapists have decided to work remotely, while others working in essential services are continuing to provide face-to-face sessions (Jurcik et al. 2020). During this time, one of the cornerstones in psychotherapy, the therapeutic relationship or therapeutic alliance, has become more important than ever before. There is a current need for psychotherapists to understand the pandemic as a relational disintegration process which triggers existential human fears of loneliness in order to provide adequate and quality services to clients in need, especially the most vulnerable groups, such as psychiatric patients, women in domestic violence situations and children. Being told to isolate, to stay alone and away from others is opposite to human nature. For these reasons, an

exploration and discussion of the therapeutic relationship at this crucial time is necessary and appropriate.

Gestalt psychotherapy, a phenomenological, existential and humanistic approach, highlights the interpersonal, co-creative therapeutic space, therapeutic relationship and awareness offering the possibility of the client's development and change (Francesetti 2015; Naranjo 1967; Spagnuolo Lobb 2013). According to Gelso and Hayes (1998), communication between the therapist and the client consists of three basic elements: real relationship, therapeutic relationship and configuration of transference and countertransference. The concept of *transference* has been explored in psychoanalysis and dynamic therapies in great detail and relates to the client's perception and experience of the therapist that is influenced by the client's past experiences, in which the feelings, attitudes and behaviours of significant others are perceived in the therapist (Gelso & Bhatia 2012; Gelso & Hayes 1998). On the opposite side, countertransference represents the therapist's reactions to the client based on the therapist's unresolved conflicts (Gelso & Hayes 1998). The therapist's reactions to the client in countertransference can be either conscious or unconscious, and they are triggered by the feelings and thoughts of the therapist towards the client that arise from what the client is presenting (Goldstein & Goldberg 2004). Countertransference is an important element in the relationship between the therapist and the client.

The aim of the therapeutic relationship is to provide a "second chance" and new experience of a relationship, which can aid in the client's healing (Wallin 2007). Various research studies have confirmed that the therapeutic relationship is a good predictor of a successful psychotherapy outcome (Dinger et al. 2009; Norcross 2002), while a weak relationship can be associated with the termination of therapy by the client (Samstag et al. 1998; Tryon & Kane 1995). The study conducted by Ligiero and Gelso (2002) confirmed that the attachment style of the therapist, countertransference and the therapeutic relationship all play a critical role in the therapeutic outcome. Moreover, clinical supervision is a central aspect of the clinician's growth and development (Zeleskov Doric 2019). For the therapeutic relationship to develop, it is necessary that the therapist possess the personality characteristics of openness, empathy, warmth, confidentiality and flexibility (Ackerman & Hilsenroth 2003; Black et al. 2005).

The therapeutic relationship changes during the therapeutic process. Establishing a strong therapeutic relationship at the beginning of the therapeutic sessions supports a successful outcome (Mikulincer, Shaver & Berant 2013). However, it is not always possible to avoid negative relational responses in the therapeutic process (Henry et al. 1993; Piper et al.

1999). Moreover, if the therapeutic relationship is not developed sufficiently and in a healthy manner, the reaction of the therapist towards the client's hostility may also be hostile (Coady 1991; Kiesler & Watkins 1989; Tasca & McMullen 1992).

During COVID-19, the therapeutic relationship is being challenged as it is taking place primarily through online platforms rather than face-to-face sessions. The challenges of online therapy are multiple and relate to confidentiality, privacy, consent and the ability to predict the therapeutic situation. Despite this, many clients report that even though they are not in the same physical space as the therapist, being with someone online who can listen and understand their issues can still be helpful and supportive. It is reassuring for them to know that by turning on their laptop or mobile phone, a trained health professional is available.

Historically, the therapeutic relationship has been defined from numerous perspectives. The father of psychoanalysis, Sigmund Freud (1915), described the transference phenomenon as part of the therapeutic relationship, as real as much as it is a fantasy, which some clients have difficulty dealing with in therapy. Freud defined this relationship as a *transference paradox* (Bateson 1972). The therapeutic relationship is a paradoxical experience by itself, because the emotional reactions the therapist has towards the client, as well as those the client has towards the therapist, are real, but they are happening in a relationship that is outside of ordinary life, and therefore they can be perceived as illusions. According to Modell (1991), the therapist and the client only need to accept the paradox of the therapeutic relationship, without trying to resolve it. The boundary concept in therapy is introduced here to serve as a distinctive line between ordinary life and therapy treatment. Greenson (1967) stated that "the difference of psychoanalysis towards other approaches is defined through understanding of transference development and its definition" (p. 151). *Object relationship theory* emphasises relationship as a fundamental aspect of human life (Greenberg & Mitchell 1983; Klein & Tribich 1981). If, in therapy, clients act out a pathological scenario from their childhood with the therapist, this is because they are unable to react differently since they have not repaired the original damaged relationship. Cashdan (1988) defined this process as *projective identification*. Relational theory in psychotherapy supports the classical analytical stance of giving clients the possibility to express themselves freely in interaction due to the therapist's anonymity and neutrality (Mitchell 1997). On the contrary, humanistic therapists believe that facilitating the emotional potential of clients supports the development of their awareness and allows them to tap into their deeper inner experience (Elliott et al. 2004; Greenberg, Rice & Elliott 1993).

During the pandemic, the therapeutic relationship needs to be considered through multiple lenses. Apart from the client's projections of significant life experiences onto the therapist or the therapist's reactions towards the client through countertransference, the *therapeutic field* is another important concept. Contemporary Gestalt therapy authors introduced the concept of the field theory in psychopathology, along with the psychopathology of awareness (Francesetti 2020; Robine & Bowman 2019), which seem to be particularly important in the COVID-19 time. Understanding the contribution of the field, in our case the pandemic field, in the context of the psychotherapeutic relationship and treatment is important and essential.

Rupture and reparation of therapeutic relationship

Difficulties in the therapeutic relationship are a main part of the therapy process. In Dalenberg's (2004) study of the relationship between clients and therapists, in which 132 patients were interviewed, the results revealed that 72% of the clients felt anger towards their therapist at least once during the course of therapy, and that the 64% of the therapists felt anger towards their clients at least once during the therapy process. These results show the complexity of the therapeutic relationship and that a rupture at some point in the therapeutic relationship is very common. Elliot et al. (2004) described six basic characteristics of the therapeutic relationship which can display when a rupture in the relationship occurs: 1) the client refuses to practise the tasks given by the therapist; 2) trust and collaboration between the therapist and client are disturbed due to a power and control imbalance; 3) the client may have the sense that the therapist is not interested in him or her; 4) the client may terminate the therapy process because of doubts about the therapist's intentions, which are not communicated to the therapist; 5) the client limits his or her engagement in therapy because the therapy will end soon; and 6) the therapist is not aware of his or her own negative reactions towards the client and therefore is unable to appropriately respond to the client.

The therapist's response to the rupture in the therapeutic relationship can be described by the six steps proposed by Elliot et al. (2004): 1) recognising the client's doubts and responding empathically; 2) exploring the difficulties in the relationship and how both sides have contributed to it; 3) acknowledging his or her contribution to the rupture; 4) inviting the client to explore how the problem might be related to emotional patterns, previous life experiences and relational strategies; 5) discussing with the client how to resolve the issue, including making changes in the therapy delivery; and 6) working to

restore mutual respect and confidence towards the therapy and therapeutic relationship after resolution of the rupture.

Contrary to humanistic psychotherapists, cognitive-behaviour therapists support the direct confrontation of negative feelings in therapy. Specifically, the therapist aims to identify the client's cognitive distortions which contribute to the therapeutic rupture, through the empirical method and the use of logic (Beck et al. 1979).

As the rupture of the therapeutic relationship is a significant occurrence in the therapy process, finding ways to overcome it and continue with the therapy is paramount. Safran et al. (2002) have proposed a four-step model when working with a rupture in the therapeutic relationship, while others have directed their interests into exploring the sources of the rupture. In the study conducted by Rhodes et al. (1994), the clients, who were psychotherapy trainees, discussed the moments when they felt misunderstood by their therapist. The results confirmed that the perception of misunderstanding happened when the therapist did something that the clients did not like (for example, criticising the client), or failed to do something that the client expected or wanted (for example, the therapist did not remember important facts about their lives).

Reparation of the therapeutic relationship can be focussed on the transference or relational interpretation. If the therapist works to repair the relationship through transfer, then interpretation forms the basis of this work. In analytical theories, this process is known as *relational interpretations* (Lowenstein 1951), which are focussed on the parallels between the therapeutic relationship and the client's relationships outside of therapy. This process involves an exploration of both the therapist's and the client's collaborative contribution to the rupture process in therapy (Safran et al. 2005). From the Gestalt therapy perspective, working on the rupture is possible in the "here and now" of the therapy process. Exploration of the rupture at the contact boundary in the present and working on the client's emotions towards the therapist in that moment are a necessary part of the reparation process. Self-disclosure of the therapist can also be beneficial in the therapy process (Hill & Knox 2002), as well as working through the misunderstanding that emerged in the therapy process (Rhodes et al. 1994; Safran et al. 2002). A therapist's working on the therapeutic relationship can be viewed from two main perspectives: confronting the client (Kasper, Hill & Kivlighan 2008) and providing support to the client (Hill et al. 2008). Some contemporary research proposes *conversational analysis* as a technique therapists can use to understand how particular interventions can lead to therapeutic rupture and reparation (Muntigl & Horvath 2014).

The processes of rupture and reparation in online therapeutic sessions during the COVID-19 pandemic are more complex than in the therapy room. The unpredictability of the online space, together with internet difficulties, can make the new normal even more challenging for both the client and the therapist. For example, the sudden cut of the video or audio during a therapy session when the client is sharing something very important to them can be misinterpreted as the therapist's lack of interest, particularly in anxious and dependent clients. Therefore, particular attention should be focussed on building therapeutic rapport with the client and defining how conflict situations can be adequately managed, as well as framing the challenges that might occur during the online treatment.

Therapeutic presence as an element of the therapeutic relationship

Therapeutic presence is an important component of the therapeutic relationship. Being present at the contact boundary with the client represents a healing moment in therapy (Shepherd, Brown & Greaves 1972). Being present means to put into practice previous knowledge and skills and stay open to the experience with the client in the here and now (Clarkson 1997). Presence in therapy is a reflection of Buber's view of I and Thou (Buber 1958; Hycner & Jacobs 1995). According to Buber (1958), being present in the here and now means that "all real living is meeting", such that the spiritual dimension can emerge in therapy (Hycner 1993). The therapist's presence means receptivity from moment to moment through relational contact, in which "being" with the client is more important than just "working" with the client. It means being receptive to the client's experiences without judgments. Therapeutic presence enables the client to "infect" the therapist with his or her own experiences and emotions, while, at the same time, the therapist is able to stay grounded and adequately respond to the client's needs. Therapeutic presence consists of two levels of consciousness: being with the client's experience and being in contact with one's own experience as a therapist, including reflecting on what is happening in the moment in the therapy process. The therapeutic presence during COVID-19 is another aspect of the therapeutic relationship that is challenged with online treatment delivery. Among other questions, one that has emerged strongly during this pandemic relates to the quality of the therapeutic presence in the online space. How can the quality of the therapeutic presence during the online treatment with the client be described? How does the client experience the therapist's presence when the therapist is not physically present in the session? These are interesting questions to be explored in future studies. However, despite the many challenges in online treatment, many Gestalt therapists who have started working more intensively online in the last couple of months have reported that this aspect of the therapeutic relationship has remained intact.

To conclude, the therapeutic relationship, as the co-creation between the therapist and the client, represents the cornerstone of psychotherapy sessions. Human dignity has been threatened and challenged on multiple levels during the COVID-19 pandemic, across most cultures and jurisdictions in the world. During this difficult time, the therapeutic relationship can help preserve human dignity, in conjunction with the field perspective on the psychopathology of human suffering. This paper has presented a brief summary of the main therapeutic relationship definitions, including rupture and reparation, along with the importance of the therapeutic presence. Future studies might focus on the therapeutic relationship in more detail or try to understand the impact of the COVID-19 pandemic on other therapy elements when providing treatment services to clients through online platforms. Whatever the future looks like after COVID-19, human dignity will always be related to other people and the need to connect, meet, share and belong.

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