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Journal of Eastern-European Criminal Law could stand out as a unique publication, at least in this part of the world, as an outcome of the partnership between specialists in Criminal law and Criminal Procedure law from the law faculties of the West University in Timisoara and the University in Pecs, who aimed at presenting, in a different language from their own, the serious amendments of criminal legislation that occurred in their countries in the post-communist era, an essential requirement for the rule of law. We envisage this journal, published semesterly, to be open to all researchers in the academic environment from the former communist countries, to professors, PhD students, but also, to magistrates and other professionals interested in the evolution of criminal legislation and in the more and more firm response to be given to the criminal phenomenon, while observing the fundamental human rights.

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The Rule of Law Messages of the Anglo-Saxon Identification Procedures

Csaba Fenyvesi*

Abstract

Both international and Hungarian empirical research strongly highlights identity parades (lineups) as the most common and most serious source of error in the measures of inquiry of justice-seeking criminal proceedings. Due to the importance of this dual-grained institution of criminal procedure and forensics, it can even have the consequences of a 'justizmord' (miscarriage of justice), therefore, it is important for the whole justice system to have a correct legal regulation and a fair and professional implementation.

Recognizing this fact, the author provides an overview of Anglo-Saxon countries regulatory models. On this basis, the author lists the most common criminal procedural and forensic causes of error. He presents recommendations for law enforcement officers and judges on criminal tactics and evidence assessment that can be used to prevent and avoid them and formulates his 'de lege ferenda' recommendations for the Hungarian legislator concerning legislative change.

Keywords: *criminalistics, criminal tactics, criminal procedure law, identity parade, line-up method, miscarriage of justice, show-up, wrongful sentence*

I. Introduction

The criminal justice system of each country strives to avoid the worst possible outcome – wrongful convictions – in other words injustice (*justizmord)*. Regrettably, criminal justice systems do not always succeed in this regard. To support this statement, some examples from Hungary may be mentioned.

In 1957, in a Hungarian town called Martfű, a sexually motivated homicide was committed, for which a so-called János K. was sentenced to death, which as an act of grace was converted to a life sentence. After serving 11 years of his punishment, it was proven that the crime was in fact committed by Péter K., called to account in the new proceedings, who was subsequently sentenced to death and was executed in 1968.

Also, in 1984, János M., a resident of Szolnok County, was charged by the prosecution with a young girl' murder. By a legally non-binding decision he was sentenced to death, however, in 1986, he was acquitted of all charges in a prolonged criminal procedure, which took place in front of several courts.

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Dénes P., a resident of Heves County, Hungary, was sentenced to 6 years in prison in 1995 for violence causing death and attempted robbery. He spent 26 months in arrest and confinement when it turned out that the crime against the victim, an old lady, was committed by another person, who was subsequently held liable.

Ede K. was non – appealable sentenced to life imprisonment for the robbery of a bank in the city of Mór, Hungary on the 9th of May 2002, in which 8 people were murdered. Several years later, in 2007, it turned out that the crime was committed by two other people.

These examples were highlighted in the introduction to make it clear that the previously mentioned phenomenon still exists these days and is a real threat in Hungary as well. For this reason, it is of immense importance to work out preventive measures and to bring to light the cause of these, frequently fatal, derailments.

Research (and actual cases as well) in the world and in Hungary as well have brought to light the accentuated importance of lineup procedures with regards to *justizmord.* This is the reason why I believe it is important to examine the lineup methodology introduced by the Anglo-Saxon countries in their modern criminalistics toolset, in light of the recommendations on its implementation. Based on these, at the end of this article, I showcase the potential opportunities for improvement from a legal and criminalistics perspective, the lessons learned from the models and the conclusions, which serve an efficient and fair procedure.

II. The United States of America (USA)

The USA was not placed at the beginning of the present essay by accident: the study on wrongful convictions and the results of the innocent project show that the lineup method is at the top of the list of causes leading to *justizmord* (*miscarriage of justice).*

I will highlight three studies of the many, which all reach similar conclusions[1].

As a result of the first research, the following were mentioned as direct causes:

a) false line ups, as the most frequent cases;[2]
b) mistake made by police during investigation, (for example: identity checking, inspection errors, influencing, contamination of material residue, cross-/carry-/over- contamination;
c) infringement of the law by the police and the investigation;
d) errors of the prosecution (for example: failure to exclude evidence);
e) expert opinion errors (unfounded, professionally mistaken);
f) erroneous testimonies and reports of other offenders, prison agents, informers;
g) mistaken, weak defense counsel activity;
h) false confession;
i) false circumstantial evidence.

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[1] A. Badó, J. Bóka, *Ártatlanul halálra ítéltek [Death penalties – innocently]* Nyitott könyv, Budapest, 2003; P. Hack, *Az igazságszolgáltatás kudarcai. [Failures of criminal justice]* in Fenyvesi C. (ed.), *A Magyar Büntetőjogi Társaság Jubileumi Tanulmánykötete.* MBT, Budapest-Debrecen-Pécs, 2011, p. 43.

[2] L. Spinney, *Line-ups on trial*, in *Nature,* 2008, no. 453, 7179, pp. 442-444.; J. Collins, J. Jarvis, *The Wrongful Conviction of Forensic Science. Crime Lab Report*, 2008, http://www.crimelabreport.com/library/pdf/wrongful_conviction.pdf, accessed on 27 July 2021.

The second study processed 205 specific cases, with the following causes of error:[3]

a) misidentification by a witness	52,3 %
b) false testimony	11 %
c) negligence of officials	9,9 %
d) forced confession	8,4 %
e) „framing"	4,2 %
f) false testimony by an official-police	2,6 %
g) expert error	1,6 %

Lastly, the third study reviewed 86 cases and named the following causative factors of miscarriages of justice:[4]

a) misidentification by a witness	71 %
b) errors in forensic science tests	63 %
c) police errors	44 %
d) prosecution errors	28 %
e) false/erroneous expert opinions	27 %
f) dishonest informers	19 %
g) incompetent defense counsels	19 %
h) false witness testimony	17 %
i) false confession	17 %.

In light of the above mentioned three studies and the research behind them it is clear that my choice of topic is not a coincidence. I have been consciously researching the rules and methodology of identification for a decade, because it is obvious that there is often an insidiously hidden misidentification behind the most serious legal errors and wrongful convictions. This has been noticed by the Innocence Project staff and some theoretical researchers, thus legal, criminological and psychological recommendations have been (and are being) formulated at the federal level, which have been adopted by most of the states, or they are in the process of being adopted (as rules, regulations). I will highlight a few noteworthy recommendations in the following:

a) use of blank tests;
b) allowing members of the lineup to introduce themselves;
c) use of video and audio recording techniques in both pre-trial interrogations and identification activities;
d) forensic training of investigators, prosecutors, judges;
e) the selection of lineup should be done with great care in a "fair" way, meaning that there should be not fundamental difference between the (potential) suspect and the members (gender, race, hair, clothing, physique, facial hair);
f) the legal representative (counsel) of the (potential) suspect preferably should also be present at the lineup;
g) not only simultaneous (in which people and objects are present at the same time), but also sequential, in other words, a one-by-one presentation is also allowed;
h) a "blank" wall of people (culprit-absent lineup), who are above all suspicion, can be applied to test the credibility of the witness;
i) a blind lineup is used to prevent official bias, in which the person who conducts the lineup is unfamiliar with the case, of which fact the recognizer must also be informed;

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[3] C.R. Huff, A. Rattner, E. Sagarin, *Convicted But Innocent. Wrongful Conviction and Public Policy,* Sage Publications, Thousand Oaks, 1966, p. 62.

[4] M.J. Saks, J.J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science* in *Science,* 309/2005, p. 892.

j) a recommendation issued by a working group of the Department of Justice (DJTWG) recommends a lineup of minimum of five people in case the people are actually present at the lineup;[5]
k) authorities shall follow the "*one line – one suspect*" principle, i.e. only one potential suspect can be in the line;
l) it must be communicated to the recognizer that the perpetrator may not even be present in the line and will not be given feedback on whether his/her choice was "correct" – if he/she makes a choice at all;
m) it must also be communicated to him/her that the investigation will continue even if he/she does not choose anyone, thus he/she does not have to choose anyone;
n) in case of photographic identification, the recognizer should also be told that the perpetrator's appearance (hair color, length, shape, facial hair, skin) may have changed over time and may look slightly different on the photographs;
o) the size of the presented photographs should be the same and the order in which they are presented should be random (and preferably the suspect's photograph should not be the first one presented to the recognizer);
p) especially in the case of child witnesses, the *show-up* method is allowed, in which case they are shown the quickly produced potential suspect at the scene of the crime or at the police station – without involving other people like in a lineup;
q) in court proceedings it is practical to apply a two-step test to check the reliability of the identification: firstly, to check whether the identification carried out can be taken into account as evidence and, secondly, whether the enforced method could have led to a misidentification.

II. United Kingdom (UK)

The UK is the second Anglo-Saxon country to be presented, as, according to my research, the Scotland Yard's inspectors were the first to use the procedure of identification as a modern forensic method. At the end of the 19th century, it was considered that putting a (potential) suspect in a line-up among eight people of similar appearance, age and size to each other, but who were innocent according to the best knowledge of the authorities, and then asking the witness to choose the perpetrator, was much more probative in the eyes of the judge than just putting the suspect in front of the witness and asking him/her whether he/she recognized the suspect or not. The method was also adequate for assessing the credibility of the witness, because, if the recognizer chose a person who was above suspicion, he/she would lose credibility and question the rest of his/her testimony, since his/her memory was not reliable.

The American term *lineup* here (in England, Wales, Northern Ireland) is known and used as *identity parade* (occasionally *identification parade*).

The Police and Criminal Evidence Act of 1984 (PACE) and, within it, the Code of Practice for the Identification of Persons by Police Officers (Code D) set out

[5] G.L. Wells, R. Lindsay, *Improving Eyewitness identifications from lineups: Simultaneous versus sequential lineup presentation*, in *Journal of Applied Pshychology,* vol. 70 (3), 1985, pp. 556-564.

requirements to guarantee a due process. I will present a series of the ones that could be instructive:

a) Identification requires an eyewitness who claims that he/she can identify the perpetrator and there are no disqualifying circumstances.
b) The description given by the witness or victim must be given to the suspect's legal representative before the hearing.
c) When the suspect arrives at the scene of the line-up, he/she should be asked whether he/she objects to the process or if he/she is willing to cooperate. At this point, he/she can acquire the advice of his/her legal representative (defense lawyer) and can consider it. If he/she objects – with just cause – steps should be taken to ensure that these reasons cease to exist. If they cannot be removed, the grounds for the objection must be recorded.
d) It is obligatory to give the suspect the opportunity to consult with a lawyer or an acquaintance.
e) Immediately before the presentation, the suspect should be informed of the procedure.
f) The identification line-up (the "parade") can take place in a simple room or in a room with one side of the room equipped with tinted glass.
g) All unauthorized people must leave and only those involved may remain.
h) At the line-up, in addition to the suspect, eight other people (of similar height, appearance and facial hair) must be presented and as a rule, one suspect can be in the line at a time.
i) The exception to this rule is when two suspects have a very similar appearance, in which case, 12 other people must be presented and both may participate in the line at the same time.
j) More than two suspects should never be in the same line.
k) If the suspect has any distinguishing marks (e.g. tattoos, scars on the face) the police may take steps to cover them up for the duration of the presentation.
l) If several suspects, who form a group, are to be identified by the police a separate "identification parade" should be held for each person, except in the case of particular similarity referred to in point (h), in which case two people may be present in one presentation.
m) The suspect may choose his/her place in the line, still cannot otherwise interfere with the process.
n) If more than one witness or victim identifies, the members of the line may change places before each new recognizer enters.
o) One witness/victim at a time may be called to the identification room, who has to be warned that the perpetrator may not be in the line and that if he/she cannot identify any person, he/she must also make this clear.
p) Before deciding, each person in the line must be looked at carefully by the witness at least twice. When the executing officer has made sure that the witness has fulfilled this obligation, he/she must ask the question: *"Can you identify anyone?"*
q) The identifier may ask the person in line to speak (repeat phrases the victim heard at the scene), assume specific poses, or make specific gestures. In such cases, the recognizer should be reminded that the identification is primarily for the purpose of identification by appearance. Only then should the person in line be asked to comply with the request.

r) The witness may also ask to see the location of the above-mentioned marks (tattoos, scars). In this case, the covered tattoo must be made visible, the hat must be removed etc., so these marks must be revealed to the witness.
s) Once the identification has been completed, the suspect and the legal representative must be informed of it, and if the witness requests it, he/she may observe the person a second time to confirm the identification.
t) Prior to the identification, it must be ensured that, in the case of multiple witnesses, the identifiers cannot talk to each other about the people lined up, and preferably about anything at all. They must not even see the people in the line before the parade, nor speak to them, before or after. None of them should make any comments about any of the participants. No pictures, video or other means should be used by the authorities to influence the identifying person.
u) The person conducting the proceedings may not interfere with the identification of a witness or victim, nor may he/she say anything about the choice or identification of a previous witness.
v) If anyone is asked to leave during the procedure, it must be recorded. A list of the names of the participants should also be made. If a convicted person is involved in the proceedings, this special circumstance should also be recorded.
w) If the person presented is in a penitentiary institution and there is no other reason to exclude him/her, he/she may leave this institution for the duration of the proceedings.
x) If the identification is carried out in the penitentiary institution, other convicts may also take part in the line-up. In this case, everyone can wear the standard uniform clothing normally worn in penitentiary institution or if there is no danger, then civilians can be used, in which case the suspect must also wear normal civilian clothing.
y) One witness can take part in a photo identification at a time to whom the authorities are obliged to show 12 photos.
z) Again, the victim or witness should be made aware that the perpetrator may not be in any of the pictures.
w) If the witness clearly selects a person from the pictures, claims that that person is the perpetrator and there are no other circumstances to suggest that the selected person can be excluded as a suspect, there is no need to call more witnesses at this stage of the procedure.
x) This can be followed by video or face-to-face identification but only if the identity of the offender is not fully established.
y) After the presentation, all further acts must be carried out in the presence of the suspect and his/her legal representative or guardian.
z) When all the witnesses have left, the suspect must be asked: *"Do you have anything to add to what happened?".*

In the field of judicial evaluation, I emphasize one guiding principle: the so-called "Turnbull Guidelines", which draws the attention to the fact that often a witness can misidentify a suspect. It is also easy for several witnesses to be mistaken at the same time, so if the prosecution's case is based entirely on identification, the judge should caution the jury to ask themselves questions accordingly, such as: *"How long did the witness watch the suspect?"*, *"From what distance?"*, *"In what light?"*, to help ensure clarity at trial. The judge will also give a precise definition and interpretation of the details, which, in such case, must be carefully considered by the jury.

III. Canada

From Canada, which also has a *common law* legal system based on precedents, I also explored lineup recommendations that are worth considering:[6]

a) The detective who is present with the identifier does not need to know anything about the case and should not know whether the suspect is among the people in the line.
b) The investigator must also tell the witness that he/she does not know whether the suspect was in the line and if he/she is in fact in the line, which one he/she was.
c) Everything that happens in the witness room should be audio-recorded, but it recommended to be video-recorded (the identifier should not be influenced in any way).
d) All information declared by the recognizer during the identification must be recorded and then signed by him/her.
e) Before and after the identification, the witness should be received and escorted out of the police station so that he/she cannot be influenced by anyone, especially by the investigators involved in the case.
f) The appearance (external physique, clothing, facial hair) of the people gathered for the line-up should correspond as closely as possible (at least should be strongly similar) to the description that the witnesses saw at the time of the event.
g) At the end of the lineup process, once a person has been identified, the witness should be asked if he/she is sure that the correct person has been identified. Both the question and the answer should be recorded word-for-word and then signed by the witness.
h) At least 10 people must be assembled for the presentation. The larger the number of people collected, the lower the risk of misidentification.
i) At least the portraits of 10 people must be included for photographic identification.
j) The appearance of the people photographed should match the description of the witnesses as closely as possible. If this is not possible, they should resemble the suspect as closely as possible.
k) Everything should be video, or audio recorded from the moment the executive investigator meets the witness until the end of the process.
l) The identification must be done by a detective who does not know who the suspect is and is not involved in the investigation.
m) In case of a photographic identification, the conductor of the process must tell the identifier that he/she does not know who the suspect is, and whether the suspect's photograph is included in the series of photographs or not.
n) Before showing the images to the recognizer, the investigator should inform him/her that it is as important to exonerate an innocent person as to identify the suspect.
o) The photos must be shown to each witness separately (one after another and not at the same time).

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[6] See more details: *Benefits of Best Practice Recommendations*, Canada, 2002, https://www.justice.gc.ca/fra/pr-rp/jp-cj/rc-ccr/pej-pmj/p5.html [accessed on 21 February 2022].

p) In addition to the audio and video recordings, a form should be filled in about the event, findings, statements, observations, and signed by the witness and the person performing the execution.
q) Police officers should not talk to witnesses about their identification after the presentation. (To avoid any possible doubt or fear.) Under no circumstances should the conductor of the investigation (or any other investigator) tell the witness that he/she was mistaken.
r) Because of the importance of evidence provided by eyewitnesses and the risk of evidence being tampered with, there is also a proposal that police other than those investigating the crime should interview witnesses and conduct the identification procedure.

IV. Suggestions and Recommendations

Before I state the conclusions and my suggestions for improvement arising from the above, I would like to remind the reader of the essential rules of identification of the *Hungarian Act of Criminal Procedure (2017 XC)* (hereinafter referred to as *the Act*). These are specifically:

§ 210

(1) The court, the prosecution or the investigating authority shall order and hold a presentation for identification if it is necessary for the purpose of identifying a person or an object. The accused or a witness shall be presented with at least three persons or objects for identification. The accused person or witness may, if no other means are available, be presented with a visual, audio or visual and audio recording of the person or object for identification.

(2) Before the presentation for identification, the person from whom the identification is expected shall be questioned in detail about the circumstances in which he or she observed the person or object in question, his or her relationship to it, and any characteristics he or she knows about.

(3) When people are presented, people who are independent of the case and not known to the person conducting the identification and who share the same characteristics as the person in question in the main features indicated by the person making the identification, in particular the same sex, age, body type, color, grooming and clothing, shall be grouped together with the person in question. Where objects are presented, the object in question shall be placed among similar objects. The position of the person or object in question within the group must not be significantly different from the others and must not be conspicuous.

(4) The presentation shall be made separately, in the absence of each other, in cases where several people are identifying.

(5) If the protection of the witness so requires, the presentation for identification shall be carried out in such a way that the witness cannot be recognized or perceived by the person presented for identification. If the personal data of the witness are ordered to be kept confidential, this shall also be ensured.

§ 213

(1) The rules of inspection shall be applied mutatis mutandis to the attempt to take evidence and to the presentation for identification.

(2) The court and the public prosecutor's office may also have recourse to the investigating authority for the conduct of the inspection, the attempt to take evidence or the presentation for identification.

(3) The accused, the witness, the victim and any other person, in particular any person in possession or possession of the object of the search, shall submit to the search, the attempt to produce evidence and the presentation for identification, and shall make the object in his/her possession available for the purpose of the search, the attempt to produce evidence or the presentation for identification. The accused may be compelled to comply with these obligations, the victim, the witness and other persons may be compelled to comply with them, or may be fined.

(4) A video and audio recording shall be made of the inspection, the attempt to take evidence and the presentation for identification, if possible.

A) Despite the fact that we've red the most detailed (Act of Criminal Procedure) statutory regulation so far on the specifically named identification, it does not say that it should be necessary to keep the identification in the original perceptual circumstances.

B) Also, as a de lege ferenda proposal, I would suggest that it would also be useful to stipulate in the law that the person who makes the identification must raise the attention (inform) of the recognizer on the following aspects:

a) it is not certain that the perpetrator is among the people to be recognized;

b) he/she is not obliged to choose (to choose at all costs);

c) the investigation proceeds even if no one is selected;

d) he/she will not get feedback on whether he/she made the "right" choice – if such a choice is made at all;

e) the warnings indicated at point (a) to (e) should also apply to the identification of objects or photographs, and that the offender's appearance (the color, length, shape of his/her hair, facial hair, skin) may change over time or look slightly different in the photographs.

C) It is my understanding that both the words "to identify" and "presentation" (individually and together) encourage the recognizer, most often the crime victim or witness, who is often willing to comply with the authorities, to choose among the people (objects, sounds etc.) presented, to make sure he/she chooses or to make sure he/she recognizes anyone. And the compulsion to comply may have the erroneous consequence of the recognizer choosing when he/she is not sure, when he/she only perceives a similarity, or simply concludes from external signs that he/she thinks that he/she recognizes the real perpetrator. However, his/her mistake can lead to justizmord, since it is difficult to disprove this selection in theory and almost impossible in practice if the identified person has no alibi. It would therefore be more appropriate to speak of an "attempt at identification", that is, an attempt to identify rather than a presentation.

D) In the field of criminal tactics, it would be worth considering the so-called ecological detection method, which is a novelty. In essence, it differs from the traditional procedure according to which the witness is led – more or less randomly – alongside the suspect, who is in a natural environment. In this case, the potential suspect is asked to be in a place where several other people are also present, e.g. in a shop, on a busy street. The witness is accompanied with the intention to try to identify the suspect and pick out the perpetrator he/she saw earlier. The fact that the people to be compared are not purposively selected is usually compensated for by the large number and diversity of people present. However, it is also possible that passers-by

are "enriched" by the authority with people fitted for comparison. The advantage of this method is that it is more relaxed than the classical presentation for identification, minimizing the risk of the target person standing out from the group because of his/her inner tension or the unwitting attention of the persons assigned to the comparison[7].

E) I also propose as a criminal tactical, influence-preventing – Anglo-Saxon-style solution – a method that can be implemented in practice. This involves the use of so-called "blind" conductors who have not been involved in the case before, rather than forensic investigators who are familiar with the case. These are law enforcement officers (police, customs investigators, prosecutors) who do not know the identity of the (potential) suspect in the case, i.e. they do not even know in their subconscious who the identification is aimed at. The line-up itself is put together by forensic experts familiar with the suspect and the case. But their role stops here for the time being, they leave the process. It is taken over by an employee who is not involved in the case and who must also communicate this fact to the recognizer. I mean, he/she is just conducting the identification and he/she does not know the case and he/she does not know the participants. Afterwards, he/she conducts the identification in a measured, distanced, uninfluenced way, because he/she does not know, does not even suspect who-what-why he/she should focus his/her influence on– the identification experiment is organized and recorded according to the tactical-technical recommendations. He/she will then hand over the report of the "result" to the forensic experts. With no history, it is not difficult for the "bystander" to comply with the recommendation not to reveal anything to the recognizers, neither confirmation nor denial, either verbally or by gesture or any kind of metacommunication. And he/she cannot do so after the identification, just as investigators who know the case cannot do so.

F) The conductor of the investigation should aim to minimize communication during the presentation. Instructions should be brief, clear and precise.

G) It is advisable to provide the (potential) suspect's legal representative (defense counsel) with a description of the witness or victim before the hearing. This gives him/her the opportunity to comment on the blatantly different, suggestive attitude and if necessary to complain.

G) It may be of tactical importance to accurately mention and correctly record how the recognizing witness expresses who among the several persons he/she recognized as the person he/she perceived in connection with the crime. Whether he points out, states it openly definitely, even repeatedly or on the contrary is vague and indefinite.

H) In agreement with Géza Katona's recommendation, in case of uncertain or doubtful identification of a person, repetition based on a different grouping of the same person is not appropriate, and the Anglo-Saxon "blank" figure is preferable. In this case, the (potential) suspect is not even included in the group (only individuals above suspicion), and the witness is then asked to identify him/her[8].

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[7] See more: R.C.L. Lindsay, G.L. Wells, *Improving eyewitness identification from lineups: Simultaneous versus sequential lineup presentation* in *Journal for Applied Psychology,* 70 (3), 1985, pp. 556-564.; A.M. Levi, *Some Facts Lawyers Need To Know about the Police Lineup* in *Criminal Law Quaterly,* 46, 2002, pp. 176-183.; A. Schäfer, *Sequenzielle Video-Gegenüberstellungen*, in *Kriminalistik,* 12, 2001, pp. 797-798.

[8] G. Katona, *Valós vagy valótlan? Értékelés a büntetőperbeli bizonyításban [Real or false? Valuation in criminal procedure proofing]* KJK, Budapest, 1990, pp. 143-169.

I) An important criterion to be checked beforehand is that none of the people in the line should be an acquaintance of the person who is identifying (most often the victim).

J) Immediately after the presentation, the person making the identification (often the witness) should be given the opportunity to explain the identification in their own words.

K) There is no place for any percentage identification, especially when evaluating an attempt at identification. There can be no identification even if a percentage of similarity is indicated by the recognizer himself/herself.

L) Especially if the selection is based (in part) on functional characteristics (e.g. walking, running, speech, voice), it is advisable to use more modern technical tools than photography (e.g. video, digital camera).

V. Conclusion

It is to be hoped that, under the rule of law, the proposals for improvement put forward by legal theory will have a meaningful influence and impact on the legislation and its implementation. Even if not immediately, but years later, we can achieve that the attempt to identify as an Achilles heel will be in place, both in law and practice, and will not give rise to erroneous court rulings ("legal death") of misguided judgments, as the Anglo-Saxons have put it: miscarriages of justice.

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13. Levi, A.M., *Some Facts Lawyers Need To Know about the Police Lineup* in *Criminal Law Quaterly*, 46, 2002, pp. 176-183.

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Children in Terrorism[1]

Nagy Melánia*

Abstract

Recently, the world watched in horror as an armed group of young children belonging to Islamic terrorist organizations, dressed in combat gear, marched through the streets of Beirut, chanting their willingness to die for their leader or god[2]. The role of children in various armed conflicts dates back a long time. In the XXth century the child soldiers were known as members of the Hitlerjugend organization. However, in addition to the Germans, the British and the Americans, also used minors for violent actions. Nowadays, the topic, though, has been revived by the Islamic State terrorist organization. The highest child mortality rate was reported in Aleppo, where more than 2,000 children died as a result of the attack. There are many examples in history of the involvement of child soldiers, still, by 1990, this problem had been pushed into the background. The change is largely due to a study by a Mozambican politician Graça Machel, who, at the request of the then UN Secretary-General, developed his work "Impact of armed conflict on children"[3]. He pointed out that children and women could be future targets for various extremist movements. Several EU Member States have confirmed that the number of their nationals, especially women and children, increased in various camps and prisons in March 2019 in north-eastern Syria[4]. There are currently ten countries where the children's participation in or joining the struggle is a common practice. These countries are: Afghanistan, Central African Republic, Congo, Iraq, Somalia, Yemen, Myanmar, Nigeria, South Sudan and Syria[5]. In the present study, the author focuses on the participation of children in violent groups.

Keywords: *children, armed conflict, victim, terrorist organization*

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[2] M. Nagy, *Női terrorizmus. PhD disszertáció (Female terrorism. PhD dissertation)*, 2020, Pécs, p. 46.

[3] C.E. Gál, *Elrabolt ártatlanság – az Iszlám Állam gyerekkatonái [Innocence Stolen – The Child Soldiers of the Islamic State]*, Magyar Rendészet 5/2018, p. 93.

[4] European Union Terrorism Situation and Trend report (TE-SAT) 2020, European Union Agency for Law Enforcement Cooperation 2020, p. 48, https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020 [accessed on 30 August 2020].

[5] https://theirworld.org/news/10-countries-where-child-soldiers-are-still-recruited-in-armed-conflicts [accessed on 28 October 2020].

I. Introduction

The armed conflicts of today show much higher figures on civilians becoming victims in comparison with previous centuries events. In World War I, 20 civilian casualties resulted, while in the 1990s, 90% of civilian casualties resulted[6]. As a consequence, children are also increased victims of such conflicts. Even if they are not "directly" affected by the negative consequences of the clash, the effects of "indirect" factors occur. Among other things, I mention hunger, malnutrition, inadequate health care, epidemics[7] and, consequently, vulnerability to extremist movements and thus the emergence and performance of child military missions.

For the most of us, *war* and *children* and the combined use of these terms are unthinkable. Unfortunately, this is not, by any means, a new phenomenon, with many historical antecedents, using children in armed conflicts continuing to be used a proven trend for various extremist movements[8]. This seems to be confirmed, as until then, groups with no previously usage of children on the front, had adopted this approach in new and never-before-seen ways[9]. Children's participation is very often coercive, still increasingly voluntarily. There are still extremely high numbers of young people in the armed conflicts taking place today, according to a 2016 estimation, their number reaches 300,000, 40% of whom are girls[10]. Research shows that the participation of minors is most prevalent where opposing parties wage war breaching internationally accepted norms of warfare and consistently ignoring *ius in bellum*[11]. My main characters are children who fight in adult battles, children who fight for the purposes of adults[12], children who – as a child soldiers – rob their childhood[13].

II. Defining the Concept of *Child*

For many centuries, children were not allowed to participate in various legal transactions as legal subjects, due to the fact that the minor was considered the property of the father[14]. There was no sensitivity to the newborns either, the number of child mortality was very high in the Middle Ages, so the parents showed a kind of distancing from them. The little ones were treated in the same way as adults after the

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[6] G. Machel, *Impact of Armed Conflict on Children*, Report of the expert of the Secretary-General, Ms. Graça Machel, submitted pursuant to General Assembly Resolution 48/157, point 24, p. 9.

[7] Z. Csapó, *Nemzetközi jogi védőháló a fegyveres konfliktusokban érintett gyermekek oltalmára. PhD értekezés [International legal safety net for the protection of children involved in armed conflicts. PhD thesis],* Pécs, 2009, p. 5.

[8] E. Cardeli, M. Bloom, S. Gillespie, T. Zayed, B.H. Ellis, *Exploring the Social-Ecological Factors that Mobilize Children into Violence*, in Terrorism and Political Violence, 2019, 1.

[9] G. Machel, *The Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, United Nations General Assembly 51st session, Item 108 (August 26, 1996), p. 1.

[10] https://www.goldininstitute.org/grassroots-solutions/child-soldier-map [accessed on 14 November 2020].

[11] N. Pajter, *Gyermekkatonaság [Child soldiers]*, in Migráció és Társadalom, 2018/1, p. 27.

[12] Z. Csapó, *cited*, p. 3.

[13] I. Beah, *A Long Way Gone: Memoirs of a Boy Soldier*, Nyitott Könyvmőhely, Budapest, 2008, p. 5.

[14] E. Végh, *Gyermekkatonák – a Sierra Leone-i polgárháború igazi áldozatai [Child soldiers – the real victims of the civil war in Sierra Leone],* 2011, https://btk.ppke.hu/uploads/articles/ 414/file/ vegheszter.pdf [accessed on 14 November 2020].

age of 6 and 7, respectively[15] artistic representations also support the spirituality of the age, as they mostly present children as small adults.

In 1989, the UN General Assembly unanimously adopted the Convention on the Rights of the Child (Resolution 44/25), which states that a child is a person who has not reached the age of eighteen, unless he or she has reached the age of discretion under national law[16]. Despite the creation of the concept, there is still no consentaneity on this issue in all parts of the world. Indeed, even today there is a huge difference between a child living in Europe and a minor living in an African tribe. While in Western civilization, a young person under the age of 18 is uniformly considered a child, this is not so clear in other societies (e.g., Africa, Asia). Tribal customs are very strongly present in these countries, serving as a basis for considering a 12-13 year-old as an adult. Typically, at a young age, they become breadwinners, marry and start a family. Another reason for the discrepancy is the length of life expectancy in the world. An 18-year-old has a different status in a society where 40-50 year life expectancy is typical, in comparison with a 70-80 year life expectancy[17].

III. History of Child Soldiers

If we look back at the historical antecedents, we can already find records in the Bible and in Greek mythology about the armed service of children. These are considered to be the story of David, who is the king of Israel, Saul, it was the squire, and Hylas who fulfilled faithful service to Heracles[18].

Going further in history, Sparta deserves a highlight. It is a well-known fact about Spartans that the children born here were part of a very special upbringing. They lived together with their child peers in so-called "flocks". They gave them a weapon in their hands and taught them the smallest details of their use. The principles of education were grouped around order, discipline, and rigor. Education was primarily focused on physical fitness, with a focus on theoretical training. The move to adulthood took place in the cruel framework. Whips were dropped on the initiated child at the age of 17, who had to endure the abuse without any sound, and if he did not, he was ashamed and returned to the minors.

We can also find many sources about the details of the Middle Ages. The boys, who were meant to be knights or even the "kings" of the battlefields, were torn from their parents' house at the age of 6-7 and fell into the hands of their master. They served there until they were 14 years old, learning all the tricks of weapon handling. By the age of 14-15, the young people had become "war prods", also mastered the handling of heavier weapons and had regularly taken part in various campaigns of their lords. By the age of 18-21, the most distinguished of them had been able to be knighted in a solemn ceremony.

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[15] N. Faix, *A gyermeki jogok kialakulása a nemzetközi jogban és az igazságszolgáltatásra gyakorolt hatásuk [The development of children's rights in international law and their impact on justice],* in *Eljárásjogi szemle*, 4/2016, p. 1.

[16] Convention on the Rights of the Child, http://www.unicef.hu/gyermekjog-egyezmeny.jsp, [accessed on 14 November 2020].

[17] E. Végh, *cited.*

[18] Z. Csapó, *cited*, p. 13.

The prevailing practice in the Ottoman Empire was the *devsirme* system, which was a Turkish term meaning *collecting*. In Europe, the word has become synonymous with "blood donation" and "child donation". It was not intended to serve any purpose other than to gather Christian children to replace the Janissary army. In the 16th century, boys aged 7-8 were collected in exchange for a "blood donor", later this age limit was pushed much higher. The parents tried to get their children back with various tricks. They were sometimes bought out or circumcised to be considered Muslim. Early marriage was also common, as only unmarried men were recruited, but they were usually hidden in mountains. The admitted boys were classified into different groups. According to the studies of Paul Fodor, those who were circumcised, the prettiest and smartest were taken to the Sultan's palace school and the strongest were given the necessary education in the palace garden. The remaining boys were placed with Turkish landlords, where they immersed themselves in the religion. The members of the first group had an easy life, but this could no longer be said of the other two groups, as many of them did not even reach the age of 10[19].

Child soldiers were also associated with Bonaparte Napoleon's troops. Initially, they did not perform combat tasks, but were present as drummers and assistants. Later, however, the number of infantry dropped so much that little boys were replaced[20]. The various records of the age also support the reality of these cruel deeds. Metternich said to Bonaparte in June 1813 at the Imperial Headquarters: *"I handed over his troops. They were just babies"*[21].

Germany's *Hitlerjugend* (HJ) was a particularly famous organization under Hitler's leadership from 1926 to 1945. *„The future is in the hands of those who have youth"*[22] – said the "Führer". He also created his military team of *Hitlerjungend*. The children were *"Aryans"*, meaning, "racially pure", they were German youths with blond or blond-brown hair, blue eyes and a proper head shape. His group leader was Baldur von Schirach, who later said in the Nuremberg trial: "*The sin I have to present to God and the German people is to… teach German children in honor of a man who committed murders in millions. That's all I can bring to my excuse*"[23]. The organization operated on the basis of Nazi ideology and very soon grew into a militaristic movement. The conditions were characterized by strict subordination, they had their own badges, flags and uniforms. The number of members has increased year by year. HJ, which numbered 1,200 in 1923, had surpassed 3 million by 1933, and by 1939 had approached 8 million. This included the *Bund Deutscher Mädel* (German Girls' Association), the *Jungvolk* (Young People) and the *Jungmädelgruppen* (Young Girls Groups). The trainings started from an early age after the age of 6. From the age of 10, they joined the Jungvolk organization, which was practically a forerunner of HJ. They were members of the HJ from 14 to 18 years old, it was no secret that Adolf Hitler's soldiers were trained here. In several HJ units, voluntary entry declarations into the SS were filled out as a "birthday present"[24]. Young people began to be indoctrinated at the age

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[19] P. Fodor, K. Hegyi, M. Ivanics, *Török és tatár hódítók [Turkish and Tatar conquerors],* Kossuth Könyvkiadó [Kossuth Publishing House], 1993, p. 19.

[20] Z. Csapó, *cited,* p. 22.

[21] A. Castelot, *Napóleon*, Európa Könykiadó [Publishing House], Budapest, 1999, p. 535.

[22] B. Ralph Lewis, *Hitlerjugend: a nácik ifjúsági szervezete békében és háborúban* [*Hitler Youth: The Youth Organization of the Nazis During Peace and War]*, 1933-1945, Hajja, Debrecen, 2001, p. 7.

[23] B. Ralph Lewis, *cited,* p. 143; Z. Csapó Zsuzsanna, *cited*, p. 27.

[24] L. Tilkovszky, A. Holzträger: *A Hitler-Jugend harci bevetése az utolsó háborús hónapok zűrzavarában [The Combat Deployment of the Hitler Youth in the Chaos of the Last Months of the War]*, Századok, 6/1996, p. 1602.

when they were most receptive. In many cases, re-education was so effective that children turned against their parents if they did not accepted a Nazi ideology. Members were taught the basics of Nazi ideology, emphasizing, among other things, the range of "main enemies": Jews, gypsies, communists, homosexuals. Many of the members lost their lives in World War II. The Allies called them the "baby division". Many times they were completely shocked by the fact that teenageers were facing them in full military equipment. The boys' religion was Nazism and Hitler was their prophet. Alfons Heck recalled his childhood in the 1980s as follows: *"I belonged to Adolf Hitler in both body and soul."*[25] In the period after the war, a large number of HJ soldiers were disappointed and realized how wrong they had been for many years[26].

Nor did the ideology of Italy and Mussolini despise the operation of youth organizations like Hitler. He considered the moral, physical and spiritual education of the young generation to be one of the tasks of fascism[27]. He envisioned to achieve this educational trichotomic goal on three levels:

1. racial protection in the national mother and infant care association;
2. spiritual education in school;
3. physical, moral and military education in youth organizations[28].

The youth organization became known as *Balilla*. Its story is related to a little boy named Gian Battista Perasso whose nickname came after his movement Balilla. The boy began throwing stones at the Austrian soldiers in the War of the Austrian Succession on December 5, 1746, thus starting the struggle that ended with the expulsion of the Austrians from Italy. A statue was also erected in honor of the boy. The Act of 3 April 1926 established the Opera Nazionaie Balilla (O. N. B.), which operated as a legal entity. Similar subsidiaries were also grouped under Balilla and all other factions were disbanded[29]. In 1930, youth assault teams were formed with the aim, as a final step, to prepare young people between the ages of 18 and 21 to join the party. In 1937, the Balillas and the Assault Troops were unified as the G.I.L. (Gioventú Italiana del Littorio) Youth Section of the National Fascist Party. Its tasks consisted in:

1. Intellectual, sports and military training;
2. Primary and secondary school physical education;
3. Arranging courses;
4. Social care (camping, holidays, medical treatment etc.);
5. Travel (tourism, foreign, sea, trips, scholarships)[30].

An outside observer might have thought that there was only the physical education taking place in youth organizations, but after many years it was proven that the members of the movement were self-conscious cultivators of Mussolini's triple slogan. *"Credere, obbedire, combattere*", that is, *"To believe, to obey, to fight":* believing in the

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[25] https://mult-kor.hu/hitlerhez-tartoztam-testben-es-lelekben-hogyan-nevelt-a-hitlerjugend-fanatikusokat-egy-nemet-generaciobol-20171212 [accessed on 15 November 2020].

[26] B. Ralph Lewis, *cited,* p. 42.

[27] „Uno dei compiti fondamentali del Fascismo é l'educazione spirituálé, morálé e fisica delle giovani generazioni" ["One of the fundamental tasks of Fascism is the spiritual, moral and physical education of the younger generations"] R. Marzolo, *Organizzazioni giovanili in Italia [Youth organizations in Italy],* p. 7; A. Gauder, *Az olasz ifjúság szervezete [Italian youth organization],* Nevelésügyi szemle, 7-8/1945, p. 165.

[28] J. Mester, *Az olasz nevelés a XIX. és XX Században [Italian Education in the XIX. and XX Century]*, Budapest, 1937, pp. 296-327, 1.

[29] A. Gauder, *cited,* p. 165.

[30] A. Gauder, *cited,* p. 168.

moral values created by the fascist state, obeying the knowledge of spiritual leaders, shaping and willing the future. Here the authoritative principle of the total view of the state emerged on the plane of youth. To fight, to fight for the realization of the Empire Romanum, was the teleological element. It all meant physical discipline, the fight against comfort[31].

IV. Child Soldiers Nowadays

The Islamic State recognized that potential male perpetrators could raise suspicions during the terrorist attacks, so new assassins had to be selected. This is why it turned primarily to women and juveniles. Their innocence and weakness easily divert the attention of law enforcement authorities, and thanks to those, the success of a terrorist act could be effectively ensured. ISIS has opened offices to recruit children, with two such offices operating in two Syrian cities – al-Mayadin and al-Bokamal – where ISIS was working to attract children living in the territory of the Islamic State[32]. According to some authors, *"the role of children in the 'Caliphate' is the culmination of the phenomenon of child soldiers"*[33]. A report for the period from 1 May to 31 October 2015 confirmed that the Islamic State had successfully recruited 1,227 adolescents, including adolescents aged 9 to 15, in various parts of Mosul[34]. The formation of the youth wing of terrorists has become a feature, the young people of ISIS were referred to as *"Fityan Al Islam"* (Islamic boys)[35]. Mia Bloom and John Horgan differentiate categories among joined minors: some were children of foreigners involved in the fight or children of supportive locals, but the organization also regularly increased the number of children with some found in the orphanages it controlled, and in addition with minors forcibly taken from parents and also with those stray children who volunteer for ISIS[36]. Involving minors has many benefits for a terrorist organization. Among other things, providing less food, lower wages, their immaturity contribute to their quick engagement, making them quick to prove loyalty, and easy to shape because they have fewer pre-formed visions and beliefs that recruiters need to reverse or change[37]. The moral judgment of young people is very easy to shape and influence. They do not need as much brainwashing as adults. Many reasonably behaving people cling to strange and cruel views simply because they have been firmly implanted in their brains early in their lives[38]. The young generation also represents the future of a radical group, which is why leaders consider early indoctrination and armed training to be extremely important, because the soldiers and

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[31] A. Gauder, *cited,* p. 170.

[32] K. Anderson, *"Cubs of the Caliphate". The Systematic Recruitment, Training, and Use of Children in the Islamic State,* https://www.ict.org.il/UserFiles/ICT-Cubs-of-the-Caliphate-Anderson.pdf [accessed on 28 October 2020].

[33] N. Benotman, N. Malik, *The Children of Islamic State*, The Roméo Dallaire Child Soldiers Initiative, Dalhousie University, 2016, p. 23.

[34] C.E. Gál, *cited,* p. 93.

[35] N. Benotman, N. Malik, *cited,* p. 22.

[36] J. Horgan, M. Bloom, *"This Is How the Islamic State Manufactures Child Militants",* VICE News RSS, 8 July 2015.

[37] War Child, *"Child Soldiers",* Report, http://www.warchild.org.uk/issues/child-soldiers; G. Machel, *Promotion and Protection of the Rights of Children*, 1996, p. 13, https://resourcecentre.savethechildren.net/document/promotion-and-protection-rights-children-impact-armed-conflict-children/.

[38] S.H. Cardoso, *Inside the mind of a suicide bomber, Dying to kill: The mind of the terrorist,* https://www.dana.org/article/dying-to-kill/ [accessed on 27 January 2020].

leaders of the future will rise from them. In schools, the curriculum is almost nothing more than an accurate, precise mastery and understanding of Islamic doctrines. Classes are intertwined around religion and learn the process of prayer on a daily basis, but instead the curriculum also includes a description of Mohamed's life and monotheism. They start religious education as little children, most children wouldn't even understand what is all about. A boy named Mohammed recounted that although he understood the concept of fasting and the importance of prayer, he did not understand the word "not believers" and why they should be fought[39]. Of course, this is to the detriment of learning other necessary information, as students cannot even study classical subjects such as mathematics, social sciences, history, geography. The school week runs from Sunday to Thursday, where girls and boys go to separate classes. Primary school starts at 5, high school lasts 4 years, compulsory schooling is strictly adhered to, as children who do not attend religious education will be harder to shape[40]. Children are also present in physical education classes on a daily basis, but this does not take place in the traditional way either, as they learn to shoot, box and fight[41]. These factors threaten the healthy physical, moral, and emotional development of children and will later be unable to contribute constructively to society[42].

Indoctrination beginning in schools is intensifying in training camps where children between the ages of 10 and 15 are taught *Sharia*. Their training consists of several stages, almost identical to the training of adults. The location of the training usually takes place in abandoned training camps set up for them, far from their place of residence, which can also be found in Mosul, Aleppo and Rakka, for example. Young people need to undergo very intense physical training to increase their endurance. They are taught the most basic combat tactics as well as the use of weapons. The third part of the training is psychological influence, as part of which they have be present as spectators in public executions. The purpose of this is to break the resentment against violence, to reshape it, and to silence the conscience[43]. Once all the three steps have been successfully completed, they have the opportunity to complete the task assigned to them, which can be a suicide bombing or front-line armed service on the side of a veteran fighter. Once the children of the Islamic State have completed their training, a graduation ceremony will be held for them, where the new graduates will march in public, in full uniform and carrying weapons. Their trainers line up the graduates and start beating them with sticks, symbolizing the unity of strength and discipline. The goal of the ISIS trainings is strikingly similar to the goal of the infamous Hitler Youth program – to create perfect, loyal, and obedient soldiers for the future[44]. One warrior said, *"It was a very difficult camp. We received very serious training. There were dense days: prayer, practice (use of firearms, religious teachings) followed by military studies,*

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[39] K. Anderson, *"Cubs of the Caliphate" The Systematic Recruitment, Training, and Use of Children in the Islamic State*, https://www.ict.org.il/UserFiles/ICT-Cubs-of-the-Caliphate-Anderson.pdf [accessed on 28 Occtober 2020].

[40] Islamic State Wilayat Raqqa, *Education in the Shade of the Caliphate*, https://archive.org/details/ta_rq [accessed on 30 October 2020].

[41] Islamic State al-Hayat Media Center, *Race Towards Good*, https://archive.org/details/fstbqo_alkeeraat. [accessed on 30 October 2020].

[42] N. Benotman, N. Malik, *cited,* p. 28.

[43] C.E. Gál, *cited,* p. 106.

[44] C. Vinograd, B. Ghazi, C.O. Ammar, *"ISIS Trains Child Soldiers at Camps for 'Cubs of the Islamic State''*, NBC News, 7 November 2014, https://www.nbcnews.com/storyline/isis-uncovered/isis-trains-child-soldiers-camps-cubs-islamic-state-n241821, [accessed on 28 October 2020].

then further Sharía courses, then rest, prayer. Between the afternoon prayers, they were not allowed to sleep, they came into our tent and fired into the sky and were sent to guard a ditch. We often fell asleep in this ditch because we were so tired"[45]. As noted by the doctrine, "these young people, in most cases, are literally cruel killing machines that execute literally all instructions"[46].

V. Conclusion

In the present study, I intended emphasize the role of child soldiers in different eras of history as well as in the Islamic State, which is playing an active role today. It can be noted that placing minors on the battlefield is not new, the change lies in the way of training. Development of technology has produced spectacular innovations in this area as well, perhaps making it even easier to spread extremist ideas. The goal remains ideological training and transformation to secure the future of the organization. It is perceptible that we have not been able to find a solution to this problem for centuries, all of which leading to innocent children continuing to play adult games.

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Characterisstics of Bullying and Cyberbullying and the State of Affairs of Anti-Bullying Efforts in Hungary

Gabriella Kulcsár*

Abstract

Bullying and cyberbullying remains a difficult problem worldwide, including Hungary. Despite financial obstacles and a lack of human capacity, researchers and practitioners work constantly to raise awareness on the problem and to introduce effective, evidence-based programs to Hungarian schools in order to build healthy school communities where bullying and cyberbullying is not part of student's everyday life. However, a long road is ahead of devoted professionals to reach their goal, and – as UNESCO recommendation says – a whole-education approach is essential to make the road a smoother one.

Keywords: *bullying, cyberbullying, victimization, prevention, intervention*

I. Introduction

The problem of bullying in schools has long concerned a wide range of researchers and education professionals. There is extensive empirical evidence that bullying involvement as either a victim, a perpetrator or a bully-victim can have severe mental and physical health consequences, among them increased suicidal ideation and suicide attempts[1].

Therefore it is essential to use effective prevention methods and antibullying measures in schools. This paper is an attempt to give an overall picture of what we know about the problem of bullying and cyberbullying and what options do we have to tackle it in Hungarian schools.

II. Definition, Characteristics and Prevalence of Bullying

There have been several attempts to define school bullying and to approach the phenomenon in alternative ways. In 2014, the U.S. Department of Education and the Center for Disease Control and Prevention developed a *uniform research definition,* based on the original definition of Dan Olweus[2] that became widely accepted:

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[1] M.K. Holt, C. Bowman, A. Alexis, A. Murphy, *Bullying, Suicide, and Suicide Prevention in Education*, in Harvey Shapiro (ed.), *The Wiley Handbook on Violence in Education: Forms, Factors, and Preventions,* First Edition, John Wiley & Sons, Inc., USA, 2018, pp. 453-454.

[2] D. Olweus, *Iskolai zaklatás [Bullying at school], Educatio* no. 4/1999, p. 717.

"Bullying is any unwanted aggressive behavior(s) by another youth or group of youth – who are not siblings or current dating partners – that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated. Bullying may inflict harm or distress on the targeted youth including physical, psychological, social or educational harm"[3]. It is very important to make a distinction between everyday conflicts and bullying. The latter must be addressed immediately and responsibly to prevent the stakeholders from long-term negative consequences.

Power imbalance and *repetition* are two key factors if we want to identify bullying and distinguish it from other forms of school violence. There has been some debate whether *intent* was a necessary component of bullying. Author Justin Patchin discusses this problem in his book, *Bullying Today*[4] and disagrees with researchers Stan Davis[5], Elisabeth Englander[6] and Lori Ernsperger[7] who say that unintentional harmful conduct should be called bullying as well because of its hurtfulness. According to Patchin, calling every harmful behavior between teens bullying dilutes the problem and as laws have been passed against bullying in several states in the US and in some European countries, it became especially important to precisely define it. *"Bullying is a specific and more serious form of interpersonal harm and the term needs to be reserved for behaviors that are repeated and intentional"*[8]. Several researchers, including the author of this paper, reinforce the idea that besides repetition and power imbalance, intent should distinguish bullying behavior from other forms of conflicts and harassment[9].

In the beginning bullying was considered to be a conflict between the victim and the perpetrator, but soon it became clear that the *role of bystanders* is essential in the escalation of the bullying situation. Currently, we regard bullying as a *group-process* and a *community problem* rather than restricting it to an interpersonal conflict between two people[10].

Most researchers agree that the *most vulnerable population* regarding bullying are children *between 11 and 16 years of age*, which marks the beginning and middle

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[3] M.R. Gladden, A.M. Vivolo-Kantor, M.E. Hamburger, C.D. Lumpkin, *Bullying Surveillance Among Youths: Uniform Definitions for Public Health and Recommended Data Elements, Version 1.0.,* Atlanta, GA National Center for Injury Prevention and Control, Centers for Disease Control and Prevention and U.S. Department of Education, 2014, p. 7.

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part of adolescence. In the higher grades of high school (above 16) there is a decline in the tendency of abuse[11]. These results were reinforced by the latest HBSC study[12].

Consequences of bullying involve an increased risk of subsequent *mental, emotional, and behavioral problems* for bullying victims as well as for individuals who bully others. Persons who both bully others and are themselves bullied appear to be at greatest risk for poor psychosocial outcomes[13]. In addition, research shows that some subgroups of children are at *increased risk* of bullying involvement, especially *students with disabilities and members of the LGBTQ population*[14].

In the last decade researchers and the media have become increasingly interested in the online form of bullying, known as *cyberbullying*. Cyberbullying is *"willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices"*[15]. Although it takes place on virtual platforms, many times it is closely related to face-to-face conflicts at school. Online bullying differs from traditional school bullying in several characteristics: the identity of the perpetrator can remain anonymous; the "audience" of bullying can be much larger than in the everyday settings of school bullying (a shared photo or video can spread like wildfire or become "viral"); the bullying student does not have to face the suffering and pain of the bullied one, and as a consequence these emotions cannot have an inhibitory effect[16]. Research shows that students who are victims of cyberbullying are less likely to notify an adult than a face-to-face bullying victim[17]. Even more worrying is the finding that there is a connection between face-to-face bullying victimization and late cyberbullying perpetration. That means that some students who are bullied at school can turn to bullying behavior online over the course of time[18]. Interestingly, students don't think of bullying and cyberbullying as two separate forms of violence. One reason is that today's young generation was born in the digital era, and the online world is a natural part of their life, often not distinguishable from "real life". The other reason is that a lot of cyberbullying occurs during the day in the school parallel to traditional bullying. Although online

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[11] P. Borbála, *Az iskolai agresszió előfordulása, intézményi percepciója (The incidence and institutional perception of school aggression),* in *Új Pedagógiai Szemle* 60, no. 1-2, 2010, p. 131. http://epa.oszk.hu/00000/00035/00139/pdf/EPA00035_uj_pedagogiai_szemle_2010_1_2.pdf.

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bullying is very real and needs to be addressed, it would still be an exaggeration to say that it is causing more problems than traditional bullying. Scientific evidence shows the opposite. Modecki et al. conducted a meta-analysis of 80 articles measuring cyber and traditional bullying and found that *traditional bullying was two times more prevalent than cyberbullying.* However, the correlation between the two forms remains strong[19].

Although researchers agree that bullying and cyberbullying behavior is a huge problem affecting millions of children all over the world, *definitional and measurement inconsistencies in studies make it hard to compare research results regarding prevalence*. There have been *only a few representative studies about bullying in Hungary*. The most recent was conducted by the Hungarian Institute for Educational Research and Development at the Eszterházy Károly University in 2015. According to the results 15,2% of the children were bullied every week[20]. These outcomes correlate with the results of the HBSC (Health Behaviour in School-Aged Children) report from 2014. HBSC surveys are WHO collaborative cross-national studies that provide information about the health and well-being of 11-, 13- and 15-year old children every 4 year, now from 44 countries[21]. The data from the 2013/14 survey shows a 14,2% bullying victimization rate and a 12,2% perpetration rate in Hungary, with every 10th child being both a victim and a bully. Some Hungarian studies[22] suggest a higher rate of bullying involvement, and also the data from the HBSC study conducted in 2018 shows approximately 4% increased involvement in bullying. According to the Hungarian HBSC researchers, increased awareness and sensitivity to the problem due to anti-bullying programs might also contribute to the rise in numbers[23]. The HSBC surveys also included a question about cyberbullying. Hungarian results showed that 11,7% of the children had been bullied through someone sending mean instant messages or had created a website that made fun of them and 5% suffered because someone shared unflattering pictures of them without their permission[24].

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[22] The first Hungarian study about bullying revealed 26,1% victims, 12,87% perpetrators and 26,53% bully/victims. E. Figula *Iskolai Zaklatás – iskolai erőszak pszichológusszemmel [School Bullying – School Violence from a Psychologist's Point of View]*, Nyíregyháza, A Szabolcs-Szatmár-Bereg Megyei Tudományos Közalapítván Kuratóriuma, 2004, p. 70.

[23] D. Várnai, *Kortársbántalmazás (bullying), internetes bántalmazás és verekedés [Bullying, Internet Abuse and Fighting]*, in A. Németh, D. Várnai (eds.), *Kamaszéletmód Magyarországon. Az Iskoláskorú gyermekek egészségmagatartása elnevezésű, az Egészségügyi Világszervezettel együttműködésben megvalósuló nemzetközi kutatás 2018. évi felméréséről készült nemzeti jelentés [Child Marriage in Hungary. National report on the 2018 survey of the international research called Health behavior of school-age children, carried out in cooperation with the World Health Organization]*, ELTE PPK – L'Harmattan Kiadó, Budapest, 2019, pp. 129-130.

[24] D. Várnai, E. Zsiros, *Kortársbántalmazás és verekedés [Peer abuse and fighting]*, in A. Németh, A. Költő (eds.), *Egészség és Egészségmagatartás Iskoláskorban: Az Iskoláskorú gyermekek*

There are *very large cross-national variations in levels of bullying perpetration and victimization*. According to the HBSC report from 2014 he overall prevalence of bullying victimization in Europe and Canada is around 12% for boys and 10% for girls. The prevalence of bullying perpetration is around 11% for boys and 6% for girls[25]. There is a rapidly growing number of research studies on bullying in the United States, but according to the Committee on the Biological and Psychosocial Effects of Peer Victimization the prevalence rates vary greatly, ranging from 17,9% to 30,9% for the prevalence of bullying behavior and from 6,9% to 14,8% for the prevalence of cyberbullying[26].

III. Best Practices in Bullying Prevention and Intervention Generally

Decades of research and practice helped to understand the best ways to reduce bullying and cyberbullying and the preconditions of a healthy school environment.

Bullying is a group process, a social phenomenon, therefore *everyone* who is part of a given school community, including teachers, other school staff and students, *has to be part of the solution*. That is why it is essential to *train every member of the school staff and the students* about bullying, cyberbullying and practices to strengthen a positive school climate. This *whole-school approach* ensures that everybody is on the same page when a bullying situation occurs.

Increased awareness of bullying in the school community can be achieved not only through trainings, assemblies, focus days, but through student-owned plans and activities. *Involving students and taking their perspective into account* when figuring out strategies against bullying can strengthen their motivation to change the school climate for the better.

It is essential, that trainings and other solutions should always *focus on positive solutions instead of fear-based messages* in order to reduce anxiety and increase positive engagement.

Another essential element of bullying prevention is the assessment of the bullying situation in schools. *Regular yearly assessment* is the key in evaluating the effectiveness of the used antibullying methods. That said, it is important to know that in the first years, higher awareness can cause an increased number of case reports.

All prevention efforts will fail if we don't *promote positive school climate and positive social norms,* otherwise the school climate will remain toxic and abuse will always resurface. This positive approach includes non-hostile and non-punitive methods of behavior management that are consistently used.

Another important condition is to empower students (especially bystanders) and staff by helping them *build the social-emotional skills needed* to respond negatively to bullying behavior and to support students who are bullied.

A healthy community also provide *mental health support* for its members who are going through a rough time and are in need of psychological counseling.

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[26] F. Rivara, S. Le Menestrel, *cited*, p. 59.

To handle bullying cases effectively, *establishing a school antibullying team* is a very wise step as well as *developing a school policy for bullying and cyberbullying cases*. Clear-cut information should be provided about the policy to teachers, students and parents alike. A non-punitive, professional policy helps building a safe atmosphere where everyone knows and follows the same steps when bullying occurs. The school antibullying team can also coordinate the bullying prevention work in the school. As part of the prevention work they can also organize *effective supervision in so called bullying "hot spots"* (e.g. bathrooms and the schoolyard) and give clear *information to students how they can seek help.*

Schools' efforts can be more efficient if the wider community is also on board with them. Recommendations on preventing and addressing school bullying and cyberbullying by the Scientific Committee of the UNESCO and the French Ministry of Education, Youth and Sports addresses this issue by proposing "that an effective response to bullying and cyberbullying should be described as a "whole-education approach". A whole-education approach ensures that local school initiatives recognize the importance of the interconnectedness of the school with the wider community including education, technological and societal systems, values and pressures, all of which can impact on the prevalence and type of bullying and cyberbullying that occurs in a school"[27].

IV. Obstacles in Bullying Prevention and Intervention in Hungarian Schools

Bullying research started in the early 2000's in Hungary and researchers as well as practitioners quickly recognized the need for evidence-based whole-school antibullying research programs. However, there is still much more to be done in order to tackle bullying and cyberbullying in Hungarian schools.

There are many obstacles that hinder the effective prevention of bullying, as a research (conducted by the author of this paper in 2017) shows[28]. The purpose of said study was to examine the perception of Hungarian school principals regarding the prevalence of bullying, self-harm, suicide, substance abuse, eating disorders and adolescent depression in their institutions. School-based prevention efforts and methods were also surveyed. An online self-report questionnaire regarding these issues was sent to the entire population of Hungarian primary and secondary education institutes, specifically addressed to the principals. 394 responses (20%) from the entire population of Hungarian educational institutes came back, and the results show that the vast majority (82,8%) of the respondents admitted having bullying problems among their students[29]. As for

[27] International Conference on School Bullying: "Recommendations by the Scientific Committee on preventing and addressing school bullying and cyberbullying." Electronic document authored by the UNESCO and France Ministère de l'éducation nationale, de la jeunesse et des sports, Accessed August, 3, 2021, https://unesdoc.unesco.org/ark:/48223/pf0000374794.

[28] G. Kulcsár, *Az iskolai zaklatás és más serdülőkori devianciák összefüggései: kérdőíves kutatás az oktatási intézmények vezetőivel [Correlations Between School Bullying and Other Adolescent Deviance: Questionnaire Research with Heads of Educational Institutions],* in *Ügyészségi Szemle* 2, no. 2, 2017, pp. 72-89.

[29] Other urgent issues seem to be substance abuse, depression, eating disorders and self-harm. While a perceived relation between bullying and other disturbances was observed by the principals in some cases, the link seems to be complex. Also, schools are clearly less active in dealing with self-harm, suicide, depression and eating disorders than in preventing bullying and substance abuse.

currently employed bullying and cyberbullying prevention measures (see Figure 1 and 2) it turned out, that there is a general lack of long-term whole-school approaches and no regular assessment of the state of affairs in schools regarding violence. Another big problem is constituted by the regulation that only schools with more than 500 students can get financing to hire a school psychologist. School policy for bullying cases was put in place only in one third of the schools, and the situation is even worse regarding cyberbullying cases. This increases the risk of ad hoc reactions when violence occurs and leads to insecurity among students and staff. Schools also often only deal with behavioral aspects of youth problems and not with the underlying interpersonal and intrapersonal conflicts. These findings were reinforced by telephone interviews I conducted with school psychologist from the responding schools. The interviewees added that school leaders and teachers often feel helpless and overwhelmed, because they face a lack of information, money and capacity for introducing programs that could reduce challenging and violent situations. Insufficient cooperation within the child support system including schools, families, education counselling services and family support services also worsen the situation in many communities.

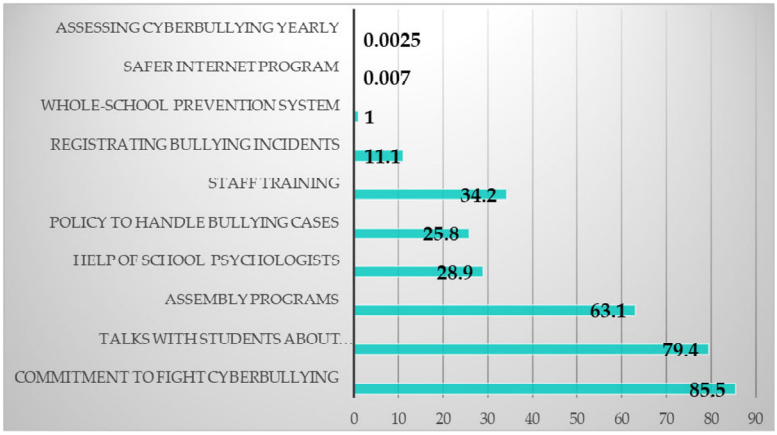

Figure 1: What does your school do to prevent bullying? – Research study with 394 schools (principals)

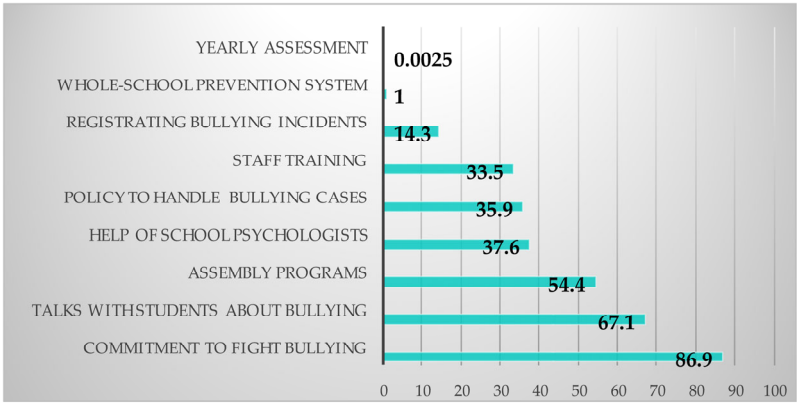

Figure 2: What does your school do to prevent cyberbullying? Research study with 394 schools (principals)

V. Antibullying Programs in Hungary

Although Hungarian researchers have emphasized the importance of bullying-prevention in schools for almost two decades, central and school-level funds remained very limited for this express purpose in the country. Therefore, internationally recognized but expensive whole-school antibullying programs couldn't be widely implemented in Hungarian schools yet. Because of this, researchers and practitioners tried to find ways to tackle bullying on their own initiative. The currently available antibullying programs and best practices available in Hungary are the following:

The Peaceful Schools Project (Békés Iskolák Program)[30] is the Hungarian version of the holistic, evidence-based antibullying program, originally called CAPSLE (Creating a Peaceful School Learning Environment) which was developed by Stuart W. Twemlow, Peter Fonagy and Frank C. Sacco[31]. It was the first program to formally apply a mentalization-based approach to the systemic problem of bullying. The main focus of CAPSLE is to enhance mentalization skills in students and teachers alike and to foster healthier power dynamics in schools by focusing more on the role of the bystanders than on that of the bully or the victim. The implementation and adaptation of the program started in 2006 in Hungary based solely on volunteer work without any financial support, albeit with the permission and help of the project developers. The Peaceful Schools Project is the only whole-school antibullying program besides the ENABLE Project that is available for all interested Hungarian schools to this date.

ENABLE (European Network Against Bullying in Learning and Leisure Environments) "aims to tackle bullying in a holistic way, helping young people exercise their fundamental rights in the home, school, class and community (i.e. peer group)"[32]. As their statement says: "the project aims to develop social and emotional learning skills as a means of building resilience in young people so that they can better understand and become more responsible and effective for their on- and offline social interactions"[33]. The ENABLE program is available for all schools if they apply for a free training offered by their local Pedagogic Education Center.

KiVa is an evidence-based antibullying program that has been developed in the University of Turku, Finland, with funding from the Ministry of Education and Culture. *KiVa* offers a wide range of concrete tools and materials for schools to tackle bullying[34]. Unfortunately, *KiVa* was only financed for a short amount of time as a pilot program in Hungary, but hopefully more schools can be introduced to this successful program in the future.

A new initiative is *KERIB* (Kerekasztal az Iskolai Biztonságért – Roundtable for Safety in Schools), a unique cooperation of Hungarian researchers, non-profit organizations, teachers unions and parents associations to reduce violence in schools

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[30] Békés Iskolák Program, http://www.bekesiskolak.hu/ [accessed on 3 August 2021].

[31] P. Fonagy, S. Twemlow, E. Vernberg, F. Sacco, T. Little, *Creating a Peaceful School Learning Environment: The impact of an Antibullying Program on Educational Attainment in Elementary Schools* in *Medical science monitor: International medical journal of experimental and clinical research* 11, CR 317-25, 2005.

[32] Implementing ENABLE, http://enable.eun.org/implementing_enable [accessed on 3 August 3 2021].

[33] ENABLE (European Network Against Bullying in Learning and Leisure Environments), https://ec.europa.eu/justice/grants/results/daphne-toolkit/content/enable-european-network-against-bullying-learning-and-leisure-environments_en [accessed on 3 August 2021].

[34] KiVa Program, https://www.kivaprogram.net/ [accessed on 3 August 2021].

by disseminating knowledge about effective technics to solve conflicts peacefully and handle bullying[35].

There are some initiatives in Hungary to address the specific problem of cyberbullying, among them was the *TABBY* Hungary program, offering training courses to teachers and students to prevent bullying and cyberbullying as a part of a comprehensive European project[36]. A fresh, new initiative is the *Online against online violence ("Online az online bántalmazás ellen")* training which will be offered to Hungarian teachers from 2021[37].

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The Cannabis Question

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Nyitrai Endre[**]

Abstract

Hemp (Cannabis sativa L.), which grows everywhere in the temperate zone, is one of the oldest plants cultivated by man, and there are countless cultural and historical records of its important industrial, commercial, food, medicinal and spiritual role in human culture over thousands of years. Drugs derived from hemp are often referred to simply as the collective name Cannabis, which refers to the genus name Cannabis in the Latin name of the plant.

There are numerous historical records of the effects of cannabis consumption on the body, mainly mentioning medicinal uses. By examining the cannabis phenomenon, we can trace the path from total freedom to strict prohibition and back to free consumption of the material what is currently considered a drug in most countries.

After nearly fifty years of a total prohibitionist approach (with the exception of the special situation of Dutch coffee shops under strict licensing), we witnessed a slow paradigm shift in cannabis use in the early 2010s. It seems very likely that the half-century-long strict ban is coming to an end. In the debate between the arguments for and against consumption, which have been in opposition for many years, it is very much the case that public opinion in more and more countries is shifting towards acceptance rather than prohibition.

Keywords: *hemp, Indian hemp (Cannabis sativa L. var. Indica), drugs, THC, Cannabis consumption, prohibition, paradigm shift, legalization, decriminalization*

I. Introduction

Hemp (*Cannabis sativa L.*), which grows everywhere in the temperate zone, is one of the oldest plants cultivated by man, and there are countless cultural and historical records of its important industrial, commercial, food, medicinal and spiritual role in human culture over thousands of years. The 'fibre' hemp (*Cannabis sativa L. var. vulgaris*) is planted as an agricultural crop and grows to several meters in height, while its stems are used to produce fibers, rope, canvas, paper, hardboard sheeting, animal bedding, thermal and sound insulation panels, geotextiles for soil work etc., and its seeds are used to produce oil.

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A very widespread biological variant of the hemp plant, the wild hemp (*Cannabis sativa L. var. ruderalis*) is a well-known weed. Another variant of the plant, the Indian hemp (*Cannabis sativa L. var. Indica*), which is used as the raw material of the drug, also grows in the Central European climatic conditions, but since its cultivation is not allowed, it takes place illegally, mainly under artificial conditions, in plastic tents, greenhouses and cellars.

II. Drugs Derived from Hemp

Drugs derived from hemp are often referred to simply as the collective name Cannabis, which refers to the genus name *Cannabis,* the Latin name of the plant.

The resinous substance produced by the inflorescence of the fruiting specimens of the dioecious plant and the glandular hairs of the leaflets around the inflorescence contains more than 60 alkaloids, of which the compound commonly abbreviated THC (delta-9-trans-tetrahydrocannabinol) is the main one that produces the psychoactive effects desired by drug users in the human body. The THC content of Indian hemp, also known as drug hemp, is generally between 1 and 2%, that of fiber hemp is around 0.2% and that of wild hemp varies widely, generally being much lower than that of fiber hemp.

Three types of illegal preparations are made from the hemp plant, which is the raw material for the drug: marijuana, hashish and hashish oil. Marijuana (Cannabis): the intensely fragrant, dried ground extract of the fruiting inflorescence and leafy, flowering shoots of the Indian hemp plant. The psychoactive ingredient content is usually 1-2%. Hashish (Cannabis resin) is a resin squeezed from the glandular hairs of the plant's fertile flowers and the leaves around the inflorescence, with a THC content of 10 to 20%. The THC content of cannabis oil obtained from solvent extraction can be as high as 30-40%.

III. History of Cannabis Consumption

There are numerous historical records of the effects of cannabis consumption on the body, mainly mentioning medicinal uses. The use of cannabis as a pleasure agent first began and spread in Europe and the United States of America in the 1800s among artists. But it should also be noted that the United States Pharmacopeia, published in 1850, recommended cannabis as a treatment for more than 100 different ailments (nerve pain, tetanus, typhoid, cholera, dysentery, alcoholism, opiate addiction, anthrax, leprosy, urinary incontinence, arthritis, tonsillitis, dementia, heavy intense menstrual bleeding, bloody urine etc.).

The drug carrier of cannabis began in the United States in the early 1900s. At first, Mexican guest workers began to consume it because of its fatigue reducing and stimulating effects, but a soon wider and wider range of people became affected not only in the United States but also in Europe.

IV. The Cannabis Phenomenon – From Total Freedom to Strict Prohibition

By examining the cannabis phenomenon, we can trace the path from total freedom to strict prohibition and back to free consumption of the material that is currently considered a drug in most countries.

The evolution of drug policy, i.e. the way in which societies in different countries relate to the consumption, production and distribution of drugs, was one of the most important social phenomena of the 20th century. However, this process has not stopped to this day, generating a serious debate today between strict prohibitionists and more lenient, more permissive positions. This includes the "light drug vs. hard drug" controversy and the equally controversial "gateway drug theory", which argues that marijuana use leads to the use of harder drugs over time. In addition, perhaps one of the most acute drug issues of the present century, alongside a wide variety of 'designer' drugs with their many dangers, is the problem of Cannabis liberalization.

The oldest archaeobotanical evidence of hemp use was found in the Upper Paleolithic (also known as Late Stone Age), estimated to be around 26,000 years old, from excavations near Pavlov and Dolni Vestonice in South Moravia (Czech Republic)[1].

Further research by Czech and American archaeologists has found that hemp was already known and used by Stone Age man, mainly for the production of textiles, ropes, and hunting and fishing nets, but for human consumption or other purposes this excavation has not yet provided evidence[2].

The first medicinal use of Cannabis is indicated by the 5,000-year-old records left over from the time of Emperor Chen Nung, considered the father of Chinese agriculture. According to the records, the scientist emperor recognized that plants, in addition to being food for humans and domestic animals, also contained poisons and antidotes, as well as a number of other medicinal substances. Legend has it that the effect of these substances was first tested by the ruler, blessed with special abilities, on his own. It is also by this time that the healing power of Cannabis, can be discovered. According to Chen Nung's writings, the flowers of female individuals of the hemp plant contain very large amounts of yin energy, the lack of which, according to traditional Chinese philosophy and medicine, ends in rheumatism, malaria, beriberi, dementia, menstrual cramps. and the development of arthritis, so consuming Cannabis is a sure antidote to these complaints. But at the same time, the notes also point out that consuming too much hemp seed can easily enable an individual to see demons, and that long-term consumption enables one to communicate with spirits[3].

Hundreds of the many thousands of clay tablets from the Assyrian Empire, from 3,000 to 2,000 BC, from the area of northern Mesopotamia at the Tigris and Euphrates, contain medical records that show that the most important healing agent of the age ~~is~~ it was cannabis. Cambell Thompson's dictionary, "The Dictionary of Assyrian Botany," published in 1949, on page 221 interprets the term Gan-zi-gun-nu, which, according to

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Thompson, means "the drug which takes away the mind," which Thompson says is nothing but hashish[4].

The ancient Egyptians also knew the effects of Cannabis on the body. The first written trace of the medicinal use of Cannabis is found in the Ramesseum III Papyrus from 1700 BC and then in the Ebers papyrus dated to around 1550. The latter 110 "pages" of slightly more than 20-meter-long, relatively intact papyrus scrolls contain descriptions of nearly 900 recipes for the cure of various diseases. Most of them contain honey and minerals in addition to the most important active ingredients, mainly of plant and, less commonly, animal origin. Among the more than 500 herbs used in the recipes is hemp, the leaves, inflorescences and seeds of which, mixed with honey, were used to relieve pain and reduce inflammation[5].

Cannabis also played an important role in Hinduism. According to mythology, Shiva, one of the most important Creator Goddess of Hinduism, once spent the night sleeping among hemp plants and then woke up in the morning to eat the green leaves, which filled him with pleasant freshness. From then on, hemp leaf became one of the Goddess's favourite foods[6].

The oldest and most fundamental sacred scriptures of Hinduism, containing the esoteric wisdom of the universe, according to the most widely accepted view today, the Vedas dating from 1200-1000 BC, one of the five sacred plants of India was hemp. It was believed to have magical powers to protect against disease, prolong life and ward off malevolent demons.

Religious scholars say the author of the Zend-Avesta sacred writings, dated to the 7th century BC, considered the Persian equivalent of the Vedas, the Persian prophet Zoroaster himself was a user of *bhanga* (the equivalent of Hindu bhang), which helped bridge the metaphysical divide between heaven and earth[7].

According to the famous Greek historian Herodotus, who lived in the 5th century BC, the use of Cannabis was also an integral part of Scythian culture. In Godley1920's English translation of Herodotus, we read about how the vapors rising from the hemp seeds scattered on the red glowing stones were used to purify the mind and body after the royal burials, which seemed very cruel to today's eyes[8].

When we talk about the role of the hemp plant in the history of mankind, we must not forget a material that is very important and indispensable to this day, paper. According to Chinese legends, an official named *Ts'ai Lun* was the first to produce paper from an aqueous mixture of crushed hemp fibres and mulberry bark around 105 BC.

The actual circumstances of the invention of papermaking are still disputed by scholars today, but one thing is certain: it happened in China sometime in the first few

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[4] C.R. Thompson, *A Dictionary of Assyrian Botany, The British Academy*, London, 1949, p. 221. http://www.samorini.it/doc1/alt_aut/sz/thompson-a-dictionary-of-assyrian-botany.pdf [accessed on 28 January 2017].

[5] L. Manniche, *An Ancient Egyptian Herba*l, British Museum Press, London, 2006.

[6] T.H. Mikuriya, *Excerpts from the Indian Hemp Drugs Commission Report*, San Francisco, 1994, https://books.google.co.in/books?id=Bq9Qm-7Q95sC&pg=PA38&dq=bhang+shiva&hl=en&sa=X&ei=uLijVZq9DojluQTfpJrACQ&ved=0CBwQ6AEwAA#v=onepage&q=bhang%20shiva&f=false [accessed on 31 January 2017].

[7] M. Eliade, *Shamanism,* Publisher: Princeton University Press, 1964, http://blogsdelagente.com/macrimoniesq/free-shamanism-archaic-techniques-of-ecstasy-bollingen-series-general-pdf/ [accessed on 31 January 2017].

[8] Hérodot: *„The Scythians then take the seed of this hemp and, crawling in under the mats, throw it on the red-hot stones, where it smoulders and sends forth such fumes that no Greek vapor-bath could surpass it."* Godley (1920) Book 4, Chapter 75.

centuries BC, and it is also certain that the main raw material for the paper that replaced leather and silk as a writing medium was hemp in the beginning, and only later was it replaced by bamboo, straw, rags and wood[9].

(Hemp-based paper production is now back in the spotlight because it is cheaper, less polluting and can significantly reduce deforestation, which has reached unbelievable levels.)

De Materia Medica, written around 50-70 AD by the Greek scientist Pedanios Dioscorides, who worked as a military doctor in the Roman Empire, was a basic work for the next 1500 years, describing 600 medicinal plants and the medicines they could be used to make, and mentioning cannabis in several places as a raw material for various medicinal mixtures, while the oil pressed from its seeds is recommended primarily for pain relief, especially earache. It is to this time that hemp seed was an important part of home medicine throughout the Middle Ages[10].

Galen (129 AD – 201 AD), the most well-known Roman physician of Greek origin in ancient times, also mentions Cannabis in his writings, and we also know from him that wealthy Romans, in order to elevate the mood while drinking at feasts, they enjoyed eating cakes containing Indian hemp seeds[11].

When considering the history of Cannabis, it is important to mention the Cannabis culture of the Arab world, in which hashish has played a very important role for a very long time. According to early Arabic writings, the word hashish was originally used not only to describe the resin of cannabis, but also to describe the dried leaves, flowers and seeds, which were consumed in baked form in cakes. The Arabs were probably introduced to it by Chinese traders, and its spread as a means of enjoyment was facilitated by the rise of Islam in the early 7th century (as we know, Mohammed founded Islam in 622), which is known to consider the consumption of alcohol a sin and forbidden.

Until the end of the 16th century, the Arab world was characterized by the use of hashish in the form of eating. Hashish smoking, as we know it today, became a habit when tobacco arrived from the New World and the smoking craze swept through Europe, which did not escape the Arab world. The smoking of dry tobacco leaves became a model for hashish smoking. The pipe used for smoking needed only a slight modification to make it suitable for smoking cannabis resin. Until then, hashish was considered to be the leaves, inflorescences and seeds of the plant. But as it was realized that smoking the resinous substance (extracted mainly from the inflorescence and the shoot tops) produced a much more intense effect and lasted for many hours longer than smoking the pipe filled with dried plant debris, from then on it was mainly the resin that was used for smoking. Arab traders then spread hashish smoking wherever they went, including much of Africa, as far away as South Africa[12]. (Booth, 2003)

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[9] T. Tsuen-Hsuin, *Paper and printing, in Science and Civilisation in China*, ed. Joseph Needham, Volume 5, *Chemistry and Chemical Technology*, Part 1, Cambridge University Press, 1985, http://www.arts.ucsb.edu/faculty/reese/classes/papermaking/Sci%20&%20Civ%201985%20p1-10.pdf [accessed on 1 February 2017].

[10] E.L. Abel, *Marijuana – The First Twelve Thousand Years*, Schaffer Library of Drug Policy, 1980, http://druglibrary.org/schaffer/hemp/history/first12000/abel.htm [accessed on 1 February 2017].

[11] Galenus: *„Nevertheless some people roast and eat it {the seed of Indian hemp} with other sweetmeats. The seeds are quite warming, and consequently when they are taken in quantity over a short period they affect the head, sending up to it a vapor that is both warm and like a drug".*

[12] M. Booth, *Cannabis: A History,* St. Martin's Press, New York, 2003, https://books.google.hu/books?id=ecITBwAAQBAJ&pg=PA48&lpg=PA48&dq=ibn+wahshiyah+hashish&source=bl&ots=IBNvx

The population of European countries became acquainted with the use of Cannabis as a by-product of great geographical discoveries and colonizations. Initially, only medical use was typical. The well-known medical/pharmaceutical books of the time, such as the New London Dispensatory (1682), the Complete English Dispensatory (1720), the New English Dispensatory (1764) and the Edinburgh New Dispensatory (1794), all recommend Cannabis for the treatment of a wide range of ailments (depression, cough, jaundice, anti-inflammatory, cancer, arthritic conditions, loss of appetite).

V. Cannabis Use Becomes a Social Problem

The use of cannabis as a pleasure agent, as it was mentioned earlier, first began and spread in Europe among the artists in the 1800s, and then in the early 1900s in the USA.

Stepping out of the art world, marijuana use spread in the following decades to an ever-widening mass of people, culminating in the hippie movement and Vietnam veterans in the 1960s and 1970s, and then the wave of marijuana from the USA swept unstoppably through the western societies of Europe and, after the break-up of the Eastern Bloc, throughout Europe[13].

The first government action against the dangerously rapid spread of Cannabis use was the Marihuana Tax Act of 1937, passed during the Roosevelt administration, which did not categorically ban the medicinal use of cannabis derivatives, but did impose a tax on all related activities[14].

In an effort to reduce the worldwide spread of drug use and the associated drug-related crime, the vast majority of UN member states signed the Single Convention on Narcotic Drugs in New York on 30 March 1961, which classified cannabis and all its derivatives as dangerous and illicit drugs. The Convention has placed cannabis in Schedules I and IV, the latter including substances of very high concern such as heroin.

The 1961 Convention also banned the use of all Cannabis derivatives for therapeutic purposes, despite the fact that it is well known in medical circles that the active ingredient in Cannabis, THC, can be successfully used to treat or alleviate the symptoms of many diseases: e.g. for the relief of severe nausea and vomiting in the chemotherapy of cancer, for the treatment of multiple sclerosis and glaucoma, and for overcoming severe anorexia in AIDS patients.

Following the 1961 drug convention, during the Nixon administration (1969-1974), the United States of America embarked on a very broad and intensive anti-drug strategy under the auspices of total rejection of all substances classified as illegal.

7PNfb&sig=4AGA3xKg6hx7zyQIbbwbYOVeMP4&hl=hu&sa=X&ved=0ahUKEwj1uYfpse_RAhXoA5oKHRIBCu0Q6AEIMTAE#v=onepage&q=ibn%20wahshiyah%20hashish&f=false [accessed on 3 February 2017].

[13] E.L. Abel, cited.

[14] In the introduction to the act by David Solomon: *„The popular and therapeutic uses of hemp preparations are not categorically prohibited by the provisions of the Marihuana Tax Act of 1937. The apparent purpose of the Act is to levy a token tax of approximately one dollar on all buyers, sellers, importers, growers, physicians, veterinarians, and any other persons who deal in marijuana commercially, prescribe it professionally, or possess it."* http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm [accessed on 6 February 2017].

VI. A Paradigm Shift in the Consumption of Cannabis

After nearly fifty years of a total prohibitionist approach (with the exception of the special situation of Dutch coffee shops under strict licensing), we witnessed a slow paradigm shift in cannabis use in the early 2010s.

The first medicines containing active ingredients derived from hemp were approved in the US in the 1980s; in Europe, the products only became official medicines in the late 1990s, and their use only became widespread in the 2010s. To resolve this contradictory situation, the various countries that have signed up to the Convention have adopted various solutions, relying in part on the experience gained during the operation of the coffee shops.

The most commonly used method was a referendum to decide whether to allow the use of cannabis derivatives. As a result, the use of marijuana for medical purposes has been authorized in Oregon and Washington since 1998, and in Colorado since 2000.

The year 2012 was crucial for the recreational marijuana use. In November 2012, three US states (Oregon, Colorado and Washington) held referendums on the use of hemp for recreational purposes. As a result of the referendum, Colorado and Washington became the first states to legalise the consumption, possession and sale of marijuana for recreational use. As with alcohol, the minimum age for legal possession was set at 21 and rules were introduced on driving after consumption. Then, two years later, legalization was also decided in Oregon and Alaska.

In the US, it was a significant step in the process of legalizing the use of Cannabis, when voters in nine Member States were able to vote to free the use of Cannabis at the same time as the November 2016 elections. In California, Massachusetts, Maine, and Nevada, voters voted to legalize recreational use, while in Arkansas, Florida, Montana, and North Dakota, voters voted in favour of medical use. (In California, marijuana use for medical purposes had already been legal since 1996.

In 2019, the WHO, which has so far been very conservative in terms of drug use, has also advocated rethinking the issue of cannabis use and some liberalization.

The Expert Committee on Drug Dependence, the WHO's independent scientific advisory body, based on the results of a multi-year review process, scientific assessment, evaluation of potential health risks and consideration of the expected therapeutic benefits, has proposed in a letter to the UN Secretary-General on 24 January 2019, among other things, the removal of cannabis and cannabis resin from Schedule IV of the 1961 Convention.

Accepting the WHO proposal, the UN Commission on Narcotic Drugs voted to change the classification of cannabis in the international drug convention at its December 2020 meeting. The Commission has de facto acknowledged the medicinal role of cannabis by limiting its inclusion to the much lighter Schedule I.

(At the December CND meeting, Hungary, as the only EU member state, described the WHO proposal as a manifestation of drug liberalization and voted against it.)

From all this, it can be seen that the paradigm shift in the Cannabis issue has begun, and this process will certainly not stop, and positions, arguments and counter-arguments will continue to be strained in the future.

Cannabis liberalisation in most countries typically takes two forms. Most countries that have embarked on liberalization have legalized only medical use (with different conditions for each country), so Argentina, Austria, Australia, Belgium, Brazil, Chile, Colombia, Chile, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany,

Greece, Ireland, Israel, Italy, Luxembourg, Malta, Mexico, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Switzerland, Turkey, United Kingdom and the Netherlands. In addition to medical use, recreational / enjoyment use has also become legal (apart from the US Member States mentioned earlier) in Uruguay since 2013 and in Canada since 2018.

The continuity of the Cannabis liberalization process is indicated by the fact that a number of countries that have authorized medicinal use in recent years, such as Argentina, Australia, Bolivia, Chile, Colombia, Croatia, the Czech Republic, Estonia, Israel, Luxembourg, Malta, Peru, Portugal, Slovenia, Spain, and Switzerland have not yet legalized recreational consumption, but have begun to decriminalize it in different ways and under different conditions.

Based on the above, we are witnessing a paradigm shift in the use for human consumption of various derivatives of the hemp plant, which contains hundreds of different active ingredients, including the highly psychoactive THC, and it seems very likely that the half-century-long strict ban is coming to an end. In the debate between the arguments for and against consumption, which has been in opposition for many years, it is very much the case that public opinion in more and more countries is shifting towards acceptance rather than prohibition.

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1937_in_Uneasy_Encounters_The_Politics_of_Medicine_and_Health_in_China_1900-1937_edited_by_Iris_Borowy_Frankfurt_am_Main_Berlin_New_York_Oxford_Peter_Lang_2009 [accessed on 28 January 2017].

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Sexual Crimes Against Chlidren and a Ceriminological Research on the Offenders Thereof

Alexandra Hurtony*

Abstract

Nowadays, taking action against perpetrators of sexual offenses against children is at the center of interest not only for lawyers, but also for the society. In Hungary this social opinion was considered and reflected in Act LXXIX of 2021 on the "anti-pedophile" amendments to certain Acts. As the title suggests, the Act resulted changes to a number of Hungarian legislation, most importantly to the provisions of Act C of 2012 on the Criminal Code. This study aims to review and evaluate the current substantive criminal law instruments for combating sexual offenses against children in Hungary, in particular, the stricter measures against pedophile offenders. For that end, a criminological analysis of the perpetrators of sexual assault against children is essential, as practical results can be formulated into criminal policy.

Keywords: *sexual crimes, sexual offenses against children, anti-pedophile, Hungarian legislation, criminological analysis of pedophile offenders*

I. Introduction

Every age and society has its own sexual culture, which is determined by religious and moral traditions. Societies are changing, evolving, and sexual culture follows these changes. Accordingly, it is far from being unified, and it is divided into different levels and types depending on the cultural approach[1]. However, it is also noteworthy that sexual relationship between a child and an adult is „*mala per se*" – hence it has always been regarded as a violation against the basic norms of communal coexistence, regardless of the socio-political contexts – and has therefore always been strictly punished. Nowadays, taking action against perpetrators of sexual offenses against children is at the center of interest not only for lawyers, but also for the society. Protecting the physical, mental, but especially the sexual development of children is a fundamental social need, since the sexual abuse against them is severely condemned by the society. According to Balogh and Virágh, the reason for this is that "*a physically and mentally immature child in a dependent position is unable to perceive or understand sexuality due to his or her vulnerability and immaturity and as a consequence of this position, the abuse may cause him or her immeasurable damage*".

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[1] V. Szilágyi, *Szexuális kultúránk állapotáról [About the state of our sexual culture]*, in *Bűnügyi Szemle* no. 4-5, 2000, p. 6.

In Hungary, the results of a study – published by the National Institute of Criminology in 1996 – reflect the position of the Hungarian public on sexual offenses. According to this study, respondents considered the latter to be the most serious type of crime right after crimes against life. They also expressed that both offenders against life and sexual offenses deserve increased penalties as a consequence of their crimes[2].

This social opinion was considered and reflected in Act LXXIX of 2021 on the "anti-pedophile" amendments to certain Acts (hereinafter: Act LXXIX of 2021). As the title suggests, the Act resulted changes to a number of Hungarian legislation, most importantly to the provisions of Act C of 2012 on the Criminal Code (hereinafter: Criminal Code). This study aims to review and evaluate the current substantive criminal law instruments for combating sexual offenses against children in Hungary, in particular, the stricter measures against pedophile offenders. For that end, a criminological analysis of the perpetrators of sexual assault against children is essential, as practical results can be formulated into criminal policy. Utilizing the results of criminology as a discipline, they can justify the introduction of certain criminal law provisions.

It is to be noted for this particular research that in Hungary there are no adequate domestic researches with a large number of samples or with extended follow-up studies on the criminological characterization of perpetrators of sexual offenses against children. As confirmed by Drexler and Somogyvári; "*Such comprehensive, comparable studies and databases are not currently available in Hungary, there is only limited information on the size of the group in the category of sex offenders. There is no previous research at all on their characteristics, motivation or groups of perpetrators*"[3]. This is especially true for researching of recidivism, for which longitudinal (long-term) data on the crime is essential. In view of this, a significant amount of foreign sources can be relied on while researching the topic.

It is also important that sexual acts against children are analyzed by several social sciences, therefore, the definitions they use often cover psychological and psychiatric categories (such as pedophilia) or social phenomena (domestic violence)[4].

II. Criminal law instruments to protect children

When declaring an act punishable and determining the penalties and measures, certain requirements of the rule of law must be taken into account, from which sexual offenses committed against children are no exception. According to Lévai; „*In order to protect the fundamental rights of its citizens and residents and to fulfill its international obligations, the State shall be entitled to criminalize and punish certain acts in such a way as to both respect the freedoms guaranteed by the Constitution and to guarantee the rights of victims*"[5]. The penalization of sexual acts against children is indisputable.

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[2] J. Kó, G. Virág, *Lakossági vélemények a szexuális erőszakról [Public views on sexual violence],* in F. Irk (ed.) *Kriminológiai és Kriminalisztikai Tanulmányok [Criminology and Forensic Studies]*, 35/1998, pp. 250-275.

[3] D. Bernadett, M. Somogyvári, *A szexuális bűnt elkövetők hazai vizsgálata büntetés-végrehajtási statisztikák alapján [Domestic investigation of sex offenders based on penitentiary statistics]* in *Belügyi Szemle*, no. 3, 2015, p. 67.

[4] *Idem*.

[5] M. Lévay, *A büntető hatalom és lehetséges korlátai egy alkotmányban, különös tekintettel a bűncselekménnyé nyilvánításra és a büntetésekre [The criminal power and its possible limits in a constitution, with particular regard to the qualification as a crime and the punishments]*, in Pázmány Péter Katolikus Egyetem [Pazmany Law Working Papers], no. 24, 2011, Budapest, p. 3.

Since criminal law is not expected to solve social and educational policy tasks, it enters when the sanctions of social means and other rights are no longer sufficient and unable to achieve the desired goal[6].

The special nature and material weight of sexual assaults on children were already emphasized by the legislator when drafting the Criminal Code in effect. Contrary to the previous structure of the Criminal Code, „crimes against sexual freedom and sexual offenses" are now penalized independently under chapter XIX. Before that, these crimes were regulated under the chapter on crimes against marriage, family, the youth and sexuality[7]. By the restructuration, the legislator aimed to give a legal relevance to the fact that sexual crimes are indeed distinctive crimes, hence should be criminalized independently.

The general justification of Act LXXIX of 2021 also emphasizes that Hungary protects children through special measures, and that all children have the right to the protection and care necessary for their proper physical, mental and moral development. The explanatory memorandum also highlighted that since 2010, the government has made a number of provisions to protect children. It has been ensured that those who have committed serious crimes against children are not allowed to engage in activities related to the upbringing, supervision, care and treatment of children (Act CCXLV of 2013); additionally, statute of limitations does not apply to serious offenses against children, in particular sexual offenses (Act LXV of 2014); a permanent ban on occupation imposed on those who have committed a sexual offense against a child has been stipulated (Act XCV of 2017 and Act CXLIX of 2017); the penalty for sexual intercourse with a person under the age of twelve has been tightened (Act CLXXVII of 2017); other elements of the ban on occupation has been more strictly regulated accordingly (Act CXVII of 2018); the elements of human trafficking have been changed and the penalties for sexual offenses against children have been increased (Act V of 2020); the principles of punishment for violent crimes against persons committed against a relative have been determined more strictly (Act CVIII of 2020)[8].

Actions against sexual abuse of children are reflected in substantive and procedural criminal law as well as in enforcement law. Substantive criminal law expresses the physical, mental and healthy sexual development of children as a value to be protected, not only through the creation of elements of crimes that penalize different behaviors and the severe penalties associated with them, but also through a number of other legal institutions, such as the exclusion of statute of limitation period or prolonging the starting date of the commission of the crime, as well as the compulsory application of the ban on occupation. Act LXXIX of 2021 has also been amended in a strict manner. The introduction of a register of sex offenders and regulating the scenario of practicing a profession despite the ban on occupation are important novelties.

The punishment of a sexual conduct committed against a person under the age of 18 is included in two types of regulatory constructions in the current Criminal Code: they are either regulated as "stand-alone" crimes (such as Sexual Abuse, Exploitation

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[6] V. Bérces, A. Domokos, *A családon belüli erőszak szankcionálásának büntetőjogi lehetőségeiről [On the criminal law options for sanctioning domestic violence]*, in *Jogelméleti Szemle*, no. 3/2017, p. 77, http://jesz.ajk.elte.hu/2017_3.pdf [accessed on 11 November 2021].

[7] Act IV of 1978 on the Hungarian Criminal Code, Chapter XIV.

[8] Act LXXIX/2021 on stricter action against pedophile offenders and amending certain laws for the protection of children, General justification, https://njt.hu/jogszabaly/2021-79-K0-00 [accessed on 15 November 2021].

of Child Prostitution, Child Pornography). The victim of these crimes can only be a minor. Or, the other method of the Code is to punish more severely an existing crime if it is committed against a child (Sexual Violence, Sexual Exploitation). The scope of the latter offenses has been expanded as a result of the amendment, as the case of harassment against a minor who has not reached the age of eighteen has been regulated as an aggravated assault.

It is worth noting that in the case of sexual abuse, the commission of a sexual act against a person under the age of fourteen is *de facto*, meaning that it does not mitigate the criminal responsibility if the perpetrator had no knowledge on the actual age of the victim.

Punishment rates for the most serious forms of sexual violence have also been risen. The penalty for violent or presumed social abuse committed against a person under the age of twelve, and the perpetration of the abuse or social offense committed against a person under the age of eighteen, ranges from five to twenty years. In the event of the cumulation of these qualifying circumstances, the sentence shall also increase, and a term of imprisonment of ten to twenty years may be imposed in the case of violent abuse of power or social offenses committed against a person under the age of twelve.

The statute of limitations shall not start until the victim reaches the age of 21 in the case of sexual offenses that are punishable by more than the five-year inprisonment. Act LXXIX. of 2021 sought to enforce the protection of minor victims of serious sexual offenses through an existing system of instruments, exclusion from parole, as a general rule, and a system of additional safeguards for exceptional cases. Therefore, it also excludes the possibility of parole for persons sentenced to imprisonment for offenses against sexual freedom and sexual morality punishable by imprisonment for a term of eight years or more. As factual behaviors or circumstances may be conceivable in the new case, which are not necessarily related to the most serious offenses, exclusion from parole may be waived in individual cases that deserve special consideration, subject to a strict security regime[9].

The amendment also made changes in the Labor Code. The conditions of employment became stricter, since according to the current rules of the Labor Code, an employer in the field of educating, supervising, caring for or treating a minor is prohibited from employing the perpetrator of a sexual offense against a minor. This has also been extended to leisure, to employers providing sport-related services. As a result of the amendment, the definitive ban on occupation also applies to perpetrators of child pornography[10].

The mandatory scope of the order of probational supervision has also been supplemented, including the probation period for imprisonment for the offense committed against a person under the age of eighteen for the offense of sexual freedom and sexual morality[11].

Act LXXIX. of 2021 introduced the "register of pedophile offenders" which has not existed in the Hungarian legal system before. The legal institution is a novelty only in Hungary, as it is already used in many European Union countries. In this context, it is important to point out the provision of Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of

[9] *Ibid*. Detailed justification for § 15.
[10] *Ibid*. Detailed justification for § 12.
[11] *Ibid*. Detailed justification for § 17.

children and child pornography and replacing Council Framework Decision 2004/68/JHA. The Directive states that" *administrative measures may also be considered, such as the registration of persons convicted of the offenses referred to in the Directive in a sex offender register. Access to such records shall be restricted in accordance with national constitutional principles and relevant data protection rules*"[12].

It is clear from the settled case law of the European Court of Human Rights (hereinafter: ECtHR) that the storage of personal data in criminal records (by police and national security authorities) may be in breach of Article 8 of the European Convention on Human Rights. A number of ECtHR judgments deal with the justification for intervention[13], one of which relates specifically to the register of sex offenders.

In the B.B contra France case[14], the applicant was convicted of a sexual offense against minors aged 15 as a person in a position of trust. According to the facts, he served his prison sentence in 2000, and a year later he requested that the details of his conviction be deleted from the criminal record, but his request was rejected. In 2004, a French Act set up a national judicial database of persons convicted of a sexual offense and the applicant was informed of his inclusion in the database. The ECtHR has ruled that the inclusion of a person convicted of a sexual offense in a national judicial database falls within the scope of Article 8 of the European Convention of Human Rights. However, given that adequate data protection safeguards have been put in place, including that the data subject may request the deletion of the data and that the time for storing the data and access to the data is limited, a balance has been struck between competing public and private interests. The ECtHR concluded that France had not infringed Article 8 of the European Convention of Human Rights.

The aforementioned Hungarian amendment justified the introduction of the register with regard to the mental state of the victims, with its serious mental and other consequences as a result of the crime: Sexual offenses committed against a child can have serious psychological and physical consequences. According to surveys, 51-75 percent of sexually abused children later develop psychiatric problems. These consequences are even more frequent and severe if the perpetrator is a family member, close acquaintance, or a person with whom the child has a personal relationship, or who may feel unconditional because of their social status or role in the child's life. That is why it is vital for people who come into direct contact with children to be trusted[15].

The introduction of the register is intended to prevent crimes against sexual freedom or sexual morality committed against children, namely by controlling persons who come into direct contact with children. In terms of practice, the data requester can enter the data request interface after electronic identification (customer gateway), for which it is necessary to enter the name of the data subject. Disclosure of the data relating to the data subject may be requested on the surface only by an adult

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[12] Directive 2011/93/EU of the European Parliament and of the Council (43). https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX:32011L0093, [accessed on 15 November 2021].

[13] See, for example, *Aycaguer v. France*, 8806/12, June 22 2017; *M.K. v. France*, 19522/09, April 18 2013.

[14] *B.B. v. France*, 5335/06, 17 December 2009.

[15] Act LXXIX of 2021 on justification of the law LXXIX of 2021 on stricter action against pedophile offenders and amending certain laws for the protection of children. To the law, General justification, https://njt.hu/jogszabaly/2021-79-K0-00 [accessed 15 November 15 2021].

who is a relative of the child or who is bringing up, supervising or caring for the child. Through the register, the surnames and forenames of the convicts, the year of birth, the place of residence restricted to the settlement, the portrait and the data on the crime committed by him or her can become known.

In view of the above, it can be seen that the current Criminal Code of Hungary relies on the deterrent effect of the law on sexual retaliation against children for retaliation on the one hand, and on the exclusion of the possibility of parole. However, the latter provision also seeks to eliminate the possibility of re-offending, as does the introduction of a register of sex offenders. The basic premise known in criminal law that not only the severity but also the inevitability of a punishment has a deterrent effect is therefore relevant to the amendment of the limitation provisions and to the elimination of non-prosecution.

A research conducted at the National Institute of Criminology in 2016 started the examination of the criminal proceedings in Budapest and five counties (Pest, Győr-Moson-Sopron, Vas, Borsod-Abaúj-Zemplén, Szabolcs-Szatmár-Bereg) for violent sexual crimes closed in 2015. A total of 153 cases were investigated. According to the research, the majority of crimes against children are committed within the family, and the vast majority of these crimes are related to the sexual abuse and abuse of children[16]. Other research has also confirmed that the perpetrators of such crimes are foreigners only in the least percentage (5-8%), hence, they come primarily from the families and immediate surroundings of the victims. In this context, important provisions are those relating to the prohibition of employment and the exclusion of employment in special child-related jobs, as it is possible to prevent the establishment of a potentially abusive relationship with regard to persons who pose a potential risk to children, thus preventing crime.

However, it is also important to see that the application of the various strict legal provisions already require a final judgment in which the perpetrator's criminal responsibility has been established. In addition, the extent to which these provisions facilitate the reintegration of perpetrators into society may be criticized. It is also questionable whether strict actions against perpetrators are indeed intended to protect the interests of children or merely satisfy society's need for retaliation. There is no doubt, however, that the stronger action against perpetrators of sexual offenses against children as a result of the amendment is strongly geared towards a punitive rather than a perpetrator treatment approach.

It should also be emphasized that the protection of children is reflected not only in substantive criminal law but also in criminal procedural and enforcement law. In criminal procedure, the possibility of using covert means subject to judicial authorization to facilitate the detection of offenses against them may be considered a means of protecting children, but measures falling within the scope of "special treatment" in the spirit of child-friendly justice may also be considered as such. In addition to the segregation of the offender from society in the execution of the sentence, it is important to facilitate the reintegration into society by improving its personality.

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[16] K. Parti, A. Solt, G. Virág, *Gyermekkorúak meghallgatása a büntetőeljárás során Magyarországon az európai és nemzetközi standardok tükrében [Interviewing children during criminal proceedings in Hungary in light of European and international standards],* in, Országos Kriminológiai Intézet, *Kriminológiai Tanulmányo*k (National Institute of Criminology, *Criminological Studies*) 55, Budapest, 2018, p. 69.

III. Characteristics of perpetrators of sexual offenses committed against children

Several experts on the subject have stated that it is not possible to treat all sex offenders in the same way, as the reasons and motivations behind committing this type of crime are usually multifactorial, multidimensional, and a significant part of them (especially pedophiles) can be traced back to mental illness. Naturally, the manifestations of their sexual impulses are sometimes dangerous to the other party[17]. From the point of view of criminological investigation, it is necessary to try to define the group of perpetrators and to formulate what we mean by sex offenders and pedophiles. Much of the literature in the latter understands pedophiles and non-violent perpetrators, but it should be noted that the terms used actually cover a much wider range and are often misleading without a proper definition[18].

Sexual offender is a term which is still in search for a universally acceptable definition. Put it plainly and simply, a sex offender is one who offends sexually. However, sexual behaviors within a group or community are greatly influenced by prevailing sociocultural norms[19]. Whether it is the commission of a crime of any kind depends on whether the person commits the legal elements of the crime. If the answer is affirmative, he is a "perpetrator" from a criminal substantive point of view. Studies in the foreign literature examining the commission of sexual offenses use different definitions of the act, with similar terms being applied to the perpetrator like *'child sexual abuse' – 'child sexual abuser'*, *'sexual offence' – 'sexual offender'*, or *'pedophilia' – 'pedophile'*. The definition of 'child sexual abuse' was most accurately described by Finkelhor as *„sexual abuse of children The use of sexual violence or coercion if the victim is under the age of 13 and the age difference between the victim and the perpetrator is at least 5 years, or if the age difference between the victim is between 13 and 16 years and the victim and the perpetrator are at least 10 years*." Importantly, the use of coercion in this formulation may also manifest itself in the perpetrator's close relationship with the child and his or her subsequent manipulation of the sexual act[20].

Other studies have revealed a difference between the 'child sexual abuser' and 'sexual offender' categories. This discrepancy was manifested, among other things, in the motivation for the offense, as in the case of the 'child sexual abuser', the offense alleviated anxiety, loneliness and depression, while the 'sexual offender' was generally characterized by anger and anti-community behavior[21]. It is also important to point out that the category of 'child sexual abuser' cannot be identified with the category of 'pedophile' in the literature. Pedophilia is a paraphilia defined by the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-V) published by the

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[17] G. Pregunné Puskás, *A szexuális bűnelkövetők terápiás kezelésének tapasztalatai [Experiences in the therapeutic treatment of sex offenders]* in *Börtönügyi Szemle*, no. 1/2011, pp. 37–52.

[18] B. Drexler, M. Somogyvári, *A szexuális bűnt elkövetők hazai vizsgálata büntetés-végrehajtási statisztikák alapján [Domestic investigation of sex offenders based on penitentiary statistics]*, in *Belügyi Szemle*, no. 3/2015, p. 67.

[19] A. Aggrawal, *Paraphilias and Sexual Crimes-An Overview*, in A. Jamieson, A.A. Moenssens (eds.), *Wiley Encyclopedia of Forensic Science,* Edition 1, Chapter: *Paraphilias and Sexual Crimes – An Overview*, Publisher: Wiley, 2009, p. 1.

[20] J.J. College, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002*, Washington, DC: United States Conference of Catholic Bishops, 2004, p. 52.

[21] D.L. Polaschek, T. Ward, S.M. Hudson, *Rape and rapists: Theory and treatment*, in Clinical Psychology Review, 17, 1997, pp. 117-144.

American Psychiatric Association. Persons with a pedophile diagnosis may become offenders, but they do not necessarily commit a crime, so the two concepts cannot be paralleled. Nevertheless, there is no doubt that if a person with a pedophile diagnosis becomes a criminal, he or she should be considered a sex offender. Pedophilia is a sexual paraphilia, which means sexual attraction, not the act itself which latter is sanctioned by law.

Some studies link the perpetrator to the potential victim, so that a particular victim is related to the specific type of offender. Thus, for example, rapists often commit crimes against adults and peers[22], while child sexual abusers do the same for children[23].

An important feature is that the majority of perpetrators are male. A research has found that only 1-6% of perpetrators are women. The gender of the victim and the relapse of the perpetrator may also be related. According to one study, the number of recidivists who abuse a boy is twice as high as that of an offender who abuses a girl child[24]. However, a study also showed that perpetrators who commit a crime against a girl child are reported twice as many casualties as those who committed it against a boy[25]. However, recent studies have also found that the highest number of victims, crimes and recidivism offenders who have committed sexual offenses against minors of both sexes are among the perpetrators[26].

Some scientific dissertations place the family at the center of the definition of the perpetrator and distinguish between 'extrafamiliar' i.e. out-of-family and 'intrafamiliar' i.e. intra-family sex offenders and examine their characteristics27. For example, 'intrafamiliar' offenders are less diagnosed with psychopathy as well as pedophilia, while the latter are found to be more common among 'extrafamiliar' offenders[28].

It is important to mention that the vast majority of children who experienced abuse knew the perpetrator. Thirty percent were molested by a family member and 60 percent by someone outside the family but known to the child (neighbor, coach, family friend etc.)[29]. 10 percent of the children surveyed were molested by a complete stranger. According to other research, 60-70% of offenders have a close relationship with the child: a (close) relative, a teacher, a family friend, a coach, or someone who can easily contact the child. The same was confirmed by a domestic study, the conclusion of which is that the child should not be feared by strangers. The research examined a

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[22] L.M.J. Simon, *Do criminal offenders specialize in crime types?* In Applied and Preventative Psychology 6, 1997, pp. 35-53.

[23] L.M.J. Simon, B. Sales, A. Kasniak, M. Kahn, *Characteristics of child molesters: Implications for the fixated-regressed dichotomy*, in Journal of Interpersonal Violence, 7, 1992, pp. 211-225.

[24] V.L.Quinsey, *Men who have sex with children*, in D.N. Weisstub (Ed.), *Law and Mental Health: International Perspectives*, vol. 2, 1986, pp. 140-172.

[25] G.G. Abel, J.V. Becker, W.D. Murphy, B. Flanagan, *Identifying dangerous child molesters*, in R.B. Stewart (ed.), *Violent Behavior: Social Learning Approaches to Prediction, Management, and Treatment*, New York, Plenum Press, 1981, pp. 53-63.

[26] D.A. Simons, C. Tyler, *The self-regulation and good lives models: Analysis of primary goods and offender type*, Symposium presented at the 29th Annual Conference of the Association for the Treatment of Sexual Abusers, Phoenix, 2010.

[27] D.G. Fischer, W.L. McDonald, *Characteristics of intrafamilial and extrafamilial child sexual abuse*, goo.gl/qgypbl 1998 [accessed on 15 October 2016].

[28] M.E. Rice, G.T. Harris, *Men who molest their sexually immature daughters: Is a special explanation required?,* in Journal of Abnormal Psychology, 111, 2002, pp. 329-339.

[29] American Psychological Association, *Understanding and Preventing Child Abuse and Neglect*, goo.gl/7izlG2, 2016 [accessed on 15 October 2016].

legally completed case of sexual violence and sexual coercion in respect of cases occured in 2017 in the country's entire data set, which covered 263 criminal records. As a result of the research, it was found that the criminal records show that 89% of the victims knew the perpetrator through their friends or other contacts (289) and 48% (139) of these persons were family members[30].

The various studies define the categories of perpetrators on the basis of the motivation and reasons for the perpetration, in which the circumstances of the perpetration are also a priority. Among the theories explaining sexual intercourse with children, the theory that considers the most important factors listed above is named after David Finkelhor, the so-called "precondition theory". As early as 1984, Finkelhor pointed out that a comprehensive theory for the analysis of sexual abuse against children should explain why some adults are able to feel sexually aroused towards children and, at the same time, why they are unable to restrain them. The theory should also be able to explain why some individuals are unable to meet some of their emotional needs (e.g., intimacy) with adults and why they turn to children to form an inner relationship (sexuality, support, friendship)[31].

According to Finkelhor, the factors discussed as an explanation for sexual abuse against children can be grouped into four preconditions. The first factors are related to sexual motivation. Motivations can be divided into three groups; the first is 'emotional congruence', which means the match between an adult's emotional needs and a child's characteristics; it may be manifested in the fact that the adult has an increased need for a sense of power that can be easily developed for children due to their inexperience and age, so they turn to them. "Stuck, block" can also appear as a motivation when the perpetrator is unable to meet his or her needs in a socially acceptable way, which is why he or she seeks the company of children. In Finkelhor's theory, "deviant sexual arousal" may also be a motivation that may indicate the category of pedophilia as paraphilia[32].

The existence of motivation alone is not enough, it is also necessary for the perpetrator to overcome his internal barriers to inciting him or her to have sex with children, ie his or her actions to appear in the outside world. How this is done is a key question in this regard. According to Finkelhor, the removal of barriers can be facilitated by the consumption of alcohol or other substances, impulse disorder in the person of the perpetrator, psychosis, incest, or even the presence of severe stress (e.g., loss of a job, death of a relative). Control can also be loosened by social attitudes, such as an environment that favors patriarchal rights of fathers or sexual interest in children[33].

The overcoming of internal barriers is followed by the overcoming of external barriers, which is an opportunity to create an infringement. This can happen after careful and lengthy planning, but it can also result from taking advantage of a particular situation. Finkelhor pointed out that there could be a number of such situations, such as the absence of a mother or carer and a lack of proper supervision of the child[34].

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[30] R. Garai, *Kitől kell félteni a gyermekeket? Kiskorúak sérelmére elkövetett szexuális bűncselekmények a tényadatok tükrében [Who should children be afraid of? Sexual crimes against minors in the light of facts]*, in Országos Kriminológiai Intézet – Kriminológiai Tanulmányok (National Institute of Criminology – Criminological *Studies)* 58, Budapest, 2021, pp. 212-214.

[31] T. Ward, D. Polaschek, A. Beech, *Finkelhor's precondition model of child sexual abuse: A critique* in *Psychology, Crime & Law*, no. 7:1-4, 2008, pp. 294-295.

[32] *Ibidem*.

[33] *Idem*, p. 296.

[34] *Idem*, pp. 296-297.

If the preconditions listed above are met, the perpetrator typically has access to the child. You can then use a number of strategies to acquire and maintain sexual intercourse with your child; from giving a gift to desensitizing a child to sexual intercourse, but it can be an emotional addiction or even the use of threats or violence[35].

Finkelhor's theory explains why some adults are able to feel sexually aroused towards children and, at the same time, why they are unable to restrain them. By understanding the theory, the risk factors of becoming a perpetrator can also be learned, by which the realization of the commission of a crime could be reduced.

IV. Conclusion

There is no doubt that trauma caused by experiencing sexual abuse in children determines and distorts the emerging personality. Therefore, childhood grievances – especially if they are chronic and recurrent – are not only associated with current stress symptoms and anxiety, but also fundamentally affect the whole personality[36]. On the one hand, a childhood concussion can cause emotional, relationship problems – anxiety, depression, lack of confidence, inability to intimacy, sexual problems etc. – until adulthood. On the other hand, it fundamentally transforms thinking: it changes the notions of the security of the world, the reliability of people, the predictability of events, the notion of self-efficiency[37]. Other studies have shown that children who have been victims of sexual abuse are more likely to have post-traumatic stress disorder and other anxiety disorders, depression and suicidal ideation[38].

In the view of all these, criminal law takes strict measures against sexual offenses committed against children. The study concludes that the provisions of the Hungarian Criminal Code are shifting towards deterrence by severe penalties and other legal institutions, as well as retaliation against perpetrators, legitimized by public opinion. This process is described in Act LXXIX of 2021. The stricter regulation introduced as a result of an enactment of the law. The law also saw a reduction in the recidivism of offenders in the introduction of strict criminal law provisions (exclusion from the possibility of parole), which may be particularly justified for offenders whose regular behavior has become part of their life cycle, or, given their extremely violent personality, the goal of crime prevention is best achieved through isolation.

It is clear that this type of crime requires decisive action, but it is also important to keep in mind the extent to which strict provisions help to reintegrate offenders into society. In addition, it is important to emphasize that the results of criminological investigations of perpetrators reveal different motivations and personality traits that could ultimately lead to a new approach to tackling the crimes in question and the treatment of perpetrators.

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[35] *Idem*, pp. 297-298.

[36] G. Virág, G. Kulcsár, A. Rosta, *Erőszakos bűnözés [Violent crime],* in A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay (eds.), *Kriminológia – Második, átdolgozott kiadás [Criminology – Second Revised Edition]*, Wolters Kluwer Hungary, Budapest, 2019, p. 577.

[37] *Idem*.

[38] J.J. Broman-Fulks, K. J. Ruggiero, R.F. Hanson, D.W. Smith, H.S. Resnick, D.G. Kilpatrick, B.E. Saunders, *Sexual assault disclosure in relation to adolescent mental health: Results from the National Survey of Adolescents*, in *Journal of Clinical Child and Adolescent Psychology,* 36(2): 260-266, 2007, Taylor & Francis DOI: 10.1080/15374410701279701, https://libres.uncg.edu/ir/asu/f/Broman-Fulks_2007_Sexual_Assault_Disclosure.pdf, 2007 [accessed on 16 October 2016].

Ultimately, the importance of recognizing sexual offenses against children, which requires a sense of social responsibility and a social environment that strengthens and protects the victim, cannot be overemphasized. As Garai points out; *"For all crimes, we have to talk about the hidden crowd, but for sexual crimes, this secret concealment is perhaps hiding an even higher-than-average, indefinite number of victims"*[39]. There are specific causes of criminal latency, including the criminal sensitivity of the victims and potential witnesses, the personality of the perpetrator and the victim, the influence of the perpetrator on the victim, and even the degree of trust in the authorities and the investigative activity of the investigating authorities[40]. In addition, it is key to recognize the signs of crime – or, worse, the signs of what has already happened, as a means of raising public awareness of the mechanism of such crimes and the symptoms of the victim's behavior and appearance. In this context, it is important to point out the appropriate intervention of the various "indicators" (kindergarten, school, health care institution etc.), as children who cannot expect safety and understanding from their families cannot count on other help. In the vast majority of minors who had suffered sexual abuse, they did not primarily tell their relatives what had happened to them or asked for help, but voted for outsiders (contemporary relationships, class teacher)[41].

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2. Act IV of 1978 on the Hungarian Criminal Code, Chapter XIV.

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[39] R. Garai, cited, p. 203.

[40] *Idem*, p. 204.

[41] G. Renáta, *A szexuális erőszak és a szexuális kényszerítés az országos jogalkalmazói gyakorlatban – Dogmatikai kérdések, eljárási és kriminológiai jellemzők [Sexual violence and sexual coercion in national law enforcement practice – Dogmatic issues, procedural and criminological characteristics],* in Országos Kriminológiai Intézet – Kriminológiai Tanulmányok (National Institute of Criminology – Criminological Studies) 57, Budapest, 2020, p. 68.

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Obtaining Samples in Serbian Criminal Procedure Code

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Abstract

The author discusses the obtaining of samples as evidence according to the Criminal Procedure Code of Serbia. The issue explained in the paper has not been the subject of regulation of the mentioned legal text for the most part so far, until the latest comprehensive legislative reforms. With the reform, the legislator introduced three types of sampling into the criminal procedure legislation. These are: obtaining biometric samples, obtaining samples of biological origin and obtaining samples for forensic-genetic analysis. Their regulation represents a step forward in this issue, so the author, in addition to explaining the solution in Serbia, provided the views of the European Court of Human Rights, which took a position on the legitimacy of sampling and storage, as well as the privilege against self-incrimination. In addition to introductory and concluding remarks in which he made proposals de lege ferenda, the author clarified each type of sampling, and finally provided a model from practice.

Keywords: *obtaining biometric samples, obtaining samples of biological origin and obtaining samples for forensic-genetic analysis, evidence, European Court of Human Rights*

I. Introduction

Crime dates back to the first human communities, and society is trying to counter this phenomenon in various ways. The response to crime must, of course, be timely, layered and synchronized[1]. Proving that a certain person has committed a crime, however, is often not easy. Therefore, proving is one of the most important activities undertaken by authorized subjects in criminal proceedings. Evidence can take many forms, ranging from, for example, a DNA fragment to a defendant's confession that he committed a crime[2]. Since this is an extremely wide area, at the beginning we will only draw attention to the necessity of making a distinction between the notion of evidence, the basis of evidence and the means of proof. Evidence means a fact on the basis of which the competent body determines the existence or non-existence of facts whose establishment in criminal proceedings is necessary, while the means of evidence are certain forms of law in which evidence appears. Finally, the evidence consists in

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[1] G. P. Ilić, B. Banović, *Oštećeni kao supsidijarni tužilac u krivičnom postupku [Damaged person as a subsidiary prosecutor in criminal proceedings]*, in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014, p. 99.

[2] C. Evans, *Criminal Justice: Evidence,* New York, Infobase Publishing, 2010, p. 7.

the facts that have already been established and from which a conclusion is drawn as to the truth of the fact to be proved[3]. The new Criminal Procedure Code provides for a number of novelties[4], and the process of reforming and simplifying criminal procedure in

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[3] S. Bejatović, *Krivično procesno pravo [Criminal Procedure Law],* Belgrade, Službeni glasnik, 2014a, p. 274.

[4] S. Bejatović, *Kaznena politika zakonodavca i reforma krivičnog procesnog zakonodavstva Srbije [Criminal policy and reform of the criminal procedural legislation of Serbia]*, in *Kaznena politika (zakon i praksa) [Criminal policy (law and practice)]* by S. Bejatović *et. al.*, Belgrade, Serbian Association for Criminal Legal Theory and Practice, 2013, pp. 5-148; S. Bejatović, *Neposredna optužnica kao instrument državne reakcije na kriminalitet [Indictment as the instrument of state reaction to the crime],* in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014b, pp. 253-268; G. Ilić, B. Banović, *op. cit.*, pp. 93-103; M. Škulić, *Charges and measures to ensure the presence of the accused and the smooth conduct of criminal proceedings*, in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014, pp. 143-175; G. Ilić, *Some public prosecutorial experiences in the application of the new CPC*, in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014, pp. 176-186;
A. Blanuša, *Pripremno ročište [Preparatory hearing],* in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014, pp. 269-280; D. Damjanović, *Odnos presude i optužbe [The relationship between the verdict and the accusation],* in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014, pp. 325-330; G. Bošković, D. Čvorović, *Indictment and abbreviated criminal procedure*, in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014, pp. 426-440; V. Petrović, *Nova rešenja u Zakoniku o krivičnom postupku Republike Srbije [New solutions in the Criminal Procedure Code of the Republic of Serbia],* in *Bilten sudske prakse Apelacionog suda u Kragujevcu, no. 2*, 2011, pp. 30-45; S. Manojlović, *Optuženje i pojednostavljene forme postupanja u krivičnim stvarima [Accusation and simplified forms of proceedings in criminal matters],* in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014, 2014, pp. 364-370; Đurđić, V., *Dokazne radnje [Evidence actions]* in *Priručnik za primenu Zakonika o krivičnom postupku [Manual for the Application of the Criminal Procedure Code]* by S. Bejatović, M. Škulić, and G. Ilić, Belgrade: Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2013, pp. 83-152; T. Bugarski, *Posebni krivični postupci u novom ZKP-u – skraženi krivični postupak I ročište za izricanje krivične sankcije [Special criminal proceedings in the new CPC – abbreviated criminal proceedings and a hearing for the imposition of a criminal sanction]* in *New solutions in the criminal legislation of Serbia and their practical application,* Zlatibor: Intermeks, 2013, pp. 212-228; S. Važić, *Nova rešenja kod mera za obezbeđenje prisustva okrivljenog i nesmetanog vođenja krivičnog postupka [New solutions in measures to ensure the presence of the accused and the smooth conduct of criminal proceedings],* in *New solutions in the criminal legislation of Serbia and their practical application*, Zlatibor, Intermeks, 2013, pp. 117-130; J. Tintor, *Branilac i nova rešenja u ZKP [Defense counsel and new solutions in the CPC]*, in *Nova rešenja u kaznenom zakonodavstvu i njihova praktična primena [New solutions in the criminal legislation of Serbia and their practical application]* Zlatibor, Intermeks, 2013, pp. 145-171; M. Tomić, *Pojednostavljene forme postupanja i nova rešenja u ZKP [Simplified forms of action and new solutions in the CPC],* in *Nova rešenja u kaznenom zakonodavstvu i njihova praktična primena [New solutions in the criminal legislation of Serbia and their practical application]* Zlatibor, Intermeks, 2013, pp. 183-190; V. Turanjanin, M. Voštinić, *O pojediim poteškoćama u primeni novog Zakonika o krivičnom postupku Srbije [On Certain Difficulties in the Application of the New Criminal Procedure Code of Serbia],* in *Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet [Prosecution and other criminal instruments of state response to crime]* by S. Bejatović, Zlatibor, Intermex, 2014a, pp. 466-481; V. Turanjanin, M. Voštinić, *"Tužilačka istraga – iskustva u BiH i početni problemi u Srbiji [Prosecutorial Investigation – Experiences in BiH and Initial Problems in Serbia]* in *Exchange of theoretical knowledge and practical experiences related to the*

order to achieve its greater efficiency, caused a number of changes in the field of evidence[5].

Detecting and proving the commission of a criminal offense, finding its perpetrator and imposing a criminal sanction in accordance with the law is the basic goal in criminal proceedings. All his rules serve this purpose[6], which raises the search for the truth to a high place in the procedure, but there are many obstacles along the way. The criminal procedure is constructed in such a way that certain values in it are in contradiction with the establishment of the accuracy of the facts[7]. The legislator has envisaged several means of evidence in Serbia (dividing them into regular and special), and in this paper the focus will be on obtaining of samples[8]. Namely, the new legal text on criminal procedure in Serbia contains significant innovations aimed at the use of modern technologies. The application of technology may not be the only solution in the fight against crime, but it is part of the solution[9], which requires both adequate equipment and preparation of persons to use it. Bypassing other solutions where there is a need to use these tools, for our consideration are important articles that regulate sampling, and according to the current CPC, there are three types: obtaining biometric samples, obtaining samples of biological origin and obtaining samples for forensic-genetic analysis. In the same time, we enter the field of forensics, as a science that analyzes the traces found at the crime scene, in order to determine the origin of the trace, and the connection between the trace and the act[10].

II. Obtaining samples

2.1.Obtaining biometric samples

„The field of evidence is no other than the field of knowledge“[11].

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work on the model of prosecutorial investigation and the concept of adversarial criminal procedure Sjenica, Univerzitet u Novom Pazaru, 20146 pp. 270-287; B. Cvetković, *Vanredni pravni lekovi i novi ZKP [Extraordinary legal remedies and new CPC]* in *Nova rešenja u kaznenom zakonodavstvu i njihova praktična primena [New solutions in the criminal legislation of Serbia and their practical application]*, Zlatibor, Intermeks, 2013, pp. 191-199; D. Lopušina, *Optuženje prema novom ZKP [Indictment under the new CPC]*, in *Nova rešenja u kaznenom zakonodavstvu i njihova praktična primena [New solutions in the criminal legislation of Serbia and their practical application]* Zlatibor, Intermeks, 2013, pp. 183-190.

[5] S. Bejatović, *cited*, 2013, pp. 5-148, Belgrade, Serbian Association for Criminal Legal Theory and Practice, 2013, pp. 36-47. Like other legislations in the region, the one of the Republic of Serbia urgently needed reform. It took courage for the legislator to enter into major reform efforts at all, or, as it is nicely said, the legislator will allow almost everything, tolerate almost everything, before he dares to embark on reform efforts. See J. Langbein, *Torture and Plea Bargain*, in *The University of Chicago Law Review vol. 46*, 1978, p. 19.

[6] W. Hassemer, *Human Dignity in the Criminal Process: The Example of the Truth-Finding*, in *Israel Law Review, vol. 44*, 2011, p. 186.

[7] M. Damaška, *Truth in Adjudication*, in *Hastings Law Review, vol. 49*, 1998, p. 305.

[8] This evidence is differently provided in criminal procedure codes. See, for example, V. Turanjanin, J. Stanisavljević, *Special Investigative Action in Baltic Countries*, in *Strani pravni život, 4/2021*, pp. 667-686.

[9] D. Makin, L. Miller, *DNA and Property Crime Scene Investigation: Forensic Evidence and Law Enforcement,* Waltham, Elsevier Inc, 2014, p. 3.

[10] J. Sretenov, *У којој мери ДНК може пружити чврст доказ? [To what extent can DNA provide solid evidence?],* in *Crimen,* vol. 2, 2014, p. 231.

[11] J. Bentham, *An Introductory View of the Rationale of the Law of Evidence for Use by Non-lawyers*

Establishing a person's identity by physical or behavioral characteristics has been known since early history, and Quintilian noted that the ear is able to distinguish voices, just as the eye can distinguish faces[12]. With the aim of establishing facts in the proceedings, impressions of papillary lines and body parts, buccal swabs and personal data may be taken, a personal description made, and a photograph taken (forensic registration of the suspect) of a suspect even without his/her consent [Article 140(1)]. Therefore, these samples are used to determine group affiliation by expertise, using appropriate biological methods, or they are used for DNA analysis[13]. There are many ways of identification and biometric methods, but all have their advantages and disadvantages[14]. Despite the name, the scope of the provisions governing the taking of biometric samples is much wider, including samples that are not used exclusively for biometric identification[15]. This group should also include individual samples that are, by mistake, classified as samples of biological origin, which will be discussed in more detail in the relevant part of the paper. This, as the legislator emphasizes, is about forensic registration of the suspect, while most of the activities are related to determining various individual body characteristics using biometric methods, which are used to identify and verify persons based on individual characteristics of the human body[16]. Biometrics is the automatic recognition of individuals, based on their biological or behavioral characteristics[17], while biometric identification methods include modern techniques based on the use of sophisticated devices for scanning, measuring and storing in a database of individual and immutable body features, which serve as a template for automatic comparison, comparative verification and identification of persons[18]. Although at first glance it seems to be relatively simple, in essence it is not, and the problems of resolving the identity of a person are grouped primarily into two categories: verification and identification of persons. Verification points us to the problem of confirming or rejecting the identity of a person, while identification is about establishing it[19].

When necessary for the purpose of establishing identity or in other cases of interest to the successful conduct of proceedings, the court may allow a suspect's photograph to be made public [Article 140(2)]. Therefore, publishing a photograph is not necessary,

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as well as Lawyers, Bowring edition, 1810, cited in T. Anderson, D. Schum, W. Twining, *Analysis of Evidence,* Cambridge, Cambridge University Press, 2005, p. 1; M.S. Pardo, *The Field of Evidence and the Field of Knowledge*, in *Law and Phylosophy, vol. 24, no. 4*, 2005, pp. 321-392.

[12] H. Lee, K. Toh, L. Li, *Advanced Topics in Biometrics,* Singapore, World Scientific, 2012.

[13] S. Bejatović, *cited.*, 2014a, p. 333.

[14] A. Jain, R. Bolle, S. Pankanti, *Introduction to Biometrics*, in *Biometrics: Personal Identification in Networked Society*, by A. Jain, R. Bolle, S. Pankanti, New York-Boston, Kluwer Academic Publishers, 2002, p. 4.

[15] G. Ilić *et al*. *Коментар Законика о кривичном поступку Србије [Criminal Procedure Code: A Commentary]*, Belgrade: Službeni glasnik, 2013, p. 375. Theoretically, identity means a set of general and special characteristics through which it differs from other persons and by which it can be identified, from which it follows that a person's identity includes personal identity (based on data acquired by birth), biographical in the process of life in the interaction of the individual with society) and biometric (which represents an identity based on unique physical characteristics or behavioral characteristics. See S. Paunović, D. Starčević, *Biometrijski sistemi za utvrđivanje identiteta [Biometric Systems for Identity Identification]*, Belgrade, Ministry of Internal Affairs, 2002-2004, p. 1.

[16] G. Ilić *et al*., cited, p. 375; B. Simonović, *Kriminalistika [Criminalistic],* Kragujevac, Pravni fakultet Univerziteta u Kragujevcu, 2004, p. 540.

[17] J. Pato, L. Millett, *Biometric Recognition: Challenges and Opportunities,* Washington, D.C., The National Academic Press, 2010, p. 1.

[18] B. Simonović, cited, p. 535.

[19] A. Jain, R. Bolle, S. Pankanti, *op. cit*., pp. 1-2.

but the entity in each specific situation assesses the necessity of publishing it. In the first case, which will probably be the most common case, it is necessary to determine the identity of the suspect, while in the second case it is about the factual circumstances on which the successful conduct of criminal proceedings depends.

In order to eliminate suspicion about being connected with a criminal offence, impressions of papillary lines and body parts and buccal swabs may be taken from an injured party or other person found at a crime scene even without their consent [Article 140(3)]. According to the Criminal Code of Serbia, the place of commission of a criminal offense means the place where the action was taken or omitted, as well as the place where the consequence occurred, but also any other place where objects and traces of the criminal offense can be found[20].

These actions shall be performed by a professional acting under an order of the public prosecutor or the court [Article 140(4)][21]. Therefore, in the first place, the functional competence for issuing the order on obtaining samples is divided between the public prosecutor and the court, and it depends on the phase of the procedure in which it is necessary to take this action. Secondly, this action will be undertaken by an expert. The expert who should take the described action does not have the status of an expert in criminal proceedings.

2.2. Obtaining Samples of Biological Origin

The obtaining of samples of biological origin and performance of other medical actions which are under the rules of the medical profession required for the purpose of analysing and establishing facts in proceedings may be conducted even without the consent of the defendant, except if it would cause harm to his /her health in some way [Article 141(1)]. If it is necessary to establish the existence of a trace or consequence of a criminal offence on another person, the obtaining of samples of biological origin and performance of other medical actions in accordance with paragraph 1 of this Article may be conducted even without the consent of the person, except if it would cause harm to his/her health in some way [Article 141(2)]. These actions shall be performed by a healthcare professional, acting on an order of the public prosecutor or the court [Article 141(4)]. The healthcare professional who should take the samples assesses the risk of damage to the health of the person from whom they are taken, and according to the case law, deficiencies related to the clinical examination, the presence of a doctor and the time of submitting a blood sample for alcohol analysis do not make such evidence that a court decision cannot be based on it[22].

A voice or handwriting sample may be taken from a defendant, injured party, witness or other person for the purpose of establishing facts in proceedings for the purpose of making comparisons [Article 141(3)]. The person who without a lawful

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[20] G. Ilić *et al*., cited, p. 375; B. Simonović, *op. cit.*, p. 290.

[21] Orders in criminal procedure are today under the supervision of the ECtHR. See, for example, V. Turanjanin, *Special Investigative Measures: Comparison of the Serbian Criminal Procedure Code with the European Court of Human Rights Standards*, in *International Journal of Evidence and Proof*, 26(1), 2022, pp. 34-60. DOI 10.1177/13657127211055230.

[22] Supreme Court of Cassation, no. 156/10 (23 March 2010); G. Ilić *et al*., cited, p. 377. A healthcare professional is a person who has graduated from the Faculty of Medicine, Dentistry, or Pharmacy, as well as a person who has completed another school of health care, and who directly as a profession performs health care in health care institutions or private practice, under special conditions prescribed by law [Article 165(1) of the Law on Helath Insurance; G. Ilić *et al. op. cit.,* p. 377].

reason (Article 68 paragraph 1 item 2), Article 93, Article 94 paragraph 1 and Article 95 paragraph 2) refuses to provide a voice or handwriting sample may be fined by the court by a fine of up to 150,000 dinars. Therefore, this measure cannot be taken against the will of the requested person. It may refuse to provide a sample only if it has a valid legal reason, which is assessed by the procedural body. Among the legal reasons that justify the rejection of a sample of voice and manuscript are primarily those based on the defendant's right not to state or deny an answer to certain questions, and to exclude / release from the duty to testify or answer certain questions. If it is not done for a valid reason, this person may still be forced to give a sample by fines. An appeal against the ruling pronouncing a fine shall be decided on by the panel. An appeal shall not stay execution of the ruling [Article 141(6)].

Prof. Bejatović and Đurđić quite rightly note that the classification of sampling of voice and manuscript is wrong, because it is not about samples of biological origin, and therefore the obtaining of the described samples should be provided among the provisions governing sampling of biometric origin, which we talked about in the first place this paper[23]. The need for this method of identification arises in cases, for example, blackmail that is carried out over the phone, in kidnappings and negotiations with the victim over the phone, wiretapping of telephone and other conversations of terrorists etc.[24]. By the way, the voice is considered to be one of the phenomena where it is difficult to distinguish between physical characteristics and behavioral characteristics, because it is a mixture of their characteristics[25].

2.3. Obtaining Samples for Forensic-Genetic Analysis

Forensic-genetic analysis means the analysis of deoxyribonucleic acid (DNA), that is, the determination of the genetic code unique to each individual. In general, the work of forensic geneticists depends on the laboratory, and thus on the specific country in question, and for our considerations it is important that this includes analysis of material collected at the scene of the crime and identification of human remains[26]. DNA has become an important tool in forensics for establishing human identity, especially in identifying perpetrators of serious crimes such as murder or rape, but it is also used in burglary and identification of human remains and missing

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[23] S. Bejatović, cited, 2014a, p. 332; V. Đurđić, cited, p. 112.

[24] B. Simonović, cited, p. 544. Voice, as a complex sound, in addition to linguistic, phonetic and acoustic character, also contains appropriate individual characteristics, thanks to which there are no two persons in the world who have identical voice characteristics (Simonović, B., cited, p. 544). Simply put, voice is a characteristic of the individual (A. Jain, R. Bolle, S. Pankanti, cited, p. 4; S. Furui, *Recent advances in speaker recognition*, in *Lecture Notes in Computer Science 1206, Proceedings of Audio- and Video Biometric Person Authentication AVBPA '97, First International Conference,* Berlin, Springer-Verlag, 1997, pp. 237-252). However, identification by voice can often be difficult, both in a situation where there are many samples and in situations where the quality of voice recording is poor due to microphones or communication channels. Difficulties in isolating the characteristics of the voice are caused by both health and emotional problems of the person whose voice recording is being studied (A. Jain, R. Bolle, S. Pankanti, cited, p. 5), and the voice changes due to age, acoustics, position or distance from the microphone.

[25] S. Paunović, D. Starčević, cited, p. 1; D. Dessimoz, J. Richiardi, Ch. Champod, A. Drygajlo, *Multimodal biometrics for identity documents*, in *Forensic Science International, vol. 167*, 2007, pp. 154-159.

[26] W. Goodwin, A. Linacre, S. Hadi, *An Introduction to Forensic Genetics,* Chichester, John Wiley & Sons, Ltd, 2007, p. 1.

persons[27]. Today, there are several methods of DNA analysis, and many are still being developed[28]. Although DNA is a huge step forward in proving, at the same time it is a means of evidence that is regularly challenged and reviewed[29].

By the way, the beginnings of forensic genetics date back to 1900, when Karl Landsteiner described the AB0 blood system, emphasizing that individuals can be grouped into different categories based on blood type. Sudden opportunities for the development of this area arose in the 60s of the last century, when the study of DNA began[30]. Around this time, the police began to monitor advances in technology, seeking space in the field of crime detection and crime prevention[31], although some roots of modern forensic science date back to the mid-19th century[32], and they have been maintaining their slow but constant development since the last quarter of the 19th century[33].

The usual task of forensic geneticists in comparative legislation is to take samples from the accused and the injured party and compare them with each other and compare them with samples from the scene of the crime[34]. With the help of DNA, we can safely exclude a specific person as a potential perpetrator, while positive DNA evidence can only with a high percentage of certainty indicate one person as the perpetrator[35]. Essentially, DNA evidence leaves little room for doubt as to the defendant's de facto innocence[36].

The legislator foresaw two situations in which an order is taken to take samples for forensic-genetic analysis: to identify the perpetrator of the crime or to establish other important facts, and to take samples from a convicted person for registration. If necessary, for detecting the perpetrator of a criminal offence or establishing other facts in the proceedings, the public prosecutor or the court may order the taking of samples for forensic-genetic analysis:

1) from the crime scene or other location where traces of the criminal offence are located;
2) from the defendant and injured party, under the conditions stipulated in Article 141(2) of CPC;

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[27] R. Thompson, S. Zoppiss, B. McCord, *An Overview of DNA Typing Methods for Human Identifi cation: Past, Present, and Future*, in *DNA Electrophoresis Protocols for Forensic Genetics*, by A. Alonso, New York, Humana Press, 2012, p. 3.

[28] D. Kaye, G. Sensabaugh, *Reference Guide on DNA Identifiation Evidence*, in *Reference Manual on Scientifi Evidence*, Washington, The National Academies Press, 2011, p. 131.

[29] J. Sretenov, cited, p. 232.

[30] W. Goodwin, A. Linacre, S. Hadi, cited, pp. 2-5.

[31] D. Makin, L. Miller, cited, pp. 2-3.

[32] W. Eckert, *Historical Development of Forensic Sciences*, in *Introduction to Forensic Sciences*, by W. Eckert, Boca Raton-New York-London-Tokyo, CRC Press, 1997b, p. 21.

[33] W. Eckert, *Introduction to the Forensic Sciences*, in *Introduction to Forensic Sciences*, by W. Eckert, Boca Raton-New York-London-Tokyo: CRC Press, 1997a, p. 11.

[34] W. Goodwin, A. Linacre, S. Hadi, cited, p. 1.

[35] We should not lose sight of the fact that DNA has proven to be an effective means of proving the innocence of convicts, due to wrongful convictions (K. Miller, *Wrongful Capital Convictions and the Legitimacy of the Death Penalty,* New York, LFB Scholarly Publishing LLC, 2006). False convictions simply still exist today as evidence of the imperfections of criminal justice systems, and there are notions that despite their existence, they are still insufficiently researched (G. Stratton, *Wrongfully Convicting the Innocent: A State Crime?*, in *Crit Crim*, 2015, p. 21).

[36] J. Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System,* New York-London, New York University Press, 2008, p. 4.

3) from other persons if there is one or more characteristics that bring them in connection with the criminal offence [Article 142(1)][37].

Therefore, the material condition for samples used for forensic-genetic analysis is reflected in the need to identify the perpetrator of the crime or establish other facts in the procedure, while the procedural condition is the existence of an order of the procedural body[38].

Obtaining samples for forensic-genetic analysis can be approached against the will of the accused and the injured party, unless damage to his health would occur. And finally, the question arises as to what is meant by a characteristic that a person associates with a crime. In theory, it is considered that this term does not mean a trace or consequence of a crime, but certain features that may be important for the identification of a person, such as anthropological characteristics and other features that make up a person's personal description[39].

In comparative theory, the question arose of the relationship between obtaining samples from a suspect and the privilege against self-incrimination. The European Court of Human Rights has held that the privilege against self-incrimination is primarily aimed at the defendant's right to defend himself by remaining silent, but cannot extend to material collected from the defendant, such as a breath or blood sample for DNA analysis[40]. But, in a decision close to this one, the court considered that there was a violation of the privilege against self-incrimination when the suspect swallowed a bag of cocaine, after which the doctor injected him with emetic, a means of vomiting. In this case, Article 3 of the European Convention of Human Rights was violated, because although the sample was basically taken against the suspect's will, the method used was far more difficult than when taking a blood or hair sample[41].

In a decision pronouncing a custodial criminal sanction, a first-instance court may ex officio order a sample for forensic-genetic analysis to be taken from:

1) a defendant sentenced to a term of imprisonment of more than year in connection with an intentional criminal offence;

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[37] This is much detailed regulation in comparison with the Criminal Procedure Code 2003, which is also emphasized by the ECtHR in *Dragan Petrović v. Serbia* (Application no. 75229/10, judgment 14 April 2020), §83: „Concerning this last point, the Court would note, in particular, that Article 131 §§ 2 and 3, as in force at the relevant time, provided, inter alia, that a blood sample could be taken from, or "other medical procedures" could be undertaken in respect of, any given person if this was deemed medically necessary in order to establish facts "of importance" to the criminal investigation, thus allowing such procedures in respect of a potentially very large group of persons. Conversely, Article 140 §§ 1, 3 and 4 of the new Code of Criminal Procedure indicates that buccal swab samples may be taken only from a suspect or, in order to "eliminate a suspicion of being connected to a criminal offence", from the victim or another person found at the scene of the crime. In those circumstances, the Court considers that it would be reasonable to assume that by adopting the clearly more detailed provisions regarding the taking of DNA samples in its recent Code of Criminal Procedure, the respondent State has itself implicitly acknowledged the need for tighter regulation compared with the earlier legislation in this sphere".

[38] M. Škulić, *Novi Zakonik o krivičnom postupku – očekivanja od primene [New Criminal Procedure Code – Expectations of Application],* in *Nova rešenja u kaznenom zakonodavstvu Srbije I njihova praktična primena [New solutions in the criminal legislation of Serbia and their practical application]*, Zlatibor, Intermeks, 2013, p. 41.

[39] G. Ilić *et al.,* cited, p. 379.

[40] *Saunders v. UK*, Application No. 19187/91, 1996.

[41] *Jalloh v Germany,* Application no. 54810/00, 2006; A. Ashwort, *Self-Incrimination in European Human Rights Law – a Pregnant Pragmatism*, in *Cardozo Law Review, vol. 30, no. 3*, 2008, pp. 751-774, p. 765; A. Choo, *Compelling the Provision of Information: the Privilege against Self-incrimination as a Human Right*, in *Legal Studies Research Paper no. 2010-2*, 2010, pp. 1-13, p. 4.

2) a defendant found guilty of an intentional criminal offence against sexual freedom;
3) a person who has been imposed a security measure of compulsory psychiatric treatment [Article 142(2)].

This must be a final decision, regardless of the legislator's failure to prescribe it. The keeping of records on the obtained samples, their safekeeping and destruction shall be regulated by the act referred to in Article 279 of the CPC [Article 142(3)]. However, it is no longer surprising that Article 279 does not regulate almost anything, except that the manner of keeping criminal records is regulated by the Government (Article 279). Essentially, the legislator had to adopt a legal text that would regulate the matter of keeping samples. As this is an extremely sensitive matter, which on the one hand encroaches on human rights and freedoms, and on the other hand is subject to abuse, adequate legal regulation is urgently needed[42]. For many years, Serbia remained one of the few European countries that did not have a regulated DNA registry, thus falling into the gap between criminal procedure solutions and realized possibilities in practice, and all together it contradicted the positions of the European Court of Human Rights and Freedoms.

Namely, one of the most famous decisions of the European Court in this matter was S. and Marper v. United Kingdom[43]. In short, S., as a minor (eleven-year-old), was deprived of liberty and charged with attempted robbery on 19 January 2001, during which his fingerprints and DNA sample were taken. However, on 14 June 2001, a verdict was rendered finding him not guilty of the crime. Michael Marper was arrested on March 13, 2001, accused of harassing his partner, his fingerprints were taken, and on June 14 of the same year, the proceedings against him were officially terminated due to reconciliation with his partner. Both applicants sought the urgent destruction of the samples taken from them. However, their requests were rejected because, according to the British law at the time, sampling was permanent after the arrest, without the possibility of destruction. After being rejected in all instances, the applicants appealed to the ECtHR, emphasizing that non-destruction of the samples taken violates their right to privacy. The ECtHR unanimously ruled that Article 8 of the European Convention on Human Rights was violated. In the procedure, the emphasis was placed on the question of whether the keeping of fingerprints and DNA samples of persons who are suspects, but have not been found guilty, is necessary in a democratic society. The court took the view that it was not. The only countries in Europe that had laws permanently retaining samples were England, Wales and Northern Ireland (paragraph 110 of the judgment), while other European countries have provisions in place in their legislation requiring or urgent destruction of samples and profiles after acquittal or within a certain period after obtaining[44]. Although it does not attract attention at first glance, which is why it is often ignored by the media[45], the fact is that the court also

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[42] B. Simonović, cited, p. 482.

[43] Applications nos. 30562/04 and 30566/04, 04 December 2008.

[44] However, despite the fact that the Strasbourg court placed emphasis on both the DNA profile and the fingerprints, in Italy the legislature limited in time only the storage of biological samples and DNA profiles, while fingerprints can be stored indefinitely (F. Crupi, *New Perspectives for the Protection of Personal Data in Criminal Proceedings in the European Union and Repercussions on the Italian Legal System*, in *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, by S. Ruggeri, Heidelberg: Springer, 2015, pp. 273-276).

[45] K. Michael, *The European Court of Human Rights Ruling against the Policy of Keeping Fingerprints and DNA Samples of Criminal suspects in Britain, Wales and Northern Ireland: The Case of S. and Murper v United Kingdom*, in *The Fourth Workshop on the Social Implications of National*

banned the storage of fingerprints, and not just DNA profiles. Finally, the court expressed concern about the high risk of stigmatizing the suspects, as innocent persons are equated with the convicted in this way (paragraph 122 of the judgment).

This decision led to changes in English legislation, so first in some verdicts, the Supreme Court found that the existing law is not in accordance with Article 8, (for example, R (on the application of GC) (FC) (Appellant) v The Commissioner of Police of the Metropolis (Respondent) и R (on the application of C) (FC) (Appellant) v The Commissioner of Police of the Metropolis (Respondent), dated 18 May 2011 and thereafter there were changes in the legislation. According to the Protection of Freedoms Act 2012, a distinction is made between defendants and accused for one of the qualifying offenses (qualifying offenses – certain crimes against sexual freedom, violence and terrorism) from the defendants who have only been arrested but not charged (section 3). In both cases, their previous convictions are taken into account, so if they have files, the retention of data is unlimited. In the first case, if the defendant has not been convicted, the data can be kept for a maximum of three years, and in the second, where he is not accused, also for a maximum of three years, but with the approval of the Independent Commissioner for Retention and Use of Biometric Material. For other offenses, the samples must be destroyed urgently, unless the conviction ends (section 4). Also, this legal text regulates in detail in which situations and for which criminal offenses permanent retention of samples may occur, and it is especially interesting that there is a provision which provides for retention of samples for up to two years due to national security, in cases where samples they were to be destroyed[46].

Serbia has relatively recently passed the Law on the DNA Registry (24/2018). However, this legal text has brought almost nothing new, and, unfortunately, does not solve the issue of preserving DNA fingerprints[47]. In sum, this law regulates the establishment and content of the national DNA registry of results of forensic genetic analysis of deoxyribonucleic acid for criminal proceedings, identification of missing or unknown persons and corpses, body parts, and processing of data obtained by forensic genetic analysis. and other issues of importance for keeping the Register (Article 1). In the sense of this law

1) DNA analysis, ie deoxyribonucleic acid analysis, is forensic-genetic analysis of biological material, performed for the purposes of criminal or identity determination procedure, which obtains DNA profiles, which are entered into the Register;
2) locus is a specific part of DNA molecules;
3) allele is a variant of a certain locus;
4) DNA profile is data that is the result of DNA analysis (a unique DNA profile is a DNA profile determined by analyzing an undisputed or disputed biological

Security. http://ro.uow.edu.au/cgi/viewcontent.cgi?article=10893&context=infopapers [accessed May 27, 2022].

[46] It is interesting to mention the data related to the destroyed samples. Namely, after the entry into force of this legal text, until October 2013, 1,766,000 DNA profiles taken from innocent persons were removed from the English National Database, then 1,672,000 fingerprint samples, also from innocent persons, and 7,753,000 DNA profiles were destroyed, of which 480,000 were taken from children. In the same period, 6,800 DNA profiles were taken and added to the database, from persons convicted of murder and sexual offenses (J. Beard, S. Lipscombe, *Retention of fingerprints and DNA data*, 2014, pp. 5-6).

[47] J. Stanisavljević, *DNK dokazi u krivičnom postupku [DNA Evidences in Criminal Procedure]*, Faculty of Law, Kragujevac, 2021.

sample originating from one person, while the mixed DNA profile is a DNA profile determined by analysis of a biological sample originating from more than one person);

5) European Standard Set (ESS) means an internationally accepted set of loci;
6) Interpol Standard Locus Set (ISSOL) is an internationally accepted set of loci used by Interpol;
7) biological sample, in the sense of this Law, is any biological material of human origin, which can be linked to a criminal offense or a sample taken for the purpose of establishing identity, on which an appropriate DNA analysis can be performed;
8) undisputed biological sample is a biological material taken from a person or corpse whose identity has been previously established;
9) the disputed biological sample is biological material of unknown origin (Article 2).

The register is kept by the ministry in charge of internal affairs through the competent forensic service. The Ministry is responsible for the accuracy of the data from the Register. The register is established for the purposes of conducting criminal proceedings and establishing the identity of missing or unknown persons and corpses and body parts. Data from the Register may be processed only in such a way as to achieve the purpose of processing for which the data were collected, ie data processing is not allowed on the basis of which physical, biochemical, physiological or psychological characteristics or specific hereditary traits can be established. Updating and deleting, retention periods and data protection measures in the Register are prescribed by a special law which regulates records and data processing in the field of internal affairs. Data from the Register may be exchanged and transferred to international organizations, ie states, in accordance with this and other laws (Article 4).

The register contains:

1) Database of DNA profiles determined from undisputed biological samples;
2) Database of DNA profiles determined from disputed biological samples and
3) Database of DNA profiles determined in criminal proceedings submitted from all DNA laboratories from the Republic of Serbia.

The database of DNA profiles determined from undisputed biological samples contains:

1) Collection of DNA profiles of persons over whom forensic registration was performed;
2) Collection of DNA profiles of persons for whom the court determined the taking of a sample by a decision on imposing a criminal sanction;
3) Collection of DNA profiles of persons convicted of criminal offenses determined in the law which regulates special measures for the prevention of committing criminal offenses against sexual freedom against minors;
4) A collection of DNA profiles submitted by the competent authorities in the framework of international police or judicial cooperation and
5) Collection of DNA profiles determined to eliminate suspicion (Article 5).

Furthermore, the database of DNA profiles determined from the disputed biological samples contains:

1) collection of unique DNA profiles of persons whose identity is established, as well as DNA profiles of other persons submitted for the purpose of their identification;
2) a collection of unique DNA profiles of corpses used to establish identity;
3) collection of unique DNA profiles obtained from disputed biological samples;

4) a collection of DNA profiles submitted by the competent authorities in the framework of international police or judicial cooperation and
5) a collection of mixed DNA profiles.

The database of DNA profiles determined in criminal proceedings submitted from all DNA laboratories in the Republic of Serbia contains:

1) collection of registered DNA laboratories containing: name of laboratory, address, contact details and accreditation data;
2) collection of determined DNA profiles from undisputed biological samples at the time of submitting data to the Registry;
3) collection of identified unique DNA profiles from disputed biological samples at the time of submission of data to the Registry.

Each individual collection contains its own special record of identification data, which contains: the database of DNA profiles determined in criminal proceedings submitted from all DNA laboratories in the Republic of Serbia contains:

1) collection of registered DNA laboratories containing: name of laboratory, address, contact details and accreditation data;
2) collection of determined DNA profiles from undisputed biological samples at the time of submitting data to the Registry;
3) collection of identified unique DNA profiles from disputed biological samples at the time of submission of data to the Registry.

Each individual collection contains its own special record of identification data, which contains: DNA profile, name, surname (previous surname), parent's name, date and place of birth and unique personal identification number, case number of the body conducting the procedure and laboratory record number, data on the origin of the sample, the name of the technicians and analysts who worked with the biological sample from which the DNA profile was obtained and the name and seat of the laboratory that performed the analysis (Article 5).

The laboratory that performed the DNA analysis on the order of the procedure body is obliged to submit the determined DNA profiles and available identification data to the Ministry, at the same time as submitting the report on the expertise to the procedure body, for entry in the Register. In case of taking an undisputed biological sample for the purpose of performing DNA analysis in criminal proceedings, one copy of the undisputed sample (buccal swab) must be submitted to the Ministry, if the analysis is performed by non-accredited DNA laboratories in accordance with SRPS ISO / IEC 17025: 2006 or appropriate standard according to which forensic laboratories are accredited, and for the accuracy of the data entered in the Register. Data on accredited DNA laboratories in the Republic of Serbia are available to the public within the register kept by the competent body of the Republic of Serbia, in accordance with the law governing accreditation. The laboratory shall, if it is not possible to take a buccal swab, submit to the Ministry blood or other biological material of a person suitable for DNA analysis (Article 6).

For the purposes of conducting criminal proceedings, the competent body of the procedure may request a search of the Register in order to compare the DNA profile obtained by DNA analysis, with the data already in the Register, without delay. The request is submitted in writing, and extremely orally, with the obligation to subsequently submit a written request (Article 7). Data storage in the Register is done in electronic form, using information and communication technologies. Data storage in the Register is performed with the application of appropriate physical and technical protection measures. Access to the data in the Register is allowed only to authorized

persons of the forensic service of the Ministry. Data from the Register are archived in a way that ensures high availability of data while ensuring data from loss and damage. Each data processing in the Register is recorded in a special record containing: name, surname and unique identification number of the person performing the processing, date and time of processing, type of processing and subject of processing (Article 8).

A special question is how long the samples will be kept after the pronouncement of the final conviction. The CPC of Serbia determines an extremely wide range of criminal offenses for which the court can order the taking of samples for forensic-genetic analysis. First of all, these are acts against sexual freedom, which were committed with intent, and we must note that there is no crime from this group that can be committed through negligence. Then, these include procedures in which a measure of obligatory psychiatric treatment was imposed (where it is not emphasized whether it is a treatment in a health institution or at large, because the Criminal Code of Serbia provides for both measures). Although practical reasons suggest that samples should be taken from a person who has been imposed a security measure of compulsory psychiatric treatment at liberty, it is prescribed that they can be taken only in a decision consisting of deprivation of liberty, and therefore, taking samples in in cases of imposing this security measure is not possible[48]. In the end, this includes all other criminal acts committed with intent, for which a prison sentence of over one year was imposed. The European Court considers that samples collected in a conviction procedure can be kept, but for a certain period of time. Since this period has not yet been determined in Serbia, this means that samples can be stored indefinitely, which is not in line with the European Convention on Human Rights[49]. The importance of the DNA sample is also discussed in the judgment of the Canadian court in the case of R. v. Plant (1993 3 S.C.R. 281), which emphasizes that taking and retaining a DNA sample is not a trivial matter, because DNA contains the most intimate details about a person, which can severely violate his right to privacy.

III.Conclusion

In the cumbersome reform of criminal procedural legislation in the Republic of Serbia, changes in the field of evidence were inevitable. The legislature regulated three types of sampling: taking biometric samples, taking samples of biological origin, and taking samples for forensic genetic analysis. Although this reminds us mostly of the American criminal procedure, this represents a big step forward for Serbian law as well. However, in order to better implement the prescribed provisions, the legislator should eliminate certain errors as soon as possible, especially when it comes to incorrect classification of voice and handwriting samples among the provisions that regulate the taking of samples of biological origin. Elsewhere, a law should be passed as soon as possible that would adequately regulate the storage of DNA profiles and samples. Serbia is an exception in Europe in this regard. As we have seen, the European Court of Human Rights has taken a fairly clear position, finding that the unrestricted

[48] G. Ilić *et al*., cited, p. 380.

[49] For example, the destruction of a sample of biological material on the basis of which DNA analysis was performed and the DNA profile obtained in the Republika Srpska is carried out three years after the DNA profile was deposited in the database, while the profile of the convicted perpetrator is destroyed after thirty years from sampling for analysis.

retention of samples and DNA profiles, as well as papillary line prints, violates the European Convention on Human Rights and Freedoms. A special issue that is inevitable to draw attention to, and which is important for the practical conduct of the police in the countries of the region, is the ratio of evidence taken from the body of the accused with the privilege against self-accusation, which requires special caution.

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Some Reflectionss on the Relationship Between the State and Society: Community Policy Concept*

Ana Vuković**

Abstract

The text deals with a review on the origin of the police role in community. The author of the paper points out that concept of police in the community represents a connection with the old understanding of the police as 'citizens in uniform'. We will point out the elements of police profession that affect the relationship between the police and society. The goal of the text is to show that the concept of police in the community is not a new modern concept of the police role as a representative of the state, but that the origin of the concept is part of the historical role of the police, which arose as a need of social community to achieve public order and peace. In the conclusion, it is indicated that the combination of culture, education and quality occupational guidance influence the reduction of the need for social control and police action in society.

Keywords: *police in community, state, society, power, culture*

I. Introduction

It has been noticed for a long time that society is not a simple set of individuals, but that it is a system formed on the basis of their association, which represents a specific reality that has its own characteristics[1]. The relationship between the state and society (community in the broader sense of the word) developed through the need to organize social life, and by maintaining public order and peace, make it safer and more suitable for life. After that, the establishment of certain powers of the state to make society function better and be safer led to the need for the police as an organization that has a dual role, to protect the rules and laws passed by the state and to protect and secure the citizenry.

In this process of association of individuals into society, social character is necessary as a pattern of desirable habits, traits and behavior type, which is most acceptable from the point of view of a certain social system in which "the function of social character is to shape and channel human energy within a given society for the continuous functioning of society"[2].

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[1] E. Durkem, *Pravila sociološke metode [The Rules of Sociological Method]* Beograd, Savremena škola, 1963.

[2] E. From, *Zdravo društvo [The Sane Society],* 1963, Beograd, Rad, p. 95.

The personality of an individual in society is also shaped on the basis of one important aspect of culture – the normative and visionary (utopian) aspect that consists of "elements that define current behavioral tendencies and social requirements in relation to individuals and social groups (traditional habits and customs, social rules and norms, values as accepted goals)"[3]. This aspect should enable a stronger social consensus and contribute to a lower need for social control and therefore for police action. Geertz believes that the concept of culture "denotes a historically transmitted pattern of meanings embodied in symbols, a system of inherited concepts expressed in symbolic forms with the help of which people transmit, preserve and develop their knowledge of life and attitudes towards it"[4].

Culture allows a person to develop the ability to communicate using language, the ability to learn and accumulate knowledge, and to adopt common patterns of behavior in a given community in the form of rules, values, norms, through the adoption of orientation frameworks as "cultural constructions of reality." It also affects the formation of opinions and feelings, as well as the development of the ability to perceive the difference between 'I' and 'others' and encourage reconciliation of those differences. Aspects of culture are different, it can serve an individual as a pattern for life, and the content of culture constitutes a social heritage that each group passes on to descendants, it is learned behavior and a series of techniques for adapting individuals to society[5].

The first police officers were defined as 'citizens in uniform'. The history of the origin of policeman personality and profession indicates that: "village constable was the product of a tradition of self-governing, responsible, local communities in the early middle ages. […] reforms led by Robert Peel succeeded in the introduction professional police force to London in 1829 which rekindled the office of constable and the relationship between police and community. There was no deep divide between police and people; rather, the police were merely 'citizens in uniform'[6]. In the seventeenth century "constables mediated between the norms of village communities and the central state's attempts to impose new standards of moral and social discipline"[7].

The constable's role was not policing in its modern sense but much more general social ordering. The term 'police' first entered the language in the eighteenth century and when people used the word "they were referring to the general regulation or government, the morals or economy, or a city or country. (...) So 'policing' originally referred to the general functions of civil government"[8].

II. Formation of the Policeman's Character

In addition to genetic characteristics, the formation of an individual's character is influenced by the processes that take place through socialization and education. Later,

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[3] Z. Golubović, *Čovek i njegov svet u antropološkoj perspektivi, [Man and his world in an anthropological perspective]*, 1973, Beograd, Prosveta, p. 75.

[4] K. Gerc, *Тумачење култура 1 [Interpretation of Cultures],* Библиотека XX век, Београд, Чигоја штампа, 1998, p. 122.

[5] Z. Golubović, *"Kultura"*, *Sociološki rečnik [Sociological glossary],* (eds.) A. Mimica, M. Bogdanović, Beograd, Zavod za udžbenike, 2007, pp. 268-270.

[6] D. Dixon, *Law in policing: Legal Regulation and Police Practices,* 1997, Clarendon Press. Oxford, p. 50.

[7] *Ibid*., p. 50, Wrightson 1980 according to Dixon.

[8] *Ibid*., p. 51, Kent 1986 according to Dixon.

by getting involved in the work process, the individual internalizes certain characteristics and styles within the profession. The working personality of a police officer is not only a product that arises on the basis of police education and involvement in the police, still is a product of the culture in which an individual matures and shapes his identity.

Precisely in order for police officers to get to know society better and develop special skills and knowledge for the job, the police profession is structured through a hierarchy in the sense that novice begin their professional development by patrolling the streets. Police research has found that the best training programs for police officers consist of three parts. The first part includes lectures by social scientists and lawyers from criminology, criminal law, human resources, and the field of mental health, the second part consists of lectures on the social importance and dignity of police work, in which it is emphasized that this profession requires high requirements such as integrity, wisdom and courage, and the third part refers to lectures on the rules within the police department[9]. The two main variables of the police role are danger and authority, and they should be interpreted through the constant pressure exerted on police officers to be efficient in their work, and through this process the working personality of the police officer is created and developed[10].

Police jobs and tasks have a specific weight that implies high legal and social responsibility. One of the most important features of the police function, which also symbolizes the connection with the state, is the legal character of the police function[11].

In addition to typologies of characteristics, in research on police, there are several typologies of police officers and styles of police action that arise on the basis of greater or lesser expression and strength of representation of police subculture characteristics and attitudes of police members to the law. This is the case, for example, with the typology of an American researcher J. Broderick.

Table 1. *Types of police attitudes towards the law* (J. Broderick)[12]

Emphasis on public order and policy	Emphasis on the law	
	Strong	Weak
Strong	Idealists	Repressors
Weak	Optimists	Realists

Then, one of the typologies of police styles that shows the possible relationships of individuals-policemen towards the law is the one observed by J.Wilson, namely: legalistic, authoritarian, communitarian and routine police style. As Milosavljević explains, idealists in the typology given by Broderick (table 1) belong to Wilson's typology in the legalistic style, repressors in the authoritarian style, optimists in the communitarian style, and realists in the routine style.

The repressors do not respect and ignore the law and regulations if it prevents them from doing their job effectively. Then, idealists strive to establish a balance

[9] E. Bittner, *The Functions of the Police in Modern Society. A Review of Background Factors, Current Practices, and Possible Role Models*, Maryland, National Institute of Mental Health, 1970, p. 60.

[10] J. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society*, New York, John Wiley & Sons, Inc., 1966.

[11] B. Milosavljević, *Наука о полицији [The Science of Police],* Beograd, Policijska akademija,1997, pp. 187-8.

[12] Source: B. Milosavljević, 1997, p. 201.

between respect for rights and civil liberties and the interests of public order and peace. Police officers who practice an optimistic style give priority to law, respect and protection of civil liberties at the expense of lower efficiency in the field of public order and policy, while realists treat the issue of law routinely, they do not analyze much the essence of the problem and make concessions to one side or the other. Police officers who have internalized the routine style generally have doubts about the values of law and public order "they are said to have a cynical vision and to be recruited among disillusioned idealists"[13].

In the modern sense, the new police operated as disciplinary force in a deeply divided society and "consent to policing is not merely an ideological fiction: but equally it is not a natural condition. Rather, the construction of consent to policing was a long-term, intensive, often deliberate, and never fully successful project of negotiation between police and people"[14].

III. The Image of the Police as an Indicator of the Relationship Between State and Society

As it was noticed a few decades ago "there is a widespread nostalgia about the days when the man on the beat could keep order by personal influence, but those days are going"[15].

Because of the symbolic-latent and manifest role that is reflected in the different degree of power that the police as a social group can have in state, the police has always attracted the attention of ordinary people and those who wanted to penetrate into its work and actions. As one of the consequences of the development of the police profession and actions, stereotypes of the public about the police, as well as stereotypes of police members about citizens, arose. The image of police as a special social group in society was formed in this relationship between the police and the public.

In part, the stereotypes of the police about citizens and vice versa generated the emergence of a police subculture, the characteristics of which determine the positive and negative aspects of the police profession and the image of the police as a whole. However, the subculture in police profession is not separated from the values and norms that society supports, but forms part of the society and culture in which it arises and survives through the actions of policemen in everyday life[16].

At the beginning of the introduction of community police concept in the modern sense, it was considered a new strategy that ensures professionalism in the police, a better image in the public, and a link between the police and other members of society. The justification of this 'new' strategy is defined as – "better satisfy the demands and needs of the citizens they serve".

That is, that strategy should reconsider the role of the police in society: "In the course of the self-examination and creative thinking that are taking place, fundamental questions have been raised about the basic purpose and responsibilities of the police,

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[13] *Ibid*., pp. 201-202.

[14] D. Dixon, *Law in policing: Legal Regulation and Police Practices,* 1997, Clarendon Press. Oxford, p. 53.

[15] M. Banton, *The Policeman in the Community*, New York, Basic Books,Inc., Publishers. 1964, p. 265.

[16] A. Vuković, *"Knowledge Management Concept and Subculture: Police Profession Example"*, in *Nauka i društvo: časopis za društvene nauke,* 2020 (12), pp. 16-35.

the capabilities they possess, the types of contributions they can make to society, the optimum methods of their organization and deployment, and the relationship they have with the communities that employ them"[17].

This text also calls into question the traditional organization of police, the so-called "military model and professionalism" because it is considered that police rigidity, which manifests itself through a strict hierarchy adopted according to the model used in the army, is an obstacle to the modernization of the police and should be reduced. Instead of that, police should be reoriented to improving skills – "reducing hierarchy and enriching skills".

Special skills are highlighted, which, according to the author of the text, were not represented in the traditional training of police, and should be learned by community oriented cops:

a) communications skills – the ability to talk effectively with all types of citizens, from community leaders to ordinary residents;
b) public speaking –the ability to articulate ideas and motivate others;
c) problem-solving techniques – how to identify and analyze problems, and develop effective responses and solutions;
d) conflict resolution and negotiating –how to help citizens resolve disputes within the community[18].

In another official document related to the community policing strategy, the reasons for its implementation are explained by the need to prevent community fear and possible crime and improve the quality of life in the neighborhoods, *"fear of crime has itself become a significant problem. A highly visible police presence helps reduce fear in the community (...) However, because fear of crime can limit activity, keep residents out of their homes, and contribute to empty streets, this climate of decline can result in even more crime. By involving the community, the police will have more resources available for crime prevention activities, rather than being forced to respond to crime after the fact"*[19].

We can see that the obligations and duties to be fulfilled by a police officer are clearly regulated, still controlling of the obligations and duties of an ordinary citizen who, due to the desire for power, or other forms of intentional or unintentional actions, may threaten the rights of other persons is a long and demanding process. That is, compliance with the legal regulations that obligate the police officer as a serviceman of the state and citizenry do not have to be part of obligations of general population if social character as a pattern of agreement about values, habits and forms of behavior (normative and visionary (utopian) aspect of culture) is not generally accepted in society.

That is why in everyday life there are cases of endangering the individual's right to privacy when citizens, for example, make publicly available recordings of private persons, even though they may be legally responsible for the act. So, as some authors pointed out "the police have the special possibility for the maintenance of public order but this mode of administration has fostered among some policemen and some

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[17] E. Meese, *"Community Policing and the Police Officer"*, in *Perspectives on Policing*, 1993, no. 15. National Institute of Justice, U.S. Department of Justice, and the Program in Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University, p. 1.

[18] *Ibid*., pp. 3-6.

[19] *Understanding Community Policing: A Framework for Action*, U.S. Department of Justice, Bureau of Justice Assistance, 1994. p. 4. Available at: https://www.ojp.gov/pdffiles/commp.pdf.

laymen the idea that public order is the responsibility of the police alone", because of that "the problem of how to develop civic responsibility in an increasingly acquisitive society will long remain"[20].

IV. Conclusion

In police-community relations public criticism is directed towards the police as a special social group (in whole) which, due to the power it has, is perceived first as a symbol of the state and then of society. The goal of implementation of community policing concept was to change the image of the police in society, and in that way, influence a more positive image of the role of the state. This concept is, in fact, of older origin than the second half of the eighties, when it is increasingly being written about as the inevitability of a "new" police strategy.

There are also differences between countries about the historical role of the police in society, which are based on the (dis)continuity of citizens' perception of the historical performance of the police and may differ from society to society. The essence of this concept, broadly speaking, was to enable the exercise of power through the voluntary obedience of citizens. However, some basic repercussions that have gone out of scope are, among other things, the individual's need to get closer to the power (embodied in the person of the policeman) in the way that he uses some police techniques and powers for which he does not have permission. The controversy of the role of the police and citizens has acquired its specific form with modern digitization, where, for example, within the scope of police powers in some cases the citizen's consent is sought, while often citizens implement police techniques (e.g. illegal (secret) recording of other persons, stalking etc.) and threaten another's right to privacy.

Society exists if there is agreement on the principle that the common good is as valuable and important as the good of the individual, and this is perhaps a return to the original idea that police officers are "citizens in uniform". The partial and incomplete adoption of the norms of general culture, morality and basic human values cannot be replaced by "lowering" the state towards society – through a personality of community-oriented police officer, but by a mutual effort through socialization, education and quality occupational guidance to reduce the need for social control through police action.

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The Development of Law and Practices on Extradition in China

Yang Chao*

Abstract

The paper provides the outline of extradition law system and bilateral treaty on extradition of China signed and ratified, expressed the general principles of extradition law of China, the diplomatic commitment applied in the extradition process, analysis the path of laws have improved, especially with some concert cases that show the successful cooperation with European countries in extradition field.

Keywords: *extradition, international assistance in criminal matters, human rights safeguard, criminal procedure law*

I. Introduction

Extradition is the typical and traditional method of international assistance in criminal matters, as it represents the sovereignty and judicial sovereignty of a country, as well. In the sense of the whole-world, due to the development of globalism, the importance of international assistance increases. Confronting with transnational organized crimes and other serious transnational crimes, or with fugitives or illegal assets frequently transfer from country to country, with the intent to escape the criminal sanctions, the need for international assistance in criminal matters is rapidly increasing. In the last decades, China drew with more attention on the legislation on international assistance in criminal matters and kept moving to carry out this work. China has achieved many goals in this filed, including some successful extradition procedures and cooperation in international assistance in criminal matters with European countries.

II. Extradition Law System of China

In the present years, China has always been committed to promoting political and judicial reform. China's legal system has been constantly improved. Thus, it successively passed the Supervision Law and Supervision Law Implementation Regulations, International Criminal Justice Assistance Law, it revised the Criminal Law and Criminal Procedure Law, promulgated and revised the departmental laws and laws in special fields, providing a solid legal basis for China's international judicial

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cooperation. Rule of law is the basic policy of China. In the field of international cooperation applies the Chinese Constitution, the Extradition Law, the Law on international assistance in criminal matters, the Criminal law, the Criminal procedure law, and the relative laws, all of the these above constituting the law system for carry out the extradition and international judicial cooperation.

2.1. The Chinese Constitution

The Chinese Constitution is the primary law in the law system of China, which also provides legal basis in the field of extradition cooperation. The Chinese Constitution stipulates the power and rights of the judicial organs, limits the line of power as the effective assurance for human rights protection in the whole extradition procedure. Article 5 of the Constitution of the People's Republic of China clearly stipulates: *"The People's Republic of China exercises the rule of law and builds a socialist country under the rule of law. The state upholds the uniformity and dignity of the socialist legal system. All laws, administrative regulations and local regulations shall not contravene with the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated".* By this article, it is provided the clear meaning that no organization or individual shall have the privilege of transcending the Constitution and the law and must act within the scope of the Constitution and the law.

The Constitution also sets standards for the judicial system to operate with fair, article 131 stipulating: *"The people's courts exercise judicial power independently, in accordance with the law, and are not subject to interference by any administrative organ, public organization or individual".* Constitution law is the legal support for China's judicial system and complies with the criteria of relevant international conventions.

2.2. Extradition Law and Relative Laws of China

On December 28th, 2000, the Permanent Commission of the National Popular Assembly enacted the Extradition Law. Extradition Law of China, as the specific and basic law in the extradition filed, including four chapters and fifty-five articles, sets out the principles and procedure of extradition, as well as the grounds on which the extradition request shall and may be denied, also including the procedural rights protected for the extradited person.

In particular, the extradition request shall be denied, according to article 8 of the Extradition Law of China[1], if the request is against the "ne bis in idem" principle,

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[1] Article 8: *"The request for extradition made by a foreign state to the People's Republic of China shall be rejected if: (1) the person sought is a national of the People's Republic of China under the laws of the People's Republic of China; (2) at the time the request is received, the judicial organ of the People's Republic of China has rendered an effective judgement or terminated the criminal proceedings in respect of the offence indicated in the request for extradition; (3) the request for extradition is made for a political offence, or the People's Republic of China has granted asylum to the person sought; (4) the person sought is one against whom penal proceedings instituted or punishment may be conducted for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings; (5) the offence indicated in the request for extradition is a purely military offence under the laws of the People's Republic of China or the laws of the Requesting State; (6) the person sought is, under the laws of the*

political reason, discrimination treatment, inhuman treatment. All these are grounds for the request to be denied, complying with the international conventions. Also, the Treaty between the People's Republic of China and the Republic of Belarus on Extradition, provides in article 3 the following grounds for denial of the request: "the requested contracting party has sufficient grounds to believe that the purpose of the extradition request is to investigate the criminal liability of the person sought or to execute a criminal sentence on account of his race, religion, nationality, political belief etc. Or that the position of the person sought in the proceedings would be prejudiced for any of these reasons".

The Law of the People's Republic of China on International Criminal Judicial Assistance was adopted by the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China at its sixth meeting on October 26th, 2018. The promulgation of the Law on International Judicial Assistance in Criminal Matters fills in the gaps in China's legislation in the field of international judicial assistance in criminal matters. Together with the multilateral conventions and bilateral treaties that China has singed and approved, it will vigorously promote China's international judicial assistance in criminal matters.

2.3. Examination Mechanism for Extradition Request in China

Extradition process could be divided to the active and passive extradition in respect to the requesting and requested country. As regards the requested country, article 16 of Extradition Law of China stipulates the examination mechanism for extradition request: *"Upon receiving the request for extradition from the Requesting State, the Ministry of Foreign Affairs shall examine whether the letter of request for extradition and the accompanying documents and acts comply to the provisions of Section 2, Chapter II of this Law and the provisions of extradition treaties. The Higher People's Court designated by the Supreme People's Court shall examine whether the request for extradition made by the Requesting State complies with the provisions of this Law and of extradition treaties regarding conditions for extradition and render a decision on it. The decision made by the Higher People's Court is subject to review by the Supreme People's Court".*

Ministry of Foreign Affairs of China as the central organ and communicate organ is responsible for accepting, issuing, examining and transmitting extradition requests. Upon receipt of a request for extradition, the Ministry of Foreign Affairs shall first conduct a formal examination of the materials to check if they conform to the general provisions. In sense, the examination for extradition request is not from the judicial prospect, in this period, it is an examination for the request whether requestee provide all the materials that would conform with the extradition law of China, bilateral extradition treaty, we can call it administrative review. If the request materials approval by administrative review, the extradition request shall be forwarded to the court, which shall first conduct a specific legal review by the Higher People's Court. After the

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People's Republic of China or the laws of the Requesting State, immune from criminal responsibility because, at the time the request is received, the limitation period for prosecuting the offence expires or the person is pardoned, or for other reasons; (7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State; (8) the request for extradition is made by the Requesting State on the basis of a judgement rendered by default, unless the Requesting State undertakes that the person sought has the opportunity to have the case retried under conditions of his presence".

Higher People's Court has examined the judicial decision, it will automatically and compulsory submit it to the Supreme People's Court, which will review the extradition ruling and finally drew a decision on whether to approve the extradition, which is a mandatory procedure for the protection of extradited person's rights.

2.4. Central Authority and Competent Authority

Central authority for extradition decision in China, according to the Extradition Law, includes Ministry of Foreign Affairs, Ministry of Justice, Ministry of Public Security, Supreme Court and Supreme Prosecutor. For example, article 6 of the Treaty between China and Belgium on extradition stipulates that *"the extradition request and supporting documents shall be transmitted through diplomatic channels. All other communications related to the request should be made directly by the Ministry of Foreign Affairs in the case of the People's Republic of China; In the case of the Kingdom of Belgium, by the Ministry of Justice of the Federal Public Service".*

Besides that, for the major duty-related crimes, such as corruption, bribery, neglect of duty, and malfeasance by public officials, according to the article 52 of the Supervision Law of China, central authority also includes the National Supervisory Commission. The competent authority refers to the specific bodies responsible for extradition, which are the direct organs and department conducting the investigation and examining relevant materials in the extradition process.

III. Diplomatic Commitment of Penalty

3.1. Dropping Death Penalty in Extradition Process

First of all, death penalty is always an important issue in the extradition process. Due to death penalty still provided as criminal punishment by the Criminal Code of China, China faces great challenge with the requested country in the extradition cooperation. As a matter of fact, in these years, China is continuing decrease the number of crimes to be punished by the death penalty as the maximum punishment. Secondly, the death penalty sentencing shall comply with a strict procedure and the Supreme Court of China, as the top juridical organ, is the only and unique court with the review power to the appeal in cases with death penalty sentencing. In this context, the appeal procedure consists in an automatic appeal to the Supreme court, in order to provide the sufficient judicial resources to protect the defendant.

In the international cooperation prospect, death penalty is an issue that cannot be avoided. In the bilateral extradition treaties China has signed and ratified, death penalty can be set as the reserve article, as in the China-Spain Extradition Treaty, article 3: "*Under the law on the method of request, the person whose extradition is requested may be sentenced to death for the offence for which extradition is requested, unless the requesting party gives such assurances as the requested party deems sufficient that the death penalty will not be imposed or, if imposed, will not be carried out."* We can see this specific article refers to the death penalty, even though death penalty is in the criminal code of China, in the extradition process, the specific case still could by negotiate to solve the problem may arouse by death penalty. Therefore, China and Spain have been successful carried out several extradition cases, based on the bilateral treaty on extradition.

Secondly, the diplomatic commitment on no-Death penalty made by Chinese government also is a legal and effective method in extradition process. China's diplomatic commitment on sentencing is based on article 50 of Extradition Law, not being against China's sovereignty. Diplomatic commitment on sentencing is made by the Ministry of Foreign Affairs as a representative and in accordance with the decision of the Supreme Court, which is legally binding China's judicial organs. On the legal validity and international credibility of diplomatic commitments, Chinese law not only stipulates the subjects and procedures for making diplomatic commitments, but also stipulates the system to ensure that the commitments can be fully concluded.

3.2. Diplomatic Commitment for the Specific Sentencing

Sentencing commitment is a kind of commitment made through diplomatic channels in accordance with the requirements of the requested party in the extradition request, which can be regarded as a legal fiction and is legally binding on the trial of the extradited person.

China has also fulfilled the diplomatic commitment to sentencing in practice. The extradition procedure of *Huang case* lasted for nearly eight years, and Huang was finally extradited back to China from Peru. After trial, the domestic judicial authorities finally sentenced him to 15 years in prison. At the same time, considering that he was detained in Peru due to the extradition procedure, the detention period was reducced. It can be seen that China has not only strictly followed the sentencing commitments made through diplomatic channels, but also reduced the term of overseas detention, which not only safeguards China's national authority and judicial sovereignty, but also fully guarantees the relevant rights of extradited person[2].

The decision of China's diplomatic commitments is made by the Supreme People's Court and the Supreme People's Procuratorate. Among them, the commitment to limit prosecution shall be decided by the Supreme People's Prosecutor, the commitment to sentencing shall be decided by the Supreme People's Court while diplomatic commitment shall be legally binding the judicial organ concerned as well. In practice, China's diplomatic commitments have been fully fulfilled. It has never happened that China's diplomatic commitments not to be fully fulfilled in an extradition process. Each diplomatic commitment made by China can ensure that the human rights of those being prosecuted were fully protected.

IV. Treaties of Extradition Signed by China and Practices

4.1. Snapshot of Treaties of Extradition

Till now, China has signed and ratified bilateral extradition agreements with 46 countries, including 14 European countries3. In practice, there are many successful cases of extradition from Europe to China, such as the extradition case of *Hu* from

[2] Huang, former head of Yuwei Trading Industry Co Ltd in Shenzhen, Guangdong province, stands accused of smuggling goods worth 1.22 billion yuan ($179 million) and evading 717 million yuan in taxes. He fled to Peru in 1998 and was detained there in 2008.

[3] http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex=1&keywords=%E5%BC%95%E6%B8% A1& chnltype_ c=all [accessed on 12 May 2021].

Greece in 2015, suspected of illegal fund-raising, of Yu extradited from Bulgaria, suspected of contract fraud, and of Zhang extradited from Italy, suspected of official embezzlement, or of *Ding*, a major economic criminal suspected of illegally absorbing public deposits, money laundering and fraud, who was extradited from Spain. In 2016, *Chen* was suspected of illegally absorbing public deposits and was extradited from France and so on.

4.2. Principles of Extradition Law of China

The Extradition Law of China complies with the international convention. The Extradition Law of China provides the principles of extradition as follows: the principle of double incrimination, the principle of denying the extradition request, including the cases if there was a risk for the extradited person to be confronted with cruel, inhuman, degrading treatment, or discrimination due to political bias, religion, national, gender etc., if the prosecution has reached the statute of limitation, if the extradited person was the alleged to be prosecuted as pure military criminal, and in the case of trial *in absentia*.

In case of lack of bilateral extradition treaty, the principle of reciprocity is regarded as an important supplement to the basis of extradition cooperation in international extradition practice. Reciprocal extradition means that in the absence of an extradition treaty, the requesting country and the requested country undertake to cooperate in extradition on the basis of mutual preferential treatment through consultation. China's Extradition Law has also provided corresponding provisions, emphasizing extradition cooperation on the basis of equality and reciprocity.

4.3. Simplified Extradition Process

Simplified extradition refers to the rapid transfer of the person sought to the requesting country under the condition that the person agrees to accept extradition voluntarily and omits the general judicial review procedure. Simplified extradition may save judicial resources to the greatest extent, and to a certain extent, reflects the will of the person whose extradition is requested.

Yao, the former deputy head of the province Xinchang county, who was also fined 3 million yuan and agreed to forfeit his illicit gains and the interest earned on them, was extradited from Bulgaria on November 30th, 2018. According to the Interpol Red Notice, the Bulgarian police arrested *Yao* in the country's capital Sofia on October 17th, 2018, and temporarily detained after receiving an application from China's National Supervision Commission. During the detainment, *Yao* expressed his desire to surrender and return home when staff from the Chinese embassy in Bulgaria visited him. Considering China and Bulgaria had a bilateral treaty of extradition, with *Yao* clearly expressing his will to be extradited back to China after years of fugitive life, China and Bulgaria agreed to carry out this case by simplified extradition process, based on the bilateral treaty of extradition and successfully cooperated in this case.

VI. Human Rights Safeguard in Extradition Process

As in the common criminal procedure, extradited person benefits from the protection of fundamental rights in the criminal process after been extradited to China. Human rights safeguard is implemented in the whole process of criminal procedure,

including the idoneal treatment for detention, fair sentencing, and the basic rights protection.

China strictly abides by the provisions of the treaty, earnestly fulfills its treaty obligations, pays attention to the connection between domestic legislation, amendment and policy formulation with the provisions of the treaty, and submits timely implementation reports to comprehensively reflect China's achievements and problems in the process of implementation.

5.1. Compliance with the Human Rights Relevant International Convention

Since 2009, China has accepted the periodic review of the United Nations Human Rights Council three times and has successfully passed the approval. China has given serious and responsible feedback to the recommendations made by various countries and has acceded to more than 20 international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and has actively participated in international human rights governance with the commitment to promote the healthy development of international human rights. As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, China has incorporated the provisions of the Convention into its domestic law and has also strictly abided by its stipulations in its judicial and law-enforcement activities.

5.2. Human Rights Safeguard in Criminal Procedure in China

After the extradition procedure is completed and the extradited person is extradited back to China. Chinese State promises to respect the human rights of the extradited person, whether in the investigation stage, or in the trial stage, as well as in the imprisonment stage.

As in the above *Yao*'s case, after extraditing him from Bulgaria through simplified extradition procedure, China confirmed the fact of bribery by Yao through court trial and considered that Yao voluntarily accepted extradition and had the will to surrender truthfully, also confirmed the circumstances of surrender, combined with the circumstances of the case and the confession of other criminal facts[4]. After he was brought back to China, he not only pleaded guilty, but also confessed to some other bribes he had taken that prosecutors had not known about. The court heard *Yao*'s case on July 5, 2019 and again on April 3rd, noting in the ruling that his behavior constituted the crime of bribery and the amount of bribes could be defined as "extremely large" under the Chinese Criminal Law. *"But given that he turned himself in, confessed to offenses that the prosecutors hadn't known about, revealed crimes of others and turned over his illicit gains, we leniently penalized him"*[5].

Article 25 of the Extradition Law of the People's Republic of China stipulates: *"After the Higher People's Court has made the decision that the extradition request meets the conditions for extradition or that extradition shall not be granted, it shall read*

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[4] https://www.rappler.com/world/217996-bulgaria-extradite-yao-jinqi-china/ [accessed on 5 May 2021].

[5] http://www.chinadaily.com.cn/a/202008/28/WS5f48412aa310675eafc55fbf.html [accessed on 20 May 2021].

the decision to the person sought and, within seven days of issuing the decision, submits the written decision together with the relevant materials to the Supreme People's Court for review". It can be seen that the protection of the rights of the person requested for extradition runs through the whole process of extradition review in China.

China's judicial system ensures that criminal suspects and defendants fully enjoy all due process rights, including the right to defense, and receive a fair and impartial trial, and will not be subjected to inhuman or degrading treatment or forced to confess by torture. China's detention system has strict procedures and restrictions, and any extension of the detention period must go through strict approval procedures.

In the extradition procedure, the protection of the basic rights of the extradited person is consistent with the principles stipulated in the Criminal Procedure Law. According to the provisions of China's Criminal Procedure Law, the extradited person also enjoys the same basic rights as the defendant in the criminal procedure, such as the right to defense, the right to appeal and so on. Articles 52 and 56 of The Criminal Procedure Law of the People's Republic of China exclude illegal evidence obtained by torture, and stipulate that the investigation of major criminal cases should be recorded and videotaped in the whole investigation actives.

For the understanding of the definition of illegal methods such as extorting confessions by torture, the relevant judicial interpretations have made more in-depth and detailed provisions. Article 67 of the Rules of Criminal Procedure of the People's Procuratorate (2019) stipulates that: *"Confessions of criminal suspects obtained by the following methods shall be excluded: (1) a confession made against the will of a criminal suspect by using violent methods such as beating, illegal use of restraints or bad means of disguised corporal punishment, which makes the criminal suspect suffer unbearable pain; (2) a confession made against the will of the criminal suspect by means of violence or serious damage to the legitimate rights and interests of the suspect and his close relatives; (3) Confessions collected by means of illegal restriction of personal freedom such as illegal detention".*

In the other side, for the extradited person back to China, if he/she had made confession or wanted to be extradited back to China, the court of China will consider the confession to reduce the sentencing. Also, the Chinese court will take into consideration the period of detention abroad because of extradition application and reduce it according to the provisions of law.

VI. Conclusion

China's judicial system is able to ensure that criminal suspects and defendants fully enjoy all basic procedural rights, including the right to defense, the right to a fair and impartial trial, and will not be subjected to inhuman or degrading treatment or extorted confessions by torture. China's detention system has strict procedures and restrictions while any extension of the detention period must go through strict approval procedures.

China's law clearly provides for a system of diplomatic assurances and a mechanism to ensure their full implementation for the extradited person who is finally extradited back to China that he/she would not face the risk of inhuman and degrading treatment or unfair trial after extradition.

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Low/Base Motive as a Qualifying Circumstance of the Criminal Act of Murder

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Abstract

The most serious form of life injury, in all criminal laws, from ancient times to the present, represents the crime of murder. Depending on the motivation of the perpetrator, the circumstances of the execution, characteristics of the perpetrator and the victim, the manner/method and means of execution, the scope/extent of the consequences, and other circumstances, there are different forms and types of manifestation of this criminal act. There are three forms of this criminal act. These are: a) ordinary murder, b) serious (qualified) murders, for which the most severe types of punishment known in the specific criminal legislation are prescribed, and c) easy (privileged) murders. Among the most serious crimes of this type is definitely a murder, which consists of illegal intentional/deliberate deprivation of another person 's life for special reasons of low (defamatory) motives. This crime is punishable by life imprisonment in Serbian criminal law, which represents the subject of analysis in this paper from the theoretical, practical and comparative law/legal aspects.

Keywords: *life, deprivation, low motive, law, crime, responsibility*

I. Introduction

One of the most important natural, fundamental, general civilizational, universal human rights is certainly the right to life. It is the basis and condition for the existence of all other human rights and freedoms. It belongs to the most important, not only personal, but also general social goods. The right to life is guaranteed by numerous international legal acts: Article 6 of the International Covenant on Civil and Political Rights with optional protocol and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols No. 4, 6, 7, 11, 12 and 13.

However, despite this universal importance of the inviolability of human life (or the right to life), society has been faced with various forms or types of attacks, injuries or threats to the life of another person since ancient times. These are the criminal acts

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of murder, which consist in the unlawful/illegal deprivation (violation, deprivation) of the life of another person. Depending on the circumstances under which this crime is committed, the method or means of execution used, the characteristics of the perpetrator or the victim, the motive of the perpetrator, the scope of the consequences etc., there are several forms of the criminal offense/act of murder. These are:

a) ordinary murder (basic crime),
b) grave/serious or qualified murder and
c) light or privileged murder, for which the legislator prescribes different punishments.

Aggravated murders are among the most serious crimes in all modern criminal legislation, for which the most severe punishments are prescribed: long-term/life imprisonment or long- term imprisonment. The situation is similar in the Republic of Serbia. As the subject of our paper, the most significant type of serious crime taken is aggravated murder according to the motives of the perpetrator. Here, another person's life is unlawfully taken with intent for the following motives, such as:

a) self-interest,
b) for the purpose of committing or concealing another criminal offense, and
c) reckless revenge and other base motives (Article 114, point 5 of the Criminal Code of Serbia[1]).

II. International and Constitutional Protection of the Right to Life

The right to life is included today in the system of human rights and freedoms that have universal, general civilizational protection. At the basis of this international legal protection of human rights, there are standards stipulated in the corresponding international documents. Depending on the bearer, two types of international documents are distinguished. These are:

a) universal documents, adopted within the framework of the United Nations Organization and
b) regional documents, adopted within the framework of the Council of Europe[2].

The universal international documents include:

a) General Declaration of Human Rights and
b) International Covenant on Civil and Political Rights[3]. Universal standards represent the content of the most important international acts, which protect the most important human rights (liberties), and that, above all, is the universal human right – the right to life. Without the right to human life, there is no possibility of realizing other human rights and freedoms, that is, they would not even exist.

The right to life as a basic human right has been protected since ancient times and the creation of the first states, but only recently has it received international legal protection. With the development of society and the creation of modern civilization, conditions are created for the equality of all members in one society, and thus the basis for uniform criminal law protection of life for all its members. Man is in the first place, so the protection of human life becomes the most important personal and general social phenomenon.

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[1] Official Gazette of the Republic of Serbia no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

[2] Đorđević, Đ., *Criminal Law. Special Part*, Belgrade, Criminal and Police University, 2014, pp. 21-25.

[3] Official Gazette of the SFRY, International Agreements no. 7/1971 and 4/2001.

The Universal Declaration of Human Rights is the first international document of universal importance that establishes a system of protection of human rights and freedoms against all forms of injury or endangerment. Thus, in the provision of Article 1 of the declaration, it is emphasized that all human beings are born free and equal in dignity and rights. They are endowed with reason and consciousness, and therefore they should treat each other in the spirit of brotherhood. Every human being (regardless of origin, age, status or other diversity) in the sense of Article 2 of the Declaration belongs to all the rights and freedoms that are right here and established, therefore, in this Declaration, without any differences in terms of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other circumstances. After the initial principles of equality, freedom and equality among people, follows Article 3 of the declaration, which reads: "Everyone has the right to life, liberty and personal security". In this way, the protection of:

a) life,

b) freedom and

c) personal safety was placed first.

Another universal international document of importance for the protection of the right to life is the International Covenant on Civil and Political Rights[4]. This pact, in the third part, guarantees the inviolability of basic human (political and civil) rights. Article 6 of the Pact guarantees that every human being has the right to life. This right must be protected by law. At the same time, no one can be arbitrarily deprived of life. This means, that in the case of arbitrary, therefore illegal deprivation of life of another person, there is a criminal offense, which must be prescribed by the national criminal law. At the same time, such a person must be sentenced by the competent state authority. In countries where the death penalty has not been abolished (in the system of criminal sanctions), the death sentence can be pronounced only exceptionally and only exceptionally for the most serious crimes, in accordance with the legislation in force at the time the crime was committed and which is not contrary to the provisions of this Covenant, nor to the Convention on the Prevention and Punishment of the Crime of Genocide. This most severe (capital) punishment can be applied to the perpetrator of the most serious criminal act (crime) only on the basis of a final (legally binding) judgment issued by the competent court.

In addition to universal international documents for the protection of human rights and freedoms in Serbia, the Convention for the Protection of Human Rights and Fundamental Freedoms5 with the amendments provided for in Protocols 11 and 14 and Protocols 1, 4, 6, 7, 12 and 13 is of particular importance. This European Convention in Article 1 establishes the obligation to respect human rights. Namely, the High Contracting Parties guarantee everyone within their jurisdiction the rights and freedoms specified in Part One of this Convention. The first part of the convention is entitled: "Rights and freedoms". In this part, the right to life is guaranteed in the first place (Article 2). According to this decision, the right to life of every person is protected by law. Namely, no one can be intentionally deprived of life, except during the execution of the court's verdict by which he was convicted of a crime for which this punishment is prescribed by law. This means that any unlawful and intentional taking of another person's life, according to national legislation, is a criminal offense for which certain types and measures of punishment are prescribed. At the same time, the Convention

[4] Official Gazette of the SFRY, International Agreements no. 7/71 and 4/2001.

[5] Official Gazette of Serbia and Montenegro no. 9/2003, 5/2005 and 7/2005.

states, in which cases the illegality of taking the life of another is excluded (in which case there is no crime of murder).

On the basis of universal and regional international standards, all national legislations establish a system of protection of human rights and freedoms in accordance with their interests and needs, but also in accordance with traditions, customs, state of morals etc. In any case, the basic, fundamental guarantee of human rights is provided by the constitution as the highest legal act of the state. And enhanced and ultimate (as the last and absent guarantee means) legal protection of human rights (and freedoms) is provided by the provisions of criminal (and other criminal, primarily misdemeanor) legislation. This means that an attack, violation or endangerment of human rights is illegal and punishable by law (and other legal regulations). On the other hand, such actions appear as unconstitutional activities since they violate, injure or threaten the system of human rights guaranteed and guaranteed in constitutional acts. Within the framework of basic constitutional solutions, the protection of the right to life (which has the nature of a constitutional principle) stands out in the first place.

Article 1 of the Constitution of the Republic of Serbia[6] states that Serbia is a country based on the rule of law and social justice, the principles of civil democracy, human and minority rights and freedoms, and belonging to European principles and values. The second part of the Constitution is entitled: "Human and minority rights and freedoms". Pursuant to Article 18 of the Constitution, human and minority rights guaranteed by the Constitution are directly applicable. 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. Article 24 of the Constitution of Serbia is entitled: “Right to life". Human life is inviolable. There is no death penalty in the Republic of Serbia. Cloning of human beings is prohibited. The inviolability of physical and psychological integrity is a constitutional principle from Article 25 of the Constitution. According to this solution, physical and psychological integrity is inviolable.

III. Characteristics of criminal law protection of life in Serbia

In the Criminal Code[7] of the Republic of Serbia, the following are systematized: "Criminal offenses against life and body" in the first item in chapter thirteen[8]. Thus, life and body are determined as the most important human and social values. From the name of this chapter results that the object of protection of these criminal acts is defined as a dual set of values. These are:

a) life (or the right to life); and
b) body/physical integrity/ integrity of the body (physical and psychological constitution of a person). One of the most important natural, fundamental, general civilizational, universal human rights is the right to life. It is the basis and condition for the existence of all other human rights and freedoms and belongs to the most important, not only personal, but also general social goods.

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[6] Official Gazette of the Republic of Serbia no. 98/2006.

[7] Official Gazette of the Republic of Serbia no: 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

[8] Jovašević, D., *Criminal code. Special part*, Belgrade, Dossier, pp. 12-15.

Life and physical integrity have been the object of criminal protection since ancient times, but this protection was not complete, nor was it equal for all members of society. Criminal acts of injury or violation of life or body are called natural, real, classic or general (atavistic) criminal acts, in contrast/as opposed to social, legal (evolutionary) or political criminal acts, which differ in terms of punishment and characteristics among individual countries and in particular/certain historical periods.

The object of protection in these criminal acts is man as a living human being, i.e. his life. This personal, that is, social good is protected well from the moment a person is born until the moment of his/her death. And at the same time, it should be pointed out that there are several other criminal acts that are directed against life or bodily/ physical integrity, but with a simultaneous attack on other goods such as: people's health; living environment; general safety of people and property; public transport safety; humanity and other goods protected by international law etc. Unlike crimes against life and body, these other crimes are not solely, exclusively or primarily directed against life and body. Protection of life and bodily/physical integrity represents a social function, and therefore it does not depend on the will of the individual. This means that the consent of the injured person is irrelevant to the existence of these criminal acts. On the other hand, these criminal acts are always committed against another natural person (and not against oneself).

The ultimate/basic crime against human life is murder. It is provided in Article 113 of the CC. The act consists in the unlawful deprivation of life of another person with intent, where there are no special circumstances that make it difficult one or an easy one. The execution action is determined according to the consequence, since this is a consequential disposition. Thus, any activity of doing or not doing, psychological or physical activity, which directly or indirectly causes a consequence – the death of another person – is considered an action. These can be various activities that are suitable or sufficient to cause the death of another person. Murder can be committed by various acts of action and omission. Failure to act can cause the death of another person in cases where there is a duty to act to prevent death. Acting activities are diverse and can be performed in various ways and by various means, indirectly or directly.

Considering the way activity is carried out, murder can be carried out by direct, indirect, physical and psychological action. It is essential for its existence that a consequence is caused as a result of the action taken. It manifests itself/It occurs as an injury in the form of a death of a person. For the existence of murder, it is necessary that the act of execution was undertaken illegally, so this offense does not exist if the loss of life occurred in necessary defence, last resort, performance of duty in public and state security affairs or when the regulations of the service allow or require it.

The perpetrator of the act can be any person, and in terms of guilt, intent is required[9]. A prison sentence of five to fifteen years is prescribed for this crime.

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[9] The intention of the accused during the execution of the murder was aimed at depriving his life, which can be concluded from his behavior on the disputed occasion (judgment of the Supreme Court of Serbia Kž. 608/2003); The accused acted with possible intent because he was aware that by stabbing a vital part of the victim's body, he could deprive him of his life, so he agreed to it (judgment of the Supreme Court of Serbia Kž. 649/2003); The existence of direct intent on the part of the accused cannot be questioned when he inflicted six stab wounds on the injured party with a knife. in the area of the abdomen and chest, despite the fact that he tried to stop the injured person's bleeding after a critical event (judgment of the Supreme Court of Serbia Kž. 618/2004).

Qualified (aggravated) murder (Article 114 CC) exists when premeditated murder is committed in such a way, under such circumstances, for such motives or against such a person that gives it a greater degree of severity and danger for which the law prescribes a heavier punishment. The Serbian Code distinguishes several forms of aggravated murder. These are murder according to:

a) the method of execution;
b) the motives of the perpetrator;
c) the circumstances of the execution and the consequences; and
d) the nature of the passive subject. When the actions of the perpetrator acquire several qualifying circumstances of murder, some of which remained in the attempt, the court is obliged to include in the legal qualification, in addition to entering qualified forms of the crime, that some of them remained in the attempt[10].

After the amendment from 2019[11], as a special form of this part (paragraph 2), the punishable preparation for the commission of aggravated murder, in any form of manifestation, is foreseen. Thus, according to this legal provision, the act of the perpetrator by which he/she acquires or equips the means for the execution of the criminal offense of capital murder or removes obstacles to its execution, or agrees with others, plans or organizes its execution, or any other action that creates the conditions for its immediate execution, is punishable. For this crime, punishable preparatory actions, a prison sentence of one to five years is prescribed.

In this paper, we will analyze a serious murder that is carried out of a special kind of motive of the perpetrator – from low/basic motive.

IV. Instigation/Motive of the Perpetrator as an Element of the Crime of Murder

In legal theory, the understanding is accepted that human behaviour aimed at the execution of a criminal offense provided for in the law is most often motivated, caused by a special type of motivation (intention, motive) of the perpetrator. That is why it is necessary to point out the concept and characteristics of motive in criminal law theory and practice.

Namely, motive represents a special subjective, psychological characteristic of criminal acts. This is a circumstance that is subject, above all, to ethical evaluation[12]. It also occurs/appears in criminal law as a circumstance that is important for sentencing. Although no motivation (or motive) fully justifies the commission of any criminal act, it can, most often, explain the perpetrator's reasons for undertaking the act of committing a specific criminal act[13].

In legal theory, one can find such understandings according to which the concept of motivation is equated with the concept of motive14. According to these understandings, motive explains the reasons for which the perpetrator committed a criminal act, thus

[10] Judgment of the Supreme Court of Serbia Kž. 10/98.

[11] Official Gazette of the Republic of Serbia no. 35/2019.

[12] Grozdanić, V., Škorić, M., *Punishing law*, Opći part, Rijeka, Law Faculty, 2009, p. 117.

[13] Babić, M., Marković, I., Krivično Law. General part, *(Criminal Law. General Part),* Spa Luka, Law Faculty, 2008, p. 406.

[14] Mrvić Petrović, N., *Criminal law*, Belgrade, Služ beni glasnik, 2005, p. 153.

indicating the personality of the perpetrator of such a crime[15]. Motive is considered to be the motivation or reason for which a certain criminal offense was committed. P. Novoselec also equates motivation and motive, who points out that the motivations or motives for which the crime was committed affect the degree of guilty[16]. A similar understanding is taken by Z. Stojanović according to which motivations (motives) can be evaluated ethically, which is important for determining the punishment or for the legal qualification of the criminal act. In doing so, he points out that there are opinions according to which motives should be evaluated in relation to the degree of guilt of the perpetrator, starting from the fact that the degree of guilt is greater the more negative the motive of the perpetrator and vice versa[17].

Those authors who consider incitement/motivation and motive as synonyms want to especially emphasize the motivation of the perpetrator to commit the crime[18]. Motivation represents an internal incentive that is a condition for action, for behavior of a person. It is the result of striving to satisfy certain needs, some of which are primary, fundamental and existential, and some of which only satisfy the existence of social-psychological balance[19]. Motivation thus represents the inner psychic force that drives human behavior. No motive justifies the commission of a criminal act, but it is not devoid of any criminal law significance, especially since the personality of the perpetrator is often manifested through it[20].

Motive is the internal driver of every decision of a person and his/her action by which decision made earlier is realized. It influences the direction of action towards the achievement or realization of a given/set goal and is at the basis of every targeted and intentional action. In the theory of criminal law, there are also such understandings according to which motive is a psychological phenomenon that develops from stimuli and psychological properties of the perpetrator and as such, causes voluntary activity.

Some authors, on the other hand, insist/believe that the motive or motivation reveals the drivers of a person's decision to commit a criminal act[21]. Thus, the motive[22] represents the driving force for the determination of the perpetrator to commit the murder. Those factors play a significant role not only in assessing the degree of guilt of the perpetrator, but also in the legal qualification of the act, and thus in the decision on punishment. Motive means a representation of something that produces a decision of the will to do something in the subject. From the criminal law point of view, a motive is a representation of a consequence or something else relevant under criminal law that had contributed to the perpetrator's decision to undertake the act of execution. The Motive or excitement reveals the initiators of the decision to commit the criminal act[23].

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[15] Petrović, B., Jovašević, D., *Krivično right BIH (Criminal Law BIH). General part*, Sarajevo, Law Faculty, 2005, p. 156.

[16] Novoseelec, P., *General Part Criminal Law*, Zagreb, Pravni Fakultet 2004, p. 401.

[17] Stojanović, Z., *Commentary on the Criminal Code of the Federal Republic of Yugoslavia*, Belgrade, Službeni list, 2002, p. 78.

[18] Stojanović, Z., *Krivično Law. General part (Criminal Law. General part),* Belgrade, Pravna book, 2005, p. 281.

[19] Horvatić, Ž., *Criminal Law. General Section*, Zagreb, Faculty of Law, 2003, pp. 186-187.

[20] Lazarević, Lj., Vučković, B., Vučković, V., *Commentary Crooked leg of the code Black Gore*, Cetinje, Obod, 2004, pp. 127-128.

[21] Radovanović, M., *Criminal law. General part*, Belgrade, Contemporary administration, 1975, p. 185.

[22] Simić, I., Petrović, M., *The Criminal Code of the Republic of Serbia. Practical Application*, Belgrade, Official Gazette, 2002, p. 30.

[23] Radovanović, M., Đorđević, M., *Criminal law. Special part*, Belgrade, Savremena administracija, 1977, p. 185.

Some authors[24] believe that the motive, that is, motivations reveal the perpetrator's intimate motives that lead to his/her decision to commit a crime. When motive is an element of nature of a criminal offense, as in the case of aggravated murder, then it is taken into account as such when determining whether the perpetrator's behavior contains elements of the said criminal offense or not.

In legal theory[25] there are opinions that motives should be evaluated in relation to the degree of guilt, starting from the fact that the degree is higher if the motive is more negative and vice versa. Although there are certain arguments for such an opinion, based on a normative understanding of guilt, it has no basis in the legal solution.

Intent is the highest degree of conscious and voluntary directing of an action towards the realization of the consequences of a criminal act. That's why it presupposes the existence of the direct intention of the perpetrator. In fact, the intention is to motivate the perpetrator's actions with his/her idea of the consequence or something else that is relevant under criminal law[26]. In certain cases, the intention reflects not only the directing of the action to the realization of the consequence that is the immediate trigger of the execution of the action, but also to the realization of some further consequence that acts as an indirect, further motivated goal. Intention in criminal law can thus appear in two forms:

a) for some criminal acts, the intention refers to the realization of the immediately following act, so it is a constitutive element of the being of the criminal act; and
b) the intention represents a special characteristic for " stunted" two-act criminal acts (that are criminal offenses where their first part is criminalized as an independent criminal offense if it was committed for the purpose of achieving a further intention).

In the case of some premeditated crimes, the existence of a special intention of the perpetrator is also required. In that case, the intention is understood as a representation of some incidental, secondary, further goal that the perpetrator wants to achieve by committing a criminal act. This means that the intention exceeds the intent; because the consciousness and will of the perpetrator include some further goals that the perpetrator seeks/strive to achieve by the act of execution[27] Actually the goal is realized by the occurrence of the consequences of the criminal act, which does not have to be the case with intent.

V. Low Motive/Basic Motivation of the Perpetrator of Serious/Aggravated Murder

In the scope of motivations as internal psychological characteristics of the perpetrator's personality that motivate him to undertake the act of depriving the life of another person, special importance, nature, characteristics for the legal qualification of the act have "low" motivations. Thus, the criminal offense of aggravated murder (Article 114, item 5 of the CC of Serbia), in addition to the basic, constitutive elements of being that make up the legal concept and content of every (ordinary) murder, is

[24] Čejović, B., *Criminal law. General part,* Belgrade, Službeni List, 2002, p. 249.
[25] Stojanović, Z., *Criminal Law. General Part*, Belgrade, Faculty of Law, 2013, p. 319.
[26] Jovašević, D., *Criminal law. General part*, Belgrade, Dosier, 2018, p. 184.
[27] Tomić, Z., *Criminal law II. Special part*, Sarajevo, 2007, Faculty of Law, p. 81.

characterized by a special type of qualifying circumstance in the form of motivation or motive of the perpetrator. Thus, this criminal offense consists of:

a) the act of execution – deprivation of the life of another is undertaken with a special type of motive,
b) the motive has a special significance, nature, character and effect that motivates the perpetrator to undertake the act of execution,
c) the motive of the perpetrator exists in the time of execution or before the execution of the criminal act and
d) motive determines the form of guilt of the perpetrator (direct intent).

This motivation of the perpetrator of the murder as a qualifying circumstance gives the committed act a more dangerous character and greater weight[28]. That is, here the murder is accompanied by a special qualifying circumstance that constitutes a supplementary element that makes it more difficult, which increases the guilt of the perpetrator, as well as the degree of wrongdoing[29].

By determining aggravated murder with a special type of "low" (defamatory, dishonorable) motive, the legislator actually, in one general clause, summarized a large number of different motives on the part of the perpetrator with which he undertakes the act of taking life, which do not represent "reckless revenge" or "self-interest" (item 5, article 114 of the CC of Serbia). At the same time, the Criminal Code does not determine what "low" motivations are and what they consist of. They are defined in legal theory, that is, in judicial practice.

The concept of low motivations should be defined with regard to the moral norms of behavior in a certain society. Thus, it is considered that low motivations are contrary to those norms, because they are condemned by the majority of members of the social community. Such motivations indicate a weak character personality, unscrupulousness, greed. Such motivations are[30]: hatred, envy, malice, greed, malice, intolerance. As a form of aggravated murder with low motives, it is considered, for example, taking the life of a person in order to achieve an immaterial benefit, murder due to hatred, racial, national or religious intolerance, murder to satisfy the sexual urge or to eliminate a rival. In each specific case, it should be assessed in the context of the other circumstances under which the specific criminal offense was committed, whether or not it is a low motive for the commission of the offense.

Low motivations are, therefore, motivations that are morally negatively valued or evaluated. It is necessary that some motivation is high on the scale of negative moral evaluation in order to be able to evaluate it as a low motivation in terms of qualifying circumstances for this criminal act[31]. It is difficult to say where that limit is, so the application of this norm (which is contained in the general clause) largely depends on the position of judicial practice. This is about murder from low motives, which should cover all other cases of murder that are committed from amoral motives, except those expressly stated by law (out of self-interest or wanton revenge). Which motivations are considered low is evaluated in each specific case considering their relation to the prevailing social-ethical norms, because they are condemned by the majority of people

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[28] Đorđević, M., Đorđević, Đ., *Criminal Law*, Belgrade, Projuris, 2020, p. 131.

[29] Đorđević, Đ. Kolarić, D., *Criminal Law. Special Part*, Belgrade, Criminal and Police University, 2020, p. 11.

[30] Lazarević, Lj., *Criminal law. Special part*, Belgrade, Savremena administracija, 1993, pp. 83-84.

[31] Stojanović, Z., Perić, O., *Commentary on the Criminal Code of the Republic of Serbia and the Criminal Code of the Republic of Montenegro with explanations,* Belgrade, Službeni List, 1996, p. 75.

in the society. Low motivations express the weak character of the perpetrator of the criminal act, his/her amorality and unscrupulousness[32]. In each specific case, it should be assessed in the context of the other circumstances under which the criminal offense was committed, whether or not it is a low motive for the commission of the offense.

Such low motivations represent different types of "other" motivations, except self-interest or wanton revenge, which are considered low from an ethical point of view (envy, hatred, national or religious intolerance, sexual extravagance)[33], i.e. motivations that are considered low from a moral and ethical point of view. The scale of low motivations is very diverse and motley, and it is impossible to precisely enumerate all these motivations, which in the context of other circumstances deserve the epithet of low motivations[34]. These are motives that are in direct opposition to the moral principles of a society, and therefore always represent absolutely low motives regardless of the context in which they appear, unlike other low motives that are subject to the court's assessment in any case. The concept of low motives, these authors further consider, is a normative, socially ethically determined concept. This stems from the fact that the legislator did not determine its essence and meaning, so in legal theory, when determining this term, one starts from the ruling social-ethical and moral views and attitudes of the given society. Based on this criterion, low motivations are those motivations that are in sharp contrast to the prevailing generally accepted moral norms and attitudes and that are condemned by the majority of members of the social community. All of them are characterized by a particularly high degree of moral reprehensibility, social and ethical reprehensibility and contempt.

These are extremely negative motivations that make the perpetrator's behavior inhuman, dishonorable and unworthy of a person, and him/her a characterless and unscrupulous personality. A murder with low motives is considered a murder in which the perpetrator is motivated by such motives that, even according to the strictest criteria, cannot be worthy of a man, motives that indicate the moral lowness of the perpetrator and that cause severe moral rebuke from the social environment. Whether it is low motivation is[35] decided by the court in each specific case, taking into account the quality, i.e. the specific form of low motivation and the relevant norms of the prevailing, general social morality. Therefore, the starting point here is the ruling social-ethical and moral views and attitudes. Low motives are a concept that is regulated by criminal legislation, but socially and ethically determined. In this way, the legislator includes all other cases of murders that are committed out of amoral aspiration and low passion and to subject the devalued and egoistic personality of the perpetrator to a proportionate sanction. Those motivations are on the highest scale of the scale of negative social and moral evaluation.

Other low motivations represent motivations as qualifying circumstances of murder that are determined on the basis of the morals of a specific society, such as: hatred, envy, malice, satisfaction of vanity or hatred caused by excessive jealousy etc.[36], i.e. motivations that require severe moral rebuke of the perpetrator, while for

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[32] Lazarević, Lj., Vučković, B., Vučković, V., *Commentary on the Criminal Code of Montenegro*, Cetinje, Obod, 2004, pp. 355-356.

[33] Đorđević, Đ., *Criminal Law. Special Part*, Belgrad, Criminal and Police University, 2014, p. 13.

[34] Babić, M., Marković, I., *Criminal Law. Special Section*, Banja Luka, Faculty of Law, 2008, p. 42.

[35] Đorđević, Đ., Kolarić, D., *Criminal Law. Special Part*, Belgrade, Criminal and Police University, 2020, p. 20.

[36] Mrvić Petrović, N., *Criminal Law*, Belgrade, Official Gazette, 2005, p. 234.

which they do not represent any of the motivations related to revenge, for example, murder in order to eliminate competition at work, competition or for the sake of maintaining a love relationship[37]. These are, therefore, the motives for committing murder, which, even by the strictest criteria, cannot be worthy of a human being and are in contradiction with social understandings of human morality. Such motivations express the moral inferiority of the perpetrator. Therefore, in order for motives to be considered low, it is necessary to manifest such a goal of the perpetrator that can be treated objectively and subjectively in the sense of lowness[38].

In legal theory and judicial practice, the following forms of expression of low motivations appear: jealousy between spouses or common-law partners, hatred, malice, satisfaction of sexual needs, for the purpose of achieving some benefit, but which is not of a material nature, national hatred, chauvinism, maintaining love relationships with a woman killed, envy, greed, malice, intolerance, marital (extramarital) infidelity (adultery) and the like/similar.

VI. Low motives as an element of aggravated murder in comparative criminal law

6.1. The Law of the States of the Region

Within the framework of the countries that were created after the breakup of the former SFR Yugoslavia, the analysis of criminal legislation shows numerous forms of manifestation of the criminal offense of aggravated murder according to the motives of the perpetrator.

Today, in Bosnia and Herzegovina there is a complex criminal justice system consisting of four criminal laws. These are:

a) the Criminal Code of Bosnia and Herzegovina (CC BIH)[39];

b) the Criminal Code of the Federation of Bosnia and Herzegovina (CC FBIH)[40];

c) the Criminal Code of the Brčko District of Bosnia and Herzegovina (CC BD BIH)[41]; and) the Criminal Code of the Republic of Srpska (CC RS)[42].

Only the last three laws in the corresponding chapter of the special act, within the criminal offenses against life and body, provide for criminal offenses of murder.

The Criminal Code of the Federation of Bosnia and Herzegovina[43], Chapter Sixteen, Article 166, provides for the basic and serious crime of murder. Ordinary/basic murder (paragraph 1) consists in the killing of another person, for which the crime is

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[37] Pavišić, B., Grozdanić, V., Veić, P., *Commentary on the Penal Code*, Zagreb, Narodne novine, 2007, p. 313.

[38] Simić, I., Petrović, M., *Criminal Law of the Republic of Serbia*, Practical Application, Belgrade, Službeni glasnik, 2002, p. 35.

[39] Official Gazette of Bosnia and Herzegovina no. 3/2003, 32/2003, 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 32/2007, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018 and 46/2021.

[40] Official Gazette of the Federation of Bosnia and Herzegovina no. 36/2003, 37/2003, 21/2004, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014 and 75/2017.

[41] Official Gazette of the Brčko District of Bosnia and Herzegovina no. 19/2020.

[42] Official Gazette of the Republic of Srpska no. 64/2017, 104/2018 and 15/2021.

[43] Simović, M., Todorović, Lj., Simović, V., *Criminal law in Bosnia and Herzegovina*, Sarajevo, Fineks, 2010, p. 190.

punishable by imprisonment for at least five years. Aggravated murder (paragraph 2) occurs in several alternative forms of manifestation. Thus, according to the motives, aggravated murder, for which a prison sentence of at least ten years or a long-term prison sentence is prescribed, occurs as[44]:

a) murder out of hatred (item c). This law, in Article 2, Item 11, provides that a hate crime is any criminal offense committed because of another person's racial affiliation, skin color, religious belief, national or ethnic origin, language, disability, gender, sexual orientation or gender identity. Such action will be taken as an aggravating circumstance if this law does not expressly prescribe a more severe punishment for a qualified form of a criminal offense committed out of hatred and
b) murder for self-interest, for the purpose of committing or concealing some other criminal offense, out of wanton revenge or from other base motives (point d).

Article 163 of the Criminal Code of the Brčko District of Bosnia and Herzegovina (chapter sixteen) has the same legal description of the crime of murder (aggravated murder). Namely, according to this legal solution, aggravated murder according to the motives of the perpetrator (paragraph 2) occurs in the following two forms of manifestation. These are[45]:

a) murder out of hatred (item 3). In Article 2, point 42 of the CC of the Brčko District of BIH, hatred is defined as follows. Thus, according to this regulation, hatred is an incitement to commit a criminal offense, prescribed by this law, which is wholly or partially based on differences based on real or assumed ethnic or national origin, language or script, religious beliefs, race, skin color, gender, sexual orientation, political or other belief, social origin, social position, age, health status or other characteristics, or due to being brought into contact with persons who have any of the aforementioned different characteristics; and
b) murder for self-interest, for the purpose of committing or concealing some other criminal act, out of wanton revenge or other base motives (item 4). This criminal offense is also punishable by imprisonment for at least ten years or long-term imprisonment.

Finally, the Criminal Code of the Republic of Srpska foresees the system of criminal offenses of murder in a different way, unlike the previous two laws. In the first place, ordinary and aggravated murders are two independent criminal acts, provided for in two separate legal provisions, in chapter twelve. Ordinary murder[46] (Article 124 of the CC) consists in taking the life of another person. A prison sentence of five to twenty years is prescribed for this crime. However, if this offense was committed under particularly extenuating circumstances (paragraph 2), then the perpetrator may be sentenced to imprisonment for a period of one to eight years.

Article 125 of the Criminal Code of the Republic of Srpska[47] provides for aggravated murder, for which a prison sentence of at least ten years or life imprisonment is

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[44] Petrović, B., Jovašević, D., Ferhatović, A., *Criminal Law 2,* Sarajevo, Law Faculty, 2016, pp. 316-318.

[45] Simović, M., Simović, V., *Criminal law Brcko district Bosnia and Herzegovina*. *Special Part*, Laktaši; Grafeks, 2021, pp. 7-8.

[46] Babić, M., Markovič, *Criminal law. Special Part,* Banja Luka, Law Faculty, 2008, pp. 37-41.

[47] Jovašević, D., Mitrović, Lj., Ikanović, V., *Commentary of the Criminal Code of Republic Srpska*, Banja Luka Official gazette, 2021, pp. 263-268.

prescribed. According to the motivations and motives of the perpetrator, this criminal act occurs as deprivation of life for self-interest, for the purpose of committing or concealing another criminal act, out of wanton revenge, hatred or other particularly low motives. (Item 2.). In addition, in Article 123, point 21, the Code of Criminal Procedure stipulates that a hate crime is a crime committed in whole or in part due to racial, national or ethnic affiliation, language, religious belief, skin color, gender or sexual orientation, health status or gender identity of a person.

The Criminal Code of North Macedonia[48] in Chapter Fourteen: "Criminal acts against life and body" in Article 123 provides for ordinary (paragraph 1) and aggravated murder (paragraph 2). Ordinary murder consists in taking the life of another person. For this crime, a prison sentence of at least five years is prescribed. Aggravated murder, according to the motives of the perpetrator, for which a prison sentence of at least ten years or life imprisonment is prescribed, exists in the following cases:

a) deprivation of life for selfish reasons, due to the commission or concealment of another criminal act, out of ruthless (reckless) revenge, out of hatred or from other low motivations (item 4); and
b) taking life for the purpose of extracting organs, tissues or cells for transplantation.

Criminal Code of Slovenia[49] in Chapter fifteen, under the title: "Criminal offenses against life and body" in article 115, foresees the criminal offense of murder – "Murder". The crime consists in the taking of life ("Whoever takes life from someone"), for which a prison sentence of five to fifteen years is prescribed. Serious murder is a criminal offense under Article 116 of the Criminal Code of Slovenia, for which a prison sentence of at least fifteen years is prescribed. This crime, depending on the motives of the perpetrator, exists in the following cases:

a) due to a violation of equality (item 3); and
b) out of selfishness ("out of murderous intent"), self-interest, in order to commit or cover up another criminal offense, out of thoughtless revenge ("out of reckless revenge") or from other low motivations ("from some other low inclinations") (item 4).

Criminal Code of Croatia[50] in Chapter ten under the title: "Criminal offenses against life and body" in article 110, provides for the criminal offense: “Murder". It consists in killing another person. This offense is punishable by at least five years in prison. "Aggravated murder" is a criminal offense under Article 111 of the CC, for which a prison sentence of at least ten years or a long-term prison sentence is prescribed. Among other things, this serious murder, according to the motives of the perpetrator, is characterized by the following types of manifestation. These are[51]:

a) murder for self-interest, wanton revenge, hatred or other base motives (item 4); and
b) murder for the purpose of committing or concealing another criminal offense (item 5).

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[48] Official Gazette of the Republic of Macedonia no *37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 87/2007, 7/2008, 139/2008, 114/2009, 51/ 2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 1* 96/2015, 226/2015, 169/2016, 97/2017, 170/2017 and 248/2018.

[49] Official Gazette of the Republic of Slovenia no. 55/2008, 66/2008, 39/2009, 91/2011, 50/2012, 54/2015, 6/2016, 38/2016, 27/2017, 23/2020, 91/2020 and 95 /2021.

[50] Official Gazette of the Republic of Croatia no. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019 and 84/2021.

[51] Turković K., et al., *Commentary Punishing of Law*, Zagreb, Narodne novine, 2013, pp. 163-164.

The Criminal Code of Montenegro[52] in Chapter Fourteen: "Criminal Offenses against Life and Body" in the provision of Article 143 provides for the basic form of murder (deprivation of the life of another person) for which a prison sentence of five to fifteen years is prescribed.

Serious/felony murder (Article 144), for which a prison sentence of at least ten years or a long-term prison sentence is prescribed, according to the motive of the perpetrator, occurs as deprivation of life:

a) out of self-interest/for selfish reasons;
b) for the purpose of committing or concealing another criminal act;
c) out of recklessness revenge; or
d) from other low motives, without further specifying what these "low" offers are, i.e. what they consist of.

6.2. The law of Representative European States

In the continuation of the paper, we will present the characteristics of criminal acts of murder according to the motive of the perpetrator, according to the solutions of the most important European criminal legislation.

Criminal Code of France[53] in a separate part, in Section two entitled: "Attack on a person's personality", in the first chapter: "Attack on a person's life" in two chapters, it foresees criminal acts against life, depending on the form of guilt (guiltiness) of the perpetrator. These are:

a) the first chapter – "Intentional attack on life" and
b) the second chapter – "Negligent attack on life". Therefore, in these two chapters, the criminal acts of murder are systematized.

Within the criminal acts of premeditated attack on life (chapter one), three parts are distinguished:

a) ordinary (premeditated) murder – Article 221-1 of the Criminal Code,
b) aggravated murder – Art. 221-2 to 221-4. CC and) poisoning (*empoisonnment*) – Article 221-5. CC. Premeditated murder – Article 221-1 of the Criminal Code (*meurtre*) is the intentional causing of the death of another person. This offense is punishable by up to thirty years in prison.

Felony murder or "murder" is prescribed by the Code in three legal articles (Art. 221-2 to 221-4 of the CC) for which the penalty of life imprisonment is prescribed. The Code defines this crime as premeditated murder that was committed under certain circumstances, in a certain way, for certain motives (goals) or against a certain person. Aggravated murder (*meurtre*) with regard to the motive, motive of the perpetrator (Article 221-2 of the Criminal Code) exists when premeditated murder is undertaken with the following goal[54]:

a) preparation or easier execution of another criminal offense; and
b) helping the perpetrator of another criminal offense or his accomplices to escape or not to be punished. Here, murder is a necessary condition to remove an obstacle and thus prepare, enable or facilitate the execution of a criminal act, regardless of whether it is another, subsequent, criminal act that is actually committed or

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[52] Official Gazette of the Republic of Montenegro no. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 42/2015, 58/2015, 44/2017, 49/2018 and 3/2020.

[53] Penal Code of France, Juillet 2012, Paris, Dalloz, 2013, pp. 61-63.

[54] Golovko, L.V., Krylova, N.E., *Ugolovn yj kodeks Francii (French Criminal Code)*, Sankt Petersburg, Zercalo, 2002, pp. 170-175.

attempted. But its execution must be a motive, the reason for which the perpetrator approaches the execution of the murder. In the second case, the murder is committed in order to enable the perpetrator or accomplices in the commission of another, previously committed, criminal act to escape or otherwise avoid criminal prosecution and punishment, that is, the execution of the imposed sentence.

The Criminal Code of Italy[55] in chapter twelve, in the group of criminal offenses against the person: "Delitti contro la persona", in the chapter: "Criminal offenses against life and body integrity" prescribes several criminal offenses of murder[56]. Article 575 of the CC provides for murder (*L' omicidio*). The offense consists in causing the death of another person. A prison sentence of up to twenty-one years is prescribed for this crime. Article 576 of the Criminal Code prescribes aggravated murder, which is called: "Murder under aggravating circumstances" (*Circostanze aggravanti. Pena dell' ergastolo*). Life imprisonment is prescribed for this crime.

Serious murder in the presence of motive as aggravating circumstances occurs in several forms of manifestation. The first form of aggravated murder (Article 576, paragraph 1 of the CC) exists if the act of committing a criminal offense was undertaken in the presence of one of the aggravating circumstances from Article 61, paragraph 2 of the CC, where the following motives appear:

a) if the offense was committed for the purpose of concealment of another previously committed criminal act, where it is irrelevant in what capacity the perpetrator of the murder participated in the earlier criminal act, as well as whether that act was discovered and known to the criminal prosecution authorities or not;
b) if the act was committed in order for the perpetrator to do it for himself or obtained or secured any benefit or other profit from another; and
c) if the act was committed in order for the perpetrator to avoid responsibility for another previously committed criminal act, regardless of whether his responsibility was determined by the competent judicial authorities or not.

Another form of aggravated murder (Article 576, paragraph 2 of the CC) exists if the act of taking life was undertaken for the following motives:

a) from low, amoral, dishonorable motives;
b) in order to commit or cover up another criminal act;
c) in order to has obtained for himself or another person a benefit that in the specific case does not have to be obtained at all;
d) in order to avoid responsibility and punishment for another previously committed criminal offense in this way.

The third form of aggravated murder (Article 576, paragraph 3 of the CC) exists if the act of causing the death of another was undertaken in order for the perpetrator of the murder to hide (remains or becomes unavailable to the criminal justice authorities) in order to avoid the imposed prison sentence or arrest due to any previously committed criminal acts, regardless of what kind of criminal act it is and in what capacity the perpetrator of the murder participated in such a criminal act.

In the Criminal Code of the Federal Republic of Germany[57], in the sixteenth chapter entitled: "Criminal offenses against life", criminal offenses against life and body are

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[55] Legge 10, Ottombre 1930, no. 1398, Testo coordinate ed aggiornate del Regio Decreto Legge 20 March 2016, No. 20 and 8 March 2017, no. 24.

[56] *Compendio di Diritto penale, Parte generale e speciale*, Napoli, Simone, 2008, pp. 401-403.

[57] *Strafgesetzbuch – StGB, Deutscher Taschenbuch Verlag (Criminal Code – StGB, German Paperback Publisher),* Munich, 2012, pp. 113-116.

provided for. Article 211 of the CC provides for aggravated murder (murder or *Mord*). This offense consists in the unlawful deprivation of life of another person with intent, for which the penalty of life imprisonment is prescribed. According to the motives used by the perpetrator during the execution of the act, aggravated murder exists in the following cases:

a) if the taking of a person's life is a pleasure for the perpetrator (a special type of low, immoral, reckless motivation (*Mordlust*);
b) if a person is taken to satisfy sexual desires the need, therefore, of low passions, eccentricities (*Geschlechttrieb*);
c) if the deprivation of a person's life comes from self-interest (*aus Habgier*) or from other low motives (*aus niedrigen Beweggründen*) and) if the deprivation of another's life is undertaken in order to enable (facilitated) the commission of another criminal offense or to hide its commission.

Ordinary murder (*Totschlag*) is provided for in the provision of Article 212 of the CC in a negative way. This criminal offense exists in all cases that do not constitute serious murder (*ohne Morder zu sein*) or as the Code says: *"Whoever kills a person and is not a murderer within the meaning of Article 211, for this offense, a prison sentence of at least five years is prescribed''*.

The Criminal Code of Switzerland[58] in the first chapter of the second part entitled: "Criminal offenses against life and health" in Article 111 provides for ordinary murder –*Totung*[59]. It consists in intentionally taking the life of a man/person (another person). However, this crime exists only if the conditions for the existence of aggravated murder from Article 112 of the CC are not met. Ordinary murder is punishable by imprisonment for at least five years. Serious murder is provided for in Article 112 of the Criminal Code. This offense is punishable by life imprisonment or a prison sentence of at least ten years. This act, among other things, exists if the act of taking the life of another person is undertaken for such motives "which are particularly depraved". Thus, this criminal offense determines a number of qualifying circumstances, among which the particular perversion of the motive or the goal of the commission of the crime, which causes a special condemnation of the society, so that it gives the committed crime a more serious appearance. When there is "special depravity" it is a factual question that the court resolves in each specific case, taking into account the objective circumstances of the committed act and the subjective circumstances of the perpetrator's personality.

The Criminal Code of Russia[60] in the seventh part entitled: "Criminal offenses against the personality", in the sixteenth chapter: "Criminal offenses against life and health" (Offences against life and health) provides for criminal offenses of murder. Ordinary murder (Murder) is provided for in Article 105, paragraph 1 of the CC. It is intentional causing of the death of another person[61]. A prison sentence of six to fifteen years is prescribed for this crime. Article 119 of the CC prescribes a specific criminal act consisting of threatening (announcing, making it appear) to commit murder. This act is called: "Threat of killing or causing severe damage to health". For this crime is

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[58] *StGB, Schweizerisches Strafgesetzbuch, Aktuell geltende Fassung (StGB, Swiss Criminal Code, currently valid version)* 2013, 7th Auflage, Zurich, 2013, pp. 77-78.

[59] A.V. Serebrenikova, N. F. Kuznetsova, *Ugolovniy codex Schwejcarii (Swiss Criminal Code),* Moscow, Norma, 2000, pp. 48-49.

[60] *Rossijskaja gazeta (Russian newspaper)* no. 63/1996.

[61] A.I. Rarog, G.A. Esakov, A.I. Chuchaev, V.P. Stepalin, *Criminal Law of Russia. General and Specific Parts*, Lesson Course, Moscow, Prospekt, 2007, pp. 207-214.

alternatively prescribed punishment of restriction of freedom for up to two years, isolation for four to six months or imprisonment for up to two years.

Felony murder or "serious murder" is provided together with ordinary murder in Article 105, paragraph 2 of the CC. For this crime is alternatively prescribed prison sentence in for a period of eight to twenty years, life imprisonment or the death penalty. With regard to the motive of the perpetrator, serious murder exists in the following cases:

1) when the murder was committed out of self-interest, for hire or was committed together with robbery, extortion or[62] banditry (item h.). Here, in fact, we are talking about three types of manifestation of this form of serious murder. These are:
   a) if the deprivation of another person's life occurred out of self-interest;
   b) if the perpetrator of the murder was hired to commit this criminal act for a specific financial gain; and
   c) if the intentional deprivation of the life of another person occurred in conjunction with other serious violent property crimes such as: robbery, extortion (racketeering) or banditry, where the force applied to another person with the intention of obtaining illegal property benefit leads to intentional deprivation of the life of another person,
2) when the murder was committed for hooligan motives (item z.)[63]. Here, violent, thuggish behavior that attacks (endangers the life or bodily/physical integrity of another person) in a public place appears as a stimulus, an internal driver of the perpetrator to take the action of taking the life of another person – either a person towards whom the perpetrator previously behaved in a hooligan way or another person who accidentally found there (observer, passer-by) or persons who tried to prevent the perpetrator from hooligan behavior;
3) when the murder was committed with the intention of concealing another criminal offense or to facilitate its commission or was committed together with rape or violent acts of sexual character (item i.);
4) when the murder was committed for the motive of national, racial or religious intolerance or hatred or blood feud (item j.); and
5) when the murder was committed with the intention of using the victim's organs or tissues (item k.). Here too, the motivation of the perpetrator is a qualifying circumstance. This motive is manifested in the form of the intention to deprive another person of his/her life in order to use his/her organs or tissues for transplantation (transplantation) contrary to legal regulations, whether these organs and tissues are used for him/her or for another, with or without property or other uses.

VII. Conclusion

From the most ancient times, until today, all criminal legislations, among the criminal acts that injure or destroy human life as the most important human and social value, recognize different criminal acts of murder. The importance of these

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[62] A.I. Rarog, *Ugolovenoe pravo Rossii. Chast osobennaya (Criminal Law of Russia. Special Part)*, Moscow, Garant, 2008, pp. 40-41.

[63] I. Fedosova, T. Skuratova, *Criminal Code of the Russian Federation*, Moscow, Norma, 2005, pp. 76-78.

criminal acts came to the fore considering that a series of universal or regional international documents adopted in the second half of the 20th century guarantee the "inviolability of the protection of life" or the right to life as one of the most important human rights. This importance is also indicated by the provisions of the constitutions of numerous countries, which include human life among the specially protected social values of the highest level.

Regardless of such international or national regulations on human rights, i.e. their comprehensive protection, even today there are cases of unlawful (illegal) deprivation of life (causing death) of another person as a criminal offense in the system of general, classic, conventional criminality. There are different forms of manifestation of the crime of murder. These are:

a) ordinary murder,
b) serious or qualified murders and
c) easy or privileged murders for which a mild punishment is prescribed – a prison sentence of up to five years.

Modern/Contemporary criminal legislation distinguishes several forms/types of serious/qualified murders according to various criteria, among which are the motivations (intentions) of the perpetrator. Among the motives of the perpetrator as internal instigators of activity, there are low, defamatory, dishonorable motives according to the understanding of morality, legal tradition, social understandings etc. In those cases, the act of taking the life of another person is preceded by the motive (decision, goal, intention) of the perpetrator, which guides or directs him/her to perform such an act. Various forms/species of manifestation of the perpetrator's "low" motivations are known not only in the legislation of Serbia and the countries of the region, but also in the legislation of other European countries.

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