INSTITUTE OF CRIMINOLOGICAL AND SOCIOLOGICAL RESEARCH
JUDICIAL ACADEMY

IX International Scientific
Thematic Conference

PENAL POPULISM AND IMPACT ON THE WORK OF INSTITUTIONS

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Dr Marina Matić Bošković

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Publisher:

Institute of Criminological and Sociological Research

For the Publisher:

Dr Ivana Stevanović

Reviewers:

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Official Language of the Conference:

English

Technical editor:

Milka Raković

Prepress & Cover design:

Boško Radulović

ISBN 978-86-80756-74-5 (IKSI)

DOI: 10.47152/penalpopulism2024

Number of Copies: 10

Copy: Institute of Criminological and Sociological Research, Belgrade

This paper is a result of the research conducted by the Institute of Criminological and Sociological Research financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia under the Contract on realisation and financing of scientific research of SRO in 2024 registered under no. 451-03-66/2024-03/200039.

IX International Scientific Thematic Cofenrence was held in Belgrade on November 22, 2024.

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FOREWORD

The Institute of Criminological and Sociological Research, in collaboration with the Ministry of Science, Technological Development and Innovation of the Republic of Serbia and the Judicial Academy in Belgrade, presents this thematic collection of papers from the 9th International Scientific Thematic Conference, titled *"Penal Populism and Impact on the Work of Institutions."* The conference was held in Belgrade on November 22, 2024, continuing a long-standing tradition of fostering dialogue and knowledge exchange on some of the most pressing contemporary issues in the penal law.

The 9th conference focused on the growing phenomenon of penal populism, a trend that transcends national borders and impacts various facets of legal and institutional frameworks. By bringing together multidisciplinary researchers, legal professionals, policymakers, and practitioners, the conference aimed to shed light on the complex interplay between penal populism and its influence on the work of institutions such as the police, public prosecution, judiciary, prison administration, independent bodies, and media. The thematic scope was broad yet pointed, addressing both theoretical underpinnings and practical implications of penal populism in modern societies.

Penal populism, as a contemporary trend, significantly affects the administration of criminal justice and extends its reach into other areas of law, including competition law and administrative law, particularly through the criminalization of migration. The concept is intrinsically linked to societal fears of crime and public demand for harsher punitive measures, often resulting in mass incarceration and a disproportionate focus on retributive justice. The conference papers explore the dynamics of how fear shapes public opinion, drives political responses, and influences institutional practices, frequently at the expense of balanced and evidence-based policymaking.

One of the key areas of discussion was the feedback loop between crime rates, public opinion, and public policy. How does the perception of crime, often amplified by media narratives and political rhetoric, shape the priorities of law enforcement and judicial systems? Conversely, how do policy decisions influenced by penal populism impact actual crime rates and societal attitudes? These questions are of paramount importance, as they underscore the need for nuanced and informed approaches to crime prevention and justice administration.

Another critical focus of the conference was the relationship between political populism and penal populism. The instrumentalization of crime and justice issues for political gain often leads to the erosion of professional expertise in policymaking, replaced by pol-

icies that cater to community sentiment or electoral interests. This dynamic challenges the balance between the objective administration of justice and populist-driven legal reforms, raising concerns about the long-term implications for rule of law and institutional integrity.

The conference also examined the repercussions of penal populism on constitutional rights and the position of citizens within the legal system, both as suspects and victims of crime. The instrumental use of crime victims in populist rhetoric was a particularly salient issue, as it often distorts the discourse on victim rights and justice. Rather than fostering a genuine victim-centered approach, populist narratives may exploit victimhood to justify overly punitive measures or to delegitimize safeguards for defendants, thereby undermining the principles of fairness and due process.

The collection of papers presented herein reflects the richness of perspectives and depth of analysis that emerged during the conference. The contributions offer valuable insights into the challenges and opportunities posed by penal populism, exploring its implications for institutional practices, public policy, and broader societal values. By critically engaging with these themes, this publication seeks to advance the discourse on penal populism and provide a foundation for future research and policy innovation in the field.

Starting from the defined framework, the work at the international scientific thematic conference, as well as the thematic collection itself, is structured around five thematic sessions, whereby each includes scientific papers by prominent experts from the country and abroad in the relevant field: Penal Populism in National Legislation; Penal Populism and Role of Media; Penal Populism, International and Comparative Law; Penal Populism and Human Rights; and Penal Populism, Retribution and Restorative Justice.

Belgrade, 23 December 2024

Marina Matić Bošković, PhD
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THE MANIFESTATIONS OF PENAL POPULISM IN SOME AMENDMENTS/PROVISIONS OF THE CRIMINAL CODE OF SERBIA

Milan Škulić*

In the article are explained the basic manifestations of penal populism in some amendments and provisions of the Criminal Code of Serbia. This is especially reflected in some areas of criminal-justice legislation. 1) Introducing the prohibition of mitigating the penalty for certain types of criminal offences; 2) Introducing the institute of multiple recidivism; 3) Significant limitation on possibilities of suspended sentencing; 4) Prescribing a lifetime imprisonment, in combination with introducing a legal prohibition on release on parole for certain categories of offenders sentenced to lifetime imprisonment.

Author especially concludes that a judge in a country characterized by the rule of law must still have the strength to resist such "public expectations" and to make his decision in accordance with the law and according to his free conviction. Besides, the judge must also resist the influence of criminal populism promoted in the media or by some politicians, even other public figures/persons, etc., but a special problem arises when elements of criminal populism penetrate in the criminal legislation.

KEYWORDS: *Penal Populism, Criminal Law, Criminal Code of Serbia, Amendments, Punishment.*

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1. INTRODUCTION

Penal populism is a type of populism and has all the main characteristics that every other type of populism ordinary has. Populism in general is a range of political stances that emphasize the idea of the common people and often position this group in opposition to a perceived elite group. It is usually frequently associated with anti-establishment and anti-political sentiment. Essentially, populism is most often based on strong demagogy. It is essentially too, the same or very similar when it comes to penal populism. In criminological theory, penal populism is explained as "a media driven political process whereby politicians compete with each other to impose tougher prison sentences on offenders based on a perception that crime is out of control" (Pratt, 2006, p. 2).

The phenomenon of penal populism as a kind of a process that ignores or minimizes the views of relevant expert, like criminal law professors, criminologists, justice experts and penal law professionals' experts, claiming instead to represent the views of "the people" about the constant need for tougher punishment for criminal offending is very interesting. It can be explained in the historical point of view, with some typical examples, like the case of United Kingdom in the 1990s years (populist punitiveness) and also the famous United States *war on Drugs* (Newburn, 2007, pp. 14-15). Of course, there are many other examples of penal populism around the contemporary world. That is most often the result of a failure to recognize that the maximum severity of punishment, by itself and without other adequate measures in the domain of not only criminal substantive law, but also criminal procedural law, which also implies greater success in detecting and evidenced criminal offenses (Škulić, 2024a, p. 13),[1] is not a universal and absolutely effective remedy for combating crime.

When it comes to the explanation of penal populism, it is very important not to forget two facts: „First, to thinking about crime and crime policy, it is always important to bear in mind the cultural and political context in which thing take place", because "crime is socially constructed politically-influenced and historically variable." Second, there is no direct link between crime rates and types and levels of punishment" (Newburn, 2007, p. 15).

The penal policy in Serbia, when we speak about the relevant criminal justice/criminal law norms that have a direct impact on the judicial practice, has been mainly characterized by an outstanding *penal populism*, which is principally not justified. Contrary to this, in recent year, among the academic community in Serbia, but also among the representatives of the competent authorities, there has been a lot of insisting on further development

[1] Namely, the traditional attitude in Criminalistics theory is that, typical unknown perpetrator usually is not in advance afraid essentially, or too much, of the prescribed penalty for the criminal offence, he has committed, but he/she is in the first line afraid of the possibility that he/she will be identified and that his/her criminal offence will be discovered and regularly evidenced in criminal procedure law point of view (Aleksić & Škulić, 2024, p. 10).

of the system of alternative criminal sanctions.

Over the last several years, and culminating in recent novelties of the Criminal Code of Serbia of May 2019 (*Official Gazette of the RS*, No. 35/2019) normative requirements for a significant and, regretfully, far-reaching and more severe penal/criminal law policy have been constantly created. This is especially reflected in some areas of criminal-justice legislation.

1) Introducing the prohibition of mitigating the penalty for certain types/forms of criminal offences;

2) Introducing the normative institute of multiple recidivism;

3) Significant limitation on possibilities of suspended sentencing; as well as

4) Prescribing a lifetime imprisonment, in combination with introducing a legal prohibition on release on parole for certain categories of offenders sentenced to lifetime imprisonment.

The legal prohibition of release on parole for certain categories of offenders sentenced to lifetime imprisonment is exceptional normative solution to the general rules (Art. 46 Criminal Code). Namely, in accordance with these criminal law provisions the court shall release on parole a convicted person who has served two thirds of the prison sentence if in the course of serving the prison sentence he has improved so that it is reasonable to assume that he will behave well while at liberty and particularly that he will refrain from committing a new criminal offence until the end of the imposed prison sentence.

In deliberating whether to release the convicted person on parole, consideration shall be given to his conduct during serving of the sentence, performance of work tasks relative to his work abilities, and other circumstances indicating that the convicted person will not commit a new criminal offence during release on parole. It is prescribed too in the Criminal Code (*Official Gazette of RS*, No. 85/2005, 88/2005 - corrected, 107/2005 - corrected, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019), that a convicted person who was given two sanctions for serious disciplinary offences or whose awarded benefits that have been withdrawn shall not be released on parole.

But, exceptionally to the general rules, the court may not release on parole a person convicted for the following criminal offences: aggravated murder (Article 114, paragraph 1, item 9), rape (Article 178, paragraph 4), sexual intercourse with a helpless person (Article 179, paragraph 3), sexual intercourse with a child (Article 180, paragraph 3) and sexual intercourse by abuse of position (Article 181, paragraph 5). Although these are, of course, very serious crimes/criminal offences, the commission of which is often abhorrent to the public, such a ban, fixed in the Criminal Code itself, is still not expedient. It is also too contradictory in a criminal-political sense. In addition, such a legal prohibition is not adequate for some very practical reasons. Namely, if a person convicted of one of these criminal offences has absolutely no hope of ever being released on parole, he or she then has no motive whatsoever to behave decently while serving his prison sentence, and he may commit a serious crime again in prison, for example, kill a guard or another convict, etc.

However, according to the amendments to the Criminal Code of May 2019, the punishment of 30 to 40 years of imprisonment was substituted by the punishment of life imprisonment. What is particularly disputable and subject to severe criticism is the fact that the legislator, quite unnecessarily, introduced an absolute prohibition on release on parole of those sentenced to life imprisonment for some of the gravest sexual offences which, essentially represents succumbing to the influence of "moral panic" (Škulić, 2019, pp. 54-55).

Release on parole is generally and traditionally an excellent measure for prison depopulation (Galliher, 1989, p. 313). Because of that all of the official penal strategies in Serbia also stipulate the increased rate of releases on parole as one of its targets which at a time, several decades ago, used to be constantly above 50 %, only to face a big crisis after that, and "recovery" of releases on parole in recent years. From 2012 until today, releases on parole recorded were generally on the rise.

The percentage of persons released from prisons on probation, in comparison to the overall percentage of convicts in prisons varied from the very law 8% in 2012 up to 26.9% in 2016. The release on parole rate in 2013 was 16.25%; in 2014 – 20.6%; in 2015 – 26.4 %; in 2016 – 26.9%; in 2017 – 26.7%; in 2018. – 26.1%. In 2019 there was a slight drop in the number of persons released on probation (24.5%).[2]

2. THE AMENDMENTS TO THE SERBIAN CRIMINAL CODE FROM 2019 AND A SUMMARY REVIEW OF SOME OF THE PROPOSED AMENDMENTS IN THE DRAFT PROPOSAL OF THE LAW ON AMENDMENTS TO THE CRIMINAL CODE OF SERBIA

The last major amendments to the Criminal Code of Serbia from 2019 (prior to the currently planned amendments during 2024) are very important (*Official Gazette of the RS*, No. 35/2019), and they were mainly aimed at a significant tightening of the legal penal policy, which is particularly expressed in a special part of the Criminal Code. It is obvious especially with regard to certain criminal offenses, such as crimes against sexual freedom. The most striking change of this type in the general part of the Criminal Code refers to the introduction of life imprisonment. The punishment of life imprisonment itself cannot be simply considered as a kind of "capital criminal sanction" and it is really not a form of tightening of penal policy, given that it is essentially very similar to the heaviest punishment that existed until then, which is a prison sentence of thirty to forty years. In this regard, first of all, as a form of a very specific tightening of the lawmaker's penal policy, is the legal ban on conditional release stands out more when it comes to the sentence of life imprisonment imposed on those convicted of certain criminal offenses. This legal prohibition represents

[2] Data obtained from the Administration for the Enforcement of Criminal Sanctions within the Ministry of Justice of the Republic of Serbia.

a very controversial legal solution, which can be justified criticize with very strong arguments.

In accordance with the article 42 of Criminal Code, within the framework of the general purpose of criminal sanctions,[3] the purpose of punishment is:

1) To prevent an offender from committing criminal offences and deter them from future commission of criminal offences (*special prevention*);

2) To deter others from commission of criminal offences (*general prevention*);

3) To express social condemnation of the criminal offence, enhance moral strength and reinforce the obligation to respect the law, what are all some aspects of *general prevention*; and

4) Achieving justice and proportionality among the committed offence and the severity of the criminal sanction.

That last (4th) purpose of punishment, i.e. the achieving justice and proportionality among the committed offence and the severity of the criminal sanction is obviously without of the prevention system of the criminal law sanctions and it cannot be aspect of either special prevention or general prevention. It was added in criminal law provisions in 2019 (amendments), with the obvious idea to promote the tightening the criminal law policy and of course it is too one of the formal manifestations of penal populism in the provisions of the Criminal Code.

Of course, the purpose of criminal sanctions for juveniles, i.e. juvenile offender, are not the same as the purpose for adult offenders. Within the framework of the general purpose of penal sanctions (Article 4 of the Criminal Code), the purpose of criminal sanctions against juveniles is: 1) Influence to the development and enhancement of personal responsibility, 2) Education and proper personality development through supervision, 3) Protection and assistance, as well as 4) Providing general and professional qualifications in order to ensure the juveniles' resocialization (Article 10 of the Law on Juvenile Perpetrators of Criminal Offences and Criminal-Justice Protection of Minors, *Official Gazette of the RS*, No. 85/05).[4]

Since the introduction of life imprisonment, and its variant which includes the prohibition of parole, which is very controversial both in theory and in practical terms, the re-introduction of a variant of multiple recidivism in the criminal legislation of Serbia has attracted far less attention. By the way, this was not done according to the model of the once existing institute of multiple restitution in the criminal legislation of the SFRY (which in the practice of the former Yugoslavia almost did not experience practical application), but

[3] The general purpose of prescription and imposing of criminal sanctions is to suppress acts that violate or endanger the values protected by criminal legislation (Art. 4 of Criminal Code). That general purpose of criminal sanctions formally prescribed in criminal Code is expression of the fundamental basic and function of criminal law and that is protective function.

[4] Application of this Law began on 1 January 2006, and the purpose of vacatio legis was to prepare all actors to the proceedings for the new legislative environment.

a concept from American criminal law, known under the slang name "the three strikes system", which is otherwise extremely controversial in the United States itself.[5]

The fact is too, that one part of the recent amendments to the Criminal Code of Serbia is quite weak in the legal and technical sense point of view. The part of these amendments is also very controversial in the essential aspect, inevitably leads to thinking about the future of our criminal law, which is otherwise part of an attitude, which is almost becoming a trend in contemporary criminal law. Namely, thinking about whether criminal law has a future has been present for some time in the science of criminal law in recent decades, and especially in recent years. For example, the famous German professor of criminal law *Claus Roxin*,[6] who even today, although largely retired, is considered a kind of "icon" of modern criminal law, wrote in particular, about the crisis/future of criminal law (Schünemann, 2007, pp. 945-958).

The concern for the future of criminal law stems primarily from the fact that today, unfortunately, there is an extremely strong influence of the so-called security criminal law, which is most often reflected in legislative practice through often hasty amendments to criminal law, largely aimed at solving the so-called security problems, starting with terrorism and organized crime, and ending with some forms of crime, which are sometimes unnecessarily treated as some particularly great "danger". That is often too, an expression of what is defined in criminology as the so-called moral panic (Hagan, 2008, p. 450). Such is the case in Serbia, for example, with an excessive focus on criminal offences against sexual freedom, especially some forms of those criminal acts/offences, etc. (Škulić, 2019, pp. 27-28).

In the context of development so called preventive criminal law and the promotion of the idea that the main purpose of the criminal law is the security of society and prevention of the crime in general way, the criminal-legal reactions becomes more and more focused on the danger of the criminality/crimes, and less and less on the concrete committed criminal offenses. In the criminological theory is also noticed that "the populistic approach to crime problems suppresses the strategies which essentially deal with the causes of crime (poverty, inequality, unemployment) and gives advantage to the measures and techniques which are relatively simply introduced and applied, and work as a means of calming down the citizens and create the impression decisive actions are taken against crime" (Soković, 2013, pp. 185-232).

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[5] First experiences with that kind of law had American state California. California's famous „3-Strikes and You're Out Law" as one version of *habitual offender laws*, went into effect on March 7, 1994. Its purpose was formally to dramatically increase punishment for persons convicted of a felony and who were convicted of one or more „serious" or „violent" felonies. After California in the USA twenty-eight states have or had some forms of a „three-strikes" law and of course that significantly increased the prison sentences in the judicial practice and too the possibility for a life imprisonment. By the way, origin of the expression „Three strikes and you are out" are from some baseball rules (Scheb & Scheb Jr, 1999, p. 574).

[6] See internet source: T. Duve, Ein Gespräch mit Claus Roxin (A conversation with Claus Roxin), https://www.researchgate.net/publication/26443246_Ein_Gesprach_mit_Claus_Roxin, 1.4.2020.

In accordance with the Article 3. of Serbian Criminal Code, protection of a human being and other fundamental social values constitute the basis and scope for defining of criminal acts, imposing of criminal sanctions and their enforcement to a degree necessary for suppression of these offences.

However, it is increasingly common for criminal law in the last decades generally and in many countries from the comparative criminal law perspective, to be in some situations used for "preventive purposes" as well (Stojanović, 2011, p. 5), contrary to the principle concept that only exceptionally and for specific criminal acts, the criminal zone is extended to the preparation of (such/specific) criminal acts. Thus, the recent amendments to the Criminal Code of Serbia criminalized preparation of murder as a special crime, for which there is essentially no valid *ratio* legis.

Some reforms of the criminal legislation disregard the *ultima ratio* character of the criminal law, so some delicts, which could rather be misdemeanours, are defined as criminal acts, i.e. criminal offences. Also, criminal law in practice is often "broken" and by the fact that the effect of punishment is significantly overestimated, which is considered not only as a "basic criminal sanction", but even as a "universal medicine" or "hot medicine" for the problem of criminality (as a kind of "angry wound"), and what is referred to in science as the so-called penal populism, accompanied by the creation of a kind of "punitive atmosphere" in society. This very *punitive social atmosphere* is generally based on the premise that increased severity of penalties certainly means less crime. This is often accompanied even by a kind of "marketing campaign" in the public in support of the need for a significant tightening of punishment in general or for certain types of criminal acts, which, as a rule, is not based on any previously conducted serious empirical research, or even reliable statistical analyses. Therefore, constantly in many European countries, including in Serbia, every new criminal law reform is accompanied by, among other things, a significant tightening of the legal penal policy. A typical example is the recent introduction of a variant of multiple restitution into the criminal legislation of Serbia (Article 55a of the Criminal Code), which was done to some extent on the model of the concept of "three strikes" from the criminal law of the USA (Škulić, 2023, p. 157).

3. BASIC TYPES OF MANIFESTATION OF PENAL POPULISM IN THE CRIMINAL CODE OF SERBIA

In several areas, it is possible to see some very clear manifestations of penal populism in the Criminal Code of Serbia. In the first line those are:

1) Generally, very significant tightening of the legal penal policy,

2) The introduction of an absolute prohibition of the mitigation of punishment for certain criminal offences/some (aggravated) forms of these criminal offences;

3) Introduction of the multiple recidivism, as well as
4) Limitation of the option of suspended sentence.

3.1. General tightening of the legal/criminal law penal policy

The punishments prescribed for a whole series of classic criminal offenses have been constantly increased in Serbian criminal legislation for decades, both by increasing the legal minimum and by increasing the legal maximum punishment. This is typical for a number of crimes, especially when it comes to crimes against sexual freedom. The tendency towards a constant increase in prescribed penalties is also observed in the proposed amendments to the Criminal Code. So, for example, the same punishment, that is life imprisonment, is prescribed for rape, as well as for murder, and at the same time, the so-called the capital criminal sanction is also prescribed for the most serious, or the most serious, forms of rape, as well as for aggravated murder, which is in principle contrary to the basic postulates of the legal penal policy.

This is, in fact, a consequence of the constant focus of the media, but also of politicians, on crimes against sexual freedom, first of all, on rape as a typical criminal offense from that sphere, which then results in the creation of expectations in the public that such crimes must be punished as severely as possible, which then experienced its "climax" in proposing a sentence of life imprisonment even for the so-called ordinary rape, so not only for qualified forms of that crime, when the victim is a minor. When it was accepted, it was proposed that for the so-called ordinary murder can be sentenced to life imprisonment, which practically erases the difference between ordinary and aggravated murder, which is, of course, meaningless in the classical sense of criminal law. Finally, this is contrary to the rules of the Criminal Code contained in its general part, because according to Article 44a of the Criminal Code, life imprisonment can only be prescribed exceptionally, in addition to imprisonment, for the most serious crimes and the most serious forms of serious crimes.

In addition, a few years ago, the amendment of the Criminal Code significantly narrowed the possibility of imposing a suspended sentence as a significant criminal sanction for crimes that are not too serious, which additionally leads to more frequent imposition of prison sentences, even when it is not fundamentally justified. This is particularly noticeable due to the constant decline in the importance of fines, and all of this, among other things, leads to significant overcrowding in prisons, that is, institutions for the execution of institutional criminal sanctions.

Besides, fine is neither a dominant punishment in the system of criminal sanctions in Serbian criminal law, nor does it have a big significance in practice (which is very disputable and unjustified in terms of criminal policy), and this might explain the reason why there are no special regulations introduced that would preclude/limit such replacement of

sentences. Fine, after all, is a basic misdemeanor`s sanction. In addition, when we speak about fines pronounced for misdemeanors, which are generally far less grave offences than criminal offences, in practice these sentences are rather replaced by prison sentences, although this, too, is very rare.

3.2. Introducing an absolute prohibition of mitigation of punishment for certain criminal offences

For certain criminal offences an absolute prohibition of mitigation of penalty was introduced back in 2009, which means that never and under no circumstances can there be a penalty below the statutory minimum, which for some of such criminal offences already seems high. This includes a number of criminal offences stipulated quite arbitrarily, which "cannot be defended by criminal-policy arguments" (Stojanović, 2023).

General rules for mitigation of penalty are prescribed in the general part of Criminal Code of Serbia. In accordance with the Article 56 of the Criminal Code of Serbia the court may pronounce to a perpetrator of a criminal offence a penalty which is under statutory limits or a mitigated penalty under next cumulative conditions:

1) If mitigation of penalty is provided by law;

2) If the law provides for remittance from punishment of the offender and the court decides otherwise and

3) If the court finds that particularly mitigating circumstances exist indicating that the purpose of punishment may be achieved by a mitigated penalty.

The exception of the general rules for mitigation of penalty is prescribed in the article 57 of the Criminal Code of Serbia. The absolute prohibition of mitigation of penalty exists in two situations:

1) For some criminal offences and aggravated/special forms of some criminal offences and

2) In the case of specific recidivism.

In the first situations, the mitigation of penalty is exceptionally from the general rules, not possible for aggravated murder, some forms of abduction, rape, sexual intercourse with a helpless person, sexual intercourse with a child, some forms of extortion, some forms of unlawful production and circulation of narcotics, some forms of illegal crossing of state border and for human trafficking.

When it comes to a restriction for mitigation of penalty due to a specific recidivism, also, exceptionally from the general rules for the mitigation of penalty, the court may not pronounce a mitigated penalty to person who is previously convicted for the same criminal offence or crime of the same type.

3.3. Multiple recidivism in the Criminal Code of Serbia

Recidivism is the "re-commitment of the criminal offense" by the offender who already has so called criminally record. It means committing a criminal offense by a person who has previously been convicted of committing a criminal offense. He or she was already convicted perpetrator of the criminal offense. For understandable criminal-political reasons, every modern criminal law pays special attention to responding to recidivism. Recidivism is, of course, always an aggravating circumstance when it comes to sentencing. It is an aspect that concerns the former life of the perpetrator in accordance with the article 54 Criminal Code. In criminal law, recidivism is considered as an important fact in sentencing, i.e. in concrete determination of sentence (Vuković, 2021, p. 482). The criminal law reaction must certainly be, in principle, harsher when it comes to forms of multiple recidivism, but of course, it can sometimes be exaggerated in this regard, which potentially has elements of penal populism.

In the Criminal Code of Serbia (Article 55a), are prescribed relatively simple conditions, which refer to the specific variant of multiple recidivism defined by it (Škulić, 2020, p. 28). It has done first prescribing in relation to which category of criminal offense a stricter punishment is possible, which practically amounts to raising the special minimum of the legal range of punishment, while retaining as the final limits and otherwise, of the special maximum punishment prescribed in the law. After that, it is also determined which conditions must exist, taking into account the effect of previous criminal sanctioning.

Under the provisions of Article 55a of the Criminal Code of Serbia, more severe punishment for multiple repeat offenders was introduced. For a premeditated criminal offence punishable with imprisonment,[7] the court must impose punishment above the middle range of statutory punishment under the following conditions:

1) If the offender was already twice or more times sentenced to punishment of at least one-year imprisonment for criminal offences committed with premeditation (intent) and

2) If less than five years elapsed from the day the offender had been released from serving the pronounced punishment until a new criminal offence was committed.

The provisions of Article 55a of the Criminal Code of Serbia introduced the rules of stricter punishment for one variant of multiple recidivism. In accordance with these provisions, stricter punishment is mandatory, without leaving it to the court to evaluate its expediency, justification by the demands of penal policy, etc. It is achieved on the other

[7] In Serbian criminal law, similar to the other continental European criminal law, the are two forms of premeditation as a form of guilty: 1) *Direct premeditation* and *Eventual premeditation*.
Namely, in accordance with the article 25 of Criminal Code, a criminal offence is premeditated if the perpetrator was aware of his act and wanted it committed (direct premeditation); or when the perpetrator was aware that he could commit the act and consented to its commission (eventual premeditation).

hand, within the limits of the otherwise prescribed range of punishment. It is not a matter of tightening the punishment, which would be reduced to the possibility/certainty of imposing a heavier punishment than that which is, as a maximum, otherwise prescribed in the criminal law.

The essence of multiple recidivism from Article 55a of the Criminal Code of Serbia, i.e. its effect on the punishment in the specific case, is not in its (optional) tightening, as was the case with multiple recidivism in the former Yugoslav criminal law (Škulić, 2024c, pp. 702-703). The effect of that institute is the drastic change of the legal range of punishment, by significantly increases/makes the minimum penalty higher. That means "if the above conditions are cumulatively met, the court must assess a penalty that will be above half of the prescribed penalty range", i.e. "the penalty range within which the court assesses the penalty in the case of multiple returns is not only raised to the upper half of the prescribed criminal range, it is already narrowing significantly" (Stojanović, 2024, pp. 349-350).

As usual, when it comes to norms that enable (optional) or impose (compulsory) harsher punishment of returnees, the basic principled theoretical objection is that "imposing a harsher sentence solely because of the perpetrator's criminal past represents a deviation from the fundamental rule in the area of sentencing. Namely, according to general rules for determination of sentencing the severity of the punishment should be adjusted to the severity of the crime and the degree of guilt of the perpetrator" (Đokić, 2020, pp. 279-280).

The essential objection to the introduction of multiple recidivism in Serbian criminal legislation is that, although this institute does not lead formally to a harsher punishment, i.e. to the punishment harsher than legal prescribed maximum of penalty for concrete criminal offense, as was the option case with multiple recidivism in the era of the former Yugoslavia, the offender is in some way punished for earlier criminal offense, because of the previously penalty did not have a (special) preventive effect on him (Stojanović, 2023, p. 291).

Finally, the normative mechanism of multiple recidivism in the positive Serbian Criminal Law, introduced since 2019 is not only one of the manifestations of penal populism, but it is not enough correctly prescribed in legal-technical point of view.

3.4. Unnecessary legal limitation of the option of suspended sentence

Certainly, or at least probably, the most radical contribution to the risk of future prison overcrowding is the unnecessary limitation of the option of suspended sentence. That criminal sanction, i.e. the kind of cautionary measures is now impossible in cases of criminal offences for which a sentence of 8 years imprisonment or a more severe sentence can be pronounced, while prior to the amendments to the Criminal Code of May 2019 this limit had been 10 years.

Suspended sentence is one of the cautionary measures, besides judicial admonition.

The cautionary measures have specific purpose. Within the general purpose of criminal sanctions,[8] the purpose of a suspended sentence and judicial admonition is not to impose a sentence for lesser criminal offences to the offender who is guilty when it may be expected that an admonition with the threat of punishment (suspended sentence) or a caution alone (judicial admonition), will have sufficient effect on the offender to deter him from further commission of criminal offences.

In accordance with the article 65 of Criminal Code, by suspended sentence the court determines punishment of the offender and concurrently determines that it shall not be enforced provided the convicted person does not commit a new offence during a period set by the court, which may not be less than one or longer than five years (probationary period). The court may too order in suspended sentence that the penalty shall be enforced if the convicted person fails to restore material gain acquired through commission of the offence, fails to compensate damages caused by the offence or fails to fulfil other obligations provided in provisions of criminal legislation. The court shall set the time for fulfilling such obligations within the specified probationary period. It is prescribed too that security measures ordered together with suspended sentence shall be enforced.

Suspended Sentence is not possible for all types of the criminal offences. In accordance with the article 66 of Criminal Code, a sentence of imprisonment of less than two years may be suspended. For criminal offences punishable by imprisonment *up to eight years or more,*[9] the sentence may not be suspended. A suspended sentence may not be pronounced when more than five years have elapsed from the time the prison sentence or parole pronounced to a perpetrator for premeditated criminal offence became final. In determining whether to pronounce a suspended sentence the court shall, having regard to the purpose of suspended sentence, particularly take into consideration, the following circumstances:

1) The personality of the offender,
2) The previous conduct of the offender,
3) The conduct of the offender after committing the criminal offence,
4) The degree of culpability of the offender and also
5) Other circumstances relevant to the commission of crime.

Although in practice, until present, a suspended sentence would often be pronounced for some criminal offences for which special maximum is a sentence of 8 years imprisonment, it would be realistic to expect that in the forthcoming period this might lead to significant expansion of prison sentences, because previously that limit was 10 years imprisonment.

[8] Criminal sanctions in Serbian criminal law are punishment, caution, security measures and rehabilitation measures and the general purpose of prescription and imposing of criminal sanctions is to suppress acts that violate or endanger the values protected by criminal legislation.

[9] That new limit (*up to eight years*), was prescribed by the amendments of the Criminal Code in 2019.

4. POTENTIAL OVERCROWDING OF INSTITUTIONS FOR THE EXECUTION OF INSTITUTIONAL CRIMINAL SANCTIONS

The total number of persons deprived of their liberty in Serbia as of 1 October 2020 was 10,600,[10] which includes persons sentenced to prison or juvenile prison (7,376), as well as the defendants in detention (2002), while the remaining 1,222 persons deprived of their liberty fall under the following categories:

1) Persons sanctioned for misdemeanor;

2) Persons subjected to mandatory psychiatric treatment and custody in a medical institution, as well as

3) Juveniles who have been subjected to the educational measure of remand to a correctional institution.[11]

Since, according to official population estimates, Serbia currently has 6,945,235 inhabitants,[12] it follows that there are about 150 persons deprived of their liberty per 100,000 inhabitants in Serbia. This is not a small number and, regretfully, it can be deemed that such a great number compared to the average number of persons deprived of liberty in Europe is exceptionally contradictory to official targets of the Government of Serbia formulated in current national strategies for achieving more extensive prison depopulation. This is particularly striking in view of the fact that, prior to the pandemic (when there were around 11,500 persons deprived of their liberty) the number of persons deprived of liberty was 165 per 100,000 inhabitants (Škulić, 2022, p. 460). For the purpose of depopulation of prisons and other facilities for the enforcement of criminal sanctions, in May 2017, the Government

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[10] Data on the number of persons deprived of liberty, as well as other data referring to the system for the enforcement of criminal sanctions in correctional facilities in Serbia, were obtained from daily reports about the number of persons Justice of the Republic of Serbia. Such data are not made public, but were obtained in direct contact with the competent authorities of the Administration for the Enforcement of Criminal Sanctions within the Ministry of Justice of the Republic of Serbia, specifically from Mrs. Aleksandra Stepanović, Head of the Department for the protection and implementation of the rights of persons deprived of their liberty.

[11] Namely, there are three categories of sanction for juvenile offenders: educational measures, juvenile prison and security measures. Only some of the educational measures and security measure are form of the deprivation of personal liberty. The juvenile prison sentence is not applicable to all juveniles. Only educational measures may be applied to younger juveniles. Primarily, educational measures are applied to older juveniles too, but they may be exceptionally sanctioned by being sent to the juvenile prison (Škulić, 2024b, p. 257). One can notice that educational treatment is predominant, and repressive responses are exceptional. Similar to other modern legislation in other countries, the purpose of these measures is not repression, but rather they are primarily of educational importance. Within the framework of the general purpose of penal sanctions (Article 4 of the Criminal Code), the purpose of criminal sanctions against juveniles is to influence the development and enhancement of their personal responsibility, education and proper personality development through supervision, protection and assistance as well as by providing general and professional qualifications in order to ensure the juveniles' re-socialization (Škulić, 2010, pp. 1195-1243).

[12] Data of the Republic Statistical Office based on results of the population census and results of statistical processing of natural and mechanical population changes, https://www.stat.gov.rs/sr-Latn/oblasti/stanovnistvo/procene-stanovnistva, 29.11.2020.

of the Republic of Serbia adopted a Strategy for depopulation of facilities for the enforcement of criminal sanctions in the Republic of Serbia until 2020 (Official Gazette of the RS, No. 43/2017, pp. 3-7). The Strategy stipulates measures and activities that contributed to solving the issue of prison overcrowding and improving the accommodation conditions in correctional facilities.

Multiple recidivism, which enables a significantly heavier, i.e. more severe punishment of a certain category of recidivists, i.e. considering its mandatory character, certainly leads to significantly heavier punishments for that type of recidivism. It is the same also with other relatively new rules of our criminal legislation aimed at the constant tightening of the penal policy, such as the prohibition of mitigation for certain criminal offences/ aggravated forms of some criminal offences etc. That will in any case lead, or could lead, especially in combination with an inefficient parole system, to practical problems with the execution of prison sentences, reduced essentially to the problem of "overpopulation" (Škulić, 2016, pp. 363-385).

There is an old anecdote that once "judges used to empty prisons", but now that is in relatively modern times just a contrary - "judges fill prisons". This is referring to the historical fact that in the past, deprivation of liberty was only a way of ensuring the presence of the accused for trial, and then when the trial was over, and if guilt was established, the appropriate punishment would, either corporal, or death penalty, or a fine.

That means too, that prison sentence is a product of a relatively recent era, which, among other things, is characterized by the fact that the freedom of a person as such has acquired a special value.[13] Because of that the deprivation of that freedom for a certain period of time could also acquire the character of a criminal sanctions, which over time becomes dominant in terms of legal norms, although it is not disputed that in modern countries various alternatives to prison sentences are increasingly dominating. However, the prototype of punishment even today (after the abolition of corporal punishment and the death penalty) is considered to be imprisonment (Roxin & Greco, 2020, p. 23).

For a long time, the size of the so-called prison population and there are different

[13] This issue is also related to human work, which is also relatively recent, i.e. primarily with the development of capitalism and the market economy, it gained significantly in value, and then there was an opportunity to "take prisoners", i.e. people punished by deprivation of liberty for a certain period of time, use them for forced labour and thus "achieve multiple goals with one blow"; the perpetrators of criminal acts are sanctioned by taking away what has become more valuable than before, which is freedom, while at the same time enabling the state in a broader sense, to make a suitable profit by exploiting the labour of those people while serving the sentence of deprivation of liberty. Namely, some criminologists observed long time ago and in general point of view, that specific forms of punishments are associated with provided stages of economic development (Galliher, 1989, p. 277).

trends,[14] but the existence of a significant disproportion between different countries and their criminal law and penological systems is quite noticeable. social values in individual countries, specific circumstances that often differ significantly, but perhaps the most important factor is the overall social climate, which also affects those social and state factors that are decisive in relation to this issue, namely the legislative, executive and of course, judicial power in the scope of the constitutional system of the division of power.

There are also some countries which are some kind of „World champions" in the matter of a number of persons deprived of their liberty per 100,000 inhabitants, what is standard criteria for the estimation of the potential overpopulation of the prisons. For example: United States (698), Turkmenistan (583), Cuba (510), Thailand (461), Russia Federation (445), Rwanda (434) etc. That is of course not a good example for Serbia, as one continental European country, especially because of in the EU the average number of persons deprived of their liberty per 100,000 inhabitants is about 100, what is far much lesser than in Serbia now days. That number is too, significantly lesser in the most countries of the former Yugoslavia.

5. CONCLUSION

Criminal law, as the most repressive branch of legislation in the protective function of the most important social/human values from the most serious forms of injury and endangerment, also includes the criminal sanctioning of perpetrators of criminal acts.

The right to implement criminal sanctions, as well as the right to punish within it (*ius puniendi*), belongs exclusively to the state, which realizes this right when the necessary legal conditions exist for it through the action of the criminal court. The imposition and application/enforcement of criminal sanctions are possible only under the conditions prescribed in the Criminal Code, which refer to the purpose of criminal sanctions in general, as well as the purpose of punishment.

Although, previously solid depopulation of correction facilities accommodating persons deprived of liberty in Serbia was achieved by using already existing normative framework, (too) big number of persons deprived of their liberty, in comparison to the number of inhabitants, indicates that it is high time to abandon the detrimental penal populism, culminated in amendments of the Criminal Code of May 2019. These amendments directed at drastically harsher penal policy will, unless the damage already done has been repaired, lead relatively quickly to further, potentially even radical overcrowding of prisons.

[14] Among the countries that today are considered to be the states with the largest number of people deprived of their freedom in relation to the total number of inhabitants, i.e. per every 100,000 inhabitants, the following countries belong: Seychelles (799), United States (698), St. Kitts & Nevis (607), Turkmenistan (583), US Virgin Islands (542), Cuba (510), El Salvador (492), Guam Island under US jurisdiction (469), Thailand (461), Belize (449), Russian Federation (445), Rwanda (434) Virgin Islands (425), http://www.prisonstudies.org/news/more-1035-million-people-are-prison-around-world-new-report-shows, 29.11.2024.

This is not only in direct contrast to the current state strategies for prison depopulation, but it is also rather in dissonance with the real situation of criminality trends in Serbia, which can by no means be considered "dramatic" by any objective criteria.

There are many serious misconceptions in our public about crimes and punishments. Irresponsible politicians, as well as very "bloodthirsty" mass media often contribute this. The traditional representation of the goddess of justice, who is blindfolded, does not mean that justice should be "blind", but that before her all people would have to be equal, and the law would have to be equally valid for everyone. The scales in one hand and the sword in the other hand of the goddess of justice indicate that the punishment must be proportionate to the guilt (*principle of guilty*). In principle, for the same criminal offence, the same criminal sanctions would have to follow. Regardless of the fact that it may be the same type of criminal offense, that is, the same legal qualification, in reality there are really never two" identical" criminal offenses.

Every criminal act/offence is an expression of very diverse circumstances. Finally, it is an old truth that one does not judge the "crime", but its potential perpetrator, and every person, even the one who is accused in criminal proceedings, has a whole series of different life circumstances. Both the circumstances related to the specific criminal act and those related to its perpetrator influence the court's decision on the type and measure of punishment.

There are biblical truths that "with what measure you judge, so will you be judged" and "do not judge, so that you will not be judged", but this does not mean that you really should not judge, but that it is not easy to neither judge nor judge. Judgment is probably more of a divine than a human function, but in the world as it is, people cannot wait only for the final judgment of God. In the rule of law, judges are entrusted with the right and duty of (re)trial. When the judge becomes convinced that the defendant has committed a criminal offense, he declares him guilty with his verdict and imposes a certain criminal sanction, which does not always have to be a punishment, but can also be a warning measure, such as a suspended sentence and a court warning. Of course, for the most serious cases, punishments follow, such as punishment considered as "classic" and that is a prison sentence.

The legislator directs the judge in determining the punishment, by first the law prescribes punishments for individual criminal offence, and as it is always in a certain range, from the minimum to the maximum, the law also prescribes a number of circumstances that the judge must consider when deciding for a specific penalty measure within that range. Those circumstances in each specific case can be both facilitating and aggravating. The judge must also consider and completely take into account the purpose of the punishment. That means that the judge has to assess whether the specific punishment will affect the perpetrator so that he does not commit criminal acts again, which is the so-called special prevention, and whether they will influence other people with their decision not to commit criminal acts, thus achieving the goal of the so-called general prevention.

Mitigating and aggravating circumstances cannot be evaluated mechanically, automatically, or routinely, but must be viewed uniquely and in the light of all relevant circumstances. The opposite procedure would turn the judge into a kind of "mathematician" who simply solves an "equation" composed of a series of "positive" and "negative" points. An absolutely "precise" punishment would follow as a "result" of a little addition and a little subtraction. Professors of criminal law explain this to students with a tragicomic story about a judge who takes the defendant's fact that he is an orphan as an important mitigating circumstance, and he is prosecuted/convicted for the murder of his father and mother.

Do some other specific circumstances affect the punishment, such as public opinion, politicians who promise "zero tolerance", media "spinning", and prejudice? It should not, but certainly sometimes those factors work. That is especially the case with the mass media that traditionally have a great influence on public opinion in many spheres of civil society. They are particularly interested in criminal cases, and of course, these themes are very interesting for the public and citizens, too. After all, science has been writing about "extra-legal factors" influencing court decisions for a long time. This can never be completely avoided, because judges, although they perform a very honorable and in a democratic society one of the most respected functions, they are not gods, nor do they live under a "glass bell".

When the media or other influential social factors condemn someone in advance or "promise" in advance that "the criminal will be severely punished" and when such expectations are created in the public, it is not easy for the judge to act differently. A judge in a country characterized by the rule of law must still have the personally strength to resist such "public expectations" and to make his decision in accordance with the law and according to his free conviction. Of course, the judge must also resist the influence of criminal populism promoted in the media or by some politicians, even other public figures/persons, some NGO etc., but a special problem arises when elements of criminal populism penetrate strong in the criminal legislation.

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PENAL POPULISM IN ITALY: A FEW EXAMPLES FROM THE LAST 20 YEARS

Giacomo Pailli
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This paper explores the phenomenon of penal populism in Italy, particularly over the last two decades, where political and public demands for harsher laws and sentencing frequently follow high-profile crimes and intense media coverage. Penal populism often results in legislative responses that prioritize public sentiment and political expediency over evidence-based policy. The study examines the interplay between lawmaking and media-driven narratives, highlighting the recurring legislative tools, including the expansion of self-defence provisions and the introduction of new offenses like road and nautical homicide, which often serve symbolic rather than practical purposes in addressing crime.

The Italian criminal justice framework, rooted in the fascist-era "Codice Rocco," is characterized by mandatory prosecution and frequent legislative amendments influenced by public outrage. The study critiques how media sensationalism and public demands for swift justice lead to measures like the "security decrees," which address perceived threats but disproportionately target marginalized groups and raise constitutional and human rights concerns.

Through detailed analysis of self-defence laws, road and nautical homicide provisions, and security decrees, the paper underscores the limitations of penal populism in achieving meaningful crime prevention. It argues that such reactive policies often fail to enhance deterrence, exacerbate social inequalities, and undermine procedural safeguards. By situating these developments within broader comparative and constitutional contexts, the paper offers insights into the challenges of balancing public demands for security with the principles of justice, fairness, and the rule of law.

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1. PENAL POPULISM IN ITALY: AN INTRODUCTION AND A WORKING DEFINITION

While the roots of the modern phenomenon of penal populism in Italy may be traced back to the 80s and the 90s (or even before), in this paper we will focus on the last twenty years. Hardly no event of the Italian public life, and especially the so called crime news (*cronaca nera*), goes by without many voices calling for a tougher response by the government and the police, for new crimes to be included in the code or special laws, and for existing sentencing to be made harsher:[2] the law in the books has to show no mercy for the criminals.

The law in action is quite a different matter. Only introducing a brand new crime, i.e. prohibiting a conduct that was previously considered lawful (if, sometimes, merely tolerated), might indeed have a deterrent effect. Citizens, and non-citizens, are advised that a conduct is no longer allowed and that there may be consequences that will ruin life, reputation and relationships. What about introducing "new" crimes that are nothing but dressing an existing crime with new clothing, or increasing sentencing for an existing crime by six months or one year: it can be doubted that these "technicalities" really raise the level of deterrence with the public. There may be side effects to these changes: statute of limitation is often dependent on the sentencing range and also arrest or custody during trial (which is much used in Italy) may also be affected directly or indirectly.

Another common topos that is often heard relates to the "certainty of the punishment" (*certezza della pena*): it is common place, but a true one, that criminal proceedings are often bureaucratised and that their effectiveness crashes against the lengthy, "grey" and micromanagement of prosecution and judgment. Wide nets cast by prosecutors often result in many acquittal, and sentencing that are shorter than the public would expect (as if "years" in prison is a holiday, board and lodge paid) and inevitably reduced on appeal. Is this a sign of a healthy criminal justice system, where the hypothesis of the prosecutors are subject to a strict scrutiny by the court, in the name of the presumption of innocence and the "beyond the reasonable doubt" standard of proof; or is it a clear evidence that the system is unable to deliver a meaningful response against crime.

There are, then, certain criminal trials (and crimes) that are televised, deconstrued in their tiniest pieces, and followed by the public almost with obsession. The summary judgment issued by the public (usually "guilt as charged") long precedes, and remains unrelated to, the actual judgment that will conclude the trial after all evidence are closely examined and witnesses are heard. Also, recent years have seen the growth of a whole set

[2] See, notably, S. ANASTASIA, M. ANSELMI, D. FALCINELLI, Il populismo penale. Una prospettiva italiana, Wolters Kluwer-CEDAM, Padova 2015; R. MINCIGRUCCI and A. STANZIANO, Il coverage della corruzione tra il 2004 e il 2015 in Italia: controllo di virtù o populismo penale?, in *Problemi dell'informazione*, fasc. 2, 2017, p. 201.

of literature and tv shows that are devoted to unravelling the deepest and darkest spaces of the human soul and mind.

Without presenting an outline of the Italian criminal system,3 before moving further we should specify at least three elements that may come useful. First, the Italian criminal code is still the one enacted in the fascist era, the "Codice Rocco", by the name of the then Ministry of Justice Alfredo Rocco, that was made into law in 1930: despite many amendments, movements, elimination and addition, the structure of the code is still the one designed by an autocratic regime and nobody seems willing to change its structure. Second, we should mention a distinctive feature of Italian criminal law: public prosecutors, who are judges and independent, do not enjoy discretion in selecting which case to prosecute; quite the contrary, prosecution of all crimes is made mandatory – at least in theory – by art. 112 of the Constitution.4 Last, criminal law is a subject matter that is infringing on several constitutional rights (first of all, personal freedom as protected by art. 13) and this means that it must be addressed with a law: the three main sources of law are acts of the Parliament, Legislative Decree made by the Government upon a delegation of legislative power by the Parliament (with a delegation law, setting goals and limits) or a Law Decree (emergency legislation issued by the Government) which is subject to mandatory conversion into law, with or without amendments, within 60 days or becomes ineffective.

The purpose of this paper is not to define the expression "penal populism", which received extensive attention in the scholarship.5 However, a working definition to define the scope is needed. We will, thus, focus on changes to criminal law (broadly intended) that followed news coverage of specific events or of a series of events, which shocked the public opinion and ignited the public debate. These events open up spaces in which political parties may try to advance their own view of the world relating to crime, marginal areas and communities, migrants, gender, balance between military and social responses, and the like.

Of the many cases of penal populism in Italy, we decided to cover here two cases: the development of self-defence in the house and the addition of so-called road and nautical homicide into the ICC. We will then turn to an emerging distinctive feature of the last 6-7 years: the development of a new "legislative literary gender", the yearly "decreto sicurezza" (decree for safety) which every year is passed to address a piecemeal of perceived social threats.

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3 See Fundamentals of Italian Law (A. SIMONI – A. DE LUCA eds.), Giuffrè, 2014, translated in Serbian as Uvod u pravo Italije, 2022, by the Institut za uporedno pravo. The text is available at https://iup.rs/wp-content/uploads/2023/01/2022-Uvod-u-pravo-Italije.pdf

4 According to which "The public prosecutor must prosecute all crimes" (*Il pubblico ministero ha l'obbligo di esercitare l'azione penale*).

5 See ANASTASIA et al., cit. supra, p. 122; see also L. FERRAJOLI, Il populismo penale nell'età dei populismi politici, in Questione Giustizia, 2019, available at https://www.questionegiustizia.it/rivista/articolo/il-populismo-penale-nell-eta-dei-populismi-politici_627.php

2. "SELF-DEFENCE WITHIN THE HOUSE"

When a home-owner shoots a person during a night home invasion, or a jeweller, tobacco shop owner or gas station attendant[6] kills a person during a robbery, news are dominated by statements from political persons claiming that the rule on self-defence should be amended addressing the specific features of the case at hand. A part of the public will also expresses outrage at the public prosecutor's initiative of registering the self-defender as a person to be investigated in relation to the murder.

Self-defence is, in Italy as in many other legal system, a defence under criminal law. Art. 52 of the ICC in its original, fascist-era, version was simple and clear: «A person cannot be punished if he committed the offence because he was compelled to do so by the necessity of defending his own or another person's right against the actual danger of an unjust offence, provided that the defence is proportionate to the offence».

The elements that are routinely balanced by the courts to assess whether self-defence is a valid justification or the defender went beyond its scope, or otherwise acted outside the justification, are essentially three: whether the defence was really necessary, whether there was actual danger of an unjust offence, and whether there is proportionality between the offence and the defence. The basic rule taught to law students is that, when given the option, a defender should run and avoid the confrontation rather than taking up the arms and react violently against an attacker; the basic assumption being that the State has a monopoly on the use of violent means and self-defence may be validly invoked as an *extrema ratio*. Of course, on the books everything may seem clear, but it is rather in action, on the ground, that the weighing shows a great degree of variety.[7]

It should be stressed, also, that one thing that is often underlined and the source of (real or just façade) outrage is the mere fact of an investigation being opened on the killing (allegedly) made in self-defence, and the registration of the name of the defender as the prime-suspect (better: the confessed killer) of the attacker. What is conveniently forgotten is the basic fact that when a person dies of a "violent" death, an investigation is not only necessary to ascertain whether it was necessary and proportionate, but is required by art. 112 of the Constitution who makes criminal prosecution of *all* crimes as mandatory. This does not mean that at the end of the investigation the defender may not be found to have acted in self-defence: in such a case the public prosecutor will apply to the judge overseeing to close the investigation without an indictment; and the judge will control whether the prosecutor's view is correct and all investigations were made, possibly allowing the close of the investigation, or ordering additional investigation to be made, or mandating the public

[6] See https://www.internazionale.it/reportage/leonardo-bianchi/2015/02/27/graziano-stacchio-lega-salvini

[7] F. GIUNTA, Ghiribizzi penalistici per colpevoli, ETS, 2019, pp. 35-36 most cases are labelled by courts as culpable excess of self defence (art. 55 ICC). See also G. FLORA, La difesa è "sempre legittima"?, in disCrimen, 11.6.2019, pp. 4 ff.

prosecutor to indict the defender.[8]

On this background, we may now note that art. 52 ICC remained untouched for more than 70 years, living through the Fascist regime, the war and post-war period, the introduction of the Italian Constitution of 1948, the economic boom, the red and black terrorism of the '70s, the renewed optimism of the '80s and the war against mafia of the 80s-90s. During this long period of time, prosecutors and criminal courts examined many cases of self-defence, sometimes finding for the defender, sometimes against the defender (who then was considered a murderer) and sometimes concluding that perhaps the defence was legitimate but disproportionate.

The first amendment of art. 52 of the ICC was made with the law of 13 February 2006, no. 59, when the government (led by Silvio Berlusconi), on the verge of the general elections of 2006 (lost by Berlusconi to Romano Prodi), introducing the so-called "self-defense in the house". The law contained only one article and added a second and third paragraph to art. 52:

2. In the cases provided for in the first and second paragraphs of Article 614 [i.e. burglary], the relationship of proportionality referred to in the first paragraph of this Article shall exist if someone lawfully present in one of the places referred to therein uses a lawfully possessed weapon or other suitable means for the purpose of defending

(a) his own or another persons' safety

(b) one's own or others' property, when there is no desistance and there is danger of aggression.

3. The provision in the second paragraph shall also apply if the act took place inside any other place where a commercial, professional or entrepreneurial activity is carried out'.

This amendment is nothing more than a showcase measure to please part of the voting constituency of the right-wing government, but it brought about very little in terms of practical significance, and was read by courts in light of the Constitution and by placing more importance on the requirement of "necessity" as a prerequisite to entertain the "proportionality" test.

In 2019 the (right-wing) government then led by Giuseppe Conte but with vice-prime minister Matteo Salvini who had made that of self-defence and guns one of his major policy points, amended again art. 52 of the ICC. The new law (law 26 April 2019, n. 36) brings about several changes. Art. 52 is amended as follows (underlined):

2. In the cases provided for in the first and second paragraphs of Article 614 [i.e. burglary], the relationship of proportionality referred to in the first paragraph of this Article always exists if someone lawfully present in one of the places referred to therein uses a lawfully possessed weapon or other suitable means for the purpose of defending

[8] This is how the rule enshrined in art. 112 of the Italian Constitution is made effective, i.e. by placing the decision of the public prosecutor *not to prosecute* under judicial supervision (as well as the decision *to prosecute*).

(a) his own or another persons' safety

(b) one's own or others' property, when there is no desistance and there is danger of aggression.

3. The provision in the second paragraph shall also apply if the act took place inside any other place where a commercial, professional or entrepreneurial activity is carried out'.

4. In the cases referred to in the second and third paragraphs, a person who act to repel an intrusion by means of violence or the threat of the use of weapons or other means of physical coercion by one or more persons, is always acting in self-defense.[9]

Other changes are relevant for this paper:

the sentencing range for burglary (art. 614 ICC) was increased from "one to four years" to "two or six years"

the sentencing range for simple theft in the house (art. 624bis(1) ICC) was increased from "three to six years" to "four to seven years" if simple, and for aggravated theft in the house (art. 624bis(3) ICC) from "four to ten years and a fine from 927 euro to 2.000 euro" to "five to ten years and a fine from 1.000 euro to 2.500 euro"

the sentencing range for simple robbery (art. 628(1) ICC) was increased from "four to ten years" to "five to ten years", for aggravated robbery (art. 628(3) ICC) from "five to twenty years" to "six to twenty years" and the fine from "1.290 euro to 3.098 euro" to "2.500 euro to 4.000 euro", and for double aggravated robbery (art. 628(4) ICC) from "six to twenty years" to "seven to twenty years" as well as in increase in the fine from "1.538 euro to 3.098 euro" to "2.500 euro to 4.000 euro".

We could see that the general attitude is towards a small tweak of sentencing ranges, with small increases in the minimum or maximum and related fines: while they could have an effect on technical issues (such as availability of special procedures, extension of statute of limitation, availability of arrest, and so on), one could question whether these small adjustments have any real effect on general prevention.

Politically, this is the answer given to that part of the (mostly, but certainly not exclusively) right-wing constituency, particularly in the Northern regions, who are expressing concerns for a (real or perceived) rise in attacks towards homes and shops, do not see an effective response from the State, and wish to take the matter in their own hands. On the one side, an attempt to give a "jail free" card to the home-owner or shop-owner reacting to protect themselves, their family and employees, and their belonging and an attempt to avoid for them even the opening of an investigation (which, as seen, is unavoidable); on the

[9] And in art. 55, titled "Culpable excess" e.g., of self-defense, "2. In the cases referred to in Article 52(2), (3) and (4), a person who committed the act for the protection of his own or other persons' safety acted in the conditions referred to in Article 61(1), no. 5 [i.e. when the other person "took advantage of circumstances of time, place or person, also with reference to age, such as to hinder public or private defence"], or in a state of serious disturbance resulting from the situation of danger at hand, cannot be punished".

other side, an increase in the sentencing for the parallel crimes that normally give place to the reaction of self-defence.

Notably, even if some political parties have included it in their populist platform, there is no real debate on relaxing rules for gun ownership. Italy has a large number of rifles registered for hunting and sports, but otherwise guns are not commonly owned (or used) by regular persons.

3. ROAD AND NAUTICAL HOMICIDE

Italy already has several provisions for homicide/murder, simple and aggravated, manslaughter and involuntary manslaughter; as well as for intentional or negligent causing of bodily injuries. Apparently, this was not enough as the Parliament decide to include "new" kind of murders into the criminal code.[10]

The first one to make the scene is the so-called "road homicide".[11] Following a series of death caused by road accidents in which one of the driver was under the influence or fled the scene, the Parliament passed Law 23 March 2016, no. 41. An important step forward was the lobbying[12] activity by the parents of Lorenzo Guarnieri, a young boy of 17 who was killed by a driver who was tested positive to alcohol and drugs.[13] When passed, the Prime Minister of the time, Matteo Renzi, expressly dedicated the new law to the memory of Lorenzo Guarnieri.[14]

This is not all. On 19 June 2021, a summer night, a couple of German tourists were driving full speed a fine Riva motorboat on the Garda Lake while intoxicated. On their path they collided with another boat where a young couple of Italians (Greta of 25 and Umberto of 36) where enjoying the night, killing them.

The news enraged the public opinion. An online petition was launched, collecting

[10] G.P. DEMURO, Uguali ma diversi: sul reato di omicidio stradale o nautico, in Diritto Penale Contemporaneo, 2/2023,

[11] Art. 589 ICC already provided for a partially different sentencing for involuntary manslaughter in violation of road regulations (and workplace safety measures): instead of 6 months to 5 years of regular involuntary manslaughter, the sentencing was 1 to 5 years. The sentencing was then modified with the law 21 February 2006, by raising the minimum from 1 to 2 years, and with the law decree 23 May 2008, n. 92 (converted with modifications into law 24 July 2008, n. 125), by raising the maximum from 5 to 8 years. By the same law of 2008, sentencing for involuntary manslaughter with road violation, under the influence (of alcohol or drugs) was set to be 3 years minimum and 10 years maximum.

[12] The family collected more than 58,000 signatures: https://www.dirittoegiustizia.it/#/documentDetail/9148823

[13] See one of the news here: https://www.corriere.it/politica/14_dicembre_10/omicidio-stradale-renzi-il-tempo-dell-impunita-finito-28138858-80af-11e4-bf7c-95a1b87351f5.shtml

[14] See the interview of Matteo Renzi (who was not PM anymore at the time) with Lorenzo Guarnier's father here: https://www.ilriformista.it/cosi-lomicidio-stradale-e-diventato-legge-la-battaglia-vinta-dal-papa-di-lorenzo-guarnieri-lintervista-di-matteo-renzi-365500/

almost 150.000 signatures[15] and demanding a new law extending the road homicide scheme also to nautical homicides. Previously a legislative project on this topic had been lagging for years in the Parliament. After the crime, the outrage and the online petition, the passed the law n. 138 of 26 September 2023, which extended the provisions of art. 589*bis* and *ter* of the *road homicide* to the *nautical homicide*.

A look at the numbers is telling. We could not find many statistics on the number and types of nautical incidents, and this is something that is meaningful per se. A report of 2019 by the Italian Ministry of Transports shows that every year around 10/15 persons die in nautical accidents and around 50/60 are injured.[16] This relatively low numbers should be contrasted with road accidents, where statistics are collected with precision and where the number are worrying: in 2023 there were 3.039 deaths and 224.634 injured.[17] According to a study of ANCI (National association of Italian municipalities), in the period 2016-2021 there have been 2,455 person investigated for road homicide and 18,882 investigated for road injury.[18] This may show that, while in the context of road accidents there is a real problem and stricter rules may be one of the tools to be deployed, there appears not to be a parallel emergency or need to be addressed in the context of nautical accidents.

The joint provision now reads something like this:

Art. 589-bis (Road or nautical homicide) – Anyone who wrongfully causes the death of a person in violation of the rules on road traffic or maritime or inland navigation is punished with imprisonment from two to seven years.

Anyone who, while driving a motor vehicle or [a boat] …, in a state of alcoholic drunkenness or psychophysical alteration … wrongfully causes the death of a person shall be punished by imprisonment from eight to twelve years.

[…]

[…]

The [same] punishment [five to ten years] shall also apply

1) to the driver of a motor vehicle who, while proceeding in an urban centre at a speed equal to or exceeding twice the permitted speed and in any case not less than 70 km/h, or on extra-urban roads at a speed exceeding the maximum permitted speed by at least 50 km/h, culpably causes the death of a person

(2) to the driver of a motor vehicle who, when crossing an intersection with the

[15] See the online petition at https://www.change.org/p/vogliamo-che-omicidio-nautico-e-stradale-siano-equiparati-e-giustizia-per-umberto-e-greta

[16] See MINISTERO DELLE INFRASTRUTTURE E DEI TRASPORTI, Rapporto sui sinistri marittimi 2019, p. 42 and at pp. 44-45 the statistic outliers years of 2011 and 2013 are explained (usually in connection to specific serious accidents). The report is available at https://www.mit.gov.it/nfsmitgov/files/media/pubblicazioni/2021-01/Rapporto_sui_sinistri_marittimi_-_Anno_2019_0.pdf

[17] ISTAT, Report incidenti stradali 2023, available at https://www.istat.it/wp-content/uploads/2024/07/REPORT-INCIDENTI-STRADALI-2023.pdf

[18] ANCI, Dossier su Omicidio stradale, available at https://www.anci.it/sicurezza-stradale/

traffic light set to red or driving on the wrong side of the road, culpably causes the death of a person

3) to the driver of a motor vehicle who, as a result of a manoeuvre reversing the direction of travel at or near intersections, bends or speed bumps or as a result of overtaking another vehicle at a pedestrian crossing or continuous line, culpably causes the death of a person.

In the cases referred to in the preceding paragraphs, the penalty shall be increased if the offence is committed by a person not in possession of a driving licence or, with the exception of the cases referred to in the fifth paragraph, of a nautical licence, where prescribed, or with a suspended or revoked licence, or if the motor vehicle or recreational craft is owned by the offender and such vehicle or craft is not in possession of compulsory insurance.

In the cases referred to in the preceding paragraphs, if the event is not the exclusive consequence of the perpetrator's action or omission, the penalty shall be reduced by up to one half.

In the cases referred to in the preceding paragraphs, if the driver of the vehicle or of the recreational craft causes the death of more than one person, or the death of one or more persons and injury to one or more persons, the penalty that should be imposed for the most serious of the violations committed shall be applied, increased by up to three times, but the penalty may not exceed eighteen years

A similar provision regulates the case of bodily injuries with a similar scheme, i.e. with violation of road or nautical rules and with increase sentencing in case of intoxication or of violation of some specific rules.

Both laws included a provision for mandatory arrest in case the crime had been committed while intoxicated or under the influence, «unless the driver immediately stopped, endeavoured to render or activate assistance, and immediately placed himself at the disposal of the law enforcement authorities» (art. 380, 2 clause, lett. m *quater*, Code of criminal procedure), addressing the "fleeing from the scene" which is a common feature of these events. In case the person flees the scene, instead of taking responsibility and helping the victims, «imprisonment time is increase by one-third to two-thirds and cannot be less than 3 years» (art. 590 *ter* ICC).

Needless to say, all these provisions do not apply in case of intentional conducts, which would go under the label of regular murder of art. 575 ICC («Anyone who kills a man is punished with imprisonment for no less than 21 years») and of arts. 582 ICC in the case of voluntary bodily injury.

Road and nautical homicide represent a double case of penal populism. Road homicide answers a real need in society, i.e. reducing the number of deaths (and injuries) caused by reckless driving or driving under the influence. Still, the law was passed with reference to a specific case which made the national headlines and outraged the entire country: the

proverbial straw that broke the camel's back. The nautical homicide, on the contrary, seems a "gut" reaction to a very bad case, but does not seem to answer a real need of deterring nautical accidents or nautical related deaths and injuries in Italy. In this case, penal law seems used as a means for reassuring the public opinion and showing that the State is present and ready to act.

4. THE SECURITY DECREE: LINGUISTIC AND LEGAL ABUSE OF A LEGISLATIVE INSTRUMENT

From 2017 to the present, the term "security decree" has entered the common lexicon due to its frequent use by successive Italian governments and the media. This terminology - bolstered by the reassuring political resonance of the word "security" - has been repeatedly invoked to address a wide range of societal issues perceived or presented as emergencies by the ruling political class. Over time, "security" decrees have evolved into a recurring legislative instrument - almost *sui generis* in nature - often reintroducing similar "key regulatory contents".

The Urban Security Decree of 2017, converted into Law 48/2017, marked Italy's first legislative instrument specifically addressing the issue of public security. This decree was a pivotal development in Italy's legislative history, as it established a focused framework to tackle urban safety concerns through localized governance. It introduced measures aimed at enhancing safety in urban areas by empowering local governments to take decisive action. Under the decree, mayors were granted extensive authority to issue ordinances targeting issues such as illegal activities, vandalism, and disturbances to public order, addressing concerns that were increasingly prevalent in Italy's cities[19].

A significant innovation within the decree was the introduction of the so-called "urban D.A.SPO."[20], a preventive measure banning individuals from accessing specific areas to protect public spaces and maintain their intended use. This approach not only sought to

[19] See also the concepts of "omnivorous legal good" (*bene giuridico onnivoro*) and "well-being of territorial communities" (*benessere delle comunità territoriali*) - translations by the author - in C. RUGA RIVA, *Il d.l. in materia di sicurezza delle città: verso una repressione urbi et orbi?*, in Diritto Penale Contemporaneo 3/2017, available at https://archiviodpc.dirittopenaleuomo.org/d/5276-il-dl-in-materia-di-sicurezza-delle-citta-verso-una-repressione-urbi-et-orbi and F. MORGANTI, *La sicurezza urbana nel c.d. "decreto Minniti"*, *Democrazia e Sicurezza*, vol. VII, no. 3, 2017, p. 47 ff., available at https://romatrepress.uniroma3.it/wp-content/uploads/2019/05/La-sicurezza-urbana-nel-c.d.-%E2%80%9Cdecreto-Minniti%E2%80%9D.pdf.

[20] The "Daspo" (Divieto di Accedere alle manifestazioni SPOrtive) is an Italian legal measure introduced in 1989 with Law No. 401 of December 13, 1989. It bans individuals from attending sporting events due to violent or dangerous behavior. The "Daspo urbano" is a measure derived from the "Daspo sportivo". For an overview: L.M. DI CARLO, *Prime riflessioni sul c.d. "Daspo urbano"*, in *Federalismi.it* 17/2017, p. 7 ff., available at http://www.antoniocasella.eu/archica/DiCarlo_13set17.pdf, and C. FORTE, *Il decreto Minniti: sicurezza integrata e "D.A.SPO. urbano". Da una governance multilivello il rischio di una… "repressione multilivello"*, in *Diritto Penale Contemporaneo* 5/2017, available at https://archiviodpc.dirittopenaleuomo.org/d/5424-il-decreto-minniti-sicurezza-integrata-e-daspo-urbano.

deter criminal behaviour but also symbolized a shift toward proactive, rather than reactive, urban security policies. Over time, the "urban D.A.SPO." became a hallmark of subsequent security decrees, highlighting its perceived effectiveness in safeguarding public spaces.

The decree also placed considerable emphasis on fostering collaboration between local authorities and law enforcement agencies. This partnership was envisioned as a mean to ensure a coordinated and efficient response to urban safety challenges. Moreover, the decree's provisions aimed to create a standardized approach to urban security across different municipalities, laying a robust foundation for Italy's modern strategies in addressing public safety concerns within urban environments[21].

The Security and Immigration Decree (D.L. 113/2018), adopted on October 4, 2018, and later converted into Law 132/2018, represented a critical turning point in Italy's immigration and security policies. It introduced a series of restrictive measures designed to curtail access to international protection and impose stricter management of migratory flows. Among its most significant provisions was the abolition of residence permits for humanitarian reasons, which had previously served as a vital protection mechanism for migrants who did not meet the criteria for traditional asylum but still required international support. This change drastically reduced legal pathways for vulnerable individuals seeking refuge in Italy.

The decree also expedited procedures for the expulsion of irregular migrants, granting authorities broader powers to remove individuals deemed unauthorized to stay in the country. Additionally, the expansion of police powers included enhanced authority to manage public order and security-related incidents, marking a shift toward a more enforcement-driven approach[22]. These measures, while presented as necessary for national security, drew sharp criticism for their potential to undermine fundamental rights and exacerbate the precarious conditions faced by migrants[23].

The Second Salvini Security Decree (D.L. 53/2019)[24], adopted on June 14, 2019, and converted into Law 77/2019, reinforced the legislative trajectory of its predecessor, furt-

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21 For a comprehensive analysis on this topic, see C. RUGA RIVA, B. BISCOTTI, P. RONDINI, R. CORNELLI, A. SQUAZZONI, *La sicurezza urbana e i suoi custodi (il sindaco, il questore e il prefetto)*, in *Diritto Penale Contemporaneo* 4/2017, available at https://archiviodpc.dirittopenaleuomo.org/d/5549-la-sicurezza-urbana-e-i-suoi-custodi-il-sindaco-il-questore-e-il-prefetto.

22 For a general overview of the legislative changes introduced during the conversion of the "Security Decree" into law, see G. MENTASTI, *Il decreto sicurezza diventa legge. Le modifiche introdotte in sede di conversione*, in *Diritto Penale Contemporaneo*, December 21, 2018, available at https://archiviodpc.dirittopenaleuomo.org/d/6393-il-decreto-sicurezza-diventa-legge-le-modifiche-introdotte-in-sede-di-conversione.

23 See L. PEPINO, *Le nuove norme su immigrazione e sicurezza: punire i poveri*, in *Questione Giustizia*, December 12, 2018, available at https://www.questionegiustizia.it/articolo/le-nuove-norme-su-immigrazione-e-sicurezza-punire-i-poveri_12-12-2018.php.

24 For the new provisions and critical aspects of the "Security Decree Bis," see A. VALSECCHI, *Decreto sicurezza bis: novità e profili critici*, in *Diritto Penale Contemporaneo*, July 26, 2019, available at https://archiviodpc.dirittopenaleuomo.org/d/6738-decreto-sicurezza-bis-novita-e-profili-critici.

her entrenching its core themes and expanding their scope. This decree introduced stricter provisions aimed at curbing illegal immigration, which was closely tied to concerns over public order and security, as outlined in "Capo I", the measures included enhanced penalties for illegal entry and extended detention periods in identification and repatriation centres, aiming to deter unauthorized migration; Capo II focused on strengthening the administrative framework to support security policies more effectively. This involved granting broader discretionary powers to local authorities and law enforcement to respond swiftly to security threats[25]. The capo also streamlined procedures to facilitate the enforcement of expulsion orders, reflecting the government's prioritization of administrative efficiency in security matters; Capo III addressed violence during sports events, introducing stricter penalties and preventive measures such as enhanced surveillance and restrictions on individuals identified as potential risks. This Capo underscored the government's commitment to ensuring public safety not only in everyday urban settings but also in high-profile public gatherings. Overall, the decree exemplified a comprehensive, albeit controversial, approach to security policy, blending immigration control with measures to address localized and event-specific safety concerns[26].

Decree No. 130/2020 amended the 2018 Security and Immigration Decree, slightly relaxing certain measures but largely preserving restrictive immigration policies[27]. It introduced modifications to appeal procedures and terms but maintained the essence of the 2018 decree. Typical elements, such as urban security measures and migration management, were reiterated, reinforcing the perceived inseparability of these themes within the public's conception of security[28]. For example, alongside migration-related measures, the decree revised the "urban ban" regulations, further embedding the concept of the "urban DASPO".

Although still under legislative review, the Security Bill 2024[29]—approved by the Chamber of Deputies on September 18—represents a significant expansion of the security decree's scope[30]. The bill introduces over twenty new crimes and aggravating circumstances,

25 G. CASSANO, *Il Decreto Sicurezza bis: profili normativi e costituzionali*, in *Diritto Penale Contemporaneo*, 9/2019, p. 10 ff. available at https://archiviodpc.dirittopenaleuomo.org/upload/7738-cassano2019a.pdf

26 *Idem*, p. 28 ff.

27 For a report by the Supreme Court of Cassation on the legislative changes, see *Relazione sulle novità normative in materia di protezione internazionale*, Supreme Court of Cassation, 2020, available at https://www.cortedicassazione.it/resources/cms/documents/Rel0942020_NOV_NORM_PROTEZIONE_INTERN.LE.pdf. An effective overview is provided by S. CIACCI, *Il decreto immigrazione (d.l. 130/2020): profili penalistici*, in *Sistema Penale*, October 2020, available at https://www.sistemapenale.it/it/scheda/decreto-immigrazione-130-2020-profili-penalistici.

28 G. DE VIVO, *Nuovo Decreto Sicurezza: commento alle novità introdotte*, *Democrazia e Sicurezza*, anno XI, n.1 2021, pp. 56 and 79, available at https://romatrepress.uniroma3.it/wp-content/uploads/2021/04/Nuovo-Decreto-Sicurezza-De-Vivo.pdf.

29 Legislative text and details: *Atto Camera 1660*, available at https://www.camera.it/leg19/126?pdl=1660-A.

30 See an overview here https://www.sistemapenale.it/it/documenti/pacchetto-sicurezza-il-testo-del-disegno-di-legge-e-il-dossier-del-servizio-studi-del-senato.

targeting marginalized groups with particular severity. For instance, it includes penalties of up to twenty years for participants in protests within CPRs (repatriation centers) and equates such actions to "riot within a penitentiary institution."

The bill also criminalizes the "occupation of someone else's domicile," with penalties ranging from two to seven years. While the Penal Code already addresses property occupation, this new provision disproportionately affects foreign communities facing housing emergencies. Other measures include amendments to the "urban DASPO" regulations, stricter penalties for using minors in begging, expanded police powers, and heightened identification requirements for SIM card purchases. For example, businesses failing to comply with customer identification obligations risk closures of up to thirty days.

5. LEITMOTIFS AND MECHANISMS: MEDIA-DRIVEN LAWMAKING

The "security decree" has emerged as a sui generis legislative act, representing a unique and evolving tool in the legislative arsenal. While formally indistinguishable from other government decrees, these statutes share a set of recurring elements and mechanisms that elevate them into a distinct legislative genre, characterized by their focus on immediate and politically charged responses to perceived security threats[31].

A detailed analysis reveals a consistent and strategic legislative focus on urban security and immigration, often intertwining these themes within public discourse to amplify their perceived urgency. This connection is reflected in recurring measures such as urban bans, expansions of police powers, and regulations addressing local offenses like child begging. These measures often serve dual purposes: addressing immediate security concerns while also reinforcing a narrative that links urban insecurity with immigration[32].

The emphasis on the local dimension is particularly notable, as it reflects a tactical approach by political actors to frame security issues in contexts most relatable to public opinion. Urban environments, as spaces where citizens interact most directly with manifestations of disorder, become the primary arena for deploying these policies[33]. The perception of security is thus deeply rooted in the local sphere[34], where legislative action aligns closely with the electorate's immediate concerns and expectations[35].

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[31] See also F. GENTILUCCI, *Analisi critica del Decreto Sicurezza e immigrazione*, in *Giurisprudenza Penale*, 11/2020, p. 11, available at https://www.giurisprudenzapenale.com/wp-content/uploads/2020/11/Gentilucci_gp_2020_11.pdf.

[32] On the ineffectiveness of migration policies related to detention or expulsion mechanisms, see also M. BARBAGLI, *Immigrazione e sicurezza in Italia*, Il Mulino, 2008, p. 129 ff.

[33] G. CASSANO, *Il Decreto Sicurezza bis: profili normativi e costituzionali, cited above,* p. 9.

[34] A. COLOMBO, *Fuori controllo? Miti e realtà dell'immigrazione in Italia*, in *Migrazioni e sicurezza: comprendere le paure, costruire la sicurezza*, Ledizioni, 2012, section 5, available at https://books.openedition.org/ledizioni/2762.

[35] C. RUGA RIVA, *Regioni e diritto penale. Interferenze, casistica, prospettive*, CUEM, 2008, p. 176.

The identification of legal interests protected by these decrees often follows patterns of media-driven lawmaking. For example, the 2018 Security Decree—a flagship policy of its government—was adopted in the wake of a high-profile crime involving a Nigerian migrant, specifically the tragic death of Pamela Mastropietro, whose case gained widespread media attention and was heavily publicized[36]. The narrative focused on the accused (an irregular migrant) and presented the case as emblematic of systemic failures in migration management. This sensationalized coverage amplified public fears and provided a pretext for stricter immigration controls.

Similarly, the 2019 Security Decree coincided with the Sea-Watch 3 standoff, where a humanitarian ship defied government orders and entered Italian territorial waters to disembark migrants in Lampedusa after being stranded at sea for days[37]. This incident, broadcast widely, served as a focal point for a narrative emphasizing the necessity of "border defence"[38]. The decree's timing reinforced the government's stance on controlling immigration, portraying the measures as essential for upholding national sovereignty and security.

The 2024 Security Bill extends this dynamic, addressing themes like collective protest and dissent. High-profile demonstrations by groups such as "Ultima Generazione", "Amnesty International", and "Extinction Rebellion" have shaped its provisions[39], reflecting tensions between institutional authority and civil activism[40]. This expansion is evident in the bill's introduction of severe penalties for acts of dissent, including measures targeting demonstrations within repatriation centers (CPRs) and public spaces. For instance, participants in protests deemed disruptive within CPRs now face penalties comparable to those for "riot within a penitentiary institution," highlighting the bill's harsh stance on marginalized groups.

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[36] The case of Pamela Mastropietro, a young Italian woman whose death in Macerata in January 2018 was linked to a Nigerian man, and the subsequent racially motivated attack by Luca Traini, a far-right extremist who injured six Black migrants in a shooting spree, became focal points in Italy's immigration and security debate. These events were heavily politicized, amplifying tensions around migration and its social impact. For more information, see *The Independent*, *Italy shootings: Six black migrants injured in drive-by attacks*, February 3, 2018, available at https://www.independent.co.uk/news/world/europe/italy-macerata-shootings-gun-attacks-black-migrants-latest-driveby-car-active-shooter-injured-dead-train-station-black-alfa-romeo-147-a8192631.html, and *BBC News*, *Italy shooting: Migrants targeted in Macerata*, February 3, 2018, available at https://www.bbc.com/news/world-europe-42930749.

[37] *The Independent*, *Italy migrant standoff: German captain defies Matteo Salvini and docks rescue ship*, July 2019, available at https://www.independent.co.uk/news/world/europe/italy-migrants-sea-watch-3-rescue-matteo-salvini-lampedusa-a8980286.html.

[38] On the recurring idea of "closing ports", see, for example, G. VILLANI, *A proposito del Decreto Sicurezza bis*, in *Questione Giustizia*, June 20, 2019, available at https://www.questionegiustizia.it/articolo/a-proposito-del-decreto-sicurezza-bis_20-06-2019.php.

[39] On the use of preventive measures such as urban bans (*Daspo urbano*) to address climate protests in Italy G. MENEGUS, *Climate Protests and City Bans: On Italy's Use of Preventive Measures to Crack Down on Climate Protests*, in *VerfBlog*, March 6, 2024, available at https://verfassungsblog.de/climate-protests-and-city-bans/.

[40] *Politico*, *Giorgia Meloni's street protest crackdown sparks growing repression fears*, February 2023, available at https://www.politico.eu/article/giorgia-meloni-street-protest-crackdown-concerns-growing-repression-italy-security-bill-climate-activists/.

Expanding the analysis to a broader comparative perspective, a parallel can be drawn with the UK's Police, Crime, Sentencing, and Courts Act 2022. Although differing in specific content, both legislative instruments share a common origin rooted in societal and media-driven perceptions of security needs. In the UK, high-profile protests by movements such as Extinction Rebellion and Black Lives Matter catalysed calls for expanded police powers, particularly in response to disruptive demonstrations and demands for systemic reform. These events created a narrative that positioned public security and order as priorities[41], thereby justifying stricter legislative measures. This dynamic mirrors the Italian experience, where political and media narratives have similarly shaped the trajectory of security-related legislation, reflecting broader patterns of governance underpinned by public perception and mediated urgency.

While lawmakers are generally tasked with addressing societal demands for regulation, the "security decrees" exemplify a legislative approach that diverges significantly from this need[42]. Rather than being grounded in a deliberative process that carefully weighs societal needs against constitutional principles, these decrees are profoundly shaped by immediate public opinion, sensationalized media narratives, and political expediency. This departure from balanced lawmaking underscores their reactive nature, prioritizing rapid implementation over thoughtful consideration of long-term legal and social implications.[43]. The approach often prioritizes short-term political gains[44] over sound legislative technique and adherence to constitutional principles, resulting in measures that disproportionately target marginalized groups.

Constitutional review mechanisms, while vital, tend to operate on a timeline far removed from the immediate effects of such policies. By the time judicial oversight intervenes, many individuals - especially those belonging to vulnerable communities - have already faced significant harm. Administrative mechanisms embedded within these decrees, coupled with expanded police powers, create structural barriers that impede access to justice[45]. For marginalized populations, such barriers can render even basic legal protections

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41 *The Independent*, *Policing Bill: Fears over chilling effect on climate protests*, January 14, 2022, available at https://www.independent.co.uk/climate-change/news/policing-bill-insulate-britain-protest-b1992980.html.

42 "When the offense is committed, it becomes evident" (originally: "quando l'illecito viene compiuto, si vede," translated by the author), M. PAPA, *Fantastic Voyage. Attraverso la specialità del diritto penale*, Giappichelli, 2019, p. 63.

43 It is evident that this matter is not an isolated example: see A. PIZZORUSSO, *La Costituzione ferita*, Laterza, 1999, p. 148, regarding the political use of the issue of separating careers within the judiciary.

44 M. AINIS, *La legge oscura. Come e perché non funziona*, Laterza, 2002, pp. 22 and 59.

45 On "administrativization" (shifting matters from criminal to administrative law), see again L. PEPINO, *Le nuove norme su immigrazione e sicurezza: punire i poveri*, cited above. Note that even when offenses are explicitly classified as "administrative," they may be reclassified as criminal under the principles of the European Court of Human Rights in the landmark Engel case. Reclassification applies particularly when offenses serve a punitive purpose or sanctions, even monetary, are severe in nature; see L. MASERA, *La nozione costituzionale di materia penale*, Giappichelli, 2018, pp. 82-83.

inaccessible, compounding the difficulties they face[46].

The immediate delegation of expansive powers to law enforcement under security decrees highlights a stark temporal asymmetry when juxtaposed with the delayed and often inaccessible pathways to judicial review or any legal remedy. This temporal gap institutionalizes a system in which police authorities or local administrative powers are empowered to act with near-instant discretion, while individuals subjected to these actions face prolonged or insurmountable obstacles in seeking adjudication or accountability through formal legal channels[47].

For marginalized populations, this structural disparity manifests as a substantive denial of rights. The immediate and tangible impacts of enforcement—detention, financial penalties, or other punitive measures—are frequently imposed without the mitigating influence of timely judicial oversight, rendering any eventual legal remedy ineffective or unattainable in practice[48].

This framework prioritizes administrative expediency over procedural fairness, undermining the foundational legal principle of equality before the law. The broader implications of such an imbalance extend beyond the immediate context, posing significant risks to the integrity of the rule of law and the legitimacy of democratic institutions. By privileging enforcement over justice[49], these measures entrench systemic inequities, raising pressing concerns about their compatibility with constitutional guarantees and broader commitments to equitable governance.

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46 A. SIMONI, *L'enciclopedia del diritto di Gheorghe e Florica. Voci di un glossario della law in action*, in *Diritto Penale e Uomo, 11/2020*, p. 6 e ss.

47 *Ibidem*; see also G. PAILLI, A. SIMONI, *Begging for Due Process: Defending the Rights of Urban Outcasts in an Italian Town*, in *Seattle University Law Review*, Vol. 39, 2016, pp. 1303 ff., available at https://digitalcommons.law.seattleu.edu/sulr/vol39/iss4/9/.

48 See again A. SIMONI, *L'enciclopedia del diritto di Gheorghe e Florica*, cited above, and, regarding police powers, L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Laterza, 2008, pp. 795-796.

49 On the "grey zone" supporting enforcement mechanisms, see V. AGNOLETTO, L. GUADAGNUCCI, *L'eclisse della democrazia*, Feltrinelli, 2021, p. 393.

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IS PENAL POPULISM A SPECIES OF POLITICAL POPULISM? A LATIN AMERICAN PERSPECTIVE

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Populism is commonly used to describe political choices that threaten perspectives of liberal democracy. In recent Latin American history, the concept of populism has been applied to left-progressive, right-liberal, and more recently, far-right-wing governments. However, the concept of populism lacks clarity and consensus. On the other hand, penal populism is also a common term used to describe criminal policy choices that seem to oppose a classic liberal perspective of criminal law. In this sense, penal populism does not appear to be related to political populism and populist governments. However, do these expressions share a common perspective on democracy? This paper aims to investigate penal populism in Latin American criminal law studies, using as a reference the perspective on populism presented by Svampa (2023) in her analysis of Latin American sociological studies. Through a bibliographic review, the article will present Svampa's considerations about populism and its history in Latin America. Then, utilizing her key concepts, the article will conduct a systematic review of penal populism and how it has been applied to describe not only the so-called "fear legislation", but also to define different projects of legal guarantees suppression and criminal convictions. Finally, the article will evaluate the relationship between penal populism and the lack of democratization of criminal policy. Ultimately, the article aims to offer a critical perspective on the use of the term "penal populism" in the region, as well as new standards for a better understanding of its occurrence.

KEYWORDS: *penal populism, political populism, Latin America, democratization process.*

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INTRODUCTION

Populism is widely used to describe political choices that often challenge the principles of liberal democracy. In recent Latin American history, populism has been applied to a broad range of governments, including left-progressive, right-liberal, and more recently, far-right governments, like Jair Bolsonaro (Brazil) and Javier Milei (Argentina). Despite its frequent use, the concept lacks a clear definition and consensus, making it difficult to apply consistently in contemporary political analysis. It is more applied as an offense or an accusation in a political campaign.

On the other hand, the term "penal populism" has emerged as a distinct category within criminal policy discussions. It is commonly used to describe legal measures that diverge from the traditional liberal criminal law perspective, often appealing to public emotions and fear, leading to harsher legislation and the suppression of legal protections. At first approach, they seem completely disconnected concepts – while political populism would promote a welfare agenda, penal populism would promote fewer rights in the name of efficiency. However, as Silva-Sanchez (2013) has demonstrated before, both phenomena are linked by the same movement – the role of the State has been changing. In this sense, both forms of populism share a complex relationship with democratic processes, individual fundamental rights over collective rights, and paternalist social control.

This article aims to investigate the links between penal populism and political populism from a Latin American perspective. First, considering the concept of populism presented by Maristella Svampa (2023), the paper analyzes if penal populism is an instrument of political populism or if the penal populism agenda is relatively independent of other policies. Through a literature review, the paper will explore Svampa's key insights into the historical and sociological dimensions of populism in Latin America, which will serve as a theoretical framework for examining penal populism. Subsequently, the study will provide a bibliographical review of how penal populism has been discussed in Brazil, not only in terms of "fear legislation", but also the main goals of this legal reforms, particularly on the Brazilian penal code.

Penal populism has been identified in various political contexts, where both right-wing and left-wing governments have adopted populist criminal policies in response to popular claims for safety. The most known proposition of "law and order" enforcement in urban areas has not demonstrated objective gains on safety, but mostly in crime and safety perception (Wacquant, 2003). However, this paper challenges the notion that penal populism is merely a reaction to public security crises in Latin America or a form of "social control against minorities". Instead, it investigates if penal populism is also a symptom of a criminal justice system legitimacy crisis in post-colonial contexts. In other words, penal populism becomes a distortion of the popular demands in the face of a criminal system that does not suit those communities.

The central question guiding this research is to what extent penal populism can be understood as an expression of political populism in Latin America. To answer this, the article will examine the defining characteristics of both concepts, utilizing a critical approach that considers the specificities of democratization processes in the Latin American context. This analysis will include examples from the Brazilian latest governments (2010-2024) specially the reforms conducted in Brazilian Penal Code at that time, illustrating how public security policies and legislative reforms have been mobilized.

Finally, the article aims not only to provide a regional perspective on the categories of populism and penal populism but also to offer a critical examination of the legislative process and the lack of democratization in criminal policymaking across Latin America. In conclusion, the paper will argue that the development of more suitable frameworks is essential for creating criminal policies that are attuned to the social and political realities of Brazil and Latin America, taking into account the dynamics of exclusion, violence, and social control that pervade the region's criminal law discourse.

1. WHAT IS POPULISM IN LATIN AMERICA?

In her book Debates Latino-Americanos, Svampa (2023) selects populism as one of the four pillars to synthesize Latin American sociological thought, alongside "indigenism", "development", and "dependency". However, at the start of her presentation, she reveals a contrast. North American and European authors (as well as some Latin Americans), when addressing populism, present it as a mythical category—in the sense that it constructs myths, residing "between religion and politics" (Svampa, 2023: 321). It is thus assumed that "the people" is an amorphous mass, shaped by these mythical discourses to transform the status quo (Svampa, 2023: 318ff). Not rarely, populism is associated with fascism—whether by right-wing or left-wing authors (Svampa, 2023: 321). This negative characterization of populism allowed the term to be applied as a disqualifying adjective, as well as it became the main root of all political flaws in democracy (Svampa, 2023: 322).

In contrast with this negative perception of populism, Svampa indicates that there is a much different perspective on Latin American studies. Between 1929 and mid-1960s, the so-called "populist" governments had as their main characteristics (Svampa, 2023: 322-323): a) to promote industrialization in substitution to importations (considering the post-Second World War absence of products); b) the questioning of local oligarchies dominance; c) wide social pacts over redistributive policies, in an interclass government; d) the expansion of national markets and reduction of foreigner investments. In that sense, Getúlio Vargas (1930-1945 and 1951-1954), Juscelino Kubitschek (1956-1961), and João Goulart (1961-1964) governments in Brazil were called populists, as many other Latin American presi-

dents overthrown by military regimes supported by Condor's Operation.[1]

In her analysis of the first populist cycle in Latin America, Svampa (2023) identifies four different theoretical approaches to populism among Latin American scholars. The first approach, which is presented by the studies of Gino Germani and Torcuato di Tella, views populism as an ideological movement capable of capturing the dissatisfaction of the masses with representative democracy (Svampa, 2023: 324). By this ideological and emotional attitude, workers' leaders would be able to capitalize, in a short amount of time, the social mobilization needed to provoke political changes before it became cooptated by the State's structures (Svampa, 2023: 326).

The second approach understands populism through the role played by the State during crises of bourgeois dominance. In this context, Svampa (2023: 326ff) cites Francisco Weffort, Alain Touraine, Carlos Vilas, and Milcíades Peña as examples of four distinct views on the State's role. For Carlos Vilas, the populist State functions as a mediator, positioned above class and power dynamics (Svampa, 2023: 328). Meanwhile, Peña, analyzing Peronism (Argentina), critiques populism as a form of Bonapartism, which distances the working class from autonomous struggle by bureaucratizing political movement structures, such as unions, within the State (Svampa, 2023: 329).

A third approach views populism as a specific phase in dependent economies, with particular reference to Cardoso and Faletto's studies on dependency theory (Svampa, 2023: 329). For these authors, populism functioned as an instrument of dominance, capable of reconciling opposing objectives by simultaneously harnessing market forces and promoting a form of distributive justice. From this perspective, they observed that this political model began to decline in the late 1960s, particularly during the 1970s, with the crisis of the Bretton Woods system (Svampa, 2023: 330).

A fourth approach considers that populism is a phenomenon related to the consolidation of urbanization in Latin America and the consolidation of its new social classes (in reference to Octavio Ianni – Svampa, 2023: 331). In that sense, during this rearrangement of imperialist and oligarchy forces, as well as the secularization of culture, populism could be seen as this attempt to assemble different groups – aligning the elites, the new bourgeois industrial class, and the middle class; or aligning industrial workers, migrants, lower classes and students (Svampa, 2023: 331).

[1] In Colombia, the period known as "The Violence" (1948-1957) has started right after the murder of Jorge Eliécer Gaitán, an important populist politician who was running his presidential campaign with the Liberal Party (Bushnell, 2004: 277-288). His death broke out a wave of violence in Bogotá (known as *Bogotazo*), that later took all over the country. Gaitán was an important Union leader who became a mayor in Bogotá (1936-1937), then Education Ministry (1940-1941) and Labor Ministry (1943-1944). In that sense, not only his political career but also his death is a good example of the concept of populism presented by Svampa. Although some might consider Gaitán as a mythical figure, able to conduct the popular masses, Gaitán was actually the greatest hope for a new pattern of development. In other words, it is not the sacralization of a man, but the incarnation of ideas. Presenting the ideas of Ernesto Laclau, Svampa will say that a populist leader has his "speeches incarnating the process of popular identification" (Svampa, 2023: 355). The skeptical perspective over populism only hides the main agenda claimed by the people.

However, three different concerns have been evaluated by social scientists in Latin America. First, the main interests of this forces articulated by populism. As presented by Svampa (2023: 332), many have considered that these popular forces are conservative, in a sense that many excluded classes would not engage in a deep revolutionary movement. That became even more dangerous when the power is personified in one leader. Also, the influence of Lenin's writings was strong over those authors that considered the small farmers retrogrades (Svampa, 2023: 343). However, some authors, especially José Carlos Mariátegui, had identified on populism the keys for a different path for a Latin American socialism, based on communities (Svampa, 2023: 346).

The second concern is the harm populism poses to democracy. The personification of a hegemonic agenda, polarization (dividing society into enemies and allies), and the nationalism adopted by populists have brought the concepts of populism and fascism closer together (Svampa, 2023: 354-357). However, *caudillismo*—also known as *clientelismo* (the exertion of power over a group through influence)—remains the primary threat to democracy in Latin America, even though many populist leaders were well-known caudillos. Furthermore, polarization predates populism. As Svampa (2023: 314) explains, the post-independence nations of Latin America were inorganic, and their institutions were fragile, leading not to a deep democracy, but to the consolidation of local elites (*caudillos*) and their rivalries.

The third concern is the broad scope of the term itself. As Svampa (2023: 368) describes, several presidents in the 1980s and 1990s were identified as neopopulists—Carlos Menem (Argentina), Alberto Fujimori (Peru), Carlos Pérez (Venezuela), Abdalá Bucaram (Ecuador), and Fernando Collor de Mello (Brazil). In this context, various scholars, such as Sergio Zermeño and Guillermo O'Donnell, noted the absence of the people, with the masses being replaced by a state apparatus capable of representing their will. Thus, neopopulism referred more to a political style, lacking the political project or economic function seen in earlier forms (Svampa, 2023: 368-369). This issue became even more problematic in the 21st century, when several left-wing governments took power in the region, reshaping the very nature of politics and the State (for example, the Plurinational States of Bolívia and Ecuador).

Despite all this complexity, Svampa (2023: 557) concludes with a proposition: to separate the populism of commoners and the populism of middle-classes. The populism of the middle class is still mistrustful and does not deepen the political power effectively, even though they had assumed a progressist agenda (for example, legalizing gay marriage and abortion, facing violence against women and racism, and, in some way, promoting some distributive justice). The populism of commoners has also reached some important gains, such as legal rights for nature and increasing representativeness (including for indigenous communities), but still limited by some immaturity.

As Svampa presents (2023: 557), this division is not between good and bad populism, because both have been relatively limited in their social changes – which is more evident

in the formal idea (but empty) of "social inclusion" of middle-class populism. However, at this point, it can be said that middle-class populism might be more dangerous, considering that the social engagement is so formal that it can be used to legitimate any interest – like the increase of mining exploitation without proper safety plans or public investments on problematic industrial sectors.[2]

The next section will explore the penal populism in Brazil and how it has been evaluated.

2. PENAL POPULISM IN BRAZIL

The concept of penal populism is quite prevalent in Brazilian academia. However, few PhD theses or dissertations have focused properly on defining the term or thoroughly investigating the issue.[3] In most cases, many research papers approach the concept as an academic commonplace, considering it either too simplistic or an obvious phenomenon, merely accepted as a given within the regional context.

In an exemplary analysis, Gazoto (2010) examines 122 new criminal laws passed between 1940 and 2009, showing that 80.3% of them increased the severity of sanctions (by creating new offenses or raising penalties). In some cases, the penalty was increased by up to eight times (Gazoto, 2010: 280), while the justifications for these bills were based on moral values, appealing to the abstract seriousness of the offense and emotional arguments (Gazoto, 2010: 282). This kind of data is applied as proof of penal populism in Brazil without the need for further investigations.

Thus, the concept of populism is associated with: a) the theatricalization of police activity (Gazoto, 2010; Paiva, 2014; Souza, 2017; Andrade, 2019; Vianna, 2023); b) the common sense on crime, the reproduction of stereotypes, exaggeration, disregard for empirical data, and often the rejection of contradictory evidence—an anti-scientific stance (Gazoto, 2010; Paiva, 2014; Souza, 2017); c) the construction of an internal enemy to be fought, exemplified by the "war on crime" (Paiva, 2014); d) political opportunism, with the electoral rise of zero tolerance and authoritarian rhetoric (Gazoto, 2010; Souza, 2017); e) a threat to democracy, due to distortions of reality and polarizing discourse (Gazoto, 2010; Andrade, 2019; Pereira, 2021); f) a behavior that favors authoritarian narratives, evidencing the authoritarianism of Latin American states (Souza, 2017; Pereira, 2021; Strano, 2021); g) a behavior promoted by the media, whether by commodifying violence or by catering to the middle class's fear of crime and demand for security (Gazoto, 2010; Souza, 2017; Vianna, 2023); h) a practice independent of the government's political orientation—populism as a praxis of contemporary democracy (Gazoto, 2010; Pereira, 2021).

[2] For a better perspective on "neo-extractivism" in Latin America: Gudynas, 2009.

[3] Using the National Digital Library of Thesis and Dissertations (BDTD), 12 studies were identified by the subject "penal populism" and only 8 of them were accessible. The first part is a bibliographical review based on them.

Ramos (2016) and Strano (2021) present the Heinous Crimes Law (Law No. 8.072/1990) as an example of penal populism in Brazil. This law was enacted following a highly publicized case involving the kidnapping of a wealthy Brazilian business owner. It establishes exceptional conditions for the criminal process and the execution of sentences for crimes considered the most dangerous or violent. Since its enactment, the law has been amended 12 times (8 times since 2015)[4], expanding the number of criminal offenses to which it applies, introducing new exceptional conditions for imprisonment during the criminal process, and increasing the severity of the sentencing regime.

Strano (2021) also presents the amendments on robbery and burglary (art.155 and 157, Brazilian Penal Code) and Brazilian criminal law on drugs (as well as Andrade, 2019). However, the criminal offense of homicide (art.121, Brazilian Penal Code) has been amended 9 times[5], six of them since 2015 – all of these 6 (in three different governments) increasing sanctions for particular cases (such as homicide against women, children or public security agents). In that sense, it is concluded that: a) most Brazilian studies are not focused on populism as an expansion of criminal law, but on how particular legal reforms are conducted and their meanings[6]; b) although the idea of penal populism as a common place for left and right-wing politicians, penal populism seems to be a main concern for Brazilian academics when played by legislators[7]; c) in the last two decades, there has been a legislative change in Brazil, which needs to be investigated assembled to other phenomena, such as the increase of former militaries and former police agents in National Congress, and the increase of police violence.[8]

Ramos (2016) and Almeida (2022) dedicated their dissertations to also investigate political populism and penal populism correlations. Ramos (2016) applied specifically the studies of Ernesto Laclau to propose a new perspective on "populism". In his turn, Almeida (2022) dedicated his dissertation to demonstrating that those concepts were not related at all and that this kind of approach would reinforce problematic categories.

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4 On that matter, see the Brazilian laws: 8.930/1994, 9.695/98, 11.464/2007, 12.015/2009, 12.978/2014, 13.104/2015, 13.142/2015, 13.497/2017, 13.964/2019, 13.344/2022, 14.688/2023 and 14.811/2024.

5 On that matter, see the Brazilian laws: 6.416/1977 [the only one to establish a more favorable condition for the defendant] 8.069/1990, 10.741/2003, 13.104/2015, 13.142/2015, 13.771/2018, 13.964/2019, 14.344/2022, 14.811/2024.

6 As an example, Souza (2017) investigates how a project of legal reform "fighting" corruption (Law Project 4.850/2016) was conducted by their supporters – which was not approved by Congress. As well, Ramos (2016) focused his analysis on the Congress debates.

7 This might be a result of different factors: a) common perception that penal populism (on the terms above) might be more dangerous to Congress; b) the relative facility to identify their propositions, in comparison with Executive policies on enforcement and urban surveillance (where data is not always available to researchers); c) the number of legislators are far higher than public figures on the Executive (as mayor, governors, secretaries, president, and ministries), which allow them to have more attention.

8 Ganzoto (2010: 287) mentions the increase in the representativeness of former security agents on legislation, but these numbers have kept growing (Neiva, 2022). According to the Brazilian Public Security Forum (FBSP), the number of civilians murdered during police interventions in Brazil had increased annually between 2013 (2.212 deaths) and 2021 (6.493 deaths) – keeping stable in 2022 (6.455 deaths) and 2023 (6.393 deaths).

Almeida (2022) describes how the concept of populism was developed in Latin America and how it was intentionally disqualified to hide the historical achievements made by the working class[9]. In that sense, penal populism is presented by this set of criminal measures with only political aims, based on a repressive and demagogic criminal policy (Almeida, 2022: 74-76). However, this foreigner concept might have been translated "too fast" in Latin America (Almeida, 2022: 81), not only ignoring the deep and historical meaning of populism for the working class in the region but reproducing the distortion and the marginalization that was already in course (Almeida, 2022: 82-84). In that sense, it would be better to abandon this concept – just as many sociologists have already made – since this idea became so broad that it turns useless to develop deeper analysis on it.

Although Almeida's (2022) research followed the same concern of aligning the concept of penal populism with that of political populism, the conclusions of this brief paper are somewhat more optimistic regarding the concept's potential – as will be seen in the following section.

3. IS PENAL POPULISM A FORM OF POLITICAL POPULISM IN LATIN AMERICA?

As demonstrated in section 2, penal populism is not a good concept, since it is applied to stigmatize a complex process that is in course, but not totally comprehended. If penal populism is accused of being anti-scientific and promoting a labeling approach, it is also problematic and reductionist to keep pulling the same behavior. But there is also no doubt that penal populism should not be considered related to political populism – at least, at this point.

As demonstrated by Svampa, despite the broad of the concept and its constant misuses, populism is still important to describe relevant gains of those "from the bottom" (*desde abajo*). Populism might describe the social changes in Bolivia and Ecuador, which became plurinational States, the "*buen vivir*" as a concept on development agendas, the recognition of juridical personality for natural elements (like rivers and mountains), as well as many initiatives that are now been fundamental to build a new perspective on environmental protection. Populism might describe the Brazilian process that overcame the abuses of "Car washing operation" and the resistance against two military coups in Bolivia (in 2019 and in 2024). Populism is important to comprehend Gabriel Boric's election in Chile (2022), but also how this process has depleted before a new constitution could be approved. Finally, the concept of populism, as proposed by Svampa, is useful to separate grassroot populism and the so-called middle-class populism, which are very different and might explain, for

[9] Referring to José Paulo Netto, this would be an intentional disqualification by the sociologist of the University of São Paulo (Almeida, 2022: 69). Almeida (2022: 69) also mentions Jorge Ferreira, who argues that all political support that Vargas had in Brazil was not by indoctrinated masses, but by those who were expecting radical changes.

example, part of the Brazilian polarized election in 2018 and 2022.

This perspective is not a rhetorical proposition. As demonstrated before by Agapito (2022), while investigating the Brazilian peasant political agenda, the civil society is not a mass, a crowd that can be manipulated without a materialistic perspective of gains. Even the messianic episodes in Brazil (such as Canudos), which could be described as the most religious form of *caudilhismo*, there were clear and realistic promises of free lands (Queiroz, 1960; Agapito, 2022).[10] In that sense, populism is not a spontaneous movement and should not be romanticized – and it can be in some measure conservative and instrumentalized. However, according to Latin American tradition, populism has a leader that incarnates a popular agenda, that captures their aims and offers a new and more representative path. In other words, populism is not a side-effect of colonialism, it is a materialist strategy to overcome these colonial patterns.

Thus, a Latin American penal populism example should be the Bolivian criminal procedure code, which recognized the communitarian judicial instances for Indigenous people and established a criminal court with three judges where two are indicated from civil society.[11] As well, the autonomous community of Cherán (México) replaced the local authorities, who were compromised with drug trafficking, with new institutions rooted in ancestral traditions—community meetings for conflict resolution, community patrols (instead of the police), and a council of elders to govern (in place of the mayor) (Haesbaert, 2021).

A Latin American penal populism should capture the "fear of crime"[12] and offer more representative paths of solution. Many Latin American leaders have faced prison and unfair trials, especially during military regimes – which is surprising that these experiences were so badly explored to promote a criminal system reform, to pull restorative mechanisms for victims, or to develop safer and more democratic cities.

Considering the Brazilian scenario, the increase in police violence (FBSP, 2024), the absence of any substantial criminal system reform (although the expansion of criminal law in the last two decades), and the acceptance of a more punitive approach to elections reflect how we lack a proper penal populism. From this perspective, penal populism is not a broad and stigmatized category, but it offers a large research agenda for Latin American criminologists to work with urban and rural communities.

[10] In 1896, Canudos was a village built by landless workers and former gangsters from the Brazilian northeast region. Led by Antônio Conselheiro, who was presented as a priest, they occupied an uncultivated valley in the interior of Bahia state. The newborn Brazilian Republic sent the army to evict the group, but they resisted until the last men were killed in battle – after four military campaigns and one-year long war (Cunha, 2002; Vargas-Llosa, 2008).

[11] About this reform: Agapito, Miranda, Januário, 2022, 278.

[12] One of the most discussed topics on Latin American criminology (Bailone, Carinhanha, Lopes, 2021).

CONCLUSION

This article aimed to investigate the concepts of populism and penal populism in Latin America, particularly within the Brazilian context. It demonstrated not only the misuse of the term populism but also the inadequacy of a literal translation of penal populism.[13] In this regard, while acknowledging the existence of a trend towards harsher penal policies aligned with electoral interests, it is argued that a new term is needed to capture the complexity of this process, especially considering the past two decades, which coincide with the so-called progressive cycle in Latin America and its subsequent decline.

However, when analyzing the history of populism in Latin America, a perspective was proposed based on a reading that acknowledges the role of communities and social movements in social transformations and the achievement of social rights. This understanding did not lead us to formulate progressive agendas for criminal law, but rather to identify the absence of such proposals in Brazil. The lack of dialogue between so-called populist governments (especially from the 21st-century progressive wave) and the population on criminal matters is evidence of the conservative nature of these movements. Moreover, particularly in the Brazilian case, it highlights the limits these governments encountered in promoting deep reforms, the resistance of police and judicial institutions, and the power they retained during the democratization process.

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THE ROLE OF THE NATIONAL REGULATOR IN IMPOSING PENALTIES IN THE ELECTRONIC COMMUNICATIONS MARKET IN CROATIA

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This paper investigates the regulatory framework of Croatia's electronic communications sector, focusing on the Croatian Regulatory Authority for Network Industries (HAKOM) and its role in imposing penalties. It delves into the penalties and enforcement mechanisms specified in the Electronic Communications Act and their application to telecom operators in Croatia. Additionally, the paper discusses the European Union's initiatives to harmonize telecommunications regulations across Member States, particularly through the European Electronic Communications Code. By analyzing recent cases involving major Croatian and European telecom operators, the paper illustrates the application of sanctions within the sector and discusses potential reforms to enhance the effectiveness and fairness of specific regulatory penalties.

KEYWORDS: *electronic communications, penalties, regulation, national regulatory authority, telecommunications.*

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INTRODUCTION

Until the 1990s, telecommunications services in Europe were predominantly public services provided to citizens by the state through state-owned enterprises. These services, along with other public services such as electricity and water supply, were ensured to be accessible across the entire national territory. Public enterprises were bound by goals set by the state, and in return, they enjoyed the privilege of a monopolistic position.

The liberalization of telecommunications markets was initiated with the aim of increasing efficiency and the number of users of telecommunications services, reducing prices, and improving the choice and quality of services. Alongside liberalization, as a counterbalance to the newly introduced market orientation and as a form of protective measure, the newly reformed market was thoroughly regulated on the national and the European Union (EU) level. In parallel, the term 'telecommunications' was replaced by 'electronic communications' to encompass a range of newly developed technologies.

Electronic communications networks are today crucial infrastructure for consumers and businesses both worldwide and in the EU. The rate of innovation and development in any region or sector often hinges on the robustness of local telecommunications networks, with digital transformation heightening the need for speed and reliability.

The electronic communications markets are complex, constitute significant portions of national GDPs, and therefore have a substantial impact on national economies. According to Statista, revenue in the communication services market is projected to reach USD 323.6 billion in Europe in 2024.[1] The total revenues in the Croatian electronic communications market amounted to 2.61 percent of the total national GDP in the same year.[2] On a much larger scale, in Germany, the share of the electronic communications market in the national GDP amounted to approximately 5.30 percent in 2023.[3]

That said, it is clear that developments in the electronic communications markets are vital at both the national and EU levels. As a result, stringent regulations have been established to safeguard the economy, society, and ultimately, every end user and national regulatory authorities inaugurated to play a key role in enforcing these regulations and taking legal action against those that violate the rules. The role of the NRAs in imposing penalties in the electronic communications market is further explored in this paper.

[1] Approximately EUR 275.06 billion, the data given relates to Europe as a region, not only EU Member States. https://www.statista.com/outlook/tmo/communication-services/europe,

[2] EUR 1.6 billion out of EUR 61.2 billion.

[3] EUR 215 billion out of EUR 4.06 trillion.

1. REGULATION OF THE ELECTRONIC COMMUNICATIONS MARKET IN THE EUROPEAN UNION

Following market liberalization, to ensure a competitive broadband marketplace crucial for fostering innovation, improving service quality, and ensuring fair pricing for end users, the EU has implemented multiple reforms of its electronic communications framework. These frameworks were typically introduced in packages of directives.[4] The first major regulatory framework, the Telecom Package, was adopted in 1998[5], followed by the one in 2002[6], amended in 2009[7] and 2015[8].

The latest significant legislative amendment was introduced with the European Electronic Communications Code[9] (EECC), which was adopted in 2018 and implemented by most EU countries by 2022. Since the EECC was adopted in the form of a directive, its transposition into the national laws of EU Member States was necessary to incorporate its rules into national legislation, thereby making them applicable in the national electronic communications markets.

The EECC aims to unify and update EU electronic communications regulations under a single framework designed to enhance connectivity and protect users. It also intends to encourage investment in high-quality infrastructure across the EU by making co-investment rules more predictable and promoting risk-sharing for very high-capacity networks, including 5G. The framework ensures that all consumers, including those with disabilities, have access to affordable communication services, including broadband. It additionally caps international call costs within the EU, enhances tariff transparency, and safeguards consumers subscribing to bundled services.

Furthermore, the EECC facilitates easier provider switching and strengthens emergency communication capabilities. It guarantees that broadband internet access and voice communications remain affordable and accessible across Europe, with universal service obligations ensuring coverage even in underserved areas. This comprehensive approach helps bridge the digital divide, promoting inclusive growth and ensuring that all citizens can benefit from modern communication technologies. Equally important, the EECC addresses over-the-top (OTT) market players, as the outdated EU framework and the lack of

[4] Clearly, there were regulations governing the telecommunications sector prior to market liberalization, but these fall outside the scope of this paper.

[5] See https://ec.europa.eu/commission/presscorner/detail/en/ip_97_462.

[6] See https://merlin.obs.coe.int/article/2262.

[7] See https://ec.europa.eu/commission/presscorner/detail/en/memo_09_491.

[8] See https://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-connected-continent-telecom-package.

[9] Directive (EU) 2018/1972 establishing the European Electronic Communications Code (Recast), OJ L 321 17.12.2018, 36.

a harmonized approach to OTT services had allowed these new global players to avoid a wide range of regulatory constraints. By including OTT services within its scope, the EECC ensures that all providers, whether traditional telecom operators or new OTT players, adhere to the same regulatory standards.

National regulatory authorities (NRAs) are tasked with safeguarding the markets and regularly analyzing them to ensure that regulation is applied only when necessary to maintain competition and foster an investment-friendly environment.

The EECC is supported by guidelines from the Body of European Regulators for Electronic Communications (BEREC) to ensure consistent application across Member States. Furthermore, the European Commission has committed to reviewing the EECC's functioning in 2025 and every five years thereafter, ensuring the framework remains effective and responsive to technological and market developments.

Although the EECC is the primary piece of legislation for electronic communications in the EU, it is not the only one. A wide range of other regulations exists, some of which fall under the authority of different state bodies or agencies. In many cases, these regulations extend beyond the electronic communications sector and apply to other industries as well. These additional regulations ensure oversight across multiple sectors, including data protection, consumer rights, cybersecurity, and competition law, all of which intersect with electronic communications.

2. REGULATION OF THE ELECTRONIC COMMUNICATIONS MARKET IN CROATIA

Telecommunications liberalization in Croatia began in 1999 with the adoption of the Telecommunications Act[10], which mandated the establishment of the Croatian Telecommunications Agency, an independent regulatory body responsible for ensuring market competition among all participants and promoting market access for new service providers. This agency served as the precursor to today's Croatian Regulatory Authority for Network Industries (HAKOM).

The entire liberalization process was considered complete in 2005. Simultaneously, national sectoral legislation was harmonized with the Acquis Communautaire during Croatia's EU accession, which was finalized in 2013.

Although liberalization led to increased competition, lower prices, improved service quality, and technological progress, continued regulation was, and remains, necessary to ensure consumer protection and market competitiveness. However, this regulation should be the minimum required to achieve these goals, with as little market intervention as possible.

[10] *Official Gazette*, No. 76/1999.

The main piece of legislation governing the electronic communications sector in Croatia is the Electronic Communications Act[11] (ECA), along with its associated bylaws.

3. THE ROLE OF THE NATIONAL REGULATORY AUTHORITIES IN ENFORCING THE REGULATORY FRAMEWORK

Telecom NRAs were introduced in the EU as a part of the broader effort to liberalize and harmonize the telecommunications sector across Europe. Namely, the first major Telecoms Package in 1998[12] required Member States to establish independent regulatory authorities to oversee the opening up of their telecommunications markets to competition. The 2002 reform mandated the establishment of independent NRAs in each Member State to ensure fair competition, regulate market entry, and protect consumer interests while the 2009 revision of the legislative framework included reinforcing the independence of NRAs, giving them greater powers to enforce regulations, and ensuring they could operate free from political influence. The most recent update, the EECC, was adopted in 2018 and brought further improvements to the regulatory framework. It aimed to enhance the role of NRAs by providing them with more tools to promote competition, investment in high-capacity networks, and consumer protection. Namely, the EECC sets out for the first time a list of minimum tasks the NRAs must carry out.

These are *ex-ante* market regulation, dispute resolution between operators, spectrum management, consumer rights, monitoring market-shaping and competition issues regarding open internet access, assessing the unfair burden and calculating the net cost of the provision of universal service, and ensuring number portability between providers.

NRAs of EU Member States are gathered in BEREC to ensure the consistent application of the EU regulatory framework. BEREC aims to promote an effective internal market in the telecoms sector, bringing benefits to both consumers and businesses. Additionally, BEREC assists the European Commission and the NRAs in implementing the EU regulatory framework for electronic communications. It provides advice both upon request and proactively to European institutions, complementing the regulatory tasks performed by NRAs at the national level.[13]

Article 29 of the EECC requires Member States to establish rules regarding penalties, which may include fines and non-criminal predetermined or periodic penalties, for infringements of national provisions adopted under the EECC or any binding decisions made by the European Commission, the national regulatory authority, or other competent authorities pursuant to the EECC. The penalties must be appropriate, effective, proportionate, and dissuasive, as mandated by the same article. However, the EECC does not define

11 *Official Gazette*, No. 76/2022, 14/2024.

12 *Ibid.*

13 For more on the work of BEREC see https://www.berec.europa.eu/en.

specific offenses or penalties, leaving the responsibility for determining them to national legislation.

NRAs have the authority to enforce regulations and take legal action against operators who violate rules established by national or EU laws. However, they generally do not prosecute operators in the traditional sense, as a law enforcement agency would. Additionally, the EECC does not specify the procedural aspects for imposing penalties; these procedures are left to the national legal systems.

3.1. Croatian Regulatory Authority for Network Industries (HAKOM)

HAKOM acts as the national regulatory authority for carrying out regulatory and other tasks within the scope and competencies prescribed by laws governing electronic communications, postal services, and rail services.[14] As established by the relevant laws, HAKOM is an independent, autonomous, and non-profit legal entity with public authority, founded by the Republic of Croatia, whose activities are public. Its founding rights are exercised by the Croatian Parliament and the Government of the Republic of Croatia, while HAKOM is accountable to the Croatian Parliament. It is managed by a Council composed of five members, including the President and Deputy President, who are elected for a term of five years. The Council is supported by an expert service that carries out professional, administrative, and technical tasks, managed by the Executive Director. Although HAKOM oversees three sectors, this paper will focus exclusively on its role in electronic communications.

As outlined by the ECA, HAKOM regulates and supervises the electronic communications market in Croatia. Its responsibilities include ensuring fair competition, promoting the efficient use of the radio frequency spectrum, and protecting consumer rights.

Although HAKOM's primary role is not to sanction market stakeholders, as a legal entity with public authority, it holds full jurisdiction for inspection and supervision in the field of electronic communications. As regulated by the ECA, HAKOM inspectors have the authority to propose to the HAKOM Council the submission of an indictment to initiate misdemeanor proceedings or to issue a misdemeanor order, in accordance with the provisions of the special law governing misdemeanors. Likewise, under the Misdemeanor Act[15], HAKOM acts as an authorized prosecutor before the competent municipal court.

[14] The competence of the Authority is laid down in Article 16. Electronic Communications Act (76/22), Article 8. Of the Postal Services Act (144/12, 153/13, 78/15 and 110/19), Articles 14 and 28. Act on the Regulation of the Rail Services Market and Protection of the Rail Passengers Rights, Official Gazette, No. 104/17. Statute of the Croatian Regulatory Authority for Network Industries, *Official Gazette*, No. 11/19.

[15] *Official Gazette*, No. 107/2007, 39/2013, 157/2013, 110/2015, 70/2017, 118/2018, 114/2022.

4. OFFENSES PROVIDED BY THE ELECTRONIC COMMUNICATIONS REGULATIONS

Although the EECC provides the framework for imposing penalties, the detailed elaboration of such offenses and penalties is left to the national legal systems of the Member States. In Croatia, these are outlined in the ECA, specifically in Articles 169 to 172.

These offenses under the Croatian legal system are classified as misdemeanors and are divided into three categories:

- Particularly serious violations
- Serious violations
- Other violations

Each category is assigned a range of fines for both the legal entity and the responsible individual within the entity, along with other penalties and measures that may be imposed, as detailed in the following sections.

Particularly serious violations refer to the most severe offenses that jeopardize national security, law enforcement, and the overall functioning of the electronic communications market. The ECA outlines 13 such offenses, including failure to implement necessary measures to protect the security of electronic communications networks or services, failure to cooperate with the national lawful interception authority, and non-compliance by an operator with significant market power with the regulatory obligations imposed by HAKOM.

These violations are considered to have a substantial negative impact on both the security of the communication infrastructure and the integrity of the market as a whole and therefore attract the highest penalties.

The penalties for particularly serious violations are as follows:

- For legal entities: Fines ranging from 1% to a maximum of 10% of the total annual gross revenue from electronic communications networks and services activities, based on the last available annual financial statements.
- For the responsible individual within the legal entity: Fines ranging from EUR 2,650 to EUR 13,270.
- For natural persons: Fines ranging from EUR 2,650 to EUR 13,270.

If the offence was committed for financial gain: The imposed fines shall be doubled.

Serious violations are those that still endanger the functioning of electronic communications services, their market, and end users, but to a lesser extent compared to particularly serious violations. The ECA defines 141 such offenses, including, for example, Failure to ensure the protection or relocation of electronic communications networks, in-

frastructure, or related equipment. Using the radio frequency spectrum in violation of radio frequency allocation plans and failing to provide information in an appropriate format when requested by an end-user with a disability.

For serious violations, the fines imposed are set within a fixed range and are not based on the defendant's revenue. The penalties for serious violations are as follows:

- For legal entities: Fines ranging from EUR 13,270 to EUR 132,720.
- For the responsible individual within the legal entity: Fines ranging from EUR 2,650 to EUR 13,270.
- For natural persons: Fines ranging from EUR 1,320 to EUR 6,630.
- If the offence was committed for financial gain: The fines shall be doubled for the responsible person and the natural person.

Additionally, penalties may include confiscation of equipment:

- the radio station, radio equipment, or other electronic communications equipment.
- computer and/or other technical equipment in some serious violation cases.

Other violations are those that pose the least serious threat to electronic communications services, their market, and end users. These violations are divided into two groups, each with different penalty ranges.

An example of a violation from the first group would be failure to provide an easy and free method to prevent the display of the caller's number.

For these violations, Article 171 defines 81 offenses, with the following penalty ranges:

- For legal entities: Fines ranging from EUR 6,630 to EUR 66,360.
- For the responsible individual within the legal entity: Fines ranging from EUR 660 to EUR 6,630.
- For natural persons: Fines ranging from EUR 260 to EUR 2,650.
- If the offence was committed for financial gain: The fines shall be doubled for the responsible person and the natural person.

Additionally, penalties may include the confiscation of equipment, such as the radio station, radio equipment, or other electronic communications equipment.

An example of a violation from the second group would be failure to inform the public about options for preventing the display of the calling number or for rejecting incoming calls when the display of the calling number is prevented.

- For these violations, Article 172 defines four offenses, with the following penalty ranges:
- For legal entities: Fines ranging from EUR 2,650 to EUR 13,270.

- For the responsible individual within the legal entity: Fines ranging from EUR 260 to EUR 2,650.
- For natural persons: Fines ranging from EUR 130 to EUR 1,320.
- For a natural person who abuses calls to the number 112 or other emergency service access numbers: Fines range from €130 to €1,320.

These offenses, while less severe than particularly serious and serious violations, still carry penalties to promote adherence to regulations and protect consumers and the integrity of the electronic communications network.

5. PROCEDURAL RULES

Since the offenses prescribed by the ECA are categorized as misdemeanors in Croatia, the procedural rules applied are those prescribed by the Misdemeanor Act. A HAKOM inspector may issue a misdemeanor order in the misdemeanor proceedings in accordance with the provisions of the law governing misdemeanors and under the conditions established by the ECA. The municipal court[16] holds jurisdiction in the first instance for conducting misdemeanor proceedings for violations prescribed by the ECA, while the appellate tier is the specialized High Misdemeanor Court. In line with the Misdemeanor Act (Article 94, Para 2), the Municipal Misdemeanor Court in Zagreb is exclusively territorially competent to adjudicate cases initiated by the authorized prosecutor, a legal entity with public powers granted the status of an independent regulator by a special law, which in this case is HAKOM.

Misdemeanor prosecution for violations prescribed by ECA cannot be initiated after four years from the date the violation was committed (statute of limitations).

Decisions on misdemeanors that are not final, along with an indication that the decisions are not final, the regular legal remedies submitted against those decisions, and the outcome of the proceedings regarding the legal remedies, are published by HAKOM on its website[17].

Although the preceding ECA 2008[18] also provided penalties and penalty ranges as shares of companies' annual turnover, these measures were largely unenforceable until the 2015 amendments to the Misdemeanor Act. The ECA 2008 established very high fines; however, the Misdemeanor Act imposed a cap of one million Croatian kunas (approximate-

[16] In the latest judicial network reform in Croatia in 2019, specialized misdemeanor courts were merged with municipal courts. In practice, they became specialized departments within the municipal courts, which facilitated better manpower distribution and caseload equalization among judges. However, due to the size of the caseloads, two misdemeanor courts continued to operate independently as Municipal Misdemeanor Courts in Zagreb and Split.

[17] https://www.hakom.hr/hr/odluke-rjesenja-i-presude/1904.

[18] *Official Gazette*, No. 73/2008, 90/2011, 133/2012, 80/2013, 71/2014, 72/2017, 76/2022. From 2008 the respective range was 1-5% of the annual company turnover, from 2017 amendments the limit was lifted to 10%.

ly EUR 133 thousand), which restricted enforcement of these fines. As a result, the 2015 amendments enabled the prescription and imposition of a wider range of fines for offenses under the jurisdiction of regulatory agencies.

However, the fixed penalty range tied to company revenue may be considered overly strict, especially in cases where the offense was committed out of negligence and did not result in significant negative effects on the market or society. To address this issue, it would be beneficial to remove the lower limit on penalties and allow the court to determine appropriate sanctions on a case-by-case basis within the lower part of the spectrum. For instance, penalties could be defined as 'up to 10%' of a company's turnover, similar to provisions in other legislative frameworks. For example, the General Data Protection Regulation[19] (GDPR) provides only the penalty maximum, capping administrative fines at 2% and 4% (Article 83), while the Regulation on Addressing the Dissemination of Terrorist Content Online[20] similarly caps penalties at 4% (Article 18).

HAKOM is also authorized to impose fines through administrative measures governed by administrative law, with court protection provided by administrative courts. As these measures fall outside the criminal law domain, they are not further explored in this paper.

6. CASE LAW IN CROATIA

As previously mentioned, HAKOM's activities are public, and its decisions, along with related court rulings, are regularly published on its website. While not all misdemeanor cases initiated by HAKOM attract widespread attention, some stand out due to their direct impact on users or the size of the penalties imposed. Naturally, not all cases result in convictions, as both HAKOM, acting as the prosecutor, and the defendants present their arguments equally before the competent court. However, one could argue that the regulatory agency, as a state body, may have an advantage when presenting its case. The following section provides a brief overview of three cases involving four major telecom operators in Croatia.

In 2022, A1 Croatia Ltd. was found guilty of failing to enter into subscription agreements in accordance with Article 41 of the ECA. The company was fined one hundred thousand Croatian kunas (approximately EUR 133 thousand). Specifically, end users were denied new subscription agreements with the operator due to credit checks that included

[19] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[20] Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online.

outdated claims, which should not have been considered.[21]

In 2023, Telemach Croatia Ltd. was found guilty of violating conditions and measures related to fulfilling operator obligations, as well as failing to comply with methods, deadlines, and criteria for preventing or reporting security incidents. The company was fined EUR 22 thousand. The case was closed after the court accepted the pre-arranged agreement between the parties, as both the prosecutor and the defendant had agreed on the guilt, as well as the type and amount of the penalty.[22]

In 2023, Iskon Internet Inc. was found guilty of failing to implement the prescribed measures to protect the security and integrity of electronic communications networks and services, due to its failure to address deficiencies identified during a previous information security audit. The fine was set to one hundred thousand Croatian kunas (approximately EUR 133 thousand). However, the ruling was overturned in appellate proceedings, as the higher court determined that the described actions did not constitute a misdemeanor under the law.[23]

In 2024, Croatian Telecom Inc. was found guilty of failing to comply with its regulatory obligations as a significant market power operator and was fined EUR 5.9 million, the highest fine ever imposed in the Croatian telecom market. Specifically, Croatian Telecom failed to meet a deadline it was required to fulfill at the wholesale level. Although the defendant appealed, the judgment was upheld by the appellate court.[24]

Croatian Telecom argued in its defense and public statement that there were no consequences for users, nor any impact on market competition, to justify classifying the situation as a violation—let alone an exceptionally serious violation of the law. It also contended that imposing such a draconian penalty for the objective impossibility of completing a procedural action within an unexpectedly shortened deadline was unreasonable. However, both courts emphasized that the penalty imposed was at the lower end of the range prescribed by law and that there were no grounds for its mitigation. This brings us back to earlier discussion on the rigidity of the ECA regarding the fixed penalty range.

7. EUROPEAN CASE LAW EXAMPLES

NRAs play a significant role in enforcing electronic communications regulations and imposing penalties. However, the processing of such cases is not regulated in the same manner across all European jurisdictions, as it is in Croatia, where it follows the misdemeanor criminal system.

21 Case no. Pp-11029/2021, Municipal Misdemeanor Court in Zagreb.

22 Case no. Pp-6577/2023, Municipal Misdemeanor Court in Zagreb.

23 Case no. Ppž-4363/2023, High Misdemeanor Court of the Republic of Croatia.

24 Case no. Ppž-3864/2024, High Misdemeanor Court of the Republic of Croatia.

In 2024, The Council of State, the highest court of administrative justice, rejected Orange's appeal against the NRA's decision to impose a fine of EUR 26 million for failing to meet its FTTH[25] coverage commitments in semi-urban or suburban areas. The Council of State concluded that Orange's deployment commitments were sufficiently clear to allow for penalties in the event of a breach; and the fine imposed on Orange does not appear disproportionate, given the seriousness of the breach committed by the incumbent operator.[26]

UK NRA, Ofcom, fined British Telecom in 2024 for the failure of its emergency call-handling service. Ofcom imposed on BT a EUR 20.5 million fine which was discounted by 30% as British Telecom admitted liability. The degree of potential harm triggered Ofcom to impose the record-high fine.[27] Also, in 2024, Ofcom, fined British Telecom for failing to give customers the required contract information and contract summary documents.[28]

BNetzA, the German regulator, imposed in 2023 fines in the total of EUR 1.44 million for allowing unsolicited calls. These fines were imposed on call centers in the energy sector, which called large numbers of consumers and often disguised the nature of the call by pretending to be the current energy supplier or an independent energy price comparison platform.[29]

CONCLUSION

The liberalization of the electronic communications markets in the EU has introduced a series of detailed regulations aimed at maintaining competition, protecting consumers, and ensuring the efficient functioning of the telecom sector. National regulatory authorities, such as HAKOM in Croatia, play a pivotal role in this system. These authorities primarily oversee market behavior, but one of their key functions is also to impose penalties and initiate related proceedings. In Croatia, penalties imposed under the Electronic Communications Act are treated as misdemeanors and processed as misdemeanor cases, with HAKOM representing the cases in competent courts. Some other EU Member States have chosen different procedural paths.

Violations of the Electronic Communications Act in Croatia are categorized into

[25] Fiber-to-the-home is the installation and use of optical fiber from a central telecommunications point to individual houses/buildings to provide high-speed internet access.

[26] https://www.telecomrevieweurope.com/articles/telecom-operators/oranges-eur-26m-fiber-rollout-fine-confirmed-by-conseil-detat/.

[27] https://www.ofcom.org.uk/phones-and-broadband/telecoms-infrastructure/bt-fined-17.5m-for-999-call-handling-failures.

[28] https://www.ofcom.org.uk/phones-and-broadband/service-quality/ofcom-fines-bt-2-8m-for-failing-its-ee-and-plusnet-customers/.

[29] https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2024/20240119_marketingcalls.html#:~:text=Bundesnetzagentur%20imposes%20maximum%20fines%20for%20unsolicited%20marketing%20calls,-Year%20of%20issue&text=In%202023%2C%20the%20Bundesnetzagentur%20imposed,requirements%20when%20making%20telemarketing%20calls.

three groups based on their severity. However, there is an ongoing debate regarding the appropriateness of the penalty range for particularly serious violations, where penalties are tied to company revenues.

The current penalty for particularly serious violations, expressed as 1% to 10% of the company's annual turnover, can be excessively punitive, especially in cases where the harm to market competition or consumer welfare is minimal. Removing lower penalty limits and providing courts with greater discretion in determining fines based on the specifics of each case could lead to a more balanced and fair approach. This would still allow the NRA and the courts the possibility to impose the maximum penalty of 10% of the company's annual turnover when warranted.

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STRUCTURE AND DYNAMICS OF THE ITALIAN CRIMINAL PROCEEDING, TODAY

Marco Cecchi *

The paper analyzes the current Italian criminal procedure from two points of view. From a structural point of view, the various stages in which the Italian criminal procedure develops are summarized. From a dynamic point of view, the logical, practical and normative profiles of the peculiar way in which the facts of crime are ascertained in the context of the Italian criminal procedure are analyzed.

KEYWORDS: *Italian criminal proceeding, structure, method, ascertainment, evidence.*

* PhD, Lecturer (School of Law, Florence) and Lawyer. E-mail: marco.cecchi@unifi.it. ORCID: https://orcid.org/0000-0002-7335-2029. Translation (in English) of the text carried out by the Review. About abbreviations: "CC" corresponding at Criminal Code, while "CPC" stays for Italian Criminal Procedure Code and "IC" for Italian Constitution.

INTRODUCTION

"What is a trial?" General Don Lope asks the peasant Pedro Crespo in The Mayor of Zalamea. The peasant's immediate response is: "paper; but written, and well: where the evidence and the indications of every fault that is ascertained are recorded" (Calderon de la Barca, 1989, p. 108). Today, we know that the judicial procedure – the criminal one, in particular – is not just "paper". At least from cognitive psychology studies, from theories on contextual communication and from sociological reflections, as well as from the boundless literature on semiotics, emotions and free judicial conviction, we learn that there are inevitable subjective dynamics, practical mechanisms and narrative events (verbal and non-verbal) that guide the decision of the specific case[1]: a decision taken in a procedural stage in whose normative frameworks the parties exercise means, "expedients and maneuvers with which they try to bend the laws to [their] practical purposes", in order to influence the outcome of what has been icastically defined "the trial as a game" (Calamandrei, 1950, p. 485)[2].

According to the current code of criminal procedure, then, writing – which nevertheless remains an indispensable tool for certifying[3] (and, therefore, making transparent) the exercise of power (also the one in which the *ius dicere* consists of) – is accompanied by orality[4].

In a predominantly accusatory procedural system, based on adversarial proceedings, the confrontation – oral and immediate – between prosecution and defense is in fact central (art. 111, co. 3 and 4 IC), before a third and impartial judge (art. 111, co. 2 IC). And

[1] A real 'invisible process' – as the collective volume Aa. Vv., *Il processo invisibile. Le dinamiche psicologiche nel processo penale*, 1997, is titled – which involves all the actors in the trial scene and which, ultimately, means that the ascertainment of "judicial truth, like any reality, [can] only have a very relative value in the knowledge of the magistrate, who reaches it through depositions and interrogations, undergoing a whole process of transformation: from sensation, the initial moment, to verbal or written exposition, the terminal moment" (Altavilla, 1955, p. 4).

[2] This playful image – as Calamandrei himself seems to remind us when he states that we must not forget man, since "all our systematic symmetries, all our *elegantiae iuris*, become illusory schemes if we do not realize that underneath them there is nothing true and alive but men, with their lights and their shadows, with their virtues and their aberrations" (Calamandrei, 1957, p. 18) – must in any case be accompanied by the acknowledgement that, ultimately, that 'dialectical game between the parties supported, where necessary, by the judge', "is not a place of entertainment for lawyers or magistrates", since in the trial – at least and certainly in the criminal trial – "all the actors feel that in their different functions lies the great responsibility of contributing to tracing the destiny of an individual in terms of freedom and reputation" (Amodio, 2016, pp. 14-15). The procedure, then, must be experienced in an "agonistic" way, like a game, but – as has been written (Bellavista, 1976, pp. 29-47) – aware of the "drama of (and in) the criminal trial" (p. 31), where one is committed to ascertaining the criminal responsibility of an individual and things, therefore, must be taken and done seriously (Calamandrei, 2014, pp. 3 and 13-14).

[3] On the crucial role of "documentality" and about "that technique of techniques which is writing as a prototypical form of recording" within society, see Ferraris, 2018, pp. 49 ff. (in part, pp. 63-66). On the subject, see Ferraris, 2009.

[4] On this point, Aghina, 2014, p. 105 reminds us that, "unlike the civil process (where writing predominates), the criminal process, especially after the reform, is substantially an oral process (especially in the first instance) and conversely less cold than the civil process: the sound of the word is warmer and more subject to emotions". And indeed, having regard to the "linguistic-textual reality of the criminal process", Dell'Anna, 2014, p. 85 underlines that "the relationship between orality and writing by tradition and regulatory provisions is still oriented in favor of the former".

this dialectical moment remains firm even with respect to those elements of evidence acquired during the preliminary investigations which, exceptionally (see art. 111, co. 5 IC), flow into the trial file (art. 431 CPC). This last eventuality, in fact, does not eliminate the profile of orality, since the goodness of unilaterally formed acts will still be tested – orally, precisely – with an ex post check on their authenticity and reliability. Thus, as a rule[5], what is lost ex ante (in an aseptic and anesthetizing verbalization) is recovered later, through the discussion and oral verification that can take place on the reliability and credibility of the declarant (for example, heard at s.i.t. [summary witness information] and subsequently absent from the trial) or on the legitimacy of the investigations carried out by the operators in the field or, again, on the scientific nature of the method used and the results achieved by the expert, involved in the procedural assessment[6].

In the dynamic unfolding of the process, a sacred representation is staged – characterized by shared and predefined environments, furnishings, clothes, words and symbolic gestures – which is expressed in the language, both written and oral, of law: a "representative, ritual and performative language, which purifies human reality from its opacity and contradictions, bringing it back within the categories of the juridical, as shared in a given historical moment and in a certain social and anthropological context" (Tedoldi, 2017, p. 45)[7].

1. ANALYSIS OF THE ITALIAN CRIMINAL PROCEEDINGS

In its classic definition, the procedure unfolds in "a chronologically ordered series of acts aimed at the pronouncement of a criminal decision, each of which, as validly performed, gives rise to the duty to implement the next one and, at the same time, is itself car-

[5] The rule is followed by several exceptions, including – for example – the following: the hypotheses referred to in art. 111, co. 5 IC (usability of evidence formed unilaterally with the consent of the accused or due to proven impossibility of an objective nature or as a result of proven unlawful conduct); the regulation of readings and disputes; cases of evidentiary incident; the non-repeatability of the examination of vulnerable witness on the same facts, except for specific needs; etc.

[6] On this subject, see Tonini, 2020, pp. 347-349, according to which the same rules as those provided for declarative evidence must be considered valid for scientific evidence. On this subject, among others: Canzio, 2018, pp. 3 ff.; Canzio, 2003, pp. 1193 ff.; Carlizzi, 2017, pp. 28 ff.

[7] In a similar sense: Bourdieu, 2017, p. 87; Camon, Cesari, Daniele, Di Bitonto, Negri & Paulesu, 2019, p. 607; Cavallone, 2016, p. 287 ("The trial [is] – like the game – first of all an anthropological, psychological and cultural phenomenon"); Cordero, 1986, p. V ("The penal device is not only a normative mechanism, but also a theatre, collective memory, cathartic celebration, with many ambiguous aspects, since crime and punishment are specular figures"); Cordero, 1981, pp. 310 ff. (in part, pp. 310-325); Dershowitz, 1995, p. 221 ("Rituals [are] indispensable for the survival of all institutions, trials included"); Forza, Menegon & Rumiati, 2017, p. 175; Sammarco, 2001, p. 61; Spangher, 2020, p. 7; see Struck, 1977, p. 66 ("Wenn Juristen sprächen, wie jedermann spricht, wären sie dann überhaupt noch sich selbst und den otheren Bürgern im Staate als juristen erkennbar?"). In topic, *amplius* Garapon, 2007, ***passim.*** (in part., pp. 173-278).

ried out in fulfillment of a duty imposed by its antecedent" (Tonini, 2020, p. 64)[8].

In the twenties of the twenty-first century, in light of the architecture prepared by the criminal procedure code (the so-called Vassalli code of 1988, retouched by many legislative amendments), the Italian criminal procedural proceeding takes place – as a rule and generally – in the following terms.

1.1. Structure and articulation of the Italian criminal procedure

The Italian criminal procedure is divided into first-instance proceedings, appeal proceedings (or second-instance proceedings) and cassation proceedings (or third-instance proceedings).

Regarding the ordinary procedure[9], the phases that constitute the first-instance proceedings are three: preliminary investigations, preliminary hearing and trial.

During the preliminary investigations, the public prosecutor and the judicial police acquire the *notitia criminis*, which is transcribed in the appropriate register of crime reports (art. 335 CPC), and carry out, in secret and with coercive powers (because it is a public activity), the investigations necessary to decide how to exercise the criminal action. The defense – that is, the suspect, assisted by a lawyer (because in the criminal trial, defense assistance is an inalienable right) – can also carry out investigative activities, this time of a private nature and therefore without coercive powers. Although rarely, it sometimes happens that the defense carries out investigations before being made aware of the existence of criminal proceedings against it (so-called preventive investigations).

For their entire duration[10], the investigators' investigations remain secret (art. 329 CPC), unless acts or activities must be carried out that directly involve the suspect (e.g. interrogation) or that clearly have an impact on his rights and/or his freedoms (e.g. search).

At this stage, in the cases established by law and upon request of a party (art. 328 CPC), the intervention of the judge for preliminary investigations is foreseen, who has no

[8] Tonini's *Manual* refers to the definition already present in Conso, 1955, p. 132. In a similar sense: Cordero, 2012, pp. 383 and 389; Orlandi, 1999, p. 20 (who speaks of a "sequential order", aimed at "simultaneously satisfying a multiplicity of needs [*i.e.* practical rationality; procedural economy; procedural correctness]"); Nobili, 1997, p. 124; Sammarco, 2001, pp. 64 and 148; Spangher, 2015, pp. 46 and 67-68.

[9] In this reconstruction, we leave aside the differentiated procedures (which have a complete structure, starting from the preliminary investigations up to the appeals, but boast some peculiarities, pertaining to the judge or the type of responsibility to be ascertained, which differentiate them from the ordinary procedure; see single-judge court, justice of the peace, juvenile court, proceedings against entities) and the special procedures (which, compared to the ordinary structure, omit one or more procedural phases; see abbreviated trial, application of the penalty at the request of the parties, immediate trial, direct trial, procedure by decree, suspension of the procedure with probation).

[10] The ordinary term for the duration of preliminary investigations is six months; exceptionally, the term is one year if the proceedings are for the crimes indicated in art. 407, co. 2, lett. a) CPC (*i.e.* serious crimes, such as mafia, terrorism and similar). If extensions are requested, the maximum term for the duration of preliminary investigations cannot exceed one year and six months; for the crimes referred to in art. 407, co. 2, lett. a) CPC, following extensions, the maximum duration can reach two years.

powers of initiative but only the function of checking the legitimacy and authorizing the adoption of the most important measures that can be adopted in this situation (e.g. wiretaps, arrest, detention, precautionary measures[11], extension of investigations). Furthermore, in the cases listed in art. 392 CPC, a hearing in adversarial proceedings (so-called evidentiary incident) is held before the judge for preliminary investigations, where evidence that cannot be referred to the trial is collected. The latter, exceptionally, can be used to subsequently decide on the guilt or otherwise of the accused. As a rule, otherwise, to make the final decision, the judge can only use the evidence legitimately acquired during the trial (art. 526 CPC) and not the investigation documents, which were formed unilaterally and not in the dialectic between the parties (principle of separation of the procedural phases).

Once the investigations have been completed, if the evidence collected does not allow for a "reasonable prediction of conviction", the public prosecutor requests the case to be closed[12]; the preliminary investigations judge, who checks the correct exercise of the criminal action (mandatory ex art. 112 IC), decides on this request. The judicial authority decides *de plano*, unless there is opposition from the injured party, i.e. the victim of the crime committed (even better: the person protected by the legal provision that is assumed to have been violated), since in this case it is necessary to hold an ad hoc hearing in chambers. Therefore, the judge – de plano or following the hearing – can decide, alternatively, either i) to archive the case or ii) to impose the carrying out of new investigations or iii) to order the registration of a subject, not yet investigated, in the register of crime reports or, finally, iv) to have the public prosecutor formulate the indictment (which means that the judge orders the continuation of the proceedings against that person in respect of whom the public prosecutor had requested the interruption, due to the non-existence or inconsistency of the evidence that had emerged up to that point). The provision that orders the archiving can be revoked and, therefore, the investigations can be reopened for the carrying

[11] Precautionary measures are a tool designed to safeguard the conduct and final effectiveness of criminal procedural investigations. If certain conditions are met (so-called conditions of admissibility: serious evidence of guilt; actual punibility; statutory penalty limits – art. 273 CPC) and there are specific and peremptory precautionary needs (danger of escape; danger of tampering with evidence; danger of repetition of the crime or commission of other specific crimes – art. 274 CPC), the public prosecutor may ask the judge to adopt an order that applies a personal precautionary measure (coercive, mandatory or interdictory) or a real precautionary measure (preventive or conservative). The choice of the measure to be adopted is made on the basis of the criteria/parameters/principles of adequacy, proportionality and graduality (art. 275 CPC). The order issued by the judge can be challenged, in the ways and within the terms provided by law, at the Court of Liberty or Review (artt. 309 and 321 CPC), or at the Court of Appeal (art. 310 CPC), and in any case at the Court of Cassation. Precautionary measures are distinguished from so-called pre-cautionary measures (***i.e.*** arrest, detention and emergency removal from the family home – artt. 379 et seq. CPC), which are so-called because they are applied without the precautionary procedure having first taken place and without a decision by the judge having been made. In any case, the judicial authority must necessarily be involved within forty-eight hours of the application of the pre-cautionary measure, of which it is necessary to request the validation and the possible transformation into a precautionary measure, according to the conditions set out in articles 273 et seq. CPC.

[12] Archiving may also be requested in cases of particularly minor nature of the fact pursuant to art. 131-***bis*** CC. When the offence is particularly minor and there is no habitual criminal behavior, the legal system – obviously, after all the conditions legitimizing such a decision have been ascertained – waives the application of the penalty.

out of new investigations (art. 414 CPC).

If, on the other hand, the evidence collected during the investigations allows for a reasonable prediction of conviction, then the public prosecutor formulates the indictment (art. 417 CPC) and requests the referral to trial[13]; the judge of the preliminary hearing decides on this request. In the context of this filter hearing, which[14] takes place in the council chamber with the necessary participation of the public prosecutor and the defendant's lawyer, the judge evaluates the validity and legitimacy of the request made (also with reference to the formulation of the indictment) and, following the formal procedures, can take an interlocutory decision or a resolutive decision.

In the first case, the judge believes he is not able to decide based on the documents and then indicates to the public prosecutor the further investigations to be carried out, within a set deadline, or orders supplementary evidence aimed however exclusively at gathering evidence whose decisiveness for the purposes of the ruling of no case to answer is evident. The evidence thus acquired, as a rule, cannot be used to subsequently express an opinion on the guilt or otherwise of the accused. The different regime of evidentiary usability in the trial is the main difference between the ex officio supplementary activity pursuant to art. 422 CPC and the evidentiary incident pursuant to art. 392 CPC. In the second case, that is, when the judge believes he can rule on the basis of the current proceedings, either a ruling of no case to answer or a decree ordering the trial is issued.

With the judgment of no case to answer the procedural process stops, because: i) there is a cause that extinguishes the crime; ii) there is a cause for which the criminal action should not have been initiated or continued; iii) the fact is not provided for by law as a crime; iv) there is evidence that the defendant is innocent; v) it is established that the defendant is not punishable for any cause[15]; vi) the elements acquired do not allow for the formulation of a reasonable prediction of conviction (art. 425 CPC). This provision cannot be issued if the judge believes that the acquittal should result in the application of a security measure other than confiscation. In any case, where issued, the judgment of no case to answer may be revoked at the request of the public prosecutor, addressed not to the preliminary hearing

[13] The public prosecutor who considers requesting a referral to trial, before making such a request, must notify the accused and his lawyer of the notice of conclusion of the preliminary investigations (art. 415-*bis* CPC). This is how, unless actions have already been carried out with the participation of the defense, the accused becomes officially aware of the proceedings concerning him. At this point, also given the right to view the entire investigation file, which contains all the investigative findings, it is possible to articulate a conscious defense strategy (*e.g.* presenting briefs, producing and/or filing documents, asking to be questioned, urging the completion of other investigations) that clarifies one's position and perhaps presents to the investigator the existence of elements that could change the initial resolution of the accusation into a request to archive the proceedings.

[14] With reference to special proceedings, we highlight that in this procedural phase those procedures that eliminate the debate may take place: that is, the abbreviated procedure, the application of the penalty at the request of the parties (so-called plea bargaining) and probation.

[15] The transition from the preliminary investigation phase to the preliminary hearing phase determines, in technical jargon, the transition from the "proceedings" to the "process/trial"; and it is only from the preliminary hearing that art. 129 CPC becomes applicable: that is, the obligation to immediately declare certain causes of non-punibility.

judge but to the preliminary investigations judge, when new sources of evidence are present which, alone or together with other sources of evidence already present, can determine the referral to trial (art. 434 CPC).

With the decree ordering the trial, the investigation moves to the consecutive step and the parties are summoned to appear in the trial. The judge of the preliminary hearing, after having positively assessed the possibility of success of the accusation in the trial, advances the proceedings. Once the decree has been issued, the trial file is drawn up - in the adversarial process between the parties - which contains the documents listed in art. 431, co. 1 CPC. All the other documents carried out up to that point, both by the prosecution and the defense, flow residually into the file of the public prosecutor (art. 433 CPC) and are not generally usable in the trial phase. At this point, the registry of the competent judge receives the decree ordering the trial and the trial file.

We have reached the heart of the first instance trial and more generally of the accusatory process, that is, the moment in which the evidence is formed in the encounter-clash between the prosecution and the defense, before a third and impartial judge and in a public regime (justice being administered in the name of the people: art. 101, co. 1 IC) [16]. CPC divides this phase into three sub-phases: preliminary acts to the trial; trial; acts following the trial.

In the first sub-phase, the so-called evidentiary discovery takes place: the parties must file the list of declarants they wish to examine, with an indication of the circumstances on which the examination must focus, at least seven days before the date set for the hearing (art. 468 CPC). The means of declaratory evidence through which the parties intend to demonstrate the truthfulness and validity of their respective reconstructions are then revealed. During the preliminary proceedings, urgent evidence may also be taken, i.e. evidence that cannot be postponed to the hearing, in the cases provided for by art. 392 CPC (so-called early hearing). Then, during the hearing, always before the hearing begins, the regular constitution of the parties is checked and any preliminary issues are discussed.

In the second sub-phase, we witness the hearing. The judge declares the hearing open, and the parties present the relevant requests for evidence, indicating the facts that they wish to prove by taking such evidence. The judicial authority proceeds with the admission of evidence on the basis of the criteria set out in art. 190 CPC: pertinent evidence, which is not manifestly superfluous or irrelevant, and evidence not prohibited by law, is admitted. Both the accused and the public prosecutor have the right to the admission of "contrary evidence", that is, that evidence or evidence in defense of the facts that are the subject of the evidence presented by the opposing party. Furthermore, with the consent of the parties, the documents contained in the public prosecutor's file, which, as has been said

[16] With reference to special proceedings, we highlight that this procedural phase, *i.e.* the trial, can be reached even without going through the preliminary hearing, where the immediate trial or the direct trial take place, or where the criminal conviction decree is opposed.

several times, would not normally be usable in the hearing (so-called agreed acquisition of investigation documents), can be acquired and therefore used for the final decision. Finally, the cross-examination takes place: a method by which oral evidence is taken and which consists of a series of rules through which the parties ask questions to the person being examined and thus contribute to the formation/construction of the adversarial evidence[17].

Cross-examination is divided into three stages: direct examination; cross-examination; re-examination. Direct examination is conducted by the party who requested to question that declarant, in order to obtain the narration of facts useful for demonstrating the reconstructive thesis supported; and since it is presumed that the questioner has prior knowledge of the information that can be obtained from such examination, he is prohibited from asking leading questions. Cross-examination is conducted, if necessary (since it is a right/option, not a duty) by the party who has an interest contrary to that of the party who requested the examination of the declarant, with the aim of testing whether the latter is credible and whether his statements are reliable; for this reason, leading questions are also permitted. Finally, with the re-examination (which is doubly optional, because it presupposes that the cross-examination has previously taken place), the party who conducted the direct examination can ask questions again to the person being examined to recover his credibility and make his narrative regain its credibility.

At the end of the sequence of direct examination-cross-examination-re-examination, the judge may ask questions of the declarant *ex officio*, without prejudice to the right of the parties to resume speaking and conclude. Based on the evidence gathered in the trial, moreover, the judge may suggest to the parties new or broader topics of evidence, useful for the completeness of the examination (art. 506 CPC). And once the acquisition of evidence has been completed, the judge may also order ex officio the gathering of new evidence, if he deems it "absolutely necessary" (art. 507 CPC). This is a power that can be exercised not to explore new reconstructive hypotheses, but to remedy the gaps in knowledge regarding the reconstruction of the prosecution or the defense; and in any case with the possibility for the parties to then request the gathering of contrary evidence.

Once the trial is over, that is, all the evidence has been acquired (formed in cross-examination; with the possibility, however, that unilaterally formed documents may be recovered, through the exceptions referred to in art. 111, co. 5 IC or through the mechanisms of consulting documents in support of the memory, of objections and of readings [art. 511 et seq. CPC]), we move on to the final discussion. The public prosecutor and the defense attorneys of the private parties formulate their conclusions and, in this way, after having fulfilled the formal burden of proof (intended as the burden of introducing the evidence in the trial), they fulfill the substantial burden of proof (intended as the burden of convincing

[17] The code provides specific rules for the examination of so-called vulnerable persons (minors, mentally ill adults, persons indicated in art. 90-*quater* CPC), who are heard on the basis of rules derogating cross-examination: in a place other than the Court; through a mirror glass, with an intercom system; through a filtered examination, ***i.e.*** not conducted directly by the parties; with other non-predetermined methods established ***ad hoc***, case by case, by the judge.

the judge of the validity of the thesis supported). The judge declares the trial closed and retires to the council chamber to deliberate the sentence: we are in the sub-phase of the documents following the trial.

In this regard, CPC provides a legal method of evaluating evidence, which does not limit the free conviction of the judicial authority but requires that this be in accordance with the law and rationality. The decision must be compulsorily motivated (art. 111, co. 6 IC), under penalty of nullity (art. 125 CPC)[18].

The sentence, the requirements of which are set out in art. 546 CPC, can be either acquittal or conviction.

The sentence of acquittal, which has a liberating nature, is distinguished between a sentence of non-prosecution (which does not contain a real investigation but is limited to ruling on purely procedural aspects that precisely prevent the completion of the investigation activity – art. 529 and 531 CPC) and a sentence of acquittal (whose different terminating formulas graduate the legal distance of the accused from the facts of which he is accused – art. 530 CPC).

The sentence of conviction, which determines the punishment of the subject deemed guilty of the crime-fact imputed and contested to him, can be issued only when the judge deems the guilt of the accused proven beyond any reasonable doubt (art. 533 CPC). There must be no reasonable alternative hypotheses on the existence of that peculiar historical event, on its legal qualification as a criminal offence and on its commission by the accused.

The first-instance trial ends here.

By virtue of the appeal system, other proceedings may subsequently be opened: the appeal (or second degree) and the cassation (or third instance); as well as, after all internal remedies have been exhausted, an appeal to the European Court of Human Rights, for violations concerning conventional law (ECHR)[19].

The subjects entitled to challenge the provision issued, in the cases and ways strictly provided by law, can challenge a prejudicial provision that has been issued against them, within the terms indicated by the Criminal Procedure Code, under penalty of forfeiture.

In the appeal stage, a second judgment is held regarding both the merit (*i.e.*, the

[18] The judge's final decision is expressed in the sentence. The sentence is composed of a motivation and a dispositive part (art. 546 CPC). In the motivation of the sentence the judge must set out the reasons for his conviction by indicating the evidence on which the decision is based and stating both the reasons for their reliability and the reasons for the unreliability of the contrary evidence (so-called dialogic or binary nature of the motivation). In essence, "judges must state why a certain claim was or was not considered proven" (Tuzet, 2023, p. 2) and it is not sufficient to generically state that they have used the evidence gathered in the trial or that they have reached the ascertainment of the fact on the basis of Caius' deposition, the result of the specialist report or the search carried out by the judicial police. Instead, it is necessary that the content of the testimony, the expert opinion or the outcome of the search activity be indicated. Only in this way does motivation become a remedy against arbitrariness, because the controllability of the judge's justifying discourse arises from the relationship between "elements of proof" and "ascertained facts".

[19] In relation to the appeal to the ECHR, there has been talk of a "fourth level of jurisdiction" (Iacoviello, 2011, p. 794). This is a judgment with its own peculiar characteristics, different from those typical of the types of judgment provided for by the Italian criminal procedure code, which we do not have space to dwell on in this paper.

validity of the reconstruction of the historical event, carried out through the evidence) and the legitimacy (*i.e.*, the correct application of the legislative provisions to the specific case) of the contested decision. A double examination of the dispute is carried out, "in fact" and "in law"; in which, however, the knowledge of the judicial authority is limited by the reasons that support the appeal. Although boasting the same decision-making powers as the first-instance judge, the appeal judge is bound by the criticisms raised by the parties, because the object of the second-instance judgment is, in essence, the contested decisum. Therefore (and also because the renewal of the trial investigation is not imposed as mandatory, where the evidence is formed ex nihilo in adversarial proceedings – art. 603 CPC), it can be said that the appeal is configured as a control instrument, which takes place on paper (i.e., on written documents; so-called paper judgment), rather than as a true new iudicium. And, at its outcome, the judge confirms or reforms (totally or partially) the first-instance provision[20], while the cases of annulment constitute exceptional hypotheses (art. 604 CPC). The issued sentence replaces the contested sentence and, in turn, can still be contested through an appeal to the Supreme Court.

In third instance, the Supreme Court only judges "legal" issues. This means that the factual reconstruction emerging from the first and second instance judgments is taken as valid, and no further investigation can be carried out in this regard. That is, it is no longer possible to take evidence and/or make meritorious assessments regarding their significance (for example, it is no longer possible to re-evaluate the credibility of the witness and the reliability of his statements); and where a "factual" re-evaluation is necessary, the Court of Cassation is forced to issue a ruling of annulment with referral to the judge of merit, who will proceed accordingly (art. 627 CPC). In fact, the grounds for appeal – listed exhaustively in art. 606 CPC – all concern questions of legitimacy. The pronouncement of the Court of Cassation is one of these four types: i) inadmissibility; ii) rejection; iii) rectification (of error iuris); iv) cancellation with or without referral (artt. 620 and 623 CPC).

Once the judicial provision is no longer contestable by ordinary means, since it is not or is no longer subject to appeal or to an appeal in cassation, then the decision in question (criminal sentence or decree) becomes irrevocable. The assessment becomes essentially unchangeable, given that – for reasons of legal certainty; and barring extraordinary remedies – the trial that has already been concluded cannot be repeated: the State's power of assessment has been "consumed"; the judge has definitively "judged". Two effects arise from this: i) the preclusive effect, such that the defendant, whether acquitted or convicted, cannot be tried again for the same historical fact, in the same capacity (i.e. that of defendant/accused; art. 649 CPC – principle of ne bis in idem); ii) the binding effect, such that the ascertained fact and the related attribution of responsibility must be considered true

[20] If only the defendant appeals, then it operates the prohibition of *reformatio in peius*. If, however, only or also the public prosecutor appeals, then the judge is free to adopt both decisions: *in peius* (*contra reum*) and *in melius* (*pro reo*), while remaining within the limits of the grounds for appeal.

throughout the legal system; and this "procedural truth" also displays its effectiveness in relation to other proceedings, whether criminal, civil or administrative, with an intensity that varies and varies according to the law (artt. 651-654 CPC).

The final stage of the criminal proceedings, concerning the provision that has become enforceable (and therefore enforceable by force, i.e. even against the will of its recipient), is governed by Book Ten of the Criminal Procedure Code.

The execution phase, which completes the jurisdictional assessment, making it effective and effective, sees as its main protagonists – in addition to the subject judged, of course – the public prosecutor, the enforcement judge, the supervisory magistrates, the prison administration and the external criminal enforcement offices, as well as the national guarantor of the rights of detained persons or persons deprived of personal liberty. On the basis of the enforcement order, the order contained in the sentence (or in the criminal decree) is implemented. In particular: on the one hand, the prerequisites and conditions of legitimacy of the enforcement order and of the enforcement activity thereof are verified; on the other hand, during the execution of the sentence, the correspondence between the sanctioning content of the executive title and the re-educational purpose of the sentence established by art. 27, co. 3 CPC (according to which "punishments cannot consist of treatments contrary to the sense of humanity and must aim at the re-education of the convicted person") is constantly monitored and possibly adjusted, with ad hoc measures.

1.2 Logical, practical and normative dynamics of the Italian criminal process

After § 2.1., it can now be stated that the criminal procedural assessment is a combination of orality and writing[21], revolving around two main questions: the *quaestio facti* (recte, the *quaestiones facti*) and the quaestio iuris (recte, the *quaestiones iuris*)[22].

Firstly, starting from the accusation formulated by the public prosecutor (art. 417 CPC) and following the procedural rules, an attempt is made to reconstruct – "in fact" – the existence of a specific legally relevant past event. This "lost fact" is reconstructed through evidence[23]: evidence, both declarative and real, which is in any case crystallized in writing (generally, in reports), to be usable for the purposes of the decision. In the methodological perspective of scientific falsificationism, the aim is to prove the procedural certainty (*recte*, the high logical-evidentiary probability[24]) of the facts charged-contested to the accused and one operates to this end by modus ponens and modus tollens, resorting to inductive, deduc-

[21] On the nature of these concepts, analyzed (also) from a historical-cultural perspective, see Ong, 1986. From a more strictly legal point of view, see Ferrua, 1981.

[22] See, *ex multis*, Ferrua, 2017, p. 726 and Mazzarese, 1996, 29.

[23] Above all: Tonini & Conti, 2014, *passim*. See also Giuliani, 1961, *passim*., Taruffo, 2009, pp. 74 ff. (in part., pp. 135 ff.) and Ubertis, 1992, pp. 1 ff. ("Any result of a factual investigation depends on the context in which the latter takes place, on the methodology followed and on the pre-established purposes" [p. 1]).

[24] Expression meaning "procedural certainty beyond any reasonable doubt" (on this point, see Conti, 2006, pp. 87 ff.).

tive and above all abductive inferences[25].

Secondly, the provision of law previously researched, identified and interpreted is applied – "in law" – to the historical-legal fact that has been ascertained. The rhetorical-argumentative activity of the parties and, in particular, the reasoning of the judge attribute a performative[26] and value-based meaning (in this case: a 'legal sense') to that particular historical event[27].

At a logical level, the two cognitive operations – "in fact" and "in law" – move on distinct levels. On the one hand, the factual reconstruction occurs in a cognitive context of truth/falsity (procedural) regarding the existence or non-existence of a certain event[28]. On the other hand, the legal reconstruction stands out in a decisional-evaluative scenario of reasonableness and hermeneutic questionability regarding the application of the law[29]. Thus, it can be said that the logical-procedural truth is "probabilistic in fact and questionable in law" (Ferrajoli, 2018, p. 20); so much so that in the Criminal Procedure Code, for the purposes of pronouncing guilt, the factual aspect is required to have evidentiary validity beyond any reasonable doubt (beyond any reasonable doubt – art. 533 CPC)[30], while the legal aspect is measured by the rational plausibility of the interpretation, that is, the validity – which will inevitably remain open to criticism and discussion – of the argument put forward, having regard to its legal conformity (see art. 606, co. 1, lett. b), c) and d) CPC) and to its actual existence, not manifestly illogical and not contradictory (see art. 606, co. 1, lett. e) CPC).

At a regulatory level, the two moments of assessment find a common denominator in the principle of legality, that is, in both being subject to a pre-established legislative regulation: that of "fair trial" (art. 111, co. 1 IC). By paying attention to judicial action, it is clear how the judge expresses a discretion legislatively bound by more or less incisive prescriptions and parameters. The judging authority, unravelling and rewinding "the thread of

25 *Ex plurimis*, see Ferrua, 1994, pp. 342-348 and Iacoviello, 1994, pp. 349-357.

26 The term "performative" was coined, as is well known, by John Langshaw Austin (see Austin, 2015, pp. 10-11), who "[h]e preferred a new word" (11) rather than using technical terms even if close to his concepts (e.g. "operational"), to express the fact that – in given circumstances and in the light of certain conventions – "the utterance of the statement constitutes the execution of an action [and] is not normally conceived as simply saying something".

27 Prosaically, see Benni, 2016, p. 16 ("Nothing is complicated, if you walk in it. The forest seen from above is an impenetrable stain, but you can know it tree by tree. A man's head is incomprehensible, until you stop to listen to him").

28 On closer inspection, what constitutes the object of control in criminal proceedings is the statement (*i.e.* the utterance) that a certain fact has occurred. Such a statement can be judged true or false; the fact itself is neither true nor false, but can only have occurred or not. See Ubertis, 1979, p. 91 and Ubertis, 1991, p. 2.

29 On the subject, at length: Ferrajoli, 2000, *passim*. On the distinction between "judgment of fact" and "judgment of law" see Taruffo, 1988, pp. 2-6. In this regard, see also Canale & Tuzet, 2020, pp. 62-63; Caprioli, 2017, pp. 317 ff.; Comanducci, 1992, pp. 232-244; Ferrua, 1994, pp. 342 ff.; Kostoris, 1997, pp. 7-8 (and following).

30 On the basis of the evidentiary elements collected in that specific historical-legal event (and not on the basis of a mere reconstruction, although abstractly conceivable but detached from the concretely existing evidence and legitimately acquired in that given trial), there must be no alternative reconstructive hypotheses that are reasonably sustainable. This is the ontologically attainable procedural certainty/truth, within the scope of the administration of justice realized by man *on* man and *for* man.

inductions [...] in the labyrinth of probabilities" (Dumas, 2012, p. 191) (*quaestio facti*) and applying – to the fact thus reconstructed – the law (*quaestio iuris*), moves in the light and in the alternation of written evidence and oral evidence. In compliance with the regulatory provisions (and taking into account the case law rulings, as well as possibly studying doctrinal contributions), the judge decides and – mandatorily, barring exceptions (see art. 125 CPC) – motivates his decisions, in accordance with the 'type' of provision to be adopted and in compliance with the different evidentiary standards of the phase or level of judgment in which he finds himself.

Finally, at a practical and material level, both the judge and the parties adopt epistemological tools that they articulate, argumentatively, by means of both orality and writing. Oral acts and written acts intersect, completing each other; and, in the progressive[31] path of ascertaining criminal responsibility, come to find themselves in a relationship of inverse proportionality: as one approaches the finality of the judgment, the spoken form gradually gives way to the written form. In the first instance, one is generally confronted with the testimonial depositions and with the potential confession of the accused before falling back on the documents; on appeal, on the contrary, the "silence" of the papers prevails over the "viva voce" and the "eloquence of the body"[32], elements – the latter – which assume a residual factual role (see hypothesis of renewal of the hearing: art. 603 CPC) and become completely recessive in the legitimacy stage, where usually one limits oneself to referring to the requests or at most to briefly illustrating the grounds for appeal already and more extensively set out in black and white in the appeal.

In this last regard, it is important to note that the progress of securitization goes hand in hand with the gradual sedimentation of evidentiary information during the proceedings, the physiological flow of which leads to the accumulation of data regularly recorded in documents. The increasing stratification of procedural acquisitions means that writing ends up taking precedence over orality; even more so if one considers that the presence of the reasoned verdict (and specifically drafted in written form) leads to understanding "orality [as] a technique for the formation of evidence, not for convincing the judge" (Iacoviello, 2013, p. 542), so that – unlike the jury, which dissolves the guilty / not guilty reserve on the basis of impressions and intuitions – the judge, having to *reddere rationem*, is obliged to rationally manage his own sensations and suggestions. Internal persuasion of the soul is not enough: the intuition of intimate conviction, to comply with the obligation of motivation, must be

[31] Spangher, 2018, pp. 31-37 identifies three structural rules – "if [they are not] to be called principles" – that characterize today's criminal proceedings: i) the principle of non-regression; ii) the principle of concentration (which can be summarized as follows: "for the so-called incidental issues of the proceedings it seems appropriate to avoid deviations from the main path"); iii) the principle of progression (or interrelation/concatenation between procedural acts and phases).

[32] Cf. Pagano, 2010, p. 113.

oriented (and validated) rationally[33].

In short, after having participated in the trial and having – as a rule (art. 525, co. 2 CPC) – personally experienced the process, the judge recomposes the framework of the legitimately acquired evidence (art. 526 CPC) and rules on the validity of the accusation. With the motivation of the sentence he fulfills a function of objective knowledge, summarizing in it the reasons for his (free) conviction, no longer bound – downstream – by the automatism of legal evidence but certainly limited – upstream – by the legal method of forming evidence, which – in some cases – can even direct (although never predetermine) his evaluative discretion towards the treatment of certain unavoidable arguments, the examination of which is considered indispensable for the purposes of a complete ascertainment of the case in question.

In the design of the code, as seen above (§ 2.1), the appeal mechanism then follows, which closes the verification process and makes possible, on the basis of the reasons reported in the appeal or in the instance for cassation, a double "sifting of correspondence": that, predominantly of merit, "between sentence and trial" (on appeal) and that, of substantial legitimacy, "between trial and logic"[34] (in Cassation).

In these juridical actions, it is the text of the decision, within which the entire historical-procedural matter is (or should be) condensed[35], that becomes the protagonist[36]. And here the words of the farmer Pedro Crespo re-emerge, in their partial and peculiar facet, since it is in the "paper" – ultimately – "that the evidence and the indications of every guilt that is ascertained are recorded" (Calderon de la Barca, 1989, p. 108). With a faithful and punctual "written" reporting, which however – it has been said – the discipline of our criminal procedure system requires that as a rule occurs at the end of a participatory process steeped in orality, the judge "offers everyone, litigants and non-litigators, the logical reason for the decision adopted" (Irti, 2017, p. 16), justifying the choices made with reference to the issues addressed[37].

[33] Perelman, 1978, p. 416 writes that "a simple description of the operations of the esprit du judge does not provide a good motivation, there is a legitimacy or a justification that persuades the parties, the superior instances and the well-founded public opinion of the decision". And this, on the other hand, is recognized by the magistrates themselves: see, for example, Lanza, 2009, p. 7 and Santoriello, 2008, p. 698.

[34] The terms in quotation marks are from Iacoviello, 2013, p. 347, who defines the "control between sentence and trial" as an extra-textual control of completeness and correctness of the evidentiary information, while the "control between trial and logic" as a textual control of logicality.

[35] Lupo & Amodio, 2009, p. 81 write that "the motivation condenses and crystallizes the entire process in a single act".

[36] On this point, see Capone, 2018, pp. 4-5.

[37] In relation to the issues that both the judge and the parties must address in the context of the assessment, it may happen that – in some cases – one finds oneself faced with aspects (sometimes factual, other times strictly legal or normative) that boast a sort of "differentiated or privileged relevance" in the economy of the case being examined. In such circumstances, one is faced with structural and salient argumentative profiles of that specific case, which - by virtue of a legislative indication, a jurisprudential practice or a doctrinal theory - possess a value that is entirely peculiar, which makes them essential for the purposes of the correct definition of the judgment. These arguments, which must necessarily be taken into consideration to concretize the case in question, become real stages or unavoidable stops in the procedural process. And, if related to the figure of the judge, such steps or obligatory passages mark – *ex lege* or *de facto* – both the evaluative moment and the justifying moment of judicial reasoning, giving rise to a peculiar motivational obligation that can be summarized in the expression "reinforced reasoning/motivation". On this point, please refer to Cecchi, 2019, pp. 1123 ff., Cecchi, 2020, pp. 1525 ff. and Cecchi, 2021, *passim*.

CONCLUSION

In conclusion, we can observe that the jurisdictional procedure is a technique of discipline, through legal forms, of the exercise of power among men who live together in 'large' societies.

In the face of conflict situations, the State prohibits taking justice into one's own hands (see artt. 392-393 CC[38]) and requires resorting to socially shared conflict resolution methods, of a mediated nature and more or less regulated depending on the case. One of these resolution methods is precisely represented by the jurisdictional procedure, which constitutes a "regular succession of activities that leads to the adoption of a legitimate judicial decision within a given legal system. A decision that, over the years, we have attempted to objectify and make as distant as possible from an act of mere arbitrariness"[39].

With this work we have attempted to describe both the static structure and the logical, practical and normative dynamics of today's Italian criminal procedure system. The hope of the Author of these pages is that this paper may foster dialogue among scholars of procedural law.

Knowledge of the procedural frameworks of a foreign legal system may provide the inspiration to adopt new institutions or to modify existing ones, or even to convince oneself that within one's own legal system things are fine as they are (at least compared to the other legal system with which one has been confronted). And, once one has taken note of the situation, it is possible – *causa cognita* – to move accordingly.

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[38] Artt. 392 and 393 CC punish the crimes of "arbitrary exercise of one's own rights with violence against things" and "arbitrary exercise of one's own rights with violence against people". It is now a generally accepted thought that a "society can consolidate itself provided that it claims for itself the right that everyone has to take revenge and to judge good and evil; and therefore has the power to prescribe a common system of life, to establish laws and to protect them" (Spinoza, 2013, p. 299. See also Spinoza, 2013, pp. 706 and 722-723).

[39] Cecchi, 2021, pp. 9-10.

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MEDIA COVERAGE OF MEDICAL NEGLIGENCE— A CRUCIAL TOOL IN THE FIGHT AGAINST SPECIFIC CRIMES OR A POTENTIAL THREAT TO THE PRESUMPTION OF INNOCENCE?

Olga Sovova*

The paper addresses the role of mass media in the public space when retrieving and providing information in the public interest. The paper highlights the topical issue of the relationship between the task of media to extend accurate and objective information, the obligation of public authorities to grant information and the privacy protection of persons and legal entities. The author focuses on criminal proceedings against medical professionals and providers. The interdisciplinarity of medical law and the interweaving of public and private law, ethics and professional procedures and their documentation can create ambiguities and disputes in case of possible or just alleged misconduct in patient care. Criminal proceedings should determine whether a crime was committed, ensure punishment and cover sustained damage. Providing information to the public is a form of prevention and helps improve healthcare systems. However, medical negligence and legal responsibility in medical law attract both the media and their audience. Shared interest in information about injured patients and perpetrators' punishments stirs communities and public opinion about insufficient victim protection and low penalties. The media points out alleged gaps in penal policy and fuels often unjustified efforts to change criminal legislation. Based on practical examples of specific court decisions related to medical negligence, the paper highlights the potential infringement of fundamental principles of court proceedings, especially the presumption of innocence, caused by penal populism.

In conclusion, the paper underscores the importance of legal protection for all parties involved in criminal proceedings. This protection is crucial not only for the fair and just operation of the legal system but also for ensuring that the media's role in the public space remains timely, impartial, and satisfactory. The paper is firmly rooted in desk research, drawing on many legal regulations, case law, and doctrinal books. It is further enriched by the author's attorney experience in medical law, which adds a practical perspective to the academic discourse.

KEYWORDS: *criminal law, medical law, public interest, privacy protection, presumption of innocence, mass media, information, court proceedings, penal populism.*

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1. INTRODUCTION

Modern society is equipped with a variety of tools to safeguard public interests. The legal order, laws, and bylaws of each state and international entity, such as the European Union or the Council of Europe, underscore the rule of law and its obligations. The fundamental principle of legality forms the backbone of this system. However, the public only sometimes adheres to this command. At this moment, the press and the media step in, serving as crucial tools for protecting public interests and ensuring a balanced representation of public concerns. The author reminds the well-known decision of the European Court of Human Rights (ECHR) Fressoz and Roire v. France, summarising the court's evaluation of the freedom of expression and dissemination of information in the public interest. The mentioned decision forms the core of the legal evaluation of freedom of expression as one of the essential foundations of a democratic society.

"Not only does the press have the task of imparting information and ideas on matters of public interest, but the public also has a right to receive them." (ECHR, Fressoz and Roire, sub. 51)

The right to freedom of expression, obtaining and spreading information, is a fundamental political right. The Convention on the Protection of Human Rights and Fundamental Freedoms ranks the right to freedom of expression, expressed in Article 10, as one of the leading interests protected by law. However, it also underscores obligations and responsibilities, such as protecting the reputation or rights of other persons or preventing the leakage of confidential information. This intricate balance within the legal framework is a testament to the complexity and importance of the issue.

Article 11 of the Charter of Fundamental Rights of the European Union explicitly, in addition to the already mentioned rights, also underscores the importance of the media's respect for their plurality. This respect for diversity is valuable and critical in the legal framework, ensuring a balanced and inclusive representation of public interests.

The Czech Charter of Fundamental Rights and Freedoms (CFRF) recognises freedom of expression, free dissemination, and receipt of information as fundamental political rights.

Freedom of expression and the right to information are subjective public rights that also respond to public obligations not to hinder freedom of expression and the provision of information.

The media often shape what is in the best public interest and what politicians should enshrine in law to protect society and its ideas. However, there is a question of what constitutes public interest and what is merely a distorted reflection of immediate societal moods. The fields of public and individual health protection and legal regulation of punishment for

unlawful conduct are often discussed in this context, with the media advocating for the inviolable protection of the public interest. However, freedom of expression has its limits. The media's influence extends beyond individual lives and the business environment, reaching political institutions and their decisions.

This paper critically examines the ongoing efforts to revise criminal legislation concerning medical negligence. It also underscores the pressing issue of penal populism, a potential threat that could erode the fundamental principles of court proceedings, notably the presumption of innocence.

The paper is firmly grounded in desk research and leverages legal regulation, case law, and doctrinal books. Drawing from her attorney's and academic experience in public and medical law, the author brings ideas to open the discussion about this matter of interest.

2. MASS MEDIA AND THEIR ROLE IN THE CONTEMPORARY INFORMATION SOCIETY

Imagine a world without mass communication. The impact on our organisational, personal and social life would be profound. This scenario underscores the essential role of the media system in contemporary society. (Blažek, 1995, p. 337)

The media world is unique, with a wide range of people affected by disseminated information. The mentioned persons can be divided into two categories—one is the processor of information, and the other is its recipient. The public receives information about a third person. However, the public is a vague notion. According to the information variety their specific recipients prefer, there are different media types—national and local dailies and titles aimed at women, men, sports fans or other interest or age groups.

As the media landscape evolves, the survival of print media, especially dailies, is increasingly challenged by the rise of new electronic media. This market competition often leads to pressure to increase circulation and readership, sometimes at the cost of violating the ethical and legal obligations of journalists.

"Admittedly, people exercising freedom of expression, including journalists, undertake "duties and responsibilities", the scope of which depends on their situation and the technical means they use. Journalists cannot, in principle, be released from their duty to obey the law." (ECHR, Fressoz and Roire, sub. 52)

It is indisputable that health protection, the general provision of health services, and their concretisation by individual providers, legal entities, doctors, and other health workers form a core matter of public interest. Citizens have the right to information. They can also decide on their own whether and where to seek health care.

The ability to obtain information is relatively easy in the age of social networks and

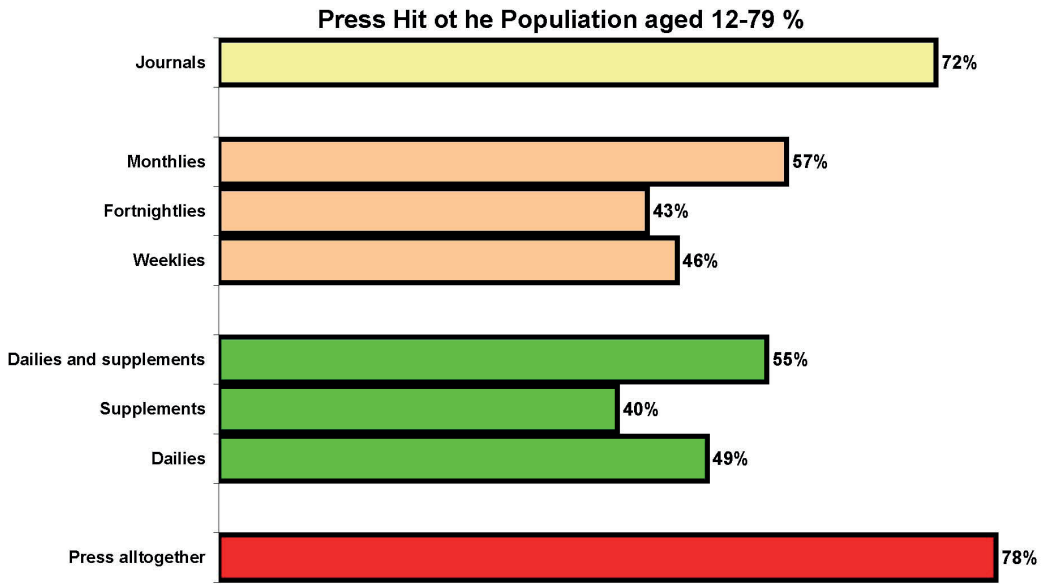
various other alternatives to print media and traditional mass media, such as public television or radio. This information can be of high quality and professional value, but it often has an air of sensationalist tabloids and, in some cases, can even be dangerous to health. The ECHR reiterates in its rulings that health services, even private services, constitute legitimate public concern, and the press can disseminate them. (ECHR, Bergens Tidende, sub.60)

The rules, as mentioned earlier, also apply to information about malpractice, other offences, and crimes connected with healthcare provisions.

One of the severe problems in providing information on legal issues through the media is the potential harm it can cause. Whether journalists obtain information through their investigative activities or if it is provided directly by public authorities, the impact on specific natural persons and their privacy or a legal entity's reputation and good name can be significant.

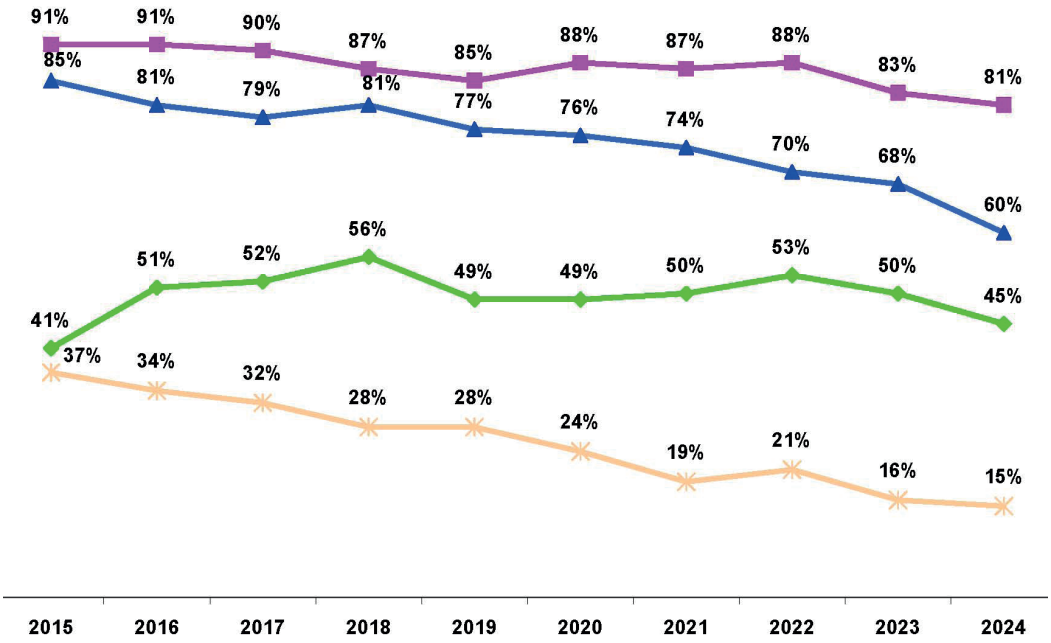
According to the Czech Statistics Office, the Czech Republic had 10 86 million inhabitants at the end of March 2024. (https://csu.gov.cz/population)

Graph No. 1 highlights the period from 1st October 2023 to 31st March 2024, which included a total reach of 6,928,000 persons, accounting for 78% of the population, primarily through digital media platforms. The data demonstrate a significant shift in media consumption, particularly the decline in printed media use among Czech inhabitants aged 12-79.



Source: Czech Publishers' Union

The second graph underscores the profound transformation in the search for topical information between 2015 and 2023 in the Czech Republic. The internet and social media have emerged as the dominant information sources, reaching 83% of the population. However, compared with the previous year, 2022, readers are less attracted to news about the current situation. Interest is declining, especially among women and the younger generation.



Source: Reuters Institute Digital News Report 2023

Mass media has played a crucial role in COVID-19, providing information to the public. Individuals who rarely read, watched, or listened to the news regularly before COVID-19 started to use it periodically. (Dhanashree et al., 2021, p. 24) However, social media often disseminated scientifically unsubstantiated allegations about pandemics and other critical social issues. That is why some users have abandoned or limited their access to mass media. However, criminal activity, especially in healthcare, still attracts the attention of both the media and the public.

3. CRIMINAL LAW IN THE PUBLIC SPACE

Criminal law, a branch of public law, is still labelled as a specific means of protecting statutory interests. It takes the initiative when other legal means are ineffective, inappropriate, or have already failed. The Czech legal theory and case law describe it as an ultima ratio principle.

"The principle of the ultima ratio is a complex concept that creates a balance between the demand for criminalisation and the need to protect the nature of the interests and values. This equipoise contributes to fulfilling the idea of justice, to which legitimacy is closely tied. (Fenyk, 2013, p.10)

However, the principle of subsidiarity of criminal punishment, the ultima ratio of criminal law, does not mean that criminal law is not connected to other branches of public and private law or does not fundamentally influence them. This interconnectedness strongly impacts healthcare law and creates interdependence.

The criminal prosecution of persons or legal entities of public interest always attracts journalists and audiences.

Unlike other sectors, healthcare faces unique challenges when providing information about criminal activity. The release of such information not only affects legal proceedings but also significantly impacts patients and their privacy.

Czech criminal proceedings enable access to the health records and files of the victim and the perpetrator. Nevertheless, information disclosure should be moderate to the person concerned, the Constitutional Court of the Czech Republic (CC), in its ruling I. US 321/06 stated: *"The possibility of working with information about the health status of persons without their consent as part of criminal proceedings does not mean that it can be done unreasonably. However, owing to the public nature of the process, it is not possible to prevent the spread of some data on the state of health among the public; it is understandably necessary that law enforcement authorities keep the nature of this information in mind and deal with it only to the necessary extent."*

The reader might have difficulties distinguishing between a factual statement, how journalists inform about what happened, and what a journalistic evaluation of the case is.

The so-called experts often give their opinions on criminal evaluations of healthcare malpractice or other crimes. Such masters are unfamiliar with the case. They cannot access the file because of the confidentiality duty. Frequently, they evaluate without knowledge of the specific situation, which appears to be significantly different than when care was provided. In decision 30 Cdo 608/2007, the Supreme Court of the Czech Republic (SC) defined the difference between information, a statement of fact, and an evaluation as follows: *"The evaluating court expresses the subjective opinion of its author, who takes a specific position on*

the given fact by evaluating it from the point of view of correctness and acceptability, based on their own (subjective) criteria. An evaluative judgement cannot be proven in any way. However, it is necessary to examine whether it is based on accurate information, whether the form of its presentation is adequate, and whether interference with personal rights is an inevitable concomitant of the performance of criticism, i.e., whether the primary goal is not defamation and dishonour of the person in question."

In this context, projects funded by the EU and professional literature draw attention to the media condemnation and violation of the presumption of the innocence principle.

"Presumption of innocence, an entitlement embedded in the right to a fair trial, which has been developed into a fundamental legal principle in many justice systems, is blatantly undermined by the media in their reports. " (Edzie, 2021, unpaged)

In high–profile cases, the parties often tend to seek media coverage. Sometimes, even law enforcement authorities initiate such interference with the fundamental principles of criminal proceedings. In the decision of Allenet de Ribemont v. France, the ECHR concluded that the presumption of innocence could be violated even at the pretrial stage of the proceedings and, more precisely, in connection with the provision of information by law enforcement authorities. It is not a matter of preventing the provision of information, but public authorities must do so with maximum restraint and discretion while protecting the presumption of innocence.

By managing the process, the media often steer public opinion about guilt and punishment. This influence can sometimes lead to more severe punishment than in similar cases without such publicity. (Media Influence in Capital Cases, not dated)

Public opinion and media pressure can catalyse the identification of legislative shortcomings, leading to potential improvements. However, often, it is a matter of different facts, varied perpetrators, or a re-evaluation of legal regulations and case law.

The influence of media discussions on politicians is undeniable. The perceived need to align with public opinion, often underlined by surveys of questionable value, can lead to urgent efforts to correct current legislation.

4. REFLECTIONS OF THE PENAL POPULISM IN THE PUBLIC SPACE

Penal populism is a media-driven process in which politicians strive to punish crime according to public opinions and moods. Generally, they try to reflect the general view of proffering the operator before the victim and society. The theory has discussed penal populism since 1993. The European Center for Populism Studies provides rich literature reviews and considerations about the latest developments in EU and non–EU countries. (www.populismstudies.org)

However, the 21st century, with a global information society and the internet, provides new content related to this concept. The main concerns brought uncertainty and the revolt against it, supported by the possibilities of the digital era. (Pratt & Anderson, 2020, p.1).

"New technologies make it considerably easier to aggregate and share the people's will and use it in law-making processes. Recently developed nationwide or local crowdsourcing and crowd law-making platforms offer unprecedented opportunities for the direct individual involvement of citizens in the law-making process. Amateur messages are increasingly treated as equivalent to expert opinion or perhaps even more valuable. (Aguerri, 2021, unpaged)

Communication between criminal justice authorities and the media is essential because of the principle of open justice. Authorities are responsible for ensuring that the correct information is passed on to the media and the public. This approach reassures the public and instils confidence, as it is done without breaching any legislation, jeopardising the interests of parties involved in the trial, or exposing them to excessive public scrutiny. (Aguerri, 2021, unpaged)

Thus far, penal populism has not been a specific subject of legal research in the Czech Republic. Politologists and sociologists study populism and populistic nationalism. Kubát et al., 2016, provided an academic overview of the topic. The author has identified the paper from 2023, which examines penal nationalism. (Drápal, 2023, pp.1549-1567)

As Czech legal theory does not pay sufficient attention to populism in law, dangerous phenomena caused by the media coverage of high-profile cases appear in civil and criminal procedures. Afterwards, the legislation reflects the populistic attitude, especially when there is enough time to negotiate the draft before approaching elections. Thus, experts and entrepreneurs criticise the excessive legal protection of debtors, rigid legal regulations on the labour market, and, in general, the inexorable legal enforcement of obligations.

Divergencies in criminal procedures, especially the conditional suspension of criminal prosecution and the settlement of guilt and punishment causes, raise doubts about some judgments and punishments for criminal acts. The main concern is whether the decision corresponds to the seriousness of the crime. Protecting victims' rights sometimes seems not to be at the required level.

The abovementioned issues can significantly escalate tensions in a more polarised society. Social tensions in the Czech Republic are rising for economic reasons. Despite having a constitutional majority in the parliament, the government is failing to stabilise the state budget, traditional manufacturing industries are vanishing, the housing market is at a standstill, and inflation is steadily increasing. These findings underline the urgent and pressing need to address populism's impact on social tensions and governance.

5. DISCUSSION

Criminal law is a domain where the media's influence can be particularly potent, potentially leading to the manipulation of public opinion. This statement is especially true in cases involving health care and potential malpractice, which tend to attract a large audience.

In the Czech Republic, even serious media outlets tend to sensationalise information about criminal proceedings, particularly in their headlines. This sensationalism can lead to a distorted public perception of the accused and the case, potentially influencing the trial outcome.

"Therefore, if the condemning decision has not acquired legal force, the detainee, the person on whom a criminal complaint has been filed, the person on whom detention has been imposed, the person on whom criminal proceedings have been initiated, the defendant or the person convicted without jurisdiction cannot be reported as a perpetrator of a crime. Therefore, it is also inadmissible to refer to him as a criminal, a criminal, a fraudster, a rapist, or otherwise. At this stage, it is necessary to refrain from any intelligence consideration that would touch on the guilt of this person since guilt is a matter of assessment that belongs exclusively to the court." (Knap et al., 2004, pp. 351 – 352)

The Supreme Court, in its judgement 30 Cdo 1413/2012, directly cited the mentioned statement and affirmed that such conduct, where the presumption of innocence is not respected and the accused is treated as a perpetrator, violates her rights to protection of personality. Czech law recognises the presumption of innocence very broadly throughout criminal proceedings. The plaintiff can only be marked as a perpetrator on the final valid judgment. However, SC emphasised that considering the accused's rights does not prohibit information about criminal proceedings.

Mass media must exercise fairness and moderation, especially in high-profile cases such as medical malpractice. Violating the presumption of innocence can significantly disrupt the plaintiff's life, making upholding these principles more crucial than ever. The pressure from the media can lead to unwarranted demands on politicians for increased punishment. Such pressure is unnecessary in the Czech Republic, as the Criminal Code, Act No. 40/2009 Coll. enshrines a specific responsibility for the malpractice of medical professionals.

Public opinion manipulation can significantly impact legal proceedings when it shapes views on punitive punishment. If the charges are dismissed, such an influence often leads to the accused filing civil applications and criminal notices against the state for unlawful prosecution, publishing houses and individual journalists.

In 2014, a Czech nurse was accused of killing six patients. According to the indict-

ment, she used to work in the intensive care unit and wanted to make her difficult job more manageable. The police and the state prosecution were so persuaded of her guilt that they immediately informed the media. The mass media repeatedly called her "Nurse Death." However, the courts acquit the charges. After some years of litigations, the nurse received compensation from the state for the unlawful custody and criminal charges and from the publishing houses—mass media owners. (zpravy.aktualne.cz/domaci/sestra-maresova)

Nevertheless, her life and social status were wholly destroyed. During one of the court proceedings about compensation, she stated:

"I cannot forgive the state in which such a case happened. I assumed that I was a nurse and that I could do it. Moreover, suddenly, I am fired from this job. I still feel the injustice of what happened to me in my heart; I live with it every day, struggling against the injustice that was done to me; the media did not respect the presumption of innocence," she stated during one of the court proceedings about compensation." (www.novinky.cz/clanek/krimi-statu-nikdy-neodpustim).

6. CONCLUSION

Publishers, mass media, and public authorities play crucial roles in providing information ultimately in the public interest. They must often remember the basic principle: minimising interference with a natural person's sphere and a legal entity's reputation.

The public space players often employ exaggerated, strained words. The result is that the terms become seemingly harmless, and their users rarely realise that they can injure specific persons and completely change their lives. In the digital age, where almost everyone is online, print, television, radio, and social media information spreads quickly among the public. (Sovova, 2017, p. 338)

The author underlines the crucial role of placing greater demands on state employees, law enforcement authorities, and the media in performing their duties and communicating with the public. Public authorities have personnel and technical facilities to ensure the expertise, accuracy, and legality of the information provided.

Legislation cannot provide a case-by-case and exact response where the line is between private and public interest in exercising freedom of expression. In the same way, it is impossible to find an unequivocal rejoinder to the title question. In disruptive times, the boundaries of what is generally and legally acceptable are changing.

The author, who worked as a lawyer in publishing houses for ten years, values the role of mass media as the watchdog of democracy. However, she is concerned about how independent and objective journalistic work can transform into manipulation and populism to gain more readers, advertisements, and profit. It is crucial to underline the need for more objective and responsible journalism. It is time to raise the bar and demand precise journalistic work to prevent the spread of penal populism.

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THE COMMON TYPES OF THE PENAL POPULISM IN THE CONTEXT OF POSSIBLE DE LEGE FERENDA AMENDMENTS AND SUPPLEMENTS OF CRIMINAL LAW FRAMEWORK OF THE REPUBLIC OF SERBIA

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Nowadays experts are increasingly talking about the negative effects of penal populism on the effective suppression of crime. The paper points out that the strengthening of penal populism in a society occurs especially after the commission of criminal acts that caused massive and serious consequences and that as such caused citizens' anxiety and fear. In order to calm tensions and dissatisfaction in society, the authorities are immediately approaching the conducting of appropriate legislative reforms in the belief that this will lead to crime prevention. This is most often recognized through overcriminalization and tightening of penal policy or the age of criminal responsibility. The abovementioned approach can be identified in the Draft Law on amendments and supplements of the Criminal Code of the Republic of Serbia. In this paper, it is considered common forms through which penal populism is strengthened. The paper concludes that the authorities, often under the influence and pressure of the mass media and the public, intend to adopt required amendments and additions in the sphere of penal policy as soon as possible in the belief that they will contribute to calming the agitated public. However, the successful suppression of crime should be based primarily on preventive action.

KEYWORDS: *penal populism, overcriminalization, tightening of penal policy, age of criminal responsibility, prevention.*

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INTRODUCTION

The decline of social values, which is accompanied by the ever-present appearance of various forms of violence, leads to increasingly frequent violations of human rights and freedoms. In such an environment, the rate of criminal activity increases, which consequently causes insecurity of citizens for their own safety. At the same time, it should be noted that under such conditions the manifestation of criminal behavior is characterized by cruelty, recklessness and a high degree of aggressiveness, affecting that the resulting consequences are of a severe and serious nature. This type of criminal activity is most often manifested through mass murder, rape or other forms of violent behavior (Powell, Scanlon, 2015:277-282). Due to the devastating consequences they cause, the fear and anxiety of citizens and the public arise, which force the authorities to take the required normative steps as soon as possible in order to calm tensions in society and increase the level of security (Ayre, 2001:887-901). In an effort to calm the frightened public, the authorities start launching ideas about the need to strengthen penal populism, which will contribute to the prevention of crime (Matić Bošković, Kostić, 2024, 79-88). One of the typical forms of strengthening penal populism is the tightening of penal policy which occurs as a result of the pressure of the public and the media about the need to adequately punish the perpetrators of crimes that have caused serious consequences (Breen, 2000:332-338). The tightening of penal policy is reflected in the prescription of stricter penalties for selected groups of existing criminal offenses or in the incorporation of new penalties into the current system of criminal sanctions. Through tightening of penal policy, the authorities are trying to appease the public, who believe that actual penal policy is not appropriate to the severity of the consequences produced by the commission of serious crimes. In certain cases, the influence of the media and the public can contribute to the prescription of new criminal offences in the legislative framework, which affect increasing the number of actions that are subject to criminal responsibility (Krasmann, 2010:554-558). In addition, the influence of penal populism can also be manifested through the spreading of ideas about the need to lower the age of criminal responsibility, which enables a wider circle of persons to be sanctioned for the undertaken actions.

1. TIGHTENING OF PENAL POLICY

Behind the ideas of tightening the penal policy are hidden populist approaches to combating crime, which are based on the concept of the strictest reaction of the authorities to serious forms of crime. In this way, the trust of the victims is instilled that the state will provide them with the necessary protection and that the perpetrators will be adequately

sanctioned for the committed crimes (Turner, 2014: 87-102). Moreover, by applying this punitive approach, the authorities try to deter potential perpetrators from committing criminal acts in the belief that the fear of severe penalties will prevent them from doing so. In most cases, the subject of the tightening of the penal policy is those groups of criminal offences whose execution leaves serious consequences for people's lives and health (Copson, 2014:55-72). In fact, the authorities are particularly trying to tighten the penal policy in terms of offences against life and limb, sexual freedom, marriage and family, and road traffic safety. Advocacy of ideas about the need to tighten the penal policy occurs especially after mass cases that caused terrible consequences and thus disturbed public safety (McDevitt, 1996:261-274). The event's background of these cases also influenced the beginning of the work on amendments and supplements to the Criminal Code of the Republic of Serbia.1 In the respect of offences against life and limb, it should be observed that Article 14 of the Draft Law stipulates that the criminal offense of murder under Article 113 of the Criminal Code will be punished by a sentence of at least five years or a sentence of life imprisonment instead of a sentence of imprisonment of five to fifteen years (Kolarić, 2015:153-154.)

In the terms of offences against sexual freedom in concordance with Article 24 of the Draft Law the punishment for the crime of rape has been increased. For this criminal offense the perpetrator will be punished with a sentence of at least five years or a sentence of life imprisonment instead of a sentence of imprisonment of five to twelve years. Tightening of punishment is also prescribed for the criminal offense of sexual intercourse with a helpless person (Article 179) and for sexual intercourse with a child (Article 180). Article 25 of the Draft Law states that the criminal offense of sexual intercourse with a helpless person will be punishable by a sentence of at least five years or a sentence of life imprisonment instead of a sentence of imprisonment of five to twelve years. On the other hand, the perpetrator of the crime of sexual intercourse with a child shall be punished by a sentence of at least eight years or life imprisonment instead of a sentence of five to fifteen years. In the matter of offences against sexual freedom, it should be mentioned that the criminal offense of sexual intercourse through abuse of position (Article 181) is also subject to tightening of penal policy. For this criminal offense, Article 27 of the Draft Law states that it will be punished with a sentence of six months to five years instead of a sentence of three months to three years for the basic form, and with a sentence of one to ten years instead of a sentence of six months to five years for the aggravated form (Škulić, 2019).

As far as offences against marriage and family, the crime of domestic violence (Article 194) is subject to tightening of penal policy. For the basic form, Article 34 of the Draft Law prescribes a prison sentence of six months to five years instead of three months to three years. For the first aggravated form, a prison sentence of one to ten years is prescribed

[1] Ministry of Justice, working versions of regulations, the Draft Law on amendments and supplements of the Criminal Code (hereinafter: Draft Law), https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php Accessed 12 Nov. 2024. Criminal Code of the Republic of Serbia ("Official Gazette of RS", no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/ 2016 and 35/2019).

instead of a sentence of six months to five years. In terms of the second aggravated form, a prison sentence of three to twelve years is prescribed instead of a sentence of two to ten years. As regards the special form of this crime, a prison sentence of six months to five years is prescribed instead of three months to three years (Kiurski, 2003:40). In respect of offences against road traffic safety the prescribed punishments have been tightened for all forms of the criminal offense regarding grave offences against traffic safety (Article 297). According to Article 45 of the Draft Law a prison sentence of two to ten instead of one to eight years is prescribed for the first paragraph of this crime, five to fifteen instead of two to twelve for the second paragraph, from six months to five years instead of up to four years for the third paragraph and from two to ten instead of one to eight years for the fourth paragraph (Đorđević, Kolarić, 2020:190-191).

Finally, it should be pointed out that prison sentences have also been tightened in the case of offences against humanity and other rights guaranteed by international law, for the criminal offense of human trafficking (Article 388) (Cvetković, 2007:205-212). Article 63 of the Draft Law stipulates that for the basic form, the perpetrator will be punished with a sentence of up to fifteen years instead of up to twelve years. If the perpetrator knows or should know that the person is a victim of trafficking, and abuses its position or allows another to abuse its position for the exploitation envisaged in the basic form will be punished with a sentence of two to ten years in prison instead of six months to five years. If the offense is committed against a person for whom an offender knew or could have known to be a minor, the perpetrator will be sentenced to prison of three to twelve years in prison instead of one to eight years.

2. OVERCRIMINALIZATION

In order to present to the public that they have an adequate response to the challenges society faces in the fight against crime, the authorities often approach expanding the zone of punishment, which is recognized by the increase in the number of actions that are criminalized as criminal offenses (Yankah, 2011:1-34). In some cases, this happens through the introduction of new criminal acts, while in other cases it is done in such a way that the existing incrimination is enriched with new forms of execution (Smith, 2012:537). No matter how it is implemented in practice, overcriminalization occurs, which is recognized by the fact that a special part of the criminal law is expanded with new actions, the execution of which is subject to criminal responsibility. One of the examples of introducing a new form of execution in the Criminal Code is recognized in the case of the criminal offense of mediation in prostitution from Article 184 (Delibašić, 2010:67-84). For this criminal offense, Article 29 of the Draft Law introduces the most severe form that will exist if the offense is committed by an organized criminal group. In the context of this criminal offence, it should be noted that it is also planned to change its name with the aim of focusing on encouraging

others to participate in prostitution, and not only on mediation (Slavković, 2015:375-393). This will be achieved by deleting the part of the text that implies the actions of participating in handing over a person to another for the purpose of prostitution. Due to the above, the criminal offense should be called incitement to commit prostitution. Overcriminalization can also occur through the expansion of the zone of punishment, as evidenced by Article 30 of the Draft Law. This amendment envisages the punishment of parents, adoptive parents or guardians who enable a minor to live in an extramarital union not only with an adult, but also with another minor or if they induce him to do so (Miladinović-Stefanović, 2023:33-54). As can be seen, the mentioned changes represent a form of overcriminalization in a broader sense.

In addition, the legislator often decides to introduce new criminal offenses. One such example is listed in Article 55 of the Draft Law which prescribes a new criminal offense against public order and peace under the title Publication of materials that advise the commission of a criminal offense (Article 343a). Responsible for the basic form of the crime would be a person who, through the means of information technology or in another way, makes available material that contains information to which advice is given in order to commit a criminal offense. A person who mediates access to such material would also be punished with imprisonment from three months up to three years. For a lighter form, a person who, using the means of information technology, knowingly accesses such material, which means any material that audibly or visually contains instructions or advice for the use of means of committing a criminal offense or objects resulting from the commission of a criminal offense, would be punished with a fine or imprisonment of up to one year.

In the chapter on criminal offenses against public order and peace, two new criminal offenses are prescribed, namely: a) assault on a person employed in an educational institution (Article 344b) (Williams, Ernst, 2016: 129-136); b) assault on a person employed in a health institution (Article 344v) (Ricciardi, Moscato, Gualano, 2023: 50-59). Anyone who attacks a person employed in an educational institution or a member of his family, and in connection with the work performed in an educational institution, will be punished for the criminal offense referred to in Article 344b. A more severe form exists in the case if the perpetrator inflicts light bodily injury or serious bodily injury to a person employed in an educational institution or a member of his family, or threatens to use a weapon. Anyone who attacks a person employed in a healthcare institution or a member of his family, and in connection with the work performed in a healthcare institution, will be punished for the criminal offense under Article 344v.

Also, it should be kept in mind that Article 57 of the Draft Law prescribes the introduction of another new criminal offense against public order and peace named approving, denying or mitigating a criminal offense (Article 346a) (Davis, 2019:1-10). This article sanctions the public approval, denial or reduction of the gravity of a criminal offense determined by a final judgment, especially if such behavior is capable of causing violence. Within the framework of this chapter of the Criminal Code, after the criminal offense the produc-

tion and acquisition of weapons and means intended for the commission of the criminal offense referred to in Article 347, the Draft Law (Article 58) envisages the introduction of three new criminal offences, namely: a) illegal carrying of deactivated firearms and cold weapons in a public place (Article 347a); b) negligent possession of a firearm (Article 347b) and c) training a minor to use a firearm (Article 347c). Whoever unlawfully carries in a public place deactivated firearm, old weapons and their modern copies that do not use a central or edge-firing bullet and cold weapons will be punished for the criminal offense under Article 347a (Meehan, Strange, 2015:1-26).

Whoever negligently holds a firearm for which he or she has the approval of the competent authority, and as a result of such holding, the weapon comes into the possession of a person who commits a criminal offense with it or an illegal act defined as a criminal offense by law, shall be punished for the criminal offense referred to in Article 347b. An aggravated form of this offense will exist if, as a result of the committed criminal act, or an illegal act designated as a criminal offense by law, serious bodily injury or death of a person occurred. Whoever, contrary to the regulations, instructs or trains a minor to use a firearm, including a responsible person of a shooting organization or shooting range who, contrary to the regulations, allows a minor to access the shooting range, will be punished for the criminal offense under Article 347c (Marvell, 2001:691–713).

Finally, it should be pointed out that Articles 59 and 60 of the Draft Law prescribe as criminal offences: a) illegal possession and carrying of firearms, ammunition and explosive substances (Article 348), b) illegal production of firearms, ammunition and explosive substances (Article 348a); c) illegal traffic and smuggling of firearms, ammunition and explosive substances (Article 348b); d) unauthorized examination, branding and marking of weapons, devices or ammunition (Article 348c); e) falsification of trademarks or markings for examination, branding and marking of weapons, devices and ammunition (Article 348g).

Whoever possesses a firearm, its parts, ammunition or explosive substances without authorization, as well as a person who carries without authorization the objects of crime for which he has the approval of the competent authority, shall be punished for the criminal offense under Article 348. An aggravated form exists if the object of the crime is firearms, ammunition, explosive substances or means based on explosive substances, dispersion or gas weapons, the manufacture, sale, acquisition, exchange or possession of which is not permitted for citizens or if it is involved a larger quantity of weapons, ammunition or means or other means of great destructive power. Whoever manufactures firearms, their parts, ammunition or explosive substances without authorization or carries out 3D printing of firearms, their parts and ammunition or reactivates a deactivated firearm, as well as a person who possesses 3D designs for the production of firearms, shall be punished for the criminal offense referred to in Article 348a (Peretyatko, 2023:144-151).

Whoever without authorization imports, exports, or otherwise acquires, sells, delivers, moves or transfers firearms, their parts, ammunition or explosive substances on the

territory of Serbia or from, or through the territory of Serbia to another country and from another country to the territory of Serbia shall be punished for the criminal offense referred to in Article 348b (Della Vigna, Ferrara, 2010 26–57). A more aggravated form exists in cases where the act was committed by a group, an organized criminal group, or the perpetrator of this act organized a network of resellers or intermediaries. Whoever examines, stamps and marks weapons, devices or ammunition without authorization shall be punished for the criminal offense referred to in Article 348v. Whoever, with the intention of using them as genuine, makes false marks or markings for testing, stamping and marking weapons, devices and ammunition, or who, with the same intention, alters such genuine marks or markings, or who uses such false or altered marks or markings as genuine, shall be punished for the criminal offense from Article 348g (Goddard, 1933, 140-148).

3. LOWERING THE AGE OF CRIMINAL RESPONSIBILITY

In comparative law, there are different age limits below which children are considered criminally irresponsible (Fagan, 2008:81-118). The main reason for this lies in the fact that the Convention on the Rights of the Child does not contain precise rules about what would be the age limit below which children would be considered criminally irresponsible.2 Moreover, this act does not even define the age range within each country should determine the limit of criminal irresponsibility for children. Namely, the mentioned document only requires in Article 40 paragraph 3 that the signatory states encourage the adoption of laws that would determine the lowest age below which children cannot be considered capable of violating the criminal law (Scott, 2000:547). The majority of countries set this limit at 14 years of age, but there are also some countries that lower this limit to 10 years. The presence of such disparate solutions opens up a wide space for legal uncertainty, which comes to the fore because the exposed differences in determining the age limit of criminal responsibility lead to different treatment of identical behavior undertaken by minors of the same age. As a result, depending on the set age limit, in one country a minor will be criminally responsible for the behavior undertaken, while in other countries this will not be the case, which overall threatens legal security.

As a rule, requests to lower the age limit for bearing criminal responsibility occur after serious cases of violence committed by minors at an age at which they are considered criminally irresponsible (Grosholz, J., Kubrin, 2007:59-83). Under the given circumstances, the mass media, under the influence of the public, approaches presenting ideas about the need to extend criminal responsibility to minors who were under the prescribed age at the time of the crime (Heath, 1984:263). In this regard, it should be noted that the media very

[2] Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577.

often report on these cases in a rather sensationalist manner, highlighting the premature conviction of the juvenile suspect, and emphasizing publication of uncensored images from the scene of the crime, which overall affects the formation of the appropriate public opinion.

The pompous reporting of cases of delinquency in the mass media arouses the public's fear that minors will imitate and interpret the forms of behavior reported by the media (Goidel, Freeman, Procopio, 2006: 119-139). Based on the fact that minors are prone to suggestibility, which is recognized by the fact that they lightly accept the patterns of behavior of delinquent minors whose criminal actions were reported by the media, the public fears that they will identify with such problematic peers. From that reason comes the fear of the public that the showing of scenes full of cruelty, brutality and aggression would influence the later delinquent actions of minors.

CONCLUSION

The analysis carried out showed that the concept of penal populism could be implemented in practice in different ways. The essence of this concept is reflected in the fact that the repressive approach takes precedence over preventive action in the area of crime suppression. In this way, the authorities try to create a sense of intimidation of potential perpetrators, so that they will give up committing criminal acts in fear of severe punishments. The promotion and spread of ideas of penal populism in a society occurs usually immediately after the commission of serious crimes, whose execution have left devastating and painful consequences. In such an environment, under the influence of the media and social networks, as well as the disaffected and agitated public, the authorities approach finding easy solutions, which come down to making changes and amendments to the criminal legislation with the aim to tighten repression.

In this way, under the guise of fighting crime and protecting victims from victimization through the reform of criminal legislation, the authorities are actually complying with the demands of the public, which is horrified by the scale and consequences of undertaken criminal activity and which demands a stricter response from the state. Therefore, one of the first measures taken by the authorities is the tightening of the penal policy. This solution will at first glance enable appeasing the disaffected and outraged public. Depending on the further requirements, the authorities can propose introducing new criminal offenses or new forms of existing incriminations, leading to overcriminalization. Finally, it should be borne in mind that minors are increasingly committing serious crimes with serious and tragic consequences, because of what experts are advocating the need to lower the age for bearing criminal responsibility.

Although the abovementioned methods through which the ideas of penal populism

are manifested can achieve certain results in terms of crime suppression in the short term, the punitive approach will not produce the expected results in the long term. The effectiveness in preventing criminal activities requires a systemic response from the authorities, which implies a detailed analysis of the basic causes, scope, structure and dynamics of the crime rates in the observed area in order to contribute to its long-term prevention. It also implies that the authorities should adopt appropriate strategies and action plans through which the necessary steps should be implemented in the defined period of time. This means that the authorities should pay attention to preventive actions, and not only to the strengthening of repression in society. Repression, although it may contribute to the initial gaining of public support for stricter punishment of perpetrators of serious crimes, will not create a long-term sense of safety and security for citizens. On the contrary, there will be present still the fear of citizens for their own safety, which may be violated by the actions of the perpetrators of serious crimes. Since the media and social networks play a significant role in spreading ideas about the need for repressive state action, it is necessary to incite mass media to promote the application of preventive concepts in crime suppression. Promoting ideas about the need to build a society based on tolerance and mutual respect should be the path to be followed in terms of crime prevention.

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PENAL POPULISM ACCROSS NATIONS: ILLUSTRATIVE CASE STUDIES

Marko Novaković*

The paper examines penal populism as a political phenomenon characterized by punitive measures that appeal to public fears rather than evidence-based policies. Through case studies of the Philippines, Nicaragua, and El Salvador, this analysis examines how penal populism is leveraged for political gains, using punitive measures to appeal to public sentiment rather than addressing the root causes of criminality or adopting evidence-based policy responses. In all three cases, the media play a significant role in amplifying public fear and shaping punitive policies, thereby promoting penal populism. This approach disproportionately impacts marginalized communities, exacerbating socio-economic inequalities through mass incarceration and harsh sentencing. By sidelining rehabilitative measures, it perpetuates cycles of poverty and crime. The paper contrasts this with countries like Finland and Germany, which resist penal populism through strong institutions and rehabilitation-focused justice. Ultimately, the paper critiques penal populism's short-term political gains at the expense of human rights and social justice, calling for more balanced, evidence-based approaches.

KEYWORDS: *penal populism, Nicaragua, Philippines, media, marginalized communities*

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INTRODUCTION

Penal populism refers to a political approach that prioritizes severe punitive measures, often disproportionate to the actual issues at hand, as the primary response to crime. One of the key elements of this political strategy is its frequent reliance on public fear, sensationalist media coverage, and political rhetoric that emphasizes a "tough on crime" stance. Some of the main prerequisites for the emergence of penal populism include a lack of trust in traditional government institutions, a shift toward public-driven demands, media's growing influence in shaping public perceptions of crime and punishment and generally politicization of criminal law According to researches, penal populism has manifested most in policy areas like sex offenses, youth crime, persistent criminals, and anti-social behaviour (Pratt, 2006, 11). Penal populism tends to prioritize punitive measures over more nuanced, evidence-based approaches to criminal justice. These factors tend to shift the focus away from assessing the risk of criminal behaviour and implementing preventive measures, favouring instead a reliance on retributive policies to control crime (Matic Boskovic & Kostic, 2024,80).

Thus, penal populism can be described as a phenomenon where politically driven criminal justice policies are designed to appeal to popular sentiments and emotions, rather than relying on expert knowledge, research, or evidence-based practices, in order to score political points with the general population. The origins of the term *penal populism* can be traced to Sir Anthony Bottoms (Bottoms, 1995), [1] who used the term populist punitiveness to describe political behaviour that seeks to win votes by adopting tough-on-crime measures. Pratt expands on this concept, pointing out that penal populism is not just about political opportunism but is deeply rooted in structural and cultural changes within societies. This approach has led to a more punitive stance in criminal justice systems in some Western democracies. Governments, in an attempt to align themselves with what they perceive as the views of the majority, adopt policies that reflect public anger or fear of crime rather than focusing on reducing crime or improving justice outcomes. Some societies, such as Finland and Germany, have effectively resisted penal populism through strong central bureaucracies and a steadfast commitment to rehabilitation-focused justice policies. In these and other cases, judges, lawyers, and academics, alongside political elites, play a crucial role in combating penal populism by actively resisting its trends.

[1] Anthony Bottoms, (1995) 'The Philosophy and Politics of Punishment and Sentencing', in C. Clarkson and R. Morgan (eds) The Politics of Sentencing Reform, Oxford: Clarendon.

2. PENAL POPULISM AND MARGINALIZED COMMUNITIES

Since penal populism tends to favour short-term popularity over sustainable, long-term solutions it has numerous nus-consequences. One particularly concerning consequence is its disproportionate impact on marginalized communities, further exacerbating existing social and economic inequalities.

One key reason for this is that penal populism often leads to policies that favour mass incarceration, harsher sentencing, and reduced focus on rehabilitation. Marginalized communities, which typically face higher levels of poverty, unemployment, and systemic discrimination, are more likely to come into contact with the criminal justice system due to socio-economic conditions. For instance, policing practices often target disadvantaged areas with a higher concentration of minorities or the poor, leading to increased surveillance and arrests in those neighbourhoods. This is why certain U.S. policies, such as "three-strikes" laws, mandatory minimum sentences, and zero-tolerance policing, disproportionately affect individuals from these communities, particularly African Americans. These policies have contributed to mass incarceration rates that far exceed their share of the population. (Cummins, 2020). Reason behind this is the fact that penal populism tends to ignore the underlying causes of crime, such as poverty, lack of education, mental health issues, and substance abuse, all of which disproportionately affect marginalized groups. Instead of addressing these root causes, the focus is placed on punishment, which does little to prevent recidivism or reintegrate offenders into society. This cycle perpetuates social exclusion, as those who have been incarcerated often face stigma, reduced job opportunities, and barriers to housing and education upon release, further entrenching the marginalization of these communities. In countries with histories of racial or ethnic discrimination, penal populism can also deepen racial disparities in the criminal justice system. For example, in the United States, the "war on drugs" disproportionately targeted African American and Latino communities, leading to high rates of incarceration for nonviolent drug offenses. This racial disparity is replicated in other nations with similar penal populist policies, where minority groups are overrepresented in prisons and other forms of state punishment. The harsh impact of penal populism on marginalized communities is also evident in its neglect of rehabilitative services. As already stated, penal populist policies often prioritize punitive over restorative measures, resulting in underfunding of programs aimed at mental health support, substance abuse treatment, education, and vocational training—all essential for breaking the cycle of poverty and crime in marginalized groups. Instead, the system perpetuates a cycle of punishment that disproportionately harms those who are already vulnerable. In conclusion, penal populism exacerbates the marginalization of already vulnerable communities by promoting punitive policies that disproportionately target and punish these groups. It fails to address the socio-economic factors that contribute to criminal behaviour, instead deepening inequalities and entrenching marginalized communities in cycles of poverty, crime, and exclusion.

2.1 The example of El Salvador

A recent example El Salvador's state of exception under President Bukele, introduced in March 2022, marks a significant escalation of mano dura policies (Rosen & Cutrona, 2023), resulting in mass incarcerations and widespread militarization. While the government claims these actions have brought a dramatic reduction in crime, particularly homicides, the social costs—especially for women—have been profound. The state of exception has led to the arrest of over 65,000 individuals, many of whom are alleged gang members. However, reports suggest that one in six of those detained may be innocent, raising serious concerns about arbitrary arrests and lack of accountability (Janetsky & Pesce, 2023). For women, the impacts of these policies extend far beyond the immediate fear of violence from gangs. The increased presence of police and soldiers in their communities has introduced new dangers, including harassment and sexual violence by security forces. Women in formerly gang-controlled neighbourhoods now find themselves living under a different form of oppression, where the threat of abuse by state actors replaces the fear once instilled by gangs (Zulver & Mendez, 2023). Moreover, the mass incarceration of men, who often served as the primary breadwinners, has left thousands of women as sole providers for their families. These women face immense financial strain, as they must not only care for their households but also support their imprisoned relatives by supplying basic necessities that the prison system fails to provide. This economic burden is particularly heavy on poor households, exacerbating cycles of poverty and vulnerability. The government's aggressive crackdown has also undermined the institutional support available to women. Funding cuts to initiatives like the Ciudad Mujer project—an acclaimed program providing healthcare, legal assistance, and job training for women—have left many without essential services. Meanwhile, women's rights organizations face growing hostility from the government. Advocates who speak out against human rights abuses are often harassed and surveyed, forcing some to curtail their activities or operate in secrecy. Despite the short-term gains in public safety, the state of exception has deepened gendered vulnerabilities and perpetuated systemic violence against women. The militarized approach, while temporarily effective in reducing gang activity, risks entrenching authoritarian practices and eroding democratic institutions. For women already marginalized and victimized, the absence of civil liberties and institutional support has made their plight even more precarious, highlighting the unsustainability of heavy-handed security policies in addressing complex social issues (Zulver & Mendez, 2023).[2]

[2] Julia Zulver and María José Méndez, "El Salvador's "State of Exception" Makes Women Collateral Damage", https://carnegieendowment.org/posts/2023/05/el-salvadors-state-of-exception-makes-women-collateral-damage?lang=en Published on May 4, 2023.

3. CAUSES OF PENAL POPULISM

One of the primary causes identified for the rise of penal populism is the public's demand for punitive measures that align with perceived moral values or societal concerns, often amplified by media portrayals of crime. This media-driven outrage can pressure governments to implement harsher policies, even when these measures are not supported by actual crime statistics or expert recommendations. These technologies often simplify complex penal issues for broader public consumption, frequently at the expense of nuanced debate and informed discussion.

One of the most significant (hidden) causes of penal populism is the collapse of trust in governmental institutions, especially among the general public. People no longer have confidence in bureaucratic or expert-driven approaches to criminal justice (Pratt, 2005, 16).[3] Weak institutions play a significant role in fueling penal populism, as governments often exploit these shortcomings in the most apparent ways. The decline in public trust has been closely linked to broader dissatisfaction with traditional political processes, creating a fertile ground for the rise of populist movements. A clear example of this can be seen in the Philippines, where the erosion of institutional strength and public confidence has allowed populist rhetoric to thrive, particularly under the leadership of President Rodrigo Duterte. His administration's harsh anti-drug campaign and disregard for human rights have been framed as necessary responses to the failures of established political systems (Calimbahin, 2018, 21).[4]

3.1 The Role of Media and New Technologies of Communication

The media has exceptional influence in various aspects of judiciary (Novakovic, 2024, 301),[5] particularly through new communication technologies, has played a crucial role in the rise of penal populism. Sensationalized crime reporting and simplified news have heightened public fear, with talk-show hosts, journalists, and victims' rights advocates amplifying emotional responses and pressuring governments for harsher justice. Media often frames crime as a threat to public safety, emphasizing retribution over rehabilitation or addressing systemic causes. New technologies of communication opened a series of new

[3] Pratt, J. (2006). Penal Populism (1st ed.). Routledge. https://doi.org/10.4324/9780203963678

[4] Cleo Calimbahin, (2018), Eroding Institutions and Exploiting Resentments: Populism in the Philippines and Southeast Asia, https://th.boell.org/en/2018/05/07/eroding-institutions-and-exploiting-resentments-populism-philippines-and-southeast-asia

[5] Marko Novakovic, Odgovornost medija kao ključan element u očuvanju slobode izražavanja: ECHTR slučaj NIT s.r.l. protiv Moldavije, u Mediji, Kazneno pravo i pravosuđe, IUP-IKSI-Pravosudna akademija, Ur. Marina Matic Boskovic i Jelena Kostic, str.299-313, 2024

possibilities for judicial systems (Boskovic & Novakovic, 2021, 199)[6] and its potential its even greater, not only in judiciary, but in entire public sector (Radonjic et al, 2024,).[7] The rise of social media and 24-hour news has democratized information flow but also simplified complex issues, fuelling penal populism with emotionally satisfying solutions. This has reduced the influence of expert opinions, making it harder for nuanced discussions on crime prevention or rehabilitation to compete with sensational headlines. Good example is example of Italy, where some researches demonstrated that, social media users who create and consume content, amplifying populist narratives (Lavorgna & Corda, 2024, 271).[8] Despite social media's influence on public discourse, its impact on policy-making remains limited. Top-down policy channels still dominate, with leaders like Prime Minister Giorgia Meloni using social media more for support than policy change. The study shows that social media narratives often reinforce existing biases rather than drive new policy. Measures like the crackdown on rave parties and tightened immigration controls were symbolic actions aimed at fulfilling political promises rather than addressing deeper issues. While digital platforms influence public debates, penal policy remains shaped by traditional power structures, illustrating the complex interplay between digital populism and real-world policy-making.

4. PENAL POPULISM – A GLOBAL PHENOMENON

Although penal populism has been most visible, due to its contrast to general policies, in democratic countries like the United States, the United Kingdom, and Australia, it is by no means confined to these regions or political systems. Pratt observes that penal populism has also had a significant impact in countries such as New Zealand and Canada, demonstrating its adaptability to diverse cultural and political contexts. However, penal populism is not solely a product of democracies; it thrives in authoritarian regimes, where it often finds its "natural habitat." In such environments, punitive policies serve as tools for consolidating power, suppressing dissent, and projecting control, often without the checks and balances that exist in democracies. Despite its global spread, some countries have successfully resisted penal populism. In Finland, for instance, a strong bureaucratic state and a deep commitment to rehabilitation have prevented it from taking root. Similarly, Germany has upheld a rehabilitative approach to criminal justice, even when faced with public demands for harsher measures. These examples highlight that while penal populism is a wide-

[6] Matić Bošković, Marina and Novaković, Marko (2021) Adaptation of Judicial Systems to the Global Pandemic - a Short and Long-term Impact of COVID-19 on Judicial Systems. John Marshall Law Journal, XIV (2). pp. 188-201. ISSN 0147-3689

[7] Lj. Radonjic, Lj. Bojic, M. Novakovic, Blockchain integration in public sector: A comprehensive review of economic and legal challenges, Ekonomika preduzeca, 2024.

[8] Lavorgna, A., Corda, A. Online Prosumers and Penal Policy Formation in an Age of Digital Polarization and Populism: An Exploratory Study. Int Criminol 4, 265–278 (2024). https://doi.org/10.1007/s43576-024-00134-4

spread phenomenon, its influence varies depending on a country's institutional frameworks and political culture.

In the next section, the author will examine the emergence and spread of penal populism in two recent case studies: the Philippines and Nicaragua. In both countries, penal populism has become a dominant tool in shaping criminal justice policies and enforcement strategies, albeit within vastly different political and cultural contexts.

Historically, mano dura strategies have transformed gangs into more powerful groups capable of exercising vast territorial control. Moreover, they have led to an increase in the number of human rights violations carried out by state security forces (Zulver & Mendez, 2023).[9]

5. PHILIPPINES

A particularly picturesque example of the penal populism emerged in Philippines under Rodrigo Duterte. Part of this picture is due to his general populist rule and the fact that he has brought significant challenges to democratic institutions, human rights, and the rule of law. Duterte is notorious for his aggressive stance on the International Criminal Court (ICC) and the United Nations Human Rights Council (UNHRC) that reflects his resistance to international accountability, particularly in relation to his administration's bloody anti-drug campaign.

His withdrawal from the ICC in 2018 (Lema & Jerome Morales, 2018)[10] exemplifies his populist narrative, positioning external organizations and critics as interfering in domestic affairs. Duterte's rhetoric, which frames the drug war as a matter of national survival, has resonated with many, particularly the Philippine National Police, whom he encouraged to ignore potential UN investigations. His populist leadership thrives on painting a crisis and offering strongman solutions, a tactic not uncommon in Southeast Asia. The attacks on democratic institutions have been a hallmark of Duterte's governance. His administration has targeted the Commission on Human Rights, leading to public attacks and threats of defunding. Chief Justice Maria Lourdes Sereno faced impeachment proceedings in 2017, driven by Duterte's congressional allies, amid allegations of asset misdeclarations and political tensions over her independent judicial stance (Villamor, 2018). The broad targeting of critics underscores the central populist theme: consolidating power by dismantling democratic safeguards. In the wider Southeast Asian region, populism is rising, with various leaders utilizing crises to justify repressive policies. For instance, Myanmar's Aung San Suu

[9] Julia Zulver and María José Méndez, "El Salvador's "State of Exception" Makes Women Collateral Damage", https://carnegieendowment.org/posts/2023/05/el-salvadors-state-of-exception-makes-women-collateral-damage?lang=en Published on May 4, 2023.

[10] Duterte to withdraw Philippines from ICC after 'outrageous attacks' By Karen Lema and Neil Jerome Morales March 14, 2018, 6:31 PM GMT+, https://www.reuters.com/article/world/duterte-to-withdraw-philippines-from-icc-after-outrageous-attacks-idUSKCN1GQ0M8/0020

Kyi has remained silent on the Rohingya crisis to maintain nationalist support, while severe measures have been taken against her critics (Novakovic & Blesic, 2020, 164). Despite international condemnation and human rights concerns, Duterte's approval ratings remain high, reflecting the entrenched populist appeal. As populist leaders continue to thrive on crisis narratives and resentment, reformists must critically examine electoral and institutional vulnerabilities to counter the populist agenda and safeguard democratic values.

6. NICARAGUA

In Nicaragua, penal populism is deeply intertwined with the broader political and social dynamics of the country, a phenomenon also prevalent across many Central American nations. The government's approach to law enforcement and the penal system reflects not just an effort to control crime, but also to consolidate political power and suppress opposition, as depictured in recent UN report (A/HRC/57/20).

6.1 Historical Context of Crime and Punishment in Nicaragua

To understand penal populism in Nicaragua, it is essential to look at the historical evolution of the country's legal and penal systems. The Nicaraguan penal system has been shaped by decades of civil war, dictatorship, and political instability. The Sandinista revolution of 1979 marked a turning point (Brown, 2003, 110)[11] as the new regime under Daniel Ortega sought to implement socialist reforms. Crime and punishment became tied to the political agenda, and while initial reforms were aimed at rehabilitation, the years of conflict and economic hardship led to a rise in crime, pushing the government towards more repressive measures.

The post-revolution era saw a shift in focus from revolutionary ideals to more pragmatic concerns about controlling crime, particularly as neoliberal economic reforms in the 1990s exacerbated poverty and inequality. This background sets the stage for the penal populism that emerged in the 21st century.

Daniel Ortega's return to power in 2007 brought about a resurgence of the Sandinista movement, but this time under different circumstances. His FSNL managed to "evolve from cadre party to electoral party that won elections (Martí i Puig & Wright, 2010, 88).[12] The government's approach to crime and punishment shifted towards penal populism, as

[11] Brown, D. (2003). The Sandinista Legacy in Nicaragua [Review of The Many Faces of Sandinista Democracy; The Undermining of the Sandinista Revolution; Nicaragua without Illusions: Regime Transition and Structural Adjustment in the 1990s, by K. Hoyt, G. Prevost, H. E. Vanden, & T. W. Walker]. Latin American Perspectives, 30(3), 106–112. http://www.jstor.org/stable/3185039

[12] Martí i Puig, S., & Wright, C. (2010). The Adaptation of the FSLN: Daniel Ortega's Leadership and Democracy in Nicaragua. Latin American Politics and Society, 52(4), 79–106. http://www.jstor.org/stable/40925837

Ortega's administration sought to address public concerns about crime while also using the criminal justice system to stifle political dissent. Ortega's government began to adopt increasingly authoritarian measures, with the legal system serving as a tool for political control.

Under Ortega, there has been a clear trend towards harsher penalties and increased incarceration rates, particularly for crimes related to opposition activities, political protests, and criticism of the regime. The government's approach to crime has been characterized by a heavy-handed response, with law enforcement and the judiciary often bypassing due process in favour of expedient, politically motivated outcomes.

6.2 Public Opinion and Fear of Crime

Penal populism thrives on public fear of crime, and Nicaragua is no exception. Crime, particularly violent crime, has been a major concern for Nicaraguans, and the government has capitalized on this fear to justify repressive measures. Media portrayals of crime, along with government propaganda, have helped to create a sense of insecurity, even when crime rates have not necessarily risen. The government's response has been to enact tough-on-crime policies that resonate with the public's desire for security. These policies include longer prison sentences, increased police powers, and a militarized approach to law enforcement. However, these measures often prioritize punishment over prevention or rehabilitation, and they disproportionately affect marginalized communities making it a perfect example of penal populism. One of the most significant criticisms of penal populism in Nicaragua is its disregard for human rights. The Nicaraguan government has been accused of using the criminal justice system to target political opponents and suppress dissent. Human rights organizations have documented numerous cases of arbitrary arrests, detention without trial, torture, and extrajudicial killings (HRW, 2023).

As in any populist and authoritarian regime, the criminalization of protest is a key feature of penal populism in Nicaragua. Following the 2018 protests against Ortega's government, thousands of Nicaraguans were arrested, with many facing trumped-up charges such as terrorism, treason, and incitement to violence. The government's use of anti-terrorism laws to silence opposition is a clear example of how penal populism can be used to serve authoritarian ends.

6.3 Government controlled society

In Nicaragua, the judiciary plays a crucial role in the implementation of penal populism. The courts are often seen as an extension of the executive branch, rather than an independent check on government power. Judges and prosecutors who are sympathetic to the government's political agenda have been instrumental in enforcing repressive laws and ensuring that opposition figures are convicted of crimes, often with little regard for due pro-

cess or fair trials. This role of judges and other judicial professionals is definitely something that not only contributes to the penal populism but also diminishes fairness and rule of law in a given system (Novakovic, 2024).[13] The politicization of the judiciary has undermined public confidence in the legal system. Many Nicaraguans see the courts as biased and corrupt, particularly when it comes to cases involving political dissent or opposition to the government. This lack of trust in the judiciary further fuels the cycle of penal populism, as the government can claim that harsh measures are necessary to maintain order and stability.

Ultimately, penal populism in Nicaragua is not just about controlling crime, but about controlling the population, like every populism is. The government's use of punitive policies is closely tied to its broader strategy of maintaining political power. By criminalizing dissent and using the legal system to target opponents, the Ortega administration has been able to weaken opposition movements and consolidate its control over the country.

It is clear that this use of penal policy for political purposes is not unique to Nicaragua, but it is particularly pronounced in a country where the government has increasingly resorted to authoritarian measures to maintain power. Finally, like in any authoritarian regime, the role of the media in promoting both Government's actions and consequently fueling penal populism in Nicaragua cannot be overstated. Crime is often sensationalized, with a focus on violent offenses and the portrayal of criminals as irredeemable threats to society. At the same time, opposition voices are often silenced or marginalized, with little space for critical discussion of the government's penal policies. Independent journalists and media outlets that criticize the government's approach to crime are frequently harassed or shut down, further limiting the public's ability to engage in informed debate about the criminal justice system.

CONCLUSION

It is clear that policies based on penal populism thrives on public fear and dissatisfaction, often exacerbated by sensationalist media and weakened trust in institutions. The cases of the Philippines under Rodrigo Duterte and Nicaragua under Daniel Ortega illustrate that, and are good examples how penal populism can serve as both a political tool and a response to societal insecurities. The author also emphasizes the global reach of penal populism, noting its adaptability in both democratic and authoritarian regimes. While some countries, such as Finland, have resisted penal populism through strong institutional frameworks and rehabilitative justice systems, others have succumbed to the populist appeal of punitive measures. A critical consequence of penal populism, noted in the paper, is its disproportionate impact on marginalized communities, which often face harsher sentencing and mass incarceration. This not only deepens existing socio-economic inequalities

[13] Marko Novaković, Idealni sudija: etički standardi u savremenim pravnim sistemima i čemu sudija treba da stremi, Zbornik radova pravnog fakulteta, Univerziteta u Nišu, 2024.

but also perpetuates cycles of poverty and crime, undermining long-term societal cohesion. The role of media and communication technologies is pivotal in shaping public perceptions and fueling penal populism. By simplifying complex issues and amplifying emotional narratives, media platforms often prioritize punitive responses over nuanced, evidence-based approaches to criminal justice. While penal populism offers short-term political gains for ruling parties, it poses significant risks to democratic institutions, human rights, and social equity and it can be perceived as a political tool pore than anything. Addressing its root causes, such as socio-economic insecurity and institutional distrust, is crucial for developing more balanced and sustainable criminal justice policies.

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THE AGE OF DISCONTENT: FROM LEGAL POPULISM TO BREXIT

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This paper examines the role of populism in the Brexit referendum, focusing on the dynamics of regional integration, using the European Union as a case study. The author argues that Brexit's success in mobilizing public opinion was rooted in the ability to present a palatable populist message that resonated with anxieties and demands of British society. The paper highlights the key elements of this message: a Eurosceptic stance critiquing the EU as an overbearing entity, a focus on national sovereignty, and the promise of simple solutions to complex problems. The paper also explores the broader political context surrounding Brexit, including the lack of preparedness among British and European leaders, the impact of campaign rhetoric on public understanding, and the historical tensions between Britain and the EU. By analyzing the interplay of these factors, the paper sheds light on the complex dynamics that led to the historic decision to leave the European Union.

KEYWORDS: *populism, legal populism, Brexit, European Union, integration, disintegration, referendum.*

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INTRODUCTION

European integration stands as a leading example of successful collective action strategies in regional integration. Its progress serves as a valuable model for research into similar cooperative ventures between states. However, integration trends are not confined to Europe. They are evident across the globe, including in the post-Soviet space, exemplified by the emergence of Eurasian integration, particularly within the Eurasian Economic Union. The rationale behind the rise of regionalization processes lies in the efficiency of collaborative action. By leveraging local conditions and fostering internal growth factors, integration allows for maximized benefits for participating entities. Furthermore, the intensification of globalization and the shift from inter-state cooperation to a more advanced supranational level necessitate a reassessment of regional integration strategies. This evolution aims to optimize the participation of countries and regions in global processes, ultimately fostering closer connections between peoples and nations across various aspects of life.

European integration stands out from other regional integration processes by extending beyond mere trade and economic cooperation. Its ambition reaches towards a political union, encompassing a more comprehensive approach. As aptly observed, «communitarian construction began with a limited number of states concentrating their efforts on achieving specific goals, only to move on to deeper forms of cooperation as ties of solidarity strengthened»[1]. Despite Europe's history of wars, clashes, and significant cultural diversity, the unification of Europe demonstrates the possibility of cooperation driven by shared objectives. Explanations for the formation of this integration entity, often termed «theories of integration,» typically assume a trajectory of ever-expanding cooperation interspersed with periods of stagnation[2].

Since the establishment of the European Economic Community in 1957, the principle of an «ever closer union» has been enshrined as a fundamental pillar of European regional integration. While academic research has predominantly focused on understanding the reasons for state cooperation and regional integration, the possibility of the EU's collapse or disintegration has been largely overlooked[3]. Consequently, the essence and characteristics of European integration are often framed within the spectrum of greater or lesser integration, neglecting the possibility of disintegration. The traditional continuum of integration is typically depicted as a spectrum ranging from integration to the lack of integration, with stagnation or «encapsulation» as possible outcomes. However, the possibility

[1] Kas'janov R. A. Konfederativnye i federativnye proekty ob#edinenija Evropy kak predposylki sozdanija evropejskih integracionnyh organizacij [Confederative and federal projects for the unification of Europe as prerequisites for the creation of European integration organizations] // *Zakony Rossii: opyt, analiz, praktika.* - 2008. - № 12. - S. 79 (In Russ.).

[2] Borzel T. A., Risse T. A. Litmus Test for European Integration Theories: Explaining Crises and Comparing Regionalisms // *KFG Working Paper,* 2018. - P. 1-23.

[3] Treaty of Rome, 1957, retrieved from: https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-rome-eec.html (дата обращения: 20.03.2023 г.).

of disintegration, a crucial aspect of understanding the complexities of the integration process, remains underrepresented. Similarly, analysis of changes within the integration process often focuses on increased integration relative to stagnation, leaving the potential for disintegration largely unexplored[4].

The early 21st century sees the international system in a state of flux, facing unprecedented challenges and threats. The world community is in the midst of a power realignment, transitioning towards a multipolar order. This shift is accompanied by a crisis in global security, fragmentation, the erosion of liberal values, and a new, unpredictable stage of technological advancement. These trends are acutely felt within the European Union, which is navigating a turbulent period. A fundamental challenge facing the EU is the dwindling trust in supranational institutions and the rise of centrifugal forces within its governance. This is fueled by the failure to cultivate a shared European identity, which is exploited by populist «Eurosceptic» movements in member states. The EU's systemic crisis was predictably one of the first to resonate with the public in Great Britain. Brexit, the historically unprecedented departure of Great Britain from the EU, continues to garner significant international attention, setting it apart from any other event in the EU's six-decade history[5].

1. POPULISM: A NEW ERA OF POLITICAL AND LEGAL UNCERTAINTY

Globalization, a defining characteristic of recent decades, has profoundly shaped the modern world. Its impact extends beyond economics and politics, permeating cultural, communicative, and psychological aspects of the relationship between state and society. This multifaceted phenomenon has created fertile ground for the rise of populism, a recurring theme in times of societal upheaval. International experience demonstrates a strong correlation between periods of significant historical transition and the surge of populist movements. During times of rapid socio-economic change, when old structures crumble and new ones are yet to solidify, populist figures often emerge, exploiting the uncertainties and anxieties of the populace. The appeal of populism is particularly pronounced among segments with a low level of political and legal literacy, especially in societies where democratic institutions are still fragile. The inability to discern demagoguery from viable solutions, a simplistic black-and-white worldview, and a predisposition towards idolization and animosity towards opponents – all hallmarks of a deficient political culture – are readily exploited by populist leaders to amass public support.

In crisis situations marked by a lack of democratic accountability and widespread

[4] Börzel T. A. Researching the EU (Studies) into Demise // *Journal of European Public Policy.* - 2018. - № 25(3). - P. 475-485.

[5] da Costa Cabral N., Gonçalves, J., Cunha Rodrigues N. *After Brexit. Consequences for the European Union.* - London: Palgrave Macmillan, 2017. - P. 83-100.

distrust in the ruling elite, the cultural narrative of populism can take root and flourish. Its defining feature is its opposition to the establishment, manifesting in a rejection of the existing order, rules of the game, and previously accepted norms. Populist movements often leverage methods and ideas previously deemed unacceptable, seeking to bypass established channels. In essence, populism represents a reaction to the perceived complexity of modern democracy, seeking to simplify both political discourse and the solutions proposed. It often thrives on a simplification of reality, promising easy answers to intricate problems and offering a sense of belonging and shared purpose[6].

Postmodernism's influence extends to all facets of social life. In politics, its effects are evident in the deinstitutionalization of the mass protest movement, giving rise to spontaneous political actions that operate outside the control of established organizations. This trend is also marked by a significant shift towards emotional and irrational responses over rational discourse, leading to a constant disruption of stability and consensus.

Drawing upon Ronald Inglehart's observations, we can further characterize postmodernism in politics as follows: "Respect for authority is declining, while the emphasis on individual participation and self-expression is increasing... In postmodern society, the focus is shifting from voting towards more active forms of mass participation. This shift is seen not as a defensive measure, but as a means of personal empowerment. Finally, postmodern politics is distinguished by a transition from class-based political conflict to issues of culture and quality of life"[7].

The cultural homogenization and massification of modern society, a phenomenon closely linked to globalization, also contributes to the rise of populism in the contemporary political landscape. This dynamic is fueled by the influence of information and telecommunication technologies, which have led to the emergence of international media corporations. These entities have reshaped the relationship between national cultures and traditional values, displacing them from their central role in shaping identity. This has accelerated the process of cultural globalization, making it both intense and dynamic. As a consequence, we witness a deepening of existing crises and the emergence of new ones, leading to an increase in the «uncontrollability» and «unpredictability» of socio-political processes8.

Ueli Altermatt, in his analysis of European populism, highlights several key factors. He argues that populism emerges as a symptom of societal crisis during the modernization process. While rejecting modernity, populists ironically utilize modern tools and technologies to spread their message. Altermatt emphasizes that populism serves as a bridge between politicians and the people. This connection is often forged through appeals to nation-

6 Cohen, J. L. Populism and the Politics of Resentment // *Jus Cogens.* - 2019. - №1. - P. 5–39.

7 Gibbins, J. R., Reimer J. *The Politics of Postmodernity: An Introduction to Contemporary Politics and Culture.* - SAGE Publications, 1999.

8 Detterbeck, K. The Challenges of Multi-Level Party Politics // *Multi-Level Party Politics in Western Europe. Comparative Territorial Politics Series.* - London: Palgrave Macmillan, 2012.

alism and racism, potentially aligning populism with radical ethno-nationalist movements. Furthermore, he notes a tendency for populist leaders to favor presidential or authoritarian forms of government[9].

Populism, according to Altermatt, positions «the people» as a unified entity, often disregarding traditional political representation. This construction of a homogenous «people» can serve to marginalize and exclude those perceived as «other.» The researcher concludes with a pessimistic outlook, stating that European populism, coupled with racism, xenophobia, and nationalism, threatens the very foundations of democratic and pluralistic societies. This is echoed in contemporary election campaigns, where «populism, outright cynicism, lies, and the ideology of dividing society and the world into 'us' and 'them'» have become central elements of the rhetoric employed by even the most popular candidates[10].

A constructive contribution to the definition of the dominant features of populism is the theoretical framework proposed by leading Western political experts, Roger Eatwell and Matthew Goodwin. They identify four key characteristics, encapsulated in the «Big Ds»:

- Distrust: populism thrives on a deep distrust of the political elite and established institutions. This distrust is often rooted in a perception that the political class is out of touch with the concerns of ordinary people;
- De-alignment: Populism weakens the traditional bonds between political parties and the population. This can be attributed to a decline in party membership, increasing voter apathy, and a growing sense that mainstream parties no longer represent the interests of the people;
- Deprivation: Populism emerges from a feeling of deprivation and marginalization among certain segments of the population. These individuals may feel disenfranchised from the political process, economically disadvantaged, or culturally alienated;
- Destruction of Identity: Populist movements often capitalize on anxieties surrounding the perceived erosion of national identity and cultural values. They present themselves as defenders of traditional ways of life and seek to restore a sense of belonging and community[11].

This framework provides a nuanced understanding of populism, highlighting its complex relationship with distrust, political alienation, societal anxieties, and the search for a sense of identity.

According to the theoretical achievements of the Russian doctrine, the following are the main markers of populism: 1) the possibility of emergence only in countries where certain democratic institutions exist; 2) spread among the strata of society with a low level of

9 Al'termatt U. *Jetnonacionalizm v Evrope [Ethnonationalism in Europe].* — Moscow: RGGU, 2000.

10 *Ibid.*

11 See: Eatwell, R., Goodwin, M. *National Populism: The Revolt Against Liberal Democracy.* - London: Pelican, 2018.

political and legal culture, in conditions where the main institutions of people's power have not been formed; 3) strengthening in periods of crisis; 4) populism often serves political radicalism; 5) escape from real problems; 6) orientation to everyday consciousness; 7) populism is a type of demagoguery, but it is not identical to it at all, because it is connected only with political activity, while demagoguery also occurs in science and art[12].

Some researchers see the reason for the growth of populism in many European countries as a result of the growing wave of migration and economic problems associated with the socially oriented policy of the ruling political forces. The most successful parties were: in Austria - Jörg Hayden's Austrian Freedom Party; in France - National Front of Jean-Marie Le Pen and Marine Le Pen. With varying levels of support, right-wing populist parties function in Germany, Spain, Portugal, Greece, and the Netherlands, declaring themselves through noisy election campaigns and rally activity[13]. The migration crisis opened the way to an explosive growth in the popularity of xenophobic anti-European parties, in particular the far-right UK Independence Party. One of the prerequisites was also the disagreement and panic fear of the population of Great Britain regarding the refugee policy in the EU, xenophobic and anti-European movements were strengthened by nationalist parties. And as a result of populism, almost 52% of the population of Great Britain voted in the referendum to leave the EU.

The rise of populism in many European countries has been attributed to a confluence of factors, including a surge in migration and economic challenges stemming from socially oriented policies implemented by governing parties. This trend has manifested itself in the success of right-wing populist parties. For instance, in Austria, Jörg Haider's Austrian Freedom Party gained considerable traction. In France, the National Front, led by Jean-Marie Le Pen and later Marine Le Pen, has also enjoyed significant support. Right-wing populist parties, with varying levels of success, have also emerged in Germany, Spain, Portugal, Greece, and the Netherlands. These parties often utilize noisy election campaigns and rallies to promote their agendas[14].

The migration crisis of recent years contributed to a dramatic increase in the popularity of xenophobic and anti-European parties. This was particularly evident in the UK, where the far-right UK Independence Party (UKIP) saw a surge in support. A key factor contributing to this phenomenon was the public's anxiety and fear surrounding the EU's refugee policy, which fueled nationalist sentiments and strengthened xenophobic and anti-European movements. Ultimately, the rise of populism culminated in the UK's decision to leave the European Union, with 51.9% of the population voting to exit in a referendum[15].

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12 Mal'ko A. Populizm kak tormoz demokratii [Populism as a Brake on Democracy] // *Obshhestvennye nauki i sovremennost'*, - 1994. - №1. - P. 104–111. (In Russ.).

13 Baranov N. Vozrozhdenie populizma: Evropejskij opyt i rossijskie praktiki [The Revival of Populism: European Experience and Russian Practices] // *Vestnik SPbGU*, 2015. №6(3). P. 25–36 (In Russ.).

14 *Ibid.*

15 Official result of the EU Referendum, retrieved from: http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-referendums/official-result-of-the-eu-referendum-is-declared-by-electoral-commission-in-manchester.

2. THE PRICE OF UNITY: THE IMPACT OF DISINTEGRATION ON INTERNATIONAL INTEGRATION ENTITIES

Integration processes aim to foster peace, freedom, and democracy by uniting countries. This union often takes the form of a regional structure based on the principles of rule of law, democracy, and respect for human rights, while considering the economic development of each member state. However, integration does not eliminate potential contradictions that may arise. To address these challenges, an effective coordination mechanism is essential. Successful integration must be gradual, mutually beneficial, and aligned with the interests and capabilities of all participating countries. Otherwise, it risks leading to the opposite process: disintegration[16].

The current world witnesses a simultaneous development of both integration and disintegration processes. Brexit, for example, exemplifies these conflicting trends. Disintegration, derived from the Latin "*integer*" (whole) and the French "*dés*" (negation), refers to the breakdown of a whole into its constituent parts. It stands in contrast to integration. Scholars recognize that integration and disintegration are objective and interconnected processes, operating in a complex dance that shapes the global landscape.

The interplay of integration and disintegration processes profoundly shapes the functioning of international integration entities. While disintegration can signify fragmentation, it doesn't necessarily equate to destruction. Instead, it can spark adaptation, leading to the exploration of new forms of interaction. This, in turn, can open avenues for integration in diverse spheres, transforming interactions between parties and propelling them to a new level with novel forms. Brexit serves as a compelling example of such a dynamic[17].

Contemporary global developments necessitate the emergence of frameworks that analyze the nature and potential mitigation strategies for the impact of disintegration on relationships between countries and integration entities. A defining characteristic of disintegration processes is the emergence of internal conflicts and contradictions between participants. These often stem from the very foundation of the entity, hindering its full potential and potentially leading to its eventual dissolution.

The debate surrounding European integration has shifted in recent years, with increasing attention paid to the potential for disintegration. This shift is partly due to a series of crises that have rocked the EU, even before the UK's departure[18]. The risk of disintegration is acknowledged even at the highest levels of EU leadership. In the preface to the

[16] Patberg, M. Can Disintegration Be Democratic? The European Union Between Legitimate Change and Regression. //*Political Studies.* - 2020. - 68(3). - P. 582-599.

[17] Leruth B., Gänzle S., Trondal J. Exploring Differentiated Disintegration in a Post-Brexit European Union // Journal of *Common Market Studies.* - 2019. - Vol. 57, Issue 5. - P. 1013-1030.

[18] See e.g.: Vollaard H. Explaining European Disintegration // *Journal of Common Market Studies*. - 2014. - №52. - P. 1142-1159.

EU Global Strategy, Federica Mogherini, the former High Representative of the Union for Foreign Affairs and Security Policy, stated that the very existence of the European Union was at stake[19]. Similarly, French President Emmanuel Macron, a leading European figure, has expressed concerns about disintegration processes if meaningful reforms are not implemented[20].

While European leaders have successfully averted the most catastrophic scenarios of the EU's collapse, the preconditions for disintegration processes remain. The UK's exit from the European Union, Brexit, marked a significant turning point in the development of these processes.

3. BEYOND BREXIT: POPULISM AND THE FUTURE OF EUROPEAN INTEGRATION

Brexit was a culmination of the international populist Eurosceptic movement, which emerged in the mid-20th century. This movement gained momentum following the rejection of the EU Constitutional Treaty in 2004 and the global financial crisis of 2008-2009. The UK's exit from the EU marked a significant victory for Eurosceptics, both domestically and internationally. Euroscepticism, as a pan-European phenomenon, has evolved into a multifaceted political movement, transcending traditional partisan divides. Brexit represents the triumph of extreme Euroscepticism, which fundamentally rejects state participation in European integration and questions its overall viability. The rise of Euroscepticism has fueled disintegrative (nationalist) sentiments and aspirations within EU member states, exemplified by the growing acceptance of leaving the union as a potential recourse for those opposing its policies. This has also contributed to the rise of regional separatism, as seen in Catalonia, fueled by the perceived successes of the UK's devolved nations in seeking autonomy and potential independence (e.g., Scotland)[21].

Following the UK's departure, Poland, Hungary, and Slovakia are now considered leading proponents of Euroscepticism in modern Europe, based on the rhetoric of their political leaders and governments. Anti-European far-right groups in France, Austria, the Netherlands, and other countries, holding prominent positions within the European Parliament, remain poised to challenge EU membership if given the opportunity. The emergence of populism and nationalism across Europe reflects a broader societal protest against active participation in international affairs and signifies a growing anti-globalist sentiment. This trend has fostered skepticism towards established views on international relations, from

[19] Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy // *European Union External Action Service. June 2016*, retrieved from: https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf.

[20] Bogain A. Reflections on Macron's Proposals for a Renewed EU // *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades*. - 2020. - Vol. 22, Núm. 45. - P. 207-235.

[21] Call S, Jolly S. Euroscepticism in the populism era // Journal of Politics. - 2020. - Jan 1;82(1). - P. e7-e12.

open trade and immigration policies to the fulfillment of allied commitments[22].

Deformations and distortions within the legal system, leading to negative consequences, often stem from internal contradictions. The prestige of law is intrinsically linked to the consistency of its various components, ensuring that legal norms, institutions, and industries align coherently. When these inconsistencies arise, trust in the law erodes. Examples of such contradictions include discrepancies between wages and utility costs, delays in utility payments juxtaposed with delayed wages, and pension calculations that fail to account for work experience and individual contributions.

A critical challenge today involves balancing the stability and flexibility of legislation. Effective law should not only maintain order and stability in social relations but also facilitate their development. Striving for excessive stability and control at any cost, potentially compromising human rights, can pave the way for totalitarianism or authoritarianism. Conversely, a lack of clear legislative policy, constant shifts in state-legal reforms, excessive loopholes, or overly rigid regulation can lead to anarchy.

While minor loopholes in legislation can often be addressed through standard legislative processes without negatively impacting legal culture, excessive regulation, the substitution of laws with by-laws, and similar practices have detrimental effects. These lead to legal nihilism, fostering an environment where it can thrive and proliferate.

Legal populism, which consists in the declaration of unrealistic rights and obligations, incentives and restrictions, which are neither economically, financially, nor legally ensured, causes significant damage to the formation of a legal state. Populism is a departure from real problems posed to society, objective interests and needs of people. It does not contribute to the solution of urgent needs, but only distracts from them as a "specific socio-political "drug" that breaks away from reality into the world of illusions and miracles. Populism arises on the basis of disappointment — "it begins with disappointment and ends with disappointment».

Characterized by unrealistic promises and declarations, legal populism often devoid of economic, financial, or legal feasibility, wreaks havoc on the development of a stable legal state. It diverts attention from real societal problems, ignores objective interests, and ultimately fails to deliver tangible solutions. Instead, it serves as a "socio-political drug," offering illusory promises and mirages in place of concrete progress. Populism thrives on disappointment, ultimately leading to further disillusionment. The Brexit scenario provides a poignant illustration of this phenomenon. A recent poll by The Guardian reveals a significant shift in public opinion: a majority (53%) now favor closer ties with the EU, with only 23% satisfied with the current relationship. This dramatic reversal reflects the reality of Brexit's consequences: 63% perceive it as a net negative, citing economic damage, increased

[22] See: Mansbach R.W., Ferguson Y.H. Europe and the Spread of Nationalist-Populism / In: Populism and Globalization. - Cham: Palgrave Macmillan, 2021.

bureaucracy, and price hikes for businesses[23].

The poll's findings are particularly striking given the overwhelming support for Brexit in 2016. The erosion of public support underscores the perilous nature of legal populism, where grand promises often clash with the harsh realities of implementation. Brexit, as a consequence of this populist surge, serves as a cautionary tale, demonstrating the potential for disillusionment when unrealistic expectations collide with the complexities of governing[24].

The example of Brexit highlights the dangers of legal populism, which thrives on an electorate dissatisfied with their lives and seeking simple solutions to complex problems. This yearning for easy answers can lead to radical political movements that exploit societal anxieties and generate confrontation in the most vulnerable areas[25].

The emergence of difficulties in society creates fertile ground for extremism, a manifestation of political and legal nihilism. It thrives in the absence of a strong political and legal culture among citizens, posing a grave threat to the development of a democratic society. Effective information provision during democratic processes is crucial. It must be timely and truthful, contributing to the education of a high legal culture within the population. Direct citizen participation through referendums is particularly important for enhancing legal culture, democratizing society, and building a state governed by the rule of law. Referendums embody direct democracy, allowing citizens to exercise their power independently without intermediary institutions[26].

However, as Brexit demonstrated, referendums can also pose a threat. The potential for incompetent and unprofessional decision-making exists when the majority of voters lack sufficient legal education. This is particularly concerning when the issues at stake could affect the very foundations of democracy. Therefore, while referendums provide a valuable tool for direct democracy, they require a high legal culture among citizens to ensure competent and responsible decision-making on matters of national significance. This contrasts with elections, where voters choose individuals or parties. In referendums, citizens must directly engage with specific legal questions, requiring a deeper understanding of the issues at hand[27].

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[23] *More than half of voters now want Britain to forge closer ties with the EU, poll reveals,* retrieved from: https://www.theguardian.com/politics/2023/may/28/more-than-half-of-voters-now-want-britain-to-forge-closer-ties-with-the-eu-poll-reveals.

[24] *Ibid.*

[25] See further: Galushko D.V. *Teorija i praktika pravovogo regulirovanija integracionnyh processov v svete vyzovov Brekzita. Dissertacija na sosiskanie uchjonoj stepeni doktora juridicheskih nauk.* - Moskva: MGIMO, 2023. [Galushko D.V. *Theory and practice of legal regulation of integration processes in the light of Brexit challenges. Dissertation for obtaining the degree of a doctor of legal sciences.* - Moscow: MGIMO-University, 2023], retrieved from: https://mgimo.ru/upload/diss/2023/galushko-dissertacziya.pdf (In Russ).

[26] Čepo D, Nikić Čakar D. Direct democracy and the rise of political entrepreneurs: an analysis of citizens' initiatives in post-2010 Croatia // Anali Hrvatskog politološkog društva, retreived from: https://doi.org/10.20901/an.16.02

[27] See: Gordon M. Referendums in the UK Constitution: Authority, Sovereignty and Democracy after Brexit // *European Constitutional Law Review.* - 2020. - №16 (2). - P. 1-36.

The Brexit referendum outcome shocked many, including even Brexit supporters. The swift realization that British political leaders (and the broader elite) were ill-prepared for the result further compounded the situation. Neither opponents like former Prime Minister David Cameron nor proponents like Boris Johnson, appointed Foreign Minister in 2016, had a clear roadmap for the post-referendum period. Similarly, Brussels appeared unprepared or unwilling to contemplate such an outcome, seemingly banking on a last-minute change of heart from the British public. This collective lack of foresight plunged both Britain and the EU into a political crisis with no easy resolution.

Contributing to this state of affairs was the influence of populist figures like Nigel Farage. His parties, including Reform UK and its predecessors UKIP and the Brexit Party, consistently advocated for a swift and unconditional exit from the EU. This Eurosceptic stance, evident in UKIP's 2015 manifesto, characterized the EU as an overbearing entity dictating terms without listening to British concerns[28]. The Brexit Party's electoral success against the backdrop of the EU referendum can be attributed to its skillful transformation of far-right radicalism into Eurosceptic national-populism and right-wing radicalism. Their relatively strong performance in the British and European parliamentary elections, as well as their significant influence on the referendum outcome, stemmed from their ability to quickly capitalize on the anxieties and demands of British society amidst a growing pan-European crisis[29].

Importantly, the Brexit Party distinguished itself from traditional far-right movements by avoiding overt racism, nationalism, and xenophobia. Instead, they presented a more moderate and palatable populist message, resonating with a broader cross-section of law-abiding citizens. They offered seemingly simple and effective solutions to pressing societal issues, appealing to those seeking straightforward answers to complex problems[30].

The debate surrounding Brexit often centers on the role of campaign rhetoric and public understanding. Proponents of Brexit made a number of claims during the campaign that have since been disputed. For instance, the pledge to redirect £350 million per week to the NHS after leaving the EU proved to be inaccurate. This has led some to argue that promises made during the campaign were misleading. Another contentious issue was the impact of Brexit on migration. While some supporters argued that leaving the EU would allow Britain to control its borders more effectively, it's important to note that the UK is not part of the Schengen zone and has always maintained its own immigration policies. Immigration patterns from countries outside the EU, such as India, Pakistan, and Caribbean nations, are largely unaffected by the UK's membership or non-membership in the EU. This highlights the complexity of the issues surrounding Brexit and the importance of

[28] van Kessel S, Chelotti N, Drake H, Roch J, Rodi P. Eager to leave? Populist radical right parties' responses to the UK's Brexit vote // *The British Journal of Politics and International Relations*. - 2020. - Vol. 22(1). - P. 65-84 .

[29] *Ibid*.

[30] Baggini J. *A Very British Populism,* retrieved from: https://counterpoint.uk.com/wp-content/uploads/2018/04/507_CP_RRadical_UK_Web.pdf.

understanding both the arguments for and against leaving the EU. It's crucial to engage in nuanced discussions that avoid oversimplification and recognize the diverse perspectives held by various stakeholders.

The relationship between Britain and the European Union has been complex and fraught with tension for decades. The current phase of this relationship didn't begin with the 2016 referendum, but can be traced back to the 2014 European Parliament elections. Former Prime Minister David Cameron, a young Conservative politician, initiated the path towards Brexit, influenced by several factors. Inspired by the 2014 Scottish independence referendum, Cameron sought a national victory to consolidate his position and appease the Eurosceptic wing of his party. The surge in popularity of the UK Independence Party (UKIP), which won the 2014 European Parliament elections with 27% of the vote, surpassing both the Conservatives and Labour, further motivated Cameron's decision.

Despite a lackluster pro-EU campaign, the emotional arguments of «sovereignty» and the appealing but misleading promise of significant financial savings by leaving the EU proved more persuasive to British voters. Ultimately, a narrow majority of 52% voted to leave the European Union, ending Cameron's political career in the process.

CONCLUSION

Populism exists as a fluid force within the democratic political landscape, gaining traction, however, during periods of crisis in politics, economics, culture, and other societal spheres. The dissertation emphasizes that the 20th and 21st centuries offer a unique opportunity for research. Political forces, previously marginalized, leveraged populist rhetoric surrounding issues like globalization, financial and economic crises, migration, social policy, government corruption, multiculturalism, and others. This allowed them to transform into significant political actors, gaining access to power institutions through voter support, thereby entering the forefront of politics while simultaneously facing institutionalized non-recognition.

Populism's prevalence is a result of several interconnected factors. These include a yearning for disintegration, the crisis of representative democracies, the ineffectiveness of political and power institutions, the discrediting of political elites, economic and social upheavals (war, unemployment, poverty, migration, etc.), cultural homogenization and massification, a shift in the modern societal worldview paradigm, and a public demand for political alternatives, "non-systemic people," and "new faces in politics." Therefore, the dissertation argues that modern humanitarian scholarship should not only analyze the evolution, divergences, causes, and consequences of populism as a socio-political phenomenon, but also focus on research aimed at identifying effective mechanisms for preventing and counteracting its emergence.

As dynamic force within democratic political landscapes, populism gains momentum in the face of crises across political, economic, cultural, and social spheres. The 20th and 21st centuries have provided a unique laboratory for the rise of populist movements. Leveraging populist rhetoric, political forces once relegated to the fringes have harnessed anxieties surrounding globalization, financial and economic crises, migration, social policies, government corruption, multiculturalism, and other issues, transforming them into significant political players. Through voter support, they have gained access to institutions of power, ascending to the forefront of politics while simultaneously facing institutional resistance and a lack of recognition.

Rise of populism can be attributed to a confluence of factors: a yearning for societal change, a crisis of confidence in representative democracies, ineffective political institutions, the discrediting of political elites, economic and social upheaval (including war, unemployment, poverty, migration), cultural homogenization and mass media, a distorted worldview in modern society, and a public demand for political alternatives, "non-systemic" leaders, and "new faces." Given the pervasive nature of populism, a concerted effort is required. Modern humanitarian scholarship should not only investigate the evolution, variations, causes, and consequences of populism but also prioritize the development of effective mechanisms to mitigate and counter its rise.

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PENALIZATION OF BEGGING AND EUROPEAN STANDARDS

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The subject of this paper addresses the question of the justification of penalizing begging. The constitutional concept of the protection of guaranteed human rights and the principle of fairness constitutes a well-founded demand to reconsider the relationship between legislators and the practice regarding the phenomenon of begging as a punishable act, and the sanctioning of the poor. Constitutional categories of equality and European standards require full respect for every individual's right to a dignified and private life. The thesis proposes the need to define the concept of begging in the Law on Public Order and Peace, separating it into actions that represent a form of exploitation of victims through begging, as well as the commission of other criminal offenses related to family protection and protection against human trafficking. European standards and the ruling in the case of Lakatos v. Switzerland by the European Court of Human Rights provide a solid basis for initiating a dialogue on the changes and preventive possibilities regarding begging as a form of social behavior.

KEYWORDS: *begging, human rights, European standards, dignity.*

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1. THE PROBLEM

Begging has been extensively discussed for a long time, and very little new can be said about this phenomenon in both scientific and social contexts! All societies and international organizations show a high level of commitment to reducing begging, with the adoption of various documents that refer to the right to a better standard of living, the rights of displaced persons, the rights of those who have served their sentences (former prisoners), the rights of so-called street children, and the reduction of criminal exploitation of beggars. Legislators have succeeded in raising standards and rights in the areas of education, social and health protection, and protection against violence. However, we observe that there are very few documents specifically addressing the protection of elderly people engaged in begging. All strategies, declarations, and adopted laws stipulate numerous rights and obligations of signatories, but the issue of begging is still not resolved, and the number of beggars is not decreasing.

The legislative framework in the Republic of Serbia (as well as in neighboring countries) and social policy have norms aimed at improving the rights of homeless people (vagrants), beggars, and others who requirxze support through affirmative discrimination measures to live under the same conditions as the majority of citizens. However, the reality of these groups shows that their actual situation remains the same as before. We can freely say that they are victims of their position and criminal structures, but we have not yet analyzed the link between begging and organized crime, which would also involve how to truly reduce this form of exploitation (human trafficking).

Begging often exists somewhere between necessity and coercion, making it difficult to determine whether they are perpetrators of the offense of begging or victims of criminals. Beggars are also victims of a society that often silently overlooks the driving of modified vehicles collecting secondary raw materials, how young children are forced to work, how copper monuments and brass signs are destroyed, and so on. What is even more challenging is that groups of children and/or women with small children begging on major roads in large cities are usually tolerated (Milosavljević, 1997:81).

Thus, the fact is often overlooked that penalizing begging may reduce the number of beggars in a specific location, but the problem will not be solved. Penalization can in fact lead to further discrimination, and sometimes it fails to recognize that other punishable acts, such as human trafficking and exploitation, are hidden behind begging. This form of state response is often a result of inherited legislation from earlier periods. To be fair, most European legislations recognize begging as an offense that should be penalized, and in those places where it has been decriminalized, there have been no effects indicating a change in stance.[1]

However, the inevitable development of human rights, which have both conventional and constitutional guarantees, demands that we address this complex situation. The standards of human rights to privacy, freedom from discrimination, freedom of expression,

[1] Begging has been decriminalized in Albania, Andorra, Finland, Georgia, Greece, Moldova, Portugal, Slovakia, and Ukraine among the member states of the Council of Europe. However, attitudes towards begging have remained the same.

the right to work, and others must not be denied to those engaged in begging. This is further supported by decisions from the highest courts, not only at the national level but also by the European Court of Human Rights. Beggars and begging are a part of our reality, which surely does not threaten society as a whole, but they do require a societal response. Analyzing the judgment in the case *Lakatos v. Switzerland* by the European Court of Human Rights, we see that many countries that are members of the Council of Europe have not decriminalized begging. While we have yet to decide whether begging should or should not be decriminalized, the fact remains that the state has an obligation to provide significant social assistance and other support so that the poor can live dignified lives without begging. But let's start by examining the issue of begging and penalization at the national level.

2. BEGGING AND BEGGARS

Begging, as a social phenomenon, can undoubtedly be classified as a socially pathological phenomenon. As such, it cannot be eliminated simply by penalization, so even in countries where penalization and decriminalization of these behaviors have taken place, it is unrealistic to claim that begging is no longer present. The extent of begging in a country is very difficult to determine, as there are no official statistics on this phenomenon, and relevant statistical institutions in Serbia, Hungary, Austria, or Croatia do not collect such data. Therefore, we can safely conclude that begging is indeed a "dark number" behavior.

According to Stevanović, begging can be classified as either classical or professional. Classical begging involves individuals begging only for themselves and their family members. Professional begging, on the other hand, is an activity with characteristics of a profession and often contains elements of at least one criminal offense, such as human trafficking. In this case, it is not begging out of social need, but rather a means of earning money (Stevanović, 2013:174). A major problem is that not enough attention is given to this phenomenon, so it often ends with the individual being convicted for the offense of begging.

People who beg ask for money from passersby in public places such as squares, fairs, shopping malls, or in front of religious buildings. Beggars are often homeless, meaning they sleep outdoors or in places not intended for residence (such as parking lots). Since there is also a certain number of homeless individuals who overlap with beggars, it is clear that these two categories cannot be clearly separated, as both belong to particularly vulnerable groups. The inability to adequately access social assistance (issues related to status, residence, etc.) often leads people either to criminal activities or to begging, regardless of how it is treated. Both statuses can carry a social stigma, making them even more vulnerable to victimization, as evidenced by recorded abuses, where often nothing can be done.

Although people who beg are often seen as passive recipients of help, there is no sharp division between begging and work. Begging is a multidimensional problem. We

can thus approach begging as an issue of labor, and the categories of people who may be prosecuted as beggars can include street vendors or sex workers. The International Labour Organization (ILO) defines begging as "a set of activities in which an individual asks for money from strangers based on being poor or in need of charitable donations for health or religious reasons.[2] Beggars may also sell small items such as sponges or flowers in exchange for money, which may have little relation to the actual value of the items for sale."[3] The ILO definition suggests that the line between begging and work is not always clear. Activities such as street vending can be classified as begging, but can also be seen as work. Those who beg often describe their activity as work. In practice, courts often penalize begging, where the defense claims that the individual asked for a monetary compensation for unauthorized parking assistance.

A special category among beggars is people with disabilities. Nikolić reports that the media often covers stories of beggars who, in the morning, discard their mobility aids and play football or train in boxing. At the same time, many present themselves as war veterans who have no means of livelihood. The response of society is ambivalent, but generally, people do not report these acts of begging, accepting their presence in the environment through which they move (Nikolić, 2010:149).

Considering that all traditional religions insist on charity as a form of redemption and that collective morality reminds us that we could one day be in a position of need, it leads to the result that the majority want to be merciful. If it weren't for this, begging would not exist as a phenomenon.

Of course, it is important not to normalize begging. People who beg are poor, disenfranchised, and homeless. They live impoverished lives that society should respond to by providing support for housing and real employment. People who beg often use interactions with strangers to convey their distress, explaining why they are poor, homeless, in need, and deserving of support. The expressive value of begging is important both for the person begging and for the recipient of the message (which is the act of execution).

3. LEGISLATIVE STANCE ON BEGGING IN SERBIA

In Serbia, there is no public policy document that specifically addresses the issue of begging. It is only mentioned in the current Strategy for the Prevention and Protection of Children from Violence for the period 2020–2023[4] and the General Protocol for the Pro-

[2] ILO,'A Rapid Assessment of Bonded Labour in Domestic Work and Begging in Pakistan' (2004)

[3] On challenges faced by street vendors, see ILO, 'The Regulatory Framework and the Informal Economy' (no date) <https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_policy/documents/publication/wcms_210451.pdf

[4] Official Gazette of the Republic of Serbia, number 80/2020.

tection of Children from Violence (Government of the Republic of Serbia 2020), where it is recognized as a form of violence against children or human trafficking. The first strategy identifies begging as a form of child labor exploitation, but there is a lack of institutional responses to begging, with no records on child begging, and no unified methodology for documenting it. As a result, little is known about children begging under the age of 14, except in small communities.

Children who beg, both in legal terms and in practice, do not have a clearly recognized status as victims of exploitation, violence, abuse, or neglect. On the contrary, children who reach the age of 14 are considered perpetrators of a criminal offense or offense and are handled by authorized police or municipal police officers. However, neither of these state bodies has established professional standards for dealing with these children beggars.

This means that after a potential procedure for begging before the Misdemeanor Court, these children are returned to the street and continue to beg. Criminalizing and punishing children who beg and their parents has not reduced the phenomenon of "street children," including child begging. Measures by relevant authorities and institutions in response to child begging are not aimed at addressing the root causes of begging. Preventive measures, such as providing material assistance, are rarely applied. The result of these procedures is not a reduction in begging but rather a temporary suspension of begging, which resumes after the judicial process is concluded. According to the General Protocol for the Protection of Children from Violence, exploiting a child for begging is considered one of the worst forms of child labor and exploitation, and it may also constitute child trafficking. Begging by a child, according to the protocol, includes a range of activities where the child seeks money or other material goods, without providing anything in return, evoking sympathy due to their poverty or citing health, religious, or other reasons. If the child is accompanied by a parent or another adult who is begging, it will be considered that the child is also begging, even if not directly.

Legislation that defines begging as a misdemeanor does not provide a legal definition of the term, and therefore, the application of the law in cases of begging can vary significantly depending on the interpretation of the decision-maker. Existing legal norms do not lead to the suppression of begging, including child begging. If children were treated as victims rather than offenders of begging offenses, the effects of these judicial procedures might be more recognizable.

Our criminal (both criminal and misdemeanor) legislation does not define begging. Begging, in a broader context, can be linked to a learned way of life for some segments of society. The legislator only states that "whoever threatens the peace of citizens or disturbs public order and peace by begging will be fined from 5,000 to 10,000 dinars or imprisoned for up to 30 days. Whoever commits the offense mentioned in paragraph 1 of this article in a group of three or more persons will be fined (from 10,000 to 30,000 dinars) or imprisoned

for up to 30 days."[5]

The legal norm protects the peace of citizens, everyone passing by on the street, regardless of why they are on the street. This protected societal good, the peace of citizens, is threatened by no one other than the beggar, precisely because of begging. However, the concept of "peace of citizens" is not clearly defined. The absurdity of the punishment is that the law threatens to fine the beggar, with money they do not have.

Our view is that if beggars had money, they would not be begging. Or, the initiator of the procedure should demonstrate to the court that the beggar has money but continues to beg. If they do not pay the fine for the offense, the beggar can be sentenced to imprisonment for up to thirty days. Thus, the legislative situation here is that a beggar who has no money is threatened with a fine, and if the fine is not paid, it will be replaced with imprisonment.

The peace of an undefined citizen is protected by punishing the act of begging, either with a fine or imprisonment. The standard of "peace of citizens," "citizens," and "begging" is placed on the same level, with different consequences. Our position is that this provision of the Law on Public Order and Peace requires an objective and professional discussion, which would approach the phenomenon of begging differently than the current approach. The misdemeanor responsibility of beggars must be considered in the context of the definition of begging, but such definitions are lacking. This seemingly small issue cannot be subject to free interpretation and must be legally defined.

The authors of this work do not insist on the decriminalization of begging, but rather on its clear definition. Individuals involved in organizing begging should be held accountable by the law, whether for their misdemeanor or criminal responsibility. The aggravating circumstance should be if it involves children, the elderly, or people with disabilities. Begging can be one of the worst forms of child labor. Begging can also be an element of the criminal act of human trafficking, as a method or goal of exploiting the victims of that criminal act. We cannot discuss other criminal acts and begging in this analysis. It is possible to link begging to the crime of neglect and abuse of a minor under Article 193 of the Criminal Code; however, begging is not explicitly mentioned as an act of execution, so even though it might be referred to in court files, it is not possible to use such assumptions in this scientific work.

All these reasons show that there is no basis for the complete decriminalization of begging, but rather for separating the function of social support for individuals and families from begging and criminal responsibility. At the same time, strengthening the role of families and guardianship authorities in protecting children from involvement in begging is necessary.

[5] Article 12 of the Law on Public Order and Peace (Official Gazette of the Republic of Serbia, no. 6/2016 and 24/2018).

4. ONE EXAMPLE AND SEVERAL QUESTIONS

In a misdemeanor case in Novi Sad, a decision was made on October 12, 2022, regarding the defendant ĐL, born in 1979, in Novi Sad, in case PR 2122/19, for violating Article 12, paragraph 1 of the Law on Public Order and Peace, due to begging. The defendant, an unemployed, unmarried man with no prior criminal record, was found to have disturbed public peace by directing vehicles to empty parking spaces and then approaching the vehicles and asking for money from citizens. The police found money on him, which was confiscated, and he was fined. The court concluded that the defendant acted intentionally, knowing his actions were prohibited. The aggravating factor was that the defendant had previously been convicted for the same offense.

In this specific case, several important questions arise, such as whether the defendant truly disrupted the peace of citizens, whether he has the right to work (even in the manner described in the judgment), and how he can be fined when he is unemployed and has no means of subsistence. All of this can be related to his guaranteed rights under the Constitution of the Republic of Serbia and European standards in Article 8 of the European Convention on Human Rights, which protects personal and family life.

5. THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENT IN THE CASE LACATUS VS. SWITZERLAND

On January 19, 2021, the European Court of Human Rights ruled in the case Lacatus v. Switzerland,[6] determining that punishing a Roma individual for begging, who is extremely vulnerable due to poverty and illiteracy, violates their right to personal and family life under Article 8 of the European Convention on Human Rights. This was the first decision where the Court examined the applicability of Article 8 to the criminalization and punishment of begging. The applicant was a Roma woman who was illiterate, unemployed, and from a poor family. Since she had no other means of living, begging was her way of surviving, and the Court held that she had the right to attempt to ensure her livelihood in this way.

The Court found that punishing the applicant by imprisoning her for five days because she could not pay the fine was disproportionate to the legitimate goal of fighting organized crime and protecting the rights of others (passersby, store owners). This case is important not only for what the Court concluded regarding the correlation between penalizing begging and the possible violation of privacy rights but also for what it did not conclude.

[6] *Lacatus v. Suisse*, 14065/15, 19. 1. 2021. https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c= (17. 10. 2022.).

In its analysis of the legal status of begging in the legislation of 38 Council of Europe member states, the Court found that in some, relatively few, countries, begging is neither criminalized nor prohibited. However, in most of the countries in the sample, begging is punishable, though the specific acts and characteristics of prohibited begging differ. Some countries only prohibit aggressive or intrusive begging, where the rights of others are jeopardized. The Court highlighted that the legal treatment of begging varies, with some countries treating it as a criminal act and others as a misdemeanor. However, in none of these instances should begging by adults be conflated with the crime of forced begging or human trafficking. Some countries impose fines for begging, while others may impose imprisonment or other sanctions, such as confiscation of property gained through begging or issuing verbal warnings.

The European Court of Human Rights (ECtHR) concluded that in the case of Lacatus, there was a violation of Article 8 of the Convention, but no violation of other contested provisions, primarily the prohibition of discrimination under Article 14.[7] The Court reiterated its standard finding from numerous other judgments that, given the established violation of Article 8, there is no need for further review of potential violations of other rights. Based on Article 14, the Court ordered the state to pay just satisfaction in the amount of 922 EUR.

Another important aspect of the Court's judgment is its skepticism toward the state's stance that penalizing begging is an effective preventive measure to combat the exploitation of potential and actual victims of human trafficking by organized crime. Moreover, the Court, in response to this argument by the defendant state, referred to a GRETA report which stated that penalizing begging places victims of forced begging in a position of great vulnerability to such groups. However, the Court also noted that nothing in the case file suggested that the applicant belonged to such a network or was a victim of exploitation by others, so these parts of the judgment were obiter dicta.

The judgment in the Lacatus case raises numerous questions. These mainly relate to the root causes of begging, to which the Roma population is disproportionately exposed, even in a transnational context such as that described in this case. The key causes are poverty and social exclusion. However, this social isolation often remains undetermined by the Court.

It should be noted that statistical data and numerous studies suggesting the disproportionate exposure of the Roma population to various forms of begging (especially forced begging) are not sufficiently used. This results in determining violations of other rights of the applicant (such as the right to private and family life), but not the right to protection from discrimination (Bardić Derenčinović 2023: 119). The consequence of this approach may be the potential sanctioning of the state's failure to act in accordance with its positive obligations, most commonly under Article 8, but also under other articles of the Conven-

[7] Bilten VKS, 2/2022.

tion (e.g., Article 3), while neglecting to identify the true causes of such violations that stem from systemic, indirect discrimination against the Roma population.

In the context of the link between forced begging as a form of human trafficking and the facts considered in this case, it is worth praising the Court's analysis regarding the "situation of great vulnerability" cited in the judgment. This refers to circumstances of extreme poverty, belonging to the Roma minority, migrant status, illiteracy, difficult family situations, etc. This means that it is necessary to verify whether the accused is actually a victim. In other words, can such begging, which is the result of the vulnerability of the person, be treated as an indicator of potential abuse, especially in cross-border cases (when individuals beg in another country), particularly when the individuals are from the Roma minority, who are disproportionately vulnerable due to social exclusion, poverty, and other reasons? Furthermore, do situations like the one in the Lacatus case indicate suspicion of third-party involvement who, in addition to exploiting the vulnerable position, may have taken other actions associated with human trafficking (e.g., engaging these individuals, transporting them, etc.) (Bardić Derenčinović2023: 113)?

It seems that these questions are mostly rhetorical in nature. It is hard to shake the impression that most countries tolerate the existing state of affairs, and in those countries where begging is punishable, the act is penalized without serious attempts to identify all the factors that led to it, many of which are linked, and very often are, to the goal of exploiting vulnerable groups. Undoubtedly, there are numerous shortcomings on the part of all relevant authorities, from the police to the courts. When it comes to the police, it is hard to deny the almost standard inertia in focusing solely on the consequences.

Of course, this pertains to discovering, reporting, prosecuting, and penalizing (either criminally or administratively) individuals found begging, without delving into a criminal investigation into further indications that could reveal the organized aspect of this lucrative criminal activity. This is especially true when dealing with extremely vulnerable individuals who, due to their difficult circumstances, become easy targets for abuse and exploitation.

Such failures not only foster organized crime, which expands its activities due to impunity, but also undermine the victim's right to identification, assistance, and protection.

6. CONCLUSION

There is undoubtedly a basis for decriminalizing begging as an offense. There is a need for professional discussions and further analysis (e.g., sociological, psychological, and legal perspectives), as well as comparative practice analysis, to determine whether begging should remain an offense under the Law on Public Order and Peace, or whether it should be removed from this legislation. If it remains, it is essential to precisely define what constitutes the act of begging. Another issue pertains to punishment, as it is difficult to penalize

financially a person who is unemployed and lacks means for survival.

It is necessary to urgently improve awareness and knowledge about begging among professionals working with children, as well as institutional capacities for protecting children from exploitation through begging. This applies not only to professionals in the police, prosecution, and judiciary but also to experts in social welfare services.

Amendments to the Criminal Code should be made to define what constitutes neglect and abuse of children. The amendments must be in line with the UN Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, as well as the recommendations of the UN Committee on the Rights of the Child, in order to improve the position of victims of human trafficking and related criminal offenses – such as trafficking for prostitution, trafficking of minors for adoption, etc.

Social work centers need to improve the way they record data to ensure clear insights into the application of parental rights supervision, initiate civil proceedings for the deprivation of parental rights, and criminal proceedings for the neglect and abuse of minors. The records should include reasons for using these legal instruments, including begging by children as a form of abuse of parental rights or child neglect.

In social protection, there is a need to improve work with families where children involved in begging are registered, providing support to eliminate this behavior.

The Criminal Code must correlate actions that are classified in case law as the criminal offense of coercion with those in human trafficking offenses.

Through continuous education and improved standards, judges should be sensitized and encouraged to address and decide on the property claims of victims of forced begging (and other forms of coercion and human trafficking) in criminal proceedings, in accordance with the provisions of the Criminal Procedure Code.

While advocating for the penalization of begging may have practical reasons, such as maintaining public order, it simultaneously raises serious social and ethical dilemmas. Critics of this policy argue that, rather than punishment, society should focus on providing support to people in need through equal access to education, healthcare, and social programs. Ultimately, effective and humane solutions must consider the complexity of poverty and homelessness, rather than merely attempting to address the consequences through criminal law.

Preventive action cannot occur without at least five things:

- A thorough understanding of the causes and phenomenology of begging;
- Coordinated preventive programs between social work centers, the Ministry of the Interior, prosecutors, courts, schools, and healthcare institutions;
- Prevention cannot exist without social welfare services, which must be equipped with both human and material resources;

- Most importantly, a fundamental change in the societal approach to solving social crises and the social consequences stemming from begging.
- Indirectly related to prevention, it is necessary to establish appropriate monitoring of this phenomenon through institutions, particularly through statistical data.

In any case, to begin changing the current state, besides these changes, there is a need to continually work on changing the public awareness about the consequences of begging for its victims. Those who beg have the right to a dignified life and opportunities, just like any other member of society. This especially applies to children and their protection.

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THE IMPACT OF TAX PENALTIES ON THE ACHIEVEMENT OF TAX DISCIPLINES

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In this paper, authors will explore the impact of tax penalties on raising tax discipline and better functioning of tax collection in the tax system of the Republic of Serbia. The development of the Tax Administration and its tax collection system is not an end in itself, but is in the function of more general economic and socio-political goals. This research defines how they can help the functioning of the Tax Administration and improve the system of forced tax collection in the Republic of Serbia. The Tax Administration Reform Program in the Republic of Serbia is primarily focused on reducing the number of branches in order to speed up the functioning of the collection process. The development of new elements of information and communication systems contributes to the accelerated achievement of goals and activities that need to be undertaken in order to collect tax debt more efficiently. In parallel with the reform of the Tax Administration, the promotion of regular payment of tax liabilities is also being carried out. The development of the E-Taxes portal implies the application of information and communication technologies in the improvement of the system of better monitoring of tax liabilities. E-taxes enable users to work more efficiently and effectively with the Tax Administration authorities in the function of reducing issued warnings and violations, as well as better collection of imposed fines. The strategy is based on the regular issuance of misdemeanor orders with issued reminders in order to stimulate taxpayers to pay their obligations on time, to try to reduce the practice of a part of businessmen who are waiting for the Tax Administration to warn them and only then pay their obligations. This practice of businessmen requires both great effort and high costs of issuing and sending tax reminders to taxpayers who have not settled their obligations on time. The amendments to the Law on Tax Procedure and Tax Administration (Official Gazette of the Republic of Serbia, No. 138/2022) provide for stricter penalties for tax offenses in order to stimulate payment.

KEYWORDS: *Tax administration, E-taxes, tax offense, tax discipline*

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INTRODUCTION

Tax discipline is the foundation of the stability of any tax system, and it is reflected in the willingness of taxpayers to regularly and timely fulfill their tax obligations. However, many taxpayers, whether individuals or legal entities, may be inclined to avoid paying taxes for various reasons, including ignorance, insufficient control or the intention to avoid tax obligations. In order to suppress such behaviors and ensure tax discipline, countries around the world apply various types of tax penalties. These fines are intended to punish irregularities and discourage non-compliance with tax laws, but also to act preventively, encouraging taxpayers to settle their obligations in a timely manner.

Tax penalties are specific financial and legal mechanisms that apply to individuals or businesses that fail to meet their tax obligations. Their role is twofold: on the one hand, they serve as a punishment for non-fulfilment of obligations, while on the other hand, they act as a means of prevention for future non-compliance with the law.

Tax offenses are prescribed by the basic criminal legislation in all former member states of the Socialist Federal Republic of Yugoslavia (except the Republic of Serbia). Italian legislation contains a specific solution. Tax crimes are prescribed by a special regulation - the Law on Tax Crimes (Legge sui reati tributari) (Kostić, 2016: 135-154). In the Federal Republic of Germany, together with tax offenses, they are prescribed as so-called Fiscal Code from 1976 (amended in 2002) (Abgabenordnung - AO).1 Unlike the German example, the solution accepted in the Republic of Serbia can contribute to legal uncertainty. Tax crimes are prescribed by the Law on Tax Procedure and Tax Administration and the Criminal Code (Kostic, Pavlovic, 2020). The tax system of a modern state must develop in parallel with the development of economic systems, because as the state passes new laws and, in the opinion of the participants in the economic system, tightens the legal regulations, so the legal and accounting sectors in companies find ways to avoid paying a certain part of the tax or at least to come to certain reliefs. By punishing certain types of violations, the short-term effects of the apparent regulation of a certain part of the tax system are obtained, because as economic entities find a way to avoid punishment, the system returns to its original state. The question that arises is: to what extent do tax penalties really contribute to achieving tax discipline, and are there more effective ways to encourage voluntary compliance with tax regulations?

1. TYPES OF TAX PENALTIES AND THEIR PURPOSE

Tax penalties can be divided into financial and non-financial, depending on their nature and severity of the offense. Financial penalties are the most common form of sanctions and involve fining taxpayers who avoid paying taxes or provide false information. These penalties can vary depending on the amount of the tax debt and the severity of the offense, and in many cases include additional interest on the debt that is not paid on time.

Non-financial penalties, on the other hand, include confiscation of assets, temporary suspension of business or even prison sentences for the most serious forms of tax evasion.

The main goal of tax penalties is to discourage taxpayers from violating tax regulations and to encourage them to regularly settle their obligations. The penalty policy must be strict enough that the penalties are significant, but at the same time fair so as not to unfairly penalize or overburden those who are late in payment due to inadvertent mistakes or financial difficulties.

The Law on Tax Procedure and Tax Administration of the Republic of Serbia prescribes a very large number of both tax crimes and misdemeanors. When enacting such laws, it is very important to pay close attention to the fact that it is not the basis of sanctions for misdemeanors, but the regulation of the system and the provision of conditions for safe and reliable operations of all market participants. When defining sanctions, it should be taken into account that they are only those behaviors that must be prevented (Antolisei, 2008: 7-8). On the other hand, one should be very careful with criminal sanctions because they must be offenses that represent a great danger for the entire economic system. Over the years, the tax system is constantly being improved, and participants in the economy have the impression that tax laws are constantly being tightened, but despite this, it is noticeable that there are more and more economic crimes. Since the creation of the first states, everyone has always tried to introduce control in the collection of taxes, and thus the creation of modern states led to the adoption of regulations sanctioning the payment of taxes and other duties, as well as punishments for providing false data important for determining tax liability (Vučković, 2013: 5). Today, there is no system that does not include sanctions for such behavior, and there are regulations that define it in all modern legislation.

Tax penalties can be divided into:

1. Fines: They usually represent an additional cost in the form of a percentage increase of the unpaid tax or a fixed amount;
2. Penalties due to delay in submitting the tax return: These penalties are applied if the taxpayer does not submit the return within the stipulated period and
3. Criminal sanctions: In some cases, tax evasion can lead to criminal prosecution, including prison terms.

Tax law, as well as the law of a modern country, should be set up so that criminal sanctions are imposed exclusively for the most serious forms of tax violations. Tax regulations must have an impact on criminal regulations, because in order to determine whether a certain criminal offense is tax evasion, it is necessary to determine whether such an obligation has the character of taxes, contributions or other duties. Due to the specificity of the taxes themselves and their diversification, it is necessary to define the elements of being tax crimes, and to interpret the norms of tax law that define the obligation that represents a tax,

contribution or duties (Popović, 2012: 26).

Tax inspectors and tax police do not have a legal obligation to inform the attorney general's office about the fact of damage caused by tax offenses. The Law on tax procedure and tax administration (Official ch. 138/22) does not establish such an obligation of the tax administration or the police, the aforementioned law regulates in detail the method of securing and collecting tax debt. Tax inspectors taking basic measures and reasonably assuming that unscrupulous taxpayers will not be able to slip through the "net" of measures for temporary security of tax debt and countless collection methods. The powers of the tax authorities were adopted because the legislator considered that, with the application of the Law on Tax Procedure and Tax Administration, it cannot happen that the tax debt remains unpaid. It is planned to effectively combine the collection of unpaid tax debt based on the decision issued by the tax administration. The tax administration has the obligation to report a case of tax evasion to the tax police, and the tax police prepares a criminal complaint based on which the competent public prosecution initiates criminal proceedings against the perpetrator of the crime (Mrvić Petrović, Kostić, 2019: 295-307). The Tax Administration is in the process of transformation, and during that transformation, a large part of the employees ended their working life, while a very small number were brought in to replace them. This transformation was carried out late, so the old staff who had the experience to recognize tax violations and therefore signal to the tax police that the violations were committed from their domain are not there to pass this knowledge on to younger colleagues who are left to gain experience on their own and are certainly not enough efficient.

2. PSYCHOLOGICAL EFFECTS OF TAX PENALTIES

The psychological aspect of tax penalties plays a key role in encouraging tax discipline. Fear of potential punishment often acts as a powerful motivator, as people naturally tend to avoid negative consequences. This fear of punishment can be an effective factor in encouraging taxpayers to comply with tax laws. Research shows that when the penalties for not paying taxes are high and severe, individuals and businesses are more inclined to pay their obligations regularly.

In addition to fear, an important role is also played by the perception of the fairness of penalties and the tax system as a whole. If taxpayers believe that penalties are fair and that the tax system treats all participants equally, they will be more motivated to pay taxes voluntarily. On the contrary, if the penalties are considered excessively strict or unfair, the opposite effect can occur – taxpayers will turn to tax evasion or evasion, arguing that the system is not fair.

Examples from different countries show that high penalties can have a significant impact on improving tax discipline. For example, in Scandinavia, tax penalties are extremely severe, but taxpayers also have a high level of trust in state institutions, leading to a very high rate of compliance with tax laws. This suggests that penalties, combined with a transparent and fairly applied tax system, can have a strong psychological effect on tax discipline.

Tax penalties have a significant economic and psychological impact on taxpayers. While they serve as a means to ensure compliance with tax laws, it is important that they are applied in a fair and proportionate manner in order to avoid negative effects on the economy and the mental health of taxpayers (Topić Pavković, Popović, 2020).

In practice, the balance between punishment and prevention plays a key role. Penalties should be the last resort applied when other mechanisms fail. Therefore, a policy that combines penalties with education and preventive measures has proven to be the most effective in achieving long-term tax discipline**.**

Problems and challenges in the application of tax penalties:

1. Excessive fines: If the fines are too high, there is a risk that taxpayers will develop a hostile attitude towards the tax authorities and the tax system in general, which may lead to wider disobedience or the development of a "gray economy";
2. Inconsistent application of penalties: If penalties are not applied consistently and fairly, it can undermine the credibility of the tax system and encourage corruption;
3. Transparency and fairness: It is important that the tax system and penalties are transparent and fair, to ensure that taxpayers feel motivated to comply with the law and not penalized for mistakes they could have avoided;
4. Decreased motivation: Tax penalties can demotivate individuals and businesses to continue doing business or investing. People who have been punished may feel that they have been treated unfairly, which can reduce their will to continue working;
5. Trust in the system: Penalties can affect trust in the tax system and authorities. If punishments are perceived as unfair or excessive, this can lead to feelings of injustice and distrust of institutions;
6. Financial strain: Tax penalties often come with a significant financial burden, which can lead to liquidity problems and the added stress of having to find the funds to pay the penalty;
7. Social stigma: Being punished for tax violations can carry social stigma, which can negatively affect personal and professional relationships (Radulović, 2010);
8. Fear of Penalty: Fear of tax penalties can motivate individuals and businesses to comply with tax laws. This fear can be an effective tool to increase tax discipline and
9. Stress and Anxiety: Tax penalties can cause stress and anxiety in taxpayers, which can negatively affect their mental health and productivity.

3. EFFECTS OF TAX PENALTIES ON TAX DISCIPLINE

Tax penalties play a key role in achieving tax discipline and reducing tax evasion. Several key effects of tax penalties on tax discipline in the Republic of Serbia:

1. Reduction of tax evasion: Tax penalties act as a deterrent to taxpayers who are thinking of avoiding paying taxes. Fear of high fines can motivate taxpayers to report their income correctly and pay taxes on time (Gogić, 2020);
2. Increase in state revenue: Effective application of tax penalties can increase the state's total tax revenue. When taxpayers know that they will be penalized for not paying taxes, they are more likely to fulfill their obligations, which directly affects the increase in government revenues;
3. Improving the tax culture: Regular application of penalties can contribute to the development of a better tax culture among citizens and businesses. When taxpayers are aware of the consequences of not paying taxes, a greater awareness of the importance of complying with tax regulations develops;
4. Reduction of the shadow economy: Tax penalties can help reduce the shadow economy, as they encourage the formalization of business. Companies operating in the gray area often avoid paying taxes, but the fear of penalties can motivate them to legalize their business and
5. Increasing confidence in the tax system: When taxpayers see that penalties are consistently applied, confidence in the tax system increases. This can lead to a greater willingness of citizens to cooperate with tax authorities and obey the laws.

Tax penalties are a necessary tool for achieving greater tax discipline and reducing tax evasion. Their effective application can significantly contribute to increasing government revenues, reducing the gray economy and developing a better tax culture.

Tax punishment in modern systems has many effects, and some of them are:

1. Preventive effect: Tax penalties create psychological pressure on taxpayers, because they understand that avoiding obligations will lead to serious consequences. The stricter and more effectively enforced the penalties, the less likely taxpayers will try to avoid tax;
2. Repressive effect: Penalties punish those who have already broken the law, which sends a clear signal to other taxpayers about the seriousness of the state in implementing tax policy;
3. The detector effect: With severe tax penalties, tax authorities usually strengthen their monitoring mechanisms and tools to detect tax fraud, which increases the chance that non-compliance will be detected and punished and

4. Change in behavior: Tax penalties can change the behavior of taxpayers, encouraging them to be more proactive in fulfilling their obligations, submit returns and pay their taxes on time to avoid negative consequences.

4. ECONOMIC IMPACT OF TAX PENALTIES

Tax penalties, in addition to the psychological impact, also have a significant economic effect on taxpayers and the overall economy. For businesses, fines can be a serious financial burden, especially if large tax debts or penalties have been accumulated through long-term tax avoidance. In extreme cases, severe tax penalties can lead to the temporary or permanent suspension of business operations, which can affect employees, suppliers and the wider economic environment.

On the other hand, tax penalties are also a source of additional revenue for the state budget. When the state successfully collects fines for unpaid tax obligations, those funds can be used to finance public services and other budgetary needs. However, excessive reliance on penalty revenue can be a sign of deeper problems in the tax system, such as weak tax control or systemic tax avoidance.

However, there are examples where excessive tax penalties can have a counterproductive effect on the economy. In some countries where tax penalties are unreasonably high, small businesses may be forced to close their operations, leading to job losses and an increase in the informal economy. This shows that a careful balance needs to be struck between effectively punishing offenses and preserving economic stability.

4.1 Direct economic impact

The direct economic impact is very short-lived, since the issuance of warnings and misdemeanor orders brings a greater flow of funds to the accounts of the Tax Administration, but also creates a shortage of funds in the accounts of taxpayers. With this system, the Tax Administration increases the collection of taxes and contributions in the short term, but in the long term, this system creates a great burden on business entities until the moment when they are no longer able to pay the issued warnings and misdemeanor orders.

Financial burden: Tax penalties represent a direct financial cost to businesses and individuals. These fines can be significant and can affect the liquidity and financial stability of entities.

Increased costs of doing business: Businesses penalized for tax violations often have to allocate additional funds for legal and accounting services in order to comply with the law and avoid future penalties.

Indirect economic impacts.

Loss of reputation: Tax penalties can negatively affect a company's reputation, which can lead to a loss of trust from clients, partners and investors.

Reduced competitiveness: Businesses that are fined may become less competitive due to additional costs and loss of reputation.

5. EFFICIENCY OF TAX PENALTIES IN PRACTICE

The effectiveness of tax penalties in achieving tax discipline depends on a number of factors, including the manner in which the penalties are implemented, the level of transparency of the tax system, and societal perceptions of justice. Research shows that penalties can be effective in discouraging tax evasion when they are balanced and fair, but also when the tax administration is able to enforce them without discrimination. In countries with an efficient tax administration, such as Germany or Canada, fines are part of a broader strategy that includes continuous control and advanced methods of monitoring tax obligations.

However, punitive policy may not always be the most effective means of achieving tax discipline. In many cases, alternative measures, such as rewarding regular tax payments or educating taxpayers about their obligations, can have an equal or even better effect. Voluntary tax reporting programs, in which taxpayers have the option to report their debt without fear of penalties, have also shown success in raising revenue and reducing tax evasion in countries such as Italy.

At the same time, preventive measures, such as regular tax audits and supervision of high-risk sectors, can act as an additional way to improve tax discipline. These measures, combined with fair and consistent punishment of violations, allow maintaining a stable tax system that is acceptable to most taxpayers.

The Law on Tax Procedure and Tax Administration prescribes the issuing of warnings and misdemeanor fines for breaking the deadline for paying taxes and contributions (ZPPA, 2022). The deadline for the payment of profit tax and value added tax is the 15th of the month, and at the end of the month, if the taxpayer is late with the payment by at least one day, according to the procedure, he receives a warning with accrued interest and a misdemeanor order (Misdemeanor Act, 2020). The problem with such a solution to raising tax discipline is that the punishments are linear, so for a debt of several hundreds of dinars and several million, the same misdemeanor order is issued, so the legal entity receives a misdemeanor order in the amount of 100,000.00 dinars and the responsible person 10,000 dinars. Entrepreneurs have the same practice, so regardless of the amount of debt that has not been settled, the owner of the entrepreneurial shop will receive a misdemeanor order in the amount of 50,000.00 dinars. In case of misdemeanor orders issued in this way, there is a payment term clause, so if a legal entity or entrepreneur settles the issued misdemeanor order, the sum will be halved.

Through the practice of issuing misdemeanor orders, it is possible to achieve higher income, reduce the number of warnings issued, but also to bring problems to business entities that are already in an unenviable position, so for example 100.00 dinars debt, they must now pay 25,000 dinars or 50,000.00 dinars within eight days if they do not comply with the deadline of the issued misdemeanor order. The Tax Administration should think about the proposal to introduce misdemeanor orders according to the amount of the debt for which a warning was issued, so that they do not create a bigger problem for business entities than they have achieved the effect of regularly paying their obligations to the Tax Administration in the following period. In practice, it has been shown that there are several groups of business entities that do not execute their payments on time, so we have: 1) negligent business entities that do not check given payment orders, so it happens that the bank refuses to execute the payment order due to an error in the order, 2) calculators who have funds, but do not want to transfer them to the accounts of the tax administration because they may need them to pay suppliers and 3) critical ones who really do not have funds and every month they have a problem to make their payments to the state. The last group is the most affected by the issuance of these misdemeanor orders, thus putting them in even greater trouble and the possibility of shutting down the business entity. The group we called caculators is less threatened, but they can easily move to the critical group with these penalties. The group called negligent will certainly not be satisfied with the punishments, because in practice they know that they are punished for a mistake that they did not make, but in the process of payment through the bank, post office or payment points, there was a stoppage and the funds were transferred on another day when the deadline had already expired.

CONCLUSION

The tax, as well as the tax system, is a very dynamic and complex phenomenon that constantly evolves over time and therefore must be less flexible and must adapt to new conditions in the economic system.

The Republic of Serbia is a country in transition, which has been in the process of joining the European Union for a long time, and is constantly harmonizing its tax system. The Tax Administration of the Republic of Serbia bases its reform on having a modern system without any continuity with the old one. A major problem that the Tax Administration is struggling with in this reform is a high percentage of public debt, a large budget deficit, an increase in public expenditures, a deficit in the balance of payments, a lack of tax culture and a lack of trained personnel in the tax administration. In a short period of time, the government of the Republic of Serbia passed a large number of tax laws, which turned out to be worthless and insignificant. Since these laws were enacted in a hurry, there are many ambiguities, inaccuracies, vagueness in the tax laws and they create the possibility of legal

loopholes to avoid paying taxes. Because of this state of affairs, we come to the fact that by constantly amending and constantly correcting those laws, domestic and foreign investments are directly disincentivized. The tax system in the Republic of Serbia would have to be more transparent, with simplified administrative procedures, to have a reliable database, to become independent and separate from political parties so that the independent implementation of tax policy would lead to a fairer tax system. The previous reforms in the tax system are more of a cosmetic type than something fundamentally changed and a more serious reform was carried out. The real reform was done only in the creation of the E-tax portal, but we cannot thank the tax reform for that, but the reform of the public administration itself, which launched the E-administration portal and encouraged all other sectors to join the system (Serbian Chamber of Commerce, 2018). In the coming period, the Republic of Serbia should deal with tax reform in a serious way, and create a unique application that will be easy to control every taxpayer. The Tax Administration of the Republic of Serbia has a big problem with the number of employees, and the occupancy rate is only about 47.7%, and the reason for this is not employment bans, but very low incomes of employees (IMF, 2024).

Tax penalties have a significant impact on achieving tax discipline, but they are not the only factor. The effectiveness of penalties depends on their fairness, strict enforcement and the way taxpayers are perceived in the tax system. Although they can successfully discourage tax evasion, over-reliance on penalties can be counterproductive and lead to financial problems for individual taxpayers and the economy as a whole. The Tax Administration currently has a good framework that needs to be worked on in order to make it more acceptable for the entire system. Issuing tax violations is a system that is effective for business entities that have funds, and with them there is a noticeable increase in discipline in the following months from the issuance of misdemeanor orders, but there is a counter effect for business entities that have limited or no funds where they are in a problem and every a month late with their payments, which requires them to be charged even higher, and they find themselves in a problem from which they have no way out. The tax administration must create a more flexible system of punishment precisely because of these critical groups, because instead of raising discipline, a counter effect occurs where the tax administration enters into forced collection of property, wages, pensions, etc. Compulsory payment of these types requires a large expenditure of resources that the Tax Administration does not have, thus causing congestion and delays in the execution of regular activities.

Alternative measures, such as rewards for regular payment, voluntary tax reporting programs and education, can be equally effective in improving tax compliance in the long term. The most successful strategies include a combination of punitive and preventive policies, ensuring that taxpayers not only pay taxes, but also understand the importance of the process for society as a whole.

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HUMAN RIGHTS IN CRIMINAL PROCEDURE IN A SHADOW OF PENAL POPULISM

Svetlana Nenadić *

Author starts from the analysis of the causes, characteristics and claims of penal populism, as forerunner of political populism. She points to the paradoxes of penal populism, especially to fact that it does not achieve the desired effects of reducing the crime rate and that it becomes a self-serving political pamphlet. Author analyzes the negative impact of penal populism on the core foundations of the Rule of law principle. Finally, she analyzes the impact of penal populism on particular rights in criminal proceedings, namely: right to a fair trial - especially principle of independence and impartiality, presumption of innocence and equality of arms; right to a liberty; principle no punishment without law.

KEYWORDS: *human rights in criminal procedure, penal populism, right to a fair trial, right to a liberty, principle no punishment without law*

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1. PENAL POPULISM – CAUSES, CHARACTERISTIC AND CLAIMS

Penal populism is more than just public claim for more sever criminal justice policies. Penal populism is political announcement of the rise of populist politics. It is precursor to the full assault of populist politics on the democratic order primarily sough to radically reconstruct the penal system,[1] making a major shift in the configuration of penal power in modern society.[2] Penal populism, as forerunner of political populism, gives a hint of future society, that will bring us an end of Reason itself, the foundation stone of modernity[3]. This is why penal populism requires exhaustive research. Penal populism is not just a fashion trend of a society in crisis, but also an announcement of the society to come.

The policy of penal populism distinguished by its characteristics: first, growing politicisation of crime control and second is increasing and apparent desire of politicians to defer to public opinion when making decisions on crime policy.[4]

1.1 Causes

There are five causes of penal populism[5]. First - growing public anxiety and insecurity; second - the decline of trust in government and existing electoral process; third - crime, disorder discredited criminal justice elites; fourth - crime news, deregulation, and technological change; fifth - greater emphasis given to victims accounts of their experiences in the media.

Growing public anxiety and insecurity is phenomenon in sociology explained by risk society theory[6]. Risk society is social response of postmodern societies on various global challenges. These societies are becoming possessed on future and forecasting, or anticipating catastrophe[7], in order to pre-empt it. State actions are becoming focus on control and elimination of criminal risks and new anticipative and preventive measures in sphere of criminal politics are arise. These measures are quite often contrary to the foundations of rule of law and human rights. Risk societies are suffering from "fear of crime" which is described as "sponge absorbing all sorts of anxieties about related issues of deteriorating

1 J. Pratt, *Populism, Punishment and the Threat to Democratic Order, The Return of the Strong Men*, Routledge, 2023, pg 37

2 J. Pratt, *Penal populism*, Routledge, 2007, pg 8

3 J. Pratt and M. Miao, "Penal Populism: The End of Reason", u: *Get Your Knee Off Our Necks From Slavery to Black Lives Matter*, (eds. Bruce E. Johansen, A. Akande), Springer,111-141, pg 112.

4 T. Newburn, *Criminology*, Routledge, 2017, pg 1056.

5 J. Pratt (2023), pg 19-25.

6 Risk society theory is developed by two sociologists Ulrich Beck and Anthony Giddens.

7 U. Bek, *Svetsko rizično društvo u potrazi za izgubljenom sigurnošću*, Akademska knjiga, Novi Sad, 2011, pg 13.

moral fabric, from family to community to society"[8]. Fear of crime is disproportionate and excessive in the perception and presentation of damage. Finally, these societies are suffering on permanent existential anxiety.

Overloading with ontological security lead to losing faith in a state and ability to protect. Liberal democracy crises, or democratic fatigue, creates resentment against order imposed by society. People, who feel that have been left out, by mainstream politicians, are stepping on political scene. They are demanding return part of their rights that they gave up in the social contrast, because they do not trust these rights are being well managed by the state. New populist politicians have find this political niche of civil discontent, demonstrating that they are in control of crime problem and opening political race in which winner will be the one who promise longer and more effective punishments.

Risk societies have lost faith in experts and science to predict and protect people from various hazards. At the same time, populism rests on the antagonism between the "people" and alienated "elite". For them, elite groups - academics, judiciary are out of the touch with everyday realities.[9] Penal populists aim is to curb the power of judicial elite, and to make them listen to the "voice of people".

Media coverage of crime, as well as the increasing influence of information obtained from social network, create a new perception of crime in modern societies. Media system is based on binary code information/non information.[10] For commercially motivated press, information is a commodity. Therefore, the media deals with those topics that are easy to sell, such as existential questions – sexuality, death, sickness and criminality, through an emotional prism. Crime has become central part of media, for reporting crime is inherently able to shock, frighten, titillate and entertain.[11] The coupling of emotionality and crime is evident in the rise of Infotainment as a dominant style of postmodern journalism[12]. At the same time, media are creating an impression of crime epidemics, in front of which the inefficient police and the mild and complacent courts are powerless[13]. Legal events and legal issues are information only when they have an entertainment value, or prejudicial publicity. Law is too complicated to be represent in media style. When the media cope with legal events, one gets the impression of inaccuracy, superficiality, oversimplification, sensationalism, sometimes manipulation or distortion[14].

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8 J. Jackson, "Introducing fear of crime to risk research", *Risk analysis* 26 (1), 2006, 253-264, 261.

9 J. Pratt (2007), pg 8.

10 N. Luhmann, *Die Realitat der Massenmedien*, 1995, pg 17.

11 J. Pratt, (2007), pg 68.

12 S. A. Kohm, "Naming, shaming and criminal justice. Mass mediated humiliation as entertainment and punishment", *Crime, Media, Culture*, 2009 5, pg 189.

13 S. Sokovic, "The Contemporary Penal Populism: The Global Thrends and the Local consequences", in: *Law in the Process of Globalisation*: [collection of papers contributed on the occasion of 40th anniversary of the Faculty of Law of the University of Kragujevac], 156-163, pg 160.

14 G. Resta, *Trial by media as a Legal problem, A Comparative Analysis*, Aracne, 2008, pg 20.

Technological change in media sphere, which happened through social networks, enabled greater diversity of opinion and lesser control of media coverage by elites. Hence, criminal justice establishment was no longer able to control the parameters of public and political debate and knowledge about crime and punishment, as it had been able to do so previously.[15]

Technological and substantive changes in media sphere become an ideal base for growing presentation of victim's experiences. Personal experiences of victims began to outweigh the detached, objective analysis of experts.[16] The emotional media charge lead observer into the role of victim. Hence, there is growing demand for depersonalized law to take on a human (victim) form. As a consequence, laws are named after victims as normative monuments to their torment.

1.2 Characteristics

Penal populism is genuine offspring of post truth, defines as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief"[17]. Emotions, like rage and anger lies in the heart of penal populism. Penal populists feel betrayed by criminal justice elites – judges, prosecutors, lawyers and academics who are alienated from "ordinary people" and their values. Hence, "ordinary man" is axle of penal populism in all the splendour of various emotions. "Ordinary man" does not have to be rational, objective, educated or informed, but he/she consider himself/herself full-fledged member of debate, no less valuable than any representative of judiciary or academic "elite". Common sense personal belief become equally important as professional reasoned opinion. Their cognition is commonsensical and anti-intellectual nature[18], based more on feelings and intuition then on science and reasoned arguments. Hence, penal populism is focusing on induction of fear, manipulation, stereotyping, victims who are causing most emotional reactions, such as children[19]

In a world of penal populism debate is based on emotional tabloid rhetorical style of communication. Emotionally charged public narratives of crime may in turn contribute to an emotional consensus about crime.[20]

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15 J. Pratt (2023), pg 24.

16 ibid, 25.

17 "*Word of the Year 2016 is...*" *Oxford Dictionaries. Archived from the original on November 16, 2016., https://languages.oup.com/word-of-the-year/2016/*

18 J. Pratt (2007), pg 17.

19 Đ. Ignjatović, "Kazneni populizam", in: *Kaznena reakcija u Srbiji* (ed by Djordje Ignjatović), pg. 28.

20 S. A. Kohm, ibid, 188.

1.3 Claims

Penal populism creates an atmosphere in which everyone feels insecure. An impression that crime is out of control, and that we need "firm hand" or "strongman", lead societies to claims for criminal legal expansionism, stronger and more dramatic punishments.

Cultural tool of penal populism is imprisonment[21] whose only purpose is to separate "criminals" from "honest people". "Lock up and throw away the key!" and "Prison work!" are phrases of tearing citizens. Mechanisms of strengthening imprisonment are expanding the reach of prison, as well as introducing indefinite prison sentence such as secure facilities for mental abnormalities. Penal populism wave brought significant increase of prison population, driving it to the highest level ever.

Creators of penal populism's law showed exceptional creativity. Beyond imprisonment, they introduced sequence of other penalties, sanctions and measures in criminal and administrative procedure. Great number of citizens were put under some kind of preventive control, such are controls of movement in public space, administrative preventive detention, or compulsory registry. Criminal procedure is followed or substituted by indefinite civil confinement, or post prison confinement. Criminal law became overloaded by hyper-criminalisation, and judges are limited in sentencing policy.

In a sphere of procedural law, there are requests for more police power and fewer procedural safeguards for the accused. The rights of victims and the communities, that experience themselves as victims, are new procedural axle.

2. PENAL POPULISM'S PARADOXES

Penal populism is facing several contradictories and absurdities in creation and elaboration.

First, penal populism begins to flourish from the early 1990 at exactly the same time as crime levels begin to drop.[22]Studies have shown the same pattern in national systems that have embraced penal populism.[23]A question arises – why people are convinced that crime is increasing, when the facts are showing that crime rate is decreasing. The reason may lay in the fact that public does not form an opinion based on facts, but on impressions. Once, when the opinion is create, it does not matter what the facts are saying, because "if men define situations as real, they are real in their consequences".[24]

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21 J. Pratt (2007), pg 28.

22 J. Pratt, (2007), pg 36.

23 Đ. Ignjatović, ibid, pg. 28.

24 Sociological Thomas theorem in W.I. Thomas and D.S. Thomas, *The child in America: Behavior problems and programs*, New York: Knopf, 1928: 571–572.

Second, penal populism is not working. If the reduction of criminality is the main goal of penal populism, than we can conclude that this goal has not been achieved. Criminological research confirms that the prison sentence and the length of the prison sentence do not significantly affect the reduction of criminal recidivism.[25] As well, stronger criminogenic effects were found for greater differences in time served, which confirms the statement that prisons as "schools of crime"[26].

The three-strikes laws, as one of the most popular penal populism fist, gave poor results. These laws, created for habitual offenders, significantly increase the prison sentences of convicted persons, who have been previously convicted, of two or more violent crimes or serious felonies. The counties sentencing the most heavily under "Three Strikes" do not show the biggest crime declines.[27] Opposite, there are some signs that crime rate in three-strikes law states increased. Some research shows that three strike laws increase homicides "because a few criminals, fearing the enhanced penalties, murder victims and witnesses to limit resistance and identification…the three-strike laws are associated with 10–12 percent more homicides in the short run and 23–29 percent in the long run".[28]

Penal populist's strongman is forgetting that law and criminal justice cannot reduce violent crimes, if it is not accompanied with other measures in the area of social support, and prevention mechanisms.[29] Growing trend of penal populism opens up space for increase of crime rate due to once more reason. The sociological and psychological theory of self-fulfilling prophecy says that one group's expectations for the behaviour of others can unintentionally contribute of developing such behaviour, thus belief or expectation influences behaviours in a way that makes the prediction came true. Thus, society's expectation that crime will explode may lead to such an explosion.

As elaborated, penal populism do not decrease crime rate. This fact is used as an excuse for even stronger penal reaction. Every failed penal popular activity is an excuse for new one. Over time, penal populism serves itself, not to the purpose.)

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[25] Gendreau, Goggin i Cullen (1999) iz Z. Stevanović, J. |Igrački, "Dužina zatvorske kazne i recidivizam", *Revija za kriminologiju i krivično pravo,* 2011, 49 (1). pp. 119-130.

[26] P. Smith, C. Goggin, P. Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences 2002-01*, Public Works and Government Services Canada, 2002, pg 20.

[27] M. Males, D. Macallair, A, Khaled Taqi-eddin, "Striking Out: The Failure of California's "Three Strikes and You're Out" Law", Justice Policy Institute, Marc 1999, table 3.

[28] T. B. Marvell, C. E. Moody, "The lethal effects of three-strikes laws", *The Journal of Legal Studies*, Vol. 30, No. 1 (January 2001), pp. 89-106, pg 89.

[29] M. Matic Boskovic, J. Kostic, "Penal populism and ab(use) of criminal law", In: *Revisiting the Limits of Freedom While Living Under Threat*: 9-10 November 2023, Riga: collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia. University of Latvia Press, pp. 79-88, pg 86.

HUMAN RIGHTS IN A CRIMINAL PROCEDURE AND PENAL POPULISM

Criminal procedure is very important issue for democratic societies and, from a normative point of view, it has been almost completely constitutionalized.[30] Effective legal protection of all human rights demands a well-functioning legal system, "thus, procedural human right could be seen as codifications of rule of law principles…in this sense, procedural rights are fundamental to the protection of other human rights".[31] Procedural rights are, in some way, rule of law rights and their function is to convey, in rights-form, the burden of certain principles of the political ideal we call "the Rule of Law"[32].

Democracy fatigue[33], as modern political trend, shook the very foundations of the rule of law. In tune, penal populism shows hostility to rules of legal procedure and right based claims, considering rights as tools of an embattled minority.[34]Populists are recognising only the rights of the general public at large to safety and security.[35] Penal populists are forgetting that fair trial idea is in the core of the human right's doctrine, not just as subjective right. In absence of that right, all other rights are jeopardize. Without right to a fair trial, state as always stronger in the process, could not be prevent from abusing that position.[36]

Penal populism is sharing populist antipathy towards human rights. In the UK, one hears the Human Rights Act condemned as a "Criminals Charter"[37]. The criminal process for them is nothing more than a charade, full of technicalities and loopholes, which serve only to the defendant. Criminal procedural rules are seen as reason why criminal justice is slow and mild and the defendant is the only one who is taking adventage of those rules. This trend leads to society's renunciation of procedural mechanisms of criminal justice that originate from the values of equality and freedom, exchanging them for desired goal - a more effective fight against crime.[38]

What is a stumbling block between penal populist and rule of law vision of ideal criminal procedure? At the centre of penal populism's vision is security, and at the centre

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30 WJ Stuntz, "Substance, Process and the Civil – Criminal Line", 1996, *Journal of Contemporary Legal Issues* 1

31 G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford University Press, 2013, pg 56.

32 J. Waldron, "Rule-of-Law Rights and Populist Impatience", in: *Human Rights in Time of Populism, Challenges and Responses,* (ed. by Gerald L. Neuman), Cambridge University Press, 2020, pg 43.

33 Richard, Javad, Heydarian, "Penal Populism in Emerging Markets: Human Rights and Democracy in the Age of Strongman", in: *Human Rights in Time of Populism, Challenges and Responses*, (ed. by Gerald L. Neuman), Cambridge University Press, 2020, pg 134.

34 J. Pratt (2007), pg 20.

35 *Ibid,* pg 21.

36 D. Robertson, *A Dictronary of Human Rights*, 2nd edition, Europa publications, London 2004, pg 80.

37 J. Waldron, "Rule-of-Law Rights and Populist Impatience", in: *Human Rights in Time of Populism, Challenges and Responses*, (ed. by Gerald L. Neuman), Cambridge University Press, 2020, pg 46.

38 S. Nenadic, *Pretpostavka nevinosti sa posebnim osvrtom na praksu Evropskog suda ya ljudska prava*, Službeni glasnik, 2021, pg 269.

of the rule of law vision is fairness. Penal populism is outcome related and rule of law is fairness related. Rule of law is focused to procedural fairness, rather than outcome.[39] Those rules does not guarantee the truth about crime or penalty, but they do guarantee a fairness. Rule of law procedure is means for procedural fairness, which does not necessary, have to lead to substantive fairness in a sense of justice. Thus, rule of law procedure is an obligation of means, whereas penal populism is asking an obligation of result.

Tension between rule of law and penal populism is nothing more than the reflection of constant tension between security and freedom from the social contract. In the criminal law, the idea of balance between security and freedom is expressed in the form of a balance between the goals of crime control and respect for procedural rights[40] and penal populism tend to upset this balance.

PARTICULAR RIGHTS IN A CRIMINAL PROCEDURE AND PENAL POPULISM

Penal populism is affecting a numerous rights in criminal procedure. Human rights in criminal procedure are interconnected and conditional, so we can say that there is no right completely immune to the penal populism's effects. Therefore, penal populism affects some rights directly, and others indirectly.

Basic human rights in the criminal procedure are defined as right to a fair trial. As well, many other human's rights are closely connected with rights in the criminal procedure, and thus can be violated. Directly susceptible to penal populism's influence are: right to a fair trial - especially principle of independence and impartiality, presumption of innocence and equality of arms; right to a liberty; principle no punishment without law.

4.1 Principle of independence and impartiality of the tribunal

Independence and impartiality of the court are closely connected. Precondition for impartiality of the court is court's independence. [41] Independency of court is valued according to the position of judicial power in relation to executive and legislative. Impartiality is best defined as absence of bias. European court of human rights established the standards of impartiality. First, the members of a court should not start with the preconceived idea that the accused has committed the offence charged.[42] Second, there is subjective and objective approach of impartiality. Subjective approach - that is endeavouring to ascertain

[39] S. Trechsel, "Why Must Trials be Fair?", (1997) *31 Israel Law Review* 94, pg 102.

[40] B. Hudson, *Justice in the Risk Society*, Sage publications, London, 2003, pg 41.

[41] P.H.Russell, „Toward a General Theory of Judicial Independence", in: (eds: P.H. Russell, Daavid M. O Brien), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World,* University Press of Virginia, 2001, pg 1.

[42] *Barbera, Messegue and Jabardo v. Spain*, EctHR, App. no. 10590/83, 6 December 1988, para 77.

the personal conviction of a given judge in a given case, and an objective approach - that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[43]

Relation between penal populism on one side and independency and impartiality of court on other side is based on relation between populists and elites. Critiques of elites define populism[44], and while political populist's movement are critical to the economic and political elite, penal populists are focused on judicial elite – more judges than prosecutors. Penal populism is based on thesis that criminal procedure is legitimate issue in public debate of democratic society and that community has not only a right, but an obligation to supervise over criminal judiciary.[45]

"Supervision" over criminal judiciary led to the crisis of confidence or legitimacy in the courts[46]. Penal populism is diminishing the authority of criminal justice officials[47]. Judges were proclaimed as main culprits for "crime explosion". They are seen as "soft on crime", alienated from the community and "ordinary people", a remoted elite with democratic deficit. Thus, people are keen to take back right to punish from alienated judges.

As judges failed to protect the community, the community has to deal with status and jurisdiction of judges. In New Zealand, the Labour Justice Minister, shortly after his party came to power, warned judges that they risked losing their discretionary sentencing powers if they did not impose longer prison sentences[48].

The influence over judiciary in penal populism is realized through actions of legislative and executive, as well as through media. Depending on legal system, judges can be more or less accountable to the public and subject to attend political influences.[49] Also, they are seen as public servants. Forms of accountability, traditional for judiciary, are changing. Traditionally, accountability of judges is estimated by appellate court. New demand is accountability to the public and community. Thus, a subject of assessment is no longer legal expertise, but demands of the community. When a judge think over more about how the community will react to the verdict, than how he will apply the law, then his impartiality is compromised. There is no objectivity when judes have to fulfill the public expectations on conviction and high sentence.

Therefore, a noticeable political trend is demand for restriction of judicial discretion sentencing. For that purpose, legislative and executive are creating advisory bodies - secu-

43 *Piersack v. Belgium*, EctHR, Appl.no.8692/79, 1 October 1982, para 30.

44 M. Mangset, F. Engelstad, M. Teigen and T. Gulbrandsen, The populist elite paradox: using elite theorz to elucidate the shapes and stakes of populist elite critiques, 203-222, pg 204.

45 S: Nenadić, ibid, pg 267.

46 A. Freiberg, K. Gelb, "Penal populism, sentencing councils and sentencing policy", in: *Penal populism, sentencing councils and sentencing policy*, Routledge, 2008 pg 1-15, pg 6.

47 John Pratt (2007), 46.

48 Ibid, pg 15.

49 Ibid, pg 160.

rity councils for judiciary whose purpose is to control the development of sentencing policy by involving a range of community stakeholders. Security councils, between the legislature, the executive and the judiciary are buffer between the public and media calls for punitive responses to crises and a more considered legislative response[50]. These trends are tending to rip off a peace of judiciary jurisdiction and put it in hands of executive. Thereby, the independence of judiciary is endangered and the separation of powers is disturbed.

4.2 The Presumption of Innocence

In the criminal procedure, there is inherent inequality of parties. Public prosecutor is immeasurable stronger party. Presumption of innocence is nothing more than leveling of initial inequality between public prosecutor and defendant, or deliberately overturning the scale[51] in favor of defendant. Turning the scale, aims to establish a balance as guarantee of equality of arms and that nobody will be wrongly convicted. Presumption of innocence is moral and political principle, based on a widely shared conception of how society should exercise the power to punish[52]. Presumption of innocence is important legal instrument in democratic societies, because these societies have an obligation of minimalizing the risk of wrongful conviction[53]. It is first line of protection from state's arbitrariness and it limits encroachment of the state in fundamental rights.

The presumtion of innocence is legal, not factical presumption, and it's elements are: burden of proof; *in dubio pro reo*; privilege anti self-incrimination; reputation of defendant, respect of his/her dignity. Each of these elements are under pressure of penal populism. Thus, there is claim for introduction of numerous substantial and process mechanisms. These mechanisms should make it easier for the prosecutor to prove guilt. As well, there is claim for restrictive application or void of certain rights of defendant, such as privilege *in dubio pro* reo and privilege anti self-incrimination.

Defendant's dignity is in close connection with his/her reputation and the prohibition of stigmatizing. The reputation and honour of the defendant are protected by the presumption of innocence. The connection between honour and the presumption of innocence is confirmed by the ECtHR in the case *Konstas v Greece*[54] stating that „the presumption of innocence, as a procedural right, serves mainly to guarantee the rights of the defence and at the same time helps to preserve the honour and dignity of the accused".

The presumption of innocence should protect from the creation of a symbolic pres-

50 A. Freiberg, K. Gelb, ibid, pg 7.

51 B. Hudson, *Justice and Security in the 21st century: Risks, Rights and the Rule of Law*, Routledge, New York, 2012, pg 207.

52 A. Ashwort, „Four threats to the presumption of innocence", *The International Journal of Evidence and Proof*, 2006, 10, 241-279, pg 249.

53 A. Stumer, *The Presumption of innocence, Evidential and Human Rights Perspectives*, Hart Publishing, 2010, pg 30-36.

54 *Konstas v Greece*, ECtHR, App.no.53466/07, 24 May 2011, para 32.

sure on the defendant's guilt. Stigmatization of the defendant, which is marking him/her with a mark of shame, can lead to the creation of an image of the defendant as „actually guilty", before the end of the proceeding. Stigmatization can produce another unfavorable effect. It can create the impression that the decision on guilt is made, by the pressure, outside the judicial institutions.

Reputation and dignity of the defendant are violated mostly by media and statements of officials. It is undeniable that the presumption of innocence is mostly violated in media. However, here we have competing rights. On the one hand the right to freedom of expression and democratic control of the judiciary. On the other hand the presumption of innocence and the prohibition of undue influence over judges and prosecutors. Weighing these rights is not easy, especially in penal populism societies. In these societies, populists are refering on freedom of expression, in a name of democratic control of judiciary, but their claims are nothing more than unde influence over judiciary. In the mind of penal populists, there is nothing wrong with this claim.

In practice, media's intrest over criminal casis turns into „trial by media" phenomenon which had been recognized by ECtHR as main risk for legitimicy of judiciary in modern society. "it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes."[55] This phenomenon is reinforced in penal populist societies by using hyperrealistic media content and cyberspace.

Judges, prosecutors and police officials have to respect professional standards regarding public statements. They have an obligation to respect confidentiality and discretion, and pay special attention to the impartiality and integrity of the profession. As well, they may not make statements, which would affect the fairness of the proceedings, in any way. They have to take care of the choice of words so that their statements do not encourage the belief that someone is guilty. However, under penal populistic pressure, judiciary professionals sometimes relent on professional standards.

There are two more trends in criminal law closely connected to the presumption of innocence. First is growing demand for preventive criminal law, that goes hand in hand with the fear of crime and penal populism. This trend is broadly developed under the auspices of predictive information technologies of AI whose task is to identify individuals who fit the prototype of future secutiry threat.

Second trend is excessive use of simplified forms of criminal procedure, such as plea bargaining, in which case defendant waives of right to trail and the presumption of innocence. This trend is turn from trial to negotiation. It is transforming criminal justice, from a status in which the state had to prove the defendant's guilt to a status in which defendant has

[55] *The Sunday Times v. the UK*, ECtHR, App. no. 6538/74, 26 April 1979, para 63.

to make an effort to resist pressure to plead guilty.[56] Simplified forms of criminal procedure are ideal for impatient penal populist's who demand quick delivery of justice. Judges are prone to aprove such agreements because they are depriving them from the risk of populist rage, due to a possible aquittal.

4.3 Right to a liberty

As mentioned, cultural tool of penal populism is imprisonment[57], and prisoners are seen as right-less object[58]. Penal populists believe that imprisonment should be used as measure for protection, not just as penalty in criminal law. Prison, as a measure, should be implemented not only in criminal law, but in different branches of law, such is administrative law and misdemeanour law. Thus, penal populism is keen to implement prison in more flexible modes - for preventive purposes. Also, it is asking the length of the prison sentence, to be as long as possible. These two claims are recognizable through preventive detention and life imprisonment.

Detention is preventive if no criminal offence has actually been committed, the detainee is not subjected to a charge, nor afforded the opportunity of trial before a competent court[59]. It is also named - administrative detention. Basic question should be asked – whether preventive detention prevents a crime or punishes danger?

Preventive detention is extremely flexible legal instrument. It can be used outside of criminal procedure and it is desired instrument for governments, which are avoiding the typical features of the criminal justice system[60]. It is commonly used in application of antiterrorism laws, laws against hooliganism in sport, laws for protection from domestic violence. The core idea of preventive detention is to prevent a crime by expulsion the potential offender from the society.

With the growth of penal populism, the position of the ECtHR regarding preventive detention has been significantly changed. The ECtHR had a position on the inadmissibility of preventive detention[61]. In 2018 ECtHR made a strong turn in the case *S., V. and A. v. Denmark*[62], allowing the possibility of deprivation of liberty outside of the context of criminal law, and due to the existence of risk of committing a criminal offense.

In the absence of the death penalty, favourite punishment of penal populists is life

[56] M. McConville and C. L. Mirsky, *Jury Trials and Plea bargaining: A True History*, Hart publishing, Oxford, pg 3.

[57] J. Pratt (2007), pg 28.

[58] A. Dyer, "Can Charter of Rights Limit Penal Populism? The Case of Preventive Detention", *Monash Unievrsity Law Review*, Vol 44, No 3, 520-566, pg 548.

[59] C. Macken, „Preventive Detention and the Right of Personal Liberty and Security Under the International Covenant on Civil and Political Rights", 1966 *Adelaide Law Review*, no.1., 2005, pg 3.

[60] C. Macken, ibid, pg 2.

[61] *Ciulla v. Italy*, EctHR, Appl.no.15598/08, 7 March 2013.

[62] *S., V. And A. v. Denmark*, Appl.nos.35553/12 and 36711/12, 22 October 2018.

imprisonment, to be precise irreducible life sentence - a life sentence without the possibility of release. Life imprisonment is compatible with the European Convention on Human Rights, as long as prisoners have some chance of being released and it is possible for their sentences to be reviewed. Life sentence without the possibility of release is violating prohibition of torture. In cases *Vinter and others v UK*[63] *and Harkins and Edwards v UK*[64] ECtHR establishes dual test that there will be violation of prohibition of torture if the applicant's continues imprisonment can no longer be justified on an any legitimate penological ground and if the sentence is irreducible de facto and de jure.

In case of *Harakchiev and Tolumov* v Bulgaria, [65] The Grand Chamber considers that it would be incompatible with human dignity, which lies at the very core of the Convention, to forcibly deprive a person of his freedom without the possibility of rehabilitation and giving him the chance to one day regain that freedom. The right to the chance, that freedom can be restored, is also called "the right to hope"[66].

Principle no punishment without law

The principle no punishment without law is the principle of legality and it is essential element of the rule of law. It is guided by three legal principles - *lex praevia, lex certa and lex stricta*. These principles guarantee the prohibition of retroactivity in criminal substantive law, avoiding general clauses and prohibition of interpretation by the analogy.

Penalty sentencing is not a subject of human right's law. Nevertheless, human rights demand consistency, or lack of disparity between sentences, punishment to be imposed consistently and non/arbitrarily and not disproportionate[67]. To put it more simply, the punishment should fit the crime. The importance of arbitrariness prevention in the sentencing process is defined as human right in EU Charter of Fundamental Rights, which directs that "the severity of penalties must not be disproportionate to the criminal offence"[68].

Rigid principles - *lex praevia, lex certa and lex stricta*, disable flexibility in application of criminal law, which is in contrasts with penal populistic claims. Therefore, penal populists are trying to disturb these principles. It is done twofold.

First way is intervention in procedural law by reducing the jurisdiction of the judge and increasing the jurisdiction of the prosecutor in imposing the sanction. For example, reducing discretionary sentencing powers of judges by introducing mandatory sentencing provisions and simultaneously strengthening the role of prosecutors in determining the sentence by enormous implementation of plea bargaining.

Second way is intervention in substantive criminal law. It is reflected in explosive

63 *Vinter and others v UK*, APP.no.66069/09.

64 *Harkins and Edwards v UK*, , App.no.9146/07.

65 *Harakchiev and Tolumov v. Bulgaria*, ECtHR, App. nos. 15018/11 i 61199/12, 8 July 2014., para 245.

66 Separate opinion of judge Power Ford in *Vinter and others v The United Kingdom*, ECtHR, App. nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

67 S. Summers, *Sentencing and Human Rights, The Limits of Punishment*, Oxford, 2022. pg 16.

68 EU Charter of Fundamental Rights Art. 49.

growth in the size and scope of the criminal law[69], expansion of crime offences and significant increasing of prescribed punishment. It is well known as overcriminalization. Husak says "the most pressing problem with the criminal law today is that we have too much of it".[70] Overcriminalization is welcomed by penal populists. However, it has a number of risks, frequently creating legal insecurity, because people are not sure any more is their behaviour legally permissible, or not. Also, more crimes produce injustice.[71]

In addition, we have new phenomenon in substantive criminal law, such as "open ended" or "catch all" provisions. These provisions are infringing the main principle of criminal substantive law – *lex certa* and they are creating high level of legal insecurity, because it is almost impossible to predict on what behaviours it can be implemented. Finally, introducing different kinds of, so called, preventive measures with a clear punitive character.

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[70] Ibid, pg 3.

[71] Ibid, pg17.

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THE IMPACT OF THE NEW EU ARTIFICIAL INTELLIGENCE ACT ON CRIMINAL LAW AND THE PROTECTION OF CITIZENS' RIGHTS IN THE DIGITAL AGE

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The EU's AI Act is the first comprehensive legislation to regulate AI. It introduces a structured framework that categorizes AI systems based on the level of risk. This framework is designed to ensure legal certainty and compliance, while emphasizing the protection of fundamental rights such as privacy, non-discrimination, and human dignity. However, such an approach has also faced criticism for its rigidity and a complex governance structure. The EU Artificial Intelligence Act (AI Act) seeks to create a broad regulatory system for AI in the European Union. This law could greatly affect criminal law and citizens' rights in the digital world by tackling risks from AI technologies and making sure they are used in an ethical and clear manner. By complementing existing EU laws, such as the General Data Protection Regulation (GDPR), the Act enhances data privacy and security. It requires AI systems to handle personal data transparently and ethically, especially in sensitive areas such as criminal justice, social services, education and healthcare. Citizens affected by decisions made using AI will have the right to understand how these decisions were reached and seek legal redress if they believe the system acted unfairly or unlawfully. Overall, the EU AI Act represents a significant step toward regulating AI technologies to ensure they align with fundamental rights and ethical standards. While it has the potential to strengthen protections for citizens' rights and enhance fairness in criminal justice, its success will depend on the effectiveness of its implementation across the EU. Reflecting on the possible problems in the implementation, several selected open issues are addressed, namely exemptions foreseen for high-risk systems, legal remedies and governance mechanisms.

KEYWORDS: *Artificial Intelligence (AI), AI Act, AI governance, legal remedies*

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1. INTRODUCTION

Artificial Intelligence (AI) has become a significant game changer that will not only trigger a new technological revolution but has the potential to substantially transform human society. The wide-spread introduction of the new technology can bring on one side significant benefits, including improved efficiency, innovation, and new capabilities for solving complex problems. However, on the other side, it has the potential for significant misuse and raises fundamental legal and broader social questions, e.g. new challenges related to privacy and data protection, security, fairness, and accountability. Governments and legislators worldwide are struggling with the task of how to regulate AI to ensure its safe development and use in line with social values and legal standards. In this context, the European Union (EU) has emerged as key player in the landscape of AI regulation. The EU has taken a legislative proactive path with the introduction of the AI Act, which seeks to establish a comprehensive legal framework for AI. On the other hand, the UK has charted its own course with the National AI Strategy, aiming to balance innovation with public trust. The U.S. has adopted a more decentralized approach, with various federal and state-level initiatives shaping the regulatory framework. Having in mind that the EU has currently taken legislatively most formal approach, this paper will focus on the aspects the new AI Act potentially has on national legislations, especially considering fundamental rights and criminal legislation.

Key themes include the need for transparency, accountability, and fairness of AI, especially in high risk applications used by law enforcement.

2. AI REGULATORY FRAMEWORK IN THE EUROPEAN UNION

The European Union's AI Act,[1] adopted in June 2024. represents one of the most comprehensive efforts to regulate AI globally. It should be noted that this Act is adopted in the form of Regulation, thus making it directly applicable in the EU Member States. Considering complex and demanding requirements for implementation, *vacatio legis* for implementation of all provisions is set for 24 months[2], allowing for Member States to secure necessary preconditions for its application.

The Act is designed to address the risks associated with AI and ensuring that AI systems are safe, transparent, and trustworthy. The Act adopts a risk-based approach, clas-

[1] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), *OJ L, 2024/1689, 12.7.2024.*

[2] Article 85 AI Act

sifying AI systems into four categories: prohibited,[3] high risk,[4] limited risk (e.g. intended for direct interaction with humans, and general-purpose models),[5] and minimal risk. Each category is subject to different regulatory requirements, with the strictest controls applied to AI systems which pose high risk to fundamental rights and safety. For high-risk systems obligations such as risk management, data governance, technical documentation, transparency, human oversight, cybersecurity and conformity assessment are foreseen.[6] For general purpose models, specific documentation, copyright, and transparency obligations (for example, content used for training) exist, while for such models with systemic risk an assessment and mitigation of possible risks has to be provided as well.[7]

By addressing issues such as discrimination, data privacy, transparency, and accountability, the Act has the potential to significantly enhance the safeguarding of human rights in the digital age. The AI Act aims to prevent discrimination and bias in AI systems. [8]Apart from high-risk systems applied by law enforcement agencies, high-risk applications are also considered as those used, for example, in recruitment, healthcare, education and social services. Measures applicable to high-risk systems are particularly important in protecting vulnerable groups and promoting equality and non-discrimination, as enshrined in the Charter of Fundamental Rights of the EU. The Act prescribes rigorous testing, documentation, and monitoring to detect and bias, ensuring fairness in the application of AI technologies.

The protection of privacy and personal data could be seen as the main driving force of the AI Act. Building on existing legislation such as the General Data Protection Regulation (GDPR), the Act introduces additional safeguards to ensure that AI systems handle personal data securely and transparently. Individuals are given greater control over their data, with provisions requiring AI systems to minimize the risk of data misuse.[9]

Transparency and accountability are emphasized throughout the AI Act.[10] Developers and deployers of high-risk AI systems are required to maintain comprehensive records and provide clear explanations about the functioning of their systems. For individuals affected by AI-driven decisions, particularly those with significant legal or personal consequences, the Act guarantees the right to meaningful explanations. This transparency enables individuals to understand and challenge decisions before competent administrative

3 Article 5 AI Act.

4 Annex III AI Act.

5 Articles 50-56 AI Act.

6 Articles 9-27 and 43 AI Act.

7 Articles 53-55 AI Act.

8 Mantelero, A. (2024). The Fundamental Rights Impact Assessment (FRIA) in the AI Act: Roots, legal obligations and key elements for a model template. SSRN

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10 In line with Articles 7 and 8 of the Charter of Fundamental Rights of the EU

and judicial bodies.[11]

The Act also clearly prohibits harmful AI applications that are incompatible with fundamental rights. Social scoring systems are explicitly banned, as is indiscriminate and mass surveillance through AI.

In terms of effect on criminal justice, the Act also includes specific safeguards for high-risk applications of AI by law enforcement bodies. These systems are subject to stricter oversight to prevent violations of rights such as freedom of expression, freedom of assembly, and the right to a fair trial. For instance, predictive policing systems must adhere to strict accuracy standards to avoid unjust profiling, and the use of facial recognition and biometric systems in public spaces is heavily restricted to protect privacy and individual freedoms. By regulating these high-stakes applications, the AI Act seeks to strike a balance between public security and the protection of fundamental rights.[12]

These provisions aim to prevent unfair automated decisions, shield people from illegal mass surveillance or profiling, and confirm that all AI-generated results in criminal justice are reviewed by humans.

However, although general legal safeguards seem to be in place, practical questions in the implementation may arise.

SELECTED OPEN ISSUES

Exemptions

Although the AI Act provides for clear written rules on prohibited and high-risk systems, legal certainty is being undermined by various exemptions. For example, in Article 5(1)(d) an exemption to the prohibition of criminal risk assessments based solely on profiling stating that "*this prohibition shall not apply to AI systems used to support the human assessment... already based on objective and verifiable facts directly linked to a criminal activity*". The same applies to the prohibition to use AI systems to infer emotions "*except where the use... is intended to be put in place or into the market for medical or safety reasons*,"[13] or the prohibition of biometric categorisation based on race, political opinions, trade union membership, etc. but "*does not cover any labelling or filtering of lawfully acquired biometric data sets ... in the area of law enforcement.*"[14] This is even more so for the sensitive area of real time remote biometric identification in publicly accessible spaces by law enforcement where an extensive exemption was permitted without a full clarification on the notion of "publicly accessible spaces" or "substantial and imminent threat."[15]

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11 Supporting the right to good administration (Article 41 of the Charter of Fundamental Rights of the EU)

12 Orwat, C., et al. (2022). Normative Challenges of Risk Regulation of Artificial Intelligence and Automated Decision-Making.

13 Article 5(1)(f) AI Act.

14 Article 5(1)(g) AI Act.

15 Article 5(1)(h) AI Act. Certain clarifications are provided in the recitals (Recitals 33 to 35).

Governance and Enforcement Mechanisms

The AI Act introduces an extremely complex governance system consisting of EU and national level with a multitude of different actors.[16] At national level, national competent authorities will be responsible consisting of at least one notifying authority[17] and one market surveillance authority[18] which shall exercise their powers independently, impartially and without bias. The names of such authorities must be notified to the Commission.[19] Further, the notifying authorities will authorize notifying bodies as third party notified bodies responsible for conformity assessment.[20] Here there will be an interaction between national and EU level, as the notifying authority has to notify the names of the notifying body to the Commission and other Members States, with the possibility to object in two months. If an objection is raised the Commission will decide with a decision.[21] Based on this it is unclear which courts will be responsible if the notifying body objects to the Commission decision and what legal remedy is available to the notified body (e.g. CJEU, national courts or both). At EU level, several bodies will be responsible, namely the Commission,[22] Commission's AI Office, the European Artificial Intelligence Board, the Advisory forum and the Scientific panel of independent experts.[23]

The AI Office will be responsible for regulatory oversight and enforcement with special role for the general purpose AI models.[24] As regards the Regulation, it will, inter alia, develop tools, methodologies and benchmarks for evaluating capabilities of general-purpose AI models, in particular for very large general purpose AI models with systemic risks; monitor the implementation and application of rules on such models and systems; monitor the emergence of unforeseen risks; investigate possible infringements of rules on general-purpose AI models and systems. To summarise, the system is a multi-layer system comb-

16 See also Novelli, C., *et al.* (2024). A Robust Governance for the AI Act: AI Office, AI Board, Scientific Panel, and National Authorities (https://philpapers.org/archive/NOVARG.pdf).

17 Notifying authority is the authority responsible for carrying out procedures for the assessment designation and notification of conformity assessment bodies. Article 3, point 19, and Article 28 AI Act.

18 These are authorities under Regulation (EU) 2019/1020 on market surveillance and compliance of products (OJ L *169, 25.6.2019, p. 1)*. Article 3, point 26, AI Act. Such authorities ensure that products comply with the requirements set out in the applicable Union harmonisation legislation and to ensure protection of the public interest covered by that legislation.

19 Article 70 AI Act.

20 Articles 29 AI Act.

21 Article 30 AI Act. On further details on notified bodies see Articles 31-39 AI Act.

22 The Commission will be responsible for procedures (delegated and implementing acts), guidelines, classifications, prohibited systems, harmonised standards and high-risk obligations, and enforcement. See, Novelli *et al.*, *supra*, p. 7.

23 Articles 64-69 AI Act.

24 Article 64 AI Act. See also Commission Decision of 24 January 2024 to establish the European AI Office (C(2024) 390 final). In Recital 5 it states that "foundations for a single governance system for AI in the Union should be laid down."

ing national and EU authorities and multiplying the authorities at EU and national level. A key to success will be the role of the AI Office. Such a new system will need several years of adjustment and fine tuning and third state relying on established channels might have an initial benefit in comparison with the new structure.

Legal remedies

One of the added values of the AI Act are provisions addressing legal remedies for the affected person providing legal certainty to the individual. In principle, the Regulation does not alter the already existing system such as on data protection, civil liability or fundamental rights violations. In that regard the AI Act clearly states that it is "*without prejudice to existing Union law, in particular on data protection, consumer protection, fundamental rights, employment, and protection of workers, and product safety, to which this Regulation is complementary. As a consequence, all rights and remedies provided for by such Union law to consumers, and other persons on whom AI systems may have a negative impact, including as regards the compensation of possible damages pursuant to Council Directive 85/374/EEC remain unaffected and fully applicable.*"[25] It further states that "*this Regulation aims to strengthen the effectiveness of such existing rights and remedies by establishing specific requirements and obligations, including in respect of the transparency, technical documentation and record-keeping of AI systems.*"[26] In addition, the Regulation specifically mentions also rights under data protection rules whereby the "[h]armonised rules for the placing on the market, the putting into service and the use of AI systems established under this Regulation should facilitate the effective implementation and enable the exercise of the data subjects' rights and other remedies guaranteed under Union law on the protection of personal data and of other fundamental rights."[27] Further, in Article 85 AI Act that any natural or legal person may submit a complaint to the relevant market surveillance authority if considering that there has been an infringement of the provisions of the AI Act.[28] This seems a very broad legal remedy as the Regulation does not use the term "affected person." It seems that market surveillance authorities have a lot of flexibility when considering such complaints when the AI Act states that "[i]n accordance with Regulation (EU) 2019/1020, such complaints shall be taken into account for the purpose of conducting market surveillance activities and shall be handled in line with the dedicated procedures established therefor by the market surveillance authorities."[29] In addition, part of remedies is the right to be adequately informed. Hence, any affected person subject to a decision taken based on high-risk AI systems and

25 Recital 9 AI Act.

26 *Ibid.*

27 Recital 10 AI Act

28 See Recital 170 AI Act.

29 Article 85 AI Act, second subparagraph.

which produces legal effects or similarly significantly affects (adverse impact on health, safety or fundamental rights) shall have the right to obtain from the deployer clear and meaningful explanations of the role of the AI system and the decision taken.[30]

Further, there are some open questions regarding legal remedies in front of courts, national and the CJEU. If the person is not satisfied with the decision or lack of decision of the market authority can it go to court to check the decision or start proceedings due to silence of the market authority?[31] Further, regarding decisions of the EU AI Office, especially as regards its power to act as a market authority when generative (general purpose) AI is concerned, it is not clear if its decisions are subject to proceedings before the CJEU and under what conditions.[32] In that regard the provisions of judicial review could have been clarified, as well as AI liability covered in the AI Act itself. At the moment, AI liability will be dealt with several different instruments and levels of jurisdiction, namely EU product liability directive (PLD),[33] non-contractual fault liability with national rules and certain proposed harmonisation,[34] contract liability and national criminal law liability.

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30 Article 86(1) AI Act.

31 Regulation (EU) 2019/1020 on market surveillance and compliance of products provides in Article 18 procedural rights for affected economic operators by the decision of the market authority. However, it does neither answer to some open questions above. See EP AM 629 introducing explicitly the right to a judicial remedy against the national market authority. See also Stockhem, O. (2022). Access to Justice and Effective Remedy in the EU AI Act: The State of Play, Center for Democracy and Technology (https://cdt.org/insights/access-to-justice-and-effective-remedy-in-the-eu-ai-act-the-state-of-play/). See also EDRi (2022). Ensure rights and redress for people impacted by AI systems (https://edri.org/wp-content/uploads/2022/05/Rights-and-Redress-AIA-Amendments-for-online.pdf).

32 The EP in its position went much further calling also for a judicial remedy after the national authority decision. See AM 133: "As the rights and freedoms of natural and legal persons and groups of natural persons can be seriously undermined by AI systems, it is essential that natural and legal persons or groups of natural persons have meaningful access to reporting and redress mechanisms and to be entitled to access proportionate and effective remedies. They should be able to report infringements of this Regulation to their national supervisory authority and have the right to lodge a complaint against the providers or deployers of AI systems. Where applicable, deployers should provide internal complaints mechanisms to be used by natural and legal persons or groups of natural persons. Without prejudice to any other administrative or non-judicial remedy, natural and legal persons and groups of natural persons should also have the right to an effective judicial remedy with regard to a legally binding decision of a national supervisory authority concerning them or, where the national supervisory authority does not handle a complaint, does not inform the complainant of the progress or preliminary outcome of the complaint lodged or does not comply with its obligation to reach a final decision, with regard to the complaint."

33 Council Directive 85/374/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (*OJ L 210, 7.8.1985, p. 29). It will be soon replaced with the new and already agreed* Directive of the European Parliament and of the Council on liability for defective products (COM(2022)0495.

34 Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) (COM/2022/496 final). See also Commission Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics (COM/2020/64 final).

CONCLUSIONS

The EU AI Act represents the first comprehensive legislative act to regulate AI globally. Its strength lies in its legal certainty and the extensive legal and governance framework that it establishes. By categorizing AI systems into risk-based classifications (prohibited, high-risk, limited-risk, and minimal-risk) the EU provides an approach designed to ensure safety and compliance horizontally The AI Act's emphasis on fundamental rights, including privacy, non-discrimination, and human dignity, underscores the EU's commitment to ethical AI deployment. The EU framework is built on the notion that detailed regulation is essential not only to protect individuals and society from potential harms but also to build public trust in AI technologies.

However, the EU's approach has certain negative aspects. While the Act aims to provide legal certainty, various exemptions and delegated powers to the European Commission, as well as standardization processes, diminish the clarity and predictability of the legislation. The complexity of the governance system, involving multiple EU and national bodies, may also lead to overlapping responsibilities, bureaucratization, and challenges in enforcement. These potential inefficiencies could undermine the effectiveness of the AI Act, particularly if the prerogatives and responsibilities of different bodies are not clarified in practice. Additionally, judicial remedies are not fully clarified, which could result in legal uncertainties and hinder affected parties to seek redress. Especially as regards judicial legal remedies and liability the regulation has certain legal lacunae. In addition, also the broad exceptions for defense and national security, as well as exception for law enforcement (such as real-time biometric recognition) raise very serious legal issues.

The EU approach, while offering legal certainty and comprehensive legislation, may be seen as overly rigid, potentially harming innovation due to its strict regulatory requirements. Regarding positive aspects, the EU AI Act stands out for its clarity and strong ethical standards, making it a possible role model for global standardisation of this realm (i.e. UN, OECD, CoE). Its structured approach to AI regulation provides a model that other jurisdictions might follow, particularly in terms of safeguarding fundamental rights and ensuring legal certainty.

The ongoing dialogue and cooperation in various formations on the global level will be crucial in shaping a more unified approach to "democratic" AI governance.

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THE EFFECTS OF PENAL POPULISM ON THE RIGHT TO A FAIR TRIAL

Bianca Mirabela Șerb *

This article examines the concept of penal populism and its effects on the right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights. By focusing on the landmark case of Öcalan v. Turkey, the study illustrates how populist pressures can compromise judicial impartiality, procedural safeguards, and equality of arms. Through a detailed analysis of the European Court of Human Rights' findings, the article highlights the challenges posed by penal populism to the rule of law and discusses the need for robust judicial mechanisms to uphold fundamental rights in politically sensitive contexts.

KEYWORDS: *Penal populism, fair trial, European Convention on Human Rights, judicial independence, procedural fairness.*

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1. INTRODUCTION

The right to a fair trial, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR), is a cornerstone of modern democratic justice systems. It ensures procedural safeguards, impartial adjudication, and equality of arms, all of which are integral to upholding the rule of law. However, these principles face growing challenges in the context of penal populism—a trend where public and political pressures influence criminal justice policies, often at the expense of fairness and justice.

This article investigates the impact of penal populism on the right to a fair trial, focusing on the European Court of Human Rights' (ECHR) jurisprudence in Öcalan v. Turkey. By examining this high-profile case, the paper reveals how political pressures and public sentiment can undermine the independence of tribunals, restrict defence rights, and compromise procedural safeguards. The findings of the Court provide critical insights into the risks posed by penal populism and offer guidance for strengthening judicial processes against these challenges.

2. THE RIGHT TO A FAIR TRIAL: GENERAL PRINCIPLES AND SCOPE

The right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights[1], encompasses both the procedural guarantees explicitly articulated within the Article and the overarching guarantee of a fair adjudication of cases.[2] This guarantee constitutes a distinct and substantive element within the broader framework of the rule of law.

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[1] (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
(3) Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[2] Ionuț Militaru, Mihaela Vasiescu, Roxana Maria-Călin…; coord.: Dragoș Călin, *Dreptul la un proces echitabil. Aspecte civile. Hotărâri ale Curții Europene a Drepturilor Omului pronunțate* în *cauzele* împotriva *României,* volumul I*,* Ed.Universitară, București 2016, p.9;

Among all the rights codified in the Convention, the right to a fair trial occupies a pivotal position[3], serving as a cornerstone of the principle of legal certainty and the rule of law.[4] By ensuring fair trial rights, the state facilitates access to justice and establishes effective remedies against judicial decisions. Such guarantees create a legal framework within which other Convention rights—such as the right to life, freedom of expression, and respect for private and family life—can be effectively exercised and defended. Consequently, violations of these rights can be invoked by individuals before competent authorities.[5]

Article 6 is structured into two parts. The first paragraph outlines the principles of fair trial guarantees in both civil and criminal matters, defining the scope of the right to a fair trial. Meanwhile, the second and third paragraphs enumerate additional safeguards specifically afforded to defendants in criminal proceedings. The guarantees derived from the general concept of a fair trial, as mentioned in paragraph (1), are broader in scope than those set out in paragraphs (2) and (3), which detail the requirements for fair criminal proceedings. In criminal contexts, the European Court of Human Rights frequently examines paragraphs (1) and (3) in conjunction.[6]

The guarantees under paragraph (1) derive from the general notion of "fair trial," which forms the central tenet of the Article. Notably, the Convention does not provide a precise definition of this concept, reflecting its inherently broad and multifaceted nature. A fair trial encompasses various elements that can only be clarified within the specific context of each case. This notion is not homogenous but is instead shaped by the prevailing conception of justice as it is administered across different legal systems, including civil and common law jurisdictions. Consequently, it remains uncertain whether Article 6 encapsulates all requisite guarantees for a fair trial. Rather, the list of safeguards is not exhaustive; even if all the enumerated guarantees are respected, a trial may still fall short of being deemed fair.[7]

Ashworth categorizes the right to a fair trial as a "strong right," situated between absolute rights (e.g., the right to life) and "qualified rights" (such as those under Articles 8–11 of the Convention). Strong rights possess a higher level of importance and legal weight, albeit not as absolute as rights from which no derogation is permissible. According to Ash-

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[3] European Court of Human Rights, *Overview, Statistics 1959-2020 (2021)*. Between 1959 and 2020, the Court found a violation of Article 6 in 11,830 cases, approximately half of which—namely, 5,950 judgments—concerned breaches of the principle of promptness;

[4] Soyer J.C. and Salvia M., "Article 6" in *La Convention Européenne des droits de l'homme*, a collective work edited by Pettiti, L.E., Decaux, E., and Imbert, P.H., Paris, 1999, pp. 240–241: "If the Convention is based, as stated in its Preamble, on the rule of law, and if the signatory states are states governed by the rule of law, then they must guarantee their citizens a judicial system capable of ensuring compliance with general rules and sanctioning any breach thereof.";

[5] Cristina Teleki, *Due Process and Fair Trial in EU Competition Law*, Brill Nijhof, 2021, p. 93;

[6] William A. Schabas, *The European Convention on Human Rights, A Commentary*, Oxford University Press, 2015, p. 271;

[7] L. Ortega, J. J., *Elementos esenciales de la nocion de proceso equitativo en el orden penal*, part of the collective work: Estudios Juridicos del Ministerior Fiscal, 2000, Minister of Justice of Spain, Madrid, p. 305;

worth, the restriction of a strong right requires more compelling and robust arguments than those needed to justify limitations on qualified rights. For instance, mere assertions of necessity in a democratic society are insufficient to curtail a strong right such as the right to a fair trial.[8]

Paragraph (1) of Article 6 guarantees not an ideal trial but a fair one. The primary concern of the European Court of Human Rights is to assess the fairness of proceedings as a whole. A singular procedural error is unlikely to render a trial unfair if the overall proceedings meet the requisite standard of fairness. The application of domestic law, the admissibility of evidence, and its evaluation remain within the purview of national courts.[9] The Court has emphasized that domestic courts are best positioned to interpret and apply relevant substantive and procedural legal norms, evaluate witness credibility, and determine the relevance of evidence in relation to the factual circumstances of a case.[10]

It is possible for individuals to waive their right to a fair trial. Such waivers may be explicit or implied but must be clear and unequivocal.[11] Procedural rights waivers are frequently encountered in criminal proceedings. The Grand Chamber has held that states must act in good faith and respect the procedural choices made by the defence. When a defendant agrees to waive certain rights for tactical advantages, the state must honour this agreement. Unilaterally undermining the benefits of such waivers violates the principle of legal certainty and erodes the legitimate trust parties place in the judicial system.[12]

The initial draft of the Convention did not include provisions analogous to the fair trial guarantees now codified in Article 6. During the first plenary session of the Consultative Assembly of the Council of Europe on August 19, 1949, the Belgian delegate, M. Fayat, highlighted the importance of not only protecting fundamental freedoms but also providing the political and legal safeguards necessary for their defence. Similarly, the Irish delegate, Sean MacEntee, proposed adopting the first twelve articles of the Universal Declaration of Human Rights without modification, including guarantees for a fair trial.[13]

The inclusion of fair trial standards within the Convention aligns with the Council of Europe's foundational commitment to the rule of law. The concept is expressly codified both in the Statute[14] and the European Convention of Human Rights[15].

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8 Andrew Ashworth, *Eroding the Structure of the European Convention, Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK*, editor K. S. Ziegler și P. M. Huber, Oxford: Hart Publishing, 2013, p. 33;

9 Cristina Teleki, *op. cit.*, pp. 59-60;

10 *Karpenko v. Russia*, Judgment of 13 March 2012, para. 80;

11 *Ibidem;*

12 *Scoppola v. Italy*, Judgment of 17 September 2009, para. 137;

13 Report of the Consultative Assembly of 19 August 1949, in William A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015, p. 266;

14 Statute of the Council of Europe, London, 5.V.1949, https://rm.coe.int/1680306052,

15 European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950, https://www.echr.coe.int/documents/d/echr/convention_ENG

• Preamble, recital 3: 'Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'.

• Article 3: 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I'.

• Article 4: 'Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers…'.

• Article 5 (a): 'In special circumstances, a European country which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited by the Committee of Ministers to become an associate member of the Council of Europe…'.

• Article 8: 'Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine'.

The inclusion of Article 6 within the Convention reflects the Council of Europe's overarching commitment to ensuring justice, fairness, and the protection of fundamental rights in judicial proceedings across its member states.

3. UNDERSTANDING PENAL POPULISM: CONCEPT AND CHARACTERISTICS

Penal populism has emerged as a significant force in contemporary criminal justice systems, characterized by a focus on punitive measures that often prioritize public sentiment over evidence-based approaches. Its defining features reflect the ways in which political, social, and institutional dynamics interact to shape policies and public perceptions of crime. As *Garland* notes, penal populism emerged as a response to rising crime rates, political dissatisfaction, and the perceived failure of traditional criminal justice systems to address public concerns effectively.[16]

One of the core characteristics of penal populism is the politicization of crime,

[16] David Garland, *The Culture of Control, Crime and Social Order in Contemporary Society*, Oxford University Press, 2012, p. 13;

where politicians use crime as a platform to gain electoral support. *Bottoms* identifies penal populism as a significant factor in the "punitive turn" observed in Western criminal justice systems during the late 20th century, wherein governments increasingly adopted harsher sentences and prioritized public demands for retribution.[17]

By framing crime as a societal threat that requires decisive action, political figures often advocate for punitive measures as straightforward solutions to complex social problems. A prominent example of this is the "three strikes" laws in the United States, which impose harsh sentencing policies, often criticized for their lack of effectiveness and equity. Such measures exemplify how penal populism can lead to policies that prioritize symbolic reassurance over practical crime reduction. In her seminal work, *Making Crime Pay: Law and Order in Contemporary American Politics*, Beckett examines the intricate relationship between political strategy and public perceptions of crime. She argues that punitive policies have often been leveraged as tools to garner political support, rather than being grounded in evidence-based approaches to crime reduction. Beckett highlights how the framing of crime as a political issue has shifted public discourse, leading to the adoption of increasingly punitive measures designed to satisfy public demand for law and order.[18] This interplay between political motivations and criminal justice policy serves as a critical lens through which to understand the rise of penal populism in modern governance.

Another defining feature of penal populism is the role of media in shaping public perceptions of crime. Sensationalized media coverage, with a disproportionate focus on violent offenses, contributes to moral panics that create public pressure for harsher punishments. Beckett argues that these media-driven narratives distort the public's understanding of crime, leading to widespread support for excessive penalties.[19]

A further aspect of penal populism is the erosion of expert authority in criminal justice policymaking. In many cases, populist rhetoric displaces the voices of criminologists, psychologists, and social scientists, whose evidence-based insights are overlooked. This sidelining of expertise undermines the development of policies aimed at addressing the root causes of crime, resulting in a reliance on punitive approaches that are often less effective in the long term.

Penal populism also disproportionately affects marginalized groups, engaging in targeted narratives that depict minorities, immigrants, and individuals accused of terrorism as threats to societal order. These groups are often scapegoated, reinforcing stereotypes and perpetuating systemic inequities. For instance, in cases such as *Öcalan v. Turkey*, political and public pressures overshadowed procedural fairness, illustrating how penal populism can erode fundamental rights.

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[17] Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing,* in Chris Clarkson (ed.), Rod Morgan (ed.), *The Politics of Sentencing Reform*, 18.05.1995, Oxford University Press, pp. 17-50;

[18] Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics*, 18.11.1999, Oxford University Press;

[19] *Ibidem*;

The impacts of penal populism extend deeply into justice systems worldwide. One significant consequence is the overcrowding of prisons, as incarceration becomes the default punitive tool. This is particularly evident in the United States, where policies driven by penal populism have contributed to one of the highest incarceration rates globally. Such reliance on imprisonment reflects the prioritization of retribution over rehabilitation, creating long-term challenges for correctional systems.

Penal populism also poses a threat to the rule of law. By prioritizing punitive measures, it often undermines principles of justice and proportionality. *Pratt* notes that the influence of penal populism frequently results in legal frameworks that conflict with human rights obligations. This misalignment challenges the capacity of justice systems to balance public demands with adherence to foundational legal principles.[20]

Finally, penal populism leads to an erosion of trust in legal institutions. While intended to address public dissatisfaction with crime, the punitive policies promoted under penal populism can inadvertently diminish confidence in the fairness and effectiveness of the justice system. When policies are perceived as unjust or disproportionate, they can alienate the very public they are meant to reassure, further weakening institutional legitimacy.

Penal populism, with its emphasis on punitive approaches and public appeasement, continues to shape criminal justice systems globally. Understanding its characteristics and impacts is essential for crafting policies that balance public sentiment with evidence-based practices and uphold the principles of justice and human rights.

4. PENAL POPULISM AND THE RIGHT TO A FAIR TRIAL: POINTS OF CONVERGENCE AND CONFLICT

Penal populism, with its focus on public sentiment and punitive approaches, poses significant challenges to the right to a fair trial. By prioritizing public demands for retribution over procedural safeguards, penal populism can distort fundamental principles of justice, such as impartiality, proportionality, and equality of arms. This phenomenon often manifests in high-profile cases, where political pressures and societal outrage risk undermining the independence and fairness of judicial proceedings.

In this section, the paper will explore the intersection between penal populism and the right to a fair trial, highlighting the potential conflicts that arise when populist pressures influence legal processes. To provide a concrete framework for this analysis, the paper will examine the case law of the European Court of Human Rights (ECHR), with particular focus on the landmark case of *Öcalan v. Turkey*[21]. This case serves as a critical example of how penal populism can affect judicial decision-making, procedural fairness, and the protection of fundamental rights.

[20] John Pratt, *Penal Populism*, Routledge, 2007;

[21] *Öcalan v. Turkey*, Judgment of 12 May 2004;

Facts of the case[22]

Abdullah Öcalan, the leader of the Kurdistan Workers' Party (hereinafter PKK), was Turkey's most wanted individual during the late 1990s. The PKK, under his leadership, had engaged in an armed insurgency against the Turkish state, with the aim of securing autonomy for the Kurdish population. This insurgency resulted in extensive loss of life, with the Turkish Court of Cassation attributing thousands of deaths, including civilians, soldiers, and police officers, to PKK activities. Turkish authorities had issued seven warrants for Öcalan›s arrest, and an Interpol notice was circulated to facilitate his capture.

In 1998, Öcalan was expelled from Syria, where he had lived for years while leading the PKK. Following his expulsion, he sought asylum in multiple countries, including Russia and several European Union member states, but was denied refuge. Early in February 1999, Öcalan travelled from Greece to Kenya and was granted temporary sanctuary at the Greek ambassador's residence. On February 15, 1999, Kenyan officials escorted him to Nairobi airport under disputed circumstances. There, he was taken into custody by Turkish authorities and transported to Turkey.

Upon arrival, Öcalan was detained on Imrali Island, a high-security facility where he was the sole inmate. He was charged with attempting to undermine the territorial integrity of the Turkish state through violent activities attributed to the PKK. In April 1999, an indictment was filed, and by June 1999, the Ankara State Security Court found him guilty of these charges and sentenced him to death. The decision was upheld on appeal.

While the death penalty was the initial sentence, Turkey had maintained a de facto moratorium on executions since 1984. Subsequently, during legal reforms in 2001-2002, the country abolished the death penalty in peacetime. In October 2002, Öcalan›s death sentence was formally commuted to life imprisonment without the possibility of parole.

Following his trial and detention, Öcalan filed a complaint with the European Court of Human Rights (hereinafter ECHR), alleging violations of his rights under the European Convention on Human Rights. His case attracted significant public and media attention due to his status as a prominent figure in the Kurdish conflict and the broader implications for human rights and terrorism-related prosecutions.

The circumstances of Öcalan's arrest raised controversy. He argued that his detention in Kenya involved irregularities, including collusion between Turkish and Kenyan officials, despite the absence of an extradition treaty. His subsequent detention in Turkey was marked by allegations of procedural irregularities and rights violations. Specifically, Öcalan highlighted the extended duration of his pretrial detention without judicial oversight and his inability to effectively challenge the lawfulness of his custody. Furthermore, the trial process itself was called into question, particularly due to the presence of a military judge

[22] For a more detailed analyse see Mirja Trilsch and Alexandra Ruth, Öcalan *v. Turkey, App. No 46221/99*, in The American Journal of International Law, Jan 2006, Vol. 100, no.1, pp. 180-186;

on the panel for a significant portion of the proceedings, restrictions on Öcalan's access to legal counsel, and insufficient time and resources provided for his defence.

The ECHR reviewed these factual elements and, on May 12, 2005, delivered its judgment in Öcalan v. Turkey, finding that Turkey had violated Articles 3 (prohibition of inhuman and degrading treatment), 5 (right to liberty and security), and 6 (right to a fair trial) of the European Convention on Human Rights.

Key Issues Under Article 6 in Öcalan v. Turkey

The European Court of Human Rights (ECHR), in its Grand Chamber judgment, conducted a thorough analysis of the violations alleged under Article 6 of the European Convention on Human Rights. The Court identified multiple breaches that collectively rendered the trial of Abdullah Öcalan fundamentally unfair. These findings provide significant insights into the interplay between procedural safeguards and the principles of justice, even in cases involving national security concerns.

Impartiality and Independence of the Tribunal

The applicant contested the independence and impartiality of the Ankara National Security Court, which initially included a military judge on its panel. The Ankara National Security Court was a specialized tribunal tasked with handling cases involving national security, terrorism, and other politically sensitive offenses. Its composition included civilian judges and a military judge. This structure was ostensibly designed to bring expertise to complex national security cases, but it also blurred the lines between the judiciary and the executive branch.

The inclusion of a military judge was particularly problematic in Öcalan's case, given the high-profile nature of the trial and its political implications. Öcalan, as the leader of the Kurdistan Workers' Party (PKK), was accused of terrorism and acts threatening Turkey's territorial integrity. The politically charged environment amplified concerns about whether the tribunal could genuinely act independently, as the trial's outcome had significant implications for national security and public order.

Judicial independence is a foundational aspect of the right to a fair trial. It ensures that the judiciary operates free from external pressures, particularly from the executive and legislative branches of government. This independence is both a functional and symbolic requirement: a tribunal must not only be impartial in fact but also be perceived as such by an objective observer. The appearance of impartiality is critical to maintaining public trust in the justice system, as justice must not only be done but also be seen to be done.

In *Öcalan v. Turkey*, the Court found that the participation of a military judge compromised the tribunal's impartiality, particularly in a case where the applicant was accused of activities posing a threat to national security. This breach undermines the structural in-

dependence required under Article 6(1).

The ECHR applied a rigorous standard to assess whether the tribunal was independent and impartial. The Court emphasized that independence must be assessed not only in terms of actual influence but also in terms of how the tribunal's composition might be perceived by the defendant and the public. It concluded that the presence of a military judge created an objectively justifiable fear of bias, especially in a case where the accused was perceived as an adversary of the state. The Court's reasoning rested on several key factors:

Firstly, the Court emphasized the dual role of military judges. Military judges are appointed from the armed forces, and their primary allegiance lies with the military hierarchy. This institutional connection creates an inherent risk that their decisions could be influenced by executive directives or national security priorities, rather than purely legal considerations.

Secondly, the Court took into consideration the high-profile and politically charged context. The Court noted that Öcalan's case was highly sensitive, with significant political and social ramifications. This heightened the need for an impartial tribunal to ensure that the trial was not perceived as a politically motivated process. The military judge's presence exacerbated doubts about whether the tribunal could deliver an unbiased verdict.

Lastly, the Court considered the broader implications for public confidence. The presence of a military judge undermined not only Öcalan's confidence in the tribunal but also the broader public perception of judicial fairness. The Court reiterated that public trust in the judiciary is a critical component of the rule of law and that any appearance of bias could erode this trust.

Turkey argued that the presence of a military judge was justified by the nature of the case, as it involved national security concerns. The government maintained that the military judge provided valuable expertise in understanding the security implications of the evidence presented. However, the ECHR dismissed this argument, emphasizing that expertise in national security does not justify a breach of the principle of independence. The Court noted that such expertise could be provided through other means, such as expert witnesses, without compromising the impartiality of the tribunal.

Adequate Time and Facilities for Defence (Article 6(3)(b) and (c))

Öcalan also argued that he was not provided sufficient time or facilities to prepare his defence. The vast case file, exceeding 17,000 pages, was not fully accessible to him in a timely manner. Furthermore, restrictions were placed on his communication with legal counsel, and his meetings with lawyers were monitored by authorities, severely hampering the confidentiality of his defence preparations.

The Court scrutinized the procedural fairness of Öcalan's ability to prepare his defence, particularly the limitations imposed on his communication with legal counsel. The applicant had restricted access to his lawyers, and their interactions were monitored by

prison authorities. This lack of confidentiality severely compromised his ability to prepare a robust defence, as sensitive discussions related to trial strategy and evidence could not be conducted freely. The ECHR held that these restrictions violated Article 6(3)(b) and (c), which guarantee the defendant adequate time to prepare and the ability to freely communicate with their legal representatives.

Equality of Arms

The applicant contended that his ability to challenge the evidence presented by the prosecution was limited. For instance, requests to cross-examine witnesses and access certain documents were denied, compromising the principle of equality of arms.

The Court further found that the principle of equality of arms, a cornerstone of fair trial rights, had been violated. Öcalan faced significant disadvantages compared to the prosecution in accessing and challenging evidence. Key witnesses could not be cross-examined, and certain prosecution documents were withheld from the defence, limiting his ability to mount an effective rebuttal to the charges.

Transparency was another area of concern. Although some hearings were conducted publicly, others were shrouded in secrecy, particularly procedural matters related to evidence. The Court highlighted that public trials are essential to ensuring accountability and public trust in the justice system. The lack of transparency in parts of Öcalan's trial compounded the perception of unfairness.

Broader Implications for International Jurisprudence

The findings in *Öcalan v. Turkey* have had a significant influence on international human rights jurisprudence. The case underscores the importance of maintaining strict separation between the judiciary and the executive, particularly in specialized tribunals. It also highlights the role of the ECHR in upholding procedural safeguards in the face of state arguments about national security.

By affirming that perceived impartiality is as important as actual independence, the ECHR has set a high standard for judicial fairness. This standard ensures that even in cases involving threats to state security, the fundamental principles of justice and the rule of law remain protected.

The ECHR's findings on the impartiality and independence of the tribunal in *Öcalan v. Turkey* exemplify the Court's commitment to upholding the right to a fair trial under Article 6(1). The judgment serves as a critical reminder that judicial systems must prioritize impartiality and independence, particularly in politically sensitive and high-profile cases. The case remains a landmark in the ongoing effort to balance national security with fundamental human rights.

CONCLUSIONS

The judgment in Öcalan v. Turkey underscores the vital role of judicial independence and procedural fairness in safeguarding the right to a fair trial, even in cases involving national security and terrorism. The European Court of Human Rights' findings highlight how penal populism, through its emphasis on retribution and public appeasement, can erode fundamental rights and the integrity of judicial systems.

This article demonstrates that addressing the challenges of penal populism requires a steadfast commitment to the principles enshrined in Article 6 of the ECHR. States must prioritize judicial impartiality, provide adequate facilities for defence, and ensure equality of arms, particularly in politically charged cases. By adhering to these principles, the judiciary can uphold the rule of law and maintain public trust in the justice system, even in the face of populist pressures. Öcalan v. Turkey remains a pivotal case, offering valuable lessons for the protection of human rights in the age of penal populism.

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THE JUDICIARY – THE WEAKEST PLAYER IN THE PUBLIC SPACE

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Public trust in the judiciary is, among other things, one of the key sources of legitimacy and authority of the judiciary. There is a broad consensus that, in general and globally, we are witnessing an erosion of trust in state government institutions as well as international organizations. Judicial institutions, both national and supranational, are not exempt. On the contrary, this branch of government seems to be in a subordinate position in public discourse. Number of factors contribute to this situation, and this is the focus of this paper. First, changes in the media scene where, primarily due to digitalization, there has been a transformation of the traditional structure into a modern and very competitive system, which includes a combination of old and new, public and commercial, cable, satellite and digital media. Furthermore, the delicate relationship between politics and the judiciary (i.e. judiciary and other branches of government), is further complicated by the strengthening of the populist approach to politics. Populism is characterized by expressions of distrust of structures in which technocrats are at the forefront and whose work does not reflect the will of the people. The judiciary is a logical target for this way of thinking, and it can mirror in judicial populism. The third factor is the restrictions on expression (freedom of expression) in the public space, which the judiciary must adhere to due to the nature of its role in society. Unlike the first two factors, these are rooted restrictions that can hardly be changed. In the end, the text will try to suggest how much and what judicial institutions can do in such a limited space.

KEYWORDS: *judiciary, public trust, media, politics, populism*

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1. INTRODUCTION

Public trust is a precondition as well as a result of a successful judiciary. As a branch of government, the judiciary is a subject to criticism, comments and opinions expressed it the public space by the journalist, commentators and politicians. On the other hand, the holders of judicial functions, as well as judicial institutions, have a limited capacity to respond or to influence on public opinion, primarily due to the nature of their role in the society. The ongoing changes in the media and the informing especially complicate the position of the judiciary. Moreover, the growing media interest for the courts arises from parallel changes in the judiciary and the commercial media. The increasing role of the judiciary in the society heightens the attractiveness for the media (Hirschl, 2004). The internet has brought changes in functioning of the print media and led to debates among journalists and between legal and media professionals about the boundaries of press freedom and the role of the journalistic ethics. For example, *sub judice* laws, which prohibit publishing anything about a case being adjudicated, have become a dead letter. In that sense, journalists are no longer limiting their reporting on the proceedings but also include comments, critiques and evaluations. Today, we say that the press is extremely cynical and critical to all public institutions.

In contrary, the separation of powers allows and even impose the need of the executive and legislative branches to engage as much as possible in the communication with the electorate. The judiciary does not seek support from interest groups in the society in the same way as the executive and legislative branches do. This is in contrast to the judicial role: to make decisions in the cases independently and impartially, applying law on established facts. Thus, it is separate from the community, even though it affects the community.

The complexity of the judiciary's position in relation to the public opinion and the media can result in frustration for certain holders of judicial functions and with challenges for courts as institutions.

The central concept in the relationship resolution between the judiciary and the public in democracy is the concept of public trust, which maintains as a fundamental requirement for the legitimacy of the judicial authorities. The importance of the public trust is emphasized in the context of concerns because of the general decline in trust in political leaders, government institutions including the judiciary. However, it is difficult to identify the nature of this public trust is hard. Sometimes it is approached as an empirical fact that can be measured, especially through researching public opinions.

2. JUDICIARY AND THE MEDIA: EDUCATIONAL OR ENTERTAINMENT CONTENT?

In the ideal conditions, the media should serve as an educator of the public, informing about significant issues and providing enough essential and necessary knowledge for

citizens to understand happenings and processes in the society. Besides that, such media should act as guardians and controllers of the government and other powerful institutions and organisations. In this way, the media would serve as the fourth branch of government and ensure a healthy system of "checks and balances" in the democratic society, ensuring responsibility in the exercise of power. Finally, such media would be a platform that enables the free exchange of different perspectives and ideas (Fox, R., Sickel, R. Steiger, 2008).

Similarly, in an ideal world, editorial policy would be in accordance with the democratic duties. However, in the modern world, it seems that the value of news is determined by the competition among a large number of news, media houses but also by the competition one specific phenomenon "citizens-journalist" whose posts on blogs and social media are followed just like standard medias. (Fox, R., Sickel, R., Steiger, 2008). This results as a separation of the market-valued story from its objective importance and serious state and global questions.

Due above mentioned, the journalists have come under intensive pressure to deliver a dramatic and personalised story. This especially refers to criminal trials where the media expose, judge and convict the accused in the „court of public opinion" (Greer and McLaughlin, 2012). The nature of these „media trials" ranges from shaming and prosecution of famous people during the trials until prejudging the outcomes of the proceedings against the unknown individuals. Public relation firms involved in the proceedings have become increasingly important actors during trials, providing communication support services and carefully constructed messages targeted at various audience – media, decision makers in the courtrooms – to influence on public opinion across the country and, in certain situations, the outcome of the trial (Gibson and Padilla 1999, p. 216).

Eight factors had been identified that the media use to determine the value of news: major events, timeliness, drama, conflict, unusual elements, unpredictable elements, famous names and visual appeal (Davis, 1996). It is argued that the "entertainment value" predominates over other factors of measuring the value of the news (Davis & Oven, 1998). Therefore, it can be seen that the media use these entire factors to increase the entertainment value of the delivered and broadcasted content. In that way, entertainment value becomes the main factor that above all other factors such as conflicts, unusual elements and major events.

In this context, judicial cases become useful for the media's efforts to increase the entertainment value of the news due to the inherent conflict in such cases (Fox, R., Sickel, R., Steiger, 2008). The media easily create entertaining news harmonising conflicts among famous people or dramatizing unusual events involving ordinary people. Therefore, the media can serve to the public good by covering the judicial system in a way that educates the public about the work of the legal system and contributes to the judicial responsibility. However, since the entertaining legal news attracts more attention and public reactions, broadcasting of the legal news in a entertaining way is a common choice for the media in the competitive environment in which they operate (Fox, R., Sickel, R., Steiger, 2008; Petersen, 1999).

Tuning judiciary news into entertainment has led to the "tabloid justice" (Fox, R., Sickel, R., Steiger, 2008; Greer & McLaughlin, 2012). Tabloid justice is an atmosphere in which the media focus on sensational, personal and shocking details of famous trials. In this environment, legal news become a tool for entertainment and educational and democratic functions of the media takes a back seat to the entertainment function. Although such legal news exists since the early days of the mass media, their number and frequency increased after the 1990s (Fox, R., Sickel, R., Steiger, 2008). The presentation style of today's legal news is the style, which is focused on the personality, visual appearance, and unusual elements of the story and emotional discourse rather than legal rules and processes (Greer & McLaughlin, 2012).

The atmosphere of tabloid justice has several characteristics. First and the most important, as mentioned earlier, the educational function of the media falls behind its entertainment role. Second, the media are deeply involved in reporting about the judicial proceedings, investing their resources and energy into covering them. The third characteristic of this situation is that the public is indeed familiar with certain parts of the process. However, this does not mean that public awareness of the judicial system is at a higher level. On the contrary, the sensationalist editorial style can result in misleading the public. On the other hand, the media inevitably allow judges to learn about public opinion on significant issues.

3. POLITICS AND THE JUDICIARY: JURISDICTION OR RULE OF LAW

The judiciary as a branch of government has a relation with the citizens that differs from the relation of other two branches of government. The judiciary does not have the democratic legitimacy that comes from national elections and enforces laws passed by the parliament, regardless of whether they agree with the laws or not. Although judicial politics and strategies are increasingly discussed in recent years, they do not refer to politics in the sense of government work politics. The judiciary depends of the legislative and executive government when it comes to funding because they cannot gather their own resources and the implementation of the decisions depends, in the end, from the executive government and state agencies that provide necessary support. Alexander Hamilton's well-known statement is that courts, without the power of a sword and the power of a wallet, are the weakest of the three branches of government.

Numerous studies have focused on the relationship between the judiciary and the politics. The general conclusion in that the freedom for political decisions is significant limited by the courts, especially those with judicial review power – constitutional courts and regular courts that are the focus of this paper. Accordingly, to that, there is a talk of the global expansion of the judicial power, the authority of the judges over laws and the rise of

the jurisdiction. A new dialectical dynamic in this narrative about the judiciary is brought by the rise of authoritarian populism, which is characterised by disdain for technocracy and a demand for the direct implementation of the will of the people. The public is encouraged to think that the judicial independence primarily benefits the judges and less to the people.

In the response to the rise of populism, the judiciary has faced challenges in maintaining its independence and upholding the rule of law. While populist universally see the courts as enemies of their projects, there are cases in which the courts themselves can be used for upgrading the populist agenda, leading to what is known as "judicial populism". That includes the use of harsh penalties by courts to satisfy the public and align with populism sentiments, potentially undermining the traditional role of the judiciary.

Besides that, it should be noted that in developing democracies, the issues covered and the opinions expressed in the media are strongly shaped by holders of the power who can influence over what is reported. A typical populist analysis and evaluation today's trends is that, in addition to the political system and political struggles for democracy, the judiciary decides about issues that shape the life of society. They point that a new version of a dual state and a dual political system has appeared, with democratic state, a multiparty system and a parliament majority government, but the judiciary, in symbiosis with the global networks of non-governmental organisations, can overcome the decisions of the parliamentary elections and majority democracy across a broad spectrum.

4. IN SILENCE IS THE SECURITY?

At the end of Andrić's short story "The Bridge on the River Žepa" the vizier comes up with the idea of engraving, alongside his name, his motto "In silence is the security" on the stone bridge he has built. It is certainly true that his motto has traditionally not been unfamiliar to the most holders of judicial functions and the judiciary overall. However, it seems that the modern times demand a different way of thinking. Indeed, how far can and must the judiciary go in explaining its work to the public through the media in order to legitimise its actions? The usual, and probably only correct, stance is that verdict should only be explained in the text of the verdict itself. A concrete and seemingly feasible suggestion would be the announcement of verdict summaries. It is well known that verdicts in more important cases are often several dozen pages long, making them almost unusable from a media perspective. Verdict summaries could serve as a direct communication tool with the public, as recommended by the Consultative Council of European Judges (CCJE). Furthermore, by systematizing the role of public relations officers in larger courts and prosecutor's offices, a significant step has been made towards a more professional and organized relationship between the judiciary and the media. However, what the public, and especially journalists, often criticize these officers for is the brevity and uniformity of the information and statements they release, which are often perceived as a kind of barrier between the media, the

public, and the holders of judicial functions, especially the heads of judicial institutions.

Holders of judicial functions, however, must not overlook that, within ethical principles, impartiality and integrity of a judge also involve actions that reflect, promote, and affirm public trust in the impartiality and integrity of the judiciary. Short summaries of the verdicts, as well as press releases that summarize the reasons for a decision, would significantly contribute to enhancing public trust in the impartiality and integrity of the judiciary. By publishing them on court websites, access would be allowed not only at the time of the decision's announcement. If the imperative to restore citizens' trust in the judiciary is accepted, it is illusory to expect that someone else will fulfil this duty. It is high time to start using existing resources and to design and implement an acceptable working model for public relations officers within the judiciary. Eventually, consideration should also be given to overseeing their work by the heads of (particularly criminal) departments, so that through more work that is transparent and a proactive approach to the media, the public is adequately informed about judicial decisions.

Today, formal and informal mechanisms for improving the relationship between the judiciary and the media are developed.

Although most judicial codes of conduct prohibit judges from giving ex parte comments on ongoing cases, and despite the preference to allow decisions to speak for themselves (Rotunda, 2001), American judges have sometimes provided explanations of their decisions to the public through the media after cases were resolved (McLaughlin, 2004). Moreover, individual judges make themselves available to the media in other ways. For example, in the U.S., judges have given interviews to journalists, promoted their books on television, allowed the press to cover their public and professional lectures, participated in academic conferences alongside media professionals and held informational briefings and informal meetings with journalists (Robben, 2004; McLaughlin, 2004; Davis, 2011).

Regardless of all the specifics, the judiciary must use the results and theories developed by media experts, both practitioners and those studying it within academic research. The literature identifies four models of public relations (Grunig and Hunt, 1984; Seletzky and Lehman-Wilzig, 2010), based on the intersection of two dimensions: the degree to which information flows in one direction (from the institution to the recipient) or in both directions, and whether various manipulations are used in transferring a positive image of the organization. The intersection of these dimensions results in four models: the press agency model, the public information model, the two-way asymmetrical model and the two-way symmetrical model. Courts are certainly classified as organizations that use the public information model, which emphasizes maintaining and improving the organization's image by simply circulating relevant and meaningful information among the target audience and the broader public.

Public relations theories have tried to define the organizational preconditions which are necessary for successful relationships between organizations and the media, and the various tools needed in the skills of PR practitioners to improve significant and positive

media coverage (Reber and Cameron, 2003). In what is called the "excellence theory", it is suggested that the extent to which senior officials in an organization recognize the importance of the public relations function can influence the allocation of resources and the ultimate effectiveness of communication strategies (Grunig, 2002). A theoretical framework for successful media relations has been created, based on paradigms well known to media professionals: the concept of information subsidies, framing theory and the agenda-building paradigm (Zoch and Molleda, 2006). Public relations experts to explain the process of intervention in news management from the perspective of media relations practitioners are now using these theories, which were used to explain news production from the media perspective. According to this model, there are three elements of media-oriented public relations practice: (1) the framing process (Entman, 1993), i.e., highlighting or withholding specific information about a topic or issue so that the organizational framework will be adopted by the media; (2) generating pre-packaged information ("information subsidies") to promote organizational positions on issues; (3) distributing information through media channels, so that public relations practitioners participate in the process of building the media agenda. These elements are part of a proactive approach to media relations, considering a broad range of relational, organizational and contextual factors.

CONCLUSION

The judicial system is supported by the power of the state, but public trust in the courts and the public support for an independent judiciary are crucial for the proper functioning of the judicial system. Therefore, the independence of the judiciary has two main sources: legal protective measures and a political culture of non-interference. Certainly, the democratic legal and institutional framework is of vital importance, but the unwritten political norms of non-interference in judicial independence create "soft safeguards" and conditions for the healthy functioning of the system of checks and balances. However, we are aware that populists do not accept these norms and view judicial independence as an obstacle to their political projects. In this context, the low reputation of the judiciary jeopardises the public perception of judicial independence and can lead to a long-term loss of societal legitimacy. In this situation, we find ourselves in a vicious cycle where lower legitimacy makes it easier for the politicians to limit the independence of the courts and disregard the mentioned norms of non-interference in the judiciary. In such a situation, the importance of the media is invaluable. However, as described above, the unwritten behaviour norms lose their value in relation to the politics toward the judiciary, and it seems that the same situation applies to the media. The educational role is lost in the commercialization. In such a situation, the judiciary, which must stick to its traditional codes and ways of working, seems to be falling behind the times, but it cannot adjust too much either. There is very little space in which the judiciary can operate in the public space, and it should be used in accordance with its social role's specifics but with modern public relations methods. What

should certainly be avoided is that, despite the importance of the interaction between the public and the judiciary, the public opinion should not gain importance comparable to that of the law and facts.

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BRIEF REPORTS ON PENAL POPULISM IN THE LIGHT OF THE RETRIBUTATIVE AND RESTORATIVE APPROACH ABOUT THE VICTIM AND THE DELINQUENT*

Miomira P. Kostić**

In this paper, the author discusses the issues of introduction and application of restorative justice in terms of achieving a balance of the interests of the victim, the social community and the delinquent. It points to penal populism versus a restorative process. It highlights the values that restorative justice strives for. Part of the work is devoted to standards for the application of restorative justice. Compliance of those standards with internationally adopted documents on the protection of basic human rights is important. The importance and type of criminal justice reforms were mentioned. Subjects that could be important bearers of the restorative process in society (citizen associations, church communities) were also highlighted.

KEYWORDS: *penal populism; restorative justice; retributive justice.*

* The paper is the result of research on the scientific project: „Responsibility in the legal and social context" funded by the Faculty of Law, University of Nis, in the period 2021–2025.

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INTRODUCTORY CONSIDERATIONS

Numerous questions related to the basic principles of criminology as an independent science, such as subjects, methods, ideological starting points of criminologists when interpreting the empirical results of research, at first glance represent standard topics that belong to the starting points of criminological literature.

From the very beginnings of thinking about criminality and the criminal, in a way that was not only criminal law, heterogeneity and indeterminacy in understandings of the concept of crime and criminality in general appeared. Experts of various other sciences, psychologists, biologists, doctors, anthropologists, sociologists, who used the knowledge of their sciences and scientific disciplines as a source for the interpretation and interpretation of various facts that stood out by observing the criminal phenomenon, or the criminal person himself, began to deal with criminological issues first.

Penal (penal populism) is a process in which the fight against criminality is highlighted from the political perceptions of the participants by introducing or applying harsh or harsher reactions to crime. Thus, the importance of one of the techniques within the criminological methods of observing crime as a mass social phenomenon is observed, which is the technique of collecting data on the feeling of insecurity, that is, the fear of crime (Konstantinović-Vilić, Nikolić-Ristanović, Kostić, 2012: 67). Penal populism most often reflects the disappointment felt by crime victims and their representatives, who believe that they are left out, or simply forgotten in justice processes that focus on the perpetrator, [1] so that the image is created that "victims (are) concerned about their own minimal participation in the criminal process and sometimes feel like a person on trial instead of a person accused of a crime... and the current system works by keeping offenders in the system rather than encouraging them to stop committing crime' (Coward 2000: 2).

Bringing the appearance of juvenile delinquency as a special type of crime into direct connection with the concepts of restorative and retributive justice, but also penal populism is not just a random phenomenon. After the mass murders in Serbia in May 2023, day after day, in which the largest number of children and young people died, an avalanche of questions related to these three terms was raised, directly caused by the drastic criminal behavior of children and young adults.

It should be emphasized that issues related to juvenile delinquency, juvenile delinquency or socially negative behavior of young people have not been so represented in studies since the very beginning of the development of criminology. On the one hand, sociological theories on the explanation of criminality that emphasized the influence of family, neighborhood, education on the appearance of juvenile delinquency and other related criminological phenomena appeared much later than criminological theories that based

[1] *Penal Populism*, https://www.populismstudies.org/Vocabulary/penal-populism/, 30.10.2024.

their study of the roots of criminality on endogenous characteristics of perpetrators (anthropological, biological - psychological, psychopathological, for example). On the other hand, today, in our country, the punishable behavior of this part of the population, as well as the issue of the lower age limit of criminal responsibility for persons up to the age of eighteen, points to a better understanding of the rise of the concept of penal populism, which is not written about so often.

During the seventies of the last century, a specific ideology dominated, which was later most directly related to the development of the movement for victims' rights, which was often called the "law and order orientation". However, over time, the evaluation of rehabilitation programs intended for delinquents was discouraged, which further contributed to the disillusionment with the ideal of rehabilitation, which modern penology strove for, thus establishing a suitable ground for the development of alternative ideological approaches, including those aimed at the victim.

Since the eighties of the 20th century, the process of observing crime victims began, so that they gain a prominent place in the general public's interest in their situation. In the light of the perception that the victims were "forgotten persons" by the criminal justice system, as well as the development of sensibility towards the categories of vulnerable persons, with particularly emphasized victimhood, such as children, women and the elderly, a new political concept, supported by the expository economic growth of European countries and The USA is beginning to look at the needs of these persons resulting from the process of victimogenesis, by being directed and open to the adoption of a large number of political documents, official declarations and proposals for modern legal solutions.

The criminal justice system, implementing retributive justice, is aimed at answering questions about what law was broken, who broke it, and how to sanction the guilty so as to achieve special prevention.[2] The approach of restorative justice consists in the strategy of gathering and discussion within the local community, it is aimed at the individual and can be applied in wider urban areas. The goal is to achieve unique solutions that are acceptable to people in certain circumstances and given the prevailing cultural circumstances.

Over time, in theoretical discussions and practical application, restorative justice, as a concept and process, has acquired the meaning of a key element of social justice. Restorative justice is credited with the ability to restore justice to a social community where the traditional criminal justice system is associated with measures of oppression within the community. Those measures

[2] Following all the achievements of the theory and practice of the criminal law response to crime, there have been certain changes in the domestic criminal legislation that indicate the gradual but consistent acceptance of all those conditional "news" that accompany the introduction and application of the restorative justice process in our country. On the other hand, even legal solutions that explicitly prescribe the possibility of applying the process of restorative justice are met with resistance, both by professionals and the general public, where the objective lack of by-laws is often taken as a subjective excuse for not applying certain solutions. Changes in criminal legislation in relation to adult and minor perpetrators of criminal offenses introduce certain concrete elements of restorative justice into the domestic, traditionally retributive criminal justice system.

are imposed by formal social control bodies in a centralized, static criminal procedure that finds its justification in general justice available to all citizens (Kostić, 2005: 45).

At the same time, there must be at least five elements that give a process the attribute "restorative". Restorative justice requires the full participation and consent of all those who were in any way affected by the commission of a criminal offense - the victim, the delinquent, their families and friends, as well as people from the community. Then, restorative justice tries to heal what has been destroyed. That is why the process is focused on the needs of the victim (what needs to be done to heal the trauma; restore the sense of security), the delinquent (what needs to be done so that the evil will never happen again; what needs to be done so that the delinquent behaves in accordance with the agreement reached) and the members community (what will make them feel safe; what steps should be taken to improve the community so that crime is less likely to happen in the future). The next thing that is necessary is that there should be full and immediate accountability of all participants. Accused persons face their victims and others who suffer the consequences of the crime and are given the opportunity to explain their behavior, take full responsibility and be part of a process that decides how to integrate the needs of all concerned. Also, restorative justice tends to bring back into whole everything that was "separated", destroyed by a criminal act. Namely, crime divides the members of a social community into an "us-them" way of thinking. Restorative discussions find ways to overcome this difference, so that "us and them" are re-connected within a social community established on healthy foundations. The return to one whole of all members of the community prevents isolation within the community. Isolation usually occurs as a natural companion of crime. It is alienation felt by both the delinquent and the victim, as well as other members of the community who suffer the consequences. However, restorative discussion cannot bind the victim and the offender into what was already an unhealthy, abusive relationship. Ultimately, restorative justice discourse aims to empower the community to prevent further harm by "building relationships and addressing the important social issues that are the root causes of crime" (Coward 2000: 7).[3]

Proponents of restorative justice argue for unlimited expansion in its application, while critics point out that excessive goals only undermine the achievement of more modest but realistic successes. Some of the main criticisms are focused on the fact that the implementation of restorative justice does not achieve proportional results. However, proportionality is not one of the key values of restorative justice, nor is the evaluation of its suc-

[3] The literature states that restorative justice is "a way of thinking, a way of behaving and a way of reasoning". This determination was presented by Bria Huculak, a judge from Canada, who participated in the PATHS conference on restorative justice in 1995. By the way, during the nineties of the last century, some writers described restorative justice as a response to criminal behavior that requires compensation for losses as a result of crimes from which the victims suffered, to facilitate the establishment of peace and to achieve peaceful relations between the opposite parties. During 1991, in Canada, restorative justice was described as the existence of principles that support and compensate the victim through mediation, compensate the social community, and help to participate in the rehabilitation of delinquents with the limited use of restrictions and supervision.

cesses, because it represents the satisfaction of all participants in the procedure, which is not an essential value or goal of the conventional criminal justice system. It is considered that the feeling of shame is a more important form of crime control than the pronounced criminal sanction. In order for the feeling of shame not to produce unfavorable consequences for the delinquent and the victim, it is necessary to end the process with a ritual act through a reintegration ceremony (Braithwaite, Daly, 2001: 29).

One of the main supporters of restorative justice in the US, Thomas Cavanagh, believes that the classic criminal justice system has collapsed and is creating a "spiral of participation for the poor, the mentally ill, and the marginalized," and that restorative justice helps people "live lives with passion, filled with personal and shared goals." and dreams in striving to reach their full potential". This former journalist, who spent twenty-eight years as a court reporter, considers restorative justice a challenge that is "dedicated to critical thinking and lifelong learning in which questions are asked that are not always answered, where one dares to do something extraordinary and takes on risk". (Cavanagh 1998:24)

1. INTRODUCTION AND APPLICATION OF RESTORATIVE JUSTICE

Howard Zehr and Harry Mika have proposed a number of "signposts" to help identify restorative justice processes. The participants in the process prefer to focus on the harm suffered rather than on the violation of the law. Balanced care is shown to the victim and the perpetrator, and both parties are involved in the criminal proceedings. Repairing the consequences suffered by the victim is done through an increased interest in meeting the victim's needs. The delinquent is supported and simultaneously encouraged to understand, accept and express his willingness to correct the evil he has caused. In the process of restorative justice, the delinquent's need to fulfill obligations that are achievable and not punishable must be recognized. The possibility of establishing a direct or indirect dialogue between the victim and the perpetrator must be developed. On the other hand, these advocates of restorative justice do not exclude the importance of criminal court proceedings and believe that the social community itself, or more precisely the narrower social environment in which the crime took place, should be part of the court proceedings, especially through increasing its capacity to perceive the crime and respond on him. In the process of "healing" society from delinquency, cooperation and reintegration should be encouraged rather than separation and correction. Given that heterogeneous groups of people participate in the process of restorative justice, certain unexpected actions and unexpected results must be noted. As the last in a series of "signposts" is the one that shows respect for the dignity of everyone, especially victims, delinquents and all other participants in the process of achieving justice

(McEvoy, Mika, Hudson 2002: 469).[4]

Restorative justice is based on a balanced focus on the offender, the victim and the community. Value judgments directed at the delinquent include apology and feeling of shame for the committed act and reintegration. In relation to the victim, the damage caused and the possibility of granting forgiveness to the delinquent are considered, while for the social community it would be important to establish previous relationships.

The results and measures of the restorative justice program are based on core values that relate to all three participants in this process. The delinquent should send a written or oral apology to the victim and the social group who suffer because of his action. He must learn to recognize his own responsibility without viewing himself as a victim of circumstances and to gain knowledge of the harm he has caused to the victim. Reintegration of the delinquent means learning how to return to the social community, especially through a plan of action aimed at "treating" the resulting harmful process.

In the case of the victim, the damage caused should be identified and assessed. In each individual case, a plan is made to repair the damage. The victim should accept an apology from the offender and express forgiveness. Values related to the social community are aimed at repairing destroyed relationships and establishing new relationships within the community.

Retributive justice tends to create security in society, unlike restorative justice, which aims to establish peace in the community. Retributive justice is aimed at singling out undesirable people, such as criminals, by imposing a prison sentence on them, as the most widespread type of criminal sanction in terms of the volume of pronouncements in final convictions. Hence the opinion of the majority of representatives of restorative justice that the process of retribution did not give the desired results because it mostly included those "different", people from the margins of life, who most often end up before the criminal court. These are the most common: homeless, mentally handicapped, poor citizens and members of minorities. Creating peace in the community involves dealing with delinquents who are part of the social community because they will return to that community even after serving their prison sentence. The social community, which directly relates to each individual delinquent, includes: family, friends and persons with whom the delinquent has business relations. These relationships provide an environment for the development of a sense of social conscience, an awareness that one's actions affect other people, and a desire to realize oneself as an exemplary member of society.

[4] Provincial Association Against Family Violence PAAFV advocates a philosophical approach to the concept of restorative justice. It is not only a model of behavior different from the traditional criminal justice system, but a philosophy or vision that reflects the needs of the victim, the delinquent and the social community. This association refers to "...community justice courts and circuit trials as incentives or initiatives in the restorative justice process and identifies some forms of alternative dispute resolution as natural restorative processes." According to others, restorative justice is aimed at inducing feelings of shame and forgiveness, so this action is solely for the benefit of the victim, not the delinquent. (Coward 2000: 6).

2. ESTABLISHING STANDARDS FOR RESTORATIVE JUSTICE

In the literature on restorative justice, the establishment of standards related to the implementation of this process is seen as the foundation of certain philosophical concepts. Namely, it is considered necessary to set a minimum of responsibility and a minimum number of standards that will compete for primacy in application in some form. Also, it is human rights that must be protected by restorative justice processes. The restorative method means a procedure through which the significance of the consequences of injustice inflicted on citizens is considered, so that all of them are individually recognized as a starting point in their treatment and prevention, as well as changing the conditions that led to the development of injustice. Citizens are encouraged to take responsibility for events that for the last few centuries have been viewed exclusively as a matter of state interest (Konstantinović-Vilić, Kostić 2006: 106).

In formulating the standards of restorative justice, some internationally recognized instruments on the protection of basic human rights must also be respected. The UN General Declaration of Human Rights[5] defines the specific values and rights of people that are promoted through the process of restorative justice. The declaration includes the right to life, liberty and security of person, the right to protection against arbitrary confiscation of property, the right to health and medical care, as well as the right to participate in democratic processes. From the point of view of restorative justice, the interesting article is Art. 5 which stipulates that no one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment. Proponents of restorative justice believe that UN member states have interpreted this article in the most permissive way that does not meet the standards of restorative justice. That is why this article is a kind of "challenge" for them to apply in restorative justice, as a minimum of "anti-punitive space".

The International Covenant on Civil and Political Rights from 1966 is aimed at further "self-determination" of the citizens of member states.[6] Namely, the Pact stipulates that every person who is arrested or detained for a criminal offense must be handed over to a judge or another authority authorized by law to perform judicial functions as soon as possible and must be tried or released within a reasonable time (Art. 6). The Pact also stipulates that everyone is equal before the courts and tribunals of justice (Article 14). In the International Covenant on Economic, Social and Cultural Rights, member states undertake to recognize the right of every person to the best psychological and mental health he can achieve

[5] The Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly by resolution 217A (III) of December 10, 1948

[6] Zakon o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima , Službeni list SFRJ br. 7/71. (Law on Ratification of the International Covenant on Civil and Political Rights, Official Gazette of SFRY no. 7/71)

(Article 12).[7] In 1989, the Second Optional Protocol to the Covenant on Civil and Political Rights was adopted, which includes the participation of political parties in the abolition of the death penalty. Also, advocates of restorative justice agree with all values and rights from the Convention on the Elimination of All Forms of Discrimination against Women[8] and the Standard Minimum Rules for Non-Detention Measures from 1990 (Tokyo Rules).

The provisions of the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UN General Assembly in 1985 are important for the construction and application of restorative justice. It includes relevant values that more closely explain the instruments for the protection of basic human rights, such as: "protection of the environment" (Art. 10), "compassion" (Art. 4), "return to the previous state", "compensation" (Art. 5), " restoration of rights" (Art. 8) and regulates "normal dispute resolution mechanisms, including mediation, adjudication and customary justice and local customs" (Art. 7), which is the legal basis for the application of restorative justice in all those situations where reconciliation should be facilitated and compensate the victim. In addition, the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950[9] is also important on the European level. (Papić 2002: 396). According to the provisions of the Convention, no one may be subjected to torture, or to inhuman or degrading treatment or punishment (Article 3). Everyone has the right to a fair and public hearing within a reasonable time before an independent and impartial court, formed on the basis of the law (Art. 6). The Convention prohibits discrimination on any basis, such as: gender, race, skin color, language, religion, political or other opinion, national or social origin, connection with a national minority, and others (Art. 14).

These values are not only derived from the texts of international documents on human rights, but also represent part of the empirical experience gathered through the statements of victims and delinquents about what they would like to achieve through the process of restorative justice.

Some authors, such as Braithwaite, propose standards that would be the basis for action in the restorative justice process. Thus, this author distinguishes standards of limitation or coercion that precisely determine rights and limitations and standards of greatest value or maximizing standards. Limitation standards, according to this author's proposal, would be: non-existence of dominance; exercise of rights; compliance with the above legal

[7] Zakon o ratifikaciji Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima, Sl. List SFRJ br. 7/71. (Law on Ratification of the International Covenant on Economic, Social and Cultural Rights, Sl. SFRY newspaper no. 7/71).

[8] With the successor declaration of March 12, 2001, Serbia and Montenegro continued its membership in all other conventions related to women's rights, for which the UN Secretary General is the depository. Serbia and Montenegro is a member state of the Convention on the Elimination of All Forms of Discrimination against Women. The Optional Protocol to this Convention was ratified in December 2002. Initial report on the implementation of the International Covenant on Civil and Political Rights in the FRY for the period from 1992-2002. year, 2003 Ministry of Human and Minority Rights of Serbia and Montenegro, Belgrade.

[9] European Convention for the Protection of Human Rights and Fundamental Freedoms, amended in accordance with Protocol no. 11, Rome, November 4, 1950.

maximums of criminal sanctions; listening to others with full respect for their personalities; giving equal attention to all participants; responsibility, possibility of appeal; respect for all basic human rights proclaimed in UN documents. In the standards of restrictions, in addition to the prohibition of domination, the standard of exercising rights occupies an important place, so that all participants should have the opportunity to be "empowered" to express their own stories in their own way. By doing so, they would make known any sense of injustice they wish to see redressed.

The highest value standards or maximizing standards refer to: establishing human dignity; restoration of destroyed property; restoration of impaired health; restoration of destroyed human relations; community renewal; restoration of the environment; emotional renewal; restoration of freedom; renewing compassion and concern for others; establishment of peace; renewal of civic sense of duty; preparation of social support for unlimited development of human abilities; prevention of future injustice. By not respecting the standards of the highest values, intolerance would be achieved due to the subjective experience of injustice. By accepting the limitation standard, the participants are not limited in achieving the standard from the list of the highest values. With the standards of the highest values, the measure is not that they are always strictly implemented, but that they are developed through a large number of cases that are in the restorative justice program. The evaluation process would consist in their comparison with cases that were not in the program.

All these values are restrictive in determining penalties. Their observance and implementation tend towards the application of some other measures because the goals and means of implementing restorative and retributive justice are not the same. The highest value standards represent different forms of healing that have their basis in internationally recognized human rights and the empirical experience of what participants want to "heal" through the process of restorative justice. Emotional renewal or emotional restoration will thus be freedom from feelings of fear for someone, freedom from hatred for another participant, and freedom from shame or undesirable traits of one's own character for someone else. The provision of social support for the full development of human abilities is aimed at formal social control bodies and their further survival as developmental and not static institutions. Namely, it is considered that state regulatory institutions prevent the development of human abilities, among which the organs of the criminal justice system focused on punishment represent the most typical example.

In the process of implementing restorative justice, Beaithwait emphasizes the importance of auxiliary standards, which he observes as: regret or repentance for the wrong done; apology, condemnation of an act, forgiveness, mercy.

The list of these standards differs from the list of magnification standards by conceptual criteria. Desmond Tutu (1999) stated that there is no future without forgiveness, which has become a guiding idea for many proponents of restorative justice. However, forgiveness is different from listening to others with full respect, which must be the basic standard of restorative justice. Advocating that everyone be heard does not mean at the same time in-

sisting on forgiveness, hastening the granting of forgiveness. Braithwait[10] even insists that it is cruel and wrong to expect the victim of a crime to forgive. (Braithwait 2002: 571) Similarly, repentance that is forcibly or formally extracted from the delinquent also lacks moral force.[11]

Difficulties in implementing these standards are that some view them as vague values and lacking specificity for the implementation of the restorative justice process. However, they should be applied in practice so that evaluation based on previous empirical indicators from implementation will help to encourage advisory regulation as opposed to legalistic regulation in the process of implementing retributive justice. In the literature, he cites as an example the right to a speedy trial, which is provided for by the provisions of the criminal procedure code of modern countries.[12] This right is also presented as a specific provision of the Beijing Rules for Juvenile Justice. [13] However, this very rule can be re-examined from the point of view of the philosophical concept of restorative justice. Namely, practice has shown that in cases where victims are severely traumatized by a committed criminal act, a certain period of time must pass before they become ready to accept "treatment" through the procedure of restorative justice. Victims should be given that right, but not to the extent that it serves as an excuse for arbitrarily keeping a delinquent in custody who has not yet been found guilty. On the other hand, some rights, such as the right to appeal taken from the legalistic regulation, is a highly specific standard in the implementation of restorative justice that, without exception, must be respected.

The basic standard is that the restorative process should strive to avoid dominance. Nevertheless, dominance is still represented in the restorative process as can be seen in any other sphere of social interaction. That's why any program that contains the "restorative" attribute must also be engaged in the prevention of domination. Any conference participant who does not allow another to express his or her position or seeks to dominate other participants must be prevented from doing so. (Braithwaite 2002: 565) If the dominance still persists or other participants are afraid to directly oppose it, then the moderator should demand that those who are subordinated speak.

[10] Furthermore, this author states that apology, forgiveness and mercy are gifts that "have meaning only if they spring from the sincere desire of the person who forgives, apologizes or receives mercy".

[11] Comparing the proposed standards, Braithwait points out that limiting standards must be accepted and applied as limitations. The list of standards of the highest values should be "actively encouraged" by advocates of restorative justice in the restorative process, while auxiliary standards are seen as something that should not be "rushed" in the restorative process, but rather they represent spare and integral parts of a successful restorative justice process.

[12] This right is provided for in Art. 16 of the Criminal Procedure Code of the FRY, according to which the defendant has the right to be brought before the court as soon as possible and to be tried without delay. The court is obliged to conduct the procedure without delay and to prevent any abuse of rights belonging to the persons participating in the procedure.

[13] See: *United Nations Standard Minimum Rules for the Administration of Juvenile Justice – Beijing Rules* (1995) Defence for Children International, s. 5.

Power imbalance is a structural phenomenon.[14] The structure of restorative processes must be such that it minimizes the imbalance of power. The adopted standards direct the preparatory work of the participants of the procedure precisely towards achieving a balance between the participants of the procedure. Organized groups representing the interests of individual victims have a particularly significant role when there is an imbalance of power expressed in the delict itself. This includes support groups for women and children when domestic violence is the subject of debate and environmental support groups when crimes against the environment are committed by powerful corporations.

It is considered that the appropriate procedure is the most important domain where the need to define standards arose. The delinquent should have the right to the advice of a lawyer on whether to agree to participate in the proceedings or not. However, the essence of the restorative justice process, according to Braithwait, is to overcome "adversarial legalism", so that participants are encouraged to speak in their own words rather than being spoken for by "legal peacemakers who may have an interest in polarizing the conflict". (Braithwaite 2002: 565) Given that the process of restorative justice tends to reintegrate harm and combat stigmatization, it is important to prohibit any form of degradation or humiliation in treatment. [15]

The key principle of the process is to pay the same attention to all participants in the procedure – the delinquent, the victim and the community. It is possible that the position of individual victims will be used as a support in programs that are oriented only on the rights of victims. Such programs are morally unacceptable. Carefully listening to the presentation of all participants in the procedure is a prohibition against disrespecting or humiliating others and preventing degrading ways of reacting or punishing.

The right to appeal is one of the basic standards that must be respected. In those situations where criminal law is the basis on which a sanction is imposed, in the restorative justice procedure, delinquents must have the right to appeal against the imposed sanction to a state authority, that is, to a competent criminal court. However, this does not mean that all the mechanisms of the criminal justice procedure simultaneously correspond to the idea of the restorative justice procedure. This particularly applies to the presence of the public in

[14] The restorative justice process applied to a juvenile delinquent, for example, must not proceed in such a way that he is accused in a "room full of adults" (Haines, 1998). This procedure should be attended by adults who see themselves as responsible for representing the interests of minors. If such persons are not found for the first round, the procedure is terminated and returns to the previous state in order to search again for those persons who will represent the interests of the child and support the child. It is similar in the treatment of perpetrators of domestic violence who would be represented by their patriarchal defenders. (Quoted from: Braithwaite 2002: 565)

[15] There is a standard by which offenders and victims have the right to have a lawyer present during the restorative justice process. However, the standard by which lawyers have the right to speak in the proceedings still seems unjustified because such a speaker is considered a threat to the "integrity of the empowerment process of restorative justice". This does not mean that the lawyer should have an unconditional ban on speaking. On the contrary, if all participants agree that they should hear an expert opinion, then that opinion should be presented during the procedure. This is especially true in the case where the lawyers have signed a legal cooperation agreement and have undergone mediation training. *Ibid.*

the proceedings. On the one hand, avoiding the stigmatization of individual participants in the restorative justice process and ensuring a dialogue without dominance implies a certain discretion, especially when the participants do not agree that the process should take place in the presence of experts or the general public. If the participants agree that the procedure takes place in the presence of the public, it is important to ensure the participation of researchers, critics, journalists, judges and colleagues from restorative justice programs in other areas. Thus, critical views, experiences of other procedures, as well as mistakes made, will be presented. The literature presents opinions that support this second understanding and highlights the importance of newspaper reporters whose task is to objectively inform about the respect or non-respect of the basic standards of restorative justice.

CONCLUSION

Modern countries strive to develop tolerance as a basis for communication between people - tolerance for differences, regardless of whether they are of an ethical, racial or economic nature. Diversity should be viewed without complaining. However, tolerance is often not enough to determine the present most accurately, and in the opinion of some supporters of restorative justice, it is not a solution. Tolerance, by itself, as an individual, isolated personal act, does not affect the "healing" of social wounds, nor does it eliminate social isolation and despair. (Cavanagh 2000) Proponents of restorative justice prefer to emphasize that the solution to the issue of social deviance should rather be based on the "general welfare" of the community. The general well-being of the community is defined as "the entire network of social conditions that enable individuals and groups of people to fully develop and live a full life, but so that everyone is not focused only on themselves, but everyone is responsible for everyone else around them." (Cavanagh 2000).

General welfare in a human community means that everyone has an obligation to contribute to the development of the general good in society, in the interest of justice, as well as in finding solutions to social issues in a social community. This is precisely what the basic criticism of retributive justice is based on. Namely, the retributive criminal justice system is designed to punish delinquents, especially through the imposition of punishments of an institutional nature. Institutions for the execution of prison sentences are often described with the words "insult to human dignity ... and poison in the bloodstream of the nation". Such a system did not affect the suppression of crime because it does not deal with resolving the causes of criminal behavior. Those causes are most often found in the closest social environment of the delinquent, in the environment to which he normally returns after the end of his sentence.

The vision of restorative justice, in the context of the common good, is aimed at achieving peace in the social community by improving relations in society, which applies to

all members of the community. The essence of implementing restorative justice is to "treat" any person associated with a crime through remediation, not through punishment. The whole process should be based on apology, forgiveness and establishing a strong connection between people within the community.

Observing the rise of penal populism caused by events in a local community or globally (war events) that encourage human aggressiveness, not in a pejorative sense, bring back the memory of the article that made a revolutionary shift in observing the relationship between victims, perpetrators and the social community. Back in 1977, Professor Nils Christie published his work entitled "Conflict as Property", which paved the way for the new/old restorative process that was put on the back burner after the Second World War (Christie, 1977).

In the field of criminal justice, various reforms have been implemented and are being implemented, in relation to the position of the victim of a criminal offense, which in many cases found their practical evaluation. Some of the proposed solutions should provide financial, practical and psychological support for victims, within the community, through the work of organizations such as "Victim Support" in Great Britain or through programs such as "victim/witness assistance" developed in USA. This type of reform and some narrowly specialized forms of organizing, similar to the establishment of centers for rape victims, shelters for battered women, and then the initiation of state programs to compensate victims, represent examples of actions in most Western countries.

The second group of reforms is aimed at a higher level of integration of victims into the criminal justice system. The "presence" of the victims would be ensured by the state authorities and services themselves, such as the police, prosecutor's office and the court, which would inform the victims about all relevant decisions during the criminal proceedings.

Then, the next group of reform efforts aims to provide justice in a more practical way, by requiring the perpetrator to pay compensation, regardless of whether the property claim is decided by a criminal or civil court.

Another type of reform continues to take place in the area of restorative justice, in the form of mediation or achieving "reintegrative shame", in order to help victims. [16]

In theoretical discussions about standards, values and ensuring the implementation of restorative justice, the neglect of social aspirations and traditions when adopting this process is often highlighted. Restorative justice is sometimes considered only as a possibility to achieve a greater scope of victims' rights in addition to the established criminal law system of retributive justice, and sometimes again as a balance between the rights of delinquents and the rights of victims.

However, despite certain disagreements and inconsistencies in implementation, re-

[16] See: Leslie Sebba, „On the Relationship between Criminological Research and Policy: The Case of Crime Victims", *Criminology and Criminal Justice*, 2001, 1, 27, 28.
[h]ttp://crj.sagepub.com/cgi/reprint/1/1/27, accessed: 22.11.2009.

storative justice, by applying its principles, ensures the restitution of victims and the social community, promotes the reintegration of delinquents and the repair of relations between the victim, the delinquent and the social community. In the process of restorative justice, the possibility is foreseen that delinquent behaviors will be experienced as extremely serious actions that will be dealt with without increased repression and exclusion of delinquents from the social community, along with the process of victim restitution. As some authors point out, restorative justice gives the appearance of avoiding the so-called "zero-sum", whereby victim benefits affect the offender, not in his rights, but in the increased scope of obligations due to his behavior (McEvoy *et al.* 2002: 469).

Various citizens' associations, social service agencies, schools, local communities, legislative bodies and prevention departments perform the largest number of different activities in the process of restorative justice. These activities, related to various areas of social life, are connected by common elements: treatment, mediation between the victim and the perpetrator, apology (feeling of shame) and reintegration. [17] That is why, when defining restorative justice, it is necessary to unite all these processes. Restorative justice is defined as "a process by which all parties involved in the commission of a particular criminal act work together to overcome the consequences of the crime and its implications in the future" (Cavanagh 1998: 24).

In the developed countries of the world, church communities are also dealing with issues of restorative justice. Thus, The Church Council on Justice and Corrections, which brings together eleven church communities in Canada, describes restorative justice as "...a favorite name given to a number of different approaches to justice that have emerged and which strive for healing and more successful responses to crime. Since there are a number of different approaches, these processes try to actively integrate participation in everything that is directly involved in the crime committed. Everyone should listen to the experiences, feelings and questions of the other participant. All of them together highlight issues of responsibility, safety and the need to undertake extremely fair and essential actions

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[17] Activities of restorative justice, much more often applied in the USA, are defined as: victim impact statement, classification and panel discussion, mediation between victim and perpetrator, social service, restitution and social restorative committees.

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PRISONERS IN GERMANY, THEIR WORK AND THEIR REMUNERATION AS PART OF THEIR RESOCIALIZATION

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Julia Aileen Kreutz**

This contribution delves into the German penal system's provisions about prisoner remuneration, shedding light on the legal challenges of prison labour in correctional facilities in Germany. Emphasizing the constitutional principle of resocialization, the article explores the historical context of imprisonment, from its origins in medieval punishment to the evolution of corrective measures during the Enlightenment. It discusses the legal challenges surrounding prisoners' rights, particularly in terms of forced labor and remuneration, highlighting the constitutional considerations and landmark decisions, such as the 1998 and 2023 decisions by the German Federal Constitutional Court (BVerfG). The text scrutinizes the intricacies of work-related aspects for prisoners, addressing the regulatory framework, the concept of resocialization, and the recent constitutional verdict regarding the inadequacy of prisoner remuneration in the federal states of Bavaria and North Rhine-Westphalia. The findings underscore the importance of fair compensation for prisoners' labor as an essential element of the resocialization process, emphasizing the need for a balanced and effective legal framework in correctional settings, and provide an outlook into which changes are expected for prisoner remuneration in German federal states.

KEYWORDS: *prison labor, prisoner remuneration, penal system, rehabilitation, German Federal Constitutional Court*

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INTRODUCTION

Article 1 of the Bavarian Act on the Execution of Prison Sentences and Juvenile Sentences of December 10, 2007 (BayStVollzG)[1] regulates the execution of prison sentences, juvenile sentences and detention in correctional facilities (in Bavaria)[2]. Art. 2 of this law stipulates that the execution of a prison sentence serves to protect the general public from further criminal offenses and enables the prisoner to lead a life without criminal offenses in a socially responsible manner in the future (treatment mandate)[3]. Although the reso-

[1] GVBl. 2007, 866 - last amended by Section 10 of the Act of December 22, 2022 (GVBl. 2022, 718).

[2] It is irrelevant whether Bavarian criminal and juvenile courts or other German, foreign or international courts have issued the order. - The BayStVollzG (similar to other state prison laws) replaces the prison regulations of the (national) Act on the Execution of Custodial Sentences and Correctional Measures (Strafvollzugsgesetz - StVollzG) of 16 March 1976 (Federal Law Gazette 1976 I, 581, 2088), which was last amended on 16 March 1976. March 1976 (BGBl. 1976 I, 581, 2088), which was last amended by Art. 27 of the Act of October 5, 2021 (BGBl. 2021 I, 4607) (on the legislative history Klaus Laubenthal/Nina Nestler/Frank Neubacher/Torsten Verrel, Strafvollzugsgesetze, 12th ed, Munich 2015, A RN 9 f.). The state prison regulations were made possible by the Federalism Reform I of August 28, 2006 (BGBl. 2006 I, 2034), which redistributed legislative powers between the federal government and the federal states and which released the prison system from the previous federal responsibility and transferred its regulations to the federal states, which incidentally also maintain the prisons (the federal government does not have its own prisons). Some aspects of the constitutional reform were met with harsh criticism, particularly with regard to the prison system [see Frank Neubacher, loc. cit, A RN 13 m. w. w. N.; for more recent legal developments in the federal states, see Klaus Laubenthal, Strafvollzug, Berlin 2018, 96 *et seq.*) Legal protection against measures in the prison system (Sections 109 et seq. StVollzG) is part of procedural law and remains the responsibility of the federal legislature (Art. 74 para. 1 no. 1 GG) (thus also expressly Art. 208 BayStVollzG. Moreover, pursuant to Art. 125 GG, the StVollzG continues to apply as particular federal law where the Länder have not made use of their (new) right to legislate (Klaus Laubenthal, loc. cit., 94 f.). On May 31, 2006 (BVerfGE 116, 69 *et seq.*), the Federal Constitutional Court (BVerfG) established constitutional requirements for the execution of juvenile sentences, which the Länder have accomplished in independent juvenile penitentiary laws (Klaus Laubenthal, loc. cit., 95; Frank Neubacher, loc. cit., A RN 17 et seq. in particular with the presentation of the cross-Länder model draft of the Land penitentiary law). On the reform of the juvenile prison system, see the fundamental decision of the Federal Constitutional Court of May 31, 2006 (BVerfGE 116, 69 *et seq.*) and Frank Neubacher, *loc. cit*. N. - As of March 31, 2023, a total of 9,339 people in Bavaria were in prison or juvenile detention (including 8,710 men, 629 women [in 36 correctional facilities] and 512 juveniles and adolescents [in 6 juvenile detention facilities]; on the federal German statistics, Frank Neubacher, *loc. cit.*) - Other types of deprivation of liberty, such as pre-trial detention (Frank Neubacher, *loc. cit.,* B RN 4), enforced detention (under civil law), preventive detention, mandatory detention and administrative detention or police detention, are governed by different regulations; however, some federal states have regulated pre-trial detention in uniform prison and pre-trial detention laws (Frank Neubacher, *loc. cit*., B RN 4).

[3] Art. 2 BayStVollzG, in deviation from the former § 2 StVollzG, puts the protection of the general public first. Whether this is intended to change the value of the purposes of imprisonment in Bavaria is controversial (see Frank Arloth/Helmut Krä, Strafvollzugsgesetze von Bund und LändeRN Kommentar, 5th ed., Munich 2021, Art. 2 BayStVollzG RN 1 with further evidence of the status of the dispute; Frank Neubacher, FN 2, B RN 32 with further references, doubting the constitutionality of the Bavarian provision. N. and RN 37 w. w. N. N.). However, both principles of enforcement already had to be weighed against each other under § 2 StVollzG. Art. 2 BayStVollzG has not changed this in Bavaria (Frank Arloth/Helmut Krä, *loc. cit.*). - Thomas Galli, Weggesperrt. Warum Gefängnisse niemand nützen, Hamburg 2000, as well as Michael R. Weisser, Crime & Punishment in Early Modern Europe, Pre-Industrial Europe 1350 - 1850, Hassocks 1979, 1, „Society first creates thieves, then punishes them for stealing", and Thomas More, Libellus vere aureus, nec minus salutaris quam festivus. De optimo rei publica statu dequ nova insula Utopia, Leuven/Belgium 1516 - in German translation by Jacques Laager, Munich 2004/2018, 34.

cialization of the adult prisoner referred to here, not his „education"[4] and certainly not his mere detention, is the guiding principle[5] of German prison law, alongside the principle of proportionality and respect for human dignity, it is not defined in detail by law. As an exclusive enforcement objective, it is expressed in a large number of individual provisions of enforcement law[6] and thus opens up flexibility for enforcement in individual cases[7]. With regard to the purposes of punishment, the provisions of prison law have opted for aspects of special prevention (Spezialprävention); other purposes of punishment that the sentencing judge may take into consideration (such as responding to the perpetrator's guilt, severity of guilt or general prevention [Generalprävention]) are not accessible to prison law[8]. The regulation on the remuneration of prisoners will have to be examined in more detail. With regard to the treatment mandate, Art. 3 Bay StVollzG stipulates all measures be suitable for working towards a future offense-free lifestyle to prevent further offenses and to protect potential future victims. The treatment measures addressed include, in particular, education and vocational training, work, psychological and socio-educational measures, pastoral care and leisure activities. The type and scope of treatment is based on the prisoner's deficits that caused the offense.

1. A LOOK BACK

Imprisonment as prescribed by the provisions of Sections 38, 39 and 43 of the German Criminal Code (StGB)[9] and the institutions in which it is carried out are a relatively new phenomenon when compared to the history of punishment (imposed by the state) and

[4] The idea of education was predominant in the efforts to reform the penal system in the Weimar Republic (see Klaus Laubenthal, FN 2, p. 88; Frank Neubauer, FN 2, A Rndr. 6; Ursula Sagaster, Die thüringische Landesstrafanstalt Untermaßfeld in den Jahren 1923 - 1933. Zur Methodik des Strafvollzugs in Deutschland, in: Gerhard Deimling [Hrsg.], Strafvollzug, Randgruppen, Soziale Hilfe, Frankfurt a. M. 1980). In contrast to the Basic Law, which does not allow the state to educate adults, under the Weimar Constitution of August 11, 1919, such considerations were compatible with the constitutional situation at the time. - The description of the National Socialist era with its return to deterrence and the associated inhumane methods of punishment in the penal system and even in the juvenile penal system is omitted here (see Klaus Laubenthal, *op. cit.* p. 89 f. with further references; Frank Neubacher, *op. cit*. N.; Frank Neubacher, *op. cit.,* A RN 7; cf. also Johannes Tuchel, Justizmorde bis zur letzten Stunde. Hinrichtungen in Berlin-Plötzensee und in Brandenburg-Görden in den letzten Monaten des Zweiten Weltkriegs, Beiträge zum Widerstand 1933 - 1945, Neue Folge 2, Berlin 2020).

[5] Klaus Laubenthal, FN 2, 109, 111 *et seq*.; the so-called Lebach judgment of the BVerfG (E 35, 235) is already fundamental; Frank Neubacher, FN 2, B RN 28.

[6] On the exclusivity of resocialization as an enforcement goal, see Frank Neubacher, FN 2, B RN 28 with further references. Resocialization and the principle of guilt under Section 46 (1) sentence 1 StGB correlate. The principle of guilt has constitutional status. The connection becomes clear in Section 46 (1) sentence 2 StGB. The provision requires that the judge imposing the sentence must also take into account the effects of the sentence on the offender's future life in society.

[7] Frank Neubacher, FN 2, B RN 41

[8] Frank Neubacher, FN 2, B RN 45 m. w. w. N.

[9] In the version published on November 13, 1998 (BGBl. 1998 I, 3323), which was last amended by Art. 1 of the Act of July 26, 2023 (BGBl. 2023 I No. 203).

the history of criminal law in general[10]. The historical purposes pursued with public punishment were aimed at retribution, social vengeance, rendering harmless and destroying the offender[11]. The criminal law of the late Middle Ages and the early modern period was far removed from the reintegration of offenders into society. Prisons were only needed by the state to keep[12] the suspect in custody until the day of his trial and then until his public execution. Punishments involving personal freedom[13] were largely unknown, and not only in Germany[14]. Corporal and capital punishment was the rule even for minor offenses, such as the theft of food, and even for children. For centuries, late medieval and early modern penal practices, with their almost liturgical staging of public executions and mutilations, were not only veritable „theaters of horror"[15] with the character of popular festivals, but also displayed of increasing state power in the early modern era[16]. Prisons in the modern sense

[10] Gerhard Ammerer/Falk Brettschneider/Alfred Stefan Weiß, Prison and Society. Zur (Vor-)Geschichte der strafenden Einsperrung, in: Gerhard Ammerer/Falk Brettschneider/Alfred Stefan Weiß (eds.), Prison and Society. On the (pre) history of punitive incarceration. Leipziger Beiträge zur Universalgeschichte und vergleichenden Gesellschaftsforschung, Jahrgang 13 (2002), 9/13 ff.; Peter Baldwin, Command and Persuade. Crime, Law, and the State across History, Cambridge (Mass.) 2021, 135 ff.

[11] Regula Ludi, Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750 - 1850, Tübingen 1999, 33 ff.; Peter Baldwin, FN 10, 20: „The harsher the punishment, the less it served an everyday function."; Frank Neubacher, FN 2, A RN 1.

[12] Places of detention were fortifications (especially castle or town towers) or cellars in town halls or, if they existed, in the cellars of courthouses (the „perforated prison" in the Renaissance town hall of the city of Nuremberg, which can still be visited today, is capable of eliciting shivers of horror [see Stadt Nürnberg (Hrsg.), Die Lochgefängnisse, Nuremberg 1992]; Frank Neubacher, FN 2, A RN 1). For the sake of completeness, it should be noted that these places of detention were also places of torture, which was regularly used in Germany at the time because it was often the only way to obtain „confessions", which the procedural law of the time regarded as the necessary evidence for a guilty verdict.

[13] An exception may be seen in monastic imprisonment under canon law, which could be imposed on „unruly" clerics, as well as on non-officials of the Church (cf. today the penalties for atonement under canons 1336, 1337 of the Codex Iuris Canonici 1983 [CIC] [prohibitions of residence], which are, however, limited to clerics and are religious penalties only) (cf. also Albin Eser, Strafrecht in Staat und Kirche. Einige vergleichende Beobachtungen, in: Dieter Schwab [ed.], Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft: Festschrift zum 65. Geburtstag von Paul Mikat, Berlin 1989, 493 - 513; Thomas Krause, Geschichte des Strafvollzugs. Von den Kerkern des Altertums bis zur Gegenwart, Darmstadt 1999, 16 f.; Gerd Kleinheyer, Freiheitsstrafen und Strafen mit Freiheitsentzug, in: Peter Landau/Friedrich-Christian Schroeder [eds.], Strafrecht, Strafprozess und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina, Juristische Abhandlungen Band XIX, Frankfurt a. M. 1984, 103/109; also Frank Neubacher, FN 2, A RN 1). Historically, monastic imprisonment was often misused to dispose of unpopular relatives or wives, but also of political opponents. For example, Emperor Charlemagne disempowered his cousin, Duke Tassilo of Bavaria, at the imperial assembly of Ingelheim in 788 by having him sentenced to monastic punishment for desertion and incorporated the largely independent Duchy of Bavaria, which had thus been eliminated, into the Frankish Empire (instead of all: Herwig Wolfram, Tassilo III. Highest Prince and Lowest Monk [Kleine bayerische Biographien], Regensburg 2016).

[14] Eberhard Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege, 2nd ed., Tübingen 1951, § 51 (60 f.)

[15] Richard van Dülmen, Theater des Schreckens. Gerichtspraxis und Strafrituale in der frühen Neuzeit, 3rd ed., Berlin 1988; Wolfgang Schild, Der ‚entliche Rechtstag' als Theater des Rechts, in: Peter Landau/Friedrich-Christian Schroeder (eds.), Strafrecht, Strafprozess und Rezeption. Foundations, Developments and Effects of the Constitutio Criminalis Carolina. Juristische Abhandlungen Volume XIX, Frankfurt am Main 1984, 119 ff. with further references. N.

[16] Regula Ludi, FN 11, 39

were unnecessary[17].

It is disputed whether the workhouses or (early) penitentiaries that emerged in the Netherlands in the 16th century and almost simultaneously in England[18] and were quickly copied in Germany[19] were forerunners of our modern deprivation of liberty institutions is disputed[20]. They primarily served a police law purpose. The Economic crises of the 16th century led to a Europe-wide „pauperism"[21] with an increase in the number of beggars and the itenerant population, which the emerging absolutism saw as a social threat, especially to the propertied classes[22]. Because other means failed, the early modern state imprisoned the begging and wandering people indiscriminately and without punishment in such work-

17 Thomas Krause, FN 13, 12; Falk Bretschneider, Humanism, Discipline and Social Policy. Theories and History of Prison in Western Europe, the USA and Germany, in: Gerhard Ammerer/Falk Bretschneider/Alfred Stefan Weiß (eds.), Gefängnis und Gesellschaft. On the (pre-)history of punitive incarceration. Leipzig papers on universal history and comparative social research. Volume 13 (2003), 19/21 f.; Frank Neubacher, FN 2, A RN 1.

18 Bridewell Palace, built by Cardinal Wolsey in 1510 and taken over by Henry VIII after the burning of Westminster Palace, was transferred to the City of London by King Edward VI in 1553, who turned the palace into a „prison" for beggars, the homeless, prostitutes and petty criminals. The prison was operated until 1855 (see, for example, Edward Geoffrey O'Donoghue, Bridewell Hospital Palace Prison Schools from the Earliest Times to the End of the Reign of Elizabeth, London 1923; William G. Hinkle, A History of Bridewell Prison 1553 - 1700, Lewiston 2006; Gerhard Deimling, Die Gründung Bridewells im Kontext der europäischen Armenfürsorge im 16. Jahrhundert, in: Josef Maria Häußling/Richard Reindl (eds.), Sozialpädagogik und Strafrechtspflege. Gedächtnisschrift für Max Busch, Pfaffenweiler 1995, 42 ff.). The penitentiary or workhouse („Rasphuis") opened in Amsterdam in 1589 was primarily used to house beggars and juvenile petty criminals (Thorsten Sellin, Pioneering in Penology: the Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries, Michigan 1944; Robert von Hippel, Beiträge zur Geschichte der Freiheitsstrafe, Zeitschrift für die gesamte Strafrechtswissenschaft Vol. 18 [1898], pp. 419 f., 437 - 494; Frank Neubacher, FN 2, A RN 2).

19 Robert von Hippel, FN 18, 608 ff.; Birgit Riedel, Die Grafschaft Saarbrücken zur Zeit der Französischen Revolution, in: Gerhard Bungert/Charly Lehnert (eds.), Das Saarbrücker Schloss. Zur Geschichte und Gegenwart, Saarbrücken 1989, p. 77 f.; Frank Neubacher, FN 2, A RN 2

20 Regula Ludi, FN 11, 38 f.

21 Although the term only emerged in the 19th century, it describes the impoverishment of large sections of the population there as well as here.

22 There is a connection between this early modern pauperism and the upheavals of the Reformation, which after 1517 led to the dissolution of monasteries and abbeys in the countries that had become Protestant, particularly in England and Wales under Henry VIII, but also in Germany and Scandinavia, and transferred their hitherto considerable assets to the respective sovereign. Until their dissolution, however, the monasteries and abbeys had provided „poor relief", which was abolished without replacement (Robert von Hippel, FN 18, 419 f, 423 - 429). State welfare did not initially take its place (see, for example, for Denmark Per Seesko/Louise Nuholen Kallestrup/Lars Bisgard [eds.], The Dissolution of Monasteries: The Case of Denmark, in a Regional Perspective [Studies in History and Social Sciences Vol. 580], University Press of Southern Denmark 2020; from the more recent literature for England James G. Clark, The Dissolution of the Monasteries. A New History, Yale University Press 2021; Harriet Lyon, Memory and the Dissolution of the Monasteries in Early Modern England, Cambridge University Press 2021).

houses[23], regardless of age, gender and mental state, with unspeakable hygienic conditions, high mortality rates and, incidentally, a breeding ground for further crime. There, the inmates were often subjected to the most severe forced labor[24] and were provided with meagre food. At the beginning of the 18th century, the first modern-looking penal institution was built in Celle, Lower Saxony, as a „workhouse, penitentiary and madhouse", where prison sentences could also be carried out if they were imposed[25].

With natural law and then the Enlightenment at the turn of the 17th and 18th centuries, the views on the purposes of punishment[26] that were pursued with public punishment gradually changed. The theological background of punishment[27], namely to make an example of the individual for offending God or divine law or to restore the peace of God, so to speak, receded into the background[28]. The individual took on the character of a subject and appeared increasingly unsuitable as an object of public vengeance. In view of the popular nature of public executions, even the deterrent character of the punishment became questionable over time. Even the criminal courts gradually realized that mutilated, severly disabled criminals were becoming a social burden. It was not only in Germany that the number of death-worthy offenses and the practice of imposing and executing death sentences on juveniles and children were seen as „out of date". Both substantive criminal law of the Emperor Charles V's Code of Criminal Procedure, i. e. the Constitutio Criminalis Carolina (the so-called Carolina), which had been in force in Germany (subsidiarily) since July 27, 1532, and the criminal statutes of the sovereigns, which were often based on it, gave criminal courts discretion to deviate from the draconian standard punishment (poena ordinaria) and impose a „poena extraordinaria". They did this from the end of the 16th centu-

[23] For the Schallenhaus or Schallenwerk of the federal city state of Bern Regula Ludi, FN 11, 38; Thomas Krause, FN 13, 22, 46 ff.; the same, Opera publica, in: Gerhard Ammerer/Falk Bretschneider/Alfred Stefan Weiß (eds.), Gefängnis und Gesellschaft. On the (pre-)history of punitive incarceration. Leipziger Beiträge zur Universalgeschichte und vergleichenden Gesellschaftsforschung, Jahrgang 13 (2003), 117 ff.; Helmut Bräuer, Die Armen, ihre Kinder und das Zuchthaus, in: Gerhard Ammerer/Falk Bretschneider/Alfred Stefan Weiß (eds.), Gefängnis und Gesellschaft. On the (pre-)history of punitive incarceration. Leipziger Beiträge zur Universalgeschichte und vergleichenden Gesellschaftsforschung, Jahrgang 13 (2003), *op. cit.* 131 ff.; Robert von Hippel, FN 18, 419, 429 ff.; Frank Neubacher, FN 2, A RN 2

[24] The mercantilism that began with early absolutism saw potential for cheap labor in the inmates of the workhouses. Often enough, if the mercantilist state did not exploit them itself, they were „leased" to the operators of manufactories, as was the case in the Brandenburg silk manufactory of the 17th century, and not only there (Thomas Krause, FN 13, 28 f. 41; Frank Neubacher, FN 2, A RN 2).

[25] Celle is the oldest prison in Germany, the old parts of which are still in use today, and was regarded as a „model institution" when it was built and later copied in other parts of Germany.

[26] Cesare Beccaria, Trattato dei delitti e delle pene, 1764 - Über Verbrechen und Strafen. Translated and edited from the 1766 edition by Wilhelm Alff, 2nd ed., Frankfurt am Main 1988). Beccaria was one of the co-founders of modern criminology (see Helmut Jacobs (ed.), Gegen Folter und Todesstrafe. Aufklärerischer Diskurs und europäische Literatur vom 18. Jahrhundert bis zur Gegenwart, Frankfurt am Main2007.

[27] See Regula Ludi, FN 11, 41, 46 *et seq*. for the criminal theory of the federal Bern.

[28] Regula Ludi, FN 11, 41 ff.

ry sentencing the accuseds „to the galleys“[29] or to forced labor in mines. During the Turkish wars at the end of the 17th century[30] the accused were conscripted to defend the German Empire at its Southeastern border[31] or were expelled from the country. The Enlightenment bore other fruits in the 18th century, when torture was increasingly put out of use. Also, the worst methods of execution, such as burning, quartering and wheeling, were largely no longer used in the course of the 18th century[32].

[29] The southern German states and Switzerland sold their delinquents to the seafaring republics in the Mediterranean, while the western German states and Switzerland sold their convicts to the King of France. The trade only came to a standstill when improved sailing technology made rowing slaves superfluous in the middle of the 18th century. - The practical effects of galley punishment were often equivalent to the death penalty. The living conditions of the rowing slaves were inhumane, and it was not always certain that the delinquent who had served his sentence on the rowing bench would be released into freedom (Arno Lott, Die Todesstrafe im Kurfürstentum Trier in der frühen Neuzeit, Frankfurt am Main 1998, 207 - 209; Sabine Schleichert, Galeerenstrafen in Tirol im 16. Jahrhundert? Munich - Ravensburg 2003, 3 ff.; Thomas Vornbaum, Einführung in die moderne Strafrechtsgeschichte, 4th ed, Berlin 2019, 104 f.; Hans Schlosser, Der Mensch als Ware: Die Galeerenstrafe in Süddeutschland als Reaktion auf Preisrevolution und Großmachtpolitik [16th - 18th century], in: Reinhard Blum/ Manfred Steiner [eds.], Aktuelle Probleme der Marktwirtschaft in gesamt- und einzelwirtschaftlicher Sicht, Festschrift zum 65. Geburtstag von Louis Perridon, Berlin 1984, 87 ff.; the same, Die Strafe der Galeere, in: Clausdieter Schott/Claudio Soliva [eds.], Nit anders denn liebs und guets. Petershauser Kolloquium aus Anlaß des 80. Geburtstags von Karl S. Baden, Sigmaringen 1986, 133/139 f.; derselbe, Die Strafe der Galeere für Kriminelle aus Bayern und Schwaben - Menschenhandel als Strafvollzug im 16. - 18. Jahrhundert, in: Verein Rieser Kulturtage e. V. [ed.], Rieser Kulturtage. Eine Landschaft stellt sich vor, vol. 5, Nördlingen 1984, 264 ff;, Die infamierende Strafe der Galeere, in: Hans Kroeschell [ed.], Festschrift für Hans Thieme zu seinem 80. Geburtstag, Sigmaringen 1986, 253 ff; Elmar Müller, Anmerkungen zur Galeerenschiffahrt und zur Galeerenstrafe, in: Josef Kürzinger/Elmar Müller [ed.], Festschrift für Wolf Middendorf zum 70. Geburtstag, Bielefeld 1986, 197 ff.; Louis Carlen, Die Galeerenstrafe in der Schweiz, Zeitschrift für die gesamte Strafrechtswissenschaft Vol. 88 [1976], 557 ff.; P. Frauenstädt, Zur Galeerenstrafe in Deutschland, Zeitschrift für die gesamte Strafrechtswissenschaft Vol. 16 [1896], 518 ff; Ulrich Niggemann, Konfessionelle Dissidenten als Kriegswaffe. Das Beispiel der hugenottischen Galeerensträflinge im 17. und 18. Jahrhundert, in: Kerstin von Lingen/ Klaus Gestwa [eds.], Zwangsarbeit als Kriegsressource in Europa und Asien, vol. 77 der Sammlung Krieg in der Geschichte, Paderborn 2014, 93 ff.). - At the end of the 18th century, Emperor Joseph II fell back on the Treidel punishment practiced in the Austrian hereditary lands, in which accused who had not been sentenced to fortress construction had to pull Danube barges up the Danube (Eberhard Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege, 3rd ed., Göttingen 1995, 256 f.). His successors abandoned this form of punishment.

[30] Karl Teply, Vom Los osmanischer Gefangener aus dem Großen Türkenkrieg 1683 - 1699, Südostforschungen: Internationale Zeitschrift für Geschichte, Kultur und Landeskunde Südosteuropas Vol. XXXII (1973), 33 ff.

[31] Hans Schlosser, Motives of change in the manifestations and penal purposes of labor punishment. „Opus publicum“ und richterliches Strafänderungsrecht, in: Reiner Schulze/Thomas Vornbaum/Christina D. Schmidt/Nicola Willenberg (eds.), Strafzweck und Strafform zwischen religiöser und weltlicher Wertevermittlung, Münster 2008, 145 ff.

[32] The literature on witch trials and burnings in Germany can no longer be surveyed (cf. a selection: Wolfgang Behringer, Hexen, Glaube, Verfolgung, Vermarktung, 7th ed., Munich 2020; Johannes Dillinger, Hexen und Magie (= Historische Einführungen Band 3), 2nd ed., Frankfurt am Main/New York 2018; Christoph Gerst, Der Hexenprozess. Vom Erkennen einer Hexe bis zum Urteil, Saarbrücken 2012). The last conviction as a witch took place on April 4, 1775 in Kempten (Allgäu). She was to be executed with the sword, but died of natural causes in Kempten prison in 1781.

The Enlightenment[33] set in motion a criminal law reform movement in Germany at the end of the 18th century/beginning of the 19th century[34], which gradually expanded the focus of imprisonment on (special) prevention (Spezialprävention)[35]. Capital punishment was reserved for only the most serious offenses, but continued to implemented which was enforced in public until the middle of the 19th century. The justice system also turned against torture[36]. Imprisonment (hard dungeon or penitentiary [often combined with forced labor], imprisonment in a fortress or prison) became the standard punishment[37]. The execution of these punishments was only seemingly humane. „Modern" prisons did not exist; their construction did not begin until the middle of the 19th century[38]. The justice system made use of what history had left behind: abandoned military buildings and secularized monasteries[39]. The concepts of prison only began to develop in the 20th century. The penal system was often limited to detention under very precarious conditions, and the separation of men and women became the rule only in the second half of the 19th century. Punishment was carried out equally on adults and minors in the same institution - at best in separate wards. Juvenile detention was only introduced in Germany in the first half of the 20th century[40]. Even those with cognitive and organic brain disorders were held in prisons until psychiatric clinics under medical management were established in the 20th century. According to the visitation reports, the conditions in these institutions - whether new or old - were at least

[33] The fundamental political and social criticism of the ancien régime of feudalism was directed precisely at criminal prosecution (cf. Regula Ludi, FN 11, 68 - 89) and denounced the backwardness and inequality of justice, particularly through Voltaire in France, with Europe-wide journalistic impact, using the example of the judicial murder of Jean Calas (instead of all Gilbert Collard, Voltaire, l'affaire Calas et nous, Paris 1994; Janine Garrisson, L'affaire Calas, Paris 2004; Dieter Hüning, Voltaires kriminalpolitische Aufklärung. Über den Zusammenhang von Religionskritik, Toleranzforderung und kriminalpolitischer Aufklärung, in: Eric Achermann/Gideon Stiening (eds.), Vom „Theater des Schreckens" zum „peinlichen Recht nach der Vernunft". Literatur und Strafrecht im 17. und 18. Jahrhundert, Berlin 2022, p. 191 ff.; Regula Ludi, *op. cit*. 100 ff.).

[34] See also Otto Zwengel, Das Strafverfahren in Deutschland von der Zeit der Carolina bis zum Beginn der Reformbewegung des 19. Jahrhunderts, Niederlauken 1963, 53 ff.

[35] Regula Ludi, FN 11, 233 ff.

[36] Regula Ludi, FN 11, 44.

[37] Beginning with the codifications in Bavaria through the Criminal Code of 1813 (see Paul Johann Anselm Feuerbach, Lehrbuch des gemeinen in Deutschland geltenden Rechts, Gießen 1803, § 149; Gerd Kleinheyer, FN 13, 103/120 and 121 ff.; Frank Neubacher FN 2, A RN 3).

[38] For example Susanne Braun, Das Gefängnis als staatliche Bauaufgabe dargestellt am Beispiel der Kölner Strafanstalt „Der Klingelpütz" (1834 - 1838 and 1843 - 1845), art history dissertation at the University of Cologne 2003

[39] Such former monasteries are still part of everyday prison life in Bavaria today, for example the former Cistercian abbeys in Kaisheim (since 1816) and Ebrach (since 1851). Frank Neubacher, FN 2, A RN 3 on the conditions within the penal institutions of the 19th century.

[40] On the development of youth law Stefan Ruppert, Recht hält jung. Zur Entstehung der Jugend aus rechtshistorischer Sicht: Deutschland im langen 19. Jahrhundert (ca. 1800 - 1919), Frankfurt am Main 2023, and on juvenile criminal law in particular, 289 ff.

precarious until well into the 20th century[41]. The Great Criminal Law Reform of 1969/1970 was a real turning point having introduced a uniform prison in Section 38 StGB[42].

2. THE POSITION OF PRISONERS AND THE REMUNERATIION FOR THEIR WORK

Until the StVollzG came into force, the legal protection of prisoners was inadequate and, moreover, controversial as far as the jurisdiction of the courts was concerned. As there were no statutory regulations in the prison system until then, it was left to the judicial administration to regulate the internal conditions of the institutions and thus also the legal status of the prisoners. Even after the German Constitution of August 11, 1919 had guaranteed basic rights, this was done by means of prison regulations issued by the prison authorities and administrative regulations issued by the ministries of justice. According to the prevailing doctrine, the fundamental rights of prisoners who were considered to be „in a special relationship of force"[43] could be restricted without a formal parliamentary act[44]. Even at the time of the Weimar Constitution, administrative agreements between the judicial administrations throughout the Reich were at best aimed at standardizing the prison system and pursuing the idea of education in the penal system with the aim of „morally uplifting" prisoners[45]. The gaps in the system of prison regulations continued into the 1970s,

41 Cf. Theodor Heinze, Andeutungen zu einer zweckmäßigen Einrichtung und Beaufsichtigung der Strafanstalten und Kriminalgefängnisse in Deutschland, Leipzig 1842, 16, 53.

42 Frank Neubacher, FN 2, A RN 8.

43 Cf. for example Klaus Laubenthal, FN 2, 88; Frank Arloth/Horst Krä, FN 3, Einl. RN 1; Thomas Krause, FN 13, 74.

44 Horst Schüler-Springorum, Strafvollzug im Übergang. Studien zum Stand der Vollzugsrechtslehre, Göttingen 1969 (also Hamburg habilitation thesis from 1967) - On the National Socialist concept of deterrence and extermination Klaus Laubenthal, FN 2, 89, which was characterized by its concentration camps, which existed alongside the ordinary penal system (Wolfgang Benz/Barbara Distel [eds.], Der Ort des Terrors. History of the National Socialist Concentration Camps. Band 1: Die Organisation des Terrors, Munich 2005; Martin Broszat, Nationalsozialistische Konzentrationslager, in: Helmut Buchheim/Martin Broszat/Hans Adolf Jacobsen *et al.* [eds.], Anatomie des SS-Staates, 6th ed., Munich 1994, 321 ff.; Ralf Faber, Strafvollzug im „Dritten Reich", in: Wolfgang Form/Theo Schiller/Lothar Seitz [eds.], NS-Justiz in Hessen: Kontinuitäten, Erbe. Historical Commission for Hesse, Marburg 2015, 169 ff.; Ernst Fraenkel, Der Doppelstaat. Recht und Justiz im „Dritten Reich", Frankfurt am Main 1984; Ulrich Herbert/Karin Orth/Christoph Diekmann [eds.], Die nationalsozialistischen Konzentrationslager. Entwicklung und Struktur, Vol. I, Göttingen 2002, 327 ff.; Günther Kaiser, Strafvollzug unter totalitärer Herrschaft, in: Guido Britz/Heike Jung/Heinz Koriath/Egon Müller [eds.], Grundlagen staatlicher Strafens. Festschrift für Heinz Müller-Dietz zum 70. Geburtstag, Munich 2001, 327 ff.; Rainer Möhler, Strafvollzug im „Dritten Reich". Nationale Politik und regionale Ausprägung am Beispiel des Saarlandes, in: Heike Jung/Heinz Müller-Dietz [eds.], Strafvollzug im „Dritten Reich", Baden-Baden 1996, 9 ff.; Heinz Müller-Dietz, Standort und Bedeutung des Strafvollzugs im „Dritten Reich", in: Heike Jung/Heinz Müller-Dietz [eds.], Strafvollzug im „Dritten Reich", Baden-Baden 1996, 99 ff.; Nikolaus Wachsmann, Gefangen unter Hitler. Justizterror und Strafvollzug im NS-Staat, Munich 2006; Frank Neubacher, FN 2, A RN 6).

45 Klaus Laubenthal, FN 2, 88; Thomas Krause, FN 13, 76 *et seq*.; Frank Neubacher, FN 2, A RN 7

even after the abolition of the National Socialist system of repression by encarceration[46]. The penal system was based on the principles of administrative regulations[47].

In its decision of March 14, 1972[48], the Federal Constitutional Court described the legal situation in prison up to that point as „inadmissible" with regard to the fundamental rights of prisoners, thereby ending its previous justification through the figure of the „special relationship of force" and securing the development of prison regulations through formal parliamentary legislation. After controversial discussions, the Bundestag passed the above-mentioned Prison Act on February 12, 1976, which came into force on January 1, 1977 with amendments enforced by the Bundesrat[49].

Since then and in conjunction with the protection of human dignity and the principle of proportionality, the concept of resocialization has shapped the German prison system. Work and employment in prison are key pillars of this resocialization, insofar as they can be reasonably expected of the prisoner, particularly in view of his health and age. The prisoner's consent to an activity assigned to him is not a prerequisite[50]. The obligation to work under Art. 43 BayStVollzG (which largely corresponds to Section 41 StVollzG) does

[46] Klaus Laubenthal, FN 2, 90 - 92 also with regard to the introduction of (judicial) legal protection options enforced by the constitutional guarantee of legal protection under Article 19 (4) of the Basic Law through §§ 23 *et seq.* of the Introductory Act to the Courts Constitution Act in the corrected version published in the Federal Law Gazette Part III, section number 300-1, which was last amended by Art. 3 of the Act of June 25, 2021 (Federal Law Gazette 2021 I, 2099) (EGGVG).

[47] Service and Enforcement Regulations of 1961 (Frank Neubacher, FN 2, A RN 8).

[48] BVerfGE 33, 1/10.

[49] When the German Democratic Republic (GDR or DDR) joined the Federal Republic of Germany on October 3, 1990, the Federal Prison Act also came into force for the acceding territory. - Forced labor was an integral part of the prison system in the GDR, especially for political prisoners. The first legal regulations can be found in the Prison and Reintegration Act of January 12, 1968, on the basis of which the GDR Ministry of the Interior, which was responsible for the prison system, issued the „Order on the Use of Prisoners for Socially Useful Work - Work Deployment Order" on February 20, 1971. In the prison system of the GDR, compulsory work was intended to fulfill the socialist plan and served the GDR, which was always short of foreign currency, to obtain it, because the prisoners often worked for well-known Western companies such as IKEA or the mail-order company Quelle under inhumane conditions (see Christian Sachse, Das System der Zwangsarbeit in der SED-Diktatur. Die wirtschaftliche und politische Dimension, Leipzig 2014; Karin Schmidt, Zur Frage der Zwangsarbeit im Strafvollzug der DDR. Die „Pflicht zur Arbeit" im Arbeiter- und Bauernstaat, Hildesheim 2011; Uwe Bastian/Hildegund Neubert, Schamlos ausgebeutet. Das System der Haftzwangsarbeit politischer Gefangener des SED-Staates, Berlin 2003; Henrik Eberle, GULag DDR? Ökonomische Aspekte des Strafvollzugs in den 50er und 60er Jahren, in: Heiner Timmermann (ed.), Die DDR - Recht und Justiz als politisches Instrument, Berlin 2000, 111 ff.; Klaus Laubenthal, FN 2, 100 ff.; Frank Neubacher, FN 2, B RN 119 m. w. w. N.B. for the penal system in the former GDR after its accession to the Federal Republic of Germany).

[50] Klaus Laubenthal, FN 2, 316 - Whether and to what extent the prisoner's wishes can be complied with depends on the circumstances of the individual case (see Klaus Laubenthal, *loc. cit.* 319, 322).

not raise any concerns under international law[51] or constitutional law[52]. In fact forced labour[53] is permissible under Article 12 (3) of the Basic Law in the case of a court-ordered prison sentence[54]. Moreover according to case law of the Federal Constitutional Court, it is considered conducive to the resocialization of the prisoner[55], even if it is performed outside the closed prison i. e. in the private sector under the public law responsibility of the prison authority[56]. Excluded from the obligation to work are those prisoners who are permitted by the prison to work for themselves, for example artists, writers or scientists[57]. Refusal to carry out an assigned activity may constitute a breach of duty in individual cases and be subject

[51] In general on the relationship between the national penal system and international law Frank Neubauer, FN 2, A RN 41- 45 - Art. 4 para. 3 lit. a ECHR and European Court of Human Rights (ECtHR), decision of February 9, 2016 - 10109/14 RN 69 *et seq.*; Klaus Laubenthal, FN 2, p. 317; Frank Arloth/Helmut Krä, FN 3, § 41 StVollzG RN 7; Rupert, in: Dürig/Herzog/Scholz, Grundgesetz. Kommentar, Art. 12 RN 506 (2006); generally on the tension between the ban on forced labor under international law and the obligation to work in the prison system: Deutscher Bundestag - Wissenschaftliche Dienste, Das völkerrechtliche Verbot der Zwangsarbeit und die Arbeit von Strafgefangenen während der Freiheitsentziehung, expert opinion of 26 October 2016 - file no: WD 2-3000-132/16.

[52] On the historical development Klaus Stern, Das Staatsrecht der Bundesrepublik Deutschland. Band IV/1: Die Einzelnen Grundrechte, Munich 2006, 994 ff.

[53] On the historical background to this prohibition BVerfGE 74, 102/116 *et seq*.

[54] See also Jörn Axel Kämmerer, in: Jörn Axel Kämmerer/Markus Kotzur (eds.), Grundgesetz. Kommentar, Vol. 1, 7th ed., Munich 2021, Art. 12 RN 162 - In contrast to earlier German criminal law, the StGB no longer considers forced labor to be a penalty. A criminal court can therefore also not impose it as an (independent) penalty; Rupert Scholz, in: Dürig/Herzog/Scholz, Grundgesetz. Commentary, Art. 12 RN 505 (2006).

[55] BVerfGE 66, 199/208; 98, 169/200 f.; Jörn Axel Kämmerer, *loc. cit*. RN 162; Frank Neubacher, FN 2, A RN 31

[56] BVerfGE 98, 169, 204 f., 211; Jörn Axel Kämmerer, FN 54, RN 162; Frank Arloth/Horst Krä, FN 3, § 41 StVollzG, RN 7 - § 41 para. 3 StVollzG, which requires the prisoner's consent to employment in a private company, has never come into force and, if it were to come into force, would cause almost insurmountable problems in terms of enforcement against the background of inmate turnover within an institution (Frank Arloth/Horst Krä, *loc. cit*, RN 7 with further references). Cf. also Hartmut-Michael Weber, Gefängnis und freier Markt, Neue Kriminalpolitik 2000, 17 ff. - When a prisoner is integrated into an external company, it is questionable whether labor law regulations apply to him or are superseded by regulations of prison law, even if the work is performed outside the prison walls. The provisions of the Federal Leave Act do not apply to prisoners, but the rules on leave under prison law do. Mandatory regulations on operational safety or working hours, for example, apply to them without distinction, as they do to all other employees of a company. However, in the case of the company manager's right to issue instructions, for example with regard to the enforcement of the employed prisoner, it may be questionable whether this right also applies to the employed prisoner without further ado and without restriction or whether the company owner is dependent on „enforcement assistance" from the prison, which is responsible under public law. For example, a prisoner employed by an external company has no claim against the external company to be taken on in an employment relationship under labor law after serving his prison sentence (see also Klaus Laubenthal, FN 2, 325).

[57] Art. 42 para. 2 BayStVollzG; Klaus Laubenthal, FN 2, 342 ff.; Frank Arloth/Horst Krä, FN 3, § 41 StVollzG RN 7). - When approving self-employment, the prison has a discretionary power which it must base on the treatment mandate, the security of the prison and the fundamental rights of the prisoner. In some federal states, the approval of self-employment can be made dependent on the payment of a contribution to prison costs, for example in accordance with Art. 49 BayStVollzG, and payment can be demanded in advance on a monthly basis (Klaus Laubenthal, FN 2, 343). The contribution to prison costs amounted to EUR 447.35 per month in 2021 (also on its calculation Frank Arloth/Horst Krä, FN 3, § 50 StVollzG, RN 10). - If a prisoner is permitted to engage in self-employment in the context of journalistic activities, their freedom of expression under Article 5 (1) of the Basic Law is of particular importance and becomes especially precarious if there is a risk of spreading (right-wing or left-wing) extremist or inciting ideas from within the prison.

to disciplinary action[58]. Assigned work is always designed to the prisoner's therapy and is intended to stimulate positive work and performance behavior, especially in the sense of perseverance at an assignment over several hours[59]. This is incompatible with meaningless or degrading activities; the latter would also be inhumane[60]. As a therapeutic measure, work must be discussed with the prisoner when he is heard on his therapy program[61].

Rehabilitation is an objective of the treatment of prisoners deprived of their liberty also through the appropriate payment of prisoner work, where success is not guaranteed. Compared to other countries, the rate of those who reoffend after completing therapy and being released to freedom may be lower in Germany. However, recidivism does occur. Therapy in prison is also a labour-intensive and costly undertaking. This is where **populist criticism** of the current (German) penal system comes in. **Populism** looks for simple and simplified truths, constructs the truths that suit it and twists facts. The complex (German) penal system does not fit into this constructed 'truth'. Populists push aside welfare state, constitutional and human rights requirements for a humane deprivation of liberty. Prisons are portrayed as 'a kind of hotel', which they are not, not only in Germany but throughout Europe, in which prisoners are 'provided for all round' and lead a 'carefree life' from a populist perspective, at the expense of the taxpayer. The appropriate remuneration of prison labour is an essential aspect of this. Not only in individual cases, when it (regrettably) comes to reoffending, but beyond that, such a populist view is a danger to the idea of rehabilitation, which took decades to develop. What's more, this populist view of the penal system avoids developing its own human rights-compliant concepts for the deprivation of personal freedom and explicitly or between the lines advocates a relapse into prison concepts that are considered obsolete: This involves pure custodial imprisonment, which in the past was associated with coercion to often pointless but physically destructive forced labour. However, a person who has committed a criminal offence does not cease to be a citizen and holder of fundamental rights once they have been sentenced to prison. This also applies to his remuneration for labour performed in prison.

58 Klaus Laubenthal, FN 2, p. 318; OLG Hamburg, NStZ 1992, 53 - Since work serves the subsequent reintegration into society, disciplinary sanctions for violation of the obligation to work should be applied with restraint (derselbe, *loc. cit.*).

59 Klaus Laubenthal, FN 2, 328 ff.; 324.

60 The „beating of stones" or running in so-called treadmills, which was quite common in former workhouses or penitentiaries, is pointless (cf. Nina Nestler, FN 2, F RN 26) and mere harassment and inadmissible (cf. for example Matthias Schmoock, Werk- und Zuchthaus. Ein Kabinett des Schreckens, in: derselbe, Hamburgs verschwundene Orte. Surprising stories from the Hanseatic city. 2nd ed., Überlingen 2021, 156 ff.; Dirk Brietzke, Die Anfänge moderner Sozialpolitik und die Erziehung zur Arbeitsamkeit. On the significance of the workhouse and penitentiary for the reforms of Hamburg's poor relief system in the 18th century, in: Mitteilungen des Hamburger Arbeitskreises für Regionalgeschichte [HAR] 30 [1997], 38 ff.).

61 For example, Art. 9 para. 4 BayStVollzG; Klaus Laubenthal, FN 2, 319.

Prisoners do not work for God's wages; their work is valued[62]. If occupational therapy is to be successful, their work must be remunerated in line with the idea of resocialization, because otherwise their employment would lack the stimulation mentioned above. In addition, a non-remunerated but compulsory work obligation would come into conflict with agreements under international law that Germany has entered into, such as the ban on slavery. Compulsory employment in a „custodial relationship" under public law, which imprisonment still represents despite all reforms, would be highly immoral and incompatible with human dignity as sheer exploitation. Although prisoners are guaranteed food and drink from the prison catering[63] , any special or additional food and drink and personal hygiene products must be purchased by the prisoner from the commissary or other source provided by the prison[64]. This is the purpose of the house allowance pursuant to Art. 50 BayStVollzG or the pocket money pursuant to Art. 54 BayStVollzG[65]. Most prisoners, however, are admitted to the prisons largely penniless and have to pay the costs associated with their cases.; if there is no financial support from outside the prison, which is only permitted to a limited extent, prisoners are dependent on the earnings from their work. This is because on their release they also require financial support (the so-called bridging allowance in accordance with Art. 51 BayStVollzG[66]) if they are not to become dependent on public social welfare immediately after their release.

Proper remuneration of prisoners' work not only has a therapeutic impetus beyond meaningful employment, but also has an impact on the internal order of a prison. Simply keeping prisoners in custody entails considerable security risks for the day-to-day running of the prison. This aspect is often overlooked[67] or underestimated in its importance. Priso-

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[62] Art. 46 para. 1 BayStVollzG stipulates that prisoners' work is to be recognized in the form of remuneration (and release from work, for example in the form of working leave) (going back to BVerfGE 98, 169/201; Nina Nestler, FN 2, F RN 107;). The socio-political appreciation is expressed in the legal turn of recognition (also on the stimulus effect Jörn Axel Kämmerer, FN 54, RN 162; Frank Neubauer, FN 2, A RN 31). With an average wage of €2.20 to €2.30, it is not possible to speak of social recognition (Wolfgang Janisch, Spitzengehalt 2,22 Euro. Häftlinge, die im Gefängnis arbeiten, werden nicht reich. in: Süddeutsche Zeitung No. 96 of April 27, 2022, p. 8, and the same, in: Süddeutsche Zeitung No. 98 of April 29, 2022, p. 6). The justice administration regularly justifies the low hourly rates with the lack of productivity of prisoner work both within the prisons and in external companies. It is also pointed out that prisons pay the full unemployment insurance contributions for working prisoners and not 50% like employers in the private sector. This leads to an increase in the value of the remuneration paid to prisoners (see Frank Arloth/Helmut Krä, FN 3, StVollzG § 43 RN 5; Nina Nestler, FN, F RN 108, 111).

[63] Art. 23 BayStVollzG; § 21 StVollzG; see Klaus Laubenthal, FN 2, H RN 143, RN 146; Frank Arloth/Helmut Krä, FN 3, StVollzG § 21 RN 1.

[64] Art. 24 para. 1 BayStVollzG; § 22 StVollzG (Frank Arloth/Helmut Krä, FN 3, StVollzG § 22 RN 1 f.; Nina Nestler, FN 2, F RN 2.

[65] §§ 47; 46 StVollzG (cf. Frank Arloth/Helmut Krä, FN 3, § 46 StVollzG RN 1, RN 5; § 47 StVollzG RN 1 f.; Nina Nestler, FN 2, F RN 145 and RN 152 f.;

[66] This bridging allowance is non-garnishable in accordance with Art. 208 BayStVollzG in conjunction with § 54 para. 4 sentence 1 StVollzG with the exception of the maintenance claims specified in § 850d para. 1 sentence 1 ZPO.

[67] Cf. for example Frank Neubacher, FN 2, B RN 100 ff. on the possibilities of restricting fundamental rights beyond the cases expressly regulated by law (so-called „fear clause" pursuant to Section 4 (2) sentence 2 StVollzG).

ners who are shown career and financial prospects are more likely to accept the necessary restrictions on their basic rights and freedoms associated with imprisonment than those who are merely detained. This is another reason why the penal system in Germany is less personnel-intensive than the penal system in other countries, and therefore ultimately less expensive[68].

The amount of remuneration is not left to the prison's internal regulations, but its calculation is regulated in detail by law[69]. The remuneration is therefore not the subject of „employment contract" agreements between the prison and the individual prisoner, nor between the individual prisoner and an external company, even if the prisoner is placed at the latter's disposal[70]. Apart from the fact that prisoners are subject to a regime under prison law, and therefore under public law, with regard to their remuneration[71], an individual remuneration agreement would contradict the requirement of equal treatment of all prison inmates (cf. Art. 118 para. 1 of the Bavarian Constitution [BV]; Art. 3 para. 1 GG) and would entail the risk of different remuneration regulations from institution to institution. Again with regard to the principle of equality, such a pay differential among different prisons would be intolerable for the inmates given the likely resentment oft he „lower paid" inmates and would also be detrimental to the security of the institution due to an envy effect. The same remuneration regime must apply to all Bavarian prisons. Not every job performed by prisoners is objectively of equal value; some require certain skills and professional knowledge, while others are more difficult or dangerous. Based on the characteristics of work, it would be arbitrary if every job received the same pay without distinction. Art. 48 BayStVollzG therefore authorizes the State Ministry of Justice to issue a statutory order on the remuneration levels in order to implement the remuneration regulations pursuant to Art. 46 and 47 BayStVollzG. In accordance with the Federal Prison Remuneration Ordinance of January 11, 1977[72], the Ministry of State introduced five (flexible) remuneration categories in

[68] Germany, with 70 prisoners per 100,000 inhabitants, ranks among the lowest in the world with Iceland, the Faroe Islands and San Marino in terms of prisoner rates per capita (Frieder Dünkel/Bernd Geng/Stefan Harrendorf, Gefangenenraten im internationalen und nationalen Vergleich, Bewährungshilfe - Soziales. Criminal Law. Kriminalpolitik Jahrgang 63 [2016], 178 ff.]; see also Joachim Obergfell, Die Entwicklung des Strafvollzugs in Deutschland seit der Jahrtausendwende, in: Rita Haverkamp/Michael Kilching/Jörg Kinzig/Dietrich Oberwittler/Gunda Wössner [eds.], Unterwegs in Kriminologie und Strafrecht - Exploring the World of Crime and Criminology, Festschrift für Hans-Jörg Albrecht zum 70. Geburtstag, Berlin 2021, 1159/1160 ff.; Frank Neubacher, FN 2, A RN 49).

[69] Art. 46, 47 BayStVollzG

[70] Nina Nestler, FN 2, F RN 16: No entitlement to collectively agreed wages. However, the amount of the remuneration to be paid by the prison to the prison in individual cases is contractually agreed between the prison and the company. Whether prisoners are entitled to information about the amount of remuneration paid by the private company to the prison for their work is disputed (see OLG Hamm, NStZ 2013, 366 f.; Klaus Laubenthal, FN 2, 324 FN 405). - Remuneration from approved self-employment in accordance with Art. 42 para. 2 BayStVollzG has special features. The income from this replaces the remuneration under Art. 46 BayStVollzG (Klaus Laubenthal, loc. cit., 343) and is subject to the general tax and social security regime.

[71] Nina Nestler, FN 2, F RN 16.

[72] BGBl. 1977 I, p. 57. On this and on the remuneration levels Nina Nestler, FN 2, F, RN 119 f. with further references. N.

its ordinance of January 15, 2008[73], which are intended to take account of the objective particularities of the work performed by prisoners.

The amount of the prisoner's pay is not equated with the statutory minimum wage that the private sector is obliged to pay[74]. Instead, Art. 46 para. 1 BayStVollzG[75] stipulates that the calculation of the prisoner's remuneration is to be based on 9 percent of the reference figure pursuant to Section 18 of the Fourth Book of the German Social Code (SGB IV)[76] (basic remuneration)[77]. A daily rate is the two hundred and fiftieth part of this basic remuneration; the remuneration is calculated according to an hourly rate[78]. The prisoner's pay calculated in this way is gross pay, which is taxed according to the tax rates[79] and is the basis for the social security contributions to be paid by the prisoner, if the justice administration of the Länder does not bear these.[80]

3. THE UNCONSTITUTIONALITY OF THE REGULATIONS IN BAVARIA AND NORTHE RHINE – WESTPHALIA

The BVerfG plays a decisive role in prison law in protecting prisoners' basic rights. The decision with which the court ended the lawless period in prison was a milestone in prison law, and the same applies to a large number of other constitutional court decisions in

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73 GVBl. 2008, 25 - The remuneration categories are guidelines, but allow for increases or reductions in the event of poor performance, for example.

74 See Minimum Wage Act of August 11, 2014 (BGBl. 2014 I, p. 1348), last amended by Art. 2 of the Act of June 28, 2023 (BGBl. 2023 I No. 172). The minimum wage will be € 12.41 gross per hour from January 1, 2024 and will increase to € 12.82 gross per hour on January 1, 2025.

75 The provision largely corresponds to Section 43 StVollzG.

76 Unless otherwise stipulated in the special provisions for the individual branches of insurance, the reference figure within the meaning of the provisions for social insurance is the average remuneration of the statutory pension insurance in the previous calendar year, rounded up to the next highest amount divisible by 420 (Section 18 (1) of the German Social Security Code IV [SGB IV] of December 23, 1976 [Federal Law Gazette 1976 I, 3845]). See Frank Arloth/Helmut Krä, FN 3, StVollzG § 43 RN 2.

77 Based on Section 18 (1) SGB IV, the Federal Government set the reference figure for the western federal states, including Bavaria, at € 42,420 from January 1, 2024 by ordinance dated November 24 (Section 1 (1) of this ordinance [BGBl. 2023 I No. 322]). For the calculation, see Frank Arloth/Helmut Krä, FN 3, StVollzG § 43 RN 8 with further references. N.; see also Nina Nestler, FN 2, F RN 115

78 The regulation of §§ 43, 200 StVollzG (and thus also of Art. 46 BayStVollzG) goes back to a decision of the BVerfG of July 1, 1998 (BVerfGE 98, 169 ff.). The prisoners' pay, which had been in force since 1977 and amounted to 5% of the average income of employees subject to pension insurance, was not sufficient to make compulsory work by prisoners an effective means of resocialization. In this light, prisoners' work must be recognized, not necessarily through financial benefits. According to the Constitutional Court, it is also conceivable to shorten the period of imprisonment through work (see Frank Arloth/Helmut Krä, FN 3, § 43 StVollzG RN 1 with further evidence).

79 However, the monthly remuneration is so low that the prisoner is not liable to pay income tax (Frank Arloth/Helmut Krä, FN 3 StVollzG § 43 RN 8). - The situation is different, however, if the prisoner is permitted to work for himself in accordance with Art. 42 para. 2 BayStVollzG and earns income from this.

80 Frank Arloth/Helmut Krä, FN 3, StVollzG § 43 RN 8

prison law, including on the constitutional appropriateness of the remuneration of prisoners, as we have seen above[81]. Over the years, the court has developed the principle of resocialization into one of, if not the cornerstone of prison constitutional law, which is based on the fundamental rights under Article 2 (1) of the Basic Law (general freedom of action) and on the protection of human dignity (Article 1 (1) of the Basic Law). These fundamental rights correlate with an obligation of the general public, derived from the principle of the welfare state, to reintegrate the individual into society[82]. This has recently been the case in the question of the constitutionality of Bavarian and North Rhine-Westphalian regulations on prisoners' remuneration for the compulsory work imposed on them in prison.

First of all, it is necessary to take a look at the previous legislation and case law on prisoner remuneration. With the introduction of the nationwide StVollzG 1976[83] , the legislator set the level of prisoner remuneration at 5% of the reference value (the so-called „basic remuneration") in Sections 43 (1) and 200 StVollzG (old version). Pursuant to Section 200 (2) StVollzG (old version), a decision whether to increase the basic remuneration was to be made on December 31, 1980, but this did not take place at that time or in subsequent years. When the BVerfG was given the opportunity to address the level of prisoner remuneration for the first time in 1998, prisoner remuneration nationwide was still only 5% of the reference figure. In its judgment of July 1, 1998, the BVerfG ruled that this percentage, anchored in § 200 StVollzG old version, was unconstitutionally low.[84] The court acknowledged in principle that compulsory work as part of a resocialization concept could be beneficial to the therapy and resocialization of the prisoner, but only if appropriate remuneration were offered in return.[85] In addition to monetary components, this appropriate consideration could also include non-monetary components[86]. If the consideration - as in the present case - is based solely or mainly on the payment of wages, the amount must be suitable to make the prisoner aware of the benefits of gainful employment. The constitutional standard for the statutory regulations on remuneration is therefore the resocialization requirement, which is derived from Art. 2 para. 1 GG (right to free development of the personality) in conjunction with Art. 1 para. 1 GG. Art. 1 para. 1 GG (human dignity) and defines the resocialization of the offender as the overarching goal of the penal system. Preparation for later gainful employment in freedom cannot be meaningfully achieved by exploiting the prisoner, who is thereby deterred from working. In response to this ruling, the federal legislator

81 Frank Neubacher, FN 2, A RN 28 ff. m. w. w. N.

82 Frank Neubacher, FN 2, A RN 29 - This also applies to life sentences, where the prisoner must have the prospect of being released again (BVerfGE 45, 187, 229; cf. on the practice of executing life sentences Frank Neubacher, FN 2, A RN 30;

83 Federal Law Gazette 1976 I, 581.

84 BVerfGE 98, 169 *et seq.*

85 BVerfGE 98, 169 (201).

86 See also Nina Nestler, FN 2, F RN 120 ff.

increased the prisoner allowance to 9% of the reference value in 2000.[87] In the course of the 2006 federalism reform, the legislative competence for the prison system was transferred to the federal states, which have passed their own state laws on the prison system with provisions of the Federal Prison Act having largely been adopted by the states. Since no state legislation has changed the regulations for calculating the basic remuneration, the 9% rate continues to apply across the board.[88] However, there is no longer an obligation to work in all federal states.[89]

In its most recent ruling on prisoner remuneration from 20 June 2023[90] , the BVerfG dealt with the remuneration regulations of the federal states of Bavaria[91] and North Rhine-Westphalia[92] in connection with the underlying resocialization concepts. In this respect, the BVerfG can draw on considerations from the 1998 judgment. It states that the requirement of resocialization stems from the self-image of a legal community that places human dignity at the heart of its values and is committed to the principle of the welfare state.[93] In addition to the individual therapeutic dimension, the resocialization of prisoners also has a collective fundamental rights dimension: since experience shows that a successfully resocialized offender is less likely to reoffend, damage to the legal interests of other citizens or the community as such is significantly less likely.[94] The BVerfG attaches great importance to a coherent resocialization concept. When the state legislature adopts regulations in its penitentiary law, it must take into account the interaction of all regulations, weigh them against each other and align them in such a way that they can achieve harmonious and effective resocialization.[95] Furthermore, updated available regulations must actually be implemented. The legislator is therefore obliged to ensure that human and financial resources are sufficient for implementation.[96]

The complainants‘ main point of attack was once again the remuneration associated

87 BGBl. 2000 I, 2043 f.

88 Baden-Württemberg Section 49 para. 1 sentence 2 JVollzGB III; Bavaria Art. 46 para. 2 sentence 1 BayStVollzG; Berlin Section 61 para. 2 StVollzG Bln; Brandenburg Section 66 para. 2 BbgJVollzG; Bremen Section 55 para. 2 Bremisches Strafvollzugsgesetz; Hamburg Section 40 para. 2 no. 1 HmbStVollzG; Hesse Section 38 para. 2 HStVollzG; Mecklenburg-Western Pomerania Section 55 para. 2 StVollzG M-V; Lower Saxony § 40 para. 1 sentence 1 NJVollzG; North Rhine-Westphalia § 32 para. 1 StVollzG NRW; Rhineland-Palatinate § 65 para. 2 LJ-VollzG; Saarland § 55 para. 2 SLStVollzG; Saxony § 55 para. 2 sentence 1 SächsStVollzG; Saxony-Anhalt § 64 para. 3 JVollzGB I LSA; Schleswig-Holstein § 37 para. 2 SVVollzG SH; Thuringia § 66 para. 3 ThürSVVollzG.

89 For an overview of the obligation to work in German federal states, see Laura Isabelle Marisken, Arbeit und Arbeitsentlohnung in den Länderstrafvollzugsgesetzen - Vollzugsrechtliche, verfassungs- und menschenrechtliche Aspekte, Neue Kriminalpolitik Vol. 30 (2018), 51/53).

90 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17.

91 Art. 46 para. 2 sentence 2, para. 3, para. 6 BayStVollzG.

92 § Section 32 (1) sentence 2, Section 34 (1) StVollzG NRW.

93 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 155.

94 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 155.

95 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 157.

96 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 162.

with compulsory work, which in their view remains unconstitutionally low. In line with its case law, the BVerfG did not oppose the prisoners' obligation to work as such, as it exists in Bavaria and Northrhine-Westfalia, and affirmed that work can promote the resocialization of the prisoner. At the same time, it reiterates that compulsory work can only be considered an effective resocialization measure if there is appropriate remuneration.[97] This remuneration can be provided not only in monetary but also in non-monetary terms. Recognition therefore not only means the remuneration received for the work, but may also include non-material rewards such as a reduction in prison time („good time").[98] In contrast to previous case law[99] , the court is now of the opinion that the financial remuneration must have an appropriate equivalent value irrespective of any non-monetary remuneration components.[100] The BVerfG emphasizes that the remuneration must not be so low that it appears to the prisoner to be part of his sentence.[101] Rather, he must feel a certain appreciation for his work and ideally benefit from it for his resocialization process. Furthermore, any „self-therapy" the prisoner may experience as a result of the satisfaction gained from his or her work cannot be counted as an immaterial component of remuneration and credited to the legislator.[102] It remains permissible for the level of remuneration to be graded according to the nature of the work (as therapeutic work or as gainful employment) and according to the qualifications required.[103] However, excessive differences between prisoners' salaries should be avoided in order to maintain social peace.[104]

The complainants argued that the prisoners' financial liabilities, which had increased due to inflation, could not be satisfied with the low prisoner pay. The BVerfG stated that the principle of resocialization does not in principle prevent prisoners from contributing to the costs incurred in the prison system.[105] Nevertheless, the judges recognized that the quantity and amount of the liabilities can hardly or not at all be covered by the current remuneration rate. In particular, the low remuneration is also incompatible with any maintenance payments (e.g. for children, spouses), cost sharing (e.g. telephone costs, medical treatment

97 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 169.

98 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 172.

99 Previously, the BVerfG had rejected a constitutional complaint against the amount of the basic remuneration because the interplay of monetary and non-monetary remuneration components still complied with the principle of resocialization even in the case of low remuneration, BVerfG, decision of 24.03.2002 - 2 BvR 2175/01.

100 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1963/17, RN 174.

101 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 192.

102 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 222.

103 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 185. Constitutionally doubtful, but only to be mentioned here in passing and, moreover, not part of the judgment, are the sometimes widely differing gradations within the basic remuneration between the federal states, which can reduce the remuneration by up to 40% in individual cases. Laura Isabelle Marisken, Neue Kriminalpolitik 2018, p. 51/57 f., 61 on the questionable constitutionality of further undercutting of the benchmark remuneration.

104 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 186.

105 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 175-182.

costs) and the payment of victim compensation.[106] For this reason, the BVerfG considers the resocialization concept as a whole to be unrealistic and inconclusive.[107]

According to the BVerfG, the Bavarian and North Rhine-Westphalian regulations also do not reveal a clear objective, do not sufficiently weigh the monetary and non-monetary remuneration components and are even contradictory in parts.[108] In some cases, the legislators have not even regulated essential components of the law themselves through parliamentary acts, but have left them for the administration to shape.[109] There is also no adequate ongoing evaluation and adjustment of the regulations in either of the two federal states.[110] As a result, both the Bavarian and North Rhine-Westphalian provisions violate the constitutionally guaranteed principle of resocialization and are therefore unconstitutional.

4. RESULT AND OUTLOOK

The latest ruling is not yet the end of the 9% remuneration. The affected provisions of the state laws will remain applicable until June 30, 2025. Until then, the Bavarian and North Rhine-Westphalian legislators must endeavor to come up with new regulations. The unconstitutional provisions were not immediately invalidated after the judgment. This is because Section 95 (3) sentence 1 BVerfGG allows otherwise unconstitutional provisions to continue to apply in order to avoid gaps. If the provisions had become invalid immediately, there would in the interim be no legal basis for any payment of prisoner remuneration in the meantime and there would be no reimbursement of the remuneration paid to date. The BVerfG justifies this decision on the basis of the need for reliable financial and budgetary planning, as retroactive remuneration could lead to considerable budgetary uncertainties.[111]

It is likely the ruling's consequences will also be felt in the other federal states. Many state prison laws are similar to each other, including the remuneration. It is very likely that a large part of the regulations of the other federal states may also be deemed unconstitutional by the Federal Constitutional Court. There is therefore a need for nationwide examination and amendment. The BVerfG expressly did not presume to define a specific regulatory concept.[112] The resocialization concept can be freely created by the respective legislator.

106 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 210, 226.

107 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 210, 224.

108 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 206, 219.

109 According to the materiality theory developed by the BVerfG in its established case law, state action in essential areas must be legitimized by formal law, whereby all essential decisions must be taken by the legislature itself. See BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 211-214, 226-228 regarding the design of prison plans (Bavaria) and the participation of prisoners in the costs of healthcare services (Bavaria and North Rhine-Westphalia).

110 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 206-233.

111 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 243-246.

112 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 164.

As long as they are weightened against each other within the resocialization concept, both monetary and non-monetary remuneration components may be used.[113] In general, rules to effect resocialization must be complete and comprehensive, and based on carefully determined assumptions and forecasts of different prison designs with regard to their effectiveness[114], They must also be conclusive and realistic, and evaluated periodically. In the 2023 ruling, the BVerfG also presented the standard by which it will measure the resocialization concepts of the federal states in the future: (1) The resocialization concept must appear to be justifiable after consideration and (2) the state legislature must show that it has made the prognosis on which the concept is based in an informed manner and that it continuously evaluates and improves it.[115]

As a result, the basic remuneration for prisoners is likely to increase across the board in the coming years. It remains to be seen how high the remuneration will be in future and whether it will then meet constitutional requirements.

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113 BVerfG, judgment of. 20.06.2023 - 2 BvR 166/16, 2 BvR 1683/17, RN 163.

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NEGATIVE EFFECTS OF PENAL POPULISM ON CRIME SUPPRESSION[1]

Filip Mirić*

After the commission of serious crimes, as a rule, the general public is in distress. The media disseminates diverse and often unverified information about the criminal offence, the circumstances of its commission, the perpetrator, and the victim. In addition to the justified fear of crime, such circumstances give rise to "penal populism", which entails the legislator's endeavours to increase the number of incriminations, expand the scope of punishment, and impose special minimum and maximum prison sentences for certain criminal offences. In this paper, the author starts from the hypothesis that these measures may temporarily reduce public anxiety caused by the commission of a criminal act but cannot influence the suppression of crime in the long run. Quite the reverse, penal populism leads to an increasing fear of crime. Crime cannot be suppressed by punishment alone, without understanding the causes and conditions generating the commission of crime as a mass social phenomenon and an individual criminal act. The author analyzes the negative effects of penal populism on crime prevention, and provides recommendations and suggestions on how to suppress penal populism and promote other ways of social and legal response to crime.

KEYWORDS: *crime, penal populism, suppression of crime.*

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INTRODUCTION

Penal populism is closely related to the concept of criminalization. Criminalization is an intervention in the criminal legislation by which some behavior is prescribed as a criminal offense (Stojanović, 2016a: 60). As a rule, after the commission of serious (aggravated) crimes, the public is perplexed, agitated and distressed. The media disseminates various and often unverified information about the criminal offence, the circumstances of its commission, the perpetrator, and the victim(s). In addition to the justified fear of crime, such circumstances generate "penal populism", which entails the legislator's endeavours to increase the number of incriminations, expand the scope of punishment, and impose special minimum and maximum prison sentences for certain criminal offences. The author starts from the hypothesis that these measures may temporarily reduce public anxiety caused by the commission of a criminal act but cannot influence the suppression of crime in the long run. Quite the reverse, penal populism leads to an increasing fear of crime. Crime cannot be suppressed by punishment alone, without understanding the causes and conditions that generate the commission of crime as a mass social phenomenon and an individual criminal act. The subject matter of this paper is the analysis of the negative effects of penal populism on crime prevention. The paper aims to provide recommendations and suggestions on how to suppress penal populism and promote other ways of social and legal response to criminality.

1. DEFINITION OF PENAL POPULISM

Laws must be fair and efficient. In order to provide moral guidance, laws must be moral (Clark R., 2009: 235). There has been a long-standing debate about the crisis of criminal justice, i.e. that crime cannot be suppressed (Stojanović, 2016a: 113). Penal populism is one of the legislators' attempts to overcome this crisis. Penal populism is a political and societal process through which major political parties and their politicians compete with each other to be "tough on crime" by promising "hard-line" penal policies (e.g. more stringent punishment and longer sentences) and simplistic crime-fighting solutions (e.g. more prisons) that will appeal to the general public (Pratt & Clark M., 2005: 303 ECPS, 2024).[1] It is commonly based on the general perception that crime is out of control and "it feeds on expressions of anger, disenchantment and disillusionment with the criminal justice establishment" which focuses on the offender rather than the victim, as well as "anger and concern...volubly expressed in the media" (Pratt, 2007: 12).[2]

[1] ECPS/European Center for Populism Studies (2024). Dictionary of Populism: Penal Populism, European Center for Populism Studies; https://www.populismstudies.org/Vocabulary/penal-populism/

[2] Pratt, J. (2007). *Penal Populism,* Routledge, Taylor &Frances Group, London and New York; https://infodocks.wordpress.com/wp-content/uploads/2015/01/john_pratt_penal_populism.pdf

"The new penology", a new framework for the study of changes emerging in penal discourse, techniques and objectives (Freely & Simon, 1992: 450)[3], aims to resocialize convicts after serving their prison sentence, given the fact that punishment must not be an end in itself. In the context of "the new penology", a few question arises: whether the prison system should still be viewed as a means of punishment or as a resource for resocialization; to what extent it is conditioned by public policies and legislation of individual states, and to what extent by contemporary global tendencies in the field of criminal policies (Pavićević, Ilijić & Batrićević, 2024: 11). Penal populism, which advocates for more stringent penal policies, punishment and longer sentences for criminal offenders, is fundamentally incompatible with the conception of the new penology.

Increased fear of criminality is often a consequence of penal populism. There is often a significant difference between the perceived risk of becoming a victim of a crime and the statistical probability of committing a crime. However, the way crime victims are reported to the public increases the fear of victimization (Tyler, 1984:27). The fear of crime that is perceived in the public is used by many politicians to mobilize and stabilize their electorate (Lee, 2007). The next part of this paper observes some examples of the influence of penal populism on the change of criminal legislation in the Republic of Serbia.

2. PENAL POPULISM IN THE REPUBLIC OF SERBIA

Fear of crime is inherent in human nature. As a rule, after the commission of serious crimes, the public is very upset. Consequently, there are demands for introducing more stringent forms of punishment and higher sentences for the commission of some criminal offences (particularly those involving elements of violence) in the penal system. In the Republic of Serbia, the latest examples are two mass shooting cases: at "Vladislav Ribnikar" Primary School in Belgrade on 3 May 2023, where a 13-year-old minor K.K. killed eight of his peers and the school security guard (BBC, 2023a)[4], and the shooting spree in the villages Dubona (near Mladenovac) and Orašje (near Smederevo) on 4 May 2023, where a young adult (aged 21) killed 8 and injured 14 young people and fled the crime scene (BBC, 2023b).[5]

After these brutal crimes, both the professional and the general public were horrified and appalled. Part of the general public called for the reinstatement of death penalty, although such a decision would be unjustified in terms of Serbian criminal policy and

[3] Feeley, M. M.; Simon, J. (1992). The New Penology: Notes on the emerging strategy of corrections and its implications, In: *Criminology*, Vol. 30, No. 4, 1992 https://onlinelibrary.wiley.com/doi/10.1111/j.1745-9125.1992.tb01112.x

[4] See*:* BBC News (2023 a): Belgrade shooting: Teen made 'kill list' for Serbia school attack, 4 May 2023, by James Gregory (London) & Slobodan Maricic (Belgrade), https://www.bbc.com/news/world-europe-65468404

[5] See*:* BBC News (2023 b): Suspect arrested after second mass shooting in Serbia**,** 5 May 2023**,** by Mattea Bubalo and Laura Gozzi, https://www.bbc.com/news/world-europe-65490418

in many ways contrary to the adopted international standards. In the aftermath of these crimes, state authorities announced a list of security measures aimed at improving gun control, including the amendment of the Weapons and Ammunition Act, audit of firearm licences, control of possession and storage of weapons, tougher punishments for possession of illegal weapons, tightening the rules on the operation of shooting ranges, lowering the age of criminal liability (to include offenders under the age of 14), hiring new police officers to enhance security in schools, etc. (BBC, 2023a; BBC, 2023b). Although many of these measures were partially implemented in practice, there was no reduction in juvenile violent crime. The basic characteristic of penal populism is that the criminal legislation and the crime prevention policy measures are not changed in line with the latest scientific research and predictions on their effectiveness; instead of addressing and resolving the actual problems, the ad hoc measures are aimed at "calming down" the agitated public and putting the issue ad acta until the next serious crime. Penal populism is quite common, not only in Serbia but also in many other European and non-European countries.[6]

The author's opinion on the measures taken in the aftermath of the mass shooting case at "Vladislav Ribnikar" Primary School in Belgrade was presented in an interview for Anadolia News Agency (Anadolu Ajensi/Balkan, 2023).[7] In the context of penal populism in Serbia, we may examine that subject matter by referring to the integral text of the interview:

"When we heal the collective sadness and anger, we will learn many valuable lessons, one of which is that we need systemic changes," says Filip Mirić, Doctor of Legal Sciences, commenting on the state measures announced after two mass murders in Serbia in which 17 people, most of them children and young people, were killed. He points out that serious crimes should be discussed in a scientifically-based and professionally-grounded manner.

On 3 May 2023, a 13-year-old boy killed eight students and a security guard at his school with a pistol, but under the law he cannot be held criminally liable. A day later, a 21-year-old boy killed 8 people in the villages around Mladenovac. The state authorities announced a series of legal changes. One of them was to lower the age limit for criminal liability from the age of 14 to the age of 12.

Filip Mirić, a research associate at the Faculty of Law in Niš, who deals with juvenile delinquency, criminology and victimology, says that this has to be accompanied by appropriate treatment measures during the child's eventual stay in a correctional facility.

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[6] In the USA, for example, the choice of the prosecutor often depends on how well a candidate managed to convince the electorate that he/she will influence the tightening of the criminal policy of the courts and the tightening of penalties for some criminal offences (usually involving violent crime) that cause the greatest anxiety among citizens (Clark R, 2009: 133).

[7] AA/Anadolu Ajanci-Balkan (2023). Doktor pravnih nauka Filip Mirić posle masovnih ubistava u Srbiji: Potrebne su sistemske promene (Filip Mirić LL.D, in the aftermath of mass murders in Serbia: Systemic changes are needed), by S.Janaćković, 11.5.2023, Anadolu Ajansi-Balkan [Online]; https://www.aa.com.tr/ba/balkan/doktor-pravnih-nauka-filip-miri%C4%87-posle-masovnih-ubistava-u-srbiji-potrebne-su-sistemske-promene/2894569 [accessed on 14 September 2024].

"If we lower the age limit to 12 years, such a provision will refer to a younger minor who can only be sentenced to stringent educational measures and confined to a correctional and educational facility. Under the current legislation, it is the most severe penalty for this age group in our criminal law system. However, if such a minor is not subjected to relevant institutional treatment by competent professional and security services, the lack of such treatment may eventually result in criminal contamination. Namely, in four or five years' time, a minor will be an adult who is ready to commit the most serious crimes," says Mirić.

Mirić believes that after such inconceivable tragedies, there is a need for new proposals and solutions. Research shows that the best results in reducing juvenile delinquency are given by the Scandinavian model, where the age limit for criminal liability of minors is the age of 15, but they are subjected to preventive (resocialization) treatment, peer education and learning about the values of social life.

"Now we are all addressing the consequences, but the key question is what has generated such a tragic event, such a serious crime. In order to discover it, there is a need for a deeper observation of social relations, all exogenous and endogenous factors that led to the commission of crime. How can such crimes be prevented? First and foremost, through appropriate treatment of convicted offenders and through primary, secondary and tertiary prevention. Primary prevention aims to preclude the occurrence of a criminal offense. Secondary prevention aims to preclude recidivism through resocialization and work in the community. Tertiary prevention entails working with multiple recidivists who have already been convicted several times," says Mirić.

Mirić believes that the activities of psychological-pedagogical services, which already exist in schools, should be supported and reinforced by multidisciplinary teams. "In situations like this one, which no one could have expected, it is necessary to supplement the psychological-pedagogical service with experts in the field of special education pedagogy. The Faculty of Special Education and Rehabilitation, at the University of Belgrade, is the only higher education institution accredited to train experts in this field; its curriculum includes a module on treating people with behavioral disorders. Both psychologists and pedagogues have their specific roles in the team but special education experts can recognize the factors that may lead to criminogenesis and coordinate the team work. When certain criminogenic tendency is recognized, it is necessary to act preventively. It can be done by criminologists and special education pedagogues", says Mirić.

The working group of the Ministry of Justice, by order of the President of Serbia, Aleksandar Vučić, is working on amending the Criminal Code and tightening the penalties for illegal production, possession and trafficking of weapons.

"In situations involving extreme criminal conduct with the most serious consequences, it is important not to resort to penal populism. Both the Criminal Code and the Act on the Execution of Criminal Sanctions include provisions on the resocialization of convicts. If the (legislator's) goal is to increase the age limit for criminal liability or maximum penalty for certain crime in order to appease the general public, then the penalty becomes an end in itself

and can never fulfill its purpose," emphasizes Mirić.

In his opinion, the Act on Weapons and Ammunition does not need to be amended.

"I believe that the Act on Weapons and Ammunition should only be consistently applied, and that more stringent provisions are not necessary. Apart from this Act, there is also the Rulebook on the safe holding, carrying and storage of weapons and ammunition. The best law is exceeded only by the best applied law. If the legal rules are consistently and effectively implemented, and if all legal acts are really respected and properly implemented in practice, weapons will only be held by psychophysically capable and authorized people," says Mirić.

Mirić adds that it is very important to deal with the victims as well.

"How can we help the families now? What is the social and legal mechanism that can ease their pain? Unfortunately, no matter what we do, the victims will not be brought back. But, we can provide effective professional work with people who have experienced the trauma. Above all, we must have an effective system of psychological and psychiatric assistance. It is essential to empower the victims and strengthen their capacities to carry on living meaningful lives even after sustaining such irreparable losses. They may help others or engage in prevention projects ensuring that such crimes never repeat" says Mirić.

After the two tragedies, dozens of people threatened to commit similar acts, mostly on social networks, glorified the committed acts, or took photos with weapons. In an interview for Serbian media, the State Secretary of the Ministry of Internal Affairs, Željko Brkić, said that, in two days, there were 56 events that could be associated with the two mass murders, including both false and confirmed reports.

"A special problem that can arise after the commission of such crimes is the problem of copycat crimes, i.e. imitation or repetition of previously committed crimes. This is especially typical in case of minors who simply see that persons (children) under the age of 14 cannot be held criminally liable, which can be a stimulating factor for various forms of juvenile delinquency, including the most serious consequences," Mirić explains.

For this reason, he adds, it is very important to reduce social tensions and point out that this is socially and morally unacceptable behavior.

"Criminal law is the last instrument of social reaction to crime, but it is not the only one. There are no instant solutions for such complicated and complex social problems. We need time, persistence and preventive work with all those who resort to the negative effects of imitating a criminal act," says Mirić.

Mirić adds that it is also important to examine the role models of the youth today.

"A role model is someone who defines our behavior, our aspirations. If we find role models in positive personalities, who demonstrate pro-social behavior and activities (such as athletes, scientists, researchers, doctors), we will have a much smaller possibility and percentage of minors who identify with persons who are on the other side of the law, whose actions are antisocial and asocial. In the long run, it will lead to a decrease in juvenile crime on the whole," concludes Mirić (Anadolu Ajanci-Balkan/Janaćković, 2023).

Another example of tightening the prescribed penalties is the criminal offense of

illegal possession, carrying and trafficking of weapons and explosive substances. Under the Act amending the Criminal Code (2009)[8], the basic form of this criminal offense was punishable by a term of imprisonment ranging from three months to three years and a fine (Article 348 of the CC Act 2009). In 2011, the Statistical Office of the Republic of Serbia reported that there was a total number of 1,010 reported offenders, 916 of whom were indicted and 778 were convicted (281 were sentenced to a term of imprisonment; 41 were fined; 446 received a conditional sentence) (Statistical Office RS, 2011: 21, 42, 62, 71).[9] Pursuant to the latest Act amending the Criminal Code (2019),[10] the basic form of the criminal offence of illegal production, possession, carrying and trafficking of weapons and explosive substances is punishable by a term of imprisonment ranging from six months to five years and a fine (Article 348 of the CC Act 2019). In 2023, the Statistical Office RS reported that there was a total number of 961 reported offenders, 843 of whom were convicted (382 offenders received a conditional sentence; 207 were imprisoned; 213 were awarded house arrest; 35 were fined; 5 were awarded educational/correctional measures) (Statistical Office RS, 2024: 7, 11).[11] The slight decrease in the total number of reported perpetrators of this crime in 2023 can be explained by several campaigns for the legalization of weapons in illegal possession, which were followed by operative actions by the Ministry of Internal Affairs of the Republic of Serbia. In the provided statistical data, there were no significant differences on the total number of convicted offenders and awarded forms of punishment. Bearing all this in mind, we can conclude that the tightening of penalties prescribed for the criminal offense of illegal production, possession, carrying and trafficking of weapons and explosive substances (Article 348 of the CC) did not significantly affect the reduction of the scope of this form of crime.

There are many reasons why penal populism and the tightening of penalties for certain criminal offenses do not produce the expected results in combating crime. First of all, penal populism, as a concept of social reaction to crime, does not observe the contemporary etiological interpretations of crime provided by criminology; in effect, penal populism treats criminality only through its phenomenological lens, as an evil that needs to be punished. This concept is based on retribution, intimidation and deterrence as the purpose

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[8] Zakon o izmenama i dopunama Krivičnog zakonika (the Act amending the Criminal Code of RS), *Službeni glasnik RS*, br. 111/2009.

[9] Republički zavod za statistiku RS/Statistics Office RS (2012). *Punoletni učinioci krivičnih dela u Republici Srbiji 2011, Prijave optuženja i osude* (Adult perpetrators of criminal offenses in the Republic of Serbia in 2011: Criminal reports, accusations and convictions, Bilten 588 [Online], Republički zavod za statistiku, Beograd; https://publikacije.stat.gov.rs/G2012/Pdf/G20125558.pdf [retrieved on 15 September 2024].

[10] Zakon o izmenama i dopunama Krivičnog zakonika (the Act amending the Criminal Code of RS), *Službeni glasnik RS*, br. 35/2019.

[11] Republički zavod za statistiku RS/Statistics Office RS (2024) *Punoletni učinioci krivičnih dela u Republici Srbiji 2023–Prijave, optuženja i osude* (Adult perpetrators of criminal offenses in the Republic of Serbia in 2023: Criminal reports, accusations and convictions), Statistika pravosuđa, Bilten br. 186, 12.7.2024, https://publikacije.stat.gov.rs/G2024/Pdf/G20241186.pdf [accessed on 15 September 2024].

of punishment.

In contemporary legal theory, there is a distinction between the negative general prevention (which is achieved by threatening and intimidating potential perpetrators) and the positive general prevention (which entails strengthening social and moral norms that preclude the commission of crime (Stojanović, 2016b: 212). There are three negative general prevention theories: 1) the theory of general intimidation by prescribing (severe) punishment; 2) the theory of admonition (warning); and 3) the theory of intimidation by (public and brutal) execution of punishment (Jovašević, Stevanović, 2012: 66).

According to the deterrence-based theory based on the statutory threat (intimidation) by prescribing punishment, the best way to prevent crime is to increase the severity of punishment; under the "psycholocially-coersive" or intimidation theory, which was defined by Feuerbach, the very prescription of such punishment in criminal legislation should be sufficient to deter potential perpetrators and realize its special preventive effect. According to the deterrence-based (intimidation) theories by the execution of punishment, the purpose of punishment is to induce fear in the perpetrator from the very execution of punishment (Vasiljević-Prodanović, 2022:32), and thus deter others. Similarly, under the deterrence-based theory of admonition, the goal of punishment is to warn potential perpetrators about the consequences of breaking the law (Konstantinović-Vilić & Kostić, 2006; Jovašević, 2006; Radoman, 2003).

Bearing in mind that the aforementioned theories have largely been overcome in modern criminological theory, we may conclude that penal populism based on these theories cannot achieve the goals embodied in the concepts of prevention and suppression of crime. These goals may only be achieved through resocialization of criminal offenders and meticulous creation of crime prevention policy measures aimed at removing the causes and circumstances that lead to the commission of crime.

CONCLUSION

Crime has always attracted public attention (Kostić, Dimovski, & Mirić, 2015: 1). As an antisocial phenomenon, it also caused public fear, especially after the commission of serious (aggravated) crimes. In order to appease the public, legislators often resort to expanding the scope of punishment for existing crimes, imposing more stringent forms of punishment for the most serious crimes, or prescribing new criminal offences. These ad hoc measures embody the concept of penal populism, which may temporarily reduce public anxiety caused by an atrocious crime but cannot influence the crime prevention in the long run. Crime cannot be suppressed by punishment alone, without understanding the causes, motives and specific circumstances triggering the commission of crime.

Penal populism has become a global trend in criminal law policy. Unfortunately, this global trend has not bypassed Serbia, which was particularly evident after two mass

shooting cases: at "Vladislav Ribnikar" primary school in Belgrade on 3 May 2023 and in the villages Dubona (near Mladenovac) and Orašje (near Smederevo) on 4 May 2023. In the aftermath of these crimes, Serbian state authorities announced stricter security measures aimed at improving gun control, including the amendment of the Weapons and Ammunition Act, audit of firearm licences, control of possession and storage of weapons, tougher punishments for possession of illegal weapons, tightening the rules on the operation of shooting ranges, lowering the age of criminal liability (to include offenders under the age of 14), etc.

Penal populism, as a rule, has a number of negative effects on the suppression of crime, primarily because it rests on the conceptual framework of retribution, intimidation and deterrence as the purpose of punishment. In addition, penal populism does not take into account the etiological characteristics of endogenous and exogenous types of criminality. In the aftermath of a committed crime, the media dissemination of diverse and often unverified information about the crime, perpetrator and victim(s) may increases the fear of crime but also generate "copycat" crimes, based on the principle of imitation or repetition of the previously committed crimes in the same or similar manner.

Considering the negative effects of penal populism on crime prevention, the concept of penal populism should be abandoned and replaced by the concept of resocialization thoughtful creation of crime prevention policy measures, which should be aimed at eliminating the causes and circumstances leading to the commission of specific crimes and promoting contemporary models of social and legal response to crime.

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LEX TALIONIS AS AN INDIVIDUAL PERCEPTION OF PENAL POLICY

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Individual perception of penal policy is a very complex issue. The reason for this is whether a person is personally involved as, for example, a victim of a criminal act in the legislative process or whether he just represents the general population without personal involvement. As a general population, the individual perception of penal policy can be based on personal education or the influence of the media, while when it comes to the perception of penal policy from the perspective of the victim, often based on a special emotional state, objectivity is lost to a certain extent in the perception of the sentence imposed, and therefore it happens that only fair is the strictest punishment possible, which ignores the purpose of punishment and proportion. In this paper, the issue of lex talionis as the principle of "an eye for an eye" was discussed, with fundamental questions about justice, punishment and ethics being raised. The special attention of the paper is devoted to issues of importance for penal policy, starting with pointing out the legislative intended purpose of punishment and the system of criminal and of misdemeanor sanctions as a tool for implementing them, and all this was considered through a theoretical review. In the continuation of the paper, the question of the individual perception of the penal policy was pointed out, which are the circumstances that affect the relevance and objectivity of the same a person who is or is not a victim experiences justice, an attempt was made to answer this by pointing to certain conducted studies, which correlates with all the previous ones and set the basic hypothesis of this research conceived in the title of this paper.

KEYWORDS: *lex talionis, individual perception of penal policy, penal policy, criminal law, criminal law*

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INTRODUCTION

Penal policy can be viewed primarily as rules, norms and measures adopted by the state and based on special research, all with the aim of protecting order through legislation and each individual by restricting or punishing individuals who do not respect the"ideal" social order, that is, they have certain behaviors that are not in accordance with the legal system.

Factually speaking, the issue of penal policy is extremely complex because it is only to a certain extent a legal issue. In order for penal policy to be functional, not just a simple legislative form, it is necessary to take into consideration sociological, psychological and cultural aspects.

It could be said that the individual perception of the penal policy may have a more significant role than the penal policy itself. If we base this position on the fact that the victim or the injured party in some illegal behavior suffers a certain type of damage, even if this damage occurred, for example, on an object with which there is an emotional relationship, then we easily end up in a situation where, for example, it is for the theft of a wristwatch that was left in inheritance from the father, grandfather, great-grandfather... the perpetrator of that theft should have his hand cut off, and maybe both. Lex talionis and draconian laws in action. Whether this is objective, it is not, and whether it is subjective is very likely. Precisely because of the aforementioned, the individual perception of penal policy plays a special role in shaping social norms and values, as well as in determining society's reaction to the violation of the law by individuals.

Within the individual perception of penal policy, one must not ignore whether there was a personal negative experience in the sense of whether the person was, say, a victim or had some form of secondary victimization, i.e. whether family members or close friends were a victim and to which in the legal sense, how they lived through all that and whether they were "satisfied" with the sentence imposed on the perpetrator of that particular act and whether as victims they have certain consequences in the form of fear or injustice. It often happens that special attitudes towards penal policy develop, which are generally more rigorous than the generally accepted ones. In such circumstances, the individual can expect the penal policy to be a tool of simple protection, but also some form of retribution.

As with many other aspects of life, so with penal policy, the media can have a high degree of influence, especially among a part of the population that is generally uninterested for the reason that they have not had contact with, say, criminal justice protection. The media can shape public awareness by creating certain well-founded or unfounded perceptions with the aim of toughening or softening existing penal policies. The aforementioned will not be analyzed in depth in this research because it is not possible to do so without making too much of an excursus. Media sensationalism of certain bloody acts can lead to unfounded fear of that form of crime, which indirectly raises the issue of toughening penalties and

repressive measures.

The individual perception of the penal policy represents a complexity made up of many factors. It is necessary to understand all these factors and their correlations, because this is the only way to create an efficient and effective penal policy.

In the end, we could also mention secondary influences on penal policy that may have a greater influence on individual perception, and that could be the influence of modern technologies and especially the influence of social networks; social justice; educational systems; community empowerment in terms of creating social cohesion; ethics and moral issues...

1. A REVIEW OF THE LEX TALIONIS

When legislative protection is viewed through the lens of, for example, criminal and civil protection in different historical epochs, it is not always provided in the same way to all persons or to the same extent.

During the period of the original community, the conflict between individuals who belonged to different social communities was resolved by blood revenge, persecution, i.e. exclusion from society, which was then practically equated with the death penalty viewed from the aspect that the excluded individual from the community had absolutely no conditions to survive independently. The mentioned blood revenge was transferred to the members of the entire society, i.e. the tribe, and later it was reduced only to the perpetrator of the crime. Over time, the talion principle was introduced. The principle is based on the principle that loss, or damage, is compensated by causing damage to another of the same type and extent. This type of original liability for damage is based on the principle of «same for same» (Vuković, 1971: 12). Later, the composition was established, i.e. material compensation to the injured party. In the feudal era, the obligation to compensate damages had a penal character. The aforementioned talionary character of compensation for damages was especially preserved in the case of personal injury.

If there was a conflict between individuals who belonged to different social groups that were not at war and the crime of murder occurred, the conflict was resolved through blood feud. (Šarkić, 2011: 25–26) The group to which the victim belonged would fight against the group to which the perpetrator of the crime belonged, and revenge would be reduced to the members of the entire group. Under these circumstances, wars of extermination were also fought. Over time, in a historical sense, the circle of persons against whom blood revenge was applied narrowed, and the talion principle was introduced and applied. Liability provisions can also be found in ancient Hebrew law. The talion principle is more precisely represented and exposed than in Hammurabi's code. If death or bodily injury occurs - take life for life, eye for eye, tooth for tooth, hand for hand, etc.

When looking at Roman law, torts as illegal and socially unacceptable actions were

sanctioned in various ways, but they have their starting point in the so-called private revenge, which included the right of the injured party to deprive the person who committed the tort of his life because of the physical injury he caused. (Zimmerman, 1999: 914–915) During the development of Roman society, this initial and exclusively punitive sanction for the committed delict was replaced by the law of talion, and over time in Roman tort law it became recognizable that the state recognizes the right of the injured party to manus iniectio, which represents revenge on the debtor's person, with by gradually introducing the obligation of the injured party «to accept payment in the name of redemption from revenge as a compromise solution» (Karanikić, 2009: 48).

Lex talionis is practically interpreted as a justification of retributivist punishment, which requires that the perpetrators receive an appropriate punishment according to law or justice, without going into consideration of the proportionality of punishment (White, 2014: 2).

In moral and philosophical discourse on criminal law, lex talionis is used to specify that the pain or harm caused by punishment should not exceed the pain or harm the perpetrator inflicted on his victim. In this sense, the purpose of criminal punishment in this way is neither revenge nor compensation. Lex talionis practically suggests the maximum damages or compensation that the victim can claim (Van Den Haag, 1992: 3).

Lex talionis seems cruel when viewed through retribution, claims that it is unworthy of human civilization and especially legal order can be rejected (VanDrunen, 2008: 945).

It is undeniable that the «correct» interpretation and explanation of the lex talionis had a special role in the study of legal history and the evolution of criminal law, and therefore for Hegel the «leading» problem related to the transition from the Old Testament rule of an eye for an eye, a tooth for a tooth, to the new covenant of Christ.

Philosophers explained the mentioned transition with the "self-help" model. Max Weber indicated that the harmonization and development of lex talionis is the basis for the rise of the legal system in Mesopotamia, Greece, Rome, pre-Christian Germany and early Islam (Boroumand, 2017: 4).

The mentioned self-help model is based on four stages. The first stage is the natural state, ordered by individuals and clans eager for revenge who inflicted Talion punishments. The second stage is characterized by a primitive state, which tends to supervise rather than completely control or eliminate the existing revenge system. In the third stage, the state seeks to function as an enforcer, seeking revenge on behalf of the injured individual or family. In the fourth stage, the state tries to gain a monopoly on force and completely eliminate private violence. In this phase, the state also establishes a system of compensations, i.e. replacement becomes monetary compensation (Whitman, 1995: 42).

2. PENAL POLICY

We can observe the penal policy through the legislative as well as the theoretical form.

In the legislative perception, the Criminal Code of the Republic of Serbia provides in Article 4 under the name of criminal sanctions and their general purpose that criminal sanctions are punishments, warning measures, security measures and educational measures. Then, the same article stipulates that the general purpose of prescribing and imposing criminal sanctions is to suppress acts that violate or endanger values protected by criminal legislation. In the last paragraph of this article, it is further specified that criminal sanctions cannot be imposed on a person who was under fourteen years of age at the time the crime was committed. Educational measures and other criminal sanctions can be imposed on a minor under the conditions prescribed by a special law.

Article 42, which is a part of the legal amendment that regulates the issue of punishments, additionally indicates the purpose of punishment (through the perception of punishment as a criminal sanction) in such a way that the purpose of punishment is to prevent the perpetrator from committing criminal acts and to influence him not to commit them in the future commits criminal acts; influencing others not to commit criminal acts; expressing social condemnation for a criminal act, strengthening morale and strengthening the obligation to obey the law; and achieving fairness and proportionality between the committed act and the severity of the criminal sanction.

The law on misdemeanors deals with this issue much more "sparingly". Article 5 foresees the purpose of misdemeanor sanctions in such a way that for a misdemeanor, the sanctions prescribed by the Law on Misdemeanors can be pronounced, and that the purpose of prescribing, pronouncing and applying misdemeanor sanctions is that citizens respect the legal system and that in the future no misdemeanors are committed.

Article 32, which provides for misdemeanor sanctions, namely fines; penalty points; warning; protective measures; and educational measures, it is not additionally predicted or indicated the purpose of punishment. In the following article, in which the punishments are determined in more detail, it is foreseen that a prison sentence, a fine and community service can be prescribed for a misdemeanor. The same article also provides that within the general purpose of misdemeanor sanctions, the purpose of punishment is to express social rebuke to the offender for the committed offense and to influence him and all other persons not to commit offenses in the future, which is actually an absolute repeat of Article 5. which has already been pointed out.

In the above, the range of prison sentences in terms of the time interval of punishment was omitted, and the range of fines was also omitted, all for the reason that relates to the relationship between penal policy and the purpose of punishment. In terms of this research, it is not necessary to consider the relationship between the amount of the fine or the

length of the prison sentence with the achievement of general and special prevention, but the exclusive focus is on the mutual necessity and correlation between the mentioned principle penal policy and the purpose of punishment. Tightening or softening the penal policy may aim to achieve general and special prevention exclusively after the entire research for specific cases has been conducted (Bingulac, Spaić, 2019: 649).

In the context of the aforementioned, the penal policy must be revised, but not for the principle of its existence, but solely for its justification and purpose. In this sense, an example can be given that deprivation of liberty through its development as a criminal sanction primarily took the form of a measure to "ensure the presence of the accused" or was used after the verdict until some other punishment followed, most often death or corporal punishment. To be more precise, deprivation of liberty was once throughout legal history not perceived as a punishment, especially in relation to other forms of cruel punishment (Bjelajac, Bingulac, 2016: 55).

It can often be seen that the penal policy is not uniform throughout the entire territory of the country, which is attributed to the inconsistency of court decisions. Research that dealt with this issue indicated that based on court practice, it can be seen that in certain parts of the country there is an increase in certain committed criminal acts, and this increase in that court can be taken as an additional aggravating circumstance. The aforementioned raises the question of what are the reasons why stricter punishments are imposed in comparison to the rest of the country for a specific offense that is more common in that part of the country, solely due to the local jurisdiction of the court. This could only be justified in terms of general prevention, but one could also expect the question of what is the reason for harsher punishment of an individual solely due to the circumstance that others commit the same acts in that area. The same research also indicates that the question of legal equality can be raised, viewed through different penal policies in the area of individual courts (Stojanović, 2024:12).

A well-defined criminal policy must be determined by joint work and conclusions preceded by precise and fundamental research of science, practice (courts, prosecution, police, security agencies) but also politics/politicians so that it can be legally implemented (Lukić, 2024:148).

In the following, some theoretical considerations of penal policy will be pointed out.

The concept of punishment is applied in different situational frameworks. Punishment of a child by a parent, punishment of a student by a teacher, punishment of a sinner by God, as well as criminal punishment, are some of the contextual differences mentioned (Milevski, 2013: 39).

If we focus on the concept of legal punishment, five central criteria can be predicted by which this concept can be fully understood. Thus, one can speak of a punishment when an action represents evil or inconvenience to the one who suffers such an action. Then, the punishment is carried out as a reaction to some act that is considered a crime, that is, it can be carried out in the context of the assumption of the crime (Flew, 1969: 85).

By reviewing the legal literature, the characteristics of the punishment can be determined in the following way. Punishment in modern criminal legislation must be personal. Then, it must not represent an act of torture or endangering the health of the perpetrator of the crime, but must bear the characteristics of humanity. Furthermore, the punishment must be fair and legal, that is, the type and amount of the punishment will be determined by the required degree of protection of society from crime. Finally, the punishment must be proportionate to the crime committed and the criminal responsibility established (Gillin, 1971: 10). The punishment should be divisible, and there should be the possibility of revoking it, that is, the punishment must carry elements of reparability of behavior, and in the end goal orientation (Pifferi, 2016: 15).

The vital contextual question discussed above concerns whether punishment must involve the infliction of pain, in the physical sense, or what quality of unpleasantness it must contain (Ellis, 2014: 5185). The earlier history of punishment certainly linked punishment to physical violence and torture, while the modern concept limits this type of physical injury in the criminal sense (Dragojlović, Bingulac, 2019: 56).

3. INDIVIDUAL EXPERIENCE OF THE PURPOSE OF PUNISHMENT

There should be only one truth. Perhaps viewed from several sides and with different capacities, but it should still be absolute and original (Bingulac, Krstinić 2024: 397). It could be considered that the satisfaction of the victim viewed through the punishment of the perpetrator of the criminal act should be as previously stated for the truth.

The definition of punishment according to psychological theories can be most succinctly stated in the way that punishment refers to any change that occurs after a behavior that reduces the likelihood that the behavior will be repeated in the future. The goal of punishment is to either reduce or stop a behavior. Punishment plays an important role in operant conditioning. Operant conditioning is a learning method that uses rewards and punishments to modify behavior (Cherry, 2023: 10).

As can be seen, they are not fundamentally different from the criminal law perception of punishment, which has already been discussed.

If it is viewed from the point of view that punishment is the infliction of certain harm on the perpetrator of an illegal act, through psychological theories one can see the consideration according to which punishment implies the use of harmful consequences to reduce certain behavior. The goal of punishment is to form and establish an association between behavior and negative consequences. The idea is that once such an association is created, that certain behavior will not occur or that the possibility of that behavior will be significantly reduced. To achieve and establish an association, punishment can include either the application of an aversive consequence - receiving a speeding ticket or confiscation of

something desirable - confiscation of an object or deprivation of freedom of movement in the case of imprisonment (Jean Richard Dit Bressel, P, Killcross, S, McNally G. 2018: 1643)

In terms of criminal law, the question of the effectiveness of sanctions has been discussed for decades and even centuries, and there is a constant search for one or the other that is effective. Evidence that many or some punishments for certain offenders are not effective is recidivism. Psychologists have also conducted some research on this.

In the research they conducted, one of the conclusions followed was that although the punishment can be effective in some cases, in other cases the punishment does not consistently reduce unwanted behavior, which is why they specifically point to the prison sentence. It is indicated that serving a sentence in prison does not necessarily serve as a deterrent from future criminal behavior (Fazel S, Wolf A. 2015: 130).

Some research has also dealt with the social and relational dimension of punishment in explaining how sanctions affect the outcome. Studies have shown that communicating the punishment with respect increases the perception of the offender, then the increase in perception is also when the one who pronounces the punishment tries to improve the relationship between the offender (perpetrator of the act) and the victim, because then the motive is relationship-oriented. The reduction of the perception of the offender is when the motives are oriented towards harm (Vel-Palumbo, M, Twardawski, M, Gollwitzer, M. 2023: 1395).

When considering the question of how the perpetrator of the criminal act perceives the sanction imposed on him, the initial feeling refers to the height or severity of the sanction itself and the personal relationship in the sense of whether it could have been "done better". If it is the lightest punishment for a specific crime that is provided for in accordance with the law, it is not necessarily the case that the convicted person perceives it as the lightest possible. It is quite logical that every perpetrator of a criminal offense or any other criminal offense does not do so in order to be punished, therefore no punishment is proportionate or small enough in this light. In the case of, for example, a misdemeanor, it is not uncommon for the perpetrator of the offense to be willing to pay a larger fine in order to be punished more severely, in order to avoid the imposition of some security measure, for example, revocation of the driver's license.

Perhaps one of the more effective indicators of how the perpetrator of a criminal act experiences punishment is recidivism. Recidivism is a very complex issue and it is not possible to fully consider the aforementioned, but it can be used as a certain parameter, especially in relation to when the punishment has not achieved its purpose, i.e. it is most likely taken lightly.

It will be pointed out to one research of the general population that was related to the emotional reaction in relation to the perpetrators of certain acts.

Anger is a key emotion in understanding public opinion toward crime and punishment. Respondents were supposed to make a decision as soon as possible based on their internal / individual reaction when shown photos of perpetrators of certain acts. It took

respondents an average of 1.3 seconds to make a punitive decision, anger was evident in less than 0.5 seconds. The speed of this "furious" emotional response suggests that it is automatic and effortless. Through this research, it can be concluded that the experience of anger is initial before the individual can even formulate an opinion about a specific crime or about the current crime rate, or even about the purpose of punishment and the type of sanction (Côté-Lussier, Jean-Denis, 2023: 345).

When it comes to the victims, that is, the victims, studies show that they have a strong feeling of revenge. The focus of those studies was to determine whether legislative punishment reduces the need for revenge. The average study showed that due to the severity of the sentence several years after the trial, it does not affect the feeling of the need for revenge, while for the time interval from a few weeks before the trial to a few weeks after the trial, the severity of the sentence significantly affects the reduction of the feeling of revenge. The results of these two studies suggest that punishing the perpetrator only partially and transiently satisfies the victim's need for revenge. One of the conclusions is that the satisfaction of the victims' feelings of revenge cannot be taken as an empirical justification for tightening the norms in sentencing (Orth, 2024: 62).

It is also necessary to point out the research that dealt with the relationship between punishment and communication between the victim and the perpetrator from the perspective of the victim. It was found that some victims see the communication between the victim and the perpetrator and the punishment as an alternative to punishment (of course depending on the act), while other victims perceived these two circumstances as independent. More than half of the participants expected that communication with the perpetrator would increase their satisfaction with the punishment, and there were those who indicated that although they did not expect this to be the case. Some of the victims had satisfaction through communication with the perpetrator. It is interesting to point out that the victims only learned during or after the conversation with the perpetrator of the crime what punishment was given to them, and therefore there were cases where they also pronounced their own milder punishment in the communication. One of the conclusions of this study is that there is a connection between punishment and communication between the victim and the perpetrator, but only in some cases and therefore cannot be considered as a future rule, at least from the perspective of some victims. If there is a need for the victim to communicate with the perpetrator, this study should not ignore or otherwise eliminate that relationship (Batchelor, 2023: 521).

CONCLUSION

In this paper, three separate issues were considered which were aimed to be viewed in a unified way. Those three segments refer to lex talionis, individual perception of punishment and penal policy.

The paper analyzes the complexity of penal policy, defining it as a set of rules and norms adopted by the state in order to preserve social order. Then the issue of the importance of individual perception of penal policy was discussed, which can often be, in a figurative sense, much stricter than the measures provided for in the laws.

Lex talionis, or the principle of "an eye for an eye", has historically served as the basis for punitive measures. Although over the centuries in legal systems, the mentioned principle has evolved, its essence remains in the idea of proportionality of the punishment to the committed act. Philosophical considerations about lex talionis, which are related to the development of the legal system and the concept of retributive justice. Viewed from a modern perspective, the principle of "an eye for an eye" has a foothold especially among victims, that is, when there is a high degree of concentrated emotion, which results in the fact that the perpetrator is rarely punished. of that offense proportionate to the damage or suffering the victim suffered.

When it comes to the penal policy, special attention is paid to the analysis of the legislative prediction of the penal policy in Serbia, including the purposes of sanctions according to the Criminal Code and the Law on Misdemeanors. Penal policy in itself is not sustainable and must therefore be revised to ensure legal equality and consistency in sentencing.

The special attention of the paper is devoted to the individual perception of penal policy in terms of the purpose of punishment and the severity of punishments, i.e. sanctions. The questions discussed are related to the analysis of the punishment from a psychological point of view, where it is emphasized that the punishment should reduce the probability of repeating the crime. The paper also indicated that emotions such as anger play a key role in shaping the individual perception of penal policy.

If the question were raised about what the penal policy should look like, taking into account the personal relationship of the victim with the sanction imposed on the perpetrator, we are of the opinion that restorative justice should be taken into account, i.e. to include the victim in the process of deciding on the sanctions that will be imposed and to consider other approaches such as mediation as well as in certain circumstances to stimulate dialogue between victims and perpetrators; then to encourage a greater degree of transparency of court proceedings in order to further build trust in the judicial system, thus achieving a greater degree of belief in an adequate penal policy, especially on the part of victims.

The aim of this paper was to point out certain questions and to look at certain circumstances of importance for the hypothesis of the work. By establishing an efficient penal system and an objective one from the victim's point of view, a fairer and more efficient legislative and social system is created.

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CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

316.642.3:343.24(082)(0.034.2)
342.7:343.24(082)(0.034.2)
316.774:343.3/.7(082)(0.034.2)
343.988(082)(0.034.2)

INTERNATIONAL scientific thematic conference Penal populism and impact on the work of institutions (9 ; 2024 ; Beograd))

Thematic conference proceedings of international significance [Elektronski izvor] / IX International scientific thematic conference Penal populism and impact on the work of institutions, Belgrade, 2024 ; [organizers] Institute of criminological and sociological research, Judicial academy, [Ministry of Science, Technological Development and Innovation] ; editors Marina Matić Bošković, Jelena Kostić. - Belgrade : Institute of criminological and sociological research, 2024 (Belgrade : Institute of criminological and sociological research). - 1 elektronski optički disk (CD-ROM) ; 12 cm

Podatak o organizatorima preuzet iz kolofona. - Tiraž 10. - Foreword / Marina Matić Bošković, Jelena Kostić. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad.

ISBN 978-86-80756-74-5

а) Казнена политика -- Популизам -- Упоредноправни аспект -- Зборници б) Казнена политика -- Људска права -- Зборници в) Криминалитет -- Медији -- Зборници г) Ресторативна правда -- Зборници

COBISS.SR-ID 161100553

ISBN 978-86-80756-74-5 (IKSI)