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SELECTED ASPECTS OF HUMAN LIFE IN CIVIL AND CRIMINAL LAW

SUZANA KRALJIĆ
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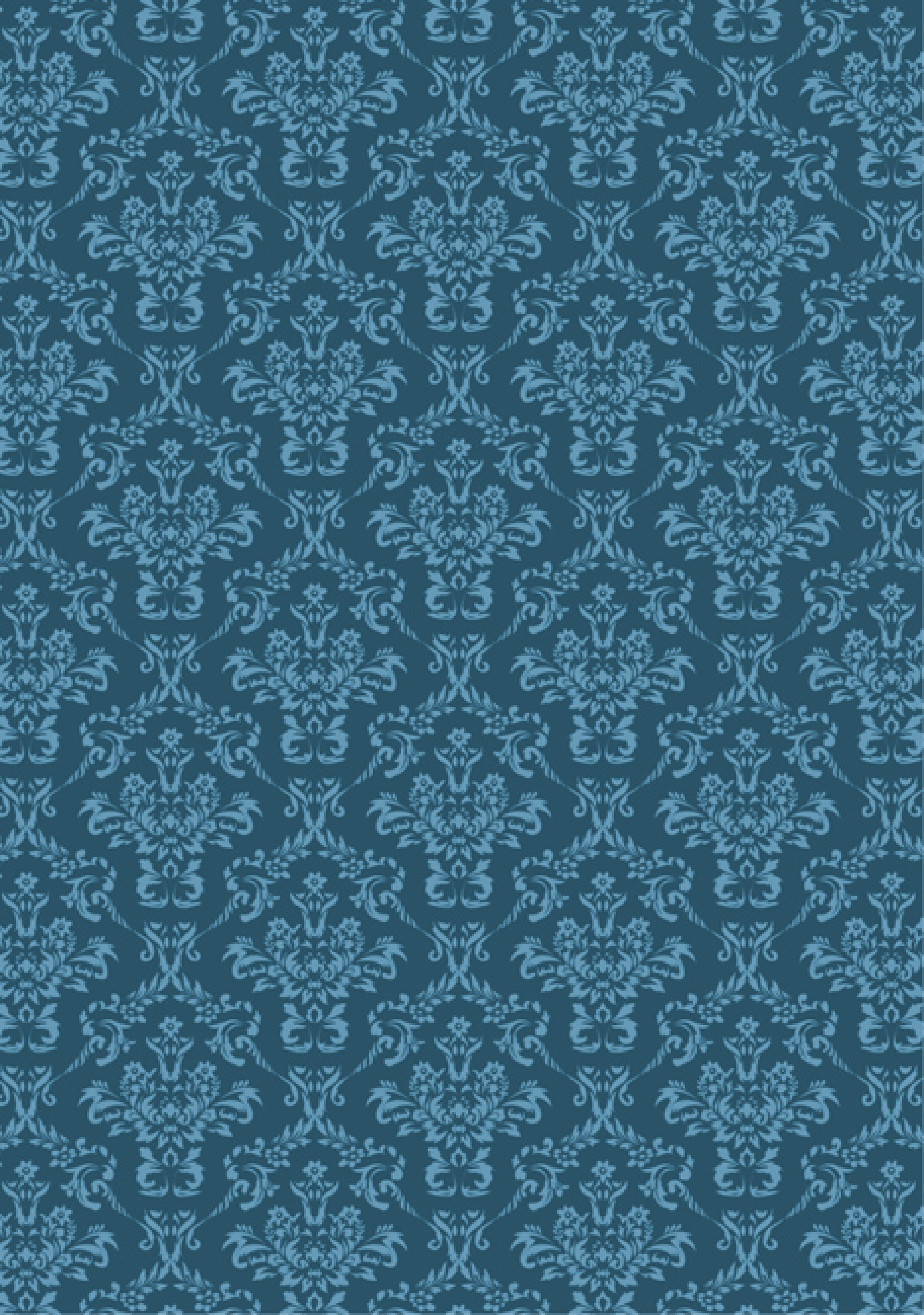

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Selected Aspects of Human Life in Civil and Criminal Law

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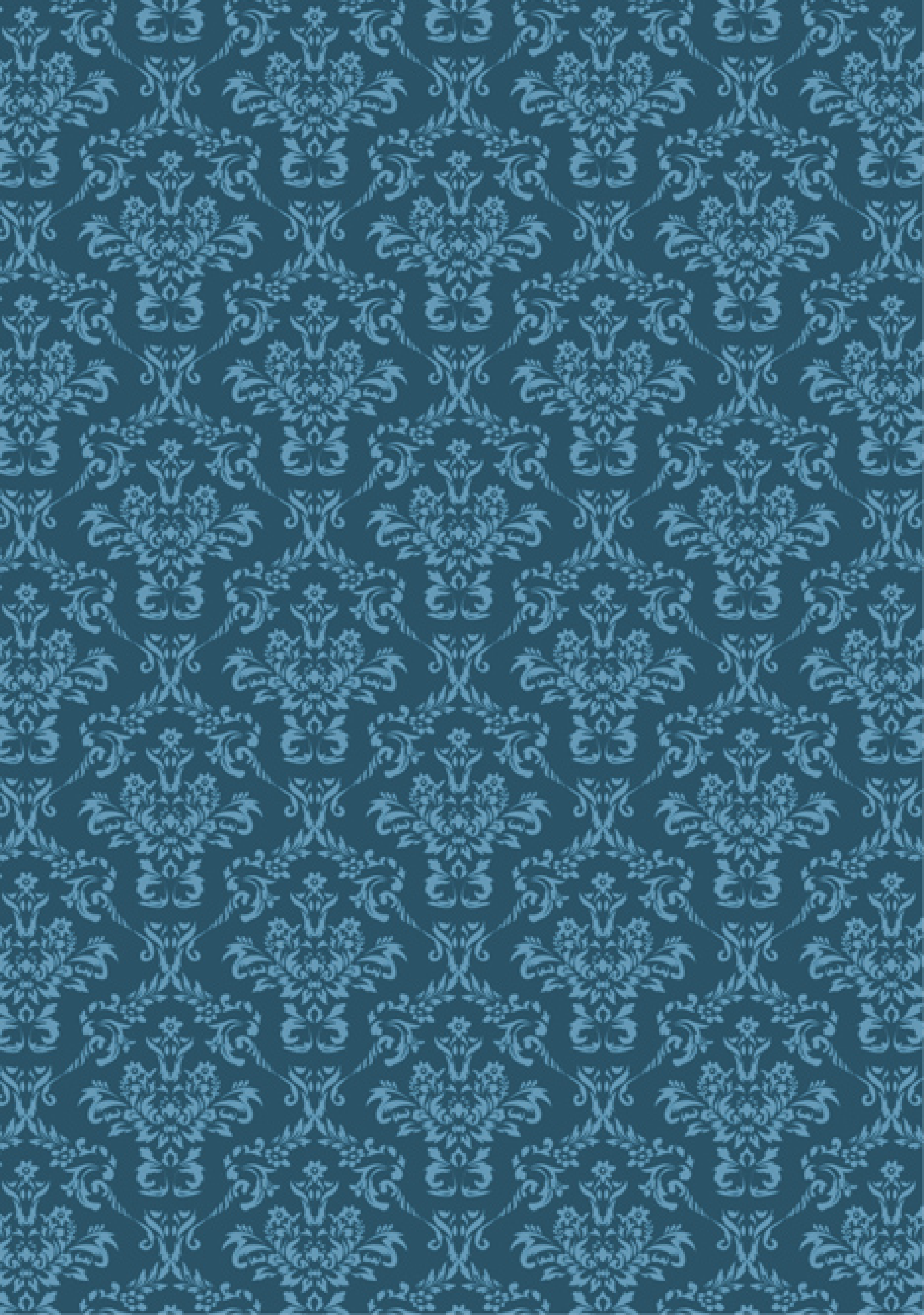

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Foreword

DAMJAN KOROŠEC

International comparison is an important cognitive and research method in law. It enables the orientation of dogmatics on all levels, on the precision of legislative solutions, on law quality. It offers itself as the standard aid in the procedure of drafting laws and other legal acts and is, in the form of a comparative scientific method, a very widespread argumentative basis in the most demanding scientific texts. Its significance is, for obvious reasons, particularly important in microstates, societies that are in close contact with great cultures and legal systems, and transitional and post-transitional historical moments.

It is more or less generally known that German legal theory, especially criminal law, is one of the most frequently compared ones in Slovenia. Germany is considered a particularly interesting legal-historical factor in the world, a significant exporter of legal-theoretical and legal-philosophical solutions as well as a country with a highly developed doctrine of the general notion of crime, which is the central engine of criminal dogmatics. Its legal potency is proverbial within the global criminal law theory. In Slovenia, it is traditionally placed at the center of comparative analysis. Unfortunately, we simultaneously often neglect other large and relevant legal systems. Among them is also the Turkish one.

As the successor of the Ottoman Empire, the Republic of Turkey, with a population of over eighty million people and almost eight hundred thousand square kilometers of territory (of which almost twenty-four thousand are on the continent of Europe), has been, in all aspects, an important country for Europe for a long time. It is an official EU succession candidate country since 1999. and it is complexly socially related with Germany since, at least, Wilhelm II. Since the fifties of the previous century, it is considered under the obvious influence of the most demanding German criminal law theory and the extremely interesting mix of impact on the emergence of law, to be one of the more interesting references in the field of legal theory. Bilateral cooperation with Turkey, in the field of legal science, has, at the faculties of law of the University of Ljubljana and the University of Maribor, in the recent decades developed into an important and particularly productive pillar that provides us with dozens of professional and scientific publications, which cannot be assessed differently than valuable for understanding the Slovenian position in the (jurisprudential) world. As a reliable and trustworthy partner, the Faculty of Law of the Özyegin University in Istanbul plays a very special role in this.

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Vorwort

DAMJAN KOROŠEC

Der internationale Vergleich ist eine wichtige Erkenntnistheorie und Forschungsmethode im Recht. Der Prozess ermöglicht Orientierung zur Eindämmung der Entwicklung der Dogmatik auf allen Ebenen, zur Genauigkeit von Legislativlösungen und zu der Qualität des Rechts. Er bietet sich als Standardhilfe in der Ausarbeitung von Gesetzen und anderen Rechtsakten und ist in der Form grundlegender wissenschaftlicher Methoden eine weit verbreitete Argumentationsgrundlage in den anspruchsvollsten wissenschaftlichen Texten. Seine Bedeutung ist, aus offensichtlichen Gründen, besonders wichtig für Zwergstaate, Gesellschaften, die in engem Kontakt mit großen Kulturen und Rechtssystemen stehen, sowie in historischen Übergangs- und Nachübergangsmomenten.

Es ist mehr oder weniger allgemein bekannt, dass die deutsche Rechtstheorie, insbesondere das Strafrecht, eine der am häufigsten im Vergleich analysierte, in Slowenien, ist. Deutschland gilt als ein besonders interessanter Rechtshistorischer Faktor in der Welt, als ein wichtiger Exporteur von rechttheoretischen und rechtsphilosophischen Lösungen sowie als ein Land, mit einer hoch entwickelten Lehre des allgemeinen Verbrechensbegriffs, was die zentrale Führung der Strafrechtsdogmatik darstellt. Seine rechtstheoretische Wirksamkeit ist in der

Globalen Strafrechtstheorie von schlüssiger Bedeutung. In Slowenien stellen wir sie traditionsgemäß ins Zentrum der Vergleichsanalysen. Dabei vernachlässigen wir häufig leider andere große und relevante Rechtssysteme, zu denen auch der türkische gehört.

Die Republik Türkei ist als Nachfolgerin des Osmanischen Reiches, mit ihren über achtzig Millionen Einwohnern und fast achthunderttausend Quadratkilometern Land (davon fast vierundzwanzigtausend auf dem europäischen Kontinent), seit langer Zeit, in jeder Hinsicht, ein wichtiges Land für Europa. Seit 1999 ist die Republik Türkei offizieller EU-Beitrittskandidat, mindestens seit Wilhelm II. komplex sozial verbunden mit Deutschland, mindestens seit den Fünfzigern des vorherigen Jahrhunderts ist sie unter dem deutlichen Einfluss der anspruchsvollsten deutschen Rechtstheorie und gehört, mit einer äußerst interessanten Mischung von Einflüssen auf das Entstehen des Rechts, zu den interessanteren Referenzen auf dem Gebiet der Rechtstheorie. Die bilaterale Zusammenarbeit auf dem Gebiet der Rechtswissenschaft mit der Türkei hat sich in den letzten Jahrzehnten, an den Rechtsfakultäten der Universität in Ljubljana und der Universität in Maribor, zu einer wichtigen und besonders produktiven Säule entwickelt, die uns Dutzende von professionellen und wissenschaftlichen Veröffentlichungen gewährleistet hat, die man nicht anders als wertvoll für das Verständnis der slowenischen Position in der (rechtswissenschaftlichen) Welt bewerten kann. Hierbei spielt die Juristische Fakultät der Universität Özyegin in Istanbul, als verlässlicher und solider Partner, eine besonders wichtige Rolle.

PARRICIDIUM AND THE PENALTY OF THE SACK

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Abstract The author examines the crime of parricide, its legal regulation, and the penalty of the sack. It belonged to the Roman tradition for a manifest perpetrator who confessed his crime. Those who were sentenced in a jury trial were exiled according to the lex Cornelia de siccariis and probably also under the lex Pompeia de parriciddis. Under Constantine the penalty of the sack became a regular sanction laid down for parricide. The exact way it was carried out was not prescribed but was subject to the circumstances and possibilities.

Keywords: *parricida, poena cullei,* Roman criminal law, Roman family, family father

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1 The Roman family

The rise of Rome was closely linked to the structure of its society. At its core stood the Roman (agnate) family which, from the most ancient times, was its most important pillar. The family was the point of intersection of the most important religious, political, economic, and societal factors. A farm household was the economic cell of the ancient agricultural society. Its head, the *pater familias,* was the owner of the property and the family members were subject to his paternal power.[1] Accordingly, the term *familia* referred to all persons under the paternal power of the same person and to his whole property.[2]

Relations inside a household were determined by the customs of the forefathers. An important part of them was the religious worship. The Romans considered themselves highly pious and devote. They regarded their rise to a world power as resulting from their piety and their ability to maintain good relations with their gods. The Roman family worshiped the deities of the household, the *di familiares*, and acted as a religious unit (see Westrup, 1944: especially pp. 59 ss). Its worship shaped its life in harmony with gods, with the spirits of their dead ancestors, the *di parentes,* as well as with its living members.

According to ancient Roman tradition every family had several guardian spirits who were protecting the household. When the Emperors Theodosius, Arcadius, and Honorius in November AD 392 prohibited the cult of ancient family spirits they mentioned three of the most important ones as follows.

> '*No person at all, of any class or order whatsoever of men or of dignities, whether he occupies a position of power or has completed such honors, whether he is powerful by the lot of birth or is humble in lineage, legal status and fortune, shall sacrifice an innocent victim to senseless images in any place at*

[1] More on the paternal power Crook, 1967: 113 ss; Arjava, 1998: 147 ss; Amunátegui Perello, 2006; Capogrossi Colognesi et al., 2019. Westrup (1939) wrote a large comparative sociological study on the patriarchal joint family.

[2] Ulp. D. 50, 16, 195, 1: 1. The designation of "household" … relates both to things and to persons. 2. … We talk of several persons as a household under a peculiar legal status if they are naturally or legally subjected to the power of a single person as in the case of a head of a household … ("*Familiae" appellatio … et in res et in personas deducitur. 2. … Iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae*). English translation of the Digest fragments in this article: The Digest of Justinian. Latin text edited by Theodor Mommsen with the aid of Paul Krueger. English translation edited by Alan Watson. University of Pennsylvania Press, Philadelphia 1985. Revised edition 1998. More on the Roman familia see Fayer, 2005, Parte terza, Concubinato, divorzio, adulterio; Franciosi, 2004; Gardner, 1998; Bardis, 1963: 225 ss.; Saller, 1984: 336 ss; Dixon, 1992.

> *all or in any city. He shall not, by more secret wickedness, venerate his lar with fire, his genius with wine, his penates with fragrant odors; he shall not burn lights to them, place incense before them, or suspend wreaths for them*.'[3]

The imperial constitution reveals the principal house deities and the way they were worshiped and venerated. As we see the most important Roman house deities were *lares*, *penates,* and *genius*.

The *Lar familiaris* (more on this Wissowa, 1971: 166 ff) symbolized the household and was the guardian spirit of the family. He was believed to care for the welfare and prosperity of the whole household and to protect all the family, both free and slaves. A traditional Roman family had a shrine of the *Lar familiaris*, called *lararium*. The *Lar familiaris* was believed to be a *lar loci*, i. e., the protecting spirit of a place upon which the house was built. As such the *Lar familiaris* was immovable and did not accompany the family when it changed its residence and moved to another place. It is possible to assume that this belief contributed to the reluctance of ancient Romans to leave their home and to move elsewhere.

An important place also of religious significance was the hearth on which the food for the family members was prepared. It stood under the protection of the goddess Vesta, similarly to the house gate which was under the protection of god Janus. The hearth had to be kept clean and tidy.[4] It was the domain of the *mater familias*, i. e., of the wife of the *pater familias* who stood under his marital power. She also performed the religious worship of Vesta (see Wissowa, 1971: 163).

The cult of the family hearth was closely tied to the worship of *di penates* (more on them Wissowa, 1971: 161 ff) who protected the *pater familias* and his immediate family and guarded the storeroom (*penus* – store or provision of food provisions, victuals) which was the innermost part of the house. Accordingly, the *penates* were associated with the food and the welfare of the household. They were worshipped as the divine powers that took care of the necessities of everyday life and assured the further existence of the family by providing food.

[3] Theod. Arc. Hon. C. Th. 16, 10, 12: *Nullus omnino ex quolibet genere ordine hominum dignitatum vel in potestate positus vel honore perfunctus, sive potens sorte nascendi seu humilis genere condicione ortuna in nullo penitus loco, in nulla urbe sensu carentibus simulacris vel insontem victimam caedat vel secretiore piaculo larem igne, mero genium, penates odore veneratus accendat lumina, imponat tura, serta suspendat.* The English translation Pharr, 1952.

[4] Cato, De agri cultura 143: She (i. e. the overseer - *vilica*) must clean and tidy the hearth every night before she goes to bed (*focum purum circumversum cotidie, priusquam cubitum eat, habeat*).

Another divine protector of the household was the *genius* (more on this Wissowa, 1971: 175 ff) of the *pater familias*. His principal activity was to protect the marital bed (*lectus genialis*). He was symbolized by a snake, which was often seen in Roman homes.[5]

The *di Manes* were the spirits of the dead ancestors that protected the family. They were allowed to do so only when they ascended from the Underworld. According to the traditional belief of the Romans this happened when a deceased received the due honours and rites.

Apart from the shrine housing a sculptural representation of the *lar familiaris* a traditional Roman household kept images of the *genius* and of the household's *penates*. At family feasts these sacred objects were placed at the table to make the presence of the household's deities visible and to make them witness important family events such as betrothals, marriages, births, adoptions, etc. Religious objects were regarded as an essential part of the household. Virgil, who wanted to give prominence to the virtues of Aeneas, whom he presented as an archetypical Roman and an ideal example of piety,[6] mentions how Aeneas took the statues of the household's *penates* from the burning Troy.[7]

Religious worship was attended by the family father[8] or a person authorized by him. The *pater familias* was also responsible for the behavior of the family members. To achieve this, he had the power and the duty to punish them in case of their misbehavior. The so-called power of life and death (*ius vitae necisque*) authorized him even to impose the death penalty on a person under his paternal power (more on this see e. g. Yaron, 1962: 243 ss; Westbrook, 1999: 203 ss). Before doing so he had to consult the family council (*consilium propinquorum*). A family father who abused this right was punished by the censors (*nota censoria*) who imposed on him *infamia*. While the judicial powers of the head of the household were (especially in the earlier periods of Roman history) a substitute for the absence of a public judiciary, these powers were considerably restricted during the Principate. During the time of Constantine, these powers were regarded as non-existent.[9]

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[5] Plin. n. h. 29, 72: … *Romam advectus est vulgoque pascitur et in domibus* …

[6] See e. g. Virgil, Aeneas I, 10: … a man, noted for piety … (… *insīgnem pietāte virum* …)

[7] See e. g. Virgil, Aeneas I, 68: bringing Troy's conquered penates to Italy (*Ilium in Italiam portans victosque Penates*). See also Aeneas, II, 717 ss.

[8] Cato, de agric. 143: … let her (i. e. the overseer - *vilica*) remember that the master attends to the devotions for the whole household (… *Scito dominum pro tota familia rem divinam facere).*

[9] See Const. C. 8, 46, 10 = C.Th. 4, 8, 6 pr.

The relations inside the Roman family were governed by piety (*pietas*). *Pietas* was one of the basic Roman virtues standing not only for a comportment of man towards god, of son or daughter towards his or her father or mother, of a client towards his patron, of a citizen towards the state, of a subject towards his or her emperor, but also the other way around of god towards a man, of father or mother towards his or her son or daughter, of a brother towards his brother, and of a ruler towards his co-ruler (more on *pietas*, Kranjc, 2012: 12 ff.).

Cicero defines piety as the virtue "which warns us to fulfil our duties towards our country, our parents, or others connected with us by ties of blood".[10]

Initially *pietas* represented the quality of a person scrupulously fulfilling all the duties required by the *di parentes* of his or her tribe. There were two groups comprising these duties:

- those related to the cult of the *di parentes,* i.e., of the divine members of the tribe, and
- the reverence and consideration towards the living members of the family (see Pauly et al., 1894: s. v. Pietas: 1221 ss).

An important duty of family members, deriving from *pietas*, was to perform religious rites and offerings to house deities, and to provide them an inviolate home. The ancient Romans believed that these were the means for a family to win the favor and support of their house deities.

The reverence and consideration towards the living members of the family required (reciprocal) respect of each member of a household, especially towards parents. It is possible to assume that the rationale standing behind this double reverence was a belief that a Roman had both divine and human *parentes* (See Pauly et al., 1894: s. v. Pietas: 1222).

Reverence and obedience were essential parts of the relationship towards the family father. A passage from the Major declamation ascribed to Quintilian expresses this very clearly.

[10] Cic. De inv. 2, 66: … *pietatem, quae erga patriam aut parentes aut alios sanguine coniunctos officium conservare moneat.*

> *I could have said more firmly: 'I have given an order as a father'. This name is greater than any law; we remove tribunes, we propose candidates; we are granted the right of life and death.*[11]

This relationship enjoyed a special status. Accordingly, Ulpian stressed that “A freedman and a son should always consider the person of a father and patron honorable and inviolable (*honesta et sancta*)”.[12] Such an appreciative esteem can be understood both in the framework of the power the family father had over the persons under his paternal power as well as in the framework of the emotional relationship based upon the kinship.

The paternal power was a part of Roman tradition and at the same time a legal category. As such it was a part of *ius civile* and reserved for Roman citizens.[13]

Besides the reverence that persons under the paternal power owed to the head of the household, Roman tradition also required more broadly reverence and obedience to one’s parents.[14] The relationship between a child and his or her parents was not primarily a legal conception but a part of the natural order. This relationship had important legal consequences, too. They were in a way aimed at preventing actions violating the due reverence towards parents or affronting their standing contrary to good morals.

In ancient Rome parents and patrons were shielded by divine protection. Festus[15] quotes in his dictionary-cum-encyclopaedia a provision of a statute of the king Servius Tullius that regulated the mistreatment of a parent by a child and probably also by a daughter-in-law:

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[11] Quint. Decl. mai. 6, 14 i. f.: *'Pater iussi. hoc nomen omni lege maius est; tribunos deducimus, candidatos ferimus; ius nobis vitae necisque concessum est.* More on this Santorelli, 2019: 73 ss. See also Saller, 1994: Ch. 5 - Pietas and patria potestas: obligation and power in the Roman household pp. 102 ss. & Ch. 6. Whips and words: discipline and punishment in the Roman household.

[12] Ulp. D. 37, 15, 9: *Liberto et filio semper honesta et sancta persona patris ac patroni videri debet.* On the relationship between Roman fathers and sons see Cantarella, 2003: 281 ss.

[13] Inst. 1, 9, 2: Our authority over our children is a right which only Roman citizen have. Nobody else has such extreme control over children. (*Ius autem potestatis, quod in liberos habemus, proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus.*)

[14] See Pomp. D. 1, 1, 2: For example, religious duties toward God, or the duty to be obedient to one's parents and fatherland (*Veluti erga deum religio: ut parentibus et patriae pareamus*).

[15] *Sextus Pompeius Festus* probably lived in the later 2nd century AD. He wrote a twenty- volume long summation of Verrius Flaccus’s treatise *De verborum significatione*. Festus added etymology and meaning of many words. Only a few fragments of his work remain. At the end of the eighth century Paul the Deacon made an abridgment of the rest of Festus’s work.

> *If a child, whether boy or girl,*[16] *[or a daughter-in-law] strike his or her parent, so that they cry out, the child shall be consecrated to the gods of parents (sacer esto).*[17]

The perpetrator was excluded from the community and from divine and human protection. Since a *homo sacer* was devoted to the gods for destruction, everyone could kill him without becoming a murderer.[18]

Apart from the special standing of the family father, the relationship between children and their parents was not regulated by their legal status. According to Labeo, even those who produced children in slavery had to be considered parents.[19] The same was true for an illegitimate child of a free woman.

In Roman law it was not possible to summon a parent to court. Because of the natural relationship between parents and children requiring respect this was true also for natural parents. No one could summon them to court: "for the same respect should be observed toward all parents".[20]

The natural relationship between a parent and a child was permanent and was not altered by adoption. Consequently, a son could not summon to court his natural parent, even while he was in the adoptive family. Since adoption only imitated nature[21] the Romans considered it to be temporary. Accordingly, the adoptive son could not summon to court his adoptive father as long as the adoptive son was under

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[16] See Paul. D. 50, 16, 163, 1: In the designation "boy" a girl is also included … (*" pueri" appellatione etiam puella significatur* …).

[17] Fest. s. v. Plorare (Lindsay, p. 320): *In regis Romuli et Tatii legibus (13): „si nurus . . . , <nurus sacra divis parentum estod." in Servi Tulli haec est (6): „si parentem puer verberit, ast olle plorassit parents, puer divis parentum sacer esto.*"

[18] Fest. s.v. Sacer Mons (Lindsay, p. 424): *at homo sacer is est, quem populus iudicavit ob maleficium; neque fas est eum immolari, sed, qui occidit, parricidi non damnatur; nam lege tribunicia prima cavetur, 'si quis eum, qui eo plebei scito sacer sit, occiderit, parricida ne sit*. More on this Pelloso, 2013: 57 ss, cap. 2. *'Homo sacer', animal sacrum', 'victima fugiens'*. Available at https://www.dsg.univr.it/documenti/OccorrenzaIns/matdid/matdid641686.pdf

[19] Ulp. D. 2, 4, 4, 3: Labeo thinks that those who have produced children in slavery are also to be considered parents and that the term is not applicable, as Severus said, only in the case where the children are legitimate. But if a son has been born in promiscuity, he shall not summon his mother to court (*Parentes etiam eos accipi Labeo existimat, qui in servitute susceperunt: nec tamen, ut Severus dicebat, ad solos iustos liberos: sed et si volgo quaesitus sit filius, matrem in ius non vocabit).*

[20] Paul. D. 2, 4, 6: No one can summon natural parents to court; for the same respect should be observed toward all parents. (*Parentes naturales in ius vocare nemo potest: una est enim omnibus parentibus servanda reverentia*).

[21] Inst. 1, 11, 4: Adoption imitates nature (*… adoptio enim naturam imitatur*). See also Pap. D. 28, 2, 23 pr.

the father's power.[22] If the adoptive son was emancipated the relationship ended and he could summon his former adopter to court.

The difference between a natural and adoptive parent is obvious. Adoption was introduced by law as a means for acquiring paternal power. It was temporary and could be reversed by emancipation whereas the relationship between a natural parent and his or her child was permanent. As a part of the natural order, it did not terminate by the death of a parent or a patron. As Ulpian pointed out "neither the defense of fraud nor any other defense, indeed, which affronts the standing of a patron or a parent contrary to good morals, can be available against the parents or the patrons… for respect must always be shown to him during his lifetime as well as after his death."[23]

These procedural restrictions were aimed at preventing disrespectful legal actions against a parent or a patron which were contrary to good morals. But the reverence towards parents and patrons was not limited to court proceedings. It also required a child to provide material assistance to a parent in need. Papinian quotes Hadrian's rescript in which the emperor commanded certain Vivius Cerealis, who defrauded his son by preventing the realization of a *fideicommissum* in his favor, to restore the inheritance to his son "in such manner that he should have no right in that money so long as his son should live. … But it accords with the reverence due a parent that a father who is perhaps in want should receive benefit from the increase of the inheritance by the discretion of the judge."[24]

We see that the fraudulent behavior of the father towards his son did not diminish the duties the son owed towards his father. The emperors Diocletian and Maximian also stressed the duty to support a parent:

> *By the authority of the provincial governor, your daughter is forced to show you not just respect, but also to provide the means of support.*[25]

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[22] Ulp. D. 2, 4, 8 pr.: A son cannot summon to court an adoptive father as long as he is in power … But he cannot summon his natural parent, even while he is in the adoptive family. *(Adoptivum patrem, quamdiu in potestate est, in ius vocare non potest … sed naturalem parentem ne quidem dum est in adoptiva familia in ius vocari*).

[23] Ulp. D. 44, 4, 4, 16: *Adversus parentes patronosque neque doli exceptio neque alia quidem, quae patroni parentisve opinionem apud bonos mores suggillet, competere potest … semper enim reverentia ei exhibenda est tam vivo quam defuncto.*

[24] Pap. D. 36, 1, 52: … *Sed paternae reverentiae congruum est egenti forte patri officio iudicis ex accessionibus hereditariis emolumentum praestari.*

[25] Diocl./Max. C. 8, 46, 5: *Filia tua non solum reverentiam, sed et subsidium vitae ut exhibeat tibi, rectoris provinciae auctoritate compelletur.*

Roman children owed respect not only to their father but to both parents. In AD 531 Emperor Justinian issued an enactment stressing this duty:

> *Among our forefathers it was doubted whether children could bring a complaint against their parents, or freedmen against their patrons, because this was unbecoming treatment of them. Some thought there was no restoration of rights against such persons, since natural parental authority and the deference due to patrons militated against such impudence except either for a significant reason or against a reprehensible person. … In order, therefore, that the honor (due) to parents and patrons of either sex remain in all things undiminished and unimpaired, We ordain that under no circumstances shall restoration be granted either against parents of either sex or against patrons of either sex. For the respect that these persons owe excludes them from obtaining any restoration …*[26]

In AD 259 the emperors Valerian and Gallienus replied to certain Galla that if the lawsuits arose between her and her sons it seemed more fitting to settle them within the household. But improper behavior or even insulting conduct towards parents represented a breach of piety and was punishable:

> *But if things reach the point that you are led by their insulting conduct both to resort to law and to seek punishment, the provincial governor, if approached, will indeed order the usual legal rules for monetary disputes (to be followed), but he will (also) compel sons to show the respect due to their mother, and, if he notices that their depravity has advanced to more serious outrage, he will quite seriously punish this injury to dutifulness (pietas).*[27]

An essential part of *pietas* was mutuality. A relationship based upon *pietas* was not regarded as a one-way relationship but required reciprocity. The piety governed all the aspects of a relationship on both sides. Relations between parents and children had to be mutually respectful and affectionate.[28] Although the duty of respect

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[26] Iust. C. 2, 41, 2: *Cum apud veteres dubitabatur, an liberi parentes suos vel liberti patronos in querimoniam deducere possint quasi non rite in eos versatos, et quidam existimabant nullam esse contra huiusmodi personas in integrum restitutionem, pondere naturali vel patronali reverentia huiusmodi petulantiae refragante, nisi vel ex magna causa vel adversus turpem eorum personam, … quod, ut maneat in omnibus honor parentibus et patrono vel patronae illibatus atque intactus, sancimus nullo modo neque adversus parentes utriusque sexus neque adversus patronum vel patronam dari restitutionem. nam personarum reverentia omnem eis excludit restitutionem …*

[27] Valer./Gallien. C. 8, 46, 4, 1: *Sed si ita res fuit, ut iniuriis eorum et ad ius experiundum et ad vindictam processeris, aditus praeses provinciae super disceptationibus quidem pecuniariis consuetum exerceri iubebit ordinem iuris: reverentiam autem debitam exhibere matri filios coget et, si provectam ad inclementiores iniurias improbitatem deprehenderit, laesam pietatem severius vindicabit.*

[28] More on the development of affection between parents and children Saller, 1994: 5 ff.

concerned primarily the obligation on the part of the children to respect their parents, the parents, too, had to treat their children justly and with respect. Piety required dutiful conduct not only towards one's parents but extended to relatives as well. The relationship as such stood under the divine protection.

A father that abused his paternal power therefore acted immorally. Although he could and had to punish crimes and other serious offences committed by persons under his paternal power, at the same time he had to act in accordance with *pietas*. Overly harsh treatment of children was regarded by Romans as disgraceful and scandalous. Seneca, for example, wrote about a Roman knight named Tricho whom angry people in the forum stabbed with their writing-styles because he had flogged his son to death. Both fathers and sons were enraged by his abuse of paternal power.[29]

The abuse of paternal power was a crime in itself. Emperor Hadrian deportated to an island a man who killed his son because he had committed adultery with his stepmother. By assassinating his son, the father himself had abused his paternal power and acted like a brigand "for paternal power ought to depend on piety and compassion (*pietas*), not cruelty".[30] Instead of consulting the family council and giving his son a fair trial, he killed him insidiously. The father's action was in clear contradiction to concepts of piety that had to govern the relationship between him and his son.

In Rome, a patron held a status similar to the one enjoyed by a parent. Thus, the relationship between a patron and his client was comparable to the relationship between parents and their children. This relationship was reciprocal and governed by *fides*. The main feature of this relationship was the duty of a client to perform certain work for his patron, and to assist him in case of need, especially to ransom him if he fell into captivity. The economically stronger patron was obligated to provide protection for his client when required, especially in legal matters. Gellius wrote about different types of relationships creating a certain degree of dependence:

[29] Sen. de Clem. 1, 15: *Trichonem equitem Romanum memoria nostra, quia filium suum flagellis occiderat, populus graphiis in foro confodit …*

[30] Marc. D. 48, 9, 5: … *quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.*

> *But it was readily agreed and accepted, that in accordance with the usage of the Roman people the place next after parents should be held by wards entrusted to our honour and protection; that second to them came clients, who also had committed themselves to our honour and guardianship; that then in the third place were guests; and finally relations by blood and by marriage.*[31]

The relationship between a patron and a client was based upon mutual trust. It was therefore essential not to breach it. This was true especially for a patron who could take advantage of his better (economic and social) position.

A violation of the trust governing the relationship between a client and his patron was considered a major crime. Accordingly, the Twelve tables (8, 21) stipulated that a patron who defrauded his client should become *sacer*, i. e., consecrated to the gods and deprived of any divine or human protection.[32] Gellius also wrote that Roman people "most of all and in particular cultivated integrity and regarded it as sacred, whether public or private". They maintained that "a client taken under a man's protection should be held dearer than his relatives and protected against his own kindred, nor was any crime thought to be worse than if anyone was convicted of having defrauded a client." (Gell. N. A. 20, 1, 40).

2 Parricidium

The overview of the moral dimension of the relationship between parents and children provided in the previous section was necessary in order to understand and appreciate why *parricidium*, i. e., killing of one's parent or close kin, had a special status among crimes in Rome. It was regarded as the most outrageous of all crimes. The Romans believed that killing someone from whom one was born constitued a crime against nature. Cicero quotes Solon, when he was asked why he had failed to punish the person who killed his father, as saying that he had not supposed that anyone would do so. The Romans, however, as Cicero concludes, understood that there was nothing so holy that audacity would not sometimes violate it (Cic. pro Rosc. Amer. 70).

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[31] Gell. N. A. 5, 13, 2: *Conveniebat autem facile constabatque, ex moribus populi Romani primum iuxta parentes locum tenere pupillos debere,fidei tutelaeque nostrae creditos; secundum eos proximum locum clientes habere, qui sese itidem in fidem patrociniumque nostrum dediderunt; tum in tertio loco esse hospites; postea esse cognatos adfinesque.* The English translation available at https://topostext.org/work.php?work_id=208

[32] Tab. 8, 21: *Patronus si clienti fraudem fecerit sacer esto.*

Some authors think that the crime of parricide was a reaction to the excessive power Roman family fathers had over members of their family. In their view, the crime of *parricidium* is possible to understand when viewed through the prism of the »dictatorship of the father" that generated a particular tension inside families, making Roman family fathers live in perpetual fear because most Romans desired to kill their fathers. As Daube pointed out: "… the system of absolute propertylessness of a *filius familas* developed the most unpleasant creaks. Sons wished their fathers dead, and more and more frequently the wish was father to the deed."[33]

Some authors see a possible reason for parricide in the excessive use of the father's power of life and death. Carlà-Uhink writes that "for a *pater familias*, killing a criminal son was a means of showing to the rest of society that they had authority and control inside their family and that their gens coexisted with the Republican institutions. By demonstrating their 'love' for Rome and the collective as being stronger than the love for their kin, they would also avoid the collective humiliation eventually brought upon the family by the execution of one of its members" (Carlà-Uhink, 2017: 39).

However, despite the report of Cassius Dio, who says that "there were many … private individuals as well, who slew their sons",[34] a connection between *ius vitae necisque* and the crime of parricide does not seem convincing. On the one hand, it is difficult to measure the impact Roman values had in daily life, while on the other hand it is undisputed that the authority of the family father was for the most part perceived as natural and just. The *ius vitae necisque* cannot be understood solely in the framework of a family. Instead, it must be understood within the broader context of the society as a whole. It protected the family members from blood feud, and was necessary because of the absence of an organized judiciary. Thus, its decline to a great extent coincides with the development of the state judiciary:

> *A father cannot kill his son without his having been heard; but he should accuse him before the Prefect or the Governor of the province.*[35]

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[33] Daube, 1969: 88; see also Thomas, 1983: 115 ss. More on this with a comprehensive presentation of the views of different authors: Carlà-Uhink, 2017: 30 ss; Cantarella, 2017: Cap. 6.

[34] Dio 37, 36, 4. English translation: Roman History by Cassius Dio published in Vol. III of the Loeb Classical Library edition, 1914. The text is in the public domain available at: https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cassius_Dio/37*.html

[35] Ulp. D. 48, 8, 2: *Inauditum filium pater occidere non potest, sed accusare eum apud praefectum praesidemve provinciae debet.*

It is noteworthy that probably many Roman family fathers exercising their power of life and death (*ius vitae necisque*) behaved, or at least tried to behave, like judges:

> *Lucius Gellius, a man who had held all public offices up through that of censor, possessed near certainty that his son was guilty of very serious offenses, namely committing adultery with his stepmother and plotting the murder of his father. Still, he did not rush at once to vengeance but (instead) summoned almost the entire Senate to his consilium, set forth his suspicions, and offered the young man the chance to defend himself. And when he had very carefully examined the case, he acquitted him not only by the verdict of the consilium but also by his own. Now if, carried away by the force of anger, he had hastened to vent his cruelty, he would more have committed a wrong than avenged one.*[36]

It is therefore difficult to imagine that killing a parent could be connected with an overly strict exercise of paternal power. Besides, the term parricide was not limited to the killing of a father. It also covered the killing of a mother and later also of some other relatives. It is also hardly possible to reduce to only one the reasons for a social phenomenon.

Probably the most "famous" parricide in Rome was committed by Macedo during the time of Vespasian. As a son under the paternal power, Macedo killed his father to inherit the estate and repay his debts. In response to this shocking crime the senate passed the *Senatus consultum Macedonianum* preventing creditors from claiming back loans given to sons-in-power even after the death of the father. The senate believed that the reasons for Macedo's crime were as follows:

> *Whereas Macedo's borrowings gave him an added incentive to commit a crime to which he was naturally predisposed and whereas those who lend money on terms which are dubious, to say the least, often provide evil men with the means of wrongdoing, it has been decided, in order to teach pernicious moneylenders that a son's debt cannot be made good by waiting for his father's death, that a person who has lent money to a son-in-power is to have no claim or action even after the death of the person in whose power he was."*[37]

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[36] Val. Max. 5.9.1. English translation: Frier & McGinn, 2004: 193.

[37] Ulp. D. 14, 6, 1 pr.: *Verba senatus consulti Macedoniani haec sunt: "cum inter ceteras sceleris causas Macedo, quas illi natura administrabat, etiam aes alienum adhibuisset, et saepe materiam peccandi malis moribus praestaret, qui pecuniam, ne quid amplius diceretur incertis nominibus crederet: placere, ne cui, qui filio familias mutuam pecuniam dedisset, etiam post mortem parentis eius, cuius*

The reasons mentioned by the senate seem quite plausible. In Macedo's case, it is therefore difficult to imagine how his father's sternness could have contributed to the crime.

In classical Roman law the word *parricidium* stood for the assassination of a father or a close relative (see Marc. D. 48, 9, 1). Etymologically the term was probably connected with the term *paricidas* which, according to Festus, occurred in a law attributed to the second Roman king Numa Pompilius. The law contained the following provision:

> *'If somebody with malice aforethought delivered to death a free man, let him be paricidas.'*[38]

According to Festus, the word *parricida* denoted not only someone who killed his father, but any man not condemned.[39]

The etymology of the word *par(r)icida* is controversial.[40] The same is true for the existence of two different categories of parricides and for the connection between them.[41] It is likely that the word *parricidium,* at the time of the Twelve tables, stood for murder in general and not only for the killing of a father or of close relative (so Kunkel, 1962: 39). But it is also possible to conjecture that even initially the killing of a close relative was at the core of the term. If we believe that the etymology of the word means simply killing of a relation (Robinson, 1995: 128, fn. 66, quoting Paul Jeffreys-Powel) then it is possible to imagine that behind the *parricidium* there was the idea of punishing above all someone who killed a relative.

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in potestate fuisset, actio petitioque daretur, ut scirent, qui pessimo exemplo faenerarent, nullius posse filii familias bonum nomen exspectata patris morte fieri."

[38] Fest. s. v. Parrici<di> quaestores (Lindsay, p. 247): *Si qui hominem liberum dolo sciens morti duit, paricidas esto.* More on the criminal law at the time of kings Santalucia, 1981: 39 ss.; Falcon, 2013: 191-274.

[39] Fest. s. v. Parrici<di> quaestores (Lindsay, p. 247*): Parrici(di) quaestores appellabantur, qui solebant creari causa rerum capitalium quaerendarum. Nam parricida non utique is, qui parentem occidisset, dicebatur, sed qualumcumque hominem indemnatum.* See Kunkel, 1962: 39: … In ihm kann *parricidium* nur den Mord im allgemeinen bedeuten, nicht dagegen, wie späterhin, den Vater- oder Aszendentenmord.

[40] See the etymology of the word at: Walde, 1938: s. v.; Glare, 1982: s.v.; Ernout, & Meillet, 1960: s. v. An overview gives Cloud, 1971: 5 fn 5. See also Henrion, 1941: 219 ss.

[41] Mommsen, 1899: 612 s, and fn. 3. On the term *paricida(s)* see e. g. Meylan, 1928; Londres da Nóbrega, 1950: 3-12; Magdelain, 1984: 549 ss, esp. 552 ss (reprinted in: Magdelain, 1990: 519 ss); Cloud, 1971: 1 ss; Thomas, 1981: 643 ss; Kunkel, 1962: 39 ss; MacCormack, 1982: 43 ss; Falcon, 2013: 191 ss, especially 224 ss. etc.

There are several arguments supporting this proposition. We already mentioned that before the introduction of public criminal courts the *pater familias* exercised jurisdiction over the persons in his paternal power. If one of them killed a member of another family, the *pater familias* had to react by punishing the murderer to prevent a feud between the two families. It is therefore possible to imagine that at that time a murder was only exceptionally an issue requiring a public reaction. As Olivia Robinson points out "it seems likely that for the Romans, as in our day, most murderers were family affairs and, until well into the Principate, that these would therefore fall within the jurisdiction of the relevant *pater familias* or owner (or patron). Of course, when the *pater familias* was the murder, someone technically outside the *familia* would need to intervene" (Robinson, 1995: 41). The same was probably true if the family father was killed. In neither case was it possible to prosecute the perpetrator within the family. It is therefore possible to imagine that a murder was a crime the broader public had to deal with only when the family father was either a perpetrator or a victim. We do not know how many murders occurred at Rome in decemviral time. But it is possible to imagine that a considerable portion of them occurred inside the same household where both the perpetrators and the victims were relatives.

There is another indication that the killing of a relative was an essential element of *parricidium* even at the time of the Twelve tables.

The decemviral Rome was small. Its population consisted of tribes. It is not entirely impossible to imagine that at the time of Roman kings free Romans perceived themselves as members of the same family, especially when confronting the foreigners. Killing a member of the same tribe was considered murder of a relative. Kinship was a hindrance to kill, even across borders (so Rüpke, 1992: 59).

Some Roman authors, especially Cicero, give some hints in this direction. In his speech against Verres, Cicero, in order to stress the abominableness of Veres' crimes, stated that "it is a crime to bind a Roman citizen; to scourge him is wickedness; to put him to death is almost parricide".[42] It is possible to imagine that by using these words Cicero was alluding to the idea that all Romans living abroad should be treated as relatives belonging to the same larger family. That could justify their special treatment by the provincial authorities.

[42] Cic. Verr. 2, 5, 170: *Facinus est vincire civem Romanum, scelus verberare, prope parricidium necare.*

The same idea might help explain the fact that the word *parricidium* could also mean treason or rebellion. Cicero spoke about someone who was "involved in the guilt of planning the parricide of his country"[43] or of wicked men "confessing that they had planned the parricidal destruction of their country,[44] and that they had agreed to burn the city, to massacre the citizens, to devastate Italy, to destroy the republic." In his treatise on duties, he even used the term "the most horrible and hideous of all murders — that of fatherland".[45] Similarly, Livy, when writing about Coriolanus, who, because he had been iniquitously condemned to exile, led troops of Rome's enemy the Volsci to besiege the city, used the term *publicum parricidium*; Coriolanus's personal piety recalled him from the public *parricidium*.[46] In this case it is again possible to imagine that by his act of treason Coriolanus was in a sense killing Roman people that constituted part of his broader family.

In his treatise on laws, Cicero used the term *parricidium* in one of his exemplary norms: "Whoever purloins or robs any temple, or steals any property deposited in a temple, shall be accounted a parricide".[47] At first glance this seemingly has no connection with the killing of a close relative or of any person at all. Yet, if we take into consideration the Roman idea of divine members of a family or a tribe (*di parentes*), this could bring us closer to the meaning of the term *parricidium* in this case as well.

According to Suetonius, *parricidas* was also the name of the Ides of March.[48] Since the Senate awarded to Caesar the title *pater patriae* for having ended the civil wars, naming the day when he had been assassinated *parricidas* corresponded in some way to the traditional meaning of the word.

There is no clear answer regarding the connection between the term *paricidium,* denoting in king Numa's law a killing of any man not condemned, and the later narrower meaning of the word *parricidium*. Festus mentioned Numa's law in connection with the foundation of *quaestores parricidii* and at the same time explained

[43] Cic. Pro Sulla 6: … *quem obstrictum esse patriae parricidio suspicere.*
[44] Cic. Phil. 2, 17: *Etenim, cum homines nefarii de patriae parricidio confiterentur …*
[45] Cic. de Off. 3, 21, 83: … *foedissimum et taeterrimum parricidium patriae …*
[46] Liv. ab U. C. 28, 29: … *reuocauit tamen a publico parricidio priuata pietas*
[47] Cic. Leg. 2, 9, 22: … '*Sacrum sacrove commendatum qui clepsit rapsitve, parricida esto*.' English translation: Bohn's Classical Library, Cicero on the nature of the gods, Divination, Fate, the republic, laws, etc. available at https://archive.org/stream/treatisesofcicer00ciceuoft#page/n7/mode/2up
[48] Suet. Caes. 88: … *placuit Idusque Martias parricidium nominari …*

that the term did not only stand for someone who killed a close relative but was also related to someone who killed any man not condemned. This does not mean that the term initially did not stand also for killing a close relative. Rather, the meaning of the term has gradually broadened over timel.[49]

When we try to determine how reliable Festus' reports are, we must remember that Festus lived about eight and a half centuries after the legendary second king of Rome, Numa Pompilius (c. 753-673 BC), and that we only possess fragments of Festus' work, which in turn were edited by Paul the Deacon (c. AD 720 -799) another six centuries later. This certainly does not mean that we should completely discount Festus's account. However, we have to bear in mind that these sources do not provide a comprehensive picture.

3 The *poena cullei*

It is not clear what legal consequences the proclamation of *parricidas esto* had (more on this Cloud, 1971: 29 ss). It is likely that initially a *parricidas* was proclaimed *homo sacer*. It is also possible that the perpetrator was punished by some special religious penalty for offending the divine protectors of the City.[50] Numa's law intended to put "the legal consequences of knowingly and with wrongful intent killing a free man not belonging to the 'clan' of the killer on a par with the consequences of knowingly and with wrongful intent killing a free man who belonged to the 'clan' of the killer. In this way, the lawmaker aimed at preventing blood feuds, the perpetrator was declared *sacer*" (ter Beek, 2012: 14; he is referring to Cloud, 1971: 2-18; MacCormack, 1982: 43. See also Falcon, 2013: 224 ss). This was particularly necessary when a *pater familias* was killed by a member of another family. Without public punishment of the perpetrator a vendetta would be a normal reaction to such a crime.

[49] This was true even later when the circle of potential victims was broadened – see e.g., Marc. D. 48, 9, 1.

[50] See Kaser, 1949: 12 s: … Vero è che proprio per il *parricidium* non ci è stata tramandata la solita formula '*sacer esto*', ma basta il fatto che esso sia stato contemplato dalle *leges regiae* e basta il rilievo della connessione tra omicidio e vendetta sacrale ad autorizzarci a supporre che esso fosse anticamente perseguito con una pena religiosa. See also Kaser, 1980: 50 ss.; Briquel, 1980: 92-1, 87 ss.

There can be no doubt that the punishment for *parricidium* was death. However, the type of capital punishment used initially is unclear (see different opinions quoted by Cloud, 1971: 26 ss). According to Cicero, the ancestors ordered the convicted parricide to be drown alive in a sack (more on this Cantarella, 2018: cap. XVII La pena del sacco).

In his defense speech delivered in 80 BC on behalf of Sextus Roscius from Ameria, accused of murdering his father, Cicero mentioned this penalty as a genuine Roman invention:

> *70 The state of the Athenians is said to have been the wisest while it enjoyed the supremacy. Moreover of that state they say that Solon was the wisest man, he who made the laws which they use even to this day. When he was asked why he had appointed no punishment for him who killed his father, he answered that he had not supposed that any one would do so. He is said to have done wisely in establishing nothing about a crime which had up to that time never been committed, lest he should seem not so much to forbid it as to put people in mind of it. How much more wisely did our ancestors act! For as they understood that there was nothing so holy that audacity did not sometimes violate it, they devised a singular punishment for parricides in order that they whom nature herself had not been able to retain in their duty, might be kept from crime by the enormity of the punishment. They ordered them to be sown alive in a sack, and in that condition to be thrown into the river.*
>
> *71 O singular wisdom, O judges! Do they not seem to have cut this man off and separated him from nature; from whom they took away at once the heaven, the sun, water and earth, so that he who had slain him, from whom he himself was born, might be deprived of all those things from which everything is said to derive its birth. They would not throw his body to wild beasts, lest we should find the very beasts who had touched such wickedness, more savage; they would not throw them naked into the river, lest when they were carried down into the sea, they should pollute that also, by which all other things which have been polluted are believed to be purified. There is nothing in short so vile or so common that they left them any share in it.*

> *72 Indeed what is so common as breath to the living, earth to the dead, the sea to those who float, the shore to those who are cast up by the sea? These men so live, while they are able to live at all, that they are unable to draw breath from heaven; they so die that earth does not touch their bones; they are tossed about by the waves so that they are never washed; lastly, they are cast up by the sea so, that when dead they do not even rest on the rocks.*'[51]

The reasons for the penalty of the sack were probably religious. Initially, it was presumably intended to expiate the preposterous crime by which the *parricida* took the life of his parent from whom he was born. Olivia Robinson believes that the sack as a penalty "ha[d] been primarily an expiatory rite more than a punishment" (Robinson, 1995: 47). In this process water played a certain role because it was believed that it possessed cleaning powers (Mommsen,1899: 922). As the emperor Constantine put it, the perpetrator was deprived of the essential things which were at the origin of every life – the heaven, the sun, water and earth (*caelum, solem, aquam terramque*): »*While still alive he may begin to lose the enjoyment of all the elements, that the heavens may be taken away from him while he is living and the earth, when he is dead.*"[52]

It is not clear when the "penalty of the sack" (*pena cullei*) was introduced as a punishment for the convicted parricide. Valerius Maximus reported that the King Tarquinius Superbus ordered the duumvir M. Atilius, who had allowed Petronius Sabinus to copy a book containing secret religious ceremonies entrusted to him, to be sewn up in a sack and dumped in the sea. According to the same report, this sort of penalty much later (*multo post*) became also the penalty for parricide by virtue of a law:

> *This kind of penalty became, long afterwards, the punishment inflicted by law on parricides. And this is very fair, for it is by equal punishment that attacks against parents and attacks against the gods must be expiated.*[53]

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[51] Cic. pro Rosc. Amer. 70-72. The English translation taken from http://artflsrv02.uchicago.edu/cgi-bin/perseus/citequery3.pl?dbname=LatinSept18&getid=1&query=Cic.%20S.%20Rosc.%2074

[52] So Const. CTh 9, 15, 1 (=C. 9, 17, 1): … *ut omni elementorum usu vivus carere incipiat, ut ei caelum superstiti, terra mortuo auferatur.*

[53] Val. Max. 1, 1, 13: *M. Atilium duumuirum, quod librum secreta rituum ciuilium sacrorum continentem, custodiae suae conmissum corruptus Petronio Sabino describendum dedisset, culleo insutum in mare abici iussit, idque supplicii genus multo post parricidis lege inrogatum est, iustissime quidem, quia pari uindicta parentum ac deorum uiolatio expianda est.*

It is not clear when and by which law this could have happened. J. D. Cloud argues that the penalty of the sack in its association with *parricidium* dates from the late third or early second century BC (Cloud, 1971: 27; see also Carlà-Uhink, 2017; Biavaschi, 2016: 169 ss). Livy, on the other hand, wrote that "the first to be sewn into a sack and thrown into the sea" was Publicius Malleolus who had killed his mother.[54] This occurred in 101 BC. Mommsen maintained that Malleolus was the first matricide to be punished that way (Mommsen, 1899: 614, fn. 1). However, from the account of the same event provided by Livy's epitomator Orosius, it is possible to conclude that Malleolus was the first to be punished by the penalty of *culleus,* which was much older itself.[55]

Either way, the penalty of *culleus* was commonly practiced in Cicero's time. In a letter to his younger brother Quintus, when the latter was propraetor of the Province of Asia (61-59 B.C.), Cicero wrote:

> … *when you say that, having sewn up in the parricide's-sack two Mysians at Smyrna, you desired to display a similar example of your severity in the upper part of your province …*[56]

Cicero doesn't seem to be surprised by his brother's sternness. Although as a governor of a province Quintus was utterly honest and just, as a military commander he had outbursts of cruelty and probably tended towards inflicting harsh punishments.[57]

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[54] Liv. Per. 68, 9: *Publicius Malleollus matre occisa primus in culleo insutus in mare praecipitatus est.*

[55] Orosius 5, 16, 23: *Publicius siquidem Malleolus seruis adnitentibus matrem suam interfecit; damnatus parricidii insutusque in culleum et in mare proiectus est; 24 inpleueruntque Romani et facinus et poenam, unde et Solon Atheniensis decernere non ausus fuerat, dum fieri posse non credit, et Romani, qui se ortos a Romulo scirent, etiam hoc fieri posse intellegentes supplicium singulare sanxerunt.* (Publicius Malleolus with the assistance of slaves killed his own mother. He was condemned for parricide, sewed up in a sack, and thrown into the sea. 24 Thus the Romans provided a penalty and punished a crime for which even the Athenian Solon had not ventured to prescribe a penalty because he did not imagine such an outrage possible; the Romans, however, realizing that they were descended from Romulus and knowing that even such a deed was possible, enacted a unique punishment for it. English translation at http://www.attalus.org/translate/orosius5B.html).

[56] Cic. ad Qu. fr. 1, 2, 2, 5: … *quod scribis cupisse te, quoniam Smyrnae duos Mysos insuisses in culleum, simile in superiore parte provinciae edere exemplum severitatis tuae* … English translation: https://en.wikisource.org/wiki/Letters_to_his_brother_Quintus/1.2

[57] This was probably regarded as a problem also by his brother. See e. g. Cic. ad Qu. fr. 1, 1, 37: *Unum est, quod tibi ego praecipere non desinam, neque te patiar, quantum erit in me, cum exceptione laudari: omnes enim, qui istinc veniunt, ita de tua virtute, integritate, humanitate commemorant, ut in tuis summis laudibus excipiant unam iracundiam; quod vitium cum in hac privata quotidianaque vita levis esse animi atque infirmi videtur, tum vero nihil est tam deforme, quam ad summum imperium etiam acerbitatem naturae adiungere.* (There is one thing on which I shall not cease from giving you advice, nor will I, as far as in me lies, allow your praise to be spoken of with a reservation. For all who come from your province do make one reservation in the extremely high praise which they bestow on your virtue, integrity, and kindness--it is that of sharpness of

Since the time of Cicero, the penalty of *culleus* was regularly used, especially during the time of Principate. Suetonius reported that Caesar increased the penalties for crimes and that he punished parricides by confiscating all of their goods and others by the loss of one-half.[58] Suetonius did not write about the penalty of parricide. But he mentioned that Caesar "administered justice with the utmost conscientiousness and strictness".[59] It is therefore possible to conclude that he did nothing to prevent the application of *poena cullei.*

This seems to have been a regular punishment for manifest parricides who confessed their crime under Augustus. Augustus, whose administration of justice, according to Suetonius, was very lenient, tried to save the manifest parricide from that penalty by altering the question about his guilt:

> *In his administration of justice he was both highly conscientious and very lenient; for to save a man clearly guilty of parricide from being sown up in the sack, a punishment which was inflicted only on those who pleaded guilty, he is said to have put the question to him in this form: "You surely did not kill your father, did you?*"[60]

In the hortatory essay On Mercy that he wrote to the emperor Nero in 55-56 A.D., Seneca the Younger mentioned that the emperor Claudius "sewed up more parricides in sacks during five years, than we hear of in all previous centuries".[61] By this example Seneca wanted to demonstrate to the young emperor that savage repression increases the frequency of crimes and that "sins which are frequently punished are frequently committed (*ea saepe committi, quae saepe vindicantur*)."

temper. That is a fault which, even in our private and everyday life, seems to indicate want of solidity and strength of mind; but nothing, surely, can be more improper than to combine harshness of temper with the exercise of supreme power. – English translation https://en.wikisource.org/wiki/Letters_to_his_brother_Quintus/1.1. But see also Cic. ad Qu. fr. 1, 1, 16.

58 Suet. Iul. 42: *Poenas facinorum auxit; et … parricidas, ut Cicero scribit, bonis omnibus, reliquos dimidia parte multavit.*

59 Suet. Iul. 43: *Ius laboriosissime ac severissime dixit.*

60 Suet. Aug. 33, 1 *Ipse ius dixit … Dixit autem ius non diligentia modo summa sed et lenitate, siquidem manifesti parricidii reum, ne culleo insueretur, quod non nisi confessi adficiuntur hac poena, ita fertur interrogasse: "Certe patrem tuum non occidisti?"* English translation
https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Augustus*.html#note40

61 Sen. de Clem. 1, 23: … *Pater tuus plures intra quinquennium culleo insuit, quam omnibus saeculis insutos accepimus.* On Claudius' harsh administration of justice see Suet. Claud. 34, 1.

The *poena cullei* was probably less used under Hadrian, who forbade the capital punishment for decurions, "save for those who had killed their parents ... they are to be punished with the penalty of the *lex Cornelia"*.[62] It is not entirely clear which penalty was meant by this expression. Possibly this was the 'interdiction of fire and water' (*aquae et ignis interdictio*), i. e. banishment with the loss of citizenship and confiscation of property (so Mommsen, 1899, Nachdruck 1955: 957; Bauman, 1996: 31). It is also possible that this was the death penalty (Levy, 1963: 33 ss; Levy, 1938: 442 ss). It is quite obvious, however, that it was not the *poena cullei*. Modestinus, quoting from Hadrian's constitution, described the exposure to wild beasts as an alternative to the 'penalty of the sack'.[63] Garnsey believes that only those of low birth or position were punished this way. Persons of high status were exiled.[64]

Marcian mentions that by the *lex Pompea de parricidiis* parricides were "liable to the same penalty as that of the *lex Cornelia* on murderers."[65] Justinian's Institutes, on the other hand, report that the Pompeian law on parricide provided the penalty of the sack for parricides.[66] These and some other reports seem contradictory. It is possible to reconcile these seemingly disparate forms of punishment if we assume that the Sullan law prescribed only a capital punishment but not the method by which it was to be carried out. To execute a parricide *more maiorum* was one of the options. Later enactments, like that of Hadrian, made this general provision more specific. Despite the Hadrian's law it is possible to assume that the *poena cullei* was never abolished. Although the literature of that time only mentions *poena cullei* a few times[67] it is possible to conclude that it was also present during the time of Principate. How often it was applied depended not that much on the law but on concrete circumstances.[68] It seems that the *poena cullei* was not explicitly prescribed until 318/19 AD by Constantine's law (Const. C. Th. 9, 15, 1 = C. 9, 17, 1).

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[62] Ven. Sat. D. 48, 19, 15: … *nisi si qui qui parentem occidissent … poena legis Corneliae puniendos … cautum est.*

[63] Mod. D. 48, 9, 9 pr. The text see bellow.

[64] Garnsey, 1970: 130 fn. 9. See also 107: For those of high status "the correct penalty was the penalty of the Cornelian law, by which was meant deportation" and p. 118: … the most serious form of exile ...

[65] Marc. D. 48, 9, 1: *Lege Pompeia de parricidiis cavetur, ut, si quis patrem matrem, avum aviam, fratrem sororem patruelem matruelem, patruum avunculum amitam, consobrinum consobrinam, uxorem virum generum socrum, vitricum, privignum privignam, patronum patronam occiderit cuiusve dolo malo id factum erit, ut poena ea teneatur quae est legis Corneliae de sicariis.*

[66] Inst, 4, 18, 6. The text see bellow.

[67] See e. g. Apul. Met. 10, 8 (… *insui culleo pronuntiaret* …), Tertull. de Anima 33, 6 (… *patibula et uiui comburia et culleos et uncos et scopulo* …), Lact, Inst. div. 5, 9, 16 (… *qui nec culleum metuant* …).

[68] Cloud, 1971: sees the explanation for earlier cases in religious hysteria.

4 The practice

There was probably no detailed procedure for carrying out the penalty of the sack. Yet we learn from different sources how the execution proceeded. There are two nearly identical accounts from the first century BC. In his handbook for orators Cicero writes:

> *A certain man was convicted of murdering a parent, and because there was no chance of his avoiding the penalty, the wooden sandals (ligneae soleae) were immediately put on his feet, his head was covered and tied up with a bag (folliculo) and he was then taken to prison to stay there until they could get ready the sack, into which he was to be placed before being thrown into the river.*[69]

A similar account is given by the unknown author of the Rhetoric for Herennius (written probably in the late 80s BC):

> *Malleolus was convicted of matricide. Immediately after he had received sentence, his head was wrapped in a bag of wolf's hide (folliculo lupino), the "wooden shoes" were put upon his feet, and he was led away to prison.'*[70]

In his account, the Roman jurist Herennius Modestinus, who worked about AD 250, does not mention wooden sandals and the *folliculus* but mentions the flogging with rods and that several animals were sewn up in the sack together with the condemned:

> *According to the custom of our ancestors, the punishment instituted for parricide was as follows: A parricide is flogged with blood-colored rods, then sewn up in a sack with a dog, a dunghill cock, a viper, and a monkey; then the sack is thrown into the depths of the sea. This is the procedure if the sea is close at hand;*

[69] Cic. de Inv. 2, 50, 149: *Quidam iudicatus est parentem occidisse et statim, quod effugiendi potestas non fuit, ligneae soleae in pedes inditae sunt; os autem obvolutum est folliculo et praeligatum; deinde est in carcerem deductus, ut ibi esset tantisper, dum culleus, in quem coniectus in profluentem deferretur, compararetur.* English translation: Cicero De invetione, De otpimo genere oratorum, Topica. With an English translation by Hubbell, 1949.

[70] Rhet, ad Herenn. 1, 13, 23: *Malleolus iudicatus est matrem necasse. Ei damnato statim folliculo lupino os obvolutum est et soleae ligneae in pedibus inductae sunt ; in carcerem ductus est.* English translation: Cicero, ad C. Herennium. De ratione dicendi (Rhetorica ad Herennium) With an English translation by Caplan, 1964, available at: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Rhetorica_ad_Herennium/home.html

> *otherwise, he is thrown to the beasts, according to the constitution of the deified Hadrian.*'[71]

It is difficult to speculate the extent to which the animals mentioned above were a part of the Roman tradition. As we have seen, Cicero does not mention any of them. Given the nature of his speech, we can imagine that he likely would have referred to them if they were indeed part of the punishment *more maiorum*. This would increase the dramatic effect of his statement. Furthermore, since there were probably no indigenous apes in Rome, it can be doubted that initially a monkey was among the animals sewn up in the sack together with the perpetrator.

The animals that were sown up in a sack together with the perpetrator that are mentioned by Modestinus are also mentioned in the Institutes of Justinian:

> *A novel penalty has been devised for a most odious crime by another statute, called the lex Pompeia on parricide, which provides that any person who by secret machination or open act shall hasten the death of his parent, or child, or other relation whose murder amounts in law to parricide, or who shall be an instigator or accomplice of such a crime, although a stranger, shall suffer the penalty of parricide. This is not execution by the sword or by fire, or any ordinary form of punishment, but the criminal is sewn up in a sack with a dog, a cock, a viper, and an ape, and in this dismal prison is thrown into the sea or a river, according to the nature of the locality, in order that even before death he shall begin to be deprived of the enjoyment of the elements, the air being denied him while alive, and interment in the earth when dead. Those who kill persons related to them by kinship or affinity, but whose murder is not parricide, will suffer the penalties of the lex Cornelia on assassins.*[72]

[71] Mod. D. 48, 9, 9 pr.: *Poena parricidii more maiorum haec instituta est, ut parricida virgis sanguineis verberatus deinde culleo insuatur cum cane, gallo gallinaceo et vipera et simia: deinde in mare profundum culleus iactatur. hoc ita, si mare proximum sit: alioquin bestiis obicitur secundum divi Hadriani constitutionem.*

[72] Inst, 4, 18, 6. English translation: The Institutes of Justinian. Translated into English by Moyle, 1913. Available at: https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0102.

Constantine's law of 318/19, which gives an account very similar to that in Justinian's Institutes, only mentions serpents:

> *If anyone hastens the death of a parent, child, or any other close relative (adfectio) at all that is included in the class of "parricide", whether acting secretly or openly, he or she will be punished with the penalty given for parricide, meaning he or she shall not suffer execution by the sword, by being burned alive, or by any other formally prescribed means. Instead, he shall be sewn up in a sack and, within its dismal confines, shall enjoy the company of serpents. …*[73]

The reference to various kinds of animals indicates that much depended on what kinds of animals were available in the region and on the phantasy of the executioners. There is speculation, for example, that a snake was introduced by the *lex Pompeia de parricidiis,* that emperor Claudius wanted to stress the inhumane nature of the parricide by adding a monkey, and that emperor Constantine added a dog and a cock which were typical of the cults of Mithras, Cybele, and Isis.[74] Yet, it is more likely that the addition of these animals depended on multiple factors including their availability and the concrete circumstances surrounding the execution.

A parricide was presumably not very frequent (see Cloud, 1971: 38 ss; see also Carlà-Uhink, 2017: 26 ss, esp. pp. 56 ss) and it is possible to imagine that the execution of a parricide was a major public event.

In the Appendix to the *Sententiae Hadriani,* the bilingual (Greek-Latin) text of the *Hermeneumata Stephani* mentions that the execution was public. The parricide was sewn up in a sack together with a snake, a dog, a monkey, and a cock (*in culleum missus consueretur cum vipera et cane, et simia et gallo*). The text also explains that these animals were added to stress the impious nature of the parricide: *impiis animalibus, impius homo* (impious animals, an impious man):[75]

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[73] Const. C. Th. 9, 15, 1 (=C. 9, 17, 1): *Si quis in parentis aut filii aut omnino adfectionis eius quae nuncupatione parricidii continetur fata properaverit, sive clam sive palam id fuerit enisus, poena parricidii punietur neque gladio neque ignibus neque ulla alia sollemni poena subiugetur, sed insutus culleo et inter eius ferales angustias comprehensus serpentium contuberniis misceatur* … English translation: The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text. Based On A Translation By Justice Fred H. Blume. Bruce W. Frier, General Editor… Cambridge University Press 2016.

[74] So Cantarella, 2017: see Cap. 6. Dalla parte dei padri, Title: *Il bestiario del parricida: un cane, un gallo, una vipera e una scimmia.*

[75] See: Corpvs Glossariorvm Latinorvm Gvstavo Loewe incohatvm avspiciis Societatis Litterarvm Regiae Saxonicae composvit recensvit edidit Georgivs Goetz, Vol. III, Lipsiae 1892: 38 and 390.

Πασιν ανθρωποις omnibus hominibus
Οπως οστις uti qui
Πατροκτονιαν patricidium
Πεποιηκι fecisset
Δημοσιος publice
Εις μολσον inculleum
Πεμφθεις missus
Συντραφηναι conscriberetur
Μετα εχιδνης cum uipera
Και πιθηκουν etsimiam
Και αλεκτορας etgallu
Και κυνας et cane
Ασεβις ζωις impiis animalibus
Ασηβες ανθρωπος impius homo
Και εις αμαξαν etinplaustrum
Εζευγμενην iunctum
Μελανον βοων nigris bovis
Κατενεχθηναι deportari
Προσθαλασσαν admare
Καιειςβυθονι etinprofundum
Βληθηναι mitti
Εδιξαν ostenderunt
Υποδιγμα exemplum
Τιμωριας poenae
ιναμαλλον utmagis
φοβηθωσιν timeant
ουτως ανοσιον siccrudelem
εργον εποιεσην opus fecit

(All the men who commit parricide should be publicly put into a sack with a snake, and an ape, and a cock, and a dog, impious animals – impious man, put on a wagon to which black oxen are harnessed, transported to the sea and thrown into a deep sea. They should serve as an example so that those who committed such a cruel deed should be more afraid of the punishment.)

After his account of the martyrdom of Apphianus, who was tortured and executed during the prosecution of Christians under Diocletian in AD 306, Eusebius added the following account of the martyrdom of Ulpian (not to be confused with the prominent Roman jurist):

> *At the same time, and almost on the same day, a young man in the city of Tyre, by name Ulpianus, after he had been cruelly scourged, and endured most grievous stripes, was sewn up in the raw hide of an ox, together with a dog and a venomous serpent, and cast into the sea. Wherefore we thought it agreeable to make mention of this person at [this place wherein we have related] the Martyrdom of Apphianus.*[76]

[76] Eusebius, De mart. Palestinae. 5, 1: ὑπὸ δὲ τὸν αὐτὸν καιρὸν αὐταῖς τε ἡμέραις ἐπὶ τῆς Τυρίων πόλεως νεανίας, Οὐλπιανὸς ὄνομα, μετὰ δεινὰς καὶ αὐτὸς αἰκίας μάστιγάς τε χαλεπωτάτας ἅμα κυνὶ καὶ ἀσπίδι, τῷ ἰοβόλῳ ἑρπετῷ, ὠμοβοΐνῃ περιβληθεὶς δορᾷ, θαλάττῃ παραδίδοται δι' ὅ μοι δοκεῖ ἐν τοῖς Ἀπφιανοῦ μαρτυρίοις εὐλόγως ἂν ἡμῖν μνημονεύεσθαι καὶ οὗτος. Eusebius, De Martyribus Palaestinae (Recensio Brevior), Chapter 5 Section 1 to Chapter 5 Section 2 (5.1 – 5.2), available at: https://scaife.perseus.org/reader/urn:cts:greekLit:tlg2018.tlg003.opp-grc1:5.1-5.2/ The English translation: History of the Martyrs in Palestine, by Eusebius, Bishop of Caesarea, discovered in a

We learn from the Eusebius' account that the sack was made of a raw ox hide. Another interesting aspect of this account is that only two animals were added – a venomous serpent and a dog. It is doubtful that the explanation for this was some new rule. It is much more likely that both the animals were a result of adaptation or improvisation. This may not be true concerning the material the sack was made of. A sack made of a raw hide of an ox played an important role. Contrary to a sack made of canvas, a leather sack was not penetrable by water. This could prolong the life, and at the same time the agony, of the person bound in it. Choosing an ox hide sack can be therefore regarded as an attempt to make the penalty even harsher. The black oxen used to pull the wagon to the sea seems to be a literary figure or something that could happen but was not an obligatory part of the procedure. It is possible to assume the same for the two animals that were sewn up together with the parricide. The unavailability of appropriate animals most likely would not constitute sufficient grounds to postpone or prevent the execution.

5 The *lex Cornelia de sicariis et veneficis* and the *lex Pompeia de parricidiis*[77]

Cicero delivered his defense speech on behalf of Sextus Roscius from Ameria in 80 BC. Presumably a year earlier the Sullan law on murderers and poisoners or magicians (*lex Cornelia de sicariis et veneficis*) was enacted. It contained provisions for trial and punishment of murderers, poisoners or magicians, abortionists, arsonists, castrators, circumcisers, malicious or carless treecutters, impious persons, armed robbers, corrupters of court trials, possessors of books on magic, etc. (Johnson, Coleman-Norton & Card Bourne, 2003: 65). Its text is not preserved. The only contemporary evidence for its text that remains are some quotations in Cicero's speech for Cluentius.[78] Cicero defended Roscius Amerinus before the *questio de siccariis*. Roscius was accused of murdering his father. From Cicero's words:

very antient Syriac manuscript. Edited and translated into English by Cureton, 1861: p. xvii. l. 30, available at http://www.tertullian.org/fathers/eusebius_martyrs.htm

[77] On the lex Pompeia see Thomas, 1981: I. Le père, la famille et la cité (La lex Pompeia et le système des poursuites publiques)', Mélanges de l'Ecole française de Rome. Antiquité 93, no. 2: 643–715; Fanizza, 1979: 266–289; Kupiszewski, 1971: 601–614 (now in Id., Scritti minori [Naples: Jovene, 2000]: 225–238).

[78] Cic. Cluent. 54, 148 and 57,157. See also Ulp. Coll. 1, 3, 1, Paul. Coll. I, 2, 1-2; PS 5, 23.

> *..they offer the wretched man this alternative, whether he would prefer to expose his neck to T. Roscius (Magnus) to be assassinated by him, or, being sewn in a sack, to lose his life with the greatest infamy.*[79]

it is possible to conclude that at that time a possible penalty for parricide was the *poena cullei*. It is quite unlikely that it was mentioned (or even formally enacted) by the Sullan law on murderers and poisoners. The *poena legis Corneliae* was probably exile. Cicero's defense was successful and Sextus Roscius was acquitted.

The Pompeian law on parricide was probably adopted by Pompey in 55 or 52 BC.[80] Its text is not preserved. There are conflicting reports on the penalty it introduced or prescribed. Aelius Marcianus (D. 48, 9, 1), who wrote after the death of Septimius Severus, described the penalty provided by the Pompeian law on parricides as the one laid down by the Cornelian law on homicide. The opening words on this law in the Institutes of Justinian speak about a novel penalty (*nova poena*) inflicted by the *Lex Pompeia de parricidiis* for the most horrible crime. According to the Institutes, this new penalty was the *poena cullei*. To describe it, the compilers of the Institutes used the above-mentioned text of the Constantine's rescript.

Also, the *Pauli Sententiae*, a compendium attributed to Iulius Paulus and compiled at the end of the third or at the beginning of the fourth century, connect the *poena cullei* with the Pompean law:

> *Under the lex Pompeia de parricidiis those who killed a father, a mother, a grandfather or a grandmother, a brother or a sister, a patron or his wife, were previously sewn up in a sack and thrown into the sea, but today they are burnt alive or thrown to the beasts.*[81]

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[79] Cic. Rosc. Amer. 30: … *hanc condicionem misero ferunt, ut optet, utrum malit cervices T. Roscio dare an insutus in culleum per summum dedecus vitam amittere.*

[80] So Bauman, 1996: 31. On the date of the law see Cloud, 1971: 47 ss; Thomas, 1981. 648: Fn 12: La seule chose certaine est que cette loi est postérieure á la *lex Cornelia de sicariis* dont elle reprend la peine (D. 48, 9, 1).

[81] PS 5, 24: *Lege Pompeia de parricidiis tenentur qui patrem matrem avum aviam fratrem sororem patronum patronam occiderint, etsi antea insuti culleo in mare praecipitabantur, hodie tamen vivi exuruntur vel ad bestias dantur.* .

Although the text is substantially genuine, it is difficult to believe that the penalty of the sack would temporarily disappear during the third century.[82] At the same time, there is no doubt that the *poena cullei* was sanctioned by the Pompey's law.

A slight hint in this direction can be seen also in Seneca's treatise On Mercy. He spoke about a law on parricide which set in motion killings of parents:

> … *parricides, consequently, were unknown until a law was made against them, and the penalty showed them the way to the crime. Filial affection soon perished, for since that time we have seen more men punished by the sack than by the cross.*[83]

Although the point Seneca wanted to make was that while harsh penalties served only to further encourage criminal behavior, it is possible to believe that the penalty of the sack at first was part of the tradition and only then it was sanctioned by law. The only law coming into consideration was the Pompeian law on parricides. We saw the same assertion in the passage of Valerius Maximus (1, 1, 13), mentioned above.

Accordingly, it is even more surprising that Modestinus, who wrote around AD 250, attributed the penalty of the sack to ancestral custom (D. 48, 9, 9). The accounts are contradicting and any conclusion is a conjecture. We already endeavored to speculate that the *poena cullei* was a part of ancestral custom until Constantine imposed it by his rescript.

Bauman believes that Pompey said nothing about the *poena cullei* in his law but only "concerned himself with the penalty of interdiction he adopted from Sulla's homicide law" (Bauman, 1996: 32). If there was a jury trial, the defendant who was found guilty was punished in accordance with Sulla's law and exiled. But if the guilt was manifest or confessed there was no jury trial and the parricide was punished *more maiorum*. It was necessary to wait until Constantine that the *poena cullei* was incorporated in a law.

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[82] So Cloud, 1971: 51. He believes that the text after 'hodie' is a Visigothic insertion and refers to Visigothic practice. Bauman, 1996: 31, regards the information about the content of the law as believable.

[83] Sen. de Clem. 23, 1: … *itaque parricidae cum lege coeperunt, et illis facinus poena monstravit; pessimo vero loco pietas fuit, postquam saepius culleos vidimus quam cruces.*

The *poena cullei* did not disappear with the decay of the Roman empire. It survived in different parts of Europe (more on this Egmond, 1995: 159-192). Since a comprehensive survey would exceed the scope of this article we only give a few examples.

In his Divine comedy, written from 1304/7 until 1320, Dante mentions it:

> *And make it known to Fano's two best men,*
> *to Messer Guido and Angiolello, too,*
> *that they, unless foreseeing be in vain*
> *down here, will from their vessel be cast forth,*
> *and drowned in sacks near La Cattòlica,*
> *through a disloyal tyrant's treachery.*[84]

The penalty of the sack was widely used in Germany. In his treatise on the origin and situation of the Germans (*De origine et situ Germanorum*), Tacitus wrote that the penalty of drowning was practiced by the Germanic tribes:

> *Penalties are distinguished according to the offence. Traitors and deserters are hanged on trees; the coward, the unwarlike, the man stained with abominable vices, is plunged into the mire of the morass, with a hurdle put over him.*[85]

[84] … gittati saran fuor di lor vasello e mazzerati presso a la Cattolica … Dante, Divina comedia, Inferno XXVIII, 76 ss. The English translation: The divine comedy of Dante Alighieri. The Italian text with a translation in English blank verse and a commentary by Langdon, 1918: 321. Available at: https://oll.libertyfund.org/titles/alighieri-the-divine-comedy-vol-1-inferno-bilingual-edition The verb *mazzerare* stands also for killing a person or animal by throwing it into water after packing it in a sack and tying to a stone to stay on the bottom.

[85] Tac. Germ. 12: … *Distinctio poenarum ex delicto. Proditores et transfugas arboribus suspendunt, ignavos et imbelles et corpore infames caeno ac palude, iniecta insuper crate, mergunt*. English translation: https://www.sacred-texts.com/cla/tac/g01010.htm

In the Middle Ages the penalty of the sack was known in different regions. It took the form of submerging in water using a leather or a canvas sack.[86] The *Glosse zum Sachsenspiegel* gives the following description:

> *Parricides should first be dragged to the place of execution (on a wooden board and on the way pinched with red-hot tongs), and then sewn in a hide together with a dog and with a monkey and with an adder and a cock.*[87]

Killing by submerging in water was established as a rule in the first body of German criminal law, the *Constitutio criminalis Carolina* of 1532, called also Procedure for the judgment of capital crimes (Peinliche Halsgerichtsordnung) of the emperor Charles V.[88]

There are several cases reported on this penalty in the literature. A chronicle of the city of Dresden provides the following account of an execution in 1548. In that year, Hans Schumann deliberately and with malicious intent killed his pregnant mother because she took another man and kept the mill his father owned. When she entered the wheel room at night, he pushed her into the water so that she was carried under the millwheel and perished. After his sentencing Schumann was first tied in a loop and pinched with glowing tongs. Then he was brought on the bridge over the Elbe. To torment him more violently, he was not put into a sack of canvas but rather into a leather sack. Several animals were also put into the sack which was tied tightly at the top. The sack was then thrown into the Elbe. But the knot became untied and the dog and the cat were able to escape. Because the water filled the sack the parricide died of suffocation under water faster than the executioners had wanted.[89]

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[86] See Deutsche Rechtsalterthümer von Grimm, 1899: 278 ss. See also Neues Archiv des Criminalrechts, 1820: 376. See also Jacobi Heils, 1738: 489 s (IV. Das Säcken oder Ertränken).

[87] Glosse 2, 14 zum Sachsenspiegel: … elternmörder soll man erst laßen schleifen u. darnach nehen in ein haut mit einem hunde u. mit einem affen u. mit einer natern u. mit einem hanen. Quoted in: Deutsche Rechtsalterthümer von Grimm, 1899: 279.

[88] E. g. Art. 131. (Infanticide) Item welches weib jre kind, das leben vnd glidmaß empfangen hett, heymlicher boßhafftiger williger weiß ertödtet, die werden gewonlich lebendig begraben vnnd gepfelt, Aber darinnen verzweiffelung zuuerhütten, mögen die selben übelthätterinn inn welchem gericht die bequemlicheyt des wassers darzu vorhanden ist, ertrenckt werden. … See also Art. 133 or 159 (Burglary): … der mann mit dem strang, vnnd das weib mit dem wasser oder sunst nach gelegenheyt der personen, vnnd ermessung des richters.

[89] Der Chur-Fürstlichen Sächsischen weitberuffenen Residentz- und Haupt-Vestung Dresden Beschreib: und Vorstellung: Auf der Churfürstlichen Herrschaft gnädigstes Belieben in Vier Abtheilungen verfaßet, mit Grund: und anderen Abrißen, auch bewehrten Documenten erläutert Durch Ihrer Churfürstlichen Durchl. zu Sachsen etc. Rath zu den Geheimen: und Reichs-Sachen bestalten Secretarium auch Archivarium Antonum Wecken. Mit Churfürstl. Sächsischen gnädigsten Privilegio. Nürnberg 1680: 482.

We know the purpose of a leather sack was to prolong the suffering. Because the leather was impermeable the victim did not die of suffocation immediately but could stay alive for hours: "let him lie in the water for half a day and if he is still not dead so leave him there longer." (Neues Archiv des Criminalrechts, 1820: 376).

In Saxony, but probably also elsewhere, different animals were put into the sack together with the convict. The selection was not uniform and depended on the circumstances and possibilities: "The rooster had already come to be honored. The monkey was exchanged for a cat, the living snake for one painted on paper. … After this wonderfully mixed menagerie had been inserted into the sack of coarse canvas to be tied over it so that no communion could take place between these animals and the person to be drowned; and only then this person was put into the sack, which was held in place with the help of an iron ring." (Neues Archiv des Criminalrechts, 1820: 377 ss).

As late as 1734, according to a decision of the law faculties of Leipzig and Wittenberg confirmed by the Sovereign, an infanticide was drowned in a sack with a dog, a cat, and a snake:

> *Because of that horrible crime the penalty of the sack was imposed on the second day and was carried out so that the wrongdoer was pulled in a loop to the place of execution, put in a sack with a dog, a cat and a snake, taken to the water, and drowned. This penalty was pronounced by the Law Faculties in Witenberg and in Leipzig and confirmed by the King of Poland so that it could be carried out.*[90]

In Saxony, this death penalty was abolished by a rescript dated June 17, 1761. In the Prussian provinces it had been abolished a few decades earlier. At least in Europe this was the end of one of the most perverse penalties. It disappeared from the inventory of criminal law for good. This unnatural punishment perversely attempted to avenge a crime which was regarded to be against the nature. To increase the

[90] Commentatio jvridica de processv criminali tam inqvisitorio qvam accvsatorio jvste decernendo rite tractando, et prvdenter absolvendo, vna cvm ajectis observationibvs et cavtelis ad praxin maxime forensem spectantibvs. Accessit in calce nova constitvtio et taxa criminalis wvrtembergica. Cvra et stvdio Joan. Ernesti Pistorii, JCri. Tvbinge 1764: 4: … *quocirca tam immani facto poena Culei d. 2. fuit opposita, sic se habens*: daß die Missethäterin auf eine Schleife zur Richtstatt ausgeführt, mit einem Hund, einer Katz und einer Schlange in einen Sack gesteckt, ans Wasser geliefert, und ersäuft worden; *quae poena a Facult. Jurid. & Witenberg. & Lips. dictata atque a Potentiss. Polon. Rege confirmata sic quoque in executionem tracta est.*

dramatic effect on the public witnessing the execution, or maybe for some cultic reason, it also caused innocent animals having no connection with the crime or its perpetrator to endure unnecessary suffering.

Although the penalty of the sack disappeared from penal codes, its basic idea did not disappear altogether. In his diary/notebook *Cursed Days* (Окаянные дни), the Nobel prize laureate for literature Ivan Bunin published a sort of a diary of the revolution he witnessed while in Moscow and Odessa in the years 1918-20. His notes, together with his story Sunstroke (Солнечный удар), served as a basis for a 2014 Russian drama movie directed by Nikita Mikhalkov. In the last scene of the movie, the officers of the White army held in a prisoner-of-war camp in the Crimea in November 1920 were put on an old barge under the pretext that they would be transported to the town of Ochakov, located on the northern coast of the Black Sea. They instead were locked inside the barge which the Reds towed to the open sea and sunk it. All officers perished. None of them were tried or convicted before a criminal court. It is possible that similar crimes were perpetrated at other times and in other places, too.

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Ehrenmorde im türkischen Strafrecht

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Zusammenfassung Die Zahl der Ehrenmorde in der Türkei hat in den letzten Jahren deutlich zugenommen. Mit einer Strafrechtsreform im Juni 2005 hat der türkische Gesetzgeber bewusst den Begriff des "moralischen Motivs" als qualifizierendes Merkmal des Totschlags ins Gesetz aufgenommen. Danach wird das Strafmaß des Totschlägers, der einen moralischen Mord begeht, erhöht. Auch wenn diese Neuregelung zu begrüßen ist, gibt es seit langem Unstimmigkeiten in Rechtsprechung und Literatur. Insbesondere wurde ein qualifizierter Totschlag in Fällen, in denen die Tötung des Opfers nicht durch einen Familienratsbeschluss beschlossen wurde, nicht berücksichtigt. Darüber hinaus hat es in diesen Fällen eine Strafmilderung wegen ungerechtfertigter Provokation angewandt, die bei Sittenmorden nicht anwendbar ist. Um eine fehlerhafte Anwendung der Milderungsregel zu vermeiden, sollte der Gesetzgeber den Begriff des Ehrenmotivs als Qualifikationsgrund ausdrücklich regeln.

Schlüsselwörter:
Ehrenmord
moralische Tötung
Beschluss des Familienrates
ungerechtfertigte Provokation
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HONOR KILLINGS IN TURKISH CRIMINAL LAW

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Abstract The number of honor killings in Turkey has increased significantly in recent years. With a criminal law reform in June 2005, the Turkish legislature has deliberately inserted the term "moral motive" into the law as a qualifying sign of manslaughter. Thereafter, the penalty of the manslaughter who commits a moral murder is increased. Even if this new regulation is to be welcomed, there have long been disagreements in jurisprudence and literature. In particular, it has not been considered qualifying manslaughter in cases where the killing of the victim was not decided by a family council resolution. In addition, in these cases it applied a reduction in punishment due to unjustified provocation, which is not applicable to moral murders. In order to avoid incorrect application of the rule of mitigation, the legislature should expressly regulate the concept of the honor motive as a qualification reason.

Keywords: honor killing, moral killing, family council resolution, unjustified provocation, gender discrimination

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1 Einleitung

Sevil, Emine, Gülsüm sind, laut der Statistik der „*Plattform-Wir-werden-Frauenmorde-stoppen*", einige der ermordeten 36 Frauen, die bloß im Juli 2020 in der Türkei zum Opfer männlicher Gewalt wurden (KCDP, 2020). Die häufigste Gewaltform, der eine Frau in ihrem Leben ausgesetzt ist, ist die Gewalt, die sie von ihrem eigenen Ehemann oder Partner erfährt (Dinç & Hotun Şahin, 2009: 125).

In diesem Zusammenhang hat die Zahl der Ehrenmorde in der Türkei in den letzten Jahren stark zugenommen (Akşam, 2020; Şimşek, 2019a; Amerikanınsesi, 2019; sputniknews, 2019; Şimşek, 2019b). Medienberichten zufolge werden immer mehr Frauen von ihren Ehemännern, Partnern, Brüdern, ihren Vätern oder anderen männlichen Familienmitgliedern, mit der Absicht der Rettung der Familienehre, ermordet (Şimşek, 2019b). Hierbei nimmt man eine Ehrverletzung nicht nur dann an, wenn eine Frau Opfer eines Sexualdeliktes wird, sondern auch dann, wenn eine Frau entgegen gesellschaftlicher Zwänge, kultureller Verbote und Sitten von ihrem sexuellen Selbstbestimmungsrecht Gebrauch macht.

Auch Männer werden Opfer von Ehrenmorden durch die Familie von Frauen, zu denen sie eine „unangemessene" Beziehung hatten (Roy, 2018: 2). In den letzten Jahren zählen auch Morde an homosexuellen Männern als Ehrenmorde (Kılıç, 2011: 158), sofern ihre sexuelle Ausrichtung als sittenwidrig oder als schamvoll bewertet wird.

Frauenmorde und Gewalt gegenüber Frauen, unter dem Deckmantel der Ehre, sind die gravierendsten Folgen der Ehrenkultur in der Türkei (Gürsoy & Arslan Özkan, 2014: 150). Anders als in Industrieländern wird in überwiegend muslimisch bevölkerten Schwellenländern angenommen, dass eine Ehrverletzung einer Frau auch gleichzeitig die Würde und Ehre der eigenen Familie verletzt. In solchen Fällen glaubt man durch eine Tötung die „befleckte Ehre" wieder „reinigen" zu können (Gürsoy & Arslan Özkan, 2014: 150). Durch diese selbstjustizielle, vermeintliche Wiederherstellung der Gerechtigkeit soll die Familie innerhalb der Gesellschaft ihr Ansehen wieder zurückerlangen und sich von dieser „Schande" befreien.

Der Ursprung dieses Verständnisses liegt in der gesellschaftlichen Geschlechterdiskriminierung, die als Folge der patriarchischen Kultur seit jeher existiert. Die Ehrenkultur der türkischen Gesellschaft, die dem Mann jegliche

Freiheiten gewährt, räumt diesem auch das Kontrollrecht über Frauen ein, die sich an Bräuche und Traditionen zu halten haben (Gürsoy & Arslan Özkan, 2014: 150). Diese Diskriminierung und Ungleichbehandlung zeigt, dass Frauen unter der Herrschaft von Männern leben und in ihren Grundbedürfnissen und Freiheiten eingeschränkt und benachteiligt werden.

Im Jahr 2005 hat der türkische Gesetzgeber mit einer umfangreichen Strafrechtsreform in Art. 82 Abs. 1 k) tStGB, als qualifiziertes Totschlagsmerkmal, das „*Sittenmotiv*" eingefügt. Nach dieser Regelung soll derjenige, der die vorsätzliche Tötung aufgrund eines Sittenmotivs begeht, mit einer erschwerten lebenslänglichen Freiheitsstrafe bestraft werden. Der Grundtatbestand nach Art. 81 tStGB sieht für den Totschlag die lebenslängliche Freiheitsstrafe vor. Mit dieser neuen Regelung des Art. 82 Abs. 1 k) tStGB, hat der Gesetzgeber ein qualifizierendes subjektives Merkmal geschaffen, das die Sitte als Tatmotiv abstellt. Es ist jedoch unklar, ob die Sitte die Ehre erfassen soll, ob die Begriffe synonym verwendet werden oder unterschiedlich sind. Diese Begriffsbestimmung ist nicht nur für die Einstufung der Tat als Totschlag oder qualifizierter Totschlag (Mord) von Bedeutung, sondern auch bei der Frage, ob die Strafmilderungsregelung der ungerechten Tatprovokation im Sinne des Art. 29 tStGB einschlägig ist. Denn die Qualifikationsregelung sollte eine Sperrwirkung gegenüber Art. 29 tStGB entfalten. Wie Ehrenmorde im türkischen Strafrecht eingestuft werden sollen und in welchem Verhältnis sie zu Sittenmorden stehen, ist trotz langer, jedoch uneinheitlicher, Rechtsprechungspraxis und Diskussionen weiterhin offen.

2 Der Ehrbegriff

Der türkische Begriff der Ehre „*namus*" wurde ins Türkische aus dem Arabischen übertragen und stammt vom griechischen Begriff „*nomo*" (plural „*nomos*") und bedeutet „Gesetz, Sitte" (Öztürk & Demirdağ, 2013: 119).

Die Türkische Sprachinstitution definiert die Ehre als die Gebundenheit an sittliche, moralische Regeln und gesellschaftliche Werte, die innerhalb einer Gesellschaft gelten (tdk.gov.tr). Diese Definition allein reicht für die Bestimmung des Ehrbegriffs bei Ehrenmorden jedoch nicht aus. Da es keine allgemeingültige, universelle Definition gibt und der Begriff stark von kulturellen Einflüssen geprägt ist, ist auf die Anwendung innerhalb der betroffenen Rechtsgemeinschaft abzustellen.

Der Begriff der Ehre und der damit eng verbundene Sittenbegriff werden nämlich subjektiv bestimmt, sodass sich ihre Bedeutung nach Zeit, Ort und sogar bei Personen am selben Ort und in derselben Zeit unterscheiden kann (Ankara Barosu Dergisi, 2008: 17). Der Ehrbegriff setzt sich von interkulturell variablen Verhaltensmustern zusammen (Haun & Wertenbruch, 2013: 3). So wird dem Begriff der Ehre in vielen, insbesondere entwickelten Ländern eine unterschiedliche Bedeutung, positive Eigenschaften wie Ehrlichkeit, Aufrichtigkeit, Sittlichkeit gleichermaßen für alle Geschlechter beigemessen. Doch in vielen Schwellenländern, insbesondere muslimischen Gesellschaften sowie in der Türkei, wird der Begriff der Ehre für Männer und Frauen unterschiedlich definiert (Gürsoy & Arslan Özkan, 2014: 149-150), geschlechterspezifisch bestimmt. Aus diesem Grund werden Frauen unterschiedliche Pflichten zur Aufrechterhaltung der Ehre auferlegt als Männern.

Die Ehre ist für den Mann ein Werkzeug, die Sexualität der Frau zu kontrollieren und spiegelt somit die Gesamtheit von Werten wider, die einseitig von Männern bestimmt wurden (Konuralp, 2019: 52). Wenn die Ehre aus einer männlichen Perspektive über den Frauenkörper definiert wird, wird der „verunreinigte" Körper als ein gesellschaftliches Risiko angesehen, das die soziale Beständigkeit bedrohe (Öztürk & Demirdağ, 2013: 126). So bezeichneten befragte gefangene Ehrenmörder im Rahmen einer Studie die Ehre als „*den wichtigsten Bestandteil des menschlichen Lebens*" (Öztürk & Demirdağ, 2013: 126). In diesem Zusammenhang wird die Ehre als wichtigstes menschliches Gut und sogar als der Grund menschlicher Existenz angesehen.

Aus der Perspektive der Frauen bedeutet Ehre, dass sie sich an bestimmte Regeln der Sexualität halten müssen: sie müssen bis zu einer Eheschließung ihre Jungfräulichkeit wahren und nach der Eheschließung dürfen sie, außer zu ihren Ehemännern, keine sexuellen Beziehungen zu anderen Männern haben. Dass Frauen vor oder während der Eheschließung mit anderen Frauen sexuelle Kontakte pflegen, führt regelmäßig nicht zu einem Ehrenmord oder einer ehrbedingten Gewalt (Konuralp, 2019: 53).

Die Jungfräulichkeit, sexuelle Reinheit, der Frau wird als Beweis dafür angesehen, dass sie eine ehrenhafte Frau ist. Hierbei wird diese Reinheit sehr weit verstanden. Denn mit einer ehrenhaften Frau wird zunächst eine Frau assoziiert, die keinen vorehelichen Beischlaf vollzogen hat, nicht geflirtet hat, sich anständig kleidet, sich nicht mit fremden Männern aufhält, (in der Öffentlichkeit) nicht viel lacht und

gegenüber dem Mann gehorsam ist (Gürsoy & Arslan Özkan, 2014: 149-150). Diese Verhaltensweisen werden als geschlechtsspezifische Verhaltensweisen angesehen. Daher ist eine ehrenhafte Frau nicht nur eine, die keinen vorehelichen Geschlechtsakt ausgeübt hat, sondern die, die gleichzeitig auch auf ihre Lebensweise achtet und stets ihre Ehre beschützt. Denn dieser Schutz gilt auch gleichzeitig als der Schutz der Familienehre und der Schutz der männlichen Familienmitglieder (Gürsoy & Arslan Özkan, 2014: 149-150). Die individuelle Ehre leitet sich nach soziologischen Studien von der Familienehre ab (Rumpf, 1999/2003: 6).

Dass aus männlicher Perspektive die Frau der Ursprung der Ehre ist, ist auch der Grund der männlichen Gewalt. Im gesellschaftlichen Leben ist die Ehre, aus männlicher Perspektive, die sexuelle Reinheit seiner Frau, seiner Schwester, seiner Tochter, seiner Mutter und seiner weiblichen Verwandten. Nach der Sitte ist der Mann verpflichtet die Ehre der Frau zu beschützen - wenn es sein muss mit Zwang und Gewalt. Diese Pflicht erlaubt es auch Gewalt gegenüber dem Mann auszuüben, der die Ehre der Frau verletzt hat. Somit sieht es der Mann nicht nur als seine Pflicht, sondern auch als sein Recht die sexuelle Reinheit der Frau gegebenenfalls mit Gewalt zu beschützen (Konuralp, 2019: 54). Denn die Ehre der Frau ist gleichzeitig auch seine eigene Ehre (Sallan Gül & Altındal, 2015: 172).

Die sexuelle Untreue des Mannes wird jedoch nicht als Verletzung seiner Verpflichtungen angesehen, weil die, aus dieser Untreue entspringenden, Nachkömmlinge in eine andere Familie hineingeboren werden (Rumpf, 1999/2003: 7). Die Ehre des Mannes wird grundsätzlich als allgemeine Ehrlichkeit, Vertraulichkeit in seiner Arbeit und der Schutz der Familienehre verstanden (Gürsoy & Arslan Özkan, 2014: 149-150).

Mit diesem geschlechterspezifischen Ehrverständnis werden der Frau Pflichten auferlegt und dem Mann das Recht gewährt, die Einhaltung dieser Pflichten zu überwachen und bei vermeintlicher Verletzung der Ehre, diese wiederherzustellen.

In der Türkei wurde, durch den Druck gemeinnütziger Organisationen, im Jahr 2005, das Motiv der Sitte in das Gesetz als Qualifikationsmerkmal eingefügt (Ankara Barosu Dergisi, 2008: 18). Daher bedarf es auch einer Begriffserklärung der Sitte. Sitte bezeichnet die unveränderlichen Verhaltensnormen, die die Lebensweisen von Menschen regeln und seit sehr langer Zeit vorhanden sind (Akbaba, 2008: 333). Die Sitte wird durch die Türkische Sprachinstitution definiert als die Gesamtheit der in

der Gesellschaft verankerten Verhaltens- und Lebensweisen, der Normen, der Bräuche und Traditionen, der gemeinsamen Gewohnheiten, verstanden. Mit anderen Worten, die Sitte wird als die moralischen Verhaltensweisen innerhalb der Gesellschaft verstanden (tdk.gov.tr). Hierbei wird der Brauch, in soziologischer Hinsicht, als Gewohnheit, kulturelles Erbe, Tradition verstanden, die von Generation auf Generation übertragen wird und innerhalb der Gesellschaft eine starke Bindung erzeugt. Der Brauch ist eine nicht gesetzliche Verhaltensnorm, an die sich das Volk jedoch wie an ein Gesetz von sich aus, ungeheiβen hält (İskender, 2009: 8).

Gesellschaftliche Normen entstehen aus dem Bedürfnis, zwischenmenschliche Beziehungen zu regeln. Nachdem sich diese verfestigen, bestimmen sie im Laufe der Zeit das Verhalten der in dieser Gesellschaft lebenden Individuen. Das Individuum erlangt durch sein sittengemäßes Verhalten gesellschaftliche Anerkennung und Akzeptanz. Diese Normen zeichnen sich dadurch aus, dass sie sehr unterdrückend und zwingend sind, denn ihre Missachtung hat strenge Konsequenzen (Dinç & Hotun Şahin, 2009: 124). Mit anderen Worten, die Tradition enthält solche Regeln, die gesellschaftlich bestimmt und gemeinschaftlich anerkannt werden und der Gesellschaft aufgezwungen werden (Dinç & Hotun Şahin, 2009: 123-124).

Die Sitte ist Teil des soziologischen Begriffs der Norm. Wie bereits dargelegt hat eine Abweichung von dieser Norm grundsätzlich strenge Sanktionen zur Folge. Es gibt jedoch keinen bestimmten Maßstab bezüglich des sittenwidrigen Verhaltens des Opfers eines Sittenmordes. Der Maßstab kann sich je nach Situation und Gebiet ändern (İskender, 2009: 9). Zu erkennen ist jedenfalls, dass zwischen dem kulturell, traditionellen Ehrbegriff und dem Sittenbegriff ein enger Zusammenhang besteht. Beide enthalten Verhaltensnormen, die traditionell geprägt sind und der Ehrenmord stellt eine Sanktion für die Abweichung von der Sitte dar. Ob die Ehre jedoch aus der Sitte resultiert oder umgekehrt, ob beide im Strafrecht als identische Synonyme verwendet werden, ist weiterhin eine umstrittene Frage, die die Rechtsprechung mithilfe von Auslegungsmethoden darzulegen versucht.

Fest steht, dass der Ehrbegriff sehr unbestimmt ist und die Gefahr einer weiten Auslegung, auch hinsichtlich des Gesetzmäßigkeitsprinzips, bedenklich erscheint (Şahin, 2019: 1009).

3 Das Phänomen des Ehrenmordes

3.1 Generelles

Ein Ehrenmord ist die Ermordung einer Frau, der vorgeworfen wird, die gesellschaftlich aufgezwungenen Sexualnormen missachtet zu haben (Konuralp, 2019: 52). Täter von Ehrenmorden sind regelmäßig Ehemänner, Väter, Brüder oder Partner (KCDP, 2020). Ehrenmorde sind somit Gewalthandlungen, die von männlichen Familienmitgliedern gegenüber weiblichen Mitgliedern begangen werden, denen angelastet wird, die Familienehre verletzt zu haben (Roy, 2018: 2). In der Regel sind Ehrenmorde keine individuellen Handlungen. Meistens sind Familie und Gesellschaft in die Handlung miteinbezogen (Ünübol et al., 2007: 70).

Durch den Ehrenmord soll die „befleckte Ehre“ der Familie wieder „gereinigt“ werden, denn die Sexualität wird als Grundbaustein der Würde und Ehre angesehen. Wenn die sexuelle Integrität verletzt wird, soll der Ruf und die Würde durch den Ehrenmord wiederhergestellt werden (Öztürk & Demirdağ, 2013: 124). Eine Frau kann aber auch aus anderen Gründen von ihrer Familie angegriffen werden, z. B. weil sie sich weigert, eine arrangierte Ehe einzugehen, Opfer eines sexuellen Übergriffs wird, oder sich sogar von einem missbräuchlichen Ehemann scheiden lässt und angeblich einen Ehebruch begeht (Roy, 2018: 33).

Im Gegensatz zu entwickelten Ländern nimmt man in muslimischen Ländern wie der Türkei an, dass eine Frau, die ihre Ehre befleckt, gleichzeitig auch die Ehre und die Würde ihrer Familie verletzt. In diesen Fällen glaubt man die vermeintlich befleckte Ehre durch die Tötung der Frau wiederherzustellen (Kardam, 2004: 2) Innerhalb der Gesellschaft und Verwandtschaft wird der Mann, der seine Ehre wiederhergestellt hat, als Held gefeiert. In diesem Zusammenhang haben Studien gezeigt, dass gefangene Ehrenmörder kundgaben, keine Reue zu verspüren (Öztürk & Demirdağ, 2013: 127).

Auch wenn Ehrenmorde über Frauen definiert werden, sind Opfer von Ehrenmorden nicht nur Frauen. Auch wenn der Begehungsgrund von Ehrenmorden hauptsächlich weibliches Handeln ist, gibt es ebenfalls eine beachtenswerte Zahl an männlichen Opfern. Auch die Rechtsprechung des türkischen Kassationsgerichts nimmt an, dass Männer Opfer von Ehrenmorden

werden können (İskender, 2009: 20-21). In diesem Zusammenhang werden nicht nur Frauen, deren Ehre verletzt wurde, selbstjustiziell bestraft, sondern auch Männer, die die Ehre der Frau verletzt haben (Adak, 2017: 16). Das Gesetz jedenfalls, trifft keine Unterscheidung hinsichtlich des Opfergeschlechts.

In der Literatur werden Ehrenmorde oft mit sogenannten Leidenschaftsmorden verglichen und gleichgestellt (İskender, 2009: 13; Akbaba, 2008: 340-341). Straftaten, die in westlichen Ländern als Leidenschafts-/Begierdemorde und in der Türkei als Liebesmorde bezeichnet werden, sind Taten, die auf Eifersucht beruhen. Die Begierde drückt hierbei den Wunsch aus, die geliebte Person allein für sich selbst zu haben. Es wird angenommen, dass aus dieser Begierde auch die Ehrrührung resultiert, wenn die Geliebte einen anderen liebt. Nach diesem Verständnis töten auch Täter von Begierdemorden mit dem Beweggrund der Ehrrettung. Daher wird in der türkischen Literatur angenommen, dass solche Morde, die auf dem fanatischen Gefühl beruhen, jemanden zu „besitzen", ebenfalls Ehrenmorde sind (Akbaba, 2008: 340 ff.; İskender, 2009: 13). In beiden Fällen geht es schließlich darum, die Tat innerhalb der Gesellschaft zu legitimieren (Akbaba, 2008: 341). Aus neueren Entscheidungen der Ersten Kammer des türkischen Kassationsgerichts folgt ebenfalls, dass Begierde, Liebes- bzw. Eifersuchtsmorde den qualifizierten Totschlag des Sittenmordes darstellen (KG 1. SK D. 4.3.2009, Az. 2008/5953, Enr. 2009/1075). Doch die Gleichstellung beider Motive, ohne auf die konkreten Sachverhaltsumstände abzustellen, könnte zu fehlerhaften Schlussfolgerungen führen. Bei Begierdemorden spielt das Gefühl der Eifersucht nämlich regelmäßig eine wichtige Rolle, die nicht unbedingt aus einer Ehrverletzung oder einem sonstigen Sittenmotiv resultieren muss.

3.2 Gründe

Es gibt viele Gründe, die das Phänomen des Ehrenmordes hervorgebracht haben. Hierbei spielt die gesellschaftliche Geschlechterdiskriminierung eine relevante Rolle, die sich radikal in den Ehrenmorden widerspiegelt.

Als Grund für diese Geschlechterungleichheit wird die Gebundenheit an gesellschaftliche Werte und die Natur gegeben. Dieses Argument führt dazu, dass die Folgen dieser Ungleichbehandlung normalisiert werden. So verwandeln sich Traditionen und Sitten zu Epiphänomenen, zum Spiegelbild der Natur. Dieser, eigentlich gesellschaftliche, Bereich - die gesellschaftliche Geschlechterungleichheit

- wird auf biologische Unterschiede reduziert, obwohl der Druck gegenüber der Frau nicht aus der Natur resultiert. Er hat seinen Ursprung in menschlicher Handlung, die sozial geformt werden kann (Konuralp, 2019: 52). Damit kann auch dieses gesellschaftliche Bild wieder verändert werden. Denn diese Diskriminierung ist kein naturgegebenes Schicksal.

Weiterhin spielen soziokulturelle Faktoren eine wichtige Rolle, denn Ehrenmorde sind zum einen das Produkt der ländlichen Kultur. Da in Schwellenländern der Übergang zur Industriegesellschaft nicht abgeschlossen ist, hat der schnelle Umzug von Dörfern in Städte auch dazu geführt, dass Ehrenmorde auch in die Großstädte ‚mitgeschleppt' wurden (Ünübol et al., 2007: 71). Weiterhin gibt es in Regionen, in denen Ehrenmorde begangen werden, Defizite in der Bildung, die zum einen die Änderung der gesellschaftlichen Werte verlangsamen und zum anderen verhindern, dass Frauen sich als Opfer für ihre Rechte und Freiheiten einsetzen (Ünübol et al., 2007: 71). Zudem sieht man Ehrenmorde am meisten in Gesellschaften, die wirtschaftlich sehr geschlossen sind. Dies sind meistens Gesellschaften, die durch die Agrarwirtschaft leben und in denen die Familie sehr groß ist und zusammenlebt. In solchen Familien sind die Verwandten aneinander angewiesen, um existieren zu können, denn als Einzelne sind sie wirtschaftlich nicht unabhängig. Diese Abhängigkeit verhindert auch, dass der Einzelne sich individualisiert. In solchen Gesellschaften, die keine individualistische Mentalität aufweisen, gibt es nicht das Bewusstsein dafür, dass jeder für seine eigenen Handlungen verantwortlich ist (Ünübol et al., 2007: 71). Dies führt dazu, dass männlichen Familienmitgliedern umfangreiche Rechte gegenüber Frauen eingeräumt werden und Frauen geradezu zu Objekten, zum Eigentum der Familie herabgewürdigt werden. Die Frau wird als eine „Sache" betrachtet, die stets überwacht und kontrolliert wird.

Von daher bestimmt die Ehre der Frau auch ihren materiellen Wert und somit die Höhe der Mitgift, die von Werbern verlangt wird. Eine „unreine" Frau hat keinen materiellen Wert mehr, weshalb auch kein Grund mehr für ihre Existenz besteht (Ünübol et al., 2007: 72). Nicht zuletzt spielen die Medien eine große Rolle. In den türkischen Medien werden Gewalttaten sehr oft bagatellisiert und weibliche Opfer beschuldigt (Sallan Gül & Altındal, 2015: 172). Die Medien haben daher, bei Ehrenmorden, eine provozierende, diskriminierende Prangerwirkung. Sie analysieren Fälle nicht detailliert und bieten ebenfalls keine Lösung und unterstützen somit auch mittelbar Ehrenmorde (Ünübol et al., 2007: 72). Gleichzeit tragen sie

dadurch auch dazu bei, dass gesellschaftliche Geschlechterrollen erneut entstehen können.

Das türkische Rechtssystem hat dieses Ehrverständnis und die damit verbundene Ungleichbehandlung von Mann und Frau unterstützt. Die alte Fassung des Strafgesetzbuches regelte den Ehebruch als Straftatbestand: Art. 440 tStGB aF (Nr. 765) sah im Falle eines Ehebruchs durch eine Frau eine Freiheitsstrafe von 3 bis 30 Monaten vor. Art. 441 tStGB aF regelte den Ehebruch durch den Mann und sah die gleiche Freiheitsstrafe vor. Dieser war allerdings nur dann strafbar, wenn er in dem gemeinsamen Haus, in dem er mit seiner Frau wohnhaft war, eine unverheiratete Frau aufhielt oder in einem anderen Haus, auf allgemein bekannte Weise, eine unverheiratete aufhielt, um mit ihr, wie in einer Ehe, zusammenzuleben. Nach diesen Normen war der Ehebruch zwar für beide Geschlechter eine strafwürdige Handlung, doch Männer waren insofern privilegiert, dass sie, anders als Frauen, nicht wegen jedem Ehebruch strafbar waren, sondern nur in den genannten zwei Ausnahmefällen verantwortlich waren. Insoweit hatte auch das Rechtssystem beiden Geschlechtern unterschiedliche Pflichten auferlegt und die Ungleichbehandlung unterstützt.

4 Rechtliche Grundlage

4.1 Qualifikationsregelung und Hintergrund

Art. 81 Abs. 1 tStGB regelt den „vorsätzlichen Totschlag“ (Mord), welcher besagt „*Wer einen Menschen vorsätzlich tötet wird mit lebenslanger Gefängnisstrafe bestraft.*“ Der Art. 82 tStGB mit dem Titel „qualifizierter Totschlag“, enthält strafschärfende Merkmale. Am 1. Juni 2005 ist, durch eine umfangreiche Strafrechtsreform, das türkische Strafgesetzbuch mit der Nummer 5237 in Kraft getreten. Mit dieser Reform wurde im Rahmen des qualifizierten Totschlages ein neues subjektives Merkmal in das Gesetz - Art. 82 Abs. 1 – k) – eingefügt. Hierbei regelt diese neue Norm den Qualifikationstatbestand wie folgt: „*Wird die vorsätzliche Körperverletzung k) mit dem Motiv der Sitte begangen, wird die Person mit einer schweren lebenslänglichen Gefängnisstrafe bestraft.*“

In der Literatur wird im Zusammenhang mit dieser Neuregelung häufig angedeutet, dass mit diesem Gesetz der Ehebruch aus dem tStGB gestrichen wurde, um den Anforderungen der Europäischen Union für eine zukünftige Mitgliedschaft gerecht zu werden (Doğan, 2016: 148-150). Die Strafnormen wurden jedoch, durch zwei Verfassungsgerichtsentscheidungen (tVerfGE v. 23.09.1996, Az. 1996/15, Enr.1996/34; tVerfGE v. 23.06.1998, Az. 1998/3, ENr. 1998/28), für nichtig erklärt. Durch diesen wichtigen Schritt wurde - nach dem männlichen Verständnis - der Frau das „Recht gewährt", Ehebruch zu begehen und damit auch gleichzeitig eine Ehrverletzung zu begehen. Nach dem patriarchischen Verständnis bedurfte es daher eines Ausgleiches. Daher verlangte dieses, zur Wiederherstellung der Ehre, die Anwendung der Strafmilderungsregelung bei Ehrenmorden. In diesem Zusammenhang nimmt man an, dass die patriarchische Regierung den Begriff des „*Sittenmotivs*" bewusst in das Gesetz eingefügt hat und gleichzeitig jedoch den Ehebruch als Scheidungsgrund in Art. 161 des türkischen Zivilgesetzbuches und die Treuepflicht des Ehepartners nach Art. 185 Abs. 2 des tZGB beibehalten hat. So wurde zwar der Ehebruch aus dem Regelungsbereich des Strafgesetzbuches herausgenommen, hat jedoch dafür gesorgt, dass der Täter, der seine untreue Frau tötet, die gegen die zivilrechtliche Treuepflicht verstoßen hat, auch noch von der Regelung der ungerechtfertigten Tatprovokation profitieren kann. Aus diesem Grund wird angenommen, dass der patriarchische Gesetzgeber den Begriff des Sittenmotivs bewusst anstelle des Ehrenmotivs ins Gesetz eingefügt hat (Doğan, 2016: 148-150). In der Gesetzesbegründung hat er ausdrücklich geregelt, dass die Qualifikationsnorm nur dann einschlägig ist, wenn die Regelung der ungerechtfertigten Tatprovokation nicht eingreift (Artuk, Gökcen & Yenidünya, 2012: 108). Damit hat er zum Ausdruck gebracht, dass auch bei Sittenmorden eine Strafmilderung eingreifen kann, die dann bewirkt, dass sie nicht mehr als qualifizierter Totschlag zu bewerten sind, sondern lediglich „nur" ein Ehrenmotiv aufweisen und damit nur den Grundtatbestand erfüllen.

Durch die Nichtigerklärung der Ehebruchstraftatbestände wurden zwar „die Rechte und Befugnisse des Staates beraubt" (Kazancı, 2014: 1347), doch die Strafmilderungsregelung sollte offensichtlich dazu beitragen, dem ehrrettenden Täter mit Mitgefühl und Empathie entgegenzukommen.

Der Gesetzgeber hat nicht den „Sittenmord“ sondern das „Sittenmotiv“ als Qualifikationsmerkmal in das Gesetz eingefügt und damit ein rein subjektives Merkmal geschaffen. Der Beweggrund der Tötung muss also die Absicht sein, Sittengebote zu erfüllen.

Phänomenologisch hat jeder Fall einen eigenartigen Grund bzw. Hintergrund, der versucht den Zustand zu legitimieren (Öztürk & Demirdağ, 2013: 122). Das Motiv ist der Beweggrund, der den Täter zur Tatausführung bewegt (İskender, 2009: 29). Der Betroffene hat immer einen Beweggrund (Akbaba, 2008: 342-343). Tatbestände, die den Beweggrund ausdrücklich regeln, verlangen zur Tatbestandserfüllung eine besondere Absicht.

Sofern der Beweggrund nicht ausdrücklich als Tatbestandsmerkmal geregelt wird, beachtet der Richter diesen im Rahmen der Berechnung der Strafe (Akbaba, 2008: 342-343). Das Sittenmotiv bringt zum Ausdruck, dass der Täter den Totschlag zur Erfüllung der Sittenregeln begeht und dem gesellschaftlichen Druck entkommen beziehungsweise gerecht werden will. Der Täter muss, mit anderen Worten, einerseits Tötungsabsicht haben, andererseits – zusätzlich – die Absicht, die Ehre wiederherzustellen, zu reinigen, damit er sein gesellschaftliches Ansehen wiedererlangt (Akbaba, 2008: 342-343).

4.2 Besondere Voraussetzung

4.2.1 Das Erfordernis einer Kollektiventscheidung: Familienratsbeschluss

Als subjektives Qualifikationsmerkmal ist festzustellen, ob die Motivation des Täters die Erfüllung einer Sittenregel war.

Die Rechtsprechung hat jedoch lange Zeit ein objektives Kriterium zur Feststellung des Sittenmotivs vorausgesetzt, und zwar das Vorliegen eines vorherigen Familienratsbeschlusses.

So hat das Kassationsgericht in dem Fall, in dem der Bruder seine Schwester, die aufgrund eines unehelichen sexuellen Geschlechtsaktes schwanger wurde, tötete, dargelegt, dass mangels Anhaltspunkte hinsichtlich eines Familienratsbeschlusses kein Sittenmord vorliege und der Täter nicht nach Art. 82/1 k) tStGB bestraft werden könne (KG 1. SK, D. 14.3.2008, Az. 2007/6700, Enr. 2008/1986). Mit

dieser Entscheidung hat das Kassationsgericht eine Rechtsprechung eingeführt, wonach ein Familienratsbeschluss für die Erfüllung des Sittenmordes erforderlich war. Die Entscheidung des Kassationsgerichts ist für erstinstanzliche Gerichte bindend (Ankara Barosu Dergisi, 2008: 18-19). Das Gericht hat damit angenommen, dass Sittenmorde das Resultat eines Kollektivbeschlusses sind (Şahin, 2019: 1006). Wenn man sich an dieser Stelle an den geschlechterspezifischen Ehrbegriff erinnert, erkennt man, dass dieses Erfordernis eng mit der Familienehre, also einer kollektiven Ehre verbunden ist, über die die individuelle Ehre definiert wird.

Die kollektive Ehre bezieht sich nämlich auf unterschiedlich hohes Ansehen oder die Ehre einer gesamten, sozialen Gruppe (Haun & Wertenbruch, 2013: 9). Währenddessen bezieht sich die individuelle Ehre auf die Selbsteinschätzung und das Selbstbewusstsein des Einzelnen (Haun & Wertenbruch, 2013: 9). Da die geschlechterspezifische Darlegung eine individuelle Ehre der Frau ablehnt, ist nicht wunderlich, dass konsequenterweise dieser Fehlschluss resultiert. Das Gericht missachtet, dass das Gesetz ein subjektives Motiv verlangt und ein Familienratsbeschluss höchstens als Indiz fungieren kann und im Rahmen der Teilnahmeregeln berücksichtigt werden muss, was die strafrechtliche Verantwortlichkeit der restlichen mitwirkenden, anstiftenden Familienmitglieder anbelangt.

Dieser Maßstab des Familienratsbeschlusses bei Sittenmorden entspringt dem Gedanken einer Großfamilie. Das Kassationsgericht geht bei einer Großfamilie von generellen Prämissen aus (Doğan, 2016: 150), sodass angenommen wird, dass in solchen Großfamilien der Familienrat zusammenkommt und das Urteil über das ehrverletzende weibliche Mitglied fällt.

Das Kassationsgericht sah den Sittenmord gleichzeitig als eine besondere Form des Ehrenmordes an. Demnach sollte ein Sittenmord dann angenommen werden, wenn ein kollektiver Wille vorlag (Doğan, 2016: 133). Diese Rechtsprechung hatte zur Folge, dass nur solche Morde als Sittenmorde eingestuft wurden, denen ein Familienratsbeschluss vorausging und die durch ein Familienmitglied begangen wurden. Im Umkehrschluss legte diese Rechtsprechung dar, dass Ehrenmorde solcher Art Sittenmorde waren, die ohne Familienratsbeschluss begangen wurden. Damit wurde der Ehrenmord geschickt aus dem Tatbestand herausgenommen, um die Sperrwirkung des Art. 29 tStGB zu umgehen.

4.2.2. Individueller Entschluss

Letztendlich hat die erste Strafkammer des Kassationsgerichtes nicht an dieser Meinung festgehalten und entschieden, dass ein Sittenmord nicht das Produkt einer kollektiven Willensentschließung ist, sondern auch ein individueller Willensentschluss ausreichend ist (Doğan, 2016: 133). In diesem Zusammenhang hat das Kassationsgericht in einer neueren Entscheidung einen Sittenmord angenommen, ohne einen Familienratsbeschluss vorauszusetzen (İskender, 2009: 27): So war es in dem Fall, in dem der Onkel die schwangere Tochter seiner Schwester mit der Annahme sie betrüge ihren Mann, mehrfach erstochen hatte (KG 1. SK, D. 30.01.2009, Az. 2008/10901, Enr. 2009/293; İskender, 2009: 27). Die 1. Strafkammer des Kassationsgerichts bestand nicht auf einem Familienratsbeschluss und erklärte, dass die Tat auch auf einer individuellen Entscheidung beruhen könne.

Zuvor gab es bereits Entscheidungen, in denen, in der Begründung der Gegenstimme, ausdrücklich unterstrichen wurde, dass bei Sittenmorden zwar regelmäßig ein Familienratsbeschluss vorliegt, dieser jedoch kein Tatbestandserfordernis ist (KG 1. SK, D. 19.11.2007, Az. 2007/2927, Enr. 2007/8501).

Die Entscheidungen des Kassationsgerichts waren somit nicht immer konsequent. Die Strafkammer hat in einigen ihrer Entscheidungen die Begriffe der Sitte und der Ehre ausdrücklich synonym verwendet und den Sittenmord als Ehrenmord definiert, bei dem die ungerechtfertigte Tatprovokationsregelung nicht eingreift (Şahin, 2019: 1006-1007).

Im Jahr 2012 hat die 1. Strafkammer des Kassationsgericht letztendlich bestimmte Grundsätze zur Bestimmung des Sittenmordes festgelegt und dargelegt, dass die Sitte, eine böswillige Sitte darstelle, die dazu zwinge, Menschen mit einer bestimmten Lebensweise zu töten, sodass zunächst vorausgesetzt wurde, dass jemand gegen bestimmte, durch die Gesellschaft allgemein anerkannte, Verhaltensweisen oder Lebensweisen verstoßen hat und dass innerhalb dieser Gesellschaft die Tötung dieser Person als Sanktion für ihr Verhalten angesehen wird und der Täter handelt, um dieser gesellschaftlichen Erwartung gerecht zu werden KG, 1. SK, D. 12.12.2012, Az. 2012/3659, Enr. 2012/9331).

4.2.3 Zwischenergebnis

Der Qualifikationstatbestand setzt nicht zwingend voraus, dass eine Entscheidung des Familienrates vorliegt und die Tat durch ein Familienmitglied begangen wird. Die Norm setzt nur das Motiv der Sitte voraus, welches ein subjektives Merkmal ist. Daher kann die Tat auch durch andere Personen als Familienmitglieder begangen werden. Eine besondere Regelung, dass es einer Verabredung zur Begehung eines Sitten- oder Ehrenmordes bedarf oder nur eine gemeinschaftliche Begehung die Qualifikation erfüllt, gibt es nicht.

Nach Art. 316 (Verabredung zur Begehung einer Straftat) wird vorausgesetzt, dass sich zwei oder drei Personen zur Straftatsbegehung verabreden. Wenn der Gesetzgeber bei Sittenmorden ebenfalls eine Verabredung im Sinne eines Familienratsbeschlusses voraussetzen würde, hätte er diese genauso wie bei Art. 316 ausdrücklich geregelt (Akbaba, 2008: 343). Es ist also nicht zwingend, dass die Tat durch ein Familienmitglied begangen wird und die Tat deswegen begangen wird, weil eine nach den Sitten rechtswidrige Handlung vorliegt. Zumal wird im konkreten Fall die Bestimmung, wann ein Verhalten sittenwidrig ist, sehr schwierig sein. Daher wäre es besser gewesen, wenn der Gesetzgeber statt Sittenmotiv das Ehrenmotiv in das Gesetz eingefügt hätte. Die Ehre ist ein allgemeinerer und breiterer Begriff. Durch die Aufnahme des Ehrenbegriffs in das Gesetz könnte man daher auch verhindern, dass Täter, um einer höheren Strafe zu entkommen, behaupten, die Tat aus Ehrmotiven begangen zu haben (Akbaba, 2008: 343).

Eine Abgrenzung dahingehend, dass spontane Taten ohne vorherigen Beschluss ein Ehrdelikt, zuvor durch den Familienrat beschlossene Taten einen Sittenmord darstellen, überzeugt nicht. Denn der Sittenmord ist eine Motivtat genauso wie der Qualifikationsgrund des Motivs der Blutrache, der in Art. 82 Abs. 1 j) zu finden ist. In der Begründung einer Gegenstimme einer Gerichtsentscheidung wurde zudem zum Ausdruck gebracht, dass Sittenmorde soziologisch sowohl Ehrenmorde als auch Blutrachenmorde umfassen, dass in beiden Fällen die Tat an die Sitten angelehnt ist. Sowohl die Blutrache als auch der Ehrenmord entspringen den Sitten und werden innerhalb einer bestimmten Kultur als legitim angesehen, obwohl diese gesetzlich mit Strafe bedroht werden. Hierbei wurde hervorgehoben, dass bei einem Sittenmord mit dem Motiv der Blutrache Männer getötet werden und bei Ehrenmorden Frauen zum Opfer werden. (Begründung der Gegenstimme KG 1. SK, D. 27.4.2010, Az. 2009/6525, Enr. 2010/3023). Eine Unterscheidung nach dem

Geschlecht des Opfers ist jedoch ebenfalls unzutreffend. Denn wie bereits dargelegt können auch Männer Opfer von Ehrenmorden sein (Doğan, 2016: 138). Diese Auffassung der Gegenstimme kann auch rechtlich nicht begründet werden, denn Art. 82 tStGB sieht in zwei unterschiedlichen Nummern das Blutrachemotiv und das Sittenmotiv vor (Doğan, 2016: 140), sodass der Gesetzgeber die Blutrache als ein selbstständiges Qualifikationsmerkmal geregelt hat.

Letztendlich ist der Familienratsbeschluss kein geeignetes Kriterium um Sitten- und Ehrenmorde voneinander abzugrenzen. Dadurch, dass Sittenmorde auch Ehrenmorde erfassen.

Zudem wäre die Bestimmung des Familienrates auch nicht unproblematisch. Da es unterschiedliche Definitionen von Familie, wie z.B. Familien mit nur einem Elternteil oder – obgleich in der Türkei auch wenig anerkannt - gleichgeschlechtliche Partnerschaften, gibt. In einer Familie, die aus Vater und Kind besteht und der Vater entscheidet, das Kind zu töten, wird diese Tötung das Ergebnis eines individuellen Willens sein und kein kollektiver Wille. Doch da die Familie nur aus diesen zwei Mitgliedern besteht, wird nicht eindeutig sein, ob man in diesem Fall auch von einem Familienratsbeschluss ausgehen kann oder es von vornherein unmöglich für den Täter ist, einen Sittenmord zu begehen. Weiterhin ist unklar, wer alles mitstimmen kann und wie sich die Verantwortlichkeit von Gegenstimmen äußern wird. (Doğan, 2016: 132).

Somit wäre zwar geklärt, dass kein Familienratsbeschluss erforderlich ist, jedoch belibt trotzdem offen, wann ein Ehrenmord vorliegt und ob die Strafmilderungsregelung der ungerechtfertigten Tatprovokation zur Anwendung kommt und der Täter nur aus dem Grunddelikt bestraft wird.

4.3 Ungerechtfertigte Tatprovokation

4.3.1 Generelles

Der türkische Gesetzgeber hat in der Gesetzesbegründung erklärt, dass die Qualifikationsnorm nur dann einschlägig ist, wenn die Regelung der ungerechtfertigten Tatprovokation im Sinne des Art. 29 tStGB nicht eingreift (Artuk, Gökcen & Yenidünya, 2012: 108). Daher dürfen niemals gleichzeitig eine ungerechtfertigte Tatprovokation und ein Sittenmotiv vorliegen. Diese

Formulierung des Gesetzgebers ist nicht sehr befriedigend. Nach dem Wortlaut der Gesetzesbegründung wird selbst bei dem Vorliegen der Voraussetzungen des Sittenmotivs, das Vorliegen des Grundtatbestandes angenommen und dazu noch die Strafe wegen ungerechtfertigter Tatprovokation gemildert. So erscheint nicht nachvollziehbar, warum ein Motiv, das eine höhere Strafe begründet, vollkommen ignoriert werden soll. Zutreffender wäre die umgekehrte Formulierung, dass immer dann, wenn ein Sittenmord vorliegt, dieses qualifizierende Merkmal eine Sperrwirkung gegenüber Art. 29 tStGB entfaltet.

Art. 29 tStGB regelt die ungerechtfertigte Tatprovokation als Strafmilderungsgrund. „*Wer unter Zorn und heftigem Leid aufgrund einer ungerechtfertigten Handlung eine Straftat begeht, wird anstelle einer erschwerten lebenslangen Freiheitsstrafe mit einer Freiheitsstrafe zwischen 18 und 24 Jahren und anstelle einer lebenslangen Freiheitsstrafe zwischen 12 und 18 Jahren bestraft.*“ Die Voraussetzung der „*ungerechtfertigten Handlung*“ wurde durch eine Gesetzesreform in die Norm eingefügt. Die alte Fassung (Art. 51 des tStGB aF) enthielt in diesem Sinne keine einschränkende Voraussetzung hinschlich der provozierenden Handlung.

Laut Gesetzesbegründung war der Grund dieser Änderung die falsche Anwendung der Norm bei Sitten- und Ehrenmorden (İskender, 2009: 35). Aus der Gesetzesbegründung des Art 29 geht hervor, dass die Strafmilderung sowohl bei Sitten- als auch bei Ehrenmorden nicht Anwendung finden soll (Şahin, 2019: 1005). Aufgrund dieser Neuregelung profitiert der Täter, der gegenüber dem Opfer einer ungerechtfertigten Handlung eine Straftat begeht, nicht mehr von der Strafmilderung (Artuk, Gökcen & Yenidünya, 2012: 54). So ist die Norm nicht einschlägig, wenn der Täter seine Tochter tötet, die Opfer eines Sexualdeliktes wurde. Hierbei stellt das Sexualdelikt die ungerechtfertigte Handlung dar. Nach Art. 29 tStGB würde der Täter nur dann von der Strafmilderung profitieren, wenn er den Vergewaltiger verletzen würde, denn die Handlung des Vergewaltigers ist ungerechtfertigt, während eine ungerechtfertigte Handlung der Tochter verneint werden muss.

Vorausgesetzt wird somit, dass das provozierende Verhalten ungerecht ist. Jede rechtswidrige Handlung ist ein ungerechtfertigtes Verhalten (Akbaba, 2008: 345). Ungerechtfertigte Handlung wird definiert als die Handlung, die aus rechtlicher und sittlicher Hinsicht als ungerechtfertigt angesehen wird. Nach dem Kassationsgericht sind „Verhaltensweisen, die den gesellschaftlichen Wertnormen, der Moral und

Gewohnheit widerstoßen rechtswidrige Handlungen“, daher sind solche Verhaltensweisen der Grund für eine ungerechtfertigte Tatprovokation. Wenn die Handlung jedoch nicht rechtswidrig ist, sondern nur den Traditionen und Gewohnheiten widerspricht, dann sollte diese Norm nicht eingreifen (Akbaba, 2008: 346). Wichtig ist, dass die Strafmilderungsregelung nicht bei Taten gegenüber dem Opfer, sondern dem Täter angewandt werden muss (Akbaba, 2008: 347). So profitiert der Ehrenmörder des Vergewaltigungsopfers in dem oben genannten Beispiel nicht von einer Strafmilderung.

4.3.1 Die Strafmilderung bei Ehrenmorden

Einigkeit besteht darüber, dass Sittenmorde mit einer Strafmilderung nicht vereinbar sind. Dennoch gibt es Sittenmorde, bei denen die Strafmilderung des Art. 29 tStGB eingreift. Dann nennt man Sittenmorde Ehren-‚Morde‘, um sie aus dem qualifizierenden Tatbestand herauszunehmen und sie als Grunddelikt einzustufen, damit die Strafe des Grunddelikts gemildert werden kann. Dann handelt es sich auch nicht mehr um einen Mord, also einen qualifizierten Totschlag nach türkischem Recht, sondern um einen einfachen Totschlag, weshalb der Begriff des Ehrenmordes auch verfehlt wäre.

In diesem Zusammenhang sind Sittenmorde eigentlich solche Tötungsdelikte mit Ehrenmotiv, bei denen die Anwendung der ungerechtfertigten Tatprovokation nicht in Betracht kommt (Doğan, 2016: 137). Dies zeigt, dass die Einstufung der Tat als Sittenmord rein pragmatische Gründe hat.

So wird die strafmildernde Norm angewandt, wenn der Täter beispielsweise seine untreue Frau tötet, denn in diesem Fall gilt die Betrugshandlung als eine ungerechtfertigte Handlung gegenüber dem Ehemann. Auch das tZGB regelt die Treuepflicht der Ehepartner: Nach Art. 185 Abs. 3 tZGB sind Ehepartner zur gegenseitigen Treue verpflichtet, so dass jeder Verstoß gegen diese Pflicht eine ungerechtfertigte Handlung darstellt.

In diesem Zusammenhang hat das Kassationsgericht in dem Fall, in dem der Ehemann zusammen mit seinen Kindern seine Frau getötet hat, die sich von ihm getrennt hat und angefangen hat mit einem anderen Mann zusammenzuleben, entschieden, dass nur die Strafe des Ehemannes zu mildern ist, weil seine Frau ihm gegenüber ihre Treuepflicht nach Art. 185 tZGB verletzt hat (Doğan, 2016: 137).

Anders ist es, wenn der Täter seine Frau oder Freundin tötet, weil sie einen Minirock trägt, sich von ihm trennen will oder ähnliche Taten und Absichten hat, die nicht ungerechtfertigt sind, denn diese Verhaltensweisen verstoßen nicht gegen das Gesetz. In diesen Fällen wird ein Sittenmord angenommen (Kazancı, 2014: 1347-1348).

Der Sittenmord wurde in neueren Entscheidungen des Kassationsgerichts grundsätzlich in solchen Fällen bejaht, in denen die Vorzüge, die Lebensweise des Opfers Grund für dessen Tötung waren und aus diesem Grund die Voraussetzungen der ungerechten Tatprovokation bei Tatbegehung nicht vorlagen. Das Gericht hat klargestellt, dass die Lebensweise von Frauen, die den Sozialnormen als zuwider empfunden wird, keinen Strafmilderungsgrund wegen gerechtfertigter Tatprovokation darstellt. In diesen neueren Entscheidungen verwendet das Gericht die Begriffe der Ehre und der Sitte als Synonyme und wendet die Norm der ungerechtfertigten Tatprovokation nicht an (Doğan, 2016: 135). Letztendlich wurde schon in Gerichtsentscheidung der 1. Strafkammer des Kassationsgerichts, die mit Gegenstimme ergangen sind, in der Begründung der Gegenstimme ausdrücklich hervorgehoben, dass Sittenmorde solche Morde erfassen, die zur Rettung der Ehre begangen werden und dass ebendiese Schlussfolgerung auch aus den Vorbereitungen der Gesetzeskommission des tStGB und der Normbegründung des Art. 29 tStGB hervorgeht (KG 1. SK, D. 24.3.2009, Az. 2009/2965, Enr. 2009/1533).

Man erkennt also, dass die Entscheidungen des Kassationsgerichts zwischen 2005 und 2010 nicht einheitlich waren und unterschiedliche Ansichten vertreten wurden und in jedem Fall eine andere Bewertung vorgenommen wurde.

Da trotz der rechtlichen Regelung seit dem 1. Juni 2005 Unstimmigkeiten bestehen, hat der Strafsenat des Kassationsgerichts mit der Entscheidung vom 11.05.2010 versucht, das Problem zu lösen (KG Strafsenat D. 11.5.2010, Az. 2010/1-56, Enr. 2010/111). In dem Fall, in dem die Söhne den Liebhaber ihrer Mutter töteten, lehnte das erstinstanzliche Gericht einen Sittenmord mangels Kollektiventscheidung des Familienrates ab und wandte die Strafmilderung wegen ungerechtfertigter Tatprovokation an. Das Kassationsgericht verwarf die Entscheidung mit der Begründung, dass Sittenmorde solche Morde seien, bei denen die ungerechtfertigte Tatprovokation nicht einschlägig sei und hier daher ein Sittenmord vorliege (KG 1. SK, D. 15.04.2009, Az. 2009/7373, Enr. 2154). Nachdem das erstinstanzliche

Gericht auf ihrer ersten Entscheidung bestand, kam der Fall vor den Strafsenat. Dieser stellte fest, dass der Begriff der Sitte auch die Ehre erfasse und diese somit ein Unterbegriff der Sitte sei. Der Senat verwies auch auf die Debatten der Justizkommission zu Art. 82 tStGB, in denen zum Ausdruck gebracht wurde, dass der Begriff der Ehre sehr weit sei und daher eine einheitliche Definition sehr schwierig sei und daher der Gesetzgeber den Begriff der Sitte verwendet habe, jedoch dass, wenn der Begriff der Ehre ins Gesetz geschrieben worden wäre, das Rechtsgut der Ehre nicht genügend geschützt werden könne, weil dann die Strafmilderung nicht mehr einschlägig sein könne (KG Strafsenat D. 11.5.2010, Az. 2010/1-56, Enr. 2010/111). Trotz der missglückten und schwer nachvollziehbaren Formulierungen versucht die Entscheidung darzulegen, dass die Sitte unter gewissen Umständen auch die Ehre erfasst und solche Ehrenmorde, die nach dem gemeinsamen gesellschaftlichen Gewissen und der Rechtsordnung nicht mehr anerkannt werden, als Sittenmorde klassifiziert werden müssen und folgerichtig in diesen Fällen auch keine Strafmilderung aufgrund ungerechtfertigter Tatprovokation mehr einschlägig sein kann (Doğan, 2016: 151-152). Diese Gleichstellung der Begriffe ist jedoch insbesondere aufgrund des Gesetzmäßigkeitsprinzips sehr fraglich.

Die Entscheidung stellte jedoch weiterhin keine eindeutige Lösung dar, denn Gerichte haben auch nach 2010 immer wieder Schwierigkeiten gehabt zu bestimmen, wann ein Sittenmord vorliegt. Da es keinen Standard gab, wann die Normen der ungerechtfertigten Tatprovokation angewandt werden und es auch schwierig ist, dass Richter diese patriarchische Betrachtungsweise verlassen wird es auch in Zukunft eine Herausforderung sein, dass das Kassationsgericht einen Standard bestimmt (Doğan, 2016: 152).

5 Exkurs: Die Istanbul-Konvention / Das Übereinkommen des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt

Außerhalb des Strafrechtes gibt es weitere rechtliche Grundlagen, die unmittelbar Regelungen zum Schutz von Frauen treffen. Zu nennen ist das Gesetz zum Familienschutz und der Prävention von Gewalt gegen Frauen mit der Nummer 6284 und die daran angelehnte Verordnung.

Das Gesetz wurde 2012 umfangreich reformiert, um den Anforderungen des Übereinkommens des Europarates zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (www.coe.int) gerecht zu werden (Moroğlu, 2016: 368). Diese Konvention ist die erste internationale Konvention, die hinsichtlich der Gewalt gegenüber Frauen verbindlicher Natur ist (Bayraktar, 2018: 88). Die Türkei hat diese Konvention schon 2011 unterzeichnet. Sie wurde 2012 ratifiziert und am 8. März 2012 türkischen Gesetzesblatt veröffentlicht. Somit wurde die Türkei ohne jeglichen Vorbehalt Vertragspartei (Bayraktar, 2018: 89).

Aus aktuellem Anlass ist die Bedeutung des Übereinkommens des Europarats zur Verhütung und Bekämpfung von Gewalt gegenüber Frauen und häuslicher Gewalt besonders hervorzuheben: aktuell wird diskutiert, ob von der Konvention zurückgetreten werden sollte oder wenigstens für einige Normen ein Vorbehalt vorgesehen werden sollte. Konventionsgegner haben dargelegt, dass einige Normen des, an die Konvention angelehnten, Gesetzes mit der Nummer 6284 in der Praxis missbräuchlich angewandt werden und dass die Garantien dieser Konvention sogar innerhalb der Familie zu Auseinandersetzungen führen und dadurch die Scheidungsrate gestiegen sei und dass eine Frau diese Auseinandersetzungen als eine körperliche Gewalt deute und Näherungsverbote einhole. Diese Verbote zerstören den Familienzusammenhalt und führen zu Ehescheidungen. Insbesondere wird innerhalb der Regierungspartei kritisiert, dass die Normen über die Freiheit der sexuellen Ausrichtung die Homosexualität legitimiere und Menschen dazu ermutige (Sayın, 2020).

Diese subjektive Kritik stellt eine ernsthafte Gefahr für die Gültigkeit der Konvention und begründet die Sorge, dass bei einem Rücktritt Frauen noch mehr Rechte und Garantien verlieren werden, denn allein die Ziele der Konvention legen ihre wesentliche Bedeutung dar. Die Konvention hat das Ziel, Frauen vor jeglicher Gewalt, insbesondere häuslicher Gewalt zu schützen und die Gleichstellung von Frauen und Männern zu unterstützen (Nuhoğlu, 2019: 987). Nach Art. 1 Abs. 1 a)-e) hat die Konvention das Ziel:

> „*a) Frauen vor allen Formen von Gewalt zu schützen und Gewalt gegen Frauen und häusliche Gewalt zu verhüten, zu verfolgen und zu beseitigen; b) einen Beitrag zur Beseitigung jeder Form von Diskriminierung der Frau zu leisten und eine echte Gleichstellung von Frauen und Männern, auch durch die Stärkung der Rechte der Frauen, zu fördern; c) einen umfassenden Rahmen*

> *sowie umfassende politische und sonstige Maßnahmen zum Schutz und zur Unterstützung aller Opfer von Gewalt gegen Frauen und häuslicher Gewalt zu entwerfen; d) die internationale Zusammenarbeit im Hinblick auf die Beseitigung von Gewalt gegen Frauen und häuslicher Gewalt zu fördern; e) Organisationen und Strafverfolgungsbehörden zu helfen und sie zu unterstützen, um wirksam mit dem Ziel zusammenzuarbeiten, einen umfassenden Ansatz für die Beseitigung von Gewalt gegen Frauen und häuslicher Gewalt anzunehmen.*“

Die Konvention trifft auch wichtige Regelungen zu Ehrentaten. Sie enthält den Begriff der „*sogenannten Ehre*“. Dieser Ausdruck kommt zunächst folgendermaßen in der Präambel vor:

> „*Die Mitgliedstaaten des Europarats und die anderen Unterzeichner dieses Übereinkommens …..mit großer Sorge feststellend, dass Frauen und Mädchen häufig schweren Formen von Gewalt wie häuslicher Gewalt, sexueller Belästigung, Vergewaltigung, Zwangsverheiratung, im Namen der sogenannten „Ehre“ begangener Verbrechen und Genitalverstümmelung ausgesetzt sind, die eine schwere Verletzung der Menschenrechte von Frauen und Mädchen sowie ein Haupthindernis für das Erreichen der Gleichstellung von Frauen und Männern darstellen;…. sind wie folgt übereingekommen*:“

Weiterhin formuliert Art. 12 Abs. 5 folgende Verpflichtung für die Vertragsparteien:

> „*Die Vertragsparteien stellen sicher, dass Kultur, Bräuche, Religion, Tradition oder die sogenannte „Ehre“ nicht als Rechtfertigung für in den Geltungsbereich dieses Übereinkommens fallende Gewalttaten angesehen werden.*“

Die „*sogenannte Ehre*“ wird zwar in der Konvention nicht definiert, bringt jedoch den, innerhalb der Gesellschaft anerkannten, über Frauen definierten und dem gesellschaftlichen Rollenbild entsprechenden, Ehrbegriff zum Ausdruck (Şahin, 2019: 1004), der einem universellen Ehrbegriff nicht entspricht.

Art. 42 der Konvention konkretisiert und regelt „Inakzeptable Rechtfertigungen für Straftaten, einschließlich der im Namen der sogenannten „Ehre“ begangenen Straftaten“. Diese bedeutende Regelung besagt:

„*Die Vertragsparteien treffen die erforderlichen gesetzgeberischen oder sonstigen Maßnahmen, um sicherzustellen, dass in Strafverfahren, die in Folge der Begehung einer der in den Geltungsbereich dieses Übereinkommens fallenden Gewalttaten eingeleitet werden, Kultur, Bräuche, Religion, Tradition oder die sogenannte „Ehre" nicht als Rechtfertigung für solche Handlungen angesehen werden. Dies bezieht sich insbesondere auf Behauptungen, das Opfer habe kulturelle, religiöse, soziale oder traditionelle Normen oder Bräuche bezüglich des angemessenen Verhaltens verletzt.*" 2 *Die Vertragsparteien treffen die erforderlichen gesetzgeberischen oder sonstigen Maßnahmen, um sicherzustellen, dass das Verleiten eines Kindes durch eine Person, eine der in Absatz 1 genannten Handlungen zu begehen, die strafrechtliche Verantwortlichkeit dieser Person für die begangenen Handlungen nicht mindert.*"

Diese Vorschriften sehen vor, dass die Vertragsparteien die Ehre nicht als Rechtfertigung der Gewalttat als legitimierendes Motiv ansehen sollen. Genau dazu führt jedoch die ungerechtfertigte Tatprovokation. Auch wenn sie keinen Rechtfertigungsgrund darstellt, bringt sie zum Ausdruck, dass das Motiv der Ehre menschlich verständlich ist und sich dieses Verständnis bei der Bestimmung der Strafe zugunsten des Täters auswirkt. Mit dieser Rechtsanwendung wird die Türkei als Vertragspartei der Konvention ihren Vorschriften nicht gerecht. In diesem Zusammenhang ist es umso bedeutender, dass das Ehrenmotiv als Qualifikationsmerkmal in das Gesetz übernommen wird. Als qualifiziertes Merkmal wäre eine Strafmilderung für ein strafschärfendes Merkmal paradox, sodass ohne Weiteres keine Strafmilderung mehr wegen ungerechtfertigter Tatprovokation eingreifen könnte.

Die Konvention ist nicht nur in Anbetracht der Ehrenmorde von Bedeutung, sondern auch bezüglich anderer „Sanktionen", die von Familienmitgliedern bei einer Ehrverletzung verhängt werden. So werden z.B. Vergewaltigungsopfer zur Wiederherstellung der verletzten Ehre mit ihren Tätern zwangsverheiratet.

In diesem Zusammenhang bringt die Konvention zum Ausdruck, dass die Zwangsverheiratung rechtswidrig ist. Daher müssten diesbezüglich rechtliche Strafnormen geschaffen werden, welche es im türkischen Strafgesetzbuch nicht gibt. Die Handlung der Zwangsverheiratung kann allenfalls den Tatbestand der Freiheitsberaubung, Drohung, Vergewaltigung oder einen sexuellen Missbrauch erfüllen (Nuhoğlu, 2019: 994). Nationale Normen gibt es nicht. Wenn diese

internationale Garantie nicht mehr besteht, dann wird es auch nicht mehr zur nationalen Regelung kommen.

6 Ausblick

Die „*Plattform-Wir-werden-Frauenmorde-stoppen*" und auch soziale Netzwerke machen mit unterschiedlichen Hashtags - wie #istanbuldurchsetzen - und ähnlichen Aufrufen auf das Gewaltproblem in der Türkei und die Diskussion zur Istanbul Konvention aufmerksam. Während sich die Welt solidarisch zeigt, wird in der türkischen Debatte der Rücktritt von der Istanbul Konvention diskutiert. Doch die Konvention sieht einen umfangreichen Schutz von Frauen vor und wird somit als eine Garantie für Frauenrechte und ihre Gleichbehandlung mit Männern innerhalb der Gesellschaft angesehen.

Sie verlangt von den Vertragsparteien den Erlass ausreichender präventiver Regeln, die Frauen rechtzeitig vor männlicher Gewalt schützen sollen. Als Vertragspartei hat die Türkei nur wenige Regelungen, die dem Opferschutz dienen. Die Rechtsanwendung ist selbst von diesen wenigen Regelungen weit entfernt (Nuhoğlu, 2019: 996).

Anstelle eines Rücktritts von der Konvention oder eines Vorbehalts für bestimmte Normen sollte die Türkei in Anbetracht der gravierenden aktuellen Lage und vermehrten Gewalttaten parallele Vorschriften zur Konvention erlassen und diese auch in der Praxis effektiv durchsetzen. Allein durch die Anwendung bereits vorhandener Präventivmaßnahmen können sehr viele Gewalttaten verhindert werden, bevor es zu einer Rechtsgutsverletzung kommt. Doch die Zahl der Ablehnung beantragter Schutzmaßnahmen durch Frauen nimmt trotz steigender Kriminalität zu. Zahlreiche Frauen bekommen keinen präventiven Schutz, obwohl ihnen gedroht wird und Gefahr besteht. So wurden z.B. im Jahr 2019 41.383 Schutzanträge (birgun.net, 2020) abgelehnt.

Damit dieser Schutz gewährleistet werden kann, müssen Anträge von Frauen an die Polizei und Staatsanwaltschaft schneller beantwortet werden und effektive Schutzmaßnahmen ergriffen werden, bevor diese Opfer von Gewalttaten und Ehrenmorden werden. Mit diesem Ziel hatte die Türkei die Istanbul-Konvention nach Ratifizierung 2012 ohne einen Vorbehalt genehmigt (Konuralp, 2019: 61). Nach 8 Jahren wäre ein Verzicht auf die Konvention ein ernsthafter Rückschlag. Da

dies zur Folge hatte, dass sich das patriarchische Verständnis geltend machen würde, welches auch die Grundlage von Ehrenmorden ist.

Auch die Anwendung der ungerechtfertigten Tatprovokation ermutigt zu Gewalttaten und hat somit dieselbe Folge. Eine Strafmilderung wegen ungerechtfertigter Tatprovokation ist jedoch nicht nur bei Ehrenmorden eine bedenkliche Strafmilderungsregelung. Dass der Täter zum Zorne gereizt wurde, sollte in einem Rechtsstaat grundsätzlich keine Beachtung als Strafmilderungsregel finden. Die Abschaffung des Art. 29 tStGB, ist zwar nicht zu erwarten, doch durch die Einfügung des Ehrenmotivs in den Qualifikationstatbestand des Totschlages sollte zumindest als erster Schritt der Ehrenmord genauso wie der Sittenmord eine Sperrwirkung entfalten und durch diese Regelung als qualifizierter Totschlag eingestuft werden, weil er neben dem Rechtsgut Leben, das „Recht des Opfers auf autonome Lebensführung“ (Greco, 2014: 319) verletzt. Im Grunde gibt es keine inhaltliche Unterscheidung zwischen Ehren- und Sittenmotiv. Die Unterscheidung wird objektiv vorgenommen. Auch die Debatte, ob ein Motiv einen Familienratsbeschluss erfordert oder ob die Sitte die Ehre erfasst oder nicht, ist nicht juristischer Natur, sondern dient dazu, die Ehre geschickt aus dem Qualifikationstatbestand rauszuhalten und dem Täter durch strafmildernde Regelungen entgegenzukommen. Daher sollten im Gesetz beide Begriffe vorkommen, damit ein Motiv nicht ausgeschlossen werden kann, um willkürlich die Strafmilderungsregelung geltend zu machen. Demzufolge wäre auch nicht zu empfehlen, das Sittenmotiv durch das Ehrenmotiv zu ersetzen.

Gesetzliche Änderungen wären ein Lösungsansatz, um das selbstjustizielle Handeln nicht mehr zu privilegieren. Da Gewalt gegen Frauen in all ihren Facetten eine „blutende Wunde“ in der Türkei ist. Eine Strafmilderung würde insofern genau dieses Verhalten legitimieren. In Gesellschaften, in denen Traditionen eine prägende Rolle für die Gesellschaft spielen, werden Ehrenmorde innerhalb der Gesellschaft stillschweigend akzeptiert und der Täter sogar als Held gefeiert, während nur ein Teil der Gesellschaft diese Selbstjustiz ablehnt. Dieses gesellschaftliche Verständnis kann sich nur ändern, wenn auch der Gesetzgeber solche Taten genügend missbilligt. Die Wiederherstellung der Gerechtigkeit ist nämlich nicht die Aufgabe des Einzelnen, sondern die des Staates.

In diesem Zusammenhang ist es auch Aufgabe des Rechtsstaates Frieden und die Beständigkeit innerhalb der Gesellschaft zu gewährleisten, Rechtsstreitigkeiten friedlich zu lösen und die Sicherheit, Gleichheit und Freiheit innerhalb der Gesellschaft zu garantieren (Öztürk & Demirdağ, 2013: 129).

Außer der fehlerhaften Rechtsanwendung, gibt es zahlreiche weitere Anknüpfungspunkte für eine Besserung der Situation von Frauen, denn diese Schutzpflicht ist nicht allein die Aufgabe des Strafrechts, welchem eine *ultima ratio* Funktion zukommt.

Als grundlegende, langfristige Lösung muss das patriarchische System abgeschafft werden, was den Ursprung des Problems darstellt. Anstelle des patriarchischen Systems muss ein neues System geschaffen werden, was jedoch gleichzeitig bedeutet, dass eine neue Gesellschaft erschaffen werden muss.

In diesem Zusammenhang sollte an der Bildung angeknüpft werden, und zwar nicht nur die Bildung der Frauen, sondern auch der Ansprechpartner für Gewalt gegen Frauen. So sollten behördliche Stellen, an die sich Frauen wenden, über Geschlechterdiskriminierung und die Gesetze ausgebildet werden. Ein guter Ansatz ist auch die Ausbildung der Männer während des Militärdienstes. Dadurch kann das patriarchische Verständnis geändert (Ünübol et al., 2007: 73), zumindest beeinflusst, werden. Doch die Bildung allein ist auch nicht ausreichend. Da auch gebildete Männer Gewalt ausüben und selbst gebildete Frauen sich manchmal männlicher Gewalt unterwerfen. Für eine Lösung sollte man also innerhalb des patriarchischen Systems ansetzen und nicht nur die Bildung, sondern alle Lebensbereiche aus der Frauenperspektive noch einmal bewerten und ein neues System einrichten. Erst dann kann die Bildung innerhalb eines solchen Systems etwas ändern, denn dann wird sich das Verständnis von traditionellen Geschlechterrollen und der Gleichbehandlung von Mann und Frau ebenfalls ändern (Ankara Barosu Dergisi, 2008: 19).

Das Bild der Frau in den Medien sollte verbessert werden. Frauen werden in den Medien als hilflose, ausweglose Frauen dargestellt, die psychischer und physischer Gewalt ausgesetzt sind. Dies normalisiert die Probleme und führt zur Desensibilierung gegenüber der Gewalt gegen Frauen. Die Gewalt, die in den Medien dargestellt wird, wird innerhalb der Gesellschaft gelernt und nachgeahmt.

Daher ist es Aufgabe der Medien die Stellung der Frauen zu stärken und das Frauenbild zu ändern (Ünübol et al., 2007: 73).

Eine grundlegende Änderung des patriarchischen Systems wird zur Folge haben, dass sich geschlechterspezifische Wertvorstellungen ändern und Rechte, wie das sexuelle Selbstbestimmungsrecht und die allgemeine Handlungsfreiheit, gleichermaßen für Frauen anerkannt werden.

Durch solch eine grundlegende Änderung können Begriffe wie der Ehrbegriff - der mit einem universellen Menschenwürdebegriff nichts gemein hat (Rumpf, 1999/2003: 7) - neu definiert werden, sodass irgendwann anerkannt wird, dass die Ehre als individuelles Rechtsgut den Interessen Einzelner dient und jeder für sein eigenes Verhalten verantwortlich ist.

Diese Änderung der Wertvorstellungen scheint ein schwieriger und langer Weg zu sein, der jedoch in der Türkei für eine langfristige Besserstellung der Frau innerhalb der Gesellschaft beschritten werden muss.

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DAS MENSCHLICHE LEBEN IM MODERNEN MEDIZINSTRAFRECHT

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Zusammenfassung Die Autonomie des Patienten ist in Slowenien ein sehr modernes Thema im materiellen Strafrecht. 2008 kam mit der Verabschiedung des neuen Gesetzes über die Rechte von Patienten sowie mit der Verabschiedung eines grundlegend überarbeiteten Strafgesetzbuchs das Prinzip der Autonomie des Patienten und auch das neu formulierte Prinzip der "offenen Zukunft des Kindes" eine offensichtliche Ableitung der Autonomie eines Menschen in die slowenische Gesetzgebung. Der strafrechtliche Schutz des menschlichen Lebens änderte sich in Richtung mehr Autonomie der Person, die den Wunsch oder das Verlangen hat zu Sterben. Es gab auch einige Änderungen im strafrechtlichen Umgang mit dem ungeborenen menschlichen Leben. Euthanasie wurde jedoch nicht ins Gesetz aufgenommen.

Schlüsselwörter:
Slowenien,
materielles
Strafrecht
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HUMAN LIFE IN MODERN MEDICAL CRIMINAL LAW

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Abstract The autonomy of the patient is in Slovenia a very modern topic in substantive criminal law. In 2008 with the adoption of the new Law on Patients' Rights as well as with the adoption of a thoroughly rewritten Criminal Code the principle of the autonomy of the patient and also the newly formulated principle, called »the open future of the child«, an obvious derivative of the autonomy of a human entered into Slovenian legislative. The criminal legal protection of the human life changed towards more autonomy of the person, wishing or demanding to die. There were also several changes in criminal legal dealing with the unborn human life. Euthanasia however was not adopted in law.

Keywords: Slovenia, substantive criminal law, killing, patient's consent, abortion

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1 Einleitung

Nach der großen politischen Wende am Ende des zwanzigsten Jahrhunderts, begannen, in den ehemaligen sozialistischen Staaten Zentral- und Osteuropas, auch auf dem Trümmerhaufen des ehemaligen Jugoslawiens und insbesondere in Slowenien, Autoren strafrechtlich zu argumentieren, dass das gesamte Thema Medizinstrafrecht, in der damaligen rechtlichen Literatur, als ein ethisch und rechtlich schwieriges, vor allem aber strafrechtlich unzulänglich erforschtes, sozusagen unterernährtes Gebiet, anzuerkennen sei. Insbesondere die Selbstbestimmung und die Autonomie des Patienten, vor allem aber die Patienteneinwilligung seien ihrer Meinung nach kritisch zu hinterfragen. Man begann sich nach einer dogmatischen Neudefinierung der Rolle der Patienteneinwilligung umzuschauen. Mit etwas Verspätung, aber im Grunde parallel und offensichtlich gerade durch die frischen Denkansätze über die Autonomie des Menschen im Strafrecht befeuert, sprießen neue Überlegungen über die Euthanasie.[1]

Die traditionelle Strafrechtstheorie will den Großteil der Legitimität des Bestehens des Medizinstrafrechts, als eines besonderen strafrechtlichen Teilgebiets, in der Tatsache sehen, dass die Natur der medizinischen Wissenschaft und Tätigkeit von allen bekannten Wissenschaften und Tätigkeiten insofern besonders sei, dass sie eine Sonderbehandlung im Strafrecht verdiene. Bereits die immanent humane Natur des medizinischen Handelns an sich soll einen Rechtfertigungs- oder sogar „*Tatbestandsverneinungs*“- (Tatbestandsausschließungs-) Grund darstellen und somit diejenige Inkriminationen in konkreten Fällen neutralisieren, die sich sonst für die Prüfung der Verantwortlichkeit des Mediziners anbieten würden (allen voran Straftaten gegen Leib und Leben, Körperverletzungstatbestände[2]). Der Wesenskern des Medizinstrafrechts sei, nach dieser Auffassung, die Aufgabe, besondere Institute und Maßstäbe des AT *(sic!)* zu entwickeln, die den Besonderheiten der Medizin entsprechend, die die materiell-rechtliche Stellung des Mediziners als Täter, grundsätzlich und gründlich zu erleichtern. Dafür bietet sich vor allem die technische Korrektheit des Heileingriffs, zusammen mit dem Willen des Täters zu heilen, als ein besonderer, selbständiger Rechtfertigungsgrund oder sogar als Hindernis für die Subsumption des Geschehens, unter den Körperverletzungstatbestand im Gesetz, als Grundausgangspunkt für die praktische strafrechtliche Analyse. Das bedeutet

[1] Eingehender in der neueren Slowenischen Rechtsliteratur siehe z.B.: Teršek (2001, 2012, 2015).
[2] Siehe: Korošec, Filipčič & Zdolšek, 2018: Kommentare von Art. 122 bis 125.

eine mehr oder weniger völlige Verneinung jedes strafrechtlichen Einflusses des Patientenwillens auf die Tatbestandsmäßigkeit oder Rechtswidrigkeit, nicht nur der Körperverletzungen, sondern auch praktisch jeder Inkriminierung des slowenischen Strafrechts. Die „Regeln der medizinischen Wissenschaft“ wurden, geradezu, als eine Art eigenständiger gesellschaftlicher Wert proklamiert. Besonders, in der sogenannten sozialistischen Strafrechtslehre, waren solche Auffassungen als geradezu selbstverständlich, zwingend logisch, ja fast schon ideologisch fundamental proklamiert oder zumindest verstanden.

Erst vor einigen Jahren sind, zum Beispiel in der slowenischen Strafrechtsliteratur, Stimmen laut geworden[3], dass bestimmte Lösungen, die sich in Slowenien auf dem Gebiet des Medizinstrafrechts, konkret der Patienteneinwilligung etabliert haben *(siehe oben)*, keine Grundlage in der geltenden Verfassung der Republik Slowenien, aus dem Jahre 1991, hätten. In der Fachpresse erscheinen Behauptungen, dass die fast universelle strafrechtliche Irrelevanz des Patientenwillens in Slowenien nicht im Geiste eines liberalen (pluralistischen) und gleichzeitig demokratischen Staates seien, was eine Gefahr für die Autonomie des Individuums als eines wichtigen (Straf)Rechts-Gutes darstelle. Es wird, so zu sagen, über Nacht offen in Frage gestellt, ob man sich weiterhin auf die Nützlichkeit, Hochsinnigkeit, Großmütigkeit und Wohltätigkeit konkreter Heilversuche oder der Human-Medizin als solcher berufen darf, wenn gleichzeitig die Autonomie des Patienten nicht entsprechend strafrechtlich geschützt wird. Als Derivat der neuen Auffassung, der Patientenautonomie, wird das Prinzip der „*offenen Zukunft des Kindes*“ erforscht und als kriminalpolitisch erwünscht dargestellt: es wird verlangt, dass alle Entscheidungen auf dem Gebiet der Gesundheit, die nicht medizinisch in die Zukunft verlegbar sind, vom Kind alleine getroffen werden, wenn es reif für solche Entscheidungen ist, also keine Ersatzeinwilligung in Frage kommt (Korošec, 2013).

Man kann ohne weiteres behaupten, dass in Slowenien, in diesem Moment, ein neues Medizinstrafrecht, bzw. ein Medizinstrafrecht, das auf einem neuen Verständnis des Patientenwillens beruht, entsteht. Bezüglich der Heilangriffe beginnt man in der slowenischen medizinstrafrechtlichen Theorie zu betonen, dass, laut dem in Slowenien traditionell einheitlich akzeptiertem objektiven Konzept der Tatbestandsmäßigkeit, als erstes Element des dreiteiligen allgemeinen Deliktsbegriffs, der Tatbestand der Körperverletzung nicht vom guten Willen des

[3] Im Folgenden in wesentlichen Teilen übernommen von: Korošec, 2016. Siehe dortige Literaturangaben!

Täters abhängig gemacht werden kann. Erst auf der Ebene der Rechtswidrigkeit, bzw. des Rechtswidrigkeitsausschlusses dürfe der Heilungswille eine entscheidende Rolle spielen, jedoch nicht selbständig, an sich, sondern höchstens zusammen mit der Patienteneinwilligung (oder subsidiär u.U. mit der Ersatzeinwilligung oder sogar mutmaßlicher Einwilligung des Patienten in den konkreten betreffenden Heileingriff) und freilich der technischen Korrektheit des betreffenden Eingriffs.

Diese Überlegungen favorisieren eine Lösung, wo in Fällen des vorsätzlichen oder fahrlässigen Ignorierens des Patientenwillens (bzw. der Regeln über die Ersatzeinwilligung oder die mutmaßliche Einwilligung des Patienten), an einer strafbaren Körperverletzung festzuhalten sei. Zumindest solange eine spezielle Inkriminierung solche Körperverletzungen nicht eindeutig als ein privilegiertes Körperverletzungsdelikt (und nicht nur als ein Delikt gegen die Selbstbestimmung des Einzelnen) decken wird. Diese Ausgangspunkte konkretisiert auch das 2008 in Kraft getretene slowenische StGB (KZ-1, *GBl. Nr. 55/08).* Der Einfluss der neueren deutschen Strafrechtsdogmatik ist dabei offensichtlich. Dabei ist sofort zu betonen, dass der Autonomie-Gedanke in der neuen slowenischen Strafgesetzgebung nicht so weit gegangen ist, dass Euthanasie-Tötungen (auf Verlangen des Getöteten) als rechtmäßig erklärt sein würden und auch nicht, dass solche Tötungen als privilegierte Formen des Totschlags vorgesehen werden. Gerade in den letzten Jahren werden jedoch gerade solche politischen und rechtlichen Optionen sehr lebhaft öffentlich diskutiert.

2 Typische neue Autonomieregelungen im heutigen Medizinrecht und ihr Einfluss auf den strafrechtlichen Lebensschutz

Mehr und mehr Staaten verabschieden relativ umfangreiche Gesetzbücher über Patientenrechte, die eine offensichtliche Blankett-Erfüllungsrolle im nationalen Strafrecht spielen. So gab es, zum Beispiel, in Slowenien, die Verabschiedung des neuen Gesetzes über Patientenrechte (in der Folge: GüPR, *GBl. Nr. 15/08),* die ein wichtiger zusätzlicher Schub, in Richtung der skizzierten neuen Autonomie-Strafrechtsphilosophie ist. Sie beschäftigt sich unter anderem, für slowenische verwaltungsrechtliche Verhältnisse ausgesprochen ungewöhnlich ausgiebig und vertieft, mit den offensichtlich eng verknüpften Patientenrechten „auf Aufklärung und Mitwirkung“, „auf Selbstbestimmung in Bezug auf medizinische Behandlung“, sowie „auf die Befolgung des Patiententestaments“. Bei der Regelung aller Rechte geht der Gesetzgeber sehr strikt von der Patientenautonomie aus. Diese ist, mit dem

neuen Gesetz, zweifellos zum Grundpostulat des Medizinrechts und mittelbar auch des Medizinstrafrechts geworden.

Kurz zusammengefasst, verlangt das GüPR nun für jeden ärztlichen Eingriff bzw. Heilungsversuch prinzipiell eine *Einwilligung* des Patienten. Diese kann der Patient nur aufgrund der vorgehenden ganzheitlichen, umfassenden Information seitens des Arztes über die Diagnose, den zu erwartenden Verlauf bzw. der Folgen der Unterlassung der Behandlung und der Risiken der Behandlung leisten. Es werden unter anderem auch Informationen über verschiedene alternative Behandlungen verlangt (GüPR, 2017, Art. 20, 21). Wenn diese bestehen (z.B. Behandlung mit Medikamenten, operative Behandlung, Behandlung durch Bestrahlungen) muss sie der Arzt dem Patienten erklären. Er muss dem Patienten die Wirkung der Medikamente, die er ihm gibt bzw. zur Verfügung stellt sowie die Wirkung der Medikamente, die er ihm bloß verschreibt, genau erklären, auch wenn den Medikamenten standardmäßig Informationen dieser Art, samt entsprechenden Warnungshinweisen, seitens der Hersteller beigelegt werden.

Die oben genannten Informationen muss der Arzt leisten. Bei Eingriffen, die mit größeren Risiken verbunden sind, „in der Regel" der Arzt, der den Eingriff durchführen wird. Personen, die zum komplementären Krankenhauspersonal zu zählen sind, also insbesondere die Krankenschwester (GüPR, 2017, Art. 21 Abs. 2), kommen für diese Aufgabe laut Gesetz nicht in Frage. Der Umfang der Informationen und andere Einzelheiten der geschilderten Aufklärungspflicht hängen von der Natur des Eingriffs ab. Bei Eingriffen, die wichtig für den Erhalt des Lebens und der Gesundheit sind, muss der Arzt den Patienten, in der Regel, bloß über die häufigeren Komplikationen informieren. Je weniger der betreffende einzelne Eingriff für den Erhalt des Lebens und der Gesundheit ist, desto breiter wird die ärztliche Aufklärungspflicht.

GüPR verlangt, dass die Aufklärung dem Patienten im unmittelbaren Kontakt geboten wird und auf eine für ihn verständliche Weise (GüPR, 2017, Art. 20 Abs. 2). Für den Arzt bedeutet das unter anderem, dass er den Patienten persönlich, mündlich die Behandlung erklärt, auch wenn er später dem Patienten noch ein Formular mit schriftlichen Erklärungen zur Unterschrift vorlegt, oder präziser: laut Gesetz in bestimmten Fällen vorlegen muss. Auf jeden Fall muss der Arzt seine Aufklärungspflicht rechtzeitig, also angemessen lange vor der geplanten Behandlung leisten, um den Patienten genug Überlegungsmöglichkeiten und nach Bedarf auch

die Einholung einer zweiten Meinung (GüPR, Art. 5 Ziff. 10), also der Meinung eines zweiten Arztes zu ermöglichen.

Diese Ausgangspunkte konkretisiert auch das neueste Strafgesetzbuch, das StGB-1 aus dem Jahr 2008. Im neu verfassten Art. 125 („*Der Ausschluss der Straftat bei Körperverletzung mit Opfereinwilligung*") im Abs. 3, der sogenannten streng objektiven Theorie der Tatbestandsmäßigkeit als Element des allgemeinen Verbrechensbegriffs folgend, geht das neue slowenische StGB nun sehr unmissverständlich von der potentiellen Tatbestandsmäßigkeit ärztlicher Eingriffe auf der Ebene der Tatbestandsmäßigkeit der Körperverletzungsdelikte des StGB (Art. 112 bis 124) aus.[4] Der Artikel bietet im genannten Absatz, der ausdrücklich besonders der humanmedizinischen und der humanen komplementärmedizinischen (heilpraktischen) Tätigkeit gewidmet ist, dem Arzt und anderen Mitgliedern des medizinischen Personals sowie dem Heilpraktiker die Möglichkeit des Rechtswidrigkeitsausschlusses, also der Rechtfertigung ihrer Tatbestandsmäßigen (Körper und Autonomie-) verletzenden Handlungen, „wenn die Einwilligung [des Patienten] in der Form und unter den Bedingungen geleistet wurde, die vom Gesetz verlangt werden". Es ist außer Zweifel, dass mit dem Gesetz in erster Linie, wenn nicht sogar ausschließlich gerade das GüPR gemeint ist. Die geschilderten, relativ genauen, Regeln über die Patienteneinwilligung im GüPR sind somit sehr unmittelbar relevant für die Bestimmung der Rechtswidrigkeit des Handelns der Ärzte und vieler anderer Berufsgruppen und somit für ihre strafrechtliche Verantwortlichkeit im weiteren Sinne.

Das ist in Slowenien nicht nur neu, sondern kam, zumindest für die große Mehrheit der Strafrechtstheoretiker, aber auch Mediziner, eher überraschend. In Slowenien wurde die Opfereinwilligung im Strafrecht nie ernsthaft gesetzlich geregelt und die traditionelle Strafrechtstheorie widmete der Patienteneinwilligung (wie auch der Opfereinwilligung als solcher), wie oben bereits erklärt, kaum Aufmerksamkeit. Die medizinische Tätigkeit an sich galt, wegen ihrer immanenten humanen Natur, als traditionell nicht hinterfragter eigenständiger Rechtfertigungsgrund aller Körperverletzungen, zumindest solange Eingriffe in den menschlichen Körper (1.) mit heilender Absicht und (2.) technisch korrekt, also im Einklang mit technischen Normen der zeitlich und örtlich aktuellen Medizinwissenschaft vorgenommen

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[4] Hier kommen nach den genannten Körperverletzungstatbeständen und nach neuerer slowenischer Strafrechtstheorie vor allem alle operativen Eingriffe, viele invasive diagnostische Eingriffe aber auch Medikamenten-Verschreibungen und -Vergabe in Frage.

wurden. Der Wille des Patienten spielte dabei strafrechtlich keine Rolle. Es wurde auch kein Bedarf für besondere Straftatbestände der eigenmächtigen Heilbehandlung (wie z.B. in Österreich und in Kroatien bekannt) erkannt. Erst vor einigen Jahren erschienen in der slowenischen strafrechtlichen Literatur vereinzelt Kritiken dieser Lage, die vor allem rechtsvergleichend die verfassungsrechtlich unzumutbare Abwesenheit der Konkretisierung des Schutzes der Patientenautonomie im Strafrecht anprangerten und eine systematische Eingliederung des Opferwillens, bei disponiblen Strafrechtsgütern, in den allgemeinen Verbrechensbegriff forderten. Diese Stimmen konnten jedoch nicht zu einer breiteren öffentlichen Diskussion in Slowenien führen. So darf man behaupten, dass die neueste Regelung der Patienteneinwilligung im StGB eine kleine Revolution im Medizinstrafrecht darstellt, die, zumindest politisch, in Slowenien überraschend kam. Nicht überraschen darf andererseits, dass gerade diese, obwohl politisch, in der Art und Form der Verabschiedung, in Slowenien radikale dogmatische Wende, brennende Diskussionen über die Spiegelseite dieser Autonomie, speziell bezüglich des Lebens entfachte: muss man die Verhinderung eines (freien) Selbstmordes als rechtswidrig verstehen oder sogar strafrechtlich ahnden (Bergant & Korošec, 2020), muss man dem Patienten das Recht gewähren, andere bei seiner eigenen Tötungsvorbereitungen und der Tötung selbst als Gehilfen oder gar Täter zu engagieren? Soll die Euthanasietötung, prinzipiell, rechtmäßig werden?

3 Das junge und das kranke Leben im modernen Strafrecht

Moderne Strafrechtsysteme haben offensichtliche ethische und politische Probleme, bei der Wertung des entstehenden und jungen menschlichen Lebens. So ist in vielen Staaten die Tötung des ungeborenen Kindes seitens der austragenden Mutter und ihrer Beauftragten sehr breit erlaubt, obwohl typisch rechtlich begrenzt, einige Staaten, wie zum Beispiel Slowenien, ethisch und vergleichsrechtlich sehr außergewöhnlich kinderfeindliche privilegierungsstufen des Kindermordes kennen (in Slowenien als Vorsatzdelikt sogar mit niedriger Strafe bedroht als die fahrlässige Tötung). Diese Regelungen werden sogar als sogenannte politische heilige Kühe verstanden, als Errungenschaften von Revolutionen und rechtliche Symbole der menschlichen Freiheit und sind als solche politisch offen tabuisiert. Angesicht der oft politisch aggressiv geführten öffentlichen Diskussionen, über den Regelungsbedarf der Euthanasie, entsteht der Eindruck, dass in Slowenien, was man jedoch als Beispiel einer modernen Entwicklung im Medizinstrafrecht in Europa

verstehen darf, der Staat den repressiven Rechtsschutz von jungen und sehr kranken Menschen schwächt oder ihn sogar voll verwehrt. Genauer: beim jungen Leben wird der Getötete naturgemäß nicht gefragt, ob er sterben will, bei schwer kranken bleibt im Moment diese Frage noch offen: viele setzen sich auch für eine Euthanasie mit Ersatzeinwilligung oder sogar ohne jegliche Einwilligung ein, einige wollen bereits den Begriff der Euthanasie bei persönlicher Einwilligung in die Tötungshandlung knüpfen, auch wenn sie vom Patienten weit in Voraus geleistet wurde (mittels formalisierten sogenannten Patientenverfügungen). Auf jeden Fall ist es offensichtlich, dass das moderne Medizinstrafrecht, gerade bezüglich des menschlichen Lebens, vor riesigen ethischen und politischen Herausforderungen steht, die momentan alles andere als gelöst scheinen.

Der Behandlungsabbruch bei Schwerstkranken gilt nach in Slowenien geltenden medizinethischen und strafrechtlichen Anschauungen nicht als Euthanasieform und nicht als Tötungsdelikt, wenn der Abbruch auf einer medizinisch fachlich korrekten Prüfung der sogenannten fachlichen Sinnlosigkeit der Lebensverlängerung beruht (in der Praxis z.B. Herzmassage als Wiederbelebung (Reanimation) nach mehrmaligem Herzstillstand in Endstadien von Krebserkrankungen).

In Slowenien gilt es als ethisch, verfassungsrechtlich und strafrechtlich unakzeptabel, das Menschenleben als Strafrechtsgut offen nach dem Alter des Getöteten zu werten, gesetzgeberisch typisch durch qualifizierte Formen von Tötungsdelikten, wenn das Opfer ein Minderjähriger bzw. ein Kind ist. So eine Wertung gilt als Diskriminierung aufgrund des Alters als persönlichem Umstand und somit als schwerer systematischer staatlicher Angriff auf die Würde der Menschen, naturgemäß der alten. Es werden in Slowenien jedoch immer wieder Stimmen laut, die fördern Kinder auch auf diese Weise strafrechtlich besonders zu schützen und sich so als eine besonders kinderfreundliche und somit humane Gesellschaft international auszuweisen. Gerade ethisch und politisch hochinteressant dabei ist, dass dieselben Stimmen dabei z.B. auf stark privilegierten(!) Kindestötungsinkriminationen mit Mutter als Täterin beharren (siehe oben) sowie an der kategorischen Nicht-Strafbarkeit des Schwangerschaftsabbruchs ohne medizinische Indikation.

3 Abschließend

Eine der zentralen Fragen des modernen Medizinstrafrechts ist, ob man sich auf die Nützlichkeit der Human-Medizin als solcher berufen darf, wenn gleichzeitig die Autonomie des Patienten nicht strafrechtlich, gesetzlich und in der täglichen medizinischen Praxis geschützt wird. Dies insbesondere bei sehr jungen und bei sehr kranken und sterbenden Patienten. In der, seit 2008 geltenden, slowenischen Strafgesetzgebung wird nun im Einklang mit dem neuen Gesetz über Patientenrechte folgendes unmissverständlich geregelt. In Fällen des vorsätzlichen oder fahrlässigen Ignorierens des Patientenwillens (bzw. der Regeln über die Ersatzeinwilligung oder die mutmaßliche Einwilligung des Patienten) ist an einer strafbaren Körperverletzung festzuhalten. Dies soll so lange gelten, bis in Slowenien eine spezielle Inkriminierung solche Körperverletzungen eindeutig als ein privilegiertes Körperverletzungsdelikt abdeckt. So eine Lösung sei einem speziellen Delikt gegen die Selbstbestimmung des Patienten vorzuziehen.

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Criminal Offences Against Life in the Criminal Code of the Republic of Slovenia

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Abstract Crimes against life are regulated together with crimes against body in Chapter Fifteen of the Criminal Code. The object of criminal law protection is life of a human being. Life of a human being as the most important good protected by criminal law is also protected in cases where the death of an injured party occurs as a result of a crime whose primary object of protection is another good. Fortunately, there are not many criminal offences against life in the Republic of Slovenia. The author finds the regulation of crimes against life to be appropriate. Infanticide is an exception. Infanticide as a privileged form of the crime of manslaughter should, in view of the author, be eliminated, as today circumstances that have guided the legislator in defining a privileged form of manslaughter no longer exist.

Keywords: manslaughter, murder, voluntary manslaughter, causing death by negligence, infanticide

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1 Introduction

Crimes against life are regulated together with crimes against the body in Chapter Fifteen of the Criminal Code (hereinafter: KZ-1). The object of criminal law protection is the life of a human being. The life of a human being, as the most important good protected by criminal law, is also protected in cases where the death of an injured party occurs as a result of a crime whose primary object of protection is another good (such as causing of public danger entailing the death of one or more persons - paragraph five of Article 314 of the KZ-1).

The right to life is an absolute, natural human right that is restricted only in those legal systems that use the death penalty. The right to life is absolute until the moment when it is relativised by a killer.

Criminal law protects life from the beginning to the end. Man, however, is protected from birth to death - the definition of both terms can be disputable (Cvitanović et al., 2018: 62-63; Deisinger, 2017: 123-124; Korošec, 2019: 275). A distinction should be made between the terms "foetus" and "man" because, unlike the life of a human being, the life of the foetus is not absolutely protected, nor is the damage or destruction of the foetus through negligence.

One can speak about different types of death:

a) biological death - a state when no part of a human being is still alive;
b) clinical death - when there are still living parts of the human body;
c) a state of apparent death *(vita minima)* with the possibility of resuscitation, and;
d) brain death, which means the cessation of all possibilities for the life of the individual and such a state is considered the death of a person in the legal sense (Deisinger, 2017: 124).

Crimes against life can be divided into two subgroups:

a) crimes against existing life: manslaughter (Article 115), murder (Article 116), voluntary manslaughter (Article 117), negligent homicide (Article 118), infanticide (Article 119) and solicitation to and assistance in suicide (Article 120), and

b) crimes against nascent life - illegal abortion (Article 121).

Crimes against life are general criminal offences, with the exception of infanticide, which is a special criminal offence. According to the Criminal Code of the Republic of Slovenia, all criminal offences against life are physically injurious offences.

All crimes against life are intentional, except for causing death by negligence, because conceptually only negligence comes into consideration. Some offences require direct intent, and in some offences, eventual intent suffices. Voluntary manslaughter requires instantaneous intent *(dolus repentinus)*. Solicitation to and assistance to suicide is sanctioned separately.

In the period 2000-2016, as many as 930 violent deaths[1] were recorded in Slovenia. In 2016, there were 26 violent deaths in Slovenia (Statistical Office of the Republic of Slovenia, 2020). This number is not large at first glance, but, unfortunately, the situation is not as ideal as some would like to present it when considered in relative terms. For example, statistics for 2017 show that in that year the number of murders per 100,000 inhabitants in Maribor and Ljubljana was higher than in New York City. In 2017, there were 5.5 murders per 100,000 inhabitants in Maribor, 3.46 in Ljubljana and 3.35 in New York City (Kamenarič, 2018).

2 Crimes against life

2.1 Manslaughter (Article 115 of the KZ-1)[2]

The crime of manslaughter constitutes a fundamental crime against life. It is founded on Article 17 of the Constitution of the Republic of Slovenia which guarantees the inviolability of human life. Paragraph one thereof defines the fundamental form of this crime, while paragraph two defines qualified form of the offence.

[1] The term "violent death" refers to manslaughter, murder, voluntary manslaughter and infanticide.

[2] *"(1) Whoever takes the life of another human being shall be sentenced to imprisonment between five and fifteen years. (2) If two or more persons, who joined in order to commit manslaughter, commit the offence referred to in the preceding paragraph, the perpetrator shall be sentenced to imprisonment between ten and fifteen years."*

Anyone can be the perpetrator of this crime, which may be committed with direct or eventual intent. The perpetrator's intent is determined according to his or her attitude towards the consequences, towards the victim, his or her motives, goals, and other subjective circumstances. The objective circumstances of the act also indicate intentional conduct - e.g., the location of the blows, stab wounds or gunshot wounds, their number, the method of commission, the instruments employed, etc.

The object of this crime can only be the man as a living being from birth to death.

The crime may be carried out by commission or omission. The crime may be committed by employing any instruments or actions that can inflict death on a person. A crime may also be committed through omission, but only when the perpetrator is bound by the duty to prevent the occurrence of illicit consequences through active action (Deisinger, 2017: 123-124).

2.2 Murder (Article 116 of the KZ-1)[3]

This Article defines qualified forms of manslaughter (unlawful taking of life). The circumstance that qualifies the act may be the method of committing the crime, the motive of the perpetrator (self-serving interest, revenge), the circumstances surrounding the commission of the act or a special characteristic of the victim.

Anyone can be the perpetrator of this crime, which may be committed with intent only. In some forms of crime, the act can be committed with direct or eventual intent. However, in other forms of commission only direct intent can be considered due to the specific purpose driving the actions of the perpetrator (self-serving interest, revenge, and out of other vile motives).

In a murder committed in a gruesome manner, the perpetrator tortures the victim by causing severe physical pain or mental suffering, which in intensity and duration exceeds the usual suffering that accompanies any murder. This particular crime requires that the victim feel this torment. This form of crime is not committed if this

[3] *"Whoever murders another human being by taking his life 1) in a cruel or perfidious manner; 2) due to taking action in official acts to protect public security, or in a pre-trial criminal procedure, or due to decisions of state prosecutors, or due to the proceeding and decisions of judges, or due to criminal complaint, or testimony in a court proceeding; 3) because of violation of equality; 4) out of desire to murder, out of greed, in order to commit or to conceal another criminal offence, out of unscrupulous vengeance, or from other base motives; 5) with the act committed within a criminal organisation to commit such offences, shall be sentenced to imprisonment for not less than fifteen years."*

element is missing. This type of murder can be committed with both direct and eventual intent.

A murder is committed in a perfidious manner when the perpetrator abuses the victim's trust and commits the act in such a way that the victim cannot perceive the perpetrator's actions or methods (murder committed while the victim is asleep, poisoning, rape drugs).

The acts referred to in point 2 of Article 116 of the KZ-1 are examples of murders committed due to official proceedings. The reason for qualifying an act as such is because the victim has the special characteristic of being an official performing specific duties.

In the case of a criminal offence set out in point 3 of Article 116 of the KZ-1, the reason for murder is a violation of equality. This criminal offence is committed because of the victim's nationality, race, gender, language, religion, political or other belief, financial status, birth, education, social status, or any other personal circumstance.

In the case of a criminal offence set out in point four of Article 116 of the KZ-1, the perpetrator commits the offence out of murderous lust or a self-serving interest in order to commit or conceal some other criminal offence, out of ruthless revenge or out of some other vile motive. The perpetrator of a criminal act performed out of murderous lust kills exclusively for his own pleasure or satisfaction. The perpetrator finds pleasure in taking a person's life.

The crime of murder committed out of self-serving interest occurs when the perpetrator pursues a material benefit. This type of murder can be committed only with direct intent.

The same applies to murder committed for the purpose of committing or concealing another crime.

Ruthless revenge constitues a special form of revenge. Ruthless revenge, contrary to ordinary revenge, is fuelled by vile motives. Blood feuds, for example, were typical in some parts of the former Yugoslavia. Other vile motives may include hatred, envy, sexual initiatives, jealousy, ambition for advancement, etc. Due to the perpetrator's specific motive, only direct intent is possible in this type of crime.

An act constitutes a criminal offence under point 5 of Article 116 of the KZ-1 when it is committed as a consequence of a criminal association defined by Article 41 of the KZ-1 (Deisinger, 2017: 128-131).

The Criminal Act of the Republic of Slovenia, which was in force from 1 July 1977 until the entry into force of the Criminal Code of the Republic of Slovenia (hereinafter: the CC of the Republic of Slovenia) on 1 January 1995, distinguished several types of the crime of murder. In addition to the categories of murder already discussed, the CC also categorizes the following situations as constituting murder: if the perpetrator deliberately endangers the life of another person in the commission of a crime; if the perpetrator commits an act of ruthless violent conduct; if the perpetrator has committed a number of murders for which he or she has been tried at the same time after having been previously convicted of the crime of murder. Among these types of murder, the last two were the most controversial, as they were in conflict with the regulation in the general part of the Criminal Act of the Socialist Federal Republic of Yugoslavia (hereinafter: the SFRY CC). The Criminal Act of the Republic of Slovenia provided for the possibility of imposing a prison sentence of twenty years on the perpetrator of several murders for which the accused was tried at the same time, while under Article 48 of the SFRY CC the perpetrator of such crime could be sentenced to not more than fifteen years in prison. The provision setting a prison sentence of twenty years for a person convicted of a criminal offence of murder, which person had also previously been convicted of the criminal offence of murder, was in conflict with Article 46 of the SFRY CC. Article 46 estabished the imposition of a more severe sentence on recidivist offender, but called for a maximum of fifteen years in prison, and not twenty. These provisions of the Criminal Act of the Republic of Slovenia were also in conflict with Article 7 of the SFRY CC, which provided that the provisions of the general part of the SFRY CC should apply to all criminal offences defined by the laws of the Federation, the federal republics and autonomous provinces. These contradictions not only raised the question of the proper relationship between the federal criminal act and the criminal acts of the federal units, but also the question of the proper relationship

between the general and the special part of the Criminal Act. With the independence of the Republic of Slovenia in 1991, the first issue became irrelevant, while the second issue may still be relevant despite the provision of Article 9 of the KZ-1. These are interesting questions about the relationship between the KZ-1 and other acts, the relationship *lex posterior-lex priori* and some other, which will not be dealt with in this survey due to their scope and complexity.

2.3 Voluntary Manslaughter (Article 117 of the KZ-1)[4]

Voluntary manslaughter is a privileged form of murder, characterized by a sudden intent - *dolus repentinus*. Anyone can be the perpetrator of this crime. This crime may be committed with direct or eventual intent. The overt act is the same as that of the crime of murder, but only commission, not omission is considered.

The condition for a legal definition under this Article is the perpetrator's severe state of provocation or heat of passion, such as fury, wrath, fear, shame, or grief. In these cases, it is not the perpetrator's usual emotional condition, but an extreme state of provocation when the perpetrator's control over his or her behaviour is greatly impaired. Such state of provocation should be distinguished from pathological affective states as symptoms of mental illnesses. Affective states may be of a relatively short duration by nature.

Victims typically greatly contribute to the commission of crimes through their provocation of the perpetrator (Deisinger, 2017: 133).

2.4 Negligent homicide (Article 118 of the KZ-1)[5]

Anyone can be the perpetrator of negligent homicide. The crime can only be committed through acts of negligence, conscious or unconscious. This act may be carried out by commission or omission.

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[4] *»Whoever kills another person through no fault of his or her own under provocation of assault or serious personal insult from that person shall be sentenced to imprisonment for not less than one and not more than ten years.«*

[5] *»Whoever causes the death of another by negligence shall be sentenced to imprisonment for not less than six months and not more than five years.«*

Attention should be drawn to the difference or distinction between negligent homicide, on the one hand, and the offences of causing a particularly serious bodily injury and a serious bodily injury resulting in death and of causing public danger resulting in the death of one or more persons, on the other hand. Although the perpetrator's negligence is evident in relation to death in these cases, there are significant differences between these crimes. In the cases both of an aggravated bodily injury that leads to a fatal outcome (paragraph two of Article 123 of the KZ-1), and a particularly grievous bodily injury with a fatal outcome (paragraph two of Article 124 of the KZ-1), there is liability for a graver consequence. The perpetrator acts intentionally in relation to the underlying consequence (severe or particularly serious bodily injury), and negligently in relation to a serious consequence, i.e., death. However, there is no intentional conduct in causing death by negligence and the result is solely negligence on the part of the perpetrator.

The criminal offence of causing public danger which results in the death of one or more persons (paragraph five of Article 314 of the KZ-1) also involves the liability for a graver consequence. The perpetrator acts intentionally or through negligence in relation to the underlying consequence, i.e., the danger to human life or property of great value, while in relation to a graver consequence (death) he or she can only be accused of negligence. The difference thus lies in the fact that, in causing public danger, the perpetrator intentionally or negligently endangers the lives of an indefinite number of people, one or more of whom lose their lives due to the perpetrator's negligence. When causing death by negligence, the perpetrator causes the death of a person or endangers a small, individually determined number of persons, one of whom loses his or her life due to the perpetrator's negligence (Deisinger, 2017: 135-136).

2.5 Infanticide (Article 119 of the KZ-1)[6]

Infanticide is a privileged form of manslaughter. This is a special form of crime that can only be committed by the mother of the child victim of the crime, during or immediately after childbirth. The woman must be under the influence of childbirth, which affects her entire psychophysical condition as perpetrator. Any other participants in the crime would be held accountable as participants in the crime of

[6] *»A mother who takes her child's life during or immediately after giving birth by reason of mental disturbance provoked by giving birth shall be sentenced to imprisonment for not more than three years.«*

manslaughter. This crime can only be committed with intent (either direct or eventual). This act may be accomplished by commission or omission.

If the death of a child occurs at birth or after birth through negligence, the act should be defined as negligent homicide, which is quite illogical, as causing death by negligence is punishable more severely than infanticide (Deisinger, 2017: 137-138).

In recent literature, there are many concerns against treating infanticide as a privileged form of homicide (Korošec & Škrubej, 2017: 77-117).

2.6 Solicitation to and assistance in suicide (Article 120 of the KZ-1)[7]

Anyone can be the perpetrator of the crime of solicitation to and assistance in suicide. A crime other than that referred to in paragraph four may only be committed with intent, either direct or eventual. The crime referred to in paragraph four is committed with intent, given the cruel and inhumane treatment, while the perpetrator's liability for the committed or attempted suicide is based on negligence. If a perpetrator intentionally attempts, through cruel or inhumane treatment, to induce another person that is subordinate to or dependent on him to commit suicide, the perpetrator would be liable for a crime under paragraphs one, two or three of this Article (Deisinger, 2017: 140-141).

Aiding and abetting are specifically criminalised in this type of crime. This is because Slovenian law accepts the theory of accessoriness (dependence) in participation, according to which the possibility to punish participants in the narrower sense (aiders and abettors) depends on whether a perpetrator commits a crime or at least tries to commit it. Without a specific incrimination of aiding and abetting in suicide,

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[7] »*(1) Whoever intentionally solicits another person to kill himself or herself or assists him or her in doing so, resulting in that person indeed committing suicide, shall be sentenced to imprisonment for not less than six months and not more than five years. (2) Whoever commits the offence referred to in the preceding paragraph against a minor above fourteen years of age or against a person whose ability to understand the meaning of his or her act or to control his conduct was substantially diminished shall be sentenced to imprisonment for not less than one and not more than ten years. (3) In the event of the offence referred to in paragraph one of the this Article being committed against a minor under fourteen years of age or against a person who was not capable of understanding the meaning of his or her act or of controlling his or her conduct shall be punished according to the prescription for manslaughter or murder. (4) Whoever treats his or her subordinate or a person depending on him or her in a cruel or inhumane manner, resulting in this person's suicide, shall be sentenced to imprisonment for not less than six months and not more than five years. (5) Whoever, under particularly mitigating circumstances, assists another person to commit suicide, and if that person indeed commits suicide, shall be sentenced to imprisonment for not more than three years. (6) If, relating to a criminal offence referred to in the above paragraphs, the suicide has only been attempted, the Court may reduce the punishment of the perpetrator.*«

it would not be punishable since it is not the criminal conduct of the perpetrator him or herself.

3 Crime against nascent life

3.1 Illegal abortion (Article 121 of the KZ-1)[8]

Among the forms of commission of this crime, only the crimes set out in paragraphs one and two of this Article may be considered as crimes against life. Other forms of commission are not directed against life

The perpetrator of the crime referred to in paragraph one may be anyone except a pregnant woman who is terminating her pregnancy or whose pregnancy is being terminated. A legal person may also be held liable for committing a criminal offence. A pregnant woman cannot be the perpetrator of this crime, nor can she be an aider or abettor in this crime.

This crime can only be committed with intent. The woman's consent does not preclude unlawfulness. Attempt and assistance equal the accomplished crime.

A crime is qualified if it is committed without the consent of the pregnant woman.

4 Conclusion

Fortunately, there are not many criminal offenses against life in the Republic of Slovenia. Nevertheless, these are important crimes, as they protect life of a human being as the most important good protected by criminal law. I find the regulation of crimes against life by the Criminal Code of the Republic of Slovenia to be appropriate. Infanticide is an exception. Infanticide as a privileged form of the crime

[8] *»(1) Whoever performs or commences to perform an abortion upon a pregnant woman with her consent or assists her in inducing the abortion in a manner not congruous with medical practice and methods of termination of pregnancy, specified by law, shall be sentenced to imprisonment between six months and five years. (2) Whoever performs or commences to perform an abortion upon a pregnant woman without her consent shall be sentenced to imprisonment for not less than one and not more than eight years. (3) Whoever affects the selection of gender of the future child by using fertilisation method with medical assistance, unless in order to avoid severe hereditary disease connected to gender, shall be sentenced to imprisonment of not more than three years. (4) Whoever illegally performs the procedure of fertilisation with biomedical assistance due to surrogate motherhood shall be punished in the same manner as in the preceding paragraph of this Article. (5) Whoever trades in sperm cells, unfertilised egg cells and early human embryos shall be punished in the same manner as in paragraph three of this Article. (6) If the act under preceding paragraphs results in severe bodily harm of the woman, the perpetrator shall be sentenced to imprisonment between one and ten years. (7) If the act under preceding paragraphs results in severe bodily harm of the woman, the perpetrator shall be sentenced to imprisonment between one and ten years.«*

of manslaughter should, in my view, be eliminated, as today circumstances that have guided the legislator in defining a privileged form of manslaughter no longer exist.

Legal Source

Criminal Code/Kazenski zakonik RS - KZ-1, Official Gazette of RS, No. 55/08 w/amendments.

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Crimes Against Human Life in Turkish Penal Code

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Abstract Human life is one of the most important values protected by law. Crimes and punishments are legitimate and essential tools necessary to protect such values. Although most crimes concerned with the protection of human life are organized in the Turkish Penal Code, other regulations serving the same purpose do exist as well in other codes. It is not open to discussion that intentional crimes require heavier penalty than negligent ones and damage-causing crimes than life-threatening ones. According to the Turkish Penal Code, life exists when a person is born healthy and alive and perishes with that person's death. Although birth and death have their own proof procedures and means in separate private law rules, no such rules are in fact regulated in Criminal Law. In Turkish Law the embryo and fetus are not considered as a human entity. The crime of killing a newborn baby within the frame of honor killing does not exist in Turkish law. Furthermore, killing people in the name of customs or vendetta is a crime frequently encountered in Turkey. Turkish legislation punishes all kinds of aid to suicide as well. Finally, death penalty does not exist in the Turkish legal system.

Keywords: human life, beginning and end of life, human honour, survival precautions, right to live and die

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1 Introduction

Human life is one of the most important subjects addressed by law. Crimes and punishments resulting therefrom, are legitimate and substantive tools for the protection of human life. Despite the fact that most of the legislation designed to protect human life exists in the Turkish Penal Code (hereinafter: TPC) (Tacir, 2013: 1302), there are other Turkish regulations that exist in treaties and other branches of the law that are designed to protect human life. Countries are obliged to protect human life, not only through different branches of law, but particularly through the wordings of the TPC itself.

The European Convention on Human Rights, following Article 90/5 of the Turkish Constitution, along with being considered so important in relation to the TPC and of the utmost importance, is considered a superior domestic regulation. According to Article 2 of the International Convention, protecting the right to life by laws should be given the highest priority. Article 2 states that no one's life can be deliberately terminated, except for the execution of the death penalty imposed by the court and for a crime punished with the death penalty by the law. In some cases, specified in paragraph 2 of Article 2, deaths occurring during the protection of a person against violence, the arrest of a suspect, preventing a detainee from escaping, or the lawful suppression of a riot or mutiny, shall not be considered unlawful so long as the rule of proportionality is observed. Parallel regulations to these rules are also observed both in the Turkish Constitution and the TPC.

Article 17 of the Turkish Constitution regulates the immunity of the person and the protection of his material and spiritual existence. Accordingly, everyone has the right not only to life but to protect and develop their material and spiritual existence. The integrity of a person's body cannot be violated, except in case of medical necessities and in such circumstances only in compliance with written words of the law; also, a person's body cannot be subjected to scientific and medical experiments without the person's consent. No one will be subjected to torture or tormentor to punishment or treatment incompatible with human dignity. However, certain defined situations are excluded from the provision of the first paragraph of Article 17. Such situations include acting in legitimate cases of self-defense, the execution of arrest and detention orders, preventing a prisoner or convict from escaping, suppression of an uprising or an insurgency, or in cases where death execution by using a weapon

permitted by law during the execution of orders given by the competent authority in a state of emergency

Regulations in the TPC in parallel with the rules of the European Convention on Human Rights and Turkish Constitution will be discussed in detail later in this article.

In accordance with Article 90/5 of the Turkish Constitution, the domestic law regulation, which supercedes the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, did not explicitly in its text recognize the concept of human birth and death. Although some concepts are defined in the TPC, the concepts of the beginning and end of human life are not defined. Furthermore, the crimes related to organ and tissue transplantation defined in the TPC also failed to recognize the concepts of the beginning and end of human life. The subject of 'death' in relation with Organ and Tissue Transplantation mentioned below within the two restricted regulation, also being taken into account in terms of criminal law, but remains uncertain in the implementation of this law. Again as will be mentioned below, the articles contained within the TPC that address the illegal termination of pregnancy, accept the embryo or fetus (in the mother's womb) as a part of the mother's body until the end of 10 weeks of pregnancy; After 10 weeks, these articles accept and protect the embryo as an 'emerging life' independent from the human (the pregnant mother).

According to Article 82/1 of the Turkish Civil Code (hereinafter: TCC), the person's personality begins when the baby is born healthy and fully detached from his mother and ends with death. No matter how many methods and means related to the proof of birth and death and the presumption of death are regulated in Articles 29, 30, and 31 of the TCC that are considered valid in relation with Private Law branches, these rules are not considered to be valid in criminal procedures.

According to Article 99 of the TPC, if the mother's pregnancy has not exceeded ten weeks, it can be terminated with her consent, even in where there is no medical necessity. According to Article 6/2 of the Law on Population Planning, if the woman is married, the consent of the spouse is also required for the evacuation of the uterus. If the pregnant woman is a minor (a child), under guardianship or is mentally ill, although the permission of the legal representative or the court is required to

terminate the life of the fetus if the child's parent or peace court requires time to grant permission and the life of the concerned mother or one of her vital organs is under threat and requires immediate intervention then the upper mentioned permission renders void (Law on Population Planning Article 6/1-3). In case the pregnancy period exceeds 10 weeks, ending the pregnancy, even with the permission of the mother, is considered a crime (TPC Article 100). In case of medical necessity (within the boundaries of the diseases related to the mother or fetus that are listed in Article 5 of the Law on population Planning), the pregnancy can always be terminated, with the consent of the pregnant mother, regardless of the duration of the pregnancy (TPC Article 99). If the woman becomes pregnant as a result of being a victim of a crime, and she intended to terminate her pregnancy, the person who terminates the pregnancy (and the mother) will not be punished provided that the pregnancy term is not more than twenty weeks (TPC Article 99/6).

In addition to the controversy whether the beginning of human life begins with the embryo or fetus, concerning positive norms, there is a need for a new set of regulations for the embryo or fetus to be considered human and for their legal status to be determined (Tacir, 2013: 1303 & so on & 1317).

In case it becomes necessary to save the lives of either the pregnant mother or the fetus, and since the mother is a living person and the fetus is in the mother's womb (unlike the duration of pregnancy condition), and since the mother's body cannot be touched unless she gives her consent, if the mother desires to stay alive she will be given the priority to live. The opposite is also true: if the mother asks for a life-threatening abortion to save the fetus, the mother's wish must be honored, despite the possibility of the mother losing her life in the process. The existing norms stress that the pregnant mother is a human being and that she enjoys the full right not to allow any interference regarding her own body and to determine her own destiny. From this we can conclude that the life of the embryo and/or fetus is given fewer legal protections when compared to that of humans'.

Devising a definition of the concept of 'death' is a difficult task and has led to a good deal of controversy. Another issue is whether it will be applied in the field of all crimes or only in organ and tissue transplantation. According to Article 11 of the Law on Organ and Tissue Removal, Preservation, Vaccination, and Transplantation (hereinafter: OTTL), '*medical death*' is considered to have occurred when a unanimous decision is taken, in accordance with evidence-based medicine rules, by one

neurologist or neurosurgeon, one anaesthesiology and reanimation or two intensive care specialist physicians (doctors). The meaning of the concept of medical death, since there is no consensus around it, must be understood within the context of the controversy that presently exists among both medical and legal professionals. Apart from the doctrines of medical death, the Turkish Medical Association, in its 1968 decision, adopted the view, that the death of the concerned person will be accepted if all human reflexes end, in addition to brain death. The High Health Council adopted the brain death criterion in its 1969 decision. The Turkish Neurological Association adopted the criteria for brain death during the process of preparing a '*brain death diagnostic guide*' in 2014 (Hakeri, 2020: 513). Except for the "*medical death*" concept mentioned in this article, there is no other related regulation and clarification in this Law. On the other hand, the Supplementary Article of the Organ and Tissue Transplantation Services Regulation, considered at length a '*brain death*' diagnosis and listed some procedures and criteria in connection therewith. The Supplementary Article, as it relates to the detection of death, indirectly regulates that, at least in situations involving organ and tissue transplants, it utilizes the 'brain death' criterion. Although in the context of organ and tissue transplantations Article 11 has caused a certain amount of uncertainty and objections, both in practice and doctrine, the concept of "brain death" as legally defining the occurrence of death is of crucial importance.

There is no specific Embryo Protection Law in Turkish law. However, the Regulation on Assisted Reproductive Treatment Practices and Assisted Reproductive Treatment Centres, prohibits (by administrative sanctions) many behaviors such as illegal in vitro fertilization, excess embryo production, experimentation on an embryo, illegal embryo production, storage or negligence, and actions of embryo production for in vitro fertilization for unmarried people (without technical criminal law enforcement) (see Regulation Article 52 & others).

Pursuant to the annexed Article 15/2, which was added to the OTTL in 2018, those who donate, vaccinate, keep, use, store and transport embryos and reproductive cells in violation of this law, and those who purchase and sell them, and those who mediate their purchase and sale, or those who act as brokers, or encourage or facilitates such acts, or anyone who advertises or publishes an advertisement, is sentenced to imprisonment from three to five years and a judicial fine from one thousand to two thousand days, on a condition that the act does not constitute a crime requiring a heavier penalty.

According to the Annexed Article 1 added to the OTTL in 2018, in cases involving either unnatural childbearing or of medical necessity, the reproductive cells of women and/or men, made available for fertilization by medical methods and reproductive cells or embryos, whether applied inside or outside of the body, are introduced to expectant mothers. This method is only used with married spouses. It is forbidden to have a child and to be a surrogate mother through the administration of reproductive cells taken from one or both spouses and the embryo obtained from these cells. Donation using someone else's reproductive cell and/or embryo and donating, selling, keeping, using, storing, transporting, importing, exporting, and mediating these transactions are prohibited.

In situations in compliance with the law and with the existence of reasons for fault elimination and sometimes for the sake of protecting human life or any other right, the rights and freedoms of others, including the right to life, can be harmed or endangered (TPC Articles 24-30). In such cases, sometimes a penalty elimination, and penalty reduction is possible. On the other hand, in cases that eliminate or reduce the ability to commit fault (TPC Articles 31-34), security measures and/or mitigated penalties can be applied to the perpetrator against violation of the right to life. Attempted crime, voluntary renunciation (TPC Articles 35-36), complicity (TPC Articles 37-41) compound crime and conceptual aggregation (TPC Articles 42 and 44), are organized as general provisions. Therefore, these rules also indirectly contribute to the protection of the right to life. On the other hand, the chain crime (joint crime) rules cannot be applied to the crime of murder. Due to the importance, the lawmaker gives to human life, in case more than one person is killed within the same plan taken under one decision, the lawmaker tends not to apply the rules of the chain crime thus applying one increased, the punishment of one committed crime, instead, the lawmaker accepts the existence of many crimes, whether the action is a murder and/or attempted murder, thus punishing each crime separately (see TPC Article 43/3).

The Turkish Penal Code tends, in an attempt to shed more importance on human life, and in case the crime is committed outside of Turkey but being investigated as an introduction to being prosecuted in Turkey, tends to activate, besides the territoriality rules, and based on the personality of the perpetrator and the victim, the fairness and universality rules (Articles 9-19). Likewise, in addition to the rules mentioned in Article 7 and the articles that follow it in The Law on International Judicial Cooperation in Criminal Matters article, there are detailed provisions in

terms of investigating and prosecuting related to many crimes, including the crime of ending human life under certain conditions. Also. The European Convention on Extradition and the European Convention on the Value of Criminal Judgments are also the sources used in this field.

2 Human Life as Legal Value Protected by Crimes

Besides the crimes related to harm and danger which aim to protect the legal value of human life, intentional and negligent crimes and even crimes aggravated by the consequences (and acts of killing which exceeds the perpetrator intent) are classified as crimes.

Article 81 of the Turkish Penal Code has stated the sentence of life imprisonment for the simple version of the crime of deliberate manslaughter.[1] The conditions of the crime of deliberate manslaughter (where the punishment of the crime is aggravated), is regulated in Article 81 of the Turkish Penal Code as follows: when the crime of deliberate manslaughter is committed

a) deliberately;
b) due to monstrous feeling or torment;
c) by fire, flood, ravage, sinking or bombing, or using nuclear, biological or chemical weapons;
d)against either an ancestor or a descendant a spouse or sibling;
e) against a child or a person who is unable to defend himself due to disability in body or spirit;
f) against a woman known to be pregnant,
g) against on duty public officer;
h) in an attempt to conceal a crime, remove an evidence or facilitating the commitment or evasion of the crime;
i) because of outrage due to inability to commit a crime;
j) with the motive of blood killing;
k) motivated by custom, the perpetrator is sentenced to aggravated life imprisonment.

[1] For more details on the elements and character of this crime see Hakeri, 2007; Polat, 1999; Ekinci & Özcan, 2004.

According to Article 83 of the Turkish Penal Code, if the crime of deliberate manslaughter is committed due to an act of negligence, the penalty of the perpetrator is reduced by a serious amount of rates specified in this article. According to Article 85 of TPC, the penalty of causing the death of a person due to negligence is lighter than deliberate manslaughter. If the act that caused death by negligence caused the death of more than one person or the death of one or more persons and injuries to one or more persons, the perpetrator's punishment is increased (the perpetrator is given a single but aggravated punishment = special aggregation state).

Article 84 of TPC has organized the crime of aiding a person’s suicide, the context of this crime aims to protect human life as well as to prohibit active euthanasia acts. In literature, in terms of the prohibition of active euthanasia acts, it can be benefited from the content of Article 26/2 of TPC. According to Article 26/2, for the consent of the person concerned to have a civil effect incompliance with the law, the subject of that consent must be "an absolutely disposable right". According to the doctrine, persons have no absolute disposable right over the right to life. Article 84 of TPC regulates that the person who instigates or encourages someone else to commit suicide, supports the suicide decision of another person or helps someone else's suicide in any way, in case the person’s suicide happens, the perpetrator of such actions will be subject to aggravated penalty. Public incitement to suicide is also a reason to increase the punishment. On the other hand, those who did not develop the ability to perceive the meaning and consequences of their actions or those who have encouraged the suicidal action of the dead person and those who use force and threat to push people to commit suicide, are held responsible for deliberate killing.

Active euthanasia should also be regulated as a right in Turkish law. Essentially, in addition to the necessity of the abolition of Article 84 of TPC and the ending of all argument related to it, there should be a clear statement addressing that the phrase "absolute right to be disposed of", which is mentioned in Article 26/2 of TPC, regulating the effect of the consent of the person concerned, does not include the "right to life".[2]

[2] For the arguments in Turkish Law and the reasons for our view that active euthanasia should be explicitly allowed see Ünver, 2011b: 27-69.

Since there is no such explicit regulation, it is also advocated that when an active euthanasia action is carried out, considering the motive of the perpetrator, this will be deemed a discretionary reason in favor of the perpetrator and the punishment will be reduced (Centel, Zafer & Çakmut, 2017: 36). It is not explained though by the authors who support this opinion, in a situation where the law prohibits and does not allow the right of life's owner himself from committing such an action, grants the perpetrator of such a crime against the owner of that right a reason for the reduction of the sentence.

Due to the important role of presidents in the country, historically, the assassination of heads of a country is often specifically regulated in criminal laws. The Turkish Penal Code has opted a different penalty for the assassination of the Turkish president and any crime committed against the head of state. Pursuant to Article 310/1 of the TPC, the person who assassinates the President is punished with aggravated life imprisonment. If the act of assassination stopped as an attempted crime, the penalty is imposed as if the crime was completed. On the other hand, and pursuant to Article 340/1 of TPC, the punishment to be imposed on a person who commits an offense against the president of a foreign state is increased by one eighth. If the crime's punishment requires life imprisonment, aggravated life imprisonment is imposed. Despite the different approaches, in the event of ending human life or attempting to do so, the fact that the victim is a Turkish or foreign heads of state did not make a difference in the amount of punishment.

Whether in the form of a criminal organization, a single person, or complicity, encouraging or persuading the convicts or detainees to go on hunger strike or death fast (TPC Article 298/2) is punished as "the crime of preventing nutrition". In addition, if death has occurred due to the prevention of nutrition, the perpetrator is also punished according to the provisions regarding the crimes of deliberate manslaughter (TPC Article 298/3). This provision aims to protect the lives of other people, especially by preventing others from forcing someone else to go on a death or hunger strike for political purposes. Another complementary part of this provision is regulated in Article 82 of the Law on the Execution of Penalties and Security Measures (EPSML), accordingly, if convicts constantly refuse food and drink given to them for whatever reason; they are informed by the prison facility doctor about the bad consequences of their actions and the physical and mental damages that will occur accordingly. The psychosocial service unit also works to help the involved person to give up these actions, and in case of reaching no result, their

nutrition is started in a suitable environment according to the regime determined by the institution doctor. Among the convicts who are on hunger strike or death fast and who refuse to be fed, thus reaches a life-threatening situation or whose consciousness is impaired despite the measures and studies carried out following the first paragraph, regardless of their wishes, immediate hospitalization is carried out for the purpose of medical research, treatment and measures such as nutrition are applied provided that they do not pose a danger to their health and lives. Apart from the cases mentioned above, the provisions of the second paragraph are also applied in the event that convicts suffering from previous health problem-posing a severe threat to their health or life, or to the health and lives of the other facility convicts by refusing examination and treatment. The measures foreseen in this article are applied under the advice and management of the institution doctor. However, if the inability of the institution physician to intervene on time or the delay may pose a life-threatening situation to the convict, these measures are applied without seeking the conditions specified in the second paragraph. Under this article, coercive measures for the protection of the convicts' health and assuring their treatment are applied provided that they are not degrading. It is worth noting, that both Article 298 and Article 82 scope of application is in terms of convicts and detainees, due to their status and for the aim of protection of their right of life, such scope does not extend to the protection of individuals who want to commit suicide willingly and are not convicted or detained.

3 Human Life as a Tool of Crimes

While some crimes aim to protect different legal values, they also protect human life in cases where the material subject of the crime is human life as well. Whereas some crimes aim to protect more than one legal value, one of these legal values is human life. Article 76 of TPC regulates genocide crimes. The crime of genocide can be committed with the murder of a single person or with the murder of more than one person: as long as the other elements of this crime exist as well. Undoubtedly, the crime of genocide is not only committed by deliberate manslaughter; In addition to deliberate manslaughter, this crime may be committed by performing any of the other stated actions mentioned in this article. Without prejudice to the provisions on compound crime and chain crimes described earlier, if one or more than one person is killed due to genocide, this crime will be seriously punished. According to Article 76/2 of TPC, the perpetrator of the genocide crime is sentenced to aggravated life imprisonment. However, in terms of the crimes related to deliberate

manslaughter and wounding committed within the scope of genocide, actual aggregation provisions are applied in accordance with the number of victims. In addition, regarding genocides committed by legal entities security measures are imposed and the statute of limitations shall not be activated. Any crime group similar to genocide crime is regulated under Article 77 of TPC titled Crimes against Humanity. In this crime too, deliberate manslaughter is punished under certain additional conditions. As optional crimes are considered a mobile crime, deliberate manslaughter is considered an optional crime. In addition, in terms of the crimes of deliberate manslaughter committed within the scope of genocide, the actual aggregation provisions are applied according to the determined number of victims, the legislator, in an attempt to increase the punishment given, neither wanted to apply one punishment in accordance with Article 77 nor to apply the rules of a chain crime (Article 43 of TPC); instead, the legislator connected the number of punishments with the number of victims of genocide. Again, the act of those who establish, manage, or become a member of an organization for the purpose of committing genocide are punished independently. Security precautions are also imposed on legal entities related to genocide crime and it is clearly stated that the statute of limitations will not be activated.

Another crime of similar nature, the crime of Immigrant Smuggling and Human Trafficking organized in Article 79 of TPC. Paragraph 2 of this article states that the stated crime, aimed at preventing the endangerment of human life by considering the situation that posed a danger to the victims' life as a reason to increase the punishment. According to this crime; the punishment to be imposed is increased by one half if it is committed in cooperation of more than one person, and from half, to one fold if it is committed within the framework of the activities of an organization. Again, if this crime is committed within the framework of the activity of a legal entity, in addition to the security measures specific to impose on the legal entity there is an attempt to impose increased protection measures as well.

Finally, Article 213 of TPC has considered, creating anxiety, fear, and panic among the people, by making public life threats as a crime for the purpose of preventing human life from being subject to threat. On one hand, for protecting the peace and security of the people, on the other hand, for assuring that it is not acceptable to cause unrest to human life through threatening. The threat that this article aims to avoid is that people do not risk their lives, and the criminals do not achieve their

unjust goals, although people might not bow to the threat, their lives will be at risk. The crime is organized to prevent both cases.

4 Human Life as the Unwanted Consequence of Crimes

Even if some human behaviors are directed to eliminate human life, such behaviors, for different reasons, can also lead to the end of it. The same can be said in terms of damage crimes and danger crimes. The most prominent of these possibilities, is the possibility of killing a person by transcending the intention to injure, is the crime aggravated due to the final result. In such cases, the special conditions brought by Article 23 of TPC is needed in order to punish the perpetrator due to a more severe or different consequence. Undoubtedly, in this possibility, often the perpetrator is punished with a heavier penalty. According to this provision, if an action causes the formation of a heavier or other consequence than intended, the person must be proven to have acted negligently the least, in order to be held responsible for such a result.

In the Turkish Penal Code, and in various cases where the crime resulting in injury has become aggravated, either the death of a person or the termination of the fetus (the human life that is being formed) is regulated as the aggravating cause of the punishment (crime nature condition). For example, if death has occurred as a result of deliberate injury committed by a person, Pursuant to Article 87/4 of TPC, the punishment of the perpetrator is determined by the legislator to be more severe than that of intentional injury. Likewise, if the crime of deliberate injury was committed against a pregnant woman and caused her child to be born prematurely (TPC Article 87/1-e) or if it was committed against a pregnant woman and caused the miscarriage of her child (TPC Article 87/2-e), these situations are also aggravating reasons for crime's penalty. (Also cf. TPC Articles 89/2-f, 89/3-g, 95/1-e, and 95/2-e). On the other hand, if the victim dies as a result of the crime of intentional injury, the provisions regarding the crime of deliberate manslaughter will be applied to the perpetrator (TPC Article 91/8).

According to Article 3 of ECHR, no one can be subjected to torture or to inhuman or degrading treatment or punishment.[3] No matter how much the act of torture aims to violate fundamental values such as dignity, body and psychological health, and fair trial, as a result of such action, the human right to life is often violated as well, special arrangements are required for avoiding such undesirable consequences. There has been special regulation in terms of torture crime regulated in The Turkish Penal Code and the aggravated situation due to the consequence in terms of criminal law. For example, if an act of torture puts the life of the victim in a dangerous situation, the punishment of the perpetrator will be increased (TPC Article 95/1-d). Likewise, if death occurs as a result of torture, the perpetrator will be sentenced to aggravated life imprisonment (TPC Article 95/4).

In accordance to the social solidarity principle and the state's imposition of duties on individuals in the society, special exceptional cases necessitate a regulation that prevents the violation of the right to life committed by simpler crimes. For example, if a person, responsible for the protection and supervision of another person who is unable to manage himself due to his age or due to a certain illness, leaves that person alone, thus causing in this person's death or injury, the perpetrator shall be aggravatingly punished in relation to his action's result. (TPC Article 97/1). The purpose of such obligation (not to abandon) set by the criminal law aims at preventing the unwanted violation of the right to life (Article 97/2 of the TPC).

The lawmaker also wanted to prevent the violation of the right to life with other similar criminal law duties through acts that are aggravated due to the action's consequence: Indeed, the person who is unable to manage himself due to his age, illness or injury or for any other reason, while another person fails to help or notify the relevant authorities immediately, to the extent permitted by the circumstances, that person who fails to notify the relevant authorities immediately will be punished (TPC Article 98/1), and if the person dies due to failure to fulfill the obligation of assistance or notification, the punishment to be imposed on the perpetrator will be a heavier penalty than that stipulated in the law (TPC Article 98/2).

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[3] For additional ECHR decisions see *S.Ç. application*, application number: 2016/58121, decision date: 09.06.2020 & *Feride Kaya application* (2), application number: 2016/13985, decision date: 9/6/2020; *Davut Yıldız application*(2), application number: 2017/39073, decision date: 01.07.2020; *Castellani v. France*, application no. 43207/16, decision date: 30.04.2020 ve *Z. v. Bulgaria*, application no.: 39257/17, decision date: 28.05.2020; *Ş.Ç. application*, application number: 2016/3594, decision date: 26/2/2020; *Barış Toylak application*, application number: 2016/10047, decision date: 15.01.2020; *Salih Şahin application*, application number: 2016/13964, decision date: 28.01.2020.

Likewise, the punishment of the perpetrator will be subject to aggravation if the victim of sexual assault crime (TPC Article 102/5) or a sexual abuse of a child crime (TPC Article 103/6) results in that person's or death as a result of sexual assault crime or sexual abuse of the child.

Finally, the Organ and Tissue Collection, Storage, Vaccination and Transplantation Law, and especially in terms of legal organ and tissue transplants done according to Articles 91-93 has introduced regulations that prevent violation of the right to life. According to Article 8 of Organ and Tissue Collection, Storage, Vaccination, and Transplantation Law, it is legally forbidden to conduct organs and tissue operations that will end or endanger the life of the organ or tissue donor. Violating this prohibition is considered a crime punished in accordance with Article 15/1 of the Organ and Tissue Collection, Storage, Vaccination, and Transplantation Law as well as according to the provisions of Article 91 of the TPC.

5 Human Life as the Subject Prevention Rules in the Constitution, Substantive Criminal Law, Criminal Procedure Law, Health Law or Police Law

Starting with the Constitution, the regulations aim to prevent the violation of human life directly or indirectly, sometimes through the type of crime, sometimes through a criminal procedure measure, sometimes through an amnesty, other times through a penal execution rule, and sometimes through a police-prevention law. There are clear examples to this in Turkish law. To mention a few:

The special right to grant amnesty given to The President in order to prevent any negative consequences, including future death. The President of the Republic mitigates or abolishes the sentences of persons due to permanent illness, disability and old age (Article 104/15 of the Constitution). Likewise, according to Article 16 of the Law on the Execution of Criminal and Security Measures, if there is a vital risk to the convict due to some diseases, under certain conditions, the convict punishment period is executed in the section of health institutions reserved for convicts or the execution of the sentence is delayed. Again, the General Health Law Articles 29-281, regulated in detail the measures to be taken against epidemic diseases, as well as the provisions of Articles 282-302, have technically regulated the crime penalties and misdemeanor penalties to be applied to those who act against the regulated measures. In addition, any person who does not comply with the

measures taken by the competent authorities to quarantine the place where a person has contracted or died of one of infectious diseases is sentenced to imprisonment from two months to one year (TPC Article 195).

If a person has been injured or died as a result of being a subject of human experimentation, the provisions regarding the crime of deliberate manslaughter are applied (TPC Article 90/5). The perpetrators who commit actions in a way that could be dangerous for the lives of people or in a way that could create fear, anxiety, or panic in people through: a) incendiary b) landslide, avalanche, inundation, or flood, c) use of a gun, or explosives are punished with imprisonment from six months to three years (TPC Article 170). The person who, by leaving the atomic energy unsupervised, causes an explosion and thereby considerably endangers someone else's life, is punished with not less than imprisonment (TPC Article 173); By changing any sign placed in order to ensure the safe passage on land, sea, air or railway transportation, making the sign unusable, removing the sign from its place, giving false signs, placing a barrier on the transit, arrival, departure or landing routes or interfering with the technical operating system, thus endangering the life of others due to such actions, is sentenced to imprisonment from one year to six years (TPC m. 179/1); Any person who negligently causes a danger in terms of the life of persons in sea, air or railway transportation, is sentenced to imprisonment from three months to three years (TPC Article 180/1); Any person who endangers the lives of people by adding poison to the drinking water or food or anything suitable to be eaten or used or consumed or adding poison to any other material or by causing damage to such things by other means, is sentenced to imprisonment from two to fifteen years (TPC Article 185/1). In the event that the acts specified in the above paragraph are committed against the obligation of attention and care, the sentence is imposed from three months to one year (TPC Article 185/2); Anyone who sells, supplies, or stores all kinds of foods or drugs that are spoiled or changed in such a way as to endanger the lives of persons are sentenced to imprisonment from one year to five years and a judicial fine up to one thousand five hundred days (TPC Article 186/1); Anyone who produces or sells drugs in a way that endangers the life and health of people is sentenced to imprisonment from one to five years and a judicial fine (TPC Article 187); Any person who produces, possesses, sells or transfers a substance that contains poison and whose production, possession or sale is subject to permission, is punished with imprisonment from two months to one year (TPC Article 193/1). Any person who delivers substances that may pose a health hazard to children, mentally ill or volatile substance users or offers them to

such people for consumption is punished with imprisonment from six months to one year (TPC Article 194) and also crimes related to drugs and stimulants regulated by very different actions (TPC Article 188-192) also indirectly protects the right to life (besides the right to health).

Although not only specific to the protection of the right to life, and due to the indirect effect of both general prevention and special prevention purposes of the penal sanction, the following provisions also indirectly contribute to the protection of the right to life: the offenses of not reporting the crime to the competent authorities by civilians (TPC Article 278), public officers (TPC Article 279), and healthcare professionals (TPC Article 280). Moreover, it should be admitted that many of the crimes against the court mentioned in the Turkish Penal Code (TPC Articles 267-297), along with other crimes, also enlighten the crimes that put an end to life and punish their perpetrators, and have an indirect prevention function.

Undoubtedly, although indirectly, the right to life is also protected by criminal procedure law. For example, in the context of Criminal Procedural law, in the process of medical examination and or body sample collection conducted on a suspect or an accused person, the intervention should danger of harm the health of that person, or in order to perform an internal physical examination or to take a blood or similar biological samples from the body the health of the person concerned should not be subjected to danger (CPL Article 75/2); in order to be able to perform an external or internal body examination on the body of the victim for the purpose of evidence collection from a crime scene, or to take samples such as hair, saliva and nails, or to take a blood or similar biological samples; the competent authority's permission is required, such a permission is granted provided that it does not endanger the person's health and does not require surgical intervention (CPL Article 76/1).

Finally, if the subject is examined in terms of law enforcement (Police, Gendarmerie etc.) law, provisions that indirectly protect the right to life are applied in this legal field. In particular; the necessity for using weapons by the police to perform their duties is subject to very strict conditions in terms of purpose, subject, and principle of proportionality (See Article 16 of the Police Duties and Authority Law). In addition, the Police, where regulated by law, must address the person, in a hearable voice, to "stop" before using a weapon. If the person does not obey the stop order and continues to flee, the polis officer must fire a warning shot first, despite this, if

the person continues to flee making it impossible for the police officer to seize him, the polis officer has the right to fire directly towards the person in an attempt to make his stop. While the police use their authority to use force or weapons in order to stop resistance or capture a person, if an attack against the police is attempted using a weapon, the police may fire with a weapon to the extent of inactivating the danger of the attack attempted by the attacker[4]. As it is noticed, in the line of duty the police attempt to protect the lives of others from attacks or dangers, they do not have the right to kill suspects, accused or convicts with a gun, rather they may shoot, in accordance with certain rules, in order to catch and/or prevent attack-danger.

6 Conclusion

In cases involving both murder and other violent crimes, some judges regrettably reduce severe penalties on cultural, customary, religious, moral, or other arbitrary grounds. While reducing the penalty, not based on legal conditions, and according to "unjust provocation" institution or "on the grounds of discretionary reduction" articles may be abused. In such cases, Judges tend to put themselves in the position of a lawmaker and reduce the punishment, especially if the victim is a woman or a child, in a way that is incompatible with the law and the case file.

In addition to the negligence in the investigation and prosecution that surround these crimes, people's right to security is not properly protected, also it cannot be said that the measures taken are also adequately implemented. In this regard, a special law (Law on Protection of Family and Prevention of Violence Against Women) that allows many measures to be taken, such as suspension (Prohibition of approaching to a certain distance or coming to the residence), especially for people with the potential of conducting violence against others, and whether they are married or not, is not implemented in practice and even those who demand protection from the police cannot be protected and are killed in most of the cases. On the contrary, even the Council of Europe Convention on the Prevention and Combating of Violence Against Women and Domestic Violence (the Istanbul Convention), which gives duties to the state to safeguard women's right to life and protect them, has been brought up for debate, and it is currently subject to withdrawal from this convention or to subject to legal studies in order to put reservations regarding certain articles.

[4] Regarding bazaar and neighborhood guards, the Police Duties and Authority Law Article 16 gave them the authority to use guns and power (see 11.06.2020 date and 7245 numbered Bazaar and Neighborhood Guards Law Article 9).

Such attempts, are scary even to be considered in the rule of law country, to view women and children as a 'human' are unfortunately due to the absence of legal culture or the complete loss of such culture in recent years. Individuals feel that they are on their own and do not have trust in their country. Especially women and children are generally considered as indistinguishable from an 'object'. Continuous brutal murders are being committed, some are not put under the spotlight, others are finalized with simple sanctions, and amnesty laws (protecting the criminal) often form a shield for such crimes perpetrators. Sometimes, the aforementioned crimes are accompanied by serious sexual crimes and other form of crimes.

Moreover, similar mistakes have been frequently made by the lawmaker for the last 15 years. For example, if the deliberately manslaughter crime is committed intentionally, pursuant to article 21/2 of TPC, according to rates specified the punishment of the perpetrator is compulsorily reduced. However, in this case, the possible intent is after all a type of intent and what is violated is the legal value of life, for this reason, there can be no theoretical and justification for such penalty reduction.[5]

Likewise, the reduction of the penalty for negligence is not justified. On the contrary, besides the similarity of the legal value harmed by the committed crime, although the perpetrator is under private legal obligation, he might also neglect another legal duty arising from different legal sources while committing the crime, so that the negligence of the act might cause much more pain and suffering for the victim (sometimes the death process takes longer, for these reasons the penalty should not have been reduced. If a different regulation was to be made in terms of the amount of the penalty, the penalty should have been increased rather than reduced.[6]

If the consequence caused by the negligent act, exclusively with regard to the personal and family situation of the perpetrator, caused the perpetrator to suffer as well to such an extent that it is no longer necessary to impose a penalty, the crime punished is not imposed. The penalty to be given in case of deliberate negligence

[5] The definition and exemplification of the possible intent, and the separation of deliberate negligence with the possible intent, are controversial in doctrine and practice due to legal definitions, and there is no consensus around them (see Düzgün & Elmaci, 2009: 42 & so on).

[6] In the event that the crime of manslaughter is committed as a partnership (complicity), if the perpetrator or the joint perpetrator or the aiding perpetrator acts negligently, it is very controversial among the authors whether there will be a penalty reduction for all perpetrators due to the negligent act and its justification (see Palut, 2019: 650-656).

can be reduced from half to one-sixth (TPC Article 22/6). The result of such regulation and its implementation and application to real cases in courts are also problematic and contradictory. It is a necessity to rearrange the article content in every aspect (for article's interpretation see Kaymaz & Gökcan, 2006: 119 & so on).

Murder for the motive of vendetta (blood feud) is a reason to increase the punishment in terms of both the abolished and the new Turkish Penal Code. In judicial precedents, taking in consideration the perpetrator's motive, even though a long time has passed since the crime has been committed, if the perpetrator, is motivated by the pain and suffering caused by the previously committed crime, killed someone to take revenge this aggravating reason should be applied (Yargıtay CGK (Ceza Genel Kurulu). 19.02.1990., E. 2, K. 29).

The crime of committing killing due to society pressure where the perpetrator believes that his honor has been contaminated and with the motive of protecting his honor in accordance is also considered manslaughter. Such crimes are common in feudal family structure and in the eastern and southeaster regions of Turkey. Although there is no distinction in the text of the article such crime is generally committed against women. According to doctrine that the way to prevent these actions is to remove the feudal society and its traces, rather than imposing heavy penalties (Hafizogullari & Özen, 2016: 55).

It has been noticed that in the judicial application, taking into consideration the motives of the crime (customs and traditions) as reasons for aggravating manslaughter, specifically, crime plotting (killing by planning), blood feud, and motivation affected by social pressure, such application is found to be extremely erroneous and in favor of the criminal. The rule of law countries have turned the law clauses into mere paper covers, criminals are neither intimidated by the rule of law nor ordinary citizens have trust for the law. This situation tends to lead any person for the purpose of protecting their right or for the purpose of arbitrarily activating the punishment of a crime perpetrator, to resort to the mafia, or to use their political relations. Failure to encounter these (and other) crimes against human beings with proper legal reactions renders the rule of law meaningless and massacres the legal culture. Unfortunately, such actions lead to the rapid destruction of the last 100 years of legal accumulation (Yurtcan, 2015: 11-331).

Another practical problem in this field is the question of whether in a factual circumstance, whether autopsy or organ transplantation should be prioritized. There is no clear legal regulation regulating this issue. Part of legal literature and judicial practice gives priority to autopsy over organ transplantation. On the other hand, another opinion in legal literature, including the author of these lines, oppose this opinion and stress on the fact that the right to life has the ultimate importance of all, supporting such opinion by stating that the compulsory provisions in favor of the third person require organ transplantation, in addition to the fact that autopsy can be done after organ harvesting, stressing on its uncertainty in collecting evidence (Ünver, 2011a: 79-93; Hakeri, 2020: 525-530).

Many violations of the law are also experienced in abortion actions. First of all, article (Article 99/6) "*In case the woman becomes pregnant as a result of a crime she is the victim of, the action of abortion is not penalized if the pregnancy term does not exceed twenty weeks and in case of victim consent*" of the Turkish Penal Code shockingly regulated in favor of the abuse, such criminal actions are ignored as if they were in accordance with the law.

On the other hand, in multiple pregnancies (twins or triplets, quadruplets), no criminal investigation or prosecution is initiated, when an operation is conducted in an attempt to keep one fetus in the mother's womb while the others are killed and removed from the womb without, although there has been no compliance with the legal terms and conditions or even the term of pregnancy. Even in cases of explicit notice and in flagrante delicto, and despite the number of killed embryos the penalty for one crime (light penalty) is given. While, after the embryo is born alive an act of active or negligent (passive) killing is considered to consist a crime of manslaughter not a crime of miscarriage. However, in some abortion acts, although the embryo is born alive, he is left to die of starvation, while the abortion procedure is either treated as if it was a legal abortion or the crime of abortion is considered as a minor offense thus the perpetrator is given a penalty less than that stated for manslaughter.

The fact that the parliament (which is, in reality, consisted of only one political party) frequently enacts amnesty laws, just as it eliminated the culture of law, eliminates the general and specific preventive purposes of crimes and punishments as well. Unfortunately, the law is sacrificed for political vote hunting. Even those convicted of the most serious crime of manslaughter are released with the amnesty law enacted soon after. Disregarding that the recurrence rates of these prisoners being very high.

Even those convicted of manslaughter who go out of prison for a short period of time due to special reasons, due to not being put under surveillance tend to commit murders again. The arrangements brought about in the recent years by the Law on the Execution of Criminal and Security Measures regarding semi-open and fully open prison institutions are deemed to be meaningless in addition to the arbitral arrangement and application of the 'conditional release' which also provides a ground for committing many murders later on.

According to a special law (Law No. 4483 on the Trial of Civil Servants and Other Public Officials), it is obligatory to obtain permission from administrative institutions in order to be able to open an investigation for most crimes where law enforcement officers (especially police and gendarmerie), and public officials (judges, prosecutors, intelligence members, etc.) are involved. Since this permission, in most cases, is not granted by the administrative authorities (and even if it granted by such institutions, the administrative courts subsequently approved the denial of this permission, mostly in a protective manner in favor of the public official), many public officials allegedly involved in killing crimes cannot be investigated and prosecuted. These results, which are against both the effective investigation and fair trial principle, cause the crimes to be included in the "dark field - black numbers" field due to this illegal permission mechanism. In addition, the relevant provisions of the Law on Police Duties and Powers (see also supplementary Article 9 of the PDPL), together with this law no 4483, prevent the proper implementation of the Criminal Procedural Law. In such cases, the right to life is not properly protected and police state instead of rule of law practices are applied.[7]

Another example of significant inconvenience practices is the inability to prosecute and give a convict in many cases due to the statute of limitations, where investigations and lawsuits take many years and often due to the statute of limitations, thus the judicial process cannot be completed properly.

The failure of judicial practice to apply the rules of proof in accordance with the law and the use of evidence unlawfully and against clear legal conditions also weaken the fight against these crimes.

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[7] For ECHR decisions see: *Baran v. Turkey*, app. no. 4370/02, decision date: 15.05.2018; *Vatandaş v. Turkey*, app. no. 37869/08, decision date: 15.05.2018.

Furthermore, there is no article to be applied, in case a deceased woman happened to be pregnant before she dies, and in order to save the life of the embryo, the dead mother must be kept artificially alive till the baby is born. Referring to the German legal sources, if the fetus has an opportunity to be born alive, the mother's body should be kept alive artificially and all necessary procedures must be provided to assure that the baby is born alive. There are also those who defend such opinion by referring to the provision regulating the patient's consent in the Patient Rights Regulation (Hakeri, 2020: 1191). In my opinion, in accordance with both the article of the Council of Europe Biomedicine Convention on the opinion of the patient (Article 9) and the general rules regarding the patient's will, unless there is a will stating the contrary, it is appropriate and legal to keep the mother’s corpse artificially alive for a while in order to save the life of the fetus.

The institution is obliged, in favor of the third person (TPC Article 25/2) to support this result as well (although the mother while being connected to the device, constitutes no difference from a corpse or an object).

Another argument is whether it would be unlawful for a person to be subjected to treatment by force and against his will. In my opinion, this is both illegal and constitutes a crime of human injury (Ünver, 2019: 53-61).

It is controversial in Turkish law whether a terminally ill patient should be told openly about his illness or hide this fact from him so that it does not demoralize or interrupt his treatment. Although there are opinions in both directions, I believe that the fact about his health condition should not be hidden from the patient, and should be told to him immediately without delay, in accordance with the legislation and the patient's consent (and the right to determine his own future) (For more details see Ünver, 2020a: 139-153).

Finally, it is important to mention that according to the Anti-Terror Law article 21 provision and related clauses, The provisions of the Law No. 2330 on Compensation in Cash and Salary are applied in case public officials who were injured while performing their duties at home and abroad or those who were subject to terrorist acts due to coming in contact with terrorists while fulfilling these duties, even if after being released of their position as public officials, become disabled, die or get killed. In this context, since the ECHR did not adequately bestow the necessary protection to the right of life, Turkey has released many convict judgments in many related

cases[8], and the Turkish Constitutional Court has released many decisions in violation of the words of this law.[9]

On the other hand, in Turkey, in the year 2018, 440 women and in the year 2019, 474 women have been found to be killed by their former spouse, boyfriend, husband, fiancé, or their own parents or siblings (Gülersöyler, n.d.). In the year 2019 murder cases, besides the 218 killed women who the reason behind their murder was not identified, there are 27 were killed for economic reasons, 114 for wanting a divorce, refusing to reconcile, refusing friendship request, and for wanting to make a decision about her own life freely. In 2019 out of 474 murders of women 115 suspected murder were officially recorded and their perpetrators were not found. Among the women whose perpetrators were learned, 134 were killed by husbands, 25 by former husbands, 51 by boyfriends, 8 by former boyfriends, 29 by uncles, brother-in-law, former father-in-law, and by the man their sister was married to, and by other people with whom she was connected by kinship relations, 19 by acquaintances, 15 by fathers, 13 by siblings, 25 by sons, a neighbor, a parent of their children school friend, and 3 by unknown persons. The 2019 report, which included that women were killed mostly by gunshots during this year has also stated that 292 of those women were killed in their homes and 52 were killed on the street. Such results are for certain unacceptable in a country that follows the rule of law, which leads to questioning the viability of the state and law in Turkey and considering it as 'culture of lawlessness', as a result, all interlocutors should be trivialized and multi-scientific solutions should be produced.

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ATTEMPT AND CRIMES AGAINST LIFE AND LIMB

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Abstract When dealing with attempts to commit a crime against life and limb, it is not always easy to distinguish between mere preparatory conduct and criminal attempt. This contribution seeks to first outline some issues which arise when trying to set a clear demarcation line between those two phases of *iter criminis*. In the second part, the search for suitable differentiation theories in Slovene criminal legal doctrine is briefly outlined, while the third part seeks to establish that the individual-objective theory of differentiation can further help us to distinguishing between different steps ("acts") of the perpetrators conduct. What is more, it is argued that the individual-objective theory can be a useful tool for distinguishing between essential and nonessential steps. In the final part of this contribution, author warns that the individual-objective criteria should not be abused as an instrument for arbitrary extension of criminal attempts towards the field of (decriminalized) preparatory conduct.

Keywords: preparatory conduct, preparatory act, preparatory offence, criminal plan, legal certainty

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1 Introduction

When dealing with attempts to commit a crime against life and limb, it is not always easy to distinguish between the perpetrator's mere preparatory conduct and attempt (Becker, 1974: 282-288). Drawing a clear line between attempt and preparatory conduct is, nevertheless, crucial for legal practitioners and (potential) perpetrators. As a rule, in the Slovene legal system, attempts to commit a criminal offence are punishable. In Article 34, the Slovene Criminal Code[1] (henceforth: CC-1) stipulates the following:

> *(1) Any person, who intentionally initiated a criminal offence but did not complete it, shall be punished for the criminal attempt, provided that such an attempt involved a criminal offence, for which the sentence of three years' imprisonment or a heavier sentence may be imposed under the statute; attempts involving any other criminal offences shall be punishable only when so expressly stipulated by the statute.*
>
> *(2) Against the perpetrator, who attempted to commit a criminal offence, the sentence shall be applied within the limits prescribed for such an offence or it may be reduced.*

In contrast, mere preparatory conduct – although a crucial stepping-stone to committing a crime in the future – is generally not punishable, except in cases when such preparatory conduct is considered a criminal act in and of itself. A person who buys a potent poison in order to kill another person, for example, cannot be held criminally liable for committing an attempted murder. In relation to the criminal offence of murder, securing the poison is considered to be only preparatory conduct. Such person could, however, be held liable for committing a criminal offence from article 306 CC-1 - Manufacture and Acquisition of Weapons and Instruments Intended for the Commission of Criminal Offence. Since of the act of obtaining a lethal poison in order to commit a criminal offence can be seen as sufficiently wrongful conduct in and of itself, the Slovene legislator decided that such preparatory conduct should be criminalized. Criminal offences specifically aimed at criminalizing preparatory conduct are, however, rare. There is a consensus in

[1] Kazenski zakonik (KZ-1), Uradni list RS, št. 50/12 – uradno prečiščeno besedilo, 6/16 – popr., 54/15, 38/16, 27/17, 23/20, 91/20.

Slovene legal theory that criminalizing preparatory conduct should be done with great caution. This is due to the fact that preparatory conduct is notoriously hard to distinguish from conduct which is not prohibited by law (Bele, 2001: 194). In most cases the question of whether conduct can be considered criminal is therefore dependant on where exactly the dividing line between the (decriminalised) conduct and (criminal) attempt is drawn.

In this contribution, we will show why drawing a sharp line between preparatory conduct and criminal attempt is not an easy task. This contribution seeks to first outline some issues which arise when trying to set a clear demarcation line between those two phases of *iter criminis*. The second part provides a brief analysis and search for suitable differentiation theories in Slovene criminal legal doctrine, while the third part seeks to establish that the individual-objective theory of differentiation can further help us to distinguishing between different steps ("acts") of the perpetrators conduct. We will argue that the individual-objective theory can be a useful tool for distinguishing between essential and nonessential steps. In the final part of this contribution, we will warn that the individual-objective criteria should not be abused as an instrument for arbitrary extension of criminal attempts towards the field of (decriminalized) preparatory conduct.

2 Attempt and Preparatory Conduct

The prevailing opinion of Slovene criminal legal doctrine (*law in books*) as well as case law (*law in practice*) is that purely subjective theories of differentiation between an attempt and preparatory conduct are not acceptable. Ferlinc (2003: 245-246) argues that grounding attempt in mere subjective criteria would allow for arbitrary extensive interpretations of attempt, reaching deep into the field of preparatory conduct. It is true that in the fact-finding process (which a vital part of the criminal procedure) the assessment of subjective evidence is objectivised. Criminalization of mere motives, intentions or plans however provides a fruitful ground for potential abuses of criminal law. Mozetič & Bavcon (2007: 187-189) argue that such abuses of criminal law might include politically and ideologically motivated prosecution as well as prosecution based on fear and demand of the public to search for scapegoats. It seems that the legislator was aware of these issues since the definition of the initiation does not explicitly rely on the perpetrator's motives and ideas related to the commission of a criminal offence. It can therefore be argued that the Slovene

legislator is amongst those who tried to established a clear demarcation line between criminalized and decriminalized conduct (Ferlinc, 2003: 245-246).

The prevailing view of the Slovene criminal legal doctrine is that the question of when a perpetrator initiates the commission of a crime ("*initiation of criminal offence*") is intertwined with the question of when the objective statutory description of a particular criminal offence commences (Bavcon *et al.*, 2013: 326-327; Bele, 2001: 198; Selinšek, 2007: 183). This criterion is supposedly especially useful in cases of criminal offences with descriptive dispositions. If the statutory description of a criminal offence, for example, includes a specific instrument (means of performing a criminal offence) or mode (way of performing a criminal offence) the perpetrator launches an attempt as the instant he uses the specific instrument with the appropriate intent. This understanding of attempt is heavily influenced by the *formal-objective* theories of differentiation, which have their roots in French criminal legal doctrine of the early 18th and the beginning of the 19th century (Novoselec & Bojanić, 2013: 297).

Such theories are useful in instances of criminal offences which can be easily broken down in two or more separate independent conducts or "acts". For example, Article 170 of the CC-1 defines the criminal offence of rape:

> *"Whoever compels a person of the same or opposite sex to submit to sexual intercourse with him by force or threat of imminent attack on life or limb shall be sentenced to imprisonment for not less than one and not more than ten years."*

This definition of rape can easily be broken down into two constituent elements: the "act" of compulsion by force or a threat and the "act" of sexual intercourse. It is true that the conduct of forceful compelling can be merged with the sexual intercourse. It can, however, also be performed at an earlier point in time (for example if the perpetrator uses force to tie the victim to the bed before a sexual intercourse). In such cases, the perpetrator is liable for an attempted rape the moment he ties the victim to the bed, even if the sexual intercourse was not yet initiated and never takes place (for example if the victim manages to break free and flee). This conclusion can be deduced from the fact that the perpetrator already started using force to compel the victim to submit to sexual intercourse, which is an integral part of the statutory description of rape (Korošec, 2008: 231-233).

Slovene criminal legal doctrine nonetheless unanimously argues that such a simplified understanding of the formal-objective criterion is flawed (Bavcon *et al.*, 2013: 326-327; Bele, 2001: 198; Selinšek, 2007: 183). The demarcation line between preparatory conduct and attempt cannot rely merely on the question of when the objective statutory description starts being fulfilled by the perpetrator. Most notably, problems arise in cases of criminal offences with short and simple dispositions. For example, Article 115 of the CC-1 defines the criminal offence of manslaughter:

> *"Whoever takes the life of another human being shall be sentenced to imprisonment between five and fifteen years."*

It is immediately evident that such a broad statutory definition cannot be of any help when we are confronted with the question when exactly the perpetrator began committing the crime. The shortcomings of relying solely on the statutory description in order to ascertain the time of the initiation of a criminal offence is however not problematic merely in criminal offences with short and simple descriptions. This is evident, for example, by examining the criminal offence of Acutal Bodily Harm from Article 122 CC-1:

> *"Whoever inflicts bodily harm on another person resulting in the temporary weakness or impairment of an organ or part of his body, his temporary inability to work, the impairment of his outlook on life or temporary damage to his health shall be punished by a fine or by imprisonment for not more than one year."*

Let us imagine a case of a perpetrator who intends to punch another person in the face and thereby inflict acute bodily harm. The perpetrator is, however, somewhat clumsy and trips over her own feet in front of the victim. Does the extensive description of the prohibited consequences in Article 122/I CC-1 in any way helps us to establish whether the perpetrator initiated the criminal offence? It should be obvious that this is not the case. From the standpoint of establishing the exact time when preparatory conduct (running towards the victim) transformed into an attempt, there would not be any difference if Article 122/I CC-1 would simply state that the offence is committed by the person who *inflicts actual bodily harm on another person*.

Let us now imagine that the perpetrator who is described above decides to attack anew. This time, she decides to use a knife instead of her fists. A few days later, she enters a convenience store and buys a pocket knife with the intention of inflicting minor cut wounds to her opponent. The clumsy perpetrator, however, falls again before she manages to inflict any bodily harm. Such a perpetrator could potentially be held accountable for committing a criminal offence under Article 122/II CC-1:

> *"If the injury under the preceding paragraph has been inflicted by means of a weapon, dangerous tool, or any other instrument, capable of causing serious bodily harm or grave damage to health, the perpetrator shall be sentenced to imprisonment for not more than three years."*

This criminal offence is even more precise than the basic mode of Acutal Bodily Harm from 122/I CC-1. Does the precise definition of tools (instruments) used to inflict bodily harm, however, assist with defining the exact moment when the attacker initiated the attack? Does, for example, the distance from the potential victim play any role? Is it important to establish the distance from the victim in the moment when the perpetrator tripped? Or should we rather establish if she already grabbed the knife – or maybe even pulled it out of her pocket? Does it play any role if the blade of the pocket knife was not yet exposed?

It seems that even when the statutory provision contains a very precise description of the tool (instrument) used to harm the victim ambiguities still remain with respect to the question of how to distinguish between (decriminalized) preparatory conduct and criminal attempts. The more precise statutory description still fails to provide any meaningful criteria that would assist in deciding the exact moment when the criminal offence was initiated. Hence, all criminal offences which do not extensively describe the (active or passive) criminal conduct and where the criminalized conduct cannot easily be broken down into separate independent "acts" require additional theories which help to establish a clearer demarcation line between preparatory conduct and attempt. We shall turn our attention to such theories in the following chapter.

3 In search of suitable theories of differentiation

By now, we firmly established that the formal-objective theory of differentiation cannot in and of itself provide an answer to when a criminal offence is initiated by the perpetrator (Novoselec & Bojanić, 2013: 298). The criteria are so broad that they not only are inadequate when dealing with the short and simple statutory descriptions of criminal offences, but also when dealing with a range of offences with descriptive dispositions. This is why it is important to consider other criteria of differentiation. Only then can the principles of legal certainty and equal treatment of (potential) perpetrators be adequately respected.[2]

Slovene criminal legal doctrine already suggested that additional criteria should be considered when drawing a demarcation line between preparatory conduct and criminal attempt. Selinšek (2007: 184) suggests that the focus should be on both objective and subjective criteria. Account should be taken of both the perpetrator's attempt together with the objective statutory description of the particular criminal offence in question and the extent to which it was fulfilled. She argues, for example, that a criminal offence occurs only if a murderer both aims her rifle at a victim (the objective element) and simultaneously intends to take her life (the subjective element). Using this test, if the rifle is being aimed at another person without the intent of ever shooting, such conduct cannot be described as attempted murder.

We agree that such conduct is insufficient to constitute criminal attempt due to the absence of the actor's subjective intent. This conclusion, however, does not help to differentiate between the different phases of *iter criminis* (preparatory conduct and attempt). The problem of differentiation typically arises in cases involving highly motivated perpetrators with clear intent (see the above example of the attacker with a pocket knife). This means that consideration of subjective criteria aids in the analysis only in those cases where the issue at hand is connected to in the absence of the perpetrators' intent (which rule out the possibility of an attempt in the first place), not the differentiation between preparatory conduct and criminal attempt.

A better solution was suggested by Ambrož, who seeks to extend the *formally-objective* criteria without relying upon *mens rea* - intent or other subjective criteria. He argues

[2] For examples of Slovene case law where essentially similar cases of attempt were treated differently see Florjančič (2011: 64-65).

that when it is not possible to differentiate merely by examining the objective aspect of the statutory description and the criterion of initiation of a criminal offence, one should take into account whether the perpetrators' conduct was so closely connected to the criminal offence that it could be committed without additional essential intermediary steps (Bavcon *et al*, 2013: 327). This begs the question how to properly evaluate whether and when a certain intermediary step is *essential*. Additionally, it is not clear what methodology should be used to distinguish between different *steps* since, in real life, they form a unified continuous flow of events.

To put these troublesome questions into context, let us return to the example of the clumsy attacker with a pocket knife. Do the additional, formal-objective criteria assist in determining if and when the attacker entered the criminal attempt phase? Was her conduct sufficiently connected to the criminal offence when she drew the knife from her pocket? What impact would her drawing the knife from her pocket without exposing the blade play? Should the actions of drawing the knife from her pocket, exposing the blade of the pocket knife and swinging the knife towards the victims count as separate *steps*? If yes – is exposing the blade of the pocket knife an *essential* intermediary step? Ambrož, examining a similar case in which a perpetrator aims at a victim but without cocking the firearm, argues that cocking a firearm is an essential intermediary step to committing the crime. Merely aiming the firearm cannot be considered a criminal attempt since, absent a bullet in the firearm's chamber, since the act of aiming an unloaded firearm is too attenuated (not *close* enough) to actually committing a criminal offence (Bavcon *et al*, 2013: 327). As with the person aiming an unloaded firearm, our hypothetical attacker should also not be held liable before actually exposing the blade of her pocket knife. Even though our hypothetical attacker already has her knife exposed and is reasonably close to the victim (so as to be able to harm the prospective victim), she nevertheless would not yet have entered the criminal attempt stage since before cutting her victim, she would need to perform the essential, intermediary action of exposing the blade of her knife.

Foreign (mainly German) criminal legal doctrine reveals that this approach is plagued by numerous shortcomings (Eser, 2019: §22, n. 40-41). It is difficult to find suitable *objective* criteria to assist in differentiating between the different essential steps. These seemingly objective criteria are, unfortunately, imprecise and therefore subject to the same objections as purely subjective criteria of differentiation – namely, that arbitrary criteria allows for (criminalizued) attempts to be extended deep into the

field of (decriminalized) preparatory conduct. The following chapter should therefore aim to provide for additional (sharper and more precise) criteria.

4 Individual-objective theory of differentiation

One possible solution to this conundrum is to better define what constitutes differentiation by utilizing not only objective, but also additional subjective criteria. In this contribution, we argue that differentiating between various events (steps) and establishing their essential value constitutes a plausiblesolution, but only if the perpetrator's plan of (criminal) conduct is also taken into account. The criminal plan must obviously aim to fulfill the objective criteria of the criminal offence. To distinguish between preparatory conduct and criminal attempt, also it is also important to determine, in objective-normative sense, whether the perpetrator himself considers certain conduct to be a crucial separate step (condition precedent) before committing a criminal offence (Höpfel & Ratz, 2018: §16, n. 31). This view has been dubbed the *individual-objective* theory of differentiation, and is utilized in the criminal legal doctrine of numerous states, including Germany (Rengier, 2016: 292-293; Jescheck, 1988: 466), Austria (Höpfel & Ratz, 2018: §16, n. 30; Kodek, Foregger & Fabrizzy, 1999: §16, n. 17) and Croatia (Novoselec & Bojanić, 2013: 200-300). The core idea of the *individual objective* theory is described by Bohlaner (2009: 139) as follows: "the intention of the offender decides whether she has begun with the execution of the offence or is about to do so because an attempt by definition requires absence of the full actus reus so one only has the state of the offender's mind to rely on in order to determine what offence was going to be committed and how."

Although not widely recognised or adequately explained, this view can also be found in Slovene criminal legal doctrine. Most notably, Bele (2001: 198) argued that when dealing with simple and short dispositions, a criminal offence is initiated with the first move which is an integral part of a uniform conduct of a perpetrator which should lead, *according to his view*, to the commission of a criminal offence.

The usefulness of the described criteria can be demonstrated by examining once again the examples of the clumsy attacker with a pocket knife and perpetrator who aims at a target without cocking her weapon. Admittedly, it is not easy to distinguish between the acts of pulling a knife from the pocket, exposing the blade and swinging it towards the victim. It is even more difficult, using purely objective criteria, to

determine whether each of those steps should be considered as essential. Accordingly, it also is important to consider how the perpetrator (subjectively) imagined the timeline for committing the crime. She might, for example, intend to pull out her knife, expose the blade, and swing it towards the victim in one swift, continuous motion and perceives this as unified conduct or route to committing the criminal offence. Following this reason, our hypothetical attacker entered the criminal attempt stage when she pulled the knife out of her pocket.

The pocket knife attacker might, on the contrary, intend to first pull out her knife and open the blade, then threaten and frighten her opponent by brandishing the weapon, and cutting her afterwards. The attacker's first actions do not differ when viewed through the lense of only objective criteria. The second case should nonetheless be treated differently if the attacker trips, for example. before managing to expose the knife's blade since there was an essential intermediary step between the act of pulling out the knife and then actually swinging it towards the victim – namely the threatening of the victim. This supports the argument that merely pulling the knife out of her pocket did not constitute a criminal attempt. When considering the perpetrator's criminal plan, her actions should be treated as (decriminalized) only preparatory conduct since she had not yet initiated a criminal offence.

The case of the perpetrator who merely aims her weapon at her target can be explained in a similar manner. The criminal law cannot treat a person whose plan can be simply described as "weapon cocking-aiming-shooting" in the same way as a perpetrator whose plan can be described as "weapon cocking-aiming-explaining to the victim why she will lose her life-shooting". Obviously, the steps in both of these perpetrators' blueprints to commit a crime differ substantially. This difference is crucial in determining whether the perpetrator who merely aims at her victim is already in the stage of a criminal attempt or merely in the stage of (decriminalized) preparatory conduct. The first perpetrator already entered the phase of criminal attempt, while the other (most likely) did not.

5 Discussion

We briefly described how the individual-objective theory of differentiation might be used to further enhance the pure formal-objective theories. Ambrož cautions, however that any substantive extension of formal-objective criteria should be done with restraint (Bavcon *et al*, 2013: 328). His views should be understood by

considering various questions which arise in relation to legal interpretation and argumentation in general. It is a prevalent view of Slovene criminal legal doctrine that giving expansive interpretations to the linguistic meaning of statutory (criminal) provisions should be the rare exception and not the rule (Bavcon *et al*, 2013: 224-225). Hence, the individual-objective theory of differentiation should not be used as a tool for radical expansive interpretations of criminal offences.

Interpretative leaps such as this would be especially dangerous in cases of unfinished attempts, where from the viewpoint of the actor the "legally protected good" has yet to be placed in jeopardy. Consider, for example, cases where either the expected contact involving the perpetrator's and the victim's "sphere" did not yet occur or where the perpetrator's conduct and the "expected prohibited consequence" are not in close temporal proximity (Kühl & Heger, 2018: §22, n. 4; Roxin, 2003: 374-377). To establish that a perpetrator entered the criminal attempt phase, the prosecution needs to prove that according to her criminal plan, her conduct is sufficiently close ("leaning onto") to objectively committing a criminal offence (Welzel, 1969: 190-191). Bohlander (2009: 139; 141) describes sufficient proximity as "a degree of imminence about [the perpetrator's] actions leading to the commission of the offence," as well as "being on the immediate verge of committing the offence."

It would therefore be wrong to say that the perpetrator entered a criminal attempt when drawing a knife and exposing the blade if her victim is still on the other side of a football field – even if in her mind, she already entered the final phase of her criminal plan. It is clear that the objective essence ("*Tatbestand*") of a criminal offence which the perpetrator seeks to commit is not reached in this hypothetical since the victim in not in any immediate danger, even according to the perpetrator's criminal plan. Similarly, if the perpetrator with the pocket knife is still dozens of meters from the victim and trips, it cannot be argued that she is sufficiently close to committing a criminal offence to have already entered into the *iter criminis* phase of a criminal attempt.

Such limitations cannot restrict the scope of a criminal attempt when the attempt is already completed at a time and at a location which are not the same as the time and location where the expected forbidden consequence should occur (according to the perpetrator's criminal plan). When a perpetrator intends to take a victim's life by sending her poisoned candy via mail, the criminal attempt phase will be reached even before the victim's life will be - according to the criminal plan - seriously threatened.

The perpetrator in this hypothetical will be liable for an attempted murder at the moment when she hands the poisoned candy over to the postal clerk since that act marks the time when the perpetrator concludes the final essential step of her criminal plan. This same approach applies when dealing with the criminal offence of Fraud under Article 211/I:

> *"Whoever, with the intention of acquiring unlawful property benefit for himself or a third person by false representation, or by the suppression of facts leads another person into error or keeps him in error, thereby inducing him to perform an act or to omit to perform an act to the detriment of his or another's property, shall be sentenced to imprisonment for not more than three years."*

A perpetrator could enter the criminal offence phase by sending (via mail) the falsified documents to the victim of the criminal offence. This means that an attempt can be completed even if the perpetrator never enters into a direct contact with the victim.[3] Differentiating between completed and unfinished attempts is therefore important for understanding the regulation of voluntary withdrawal from completing the criminal offence. It also plays a vital role for drawing a more precise demarcation line between criminal attempts and preparatory conduct.

5 Conclusion

The analysis of these hypothetical cases demonstrates that drawing a sharp line between preparatory conduct and criminal attempt is not an easy task in some particularly hard cases involving crimes against life and limb. These difficulties are reflected in the various conflicting theories of differentiation which were developed by (German, Austrian, Croatian and Slovene) criminal legal doctrine to try to cope with these issues. Even though these theories range from purely subjective to exclusively objective, we argued that theories which draw from both the subjective as well as objective criteria are more convincing. The individual-objective theory is especially useful in cases where the criminalized conduct cannot easily be broken down into separate independent and essential "acts".

[3] See for example the judgment of the Slovene Supreme Court I Ips 191/2001 from 16.01.2003.

Criminal legal doctrine and courts alike should exercise caution to avoid over emphasing the role of the individual-objective theory. Even though this theory places emphasis on the perpetrator's criminal plan, the actor still needs to be sufficiently close to objectively committing a criminal offence for her conduct to be treated as a (criminalized) attempt. The perpetrator's subjective criminal plan should not be used to extend the reach of a criminal offence deep into the field of preparatory conduct. in cases involving unfinished attempts where the legally protected good is not yet endangered. When understood correctly, the individual-objective theory should therefore improve legal certainty without allowing for arbitrary criminalization of preparatory conduct.

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EFFECT OF PARTNER'S DEATH ON COMPANIES

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Abstract The death of a partner has important legal consequences on the company's shareholding structure in companies comprised of a community of people. According to Turkish law of succession, the succession shares of the deceased partner pass to his successors. In some companies, this change in shareholding structure does not cause any changes, while in others it results in dissolution of the company. These legal consequences, which vary according to type of the company upon death, are separately anayzed in our study.

Keywords: shareholder, death of the shareholder, trading company, share ownership, inheritance

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1 Introduction

Article 124 of the Turkish Commercial Code ("TCC") recognizes the following types of companies: the unlimited liability company, the commandite company (ordinary and capital divided into shares), as well as joint-stock, limited and cooperative companies.

Privately owned unlimited liability companies and commandite companies, joint stock companies, limited liability companies, and commandite companies with share capitals, are regulated as capital stock companies (TCC, Art. 124(2)). The cooperative constitutes a separate group apart from this definition.

The differentiating factors in each form of company are the partners' identities and relationships, the shares of capital contributed to the company, and the share rates acquired in consideration for the amounts contributed. While the partners' personalities and relationships are the paramount consideration in private companies, in capital stock companies the amount of capital contributed to the company the principal concern.

2 Changes Caused by Death of the Partner in Companies

Since the identity and relationships of the partners are important both in unlimited liability and in commandite companies, which are private companies (sole proprietorships), it is more difficult for the partners to enter or exit these companies or to transfer shares, and as a rule, they can do so only upon unanimous resolutions. The death of any one partner, or the loss of a partner's capacity to act, or a partner's bankruptcy may lead to automatic dissolution of such companies.

It is easier for partners to enter and exit from joint-stock, limited and commandite companies with share capital, all of which are capital stock companies, because such companies share the common characteristic that the capital is more important than the personality and identity of the partners. Accordingly, the death, loss of capacity or bankruptcy of the partners, as a rule, do not terminate the company.

Since the unique characteristics of each form of company and the impact of any of the partners' death are different, we will now analyze each form of company individually.

2.1 Unlimited Liability Companies

An unlimited liability company is a type of company incorporated by and between real persons in order to operate a commercial enterprise under a trade name. The liability of the partners is not limited due to the successor's debts (TCC, Art. 211).

The effect the death of a partner has on the company under provision 253 is regulated separately, according to whether there is a regulation regarding the death of the partners in the articles of association.

2.1.1 If Death of the Partner is not regulated in Articles of Association

As for unlimited liability companies, if there is no regulation in the articles of association, stating that the company will continue with the successors of the deceased partner, the company ends as a rule upon death of the partner (TCC, Art. 253). However, the successors and all other partners can ensure the continuation of the company by unanimous resolution. In case the relevant resolution is not required to be made explicitly and the business of the company continues without objection, the relevant resolution may be deemed to have been passed implicitly.

Successors, who do not intend to join the company, are paid successor shares by other partners (TCC, Art. 253(1)). Thus, other partners can remove the successors that do not intend to join the company, thereby ensuring the continuation of the company among themselves. However, the partners must unanimously agree to continue the company and their failure to agree will result in the company's termination.

The successors have the right to independently decide whether or not to join the company (Poroy, Tekinalp & Çamoğlu, 2014: 233). Notification of this intent must be given to the other partners, not to the legal entity (Poroy, Tekinalp & Çamoğlu, 2014: 233).

If all the successors prefer not to join the company, the other partners must unanimously pass a resolution among themselves tocontinue the company (Pulaşlı, 2014a: 404; Poroy, Tekinalp & Çamoğlu, 2014: 233). Otherwise, the company will dissolve (TCC, Art. 243; Turkish Code of Obligations (TCO) Art. 639/2). If there

is only one partner in the company, it is not possible to continue the company with a single partner (Pulaşlı, 2014a: 404; Court of Appeals 11th Law Chamber, 2013).

The right of the successor, who does not intend to join the company, which arises from a succession of the company, vests on the date when it becomes certain that he either will not join the company or will not be taken into the company by other partners (Poroy, Tekinalp & Çamoğlu, 2014: 233). In this case, the succession share will be calculated according to the date of the partner's death and the share is paid on the first balance sheet date after separation (TCC, Art. 262(1)).

Although the law does not provide any specific time for when these transactions must be executed, they must be concluded within an appropriate statutory period of time according to the concrete event. Otherwise, it is accepted that the company will dissolve (Poroy, Tekinalp & Çamoğlu, 2014: 234).

2.1.2 If Death of the Partner is regulated in Articles of Association

The unlimited liability company does not end upon death of any of the partners so long as there is a regulation in the articles of association stating that the company will continue with the successors of the deceased partner. The articles of association can also regulate whether the successors will become partners in the company and what kind of partners they will be, namely unlimited liability or commanditer (Pulaşlı, 2014a: 401).

The successors of the deceased partners are free to continue with the company as unlimited liability partners. In cases where the successors intend to continue the company, other partners must accept this decision. In this case, the successors have a founding right, and successor demands in this direction will bear consequence with no need for the company's acceptance (Pulaşlı, 2014a: 403).

In case any partner does not intend to stay in the company as an unlimited liability partner, among the successors, he may propose to be accepted into the company as an unlimited partner with the amount of the share he inherited from the deceased partner. However, contrary to the situation involving an unlimited liability partner, existing partners do not have to accept the partner's proposal to join the company as an unlimited partner (TCC, Art. 253(2)). Nevertheless, if any of the partners makes a declaration to become an unlimited partner, the type of company will have

to change, and the existing partners are required to accept this change (Bahtiyar, 2019: 96; Pulaşlı, 2014a: 403). In this case, a unanimous resolution must be passed by and between the other partners (Poroy, Tekinalp & Çamoğlu, 2014: 234; Pulaşlı, 2014a: 403). While the demands of the successors to join the company collectively must be accepted by the company, the participation of the successors in the company as unlimited limited partners are subject to acceptance by the other partners (Pulaşlı, 2014a: 403-404).

In accordance with the provision of Art. 253 of the TCC (2), the successors are required to notify the company, within three months from the date of death of the partner, whether they will enter the company with the capacity of a collective or unlimited liability partner. Until this notice is provided, the successors are considered as the commanding (unlimited) partners in the company. Successors that are not notified within three months shall have the title of unlimited liability partner as of the end of the period.

2.2 Commandite Companies

As with unlimited liability companies, commandite companies are private. They are incorporated to operate a commercial enterprise under a trade name. One or more of its partners is/are unlimited and other partners or partners have limited liability for company debts.

The main feature of the commandite company is that it has two types of partners, namely, active and silent, in terms of liability for company debts. The active partner has unlimited liability for the debts of the company, while the silent partner has limited liability.

Pursuant to Article 328 of the TCC on commandite companies, unlimited liability company provisions concerning changes between partners also apply to commandite company. The provisions regarding unlimited liability companies are applied regardless of whether the partner is an active or a silent partner. However, there are some differences in the event of the death of the silent partner.

Article 328 of the TCC provides that the death of the silent partner does not terminate the company unless otherwise stipulated in the articles of association. The deceased partner is replaced by his successors (TCC, Art. 316). Thus, the deceased partner's successor enters the company by operation of law, and successors do not have the right to choose in this regard (Poroy, Tekinalp & Çamoğlu, 2014: 271).

In case some successors do not intend to be partners in the company, the other partners must consent to this unanimously, as successors' exit from the company by taking the shares of the deceased partner constitute a termination (Poroy, Tekinalp & Çamoğlu, 2014: 271). However, a successor that does not intend to enter the company may also choose to renounce its succession rights (Poroy, Tekinalp & Çamoğlu, 2014: 271).

It is also possible for the articles of association to include a provision stating that in the event of death of the active partner the company terminates (Pulaşlı, 2014a: 447).

The analysis is different ff the silent (limited) partner is a legal person since legal persons do not have a successor to enter the company in the place of the deceased, such as is the with real persons (Poroy, Tekinalp & Çamoğlu, 2014: 271-272). Liquidation of the silent (unlimited) partner shall not result in the dissolution of the company (Poroy, Tekinalp & Çamoğlu, 2014: 272). In this case, however, the liquidators may ask the company to permit the legal person to exit from the company or transfer his share to any third party (Poroy, Tekinalp & Çamoğlu, 2014: 272; Pulaşlı, 2014a: 447). In case the Company does not agree to the liquidators' request, the liquidators may ask for the commandite company to be terminated (TCC, 328/245) (Pulaşlı, 2014a: 447; Poroy, Tekinalp & Çamoğlu, 2014: 272). The partners of the company may request the court to dissolve the company, claiming that the liquidation of the partner legal entity is justified pursuant to 328/255 (1) of the TCC (Pulaşlı, 2014a: 447-448; Poroy, Tekinalp & Çamoğlu, 2014: 272).

2.3 Joint Stock Companies

Since joint-stock companies are capital companies, it is the capital, rather than the personalities of the partners, that is important. Therefore, the death of any of the partners does not constitute legal justification for termination of the company (TCC, Art. 529-531). However, there are situations where the death of the partner has legal effects on the company.

Shares are, as a general rule, freely transferrable in joint-stock companies. However, with respect to registered shares, provisions called context, which either limit the transfer of shares or subject them to consent, may be included in articles of association. However, context is ineffective in some cases, namely, in situations involving the acquisition of shares through succession, sharing of succession, the property regime between spouses, or forced enforcement. Therefore, succession, in other words, the death of a partner, is one of the cases where the context is ineffective under TCC, Art. 493(4). Accordingly, the effect of the death of a partner on the company should be separately examined according to whether there is a context clause in the articles of association.

2.3.1 If There is No Context in the Articles of Association

If the context provision is not stipulated in the articles of association, the share of the deceased partner passes to his successors through succession (Pulaşlı, 2014b: 1394). In this case, his successors gain the relevant share by transfer and within legal succession (Pulaşlı, 2014b: 1394; Poroy, Tekinalp & Çamoğlu, 2014: 580).

There are situations where there is legal context even though the articles of association do not explicitly provide for context. In accordance with Article 491(1) of the TCC, in case the consideration for registered shares is not fully paid, those shares that were not fully paid for can only be transferred upon the company's consent. In continuation of the provision, however, the share transfer is excluded in case of succession, sharing the succession, the provisions of the property regime between the spouses or forced execution. Thus, the restriction does not apply if the transfer takes place through succession as a result of the partner's death. In this case, the company may refuse to give consent only if the solvency of the transferee is doubtful and the security requested by the company has not been provided (TCC, Art. 491(2)).

2.3.2 If Context is stipulated in Articles of Association

By inserting a context provision in the articles of association, it is possible to condition the transfer of the registered shares upon the company's approval. However, the law stipulates different arrangements on the context provisions stipulated in the articles of association, in terms of those shares listed on the stock exchange as compared to those shares not listed on the stock exchange.

2.3.2.1 At Off-Board Companies

Under certain circumstances, based on the context provisions of the articles of association, the company may refuse to approve the transfer of registered shares not quoted on the stock exchange. The first such circumstance is where the company refuses to transfer, asserting an important reason as contained in the articles of association and pursuant to TCC, Art. 493(1). Some authors assert that provisions of the articles of association regarding the composition of the shareholder's environment will constitute an important reason in case the company argues that it is entitled to refuse the approval based upon the economic independence of the business (TCC, Art. 493(2)). Thus, the company was not released in terms of stipulating significant reason in the articles of association (Poroy, Tekinalp & Çamoğlu, 2017: 142).

Secondly, the company may refuse its consent by proposing that the transferee purchase their shares for their own or other partners or third parties at their fair market value at the time of application (Court of Appeals 11th Law Chamber, 2015).

Accordingly, in such circumstances, the company is given a legal pre-emption right by proposing to purchase the shares at their fair market value against the transferee (Bahtiyar, 2019: 332). In order for the company to exercise this right, the articles of association must contain a provision conditioning the transfer of the shares upon the company's approval (Poroy, Tekinalp & Çamoğlu, 2017: 146). In addition, the company must disclose the price to be paid for the shares, at the time is makes its proposal to purchase the shares (Poroy, Tekinalp & Çamoğlu, 2017: 146).

Lastly, in order to prevent circumvention of the context provisions contained in the articles of association, the legislator has given the company the right to refuse to record the transfer of the shares in the share ledger, in cases where the transferee does not explicitly declare that he has acquired the shares on the name and behalf of the company (Bahtiyar, 2019: 333).

However, in cases where the shares are acquired due to succession, sharing of succession, or pursuant to provisions of the property regime between spouses or forced execution, the company only has the right to refuse approval by proposing to purchase the shares at their fair market value. Therefore, if the shares pass through

succession as a result of the death of the partner, the company may refuse to give its consent by proposing to purchase its shares only at their fair market value.

The company should also report the value of the share, while notifying that it will take over the share (Bilgili & Demirkapı, 2013: 553).

If the transferee does not accept the value of the shares placed on them by the company as set forth in its notice, the transferee may, within one month, request that the commercial court of first instance where the company headquarters is located to determine of the fair market value of the shares (Bilgili & Demirkapı, 2013: 553). If the transferee does not object to the declared value within one month from the date of learning the real value, the proposal to take over the share, given by the company, is deemed to have been accepted (Bilgili & Demirkapı, 2013: 554; Poroy, Tekinalp & Çamoğlu, 2017: 147).

In the event of succession of a share upon the death of a partner, the rights of the assets arising from the shareholding pass immediately to the successor, while the right to attend the general assembly and vote only pass upon consent of the company (TCC, 494(2)). If the company does not refuse the request for approval within three months from the date of receipt, or if the refusal is unfair, it is deemed to have given the consent (TCC, Art. 494(3)).

2.3.2.2 At Listed Companies (Quoted on the Stock Exchange)

The legislator has allowed companies listed on the stock exchange to prevent the transfer of shares in two cases. The first situation, governed by TCC, Art. 495(1), is where the company recognizes the acquirer of the registered shares as a partner, but the articles of association stipulate an upper limit for such an acquisition, based on the capital, expressed in percentage, and can reject the proposed transfer if this upper limit is exceeded. In other words, the company may prevent the acquisition of the share by setting the acquisition upper limit, which is based on the basic capital and expressed as a percentage, in the articles of association.

The company may also refuse to register the shares in the share register upon the transferee's explicit declaration that he bought the shares in his own name and account despite his request (TCC, Art. 495(2)).

The last paragraph of the provision contains an exception regarding the acquisition of registered shares listed on the stock exchange by succession, sharing of succession, provisions of property regime between spouses, or forced execution. The common denominator in each such case is that the company does not have the opportunity to refuse the transferee the title of partner. Therefore, in case of succession of the share in the listed companies upon death of the partner, the company does not have the opportunity to prevent the transfer of the share. Thus, the legislator has not provided the companies listed on the stock exchange with the legal pre-emptive right (Bahtiyar, 2019: 339). However, companies not listed on the stock exchange could refuse to approve the transfer by proposing to take over the shares at their real value if their registered shares were transferred by succession (TCC, Art. 493(4)). However, as this right does not exist for companies listed on the stock exchange, the company must accept the shareholding capacity of the transferee (Pulaşlı, 2014b: 1652). Even where the company has stipulated some rate limitations or other contextual reasons in the articles of association, those limitations shall be invalid in terms of the transfer of the share by succession (Pulaşlı, 2014b: 1652; Bilgili & Demirkapı, 2013: 556).

2.4 Limited Companies

Limited companies are also capital companies, and, unlike joint-stock companies, they also have features in common with sole proprietorships (private company's). Within this frame, pursuant to TCC, Art. 595, the approval of the partners' general assembly is required unless otherwise stipulated in the articles of association regarding the transfer of the basic capital shares. The transfer is valid upon this consent. Unless otherwise stipulated in the articles of association, the partners may refuse to give consent to the general assembly without any reason. In addition, the transfer of the basic capital share may be prohibited entirely by regulating the same in association articles.

In some cases, the transfer of the basic capital share is realized by operation of law. Pursuant to TCC, Art. 596 (1), in cases where the basic capital share is passed by succession, or by provisions regarding the property regime between spouses or execution, all rights and obligations are transferred to the person who acquired the basic capital share without any need for approval of the general assembly. Upon death of the partner, in case the share passes by inheritance, the basic capital share will be transferred to the successor by law.

2.4.1 Notification to the Company of Death of the Partner and Exercise by the Company of the Right to Refuse

Under TCC, Art. 596(2), if the basic capital share is inherited, all rights and liabilities are transferred to the person who acquired the basic capital share without the need for the general assembly to give its consent. However, the company has a statutory right to prevent the person who took over the share from entering the company. TCC, Art. 596(2) provides that the company may refuse to approve the person to whom the basic capital share has been transferred within three months after learning about the acquisition.

To exercise this right, the company must offer the person to whom the share is transferred the opportunity to acquire the shares at their real values to the account of his own or his partner or a third party shown by its partner or a third party, at their real value (TCC, Art. 596(2)). The company may exercise the right to create a unilateral founding capacity on its own behalf, or on behalf of its partners or a third party pursuant to its legal pre-emption right (Poroy, Tekinalp & Çamoğlu, 2017: 420). Receipt of the company's notification by the drawee has legal consequences; namely, a purchase contract is established between the company and the transferee (Poroy, Tekinalp & Çamoğlu, 2017: 420). The company is required to exercise its right of refusal clearly and in writing (Şener, 2017: 342).

If the parties cannot agree on the real value, it will be determined by the commercial court of first instance where the headquarters of the company are located, upon the request of one of the parties pursuant to TCC, Art. 597. The court uses experts to arrive at the value (Poroy, Tekinalp & Çamoğlu, 2017: 421). To determine the court will use various criteria such as the balance sheet, profit and loss accounts, tangible assets of the enterprise and the nominal values of the intellectual and industrial assets (Poroy, Tekinalp & Çamoğlu, 2017: 421-422). Although the statutory provision does not specify when the actual value will be taken as a basis, it is appropriate to utilize the closest date to the resolution date. Some experts reach this conclusion by analogizing this provision to a similar rule found in TCC, Art. 493(5) (Şener, 2017: 350-351; Topaloğlu & Özer, 2019: 1958).

The law does not specify organ giving rise to this right. However, since all managerial powers, except the rights granted to the general assembly by law or articles of association, are exercised by managers, logically this authority belongs to the directors as a rule (Poroy, Tekinalp & Çamoğlu, 2017: 420).

The company is deemed to have given its consent if it does not expressly and in writing refuse the transfer of the basic capital share within three months. The three-month period is the period of prescription (Poroy, Tekinalp & Çamoğlu, 2017: 420). The period starts when the company learns about the transfer of the share or the right holder applies to the company with documents evidencing the transfer (Poroy, Tekinalp & Çamoğlu, 2017: 420-421).

2.4.2 Effects and Consequences of the Exercise of the Right of Refusal

The company's refusal resolution is effective retroactively from the date of the transfer (TCC, Art. 596(3)). However, the refusal does not invalidate the general assembly resolutions passed within the period until the resolution on this matter is passed. Accordingly, the person who acquires the share has the right to attend the general assembly meetings, and votes casted during the interim period are effective. The relevant general assembly resolutions shall be valid (Şener, 2017: 344; Bahtiyar, 2019: 457).

Although the share is legally transferred to the acquirer as a result of death of the partner under TCC, Art. 596, the fact that the company can prevent the acquisition by passing a retroactive refusal resolution from the date of the transfer may cause other problems. For example, if the acquirer of the share has filed an action, in his putative capacity of successor partner, for termination with fair reason within the framework of TCC, 636(4), the court should not start the case until his partner status is finalized (Şener, 2017: 344). Otherwise, the termination action, which may be filed by the partners, will be subject to possible dismissal if the court ultimately concludes the partner does not have successor's capacity (Şener, 2017: 344-345).

Case law

Court of Appeals 11th Law Chamber., E.2011/6084, K.2013/5356, T.19.03.2013.
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Consequences of Crimes Against Life for the Order of Succession

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Abstract In addition to sanctions stipulated by criminal law, an offender who commits a crime against life could also be facing civil-law consequences, including the loss of succession rights. These consequences are justified upon the basic principle that no offender should be allowed to benefit or enrich themselves by their criminal actions. Slovenian legislation regulates two legal institutions that are intended to punish the offender for committing a criminal offence against the decedent or their relatives; the unworthiness to inherit and disinheritance. The realisation of these concepts is essentially the question of determining the limits of two conflicting rights, the right of the heir to inherit from the decedent and the decedent's freedom of testation. The article will examine the nature of both concepts, the requirements under which they may be applied, as well as the implications for the offender and for the order of succession.

Keywords: crimes against the decedent, unworthiness to inherit, disinheritance, forced heirs, intestate succession, testate succession

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1 Introduction

Punishing offenders for committing a crime against life is primarily a task that falls under the rules of criminal and/or tort law. However, consistent with a general principle that the offender should not profit from their crime, most modern jurisdictions have also recognised the significance of sanctioning the offender with a loss of their rights in other areas, including the field of succession. Disregarding slight variations of legal rules and requirements, most legal systems have established measures preventing an offender who commits a crime against another person's life from inheriting this person's possessions. To that effect, statutes regulating succession in civil-law countries all provide for some version of the concept of the unworthiness to inherit or, in some instances, disinheritance,[1] while common-law countries achieved the same effects through the rules established by case law; namely, the forfeiture rules in the UK or Australia (see, for example, Peart, 2002 or Hemming, 2008) and the slayer rule in the US (see, for example, Cohen, 2012 or Fellows, 1986), established in the case of Riggs v Palmer (1889).[2] The latter became (arguably) the most (in)famous case of murdering for inheritance in legal literature, not only for the court's decision that a slayer should not inherit and thus profit from their crime but also for its central position in the Dworkin-Hart debate on the merits of legal positivism.[3]

In the Republic of Slovenia, the available statistics clearly show that most crimes against life happen within the family, with as many as one-third to one-half of all killings committed against family members (Voglar, 1997: 52; Groznik, 2007). The vast majority of family murders and killings are not premeditated and happen as a result of dysfunctional family relationships (involving jealousy, hate, revenge, long-term violence), whereas only rare cases can be attributed to the motive of self-

[1] For an up-to-date comparative overview of legislation in the EU Member States, see for example a collection of national reports on Family Property and Succession in EU Member States by Ruggeri, Kunda & Winkler, 2019.

[2] Riggs v Palmer was a case decided by the Court of Appeals of New York in 1889. Francis B. Palmer made a will in which he left most of his estate to his grandson, Elmer E. Palmer, a defendant in the case. A smaller part of his property was bequeathed to two daughters, Preston and Riggs, the plaintiffs. Because Francis Palmer remarried, Elmer Palmer was worried that his grandfather might change the will, so he murdered him with poison. There was no rule in a valid statute that would prevent Elmer Palmer from inheriting from his victim. The court of appeal finally (with a dissenting opinion) ruled that when enforcement of a statute renders an absurd or unreasonable result, a court may interpret the statute in a manner which displays the lawmakers' true intentions and may stray from the statute's plain text.

[3] The case Riggs v Palmer was used by a legal philosopher Ronald Dworkin to argue that legal positivists have no plausible theory of theoretical disagreement (i.e. disagreement about the relevant criterion of legal validity), and that in addition to legal rules (contained in legal acts), law also consists of legal principles. For Hart's arguments, see Hart, 1961; for Dworkin's argument, see Dworkin, 1986 and Dworkin, 1977.

interest (Voglar, 1997: 58). However, even though most crimes against life are not committed with a specific intention of obtaining inheritance from the victim, the very act of taking someone's life, regardless of the offender's motive, carries both criminal-law and civil-law consequences. In the field of succession law, Slovenian legislation provides for two legal institutions that may be applied to punish the offender who would take or attempt to take the life of decedent (or his or her close relatives) by depriving them of their share of an inheritance, which they would otherwise have the right to receive. The notion of disinheritance gives the victim or the affected person a possibility to willingly deprive the offender of their forced share, while the unworthiness to inherit is applied *ex officio*, mostly in cases where the decedent can no longer express their will (e.g., because their life was taken by the offender), but it is presumed that they would agree that the offender no longer deserves to inherit any part of their estate.

The most important consequences of both institutions, the unworthiness to inherit and disinheritance, are basically the same; the offender is excluded from inheriting, and the order of succession is adjusted accordingly. However, there are also significant differences relating to the justification and nature of each institution, the scope and contents of offences that would be considered a justified reason for applying these consequences, procedural requirements, etc., which will be addressed within the framework of this article.

2 Succession in the Republic of Slovenia

In the Republic of Slovenia, both the right to inheritance and to private property are constitutionally guaranteed under Article 33 of the Constitution of RS,[4] whereas the former is primarily realised through the provisions of the Inheritance Act (*Zakon o dedovanju*, hereinafter: ZD).[5] The ZD comprehensively regulates relationships arising from succession rights and limitations thereof, all elements of intestate and testate succession, probate proceedings and other procedural matters. The Inheritance of Agricultural Holdings Act (*Zakon o dedovanju kmetijskih gospodarstev*, hereinafter:

[4] Ustava Republike Slovenije – Constitution of the Republic of Slovenia, Official Gazette of the RS, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 and 75/16 – UZ70a.

[5] Zakon o dedovanju (ZD) – Inheritance Act, Official Gazette of the SRS, No. 15/76, 23/78, Official Gazette of the RS, No. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US and 63/16.

ZDKG)[6] is the most important of other special acts affecting the course of succession. The ZDKG regulates the specifics of inheriting from a decedent who owned a protected farm, with the intention of preserving both the physical and economic integrity of protected farms. Certain succession-related issues are addressed by other specific acts, regulating different legal areas (e.g. Denationalization Act, Obligations Code, Notariat Act, Inheritance and Gift Tax Act, Civil Procedure Act, Non-Contentious Civil Procedure Act, etc.).

The constitutional right to inheritance is reflected in the right of the decedent to dispose with their property freely, not only during their life but also after their death (the so-called freedom of testation), and in the right of the heir to acquire the decedent's possession *mortis causa* (Zupančič & Žnidaršič Skubic, 2009: 30). As explained in the text below, none of these rights are unlimited.

Based on ZD provisions, Slovenian authors (e.g., Zupančič, 2002: 100-101; Zupančič & Žnidaršič Skubic, 2009: 71; Šinkovec & Tratar, 2005: 341; Kraljić & Rijavec, 2014: 126) derived the following list of necessary conditions that have to be met for the succession to take place:

(1) The decedent[7] died.

The succession commences after the decedent's death (Article 123 of ZD), which means that as long as the person is still alive, the succession cannot take place.[8] Before the decedent's death, the heirs have no right to inherit, nor do they have any other rights related to their (future) inheritance. They may not use or dispose of any part of the expected estate, and any such contract which purports to do so would be considered invalid (Article 104 of ZD).

[6] Zakon o dedovanju kmetijskih gospodarstev (ZDKG) – Inheritance of Agricultural Holdings Act, Official Gazette of the RS, No. 70/95, 54/99 – odl. US and 30/13.
[7] A decedent is a person whose possession is passed on to other persons after his or her death. If the decedent made a will, the term »testator« is used to emphasise that fact.
[8] The exception is a person who was declared dead. A declaration of death has the same legal effects in terms of succession as the actual death (Article 123(2) of ZD). In such case, the succession is deemed to take place on the day when the declaration of death becomes final, unless the declaration itself stipulates some other date (Article 124 of ZD). For more, see Kraljić & Rijavec, 2014: 127-128.

The moment of death dictates the frame of reference for the most critical legal consequences of succession, including the existence of heirs, the volume and scope of the estate, the validity of the title to succession, deadlines, the jurisdiction, etc. (for more, see Zupančič & Žnidaršič Skubic, 2009: 71-73).

(2) The heir exists.

The heir may be any natural person or legal entity, but only if they were alive (or incorporated) at the time of the decedent's death. The only exception is a *nasciturus*, a child that had already been conceived (but not yet born) at the commencement of succession, who is considered an heir if born alive (Article 125 of ZD). By analogy, a legal entity may also inherit even if it had not yet been incorporated at the moment of the decedent's death, assuming it subsequently fulfils all conditions necessary for acquiring its status as a legal entity and further assuming the procedure for its creation was underway at the time of death (Zupančič, 2002: 101). Legal entities may only inherit on the basis of a will, as they are not included in the circle of potential heirs under provisions of ZD.

(3) The heir has a valid title to succession.

A title of succession denotes reasons that grant a certain person the right to inherit in a particular case (Šinkovec & Tratar, 2005: 57). Thus, a person may only inherit if they have a valid title to succession in a particular case. In the Republic of Slovenia, this title can either be a law, which determines the circle of persons who qualify as potential heirs according to their relation to the decedent (intestate succession), or a will, in which the decedent determines his or her own heirs (testate succession). The purpose of the will is to bypass the legal order of succession, which is why the testate succession has a priority and the intestate succession will only take place in those cases where no valid will exists or where the testate heir cannot or may not inherit (Zupančič & Žnidaršič Skubic, 2009: 74-75). Succession contracts, with which someone intended to leave their estate or a part thereof to another person, are explicitly prohibited by Slovenian legislation (Article 103 of ZD), as no one may irrevocably be bound by such decision regarding their property.

(4) The heir has a capacity to inherit and is not unworthy to inherit.

The capacity to inherit is a capacity to acquire the decedent's rights and obligations. Under Slovenian legislation, every natural person has the capacity to acquire inheritance on the basis of the law or will, whereas legal entities may only inherit through the testate succession (Pavlin, 2012: 371; Zupančič & Žnidaršič Skubic, 2009: 75). Foreign citizens enjoy the same rights of inheritance as citizens of the Republic of Slovenia, under the condition of reciprocity (Article 6 of ZD). Nevertheless, even a person with a capacity to inherit may not do so, if he or she is deemed unworthy to inherit (see below, point 3).

(5) The estate exists.

By definition, succession can only take place if the decedent left some property and/or rights that can be subject to succession (i.e. the estate). The estate can be active or passive (Šinkovec & Tratar, 2005: 341).

If the listed conditions are met, the heirs are considered to obtain the estate at the moment of the decedent's death, without delay (*ipso iure*). No special legal act is thus necessary for the acquisition of inheritance (e.g. a hereditary statement); however, heirs may waive their inheritance with an explicit statement, if they wish to do so, regardless of whether the title of succession is a law or a will (Zupančič, 2002: 104; Zupančič & Žnidaršič Skubic, 2009: 71; Šinkovec & Tratar, 2005: 356, 367).

3 The unworthiness to inherit

3.1 Crimes against life and the unworthiness to inherit

A person becomes unworthy to inherit if they commit an act or omission for which they no longer deserve to inherit, even though they would otherwise have the capacity to do so (Zupančič & Žnidaršič Skubic, 2009: 75). The institute of the unworthiness to inherit is a type of a civil-law sanction, which may be imposed against the offender in addition to, or independent of, a criminal sanction. Its purpose is not only to discourage individuals from trying to obtain the inheritance by any means necessary, but also to uphold the (presumed) will of the decedent. By stipulating the consequences of the unworthiness to inherit, the law presumes that in some instances, the decedent would not want a particular person to inherit his or

her estate, but is unable to express his or her opinion by disinheriting that person (e.g. the unworthy person took their life or destroyed the will after their death or without their knowledge) (Pavlin, 2012: 372; Constitutional Court of the RS, U-I-3/93).

Article 126 of ZD catalogs the situations when a person becomes unworthy to inherit:

- a person who intentionally took or attempted to take the decedent's life;
- a person who forced, threatened or deceived the testator into writing or revoking his or her will or a provision of the will or prevented him or her from doing so;
- a person who hid or destroyed the testator's will in an attempt to prevent the execution of a will, as well as a person who forged the testator's will;
- a person who gravely neglected his or her obligation to maintain the decedent, even though such obligation was imposed on him or her by law, as well as a person who refused to provide necessary assistance to the decedent.[9]

The situations contained in this list, are exhaustive and must be interpreted strictly and narrowly. Interpreting the last situation on this list has turned out to be the most problematic, as "to gravely neglect one's obligation" and "necessary assistance" are legal standards, the precise contents of which should be determined in each particular case.[10] While the courts are required to consider all subjective and objective circumstances of the case, relating to both the decedent and the heir, they must also take pains to ensure their scope of review follows a restrictive interpretation, without resorting to analogies (Pavlin, 2012: 373, 379; Higher Court in Ljubljana judgment I Cp 1901/2018).

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[9] Until 1994, a person was also considered unworthy to inherit if they fled the country in order to avoid a conviction for a serious criminal offence, to avoid a mandatory military service or with the intention to perform hostile acts against their country, and have not yet returned at the moment of the decedent's death. The Constitutional Court of the Republic of Slovenia repealed this reason as unconstitutional with a reasoning that the state cannot protect state or public interest by intervening with the testator’s right to dispose of his or her property after death. For more see, the Constitutional Court of the Republic of Slovenia decision No. U-I-3/93 of 16 June 1994.

[10] E.g., for how long did the heir failed to provide support or assistance, if the decedent had any other means of support at his or her disposal, if the decedent's life was at risk, if the heir committed a criminal offence by failing to provide support or assistance, if the heir was even able to provide support or assistance, etc. See, for example, the Supreme Court of the RS decisions II Ips 552/2004, II Ips 667/2006 and II Ips 418/2008; Higher Court in Ljubljana judgments III Cp 951/2009 and II Cp 1356/2019; Higher Court in Celje judgment Cp 699/97.

Tthe first reason listed under Article 126 of ZD for the unworthiness to inherit is an act of intentionally taking or attempting to take the decedent's life. The assessment of whether such act was indeed committed, and whether, consequently, the unworthy person should be prevented from inheriting, should be carried out in accordance with the provisions of Criminal Code (hereinafter: KZ-1)[11] and the following considerations should be taken into account. First, a person may only be deemed unworthy to inherit if they committed or attempted to commit a criminal offence of intentionally taking the decedent's life (mainly manslaughter and murder under Articles 115 and 116 of KZ-1, but also voluntary manslaughter under Article 117 of KZ-1) and not for any other criminal offence, regardless of how seriously it affected the decedent (Pavlin, 2012: 375). Second, the act has to be directed against the decedent and not some other person; if the offender took or attempted to take a life of the decedent's relatives, they may not be sanctioned by the unworthiness to inherit after the decedent (but might be unworthy to inherit after the affected relative, if they also have a title to succession in relation to that person). Third, the act must be committed with intent, which means that the offender had to be either aware of his or her act and wanted to commit such act (direct intent), or had to be aware that an unlawful consequence might result from his or her conduct but nevertheless allowed for such consequence to occur (conditional intent) (Article 25 of KZ-1; see also Bavcon et al., 2013: 278ff.). Acts committed through negligence or acts resulting in graver consequences than intended (e.g., grievous bodily harm resulting in death, Article 124 of KZ-1) do not qualify as reasons for a person to be considered unworthy to inherit (see also Bavcon, 2013: 303-305). Fourth, the attempt to take a life is sanctioned by the unworthiness to inherit, but the act committed in self-defence or out of (justifiable) necessity is not, as in both situations the necessary intent element is absent (Articles 22, 32, 34 of KZ-1; Pavlin, 2012: 374-375; for more, see also Bavcon, 2013: 232ff. and 240ff.). Fifth, it is not just the offender who is deemed unworthy to inherit, but also the accomplice and any other person who instigated the offence or assisted the offender (Zupančič & Žnidaršič Skubic, 2009: 75).

[11] Kazenski zakonik (KZ-1) – Criminal Code, Official Gazette of the RS, No. 50/12 – official consolidated text, 6/16 – popr., 54/15, 38/16, 27/17, 23/20 and 91/20.

A criminal conviction or a final judgment in criminal proceedings is not a condition precedent for the offender to be considered unworthy to inherit. If such judgment exists, the probate court is bound by the criminal court's decision, regardless of the outcome (either a conviction or acquittal). However, if no such judgment was issued by a criminal court, the probate court may either stay the proceedings until a competent criminal court issues its decision in criminal proceedings or, instead, address the question of the offender's criminal liability as a preliminary question. This option is especially relevant in cases where criminal proceedings are no longer possible (e.g. the offender died). The probate court may issue its own decision regarding the elements of a criminal offence and the potential heir's (un)worthiness to inherit, or stay the proceedings and refer the case to litigation if certain facts remained disputed (Pavlin, 2012: 384-385; Higher Court in Ljubljana decision I Cp 2561/2017; see also Ude et al., 2010: 134-135).

3.2 Consequences of the unworthiness to inherit for the order of succession

A person who is unworthy to inherit is prevented from acquiring inheritance through either the intestate or testate succession, as well as from obtaining anything else (e.g. a bequest or other benefits) on the basis of a will (Article 126(1) of ZD). The unworthiness to inherit thus affects all forms of universal or singular succession and all heirs (including forced heirs) (Pavlin, 2012: 373). All reasons for the unworthiness to inherit refer to the acts or omissions that target a particular decedent, which is why a person who is unworthy to inherit from one testator may still inherit from others. The unworthiness to inherit is, therefore, an instance of a relative incapacity to inherit (Zupančič & Žnidaršič Skubic, 2009: 78).

Furthermore, the unworthiness to inherit is personal in nature, meaning that only the person who is unworthy to inherit bears the consequences of his or her actions; that person’s actions should not adversely affect his or her descendants. In the case of intestate succession, the descendants inherit their shares as if the unworthy person had died before the decedent (under the right of representation). In the case of testate succession, the descendants have no right of representation, which is why intestate heirs will inherit instead of the unworthy person, unless the testator stipulated otherwise in his or her will (Articles 79 (1) and 127(1) of ZD; Zupančič & Žnidaršič Skubic, 2009: 78; Kukovec, 2017: 11-12; Pavlin, 2012: 387; Supreme Court of the RS decision II Ips 301/2017). Therefore, regardless of the title to succession,

the unworthiness to inherit affects the order of succession in the same way as if the offending heir had died before the decedent, with all accompanying legal consequences.

The probate court considers the unworthiness to inherit of its own motion (*ex officio*), unless a person is allegedly unworthy to inherit for failing to provide support or necessary assistance (Article 127(3) of ZD; see also Higher Court in Ljubljana decision I Cp 4883/2010). In such a case, any person who has a legal interest for someone not to inherit may claim that they are unworthy to do so (Zupančič & Žnidaršič Skubic, 2009: 78). Generally, the reason for the unworthiness should exist before or at the moment of the decedent's death, but it may also occur later (e.g. a will is destroyed or forged after the testator's death). In such cases, the unworthy person is deemed never to have become an heir (with the *ex tunc* effect) (Pavlin, 2012: 383).

The unworthiness to inherit, therefore, occurs *ipso iure,* regardless of the decedent's will. However, the decedent can forgive actions which otherwise would result in the unworthiness to inherit, either explicitly or with a conclusive act (e.g., the decedent and the heir later renew a close friendship; the decedent leaves something to the heir in his or her will after being made aware of their actions). Following the (full) forgiveness, the heir is no longer deemed to be unworthy to inherit (Šinkovec & Tratar, 2005: 345, 347; Pavlin, 2012: 388). The option of forgiveness stems from the highest importance of the decedent's last will. Since one of the main reasons for the existence of this institute is a presumption that the decedent would not want such person to inherit from them, the possibility to forgive allows them to rectify the situation (where that is still possible) if this is not, in fact, the case.[12]

3 Disinheritance

3.1 Freedom of testation and its limitations

The testate succession in the Republic of Slovenia is governed by the principle of the freedom of testation, which means that the testator may decide, by drafting a will, the fate of their possessions after their death, regardless of the legal order of succession (Zupančič & Žnidaršič Skubic, 2009: 33). The testator is free to leave his

[12] Unlike ZD, ZDKG explicitly provides that the decedent may not forgive the unworthy person who failed to provide support or necessary assistance to the decedent, if the unworthy person is the decedent's spouse or partner, parent, child, adoptee or a descendant thereof (Articles 14 and 18 of ZDKG).

or her possessions, or part thereof, to any person or persons (and is not obliged to treat all descendants equally, as the law does), either as a hereditary share or as a bequest; determine a substitute heir in case the first heir dies before the testator or becomes unworthy to inherit; assigns a specific part of the estate to be used for a pre-determined purpose, etc. (Articles 78 to 82 of ZD). Above all, the freedom of testation may not be restricted by a contract. Any contract that purports to oblige someone to include or omit a particular provision in their will, or to revoke or not revoke a particular provision, is null and void (Article 105 of ZD). The same applies to all succession contracts that purports to oblige a party to leave their estate to another person, as well as to all contracts referring to a future estate or expected inheritance (Articles 103 and 104 of ZD). Thus, the law gives priority to the freedom of testation, before legal provisions determining the heirs and their shares (Zupančič & Žnidaršič Skubic, 2009: 65; see also Kraljić, 2011: 257ff.).

However, this does not mean that the freedom of testation is entirely unlimited. Certain restrictions can be found under general rules on legal transactions (e.g., the contents of the will may not violate constitutional provisions), whereas the ZD also includes limitations specifically intended to restrict the freedom of testation. Article 8 of ZD states that the testator may dispose of his estate in a manner and within limits set by law.

The most notable and significant of those limitations is the concept of a forced share. While testators may change the legal order of succession by making a will, they may not wholly disregard it. The concept of a forced share is designed to prevent testators from disposing of a part of their estate (the so-called reserved share) if certain persons exist who are assigned this share by law, regardless of the testator's wishes. The absolute forced heirs are comprised of the decedent's descendants, adoptees and their descendants, the decedent's parents and the decedent's spouse, a cohabiting partner or a same-sex partner. The relative forced heirs are the decedent's grandparents and siblings, who may only evoke their forced heir status if they are permanently unable to work and do not have sufficient means of maintenance. All these persons are considered forced heirs only if they would be entitled to inherit as intestate heirs in the specific case (Article 25 of ZD). The forced share of the decedent's descendants, adoptees and their descendants, the decedent's spouse or partner amounts to one-half, and the forced share of other forced heirs' amounts to one-third of what they would be entitled to inherit under the rules of intestate succession (Article 26 (2) of ZD). The decedent is free to dispose with the rest of

his or her estate as desired (the so-called available share). If the total value of the decedent's testamentary dispositions and gifts distributed during the decedent's life exceed the available share, the forced heirs may claim that they were deprived of their forced share and request the reduction of decedent's dispositions or even the return of gifts (for more on a forced share, see Pavlin, 2012; Zupančič & Žnidaršič Skubic, 2009: 92-103; Zupančič, 2002: 54-62; Kraljić & Rijavec, 2014: 168-171).

Some other restrictions refer to the prohibition of determining an heir to another heir (the so-called fideicommissary or indirect substitution; Article 93 (3) of ZD); a ban on simultaneous wills between two persons who would appoint each other as mutual heirs; or the conditions for the unworthiness to inherit or disinheritance (see also Zupančič & Žnidaršič Skubic, 2009: 65-66; Šinkovec & Tratar, 2005: 59-61). Furthermore, a testator has to satisfy certain legal requirements regarding the form of the will; a will is only valid if it was drafted in one of the forms determined by the ZD and under conditions stipulated by the ZD (e.g., as the will is a strictly personal legal transaction, representation is not allowed; the invalidity of the will due to force, threat, fraud or error, etc.; see Articles 59 and the following; see also Zupančič, 2002: 65-71).

3.2 Crimes against life and disinheritance

Even though the law does not generally permit the testator to dispose of the forced share freely, it does recognise certain exceptional circumstances under which even the concept of the forced share would be deemed unfair. The ZD recognises two situations in which a forced heir may be deprived of their forced share (or a part thereof); pursuant to conditions stipulated by the ZD, they may be disinherited (*exheredatio ob iusta causa*) or they might be deprived of their forced share in favour of their descendants (*exheredatio bona mente*).[13]

[13] The testator may deprive his or her descendant or adoptee who is deeply in debt or lives extravagantly of their forced share (in part or in full) in favour of their own descendants. This measure remains valid only if the person who is to be deprived of their forced share has a child or grandchild from a previously deceased child at the time of the testator's death, who are not yet of age or are of age but are incapable of earning their own living (Article 45 of ZD). The purpose of this provision is to protect financial interests of the forced heir's descendants in cases where the inheritance could be spent or seized by the forced heir's creditors. The confiscated forced share is divided among all descendants who fulfil legal requirements of age or incapacity to earn in accordance with the provisions regulating a forced share (for more, see Zupančič & Žnidaršič Skubic, 2009: 105-106; Šinkovec & Tratar, 2005: 193-196; Pavlin, 2012: 410-415; Kraljić & Rijavec, 2014: 171-172).

Disinheritance is a legal institute that allows the testator to deprive a forced heir of their forced share (or part thereof) and thus prevent them from inheriting a part of the estate despite their statutory right to inherit a forced share (Pavlin, 2012: 391). The purpose of disinheritance is to punish an heir who has a legal right to a forced share for their unacceptable behaviour towards the testator or his or her relatives, or for the objectionable way in which they live their life (Zupančič, 2002: 60; Zupančič & Žnidaršič Skubic, 2009: 103). Article 42 of ZD lists only three reasons[14] for which a testator may disinherit their forced heir:

- who committed a serious offence against the testator by violating some moral or legal obligation;
- who intentionally committed a serious criminal offence against the testator, his or her spouse, child, adoptee or parents;
- who lives an idle and dishonest life.

The list of possible reasons for disinheritance is exhaustive and does not allow for an expansive interpretation (Pavlin, 2012: 393). The contents of (unclear) legal standards, such as "a serious offence against a moral obligation" or "idle and dishonest life", are determined by the courts, taking into account both the objective and subjective circumstances of each particular case. Slovenian case law[15] has adopted a firm position that reasons for disinheritance should not be evaluated only as an expression of the testator's displeasure with the disinherited person's conduct; instead, the reasons should be of sufficient importance and severity to justify the punishment of the offending heir with deprivation of (even) the legally guaranteed forced share. Therefore, the offence against the testator should be considered "serious" also under the criteria of social morality, and not just under the criteria established in a relationship between the testator and the heir.

Unlike in the case of unworthiness to inherit, where a person is deemed unworthy to inherit only if they committed a criminal offence of intentionally taking or attempting to take the decedent's life, the second reason for disinheritance has a broader scope. First, a person may be disinherited not only if they committed a

[14] The fourth reason, a crime against political foundations and security of Yugoslavia, was abandoned with the amending act of 2001 (Zakon o spremembah in dopolnitvah zakona o dedovanju (ZD-B) - Act Amending the Inheritance Act, Official Gazette of the RS, No. 67/01).

[15] See, for example, the Supreme Court of the RS judgments II Ips 562/92 and II Ips 43/2008; Higher Court in Ljubljana judgments II Cp 1936/2016 and I Cp 1531/2018; Higher Court in Maribor judgment I Cp 343/2003.

criminal offence against the testator, but also against his or her "spouse, child, adoptee or parents". Even though the ZD does not explicitly state so, this provision includes cohabiting partners or same-sex partners (whose legal status is equal to that of a spouse), as well as adoptive parents (whose legal status is equal to that of biological parents). If the testator separated from or divorced his or her partner after disinheriting the person who committed a criminal offence against the partner, disinheritance remains valid, as long as the reason for disinheritance existed when the will was made (Pavlin, 2012: 397).

Moreover, disinheritance is possible not only in the case of crimes against life (although the latter are definitely included) but also against other serious criminal offences. Disinheritance is only justified if the criminal offence in question was committed intentionally; either with a direct intent (the offender had to be either aware of his or her act and wanted to commit such act), conditional intent (the offender had to be aware that an unlawful consequence might result from his or her conduct but nevertheless allowed for such consequence to occur), or even momentary intent (the intent without a motive, *dolus repentinus*) (Article 25 of KZ-1; see also Bavcon et al., 2013: 278ff.). Acts committed through negligence, in self-defence or out of (justifiable) necessity are not valid reasons for disinheritance (Articles 22, 32, 34 of KZ-1; Pavlin, 2012: 398; for more, see also Bavcon, 2013: 232ff. and 240ff.). The testator may disinherit the offender, but also the accomplice or any other person who instigated the offence or assisted the offender (Pavlin, 2012: 398).

A final criminal judgment convicting the offender is not necessary for disinheritance. If no such judgment was issued by a criminal court, the existence of a criminal offence may be determined by a civil court. However, if the person who is being disinherited had already been acquitted with a final judgment before a criminal court, it is clear that the criminal offence was not committed and the reason for disinheritance, therefore, does not exist (Pavlin, 2012: 398).

3.3 Consequences of disinheritance for the order of succession

Testator wishing to disinherit their heir must explicitly and clearly state this in their will. The will can take any form, as long as it is legally valid, and the testator had the capacity to make it (Pavlin, 2012: 400). The word "disinherit" does not need to be included if the testator's intention to achieve this consequence is expressed in an

unambiguous manner. Disinheritance with a conclusive act (e.g. a testator who would divide his or her estate without including one of the heirs) is not possible (Šinkovec & Tratar, 2005: 186; Higher Court in Koper judgment I Cp 1279/2004).

The reason for disinheritance does not need to be indicated (e.g., if the testator wished to keep it private), as long as the statement clearly expresses the testator's intent to disinherit a certain person and the existence of a legally determined reason for them to do so (Šinkovec & Tratar, 2005: 187). However, it is prudent to do so anyway, in case a dispute arises, and the reason has to be proven to exist. At least one of the above-listed legal reasons has to exist at the moment of disinheritance (i.e. when the testator made a will or another act on disinheritance that meets all formal requirements to be considered a will). If the heir is being disinherited for living an idle or dishonest life, this reason also has to exist at the moment of the testator's death (Article 43 of ZD). The testator may not use the act of disinheritance to exclude everyone from universal succession; it has to refer to a specific heir (Pavlin, 2012: 391; Higher Court in Ljubljana judgment I Cp 3051/2016).

Disinheritance can be complete or partial, and may also be revoked by an explicit statement, pursuant to the same requirements as the revocation of a will, regardless of whether the reason for disinheritance has ceased or not. This means that disinheritance remains valid until formally revoked, even if the reasons for disinheritance no longer exist or if the testator (informally) forgave the offender (Pavlin, 2012: 410).

The consequence of complete disinheritance is a complete loss of the right to inherit (and of a status of a forced heir); a disinherited person may not inherit on the basis of any title to succession. They may not receive any part of the estate, nor may they request the return or reduction of gifts given while the testator was still alive (Šinkovec & Tratar, 2005: 181; Pavlin, 2012: 407). In such a case, the rights of other persons who may inherit from the testator are determined as if the disinherited person had died before the testator (Article 44 of ZD). As the act of disinheritance represents a punishment for a certain offence, the consequences are of a strictly personal nature and do not affect the rights of other forced heirs (Pavlin, 2012: 409). This means that if the disinherited person has any descendants, they shall acquire his or her forced share on the basis of the right of representation; otherwise, the shares of other forced heirs shall increase correspondingly. If there are no forced heirs who would inherit under the provisions of ZD, the disinherited person's share is added

to the available share of the estate (Zupančič & Žnidaršič Skubic, 2009: 105; Šinkovec & Tratar, 2005: 190-194). Partial disinheritance results in a reduced forced share; a disinherited person does not lose the status of a forced heir, but their right to inherit is proportionally reduced to the extent of disinheritance (Zupančič & Žnidaršič Skubic, 2009: 104; Pavlin, 2012: 408).

The testator is not free to dispose of the part of the estate that would have been inherited by the disinherited forced heir, as that part of the estate remains reserved for other forced heirs who will inherit instead of the disinherited person (unless, of course, no such heir exists). These forced heirs will not acquire the part of the estate that would have been inherited by the disinherited person, as they have their own, personal legal right to inherit a part of the estate as forced heirs of the testator. Their forced share is calculated in relation to the entire estate and not in relation to the share of the disinherited person (Šinkovec & Tratar, 2005: 194).

If the disinherited forced heir disputes disinheritance (by claiming either that a legal reason for disinheritance does not exist or that disinheritance is not justified in a particular case), the probate court shall stay proceedings and refer the case to litigation. The person claiming disinheritance, i.e. a person who would then receive the disinherited person's share, must prove the existence of a valid reason, as well as the fact that grounds for disinheritance existed at the time of disinheritance (Zupančič & Žnidaršič Skubic, 2009: 104; Šinkovec & Tratar, 2005: 188; Higher Court in Celje decision Cp 759/2008).[16] When assessing the merits of disinheritance, the court may examine and establish facts related to the existence of any legally determined reasons, even those not mentioned by the testator, if the court can deduce that these are the actual reason for the testator's decision (Higher Court in Koper judgment I Cp 1279/2004; Higher Court in Ljubljana judgment I Cp 3051/2016; Šinkovec & Tratar, 2005: 187).

[16] This is an exception from a general rule contained in Article 213 (1) of ZD, according to which the court shall refer the party whose right is considered less likely to initiate civil or administrative proceedings. In the case of disinheritance, therefore, it is not necessary for the court to assess which party's right is less likely, as the burden of proof lies with the party claiming disinheritance. See Higher Court in Koper decision I Cp 63/2016 or Higher Court in Ljubljana decision I Cp 1357/2017. For more on this topic, see also Požun, 1996: 10-11.

4 Conclusions

In addition to sanctions stipulated by criminal law, an offender who commits a crime against life could also face civil-law consequences, including the loss of succession rights. These consequences are justified upon the basic principle that no offender should be allowed to benefit or enrich themselves by their criminal actions. Slovenian legislation provides two legal institutions that are intended to punish an offender for committing criminal offences against the decedent or their relatives; the unworthiness to inherit and the disinheritance. When considering these institutes, the law must balance two conflicting rights: on the one hand, the right of the heir to inherit from the decedent and on the other hand the freedom of testation, which allows the decedent to dispose with their property after their death as they wish.

A person who takes or attempts to take the decedent's life can be deemed unworthy to inherit. In such cases, the law presumes that the decedent would not want the offender to inherit his or her estate, but since they might not be able to express their will (as a murder/manslaughter victim), the unworthiness to inherit is considered *ex officio*. If the offender only attempted to take another person's life, they may be forgiven, but this is the extent to which the decedent's will is considered. In the case of disinheritance, however, the will of the decedent/testator is crucial. The intention must be clearly expressed in a form that meets all legal requirements for making a will. For that reason, an offender that took the decedent's life would not be disinherited, as the victim would be unable to express their will (but they might be deemed unworthy to inherit instead). On the other hand, disinheritance is possible not only in the case of (attempted) murder or manslaughter, but also in the case of other serious crimes, and not only in the case of crimes committed against the decedent, but also against their close relatives. Hypothetically, the offender who took another person's life could thus be disinherited by all their close relatives (spouses or partners, children or adoptees, parents or adoptive parents), while also being unworthy to inherit any part of the murdered decedent's estate. Despite some important differences between the two institutes that were highlighted in this article, the implications for the offender are basically the same. In both cases, the offender would be deprived (fully or partially) of the share that he or she would otherwise have the right to acquire, they would be excluded from the order of succession, and the estate would be divided instead as if the offender had died before the decedent.

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Vulnerabilität von älteren Personen – ausgewählte Aspekte

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Zusammenfassung Heutzutage sind wir Zeugen intensiver demografischer Veränderung. Die Bevölkerung wird älter und ältere Personen werden häufig als Belastung in der Gesellschaft angesehen. Ältere Personen sind erst in den letzten Jahren als eine besonders verletzliche Gesellschaftsgruppe im Menschenrechtsschutzsystem sichtbar geworden und wurden als Rechteträger wahrgenommen. Im Beitrag werden Ausgangspunkte der Altersdiskriminierung, in Verbindung mit ausgewählten Gesichtspunkten der Rechtsstellung, der älteren Personen, in der internationalen und slowenischen Perspektive, in den Mittelpunkt gestellt.

Schlüsselwörter: Menschenrechte, Altersdiskriminierung, Autonomie, COVID-19, Ehe

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VULNERABILITY OF THE ELDERLY - SELECTED ASPECTS

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Keywords: human rights, age discrimination, autonomy, COVID-19, marriage

Abstract Today, we are witnessing intense demographic change. The population is getting older, and older people are often seen as a burden in society. Older persons have in recent years been recognized as a particularly vulnerable social group. They became visible in the human rights protection system and were perceived as rights holders. The author in the article presents from an international and Slovenian perspective the problematics of age discrimination in connection with selected aspects of the legal status of older persons.

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1 Einleitung

Wir leben in einer Zeit, intensiver demografischer Veränderungen. Insbesondere Europa steht dem Altern gegenüber, da seine Bevölkerung immer älter wird. Man erwartet, dass 2050 mehr Menschen, im Alter über 60 Jahren, geben wird, als Kinder im Alter unter 15 Jahren. Obwohl die älteren Personen eine wichtige gesellschaftliche Gruppe darstellen, ist nicht zu übersehen, dass sie häufig marginalisiert werden (Ryrstedt, 2013: 81). Die Haltung gegenüber älteren Personen und die Einstellung gegenüber dem Altern sind unterschiedlich. Sie können negativ sein: die älteren Personen werden als Belastung für die Familie, Gesellschaft, das Arbeitsumfeld, … gesehen. Andererseits sind die älteren Personen willkommen und werden geschätzt, da sie als weise, erfahren, ruhig, geduldig, ... bezeichnet werden (Kraljić, 2019a). Mit dem Bewusstsein über das Altern öffnen sich auch bestimmte Rechtsfragen in Verbindung mit dem Altern oder den älteren Personen, beziehungsweise werden in den Mittelpunkt gestellt (z. B. das Recht auf Würde, das Verbot der Altersdiskriminierung, die Entscheidungsautonomie, …). In den letzten Jahren kam es zu einem größeren Bewusstsein und zum Anstieg der Rechtsakte, die Bestimmungen, die sich auf die Rechtsstellung der älteren Personen beziehen, enthalten. Im Bewusstsein über die Problematik der alternden globalen und insbesondere der europäischen und slowenischen Gesellschaft, sind rechtliche Ausgangspunkte und faktische Grundlagen, welche die Altersdiskriminierung verhindern werden, zu schaffen. Im Beitrag werden zunächst wichtige Ausgangspunkte in Verbindung mit der Altersdiskriminierung dargestellt. Im Weiteren folgen ausgewählte Gesichtspunkte der Rechtsstellung der älteren Personen, wie, insbesondere, die verletzlichen Gesellschaftsgruppen, in der internationalen und slowenischen Perspektive.

2 Allgemeines über das Alter

Da ältere Personen keine homogene Gruppe darstellen, ist es schwierig eine rechtliche Definition für eine 'ältere Person' beziehungsweise einen 'älteren Menschen' festzulegen (Council of Europe, 2014: 31). Das Alter und das Altern können somit aus vier verschiedenen, jedoch sich überschneidenden Perspektiven behandelt werden:

a) *das chronologische Alter* wird durch das Geburtsdatum bestimmt. Damit werden die Jahre, die bei einer Person seit Ihrer Geburt bis zu einem bestimmten Tag vergangen sind, bezeichnet;

b) *das biologische (*auch *funktionelle) Alter*, das hinsichtlich der Vitalität des Organismus im Vergleich zu den anderen Menschen desselben chronologischen Alters festgelegt wird. Davon sind die funktionellen Kapazitäten der Organe abhängig – wie viel an täglichen Aktivitäten ein Mensch, seinem Alter entsprechend, bewältigen kann. Für die Bemessung dieses werden messbare Körperindikatoren verwendet, wie: der Blutdruckwert, die Muskelkraft, die Körperbeweglichkeit, die Hörschwelle und die Sehstärke, der Grad der körperlichen Leistungsfähigkeit, u. ä.;

c) *das psychologische beziehungsweise das Erlebnisalter* bezieht sich auf die geistigen und die Persönlichkeitsveränderungen im Lebenszyklus und darauf, wie alt sich ein Mensch fühlt und wie er sein chronologisches und biologisches Alter erlebt und akzeptiert;

d) *das soziale Alter* legt die Änderung der Rollen und Beziehungen des Individuums mit dem Älterwerden fest (Ramovš, 2010; European Union Agency for Fundamental Rights, 2018: 10).

Das Alter ist untrennbar mit dem Lauf der Zeit verbunden. Das Altern ist also ein Prozess, der für jeden Einzelnen anders verläuft und von verschiedenen persönlichen Umständen und Umfeldern definiert wird (Council of Europe, 2014: 31). Die Zeit läuft für jeden gleich schnell, aber das chronologische Alter beeinflusst jeden von der Geburt bis zum Tod unterschiedlich. Ungeachtet des Bezugs zum Alter oder zu verschiedenen Folgen, die der Lauf der Zeit am Einzelnen hinterlässt, sind wir aufgrund unseres tatsächlichen oder vorausgesetzten beziehungsweise scheinbaren chronologischen Alters mehrheitlich bestimmten Vorurteilen und Stereotypen unterworfen (Brezovar, 2017: 9).

Gewöhnlich werden Personen, die das chronologische Alter von +65 Jahren oder mehr erreicht haben, als alt bezeichnet. Dabei werden Personen von 65 bis 74 Jahren als 'frühe ältere Personen′ (eng. *early elderly*), Personen ab 75 Jahren als 'spätere ältere Personen' (eng. *late elderly*) bezeichnet (Hajime et al, 2006: 149).

In Slowenien liegt das Durchschnittsalter bei 44,5 Jahren, womit es, hinsichtlich des Durchschnittsalters, mit an der Spitze der Weltbevölkerung steht. In China, dem Land mit der höchsten Bevölkerungszahl (1.439.323.776), beträgt das Durchschnittsalter 38,4 Jahre. Das höchste Durchschnittsalter hat Japan, mit 48,4 Jahren, bei einer Bevölkerung von 126.473.774. Das höchste Durchschnittsalter der Bevölkerung in Europa hat mit 47,3 Jahren Italien (60.461.826 Einwohner). Andererseits gibt es Staaten, die ein viel niedrigeres Durchschnittsalter der Bevölkerung haben. So hat Uganda mit 45.741.007 Einwohnern das Durchschnittsalter von nur 16,7 Jahren. Niger ist, bei 15,2 Jahren (Worldometers, 2020), der Staat mit dem niedrigsten Durchschnittsalter.

3 Altersdiskriminierung

Mit älteren Personen wird häufig auch der Begriff 'ageism', der zum ersten Mal 1969 von Robert Butler verwendet wurde, verbunden (Achenbaum, n.d.). Laut Butler besteht ageism aus drei Hauptkomponenten:

a) von den Vorurteilen gegenüber älteren Personen, dem Alter und dem Alterungsprozess;
b) von der diskriminierenden Praxis sowie der institutionellen Praxis;
c) von den Normen, die zur Erhaltung der negativen Stereotypen über ältere Personen beitragen.

Als ageism wird die Gesamtheit von Ideen, Standpunkten, Überzeugungen und Praktiken seitens einzelner Personen, die aufgrund des Alters, gegenüber Personen oder Gruppen parteiisch sind, bezeichnet. Gründe, für die Unterschiede bei der Behandlung von Personen, aufgrund ihres Alters, beruhen häufig auf allgemeinen Voraussetzungen oder Gelegenheitsstereotypen. Sind einzelne Personen wegen dieser erniedrigenden Stereotypen der Diskriminierung ausgesetzt, wird ihr Grundrecht auf Menschenwürde verletzt, zusätzlich wird von dem Respektieren der Gleichberechtigung abgewichen (O'Cinneide, 2005: 5). Ageism steht gewöhnlich mit negativen Stereotypen (z. B. ältere Personen sind senil, krank) im Zusammenhang (Zovko & Damjanić, n.d.: 366-367). Das Wesentliche des ageism ist also, dass die Diskriminierung nur aufgrund von Vorurteilen, die am chronologischen Alter der Person oder Gruppe angesetzt sind und nicht am Zustand des tatsächlichen Alterungsprozesses, ausgeübt wird. Letzteres läuft nämlich bei jedem Einzelnen anders ab und wird vom Gesundheitszustand des Einzelnen, der genetischen

Grundlage, vergangenen Ereignissen, dem Eigenbefinden, … beeinflusst (Kraljić, 2019a). Beim ageism sind das chronologische Alter und die Stereotypen, die in der Gesellschaft oder beim Einzelnen, der die Diskriminierung ausübt, bestehen, die Grundlage der Diskriminierung.

4 Internationale Regelungen in Verbindung mit der Altersdiskriminierung

Heute gibt es bereits eine Reihe von internationalen, verbindlichen und unverbindlichen Urkunden, die inhaltlich an ältere Personen anknüpfen. Geht man von den allgemeinen Menschenrechtsurkunden aus, wie:

a) *der Allgemeinen Erklärung der Menschenrechte* (AEMR)[1];
b) *dem Internationalen Pakt über bürgerliche und politische Rechte* (IPbpR)[2]**;**
c) *dem Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte* (IPwskR)[3];
d) *der Konvention zum Schutze der Menschenrechte und Grundfreiheiten* (EMRK);[4]

kann festgestellt werden, dass das Alter nicht ausdrücklich als Diskriminationsumstand genannt wird. Allerdings kommt das Verbot der Altersdiskriminierung von dem allgemeinen Verbot (z. B. »oder eines anderen Umstands«), das alle genannten Urkunden beinhaltet, hervor.[5]

Andererseits gibt es neuere internationale Urkunden, wo das Alter ausdrücklich als Diskriminationsumstand genannt wird, und zwar:

a) Punkt p. der Präambel zum *Übereinkommen über die Rechte von Menschen mit Behinderungen* (UN-Behindertenrechtskonvention - BRK)[6];
b) Art. 4(3) des *Übereinkommens des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (*Istanbul-Konvention*)*[7];

[1] Die Allgemeine Erklärung der Menschenrechte (AEMR): Uradni list (Gesetzblatt) RS, Nr. 24/18.
[2] Der Internationale Pakt über bürgerliche und politische Rechte (IPbpR): Uradni list RS, Nr. 9/92.
[3] Der Internationale Pakt über wirtschaftliche, soziale und kulturelle Rechte (IPwskR): Uradni list RS, Nr. 9/92.
[4] Die Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK): Uradni list RS-MP: Nr. 7-41/94.
[5] Vergleiche Art. 7 AEMR; Art. 26 IPbpR; Art. 2(2) IPwskR; Art. 14 EMRK.
[6] Das Übereinkommen über die Rechte von Menschen mit Behinderungen oder UN-Behindertenrechtskonvention (BRK): Uradni list RS, Nr. 10/08.
[7] Das Übereinkommen des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (Istanbul-Konvention): Uradni list RS, Nr. 1/15.

c) die Grundrechte, die von der *Charta der Grundrechte der Europäischen Union* (GRC)[8] genannt werden, stehen allen unabhängig vom Alter zu. Allerdings bietet Art. 21 GRC expliziten und klaren Schutz vor der Altersdiskriminierung (European Union Agency for Fundamental Rights, 2018: 18).

Internationale Organe befassen sich schon einige Jahre vermehrt mit den Menschenrechten Älterer. Die UNO schuf 2014 das Mandat der *unabhängigen Expertin für die Menschenrechte Älterer*.[9] Das ist seit 2020 Frau Claudia Mahler.[10]

Im Jahr 2014 erließ das Ministerkomitee des Europarates eine Empfehlung an die Mitgliedstaaten zur Förderung der Menschenrechte Älterer.[11]

Das einzige bislang rechtlich verbindliche Instrument, das sich mit den Menschenrechten älterer Personen befasst, ist seit 2017 die *Interamerikanische Konvention zum Schutz der Menschenrechte Älterer* (IKSMÄ),[12] die aber nur für den amerikanischen Raum gilt. Ziel dieser Konvention ist es, die Anerkennung sowie die uneingeschränkte Wahrnehmung und Ausübung aller Menschenrechte und Grundfreiheiten älterer Personen zu fördern, zu schützen und sicherzustellen, um zu ihrer vollständigen Einbeziehung, Integration und Teilnahme in der Gesellschaft beizutragen (Art. 1(1) IKSMÄ). Die Bedeutung der IKSMÄ ist groß, da sie in Art. 2 wichtige Definitionen in Verbindung mit dem Alter und der Altersdiskriminierung einführt. Insbesondere, wenn man davon ausgeht, dass es auf internationaler und europäischer Ebene noch keine spezifische und rechtlich verbindliche derartige Konvention gibt, stellt Art. 2 IKSMÄ folgende Definitionen vor:

a) »*Verlassenheit*«: Fehlende Maßnahmen, absichtlich oder nicht, zur umfassenden Versorgung einer älteren Person, die ihr Leben oder ihre physische, psychische oder moralische Integrität gefährden können. (Eng. *Abandonment*: Lack of action, deliberate or not, to comprehensively care for an older person's needs, which may jeopardize their life or physical, psychological, or moral integrity);

[8] Die Charta der Grundrechte der Europäischen Union (GRC): Uradni list Evropske unije C 83/389.
[9] Eng. *the Independent Expert on the enjoyment of all human rights by older persons.*
[10] Von 2014 bis 2020 war das Frau Rosa Kornfeld-Matte.
[11] Eng. *Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons.*
[12] Eng. *Inter-American Convention on Protecting the Human Rights of older People.*

b) »*Palliativversorgung*«*:* Aktive, umfassende und interdisziplinäre Betreuung und Behandlung von Patienten, deren Krankheit nicht auf eine kurative Behandlung anspricht oder die unter vermeidbaren Schmerzen leiden, um ihre Lebensqualität bis zum letzten Tag ihres Lebens zu verbessern. Im Mittelpunkt der Palliativversorgung steht die Kontrolle der Schmerzen, anderer Symptome und der sozialen, psychologischen und spirituellen Probleme des älteren Menschen. Sie bezieht den Patienten, sein Umfeld und seine Familie mit ein. Sie bejaht das Leben und betrachtet den Tod als normalen Prozess, den sie weder beschleunigt noch hinauszögert (Eng. *Palliative care*: Active, comprehensive, and interdisciplinary care and treatment of patients whose illness is not responding to curative treatment or who are suffering avoidable pain, in order to improve their quality of life until the last day of their lives. Central to palliative care is control of pain, of other symptoms, and of the social, psychological, and spiritual problems of the older person. It includes the patient, their environment, and their family. It affirms life and considers death a normal process, neither hastening nor delaying it.);

c) »*Diskriminierung*«: Jede Unterscheidung, jeder Ausschluss oder jede Beschränkung mit dem Zweck oder der Wirkung, die Anerkennung, den Genuss oder die gleichberechtigte Ausübung der Menschenrechte und Grundfreiheiten im politischen, kulturellen, wirtschaftlichen, sozialen oder jedem anderen Bereich des öffentlichen und privaten Lebens zu verhindern, aufzuheben oder einzuschränken (Eng. *Discrimination*: Any distinction, exclusion, or restriction with the purpose or effect of hindering, annulling, or restricting the recognition, enjoyment, or exercise, on an equal basis, of human rights and fundamental freedoms in the political, cultural, economic, social, or any other sphere of public and private life.);

d) »*Mehrfache Diskriminierung*«: Jede Unterscheidung, Ausgrenzung oder Einschränkung gegenüber einer älteren Person, die auf zwei oder mehr Diskriminierungsfaktoren beruht (Eng. *Multiple discrimination:* Any distinction, exclusion, or restriction toward an older person, based on two or more discrimination factors.);

e) »*Altersdiskriminierung im hohen Alter*«: Jede Unterscheidung, jeder Ausschluss oder jede Beschränkung aufgrund des Alters, die bezweckt oder bewirkt, dass die Anerkennung, der Genuss oder die gleichberechtigte Ausübung von Menschenrechten und Grundfreiheiten im politischen, kulturellen, wirtschaftlichen, sozialen oder jedem anderen Bereich des öffentlichen und privaten Lebens aufgehoben oder eingeschränkt wird. (Eng. *Age discrimination in old age*: Any distinction, exclusion, or restriction based on age, the purpose or effect of which is to annul or restrict recognition, enjoyment, or exercise, on an equal basis, of human rights and fundamental freedoms in the political, cultural, economic, social, or any other sphere of public and private life;

f) »*Alterung*«: Ein allmählicher Prozess, der sich im Laufe des Lebens entwickelt und biologische, physiologische, psychosoziale und funktionelle Veränderungen mit unterschiedlichen Folgen mit sich bringt, die mit permanenten und dynamischen Interaktionen zwischen dem Individuum und seiner Umwelt verbunden sind. (Eng. *Ageing*: A gradual process that develops over the course of life and entails biological, physiological, psychosocial, and functional changes with varying consequences, which are associated with permanent and dynamic interactions between the individual and their environment.);

g) »*Aktiv und gesund älter werden*«: Der Prozess der Optimierung der Möglichkeiten für körperliches, geistiges und soziales Wohlbefinden, Teilhabe an sozialen, wirtschaftlichen, kulturellen, spirituellen und bürgerlichen Angelegenheiten sowie Schutz, Sicherheit und Pflege, um die gesunde Lebenserwartung und Lebensqualität aller Menschen im Alter zu verlängern und ihnen zu ermöglichen, weiterhin einen aktiven Beitrag für ihre Familien, Gleichaltrigen, Gemeinschaften und Nationen zu leisten. Es gilt sowohl für Einzelpersonen als auch für Bevölkerungsgruppen (Eng. *Active and healthy ageing*[13]: The process of optimizing opportunities for physical, mental, and social well-being,

[13] Im Bewusstsein über die Problematik des Alterns und der älteren Personen wurde am 3. August 2020 auf der 73. Weltgesundheitsversammlung »Das Jahrzehnt des gesunden Alterns (2020-2030)« (Eng. *The Decade of Healthy Ageing*) gebilligt. Dabei wird das gesunde Altern bezeichnet als: *»Healthy Ageing is the process of developing and maintaining the functional ability that enables wellbeing in older age. Functional ability is about having the capabilities that enable all people to be and do what they have reason to value.«* (WHO, 2020).

participation in social, economic, cultural, spiritual, and civic affairs, and protection, security, and care in order to extend healthy life expectancy and quality of life for all people as they age, as well as to allow them to remain active contributors to their families, peers, communities, and nations. It applies both to individuals and to population groups.);

h) »*Missbrauch*«: Eine einmalige oder wiederholte Handlung oder Unterlassung zum Nachteil einer älteren Person, die ihre körperliche, geistige oder moralische Unversehrtheit schädigt und den Genuss oder die Ausübung ihrer Menschenrechte und Grundfreiheiten verletzt, unabhängig davon, ob sie in einem Vertrauensverhältnis erfolgt oder nicht. (Eng. *Abuse*: A single or repeated act or omission to the detriment of an older person that harms their physical, mental, or moral integrity and infringes the enjoyment or exercise of their human rights and fundamental freedoms, regardless of whether or not it occurs in a relationship of trust);

i) »*Nachlässigkeit*«: Unbeabsichtigter Fehler oder unbeabsichtigtes Verschulden, einschließlich u. a. Vernachlässigung, Unterlassung, Verlassen und Unterlassen des Schutzes, das einer älteren Person Schaden oder Leiden zufügt, entweder im öffentlichen oder im privaten Bereich, bei dem normale, den Umständen angemessene Vorsichtsmaßnahmen, nicht getroffen wurden. (Eng. *Negligence:* Involuntary error or unintentional fault, including, inter alia, neglect, omission, abandonment, and failure to protect, that causes harm or suffering to an older person, in either the public or the private sphere, in which normal necessary precautions proportional to the circumstances have not been taken.);

j) »*Ältere Person*«: Eine Person, die 60 Jahre oder älter ist, es sei denn, die Gesetzgebung hat ein niedrigeres oder höheres Mindestalter festgelegt, sofern es nicht über 65 Jahre liegt. Dieser Begriff umfasst u. a. ältere Personen. (Eng. *Older person* A person aged 60 or older, except where legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years. This concept includes, among others, elderly persons);

k) »*Ältere Person, die Pflegedienstleistungen erhält«*: Eine Person, die vorübergehend oder dauerhaft in einer geregelten, öffentlichen, privaten oder gemischten Einrichtung wohnt, die qualitativ hochwertige, umfassende Sozial- und Gesundheitsdienste anbietet, einschließlich Langzeiteinrichtungen für ältere Menschen mit mittlerer oder schwerer Pflegebedürftigkeit, die nicht in ihrer Wohnung gepflegt werden können. (Eng. *Older person receiving long-term care services:* One who resides temporarily or permanently in a regulated, public, private or mixed establishment, which provides quality comprehensive social and health care services, including long-term facilities for older persons with moderate or severe dependency, who cannot receive care in their home.);

l) »*Lebensalter«:* Soziales Konstrukt der letzten Phase des Lebenslaufs (Eng: *Old age*: Social construct of the last stage of the life course.).

5 Einordnung der älteren Personen in die slowenische Gesetzgebung – ausgewählte Gesichtspunkte

Auch in der Verfassung der Republik Slowenien (GGRS)[14] wird das Alter nicht ausdrücklich als Diskriminierungsumstand genannt, es kann jedoch zu den allgemeinen Verboten eingeordnet werden (»oder irgendeines anderen Umstands«) (vgl. Art. 14(1) GGRS). Als Diskriminationsumstand wird das Alter z. B. ausdrücklich genannt in:

a) Art. 1(1) Diskriminationsschutzgesetz (DSG);[15]
b) Art. 7 Patientenschutzgesetz (PSG)[16]
c) Art. 6(1) Arbeitsgesetz (AG-1);[17]
d) Art. 3 Gesetz gegen familiäre Gewalt (GgfG).[18]

[14] Verfassung der Republik Slowenien (slo. *Ustava Republike Slovenije*): Uradni list RS, Nr. 33/91-I; 42/97 – UZS68; 66/00 – UZ80; 24/03 – UZ3a, 47, 68; 69/04 – UZ14; 69/2004 – UZ43; 69/04 – UZ50; 68/06 – UZ121, 140, 143; 47/13 – UZ148; 47/13 – UZ90, 97, 99; 75/16 – UZ70a.
[15] Diskriminationsschutzgesetz (slo. *Zakon o varstvu pred diskriminacijo*): Uradni list RS, Nr. 33/16.
[16] Patientenrechtsgesetz (slo. *Zakon o pacientovih pravicah*): Uradni list RS, Nr. 15/08; 55/17.
[17] Arbeitsgesetz (slo. *Zakon o delovnih razmerjih*): Uradni list RS, Nr. 21/13; 78/13 – korr.; 47/15 – ZZSDT; 33/16 – PZ-F; 52/16; 15/17 – Entsch. VerfG; 22/19 – ZPosS.
[18] Gesetz gegen familiäre Gewalt (slo. *Zakon o preprečevanju nasilja v družini*): Uradni list RS, Nr. 16/08; 68/16; 54/17 – ZSV-H.

Wegen der niedrigeren Geburtenzahlen in der Vergangenheit und der Verlängerung der Lebenserwartung, bemerkt man einen Alterungsprozess der Bevölkerung, der, den demografischen Projektionen nach, in Slowenien intensiver sein wird, im Vergleich mit dem EU-Durchschnitt. Das Wachstum der Bevölkerung im Alter ab 65 Jahren beeinflusst die Ausgaben für Rente, Gesundheit, langfristige Pflege und für andere, mit dem Altern verbundene, Ausgaben, wesentlich, wobei Slowenien, bei der Höhe dieser, in der Zukunft im Vergleich zu anderen EU-Staaten wesentlich hervorstechen wird. Die Bevölkerungsalterung wird auch Änderungen im Bereich des Sozialschutzes, der Beschäftigung sowie die Reaktion der Politik in zahlreichen anderen Bereichen, wie z. B. die Anpassung des Umfelds und der Dienstleistungen an ältere Personen, erforderlich machen (Republika Slovenija, 2020).

In Folge werden ausgewählte Gesichtspunkte dargestellt, in denen den älteren Personen und ihrer Vulnerabilität, in der slowenischen Gesetzgebung, besondere Aufmerksamkeit gewidmet wird, nämlich vom Gesichtspunkt der Eheschließung, der familiären Gewalt, des Strafvollzugs, …

5.1 Ehe

Art. 3(2) Familiengesetz[19] (FG) legt fest, dass die Bedeutung der Ehe in der Familiengründung liegt. Die künftigen Ehegatten, im höheren Alter (z. B. +65), haben gewöhnlich nicht den Wunsch, eine Familie zu gründen. Ihr Wunsch nach der Eheschließung kann durch die gegenseitige emotionale Verbindung, den gegenseitigen Respekt, Verständnis, Vertrauen und der gegenseitigen Unterstützung begründet sein (Art. 20 FG). Deshalb kann die Fortpflanzung nicht als konstitutives Element der Ehe gelten (Novak In Novak, 2019: 37), insbesondere, da die Fruchtbarkeit bei älteren Personen mit dem Alter schwindet. Die Unfähigkeit, ein Kind zu zeugen (in unserem Fall aufgrund des Alters), kann einer Person nicht die konventionell anerkannten Rechte auf die Eheschließung entziehen. Die Ehe kann auch von Ehegatten geschlossen werden, die sich bewusst entscheiden, keine Familie zu gründen (Kraljić, 2019a; Kraljić, 2019b: 46).

[19] Familiengesetz (slo. *Družinski zakonik)*: Uradni list RS, Nr. 15/17; 21/18 – ZNOrg; 22/19; 67/19 – ZMatR-C; 200/20 – ZOOMTVI.

5.2 Strafvollzug

Die Vulnerabilität älterer Personen tritt beim Verbüßen von Strafsanktionen noch besonders stark hervor. Deswegen ist die Bestimmung des Art. 4(5) der Amerikanischen Menschenrechtskonvention,[20] die festlegt, dass die Todesstrafe für Personen, die bei der Begehung der Straftat älter waren als 70 Jahre, nicht ausgesprochen wird, besonders wichtig. Da der EMRK die Todesstrafe abgeschafft hat, ist eine solche Bestimmung überflüssig. Allerdings ist nicht zu übersehen, dass es einerseits immer noch Verurteilte gibt, die beim Antritt der Verbüßung einer Gefängnisstrafe bereits vom chronologischen Gesichtspunkt als ältere Personen bezeichnet werden können. Andererseits gibt es Gefängnisinsassen, die während des Verbüßens der Gefängnisstrafe die chronologische Grenze erreichen, durch die sie als ältere Personen definiert werden. In beiden Fällen stellen sie, aufgrund des Alters, eine besondere Gesellschaftsgruppe dar, die wegen ihrer Vulnerabilität auch in bestimmten Fällen, dem Strafvollzugsgesetz (SVG)[21] zur Folge, besondere Aufmerksamkeit erhalten. Das Alter wird in folgenden Artikeln als relevanter Umstand beim Verbüßen von Strafsanktionen erfasst:

a) Art. 18(7) SVG legt fest, dass das Alter einer der Umstände ist, die vom Gericht bei der Entscheidung darüber, in welche Anstalt der Verurteilte geschickt wird, berücksichtigt werden;
b) Art. 60(2) SVG legt fest, dass Verurteilte, die wegen des Alters, einer Krankheit oder Invalidität zusätzliche Hilfe bei der Befriedigung der grundlegenden Lebensbedürfnisse in Form von Pflege oder Sozialfürsorge benötigen, in einem dafür angepassten raum oder einer Abteilung einer Anstalt untergebracht werden können. Die genannten Umstände (Alter, Krankheit, Invalidität) können durch eine miteinander auftretende Verbindung sogar zur sog. multiplen Diskrimination führen;
c) Nach Art. 239(4) SVG darf ein Strafvollzugspolizist gegen eine ältere Person keine Zwangsmittel anwenden.[22]

[20] American Convention on Human Rights; Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22. November 1969.
[21] Strafvollzugsgesetz (slo. *Zakon o izvrševanju kazenskih sankcij*): Uradni list RS, št. 110/06 – uradno prečiščeno besedilo, 76/08, 40/09, 9/11 – ZP-1G, 96/12 – ZPIZ-2, 109/12, 54/15, 11/18.
[22] Art. 239(5) SVG listet als Zwangsmittel: 1. Verriegelungs- und Bindemittel; 2. physische Kraft; 3. Gassprühgerät; 4. Stock; 5. Diensthund; 6. Schusswaffen.

In der Sache *Papon v. France* (app. no. 54210/00) hat der EGMR die Beschwerde eines ungefähr 90-jährigen Beschwerdeführers als unzulässig abgelehnt. Der Beschwerdeführer hat die Verletzung des Art. 3 EMRK (Folterungsverbot) behauptet. Er war der Meinung, dass der Freiheitsentzug eines Menschen seines Alters im Gefängnis (von 79 bis 90 Jahren) im Gegensatz zu Art. 3 EMRK sei. Dabei berief er sich auf sein hohes Alter, gesundheitliche Beschwerden und die ungeeignete Behandlung dieser. Deswegen würde das Verbüßen der Gefängnisstrafe für ihn eine außerordentliche Krise bedeuten. Der EGMR hat seine Beschwerde abgelehnt und betont, dass kein Mitgliedstaat der EMRK eine Altershöchstgrenze für das Verbüßen einer Gefängnisstrafe vorsieht. In dieser Sache der EMRK waren die Voraussetzungen für die Verletzung des Art. 3 EMRK nicht erfüllt, da seine Gesundheit und der Zustand im Gefängnis als gut erachtet wurden. Der EGMR hat ebenso hervorgehoben, dass in jedem derartigen Fall die Umstände des Einzelfalls zu bewerten seien.

5.3 Gewalt gegen ältere Personen

Die Gewalt gegen ältere Personen ist sehr vielschichtig. Gegen sie wird nämlich selten nur eine einzelne Art von Gewalt ausgeübt, da es häufig zur Verflechtung mehrerer Arten kommt (z. B. physisch, psychisch, wirtschaftlich, Vernachlässigung, …). Sie kann von verschiedenen Personen ausgeübt werden (z. B. den Angehörigen, Nachbarn, krankenpersonal, Angestellten in Sozialschutzeinrichtungen, …). Ebenso kann sie in verschiedenen Umfeldern ausgeübt werden (z. B. daheim, im Krankenhaus, in der Sozialschutzanstalt, im Gefängnis, …).

WHO-Beweise zeigen, dass Frauen etwas weniger wahrscheinlich Opfer von Missbrauch aufgrund von körperlichen Problemen werden, als Männer (2,6% gegenüber 2,8%), bei psychologischem Missbrauch (18,9% gegenüber 20,0%) und finanziellem Missbrauch (3,7% gegenüber 4,1%), aber mehr Frauen als Männer waren Opfer von sexuellem Missbrauch (1,0% gegenüber 0,3%) und erlitten Verletzungen (0,9% gegenüber 0,4%) (European Union Agency for Fundamental Rights, 2018: 13).

Art. 4(3) GgfG legt somit fest, dass ältere Personen und Invalide sowie Personen, die aufgrund von persönlichen Umständen unfähig sind, für sich zu sorgen, bei der Behandlung von Gewalt und der Unterstützung besondere Zuwendung benötigen. Der Gesetzgeber war sich der Vulnerabilität der älteren Personen bewusst, weshalb

er sie auch ausdrücklich anführt. Allerdings ist noch besonders hervorzuheben, dass das Alter als Umstand familiärer Gewalt häufig in Verbindung mit den noch anderen beiden in diesem Artikel genannten Umständen auftritt., und zwar der Invalidität und der Unfähigkeit der Person, allein für sich zu sorgen. Es handelt sich um die sog. *Multiple Diskriminierung* (Council of Europe, 2014: 34). Mit dieser Regelung soll die Ausübung verschiedener Formen der Gewalt gegen ältere Personen verhindert oder zumindest verringert werden. Insbesondere hier tritt die physische[23], psychische[24] und wirtschaftliche[25] Gewalt sowie die Vernachlässigung[26] in den Vordergrund.

5.4 COVID-19 und ältere Personen

Ausgehend von vielen internationalen Verträgen hat jeder das Recht auf den höchsterreichbaren Gesundheitsstandard. Allerdings hat COVID-19 dieses Recht in vielen Staaten und natürlich auch in Slowenien in Frage gestellt. Bereits zu Beginn der Epidemie in Slowenien, haben sich viele Defizite des slowenischen Gesundheitssystems gezeigt, z. B. durch den Mangel an den grundlegenden medizinischen Mitteln für den Kampf gegen COVID-19, beispielsweise Schutzmasken, Handschuhe und Desinfektionsmittel, Beatmungsgeräte, … Wegen des Mangels waren auch das Kranken- und sicherlich auch das Sozialpersonal in den Kranken- und Sozialschutzanstalten, wie auch die Patienten selbst, gefährdet.

Die Problematik, bezüglich der älteren Personen, die in Altersheimen leben, kam gerade in der Zeit von COVID-19 noch besonders zum Ausdruck. Wegen der gesundheitlichen Umstände, die durch die Pandemie aufkamen, haben die Beschwerden, der älteren Personen, die diesen bereits unter normalen Umständen gegenübersehen, vertieft. Die neu entstandenen Umstände, die wegen COVID-19

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[23] Vgl. Art. 3. Abs. 3 GgfG: *»Physische Gewalt ist jede Anwendung physischer Gewalt oder Drohung mit Gewaltanwendung, die das Opfer zwingt, etwas zu tun oder zu unterlassen oder etwas zu erdulden oder ihm die Bewegung beziehungsweise Kommunikation einschränkt und ihm Schmerzen, Angst oder Erniedrigung verursacht, ungeachtet dessen, ob körperliche Verletzungen entstanden sind.«*

[24] Vgl. Art. 3 Abs. 5 GgfG: *»Psychische Gewalt sind Verhalten und Verbreitung von Informationen, mit denen der Verursacher der Gewalt beim Opfer Angst, Erniedrigung, das Gefühl der Minderwertigkeit, Gefährdung und andere geistige Not auslösen will, auch wenn sie mit der Verwendung der Informations- und Kommunikationstechnologie begangen wird.«*

[25] Vgl. Art. 6 Abs. 6 GgfG: *»Wirtschaftliche Gewalt ist die unberechtigte Beaufsichtigung oder Einschränkung des Opfers bei der Verfügung über die Einkünfte beziehungsweise die Verwaltung seines Vermögens, über welches das Opfer selbständig verfügt beziehungsweise das es verwaltet, oder die unberechtigte Einschränkung der Verfügung über beziehungsweise der Verwaltung des gemeinsamen Vermögens der Familienmitglieder, die unberechtigte Nichterfüllung der finanziellen beziehungsweise Vermögensverpflichtungen gegenüber einem Familienmitglied oder die unberechtigte Übertragung der finanziellen beziehungsweise der Vermögensverpflichtungen auf ein Familienmitglied.«*

[26] Vgl. Art. 3 Abs. 7 GgfG: *»Vernachlässigung ist eine Form der Gewalt, wo der Verursacher die gebotene Fürsorge für das Opfer, die dieses wegen einer Krankheit, Invalidität, Entwicklungs- oder anderen persönlichen Umständen benötigt, unterlässt.«*

eingetreten sind, haben ihre soziale Isolierung noch verstärkt, da Besuche in den Institutionen, in denen sie untergebracht sind (z. B. in Altersheimen), untersagt wurden. Viele leben in Armut und ihre finanzielle Not wurde noch weiter vertieft. Ebenso wurde ihr Recht auf Zugang zu bestimmten Gesundheitsdienstleistungen begrenzt. Aus gesundheitlichen Gründen wurde die 'physische Distanz' beziehungsweise 'soziale Distanzierung', die zur Begrenzung der Kontakte der Angehörigen in den Heimen geführt hat und den älteren Personen noch zusätzliche Angst und Not verursacht hat, empfohlen. Einige Heime haben die Lösung dieser Notlagen der älteren Personen mit der Anwendung von Technologien (z. B. der Kontaktmöglichkeit der Angehörigen mit den älteren Personen durch die Anwendung des Internets und Tablets und verschiedenen Applikationen, …) in Angriff genommen. Allerdings ist dem, dass die soziale Distanzierung keine soziale Isolierung verursacht, besondere Aufmerksamkeit zu widmen (Age Platform Europe, 2020a).

Insbesondere bei Triage-Protokollen ist zu gewährleisten, dass ältere Personen ihr Recht auf Gesundheit nicht verlieren und mit anderen Patienten gleichberechtigt behandelt werden. Die dabei getroffenen Entscheidungen müssen auf den gesundheitlichen Bedürfnissen des Patienten, auf medizinischen Beweisen, ethischen Prinzipien und den Verfügbarkeiten des Gesundheitssystems (z. B. der Anzahl der Beatmungsgeräte) beruhen. Allein der objektive Umstand des Alters darf dabei keine bloße Entscheidungsgrundlage sein (United Nations, n.d.; Age Platform Europe, 2020a).

Wegen COVID-19 stehen ältere Personen also vielen Verletzungen der Menschenrechte gegenüber. Man muss sich der Tatsache bewusst sein, dass die Hälfte der Todesopfer in Verbindung mit COVID-19 in Europa ältere Personen, die niemals ins Krankenhaus gebracht worden sind, darstellen. Folglich werden damit viele Verletzungen der Menschenrechte, vor allem das Recht auf Leben, das Recht auf Gesundheit, das Recht auf Familienleben, das Recht auf Würde[27], das Recht auf Mitwirkung in der Gesellschaft u. a. wahrgenommen (Age Platform Europe, 2020b).

[27] Der EGMR hat so im Fall *McDonald v. United Kingdom* (app. no. 4241/2014, 20.08.2014), der eine ältere Frau betraf, deren staatlicher Unterstützungsbeitrag für die nächtliche Betreuung gekürzt wurde. Frau McDonald war in der Nacht nicht mehr in der Lage, das Bett selbständig zu verlassen. Deswegen war sie gezwungen, die Hygieneeinlagen zu tragen, obwohl sie noch nicht inkontinent war. Der EGMR hat in diesem Fall entschieden, dass die Reduktion des Unterstützungsbeitrages für die nächtliche Betreuung von Frau McDonald das Recht auf ihre Privatleben verletzte.

Deshalb müssen alle Maßnahmen, die von den Staaten als Reaktion auf COVID-19 erfasst werden, als notwendig und verhältnismäßig definiert werden. Die Verlegung eines Patienten aus der Versorgung im Krankenhaus in eine Pflegeanstalt oder die Pflege daheim soll erst durchgeführt werden, wenn sichergestellt ist, dass der Einzelne Zugang zur Gesundheits-, Rehabilitations- und palliativen Fürsorge hat, die er benötigt (Council of Europe, 2014: 22; Age Platform Europe, 2020a).

Ältere Personen, die an COVID-19 sterben, haben ebenso das Recht auf die medizinische Versorgung am Lebensende, einschließlich der psychologischen, sozialen und geistlichen Unterstützung und Linderung der Symptome mit den entsprechenden Arzneimitteln und dazu, mit den nächsten Angehörigen umgeben zu sein (palliative Versorgung). Gerade Letzteres wurde ihnen in der Zeit der Pandemie vielfach entnommen. Ältere Personen haben dasselbe Recht auf medizinische Behandlung, wie alle anderen. Sie haben aber auch dasselbe Recht auf Ablehnung der medizinischen Behandlung und auf die Ablehnung der palliativen Versorgung. Ihre Selbständigkeit ist auch bei der Fällung von Entscheidungen über ihr Leben in der Zeit der Pandemie zu respektieren (Council of Europe, 2014: 22; Age Platform Europe, 2020a).

Im Bewusstsein über die Problematik in Verbindung mit der Verletzung der Menschenrechte, denen sich in bestimmten Kranken- und Sozialschutzanstalten untergebrachte ältere Personen gegenübersehen, wird an die Staaten appelliert, gesetzgeberische oder andere Maßnahmen zum Schutz der Personen, die von Folterungen berichten ('Whistleblower'), vor der Entlassung oder anderen Repressionsmaßnahmen zu ergreifen (Council of Europe, 2014: 36). Mit dieser Frage beschäftigte sich auch der EGMR im Fall *Heinisch gegen Deutschland* (app. no. 28274/08), als er entschied, dass die Berichterstattung über Mängel und Fehler bei der Versorgung älterer Personen in einer Anstalt im öffentlichen Interesse und unter Berücksichtigung der besonderen Vulnerabilität dieser Personen auch von wesentlicher Bedeutung für die Verhinderung von Missbrauch ist (Althoff, 2013).

5 Schlussfolgerungen

Es gibt keinen Zweifel, dass ältere Personen heute eine Bevölkerungsgruppe, die, nur aufgrund von Stereotypen, häufig an den Rand unserer Gesellschaft gedrängt wird, darstellen. Viele ältere Personen genießen heutzutage auch im späten Alter ein qualitätsvolles Leben, häufig sogar ohne fremde Hilfe. Es ist nicht zu übersehen,

dass es andererseits jedoch ältere Personen gibt, die entweder teilweise oder gar ganzheitlich Hilfe und Unterstützung anderer benötigen. Ältere Personen bilden bereits nur aufgrund ihres chronologischen Alters eine besondere Bevölkerungsgruppe. Kommt diesem chronologischen Alter noch eine Krankheit oder Invalidität hinzu, geht es um eine Person, die multiple Diskriminierung und Stigmatisierung ausgesetzt ist. Da wir uns bewusst sind, dass sich die Anzahl der älteren Personen in der Zukunft noch vergrößern wird, wurden in den letzten Jahren, auf internationalem Niveau, deshalb große Fortschritte gemacht. Es stellt sich die Frage, ob es auf globaler, oder zumindest auf europäischer Ebene nötig wäre, ein verbindliches internationales Dokument, das die gesamte Problematik der Wahrung der Menschenrechte älterer Personen erfasst, als *lex specialis* zu vereinbaren. Wie auf internationaler Ebene, gibt es auch in Slowenien recht viele 'Rechtslücken', die zum Zweck der Gewährleistung eines qualitätsvollen Schutzes älterer Personen gefüllt werden müssen und damit die Verbesserung des Lebens und des Schutzes der Rechte dieser verletzlichen Gruppe ermöglicht werden muss.

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Forcible medical intervention as a violation of Article 3 of the European Convention on Human Rights

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Abstract The European Court of Human Rights has on multiple occasions considered the question of whether an act of forcible medical intervention constituted a violation of Article 3 of the European Convention on Human Rights. It found that it did not if the applicant could not prove he dissented to the medical intervention being carried out, if the act was one of medical necessity or if the medical intervention was necessary for obtaining evidence for use in criminal proceedings. However, national authorities must follow strict rules both in the determination of whether forcible medical intervention will be carried out and in its methods of execution.

Keywords: medical necessity, inhuman and degrading behaviour, force, consent, evidence

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1 Introduction

This article explains the case law and general rules laid down through it by the European Court of Human Rights (henceforth: the Court) concerning the question whether an act of forcible medical intervention constitutes a violation of Article 3 of the European Convention on Human Rights (henceforth: the Convention). It will offer the reader some relevant theoretical background on Article 3 of the Convention, the term forcible medical intervention and the connections between the two. The article will continue with an overview of the most important judgments regarding acts of forcible medical intervention where the applicant claimed a violation of Article 3. The last section of the article will analyze the Court's reasoning in those judgments and will summarize the general rules the Court laid down to answer the questions whether and under what conditions Article 3 prohibits an act of forcible medical intervention.

2 Article 3 of the European Convention on Human Rights

Article 3 (prohibition of torture and of degrading treatment or punishment) of the Convention "enshrines one of the fundamental values of the democratic societies making up the Council of Europe" (*Soering v. United Kingdom*, 1989, para. 88). Article 15 of the Convention lists Article 3 as one of the Convention's non-derogable provisions, meaning it cannot be breached even in "time of war or other public emergency threatening the life of a nation" (European Convention on Human Rights, 1950, Article 15/1). Therefore, even the direst of circumstances will not justify a breach of Article 3. The Court has (deliberately) avoided giving an exact definition of what constitutes torture, degrading treatment or punishment. However, its jurisprudence establishes that acts of torture are those causing severe physical or mental pain or suffering and that are intentionally inflicted, with the aim of obtaining information (e.g., brutal forms of interrogation) or as a means of punishment (e.g., water boarding, deprivation of sleep). On the other hand, certain actions do not rise to level of resulting in a breach of Article 3, for example "ill-treatment, which is not torture, in that it does not have sufficient intensity or purpose, will be classed as inhuman or degrading behaviour" (Reidy, 2002: 16). Inhuman acts in most cases cause some degree of physical or mental pain that is not of such intensity to qualify as torture, while degrading acts are acts that "arouse in its victims' feelings of fear, anguish and inferiority, capable of humiliating and debasing them" (Reidy, 2002: 16).

Therefore, we can conclude that acts of torture are more intense as compared to acts of degradation or inhuman behaviour and accordingly cause a greater degree of physical and/or psychological pain and must also be intentionally inflicted. The Court has not drawn a red line separating acts of torture from acts of inhuman or degrading behaviour, choosing instead to examine both the issues of intent and the level of physical and psychological pain caused by an act on a case-to-case basis.

3 Forcible medical intervention

An exact definition of what forcible medical intervention is does not exist. However, it can be described as medical treatment without the consent of the person being treated. As a rule, adults with full mental capacity have the right to refuse medical treatment. Yet, if certain conditions are met, an act of forcible medical intervention can be imposed on them. Most of these cases involve forcible medical intervention being imposed on individuals whose liberty was limited because they were, for example, detained, imprisoned, or admitted to psychiatric institutions.

3.1 Forcible medical intervention and the Convention

Forcible medical intervention, under certain conditions, can constitute a breach of the rights and liberties accorded to individuals by the Convention, namely Article 3 and that part of Article 8 that sancifies the right to private life. Violations of Article 8 were found in *Fyodorov and Fyodorova v. Ukraine* – unlawful psychiatric examination and diagnoses of chronic delusional disorder –, *Storck v. Germany* – forcible medical treatment on an arbitrarily detained applicant –, *Shopov v. Bulgaria* – absence of a regular judicial review of the compulsory treatment[1] (European Fundamental Rights Agency, 2020: 24). An act of forcible medical intervention is only allowed under the Convention if it is "necessary for the fulfilment of a legitimate aim, typically the protection of the rights of others or of the individual concerned and his or her health (Reidy, 2002: 24). Case law interpreting what constitutes forcible medical intervention is sparce. The existing case law does shed light on the conditions that must be satisfied for an act of forced medical intervention to constitute a violation of Article 3.

[1] This paper only examines forcible medical intervention from the perspective of Article 3 and therefore omits further explanation concerning Article 8.

4 Case Law

The following section will analyse the Court's most important judgments that examined whether an act of forcible medical intervention constituted a violation of Article 3.

4.1 Jalloh v. Germany

A drug deal involving A. B. Jalloh, who took two tiny bags from his mouth and exchanged them for money, was spotted by plain clothes policemen, who proceeded to arrest him. Subsequently, Jalloh swallowed a tiny bag. Jalloh was taken to the prosecutor who ordered he be given an emetic to regurgitate the bag. Refusing to take the emetic voluntarily, Jalloh was held down by four police officers while a doctor inserted a tube through his nose and administered an emetic solution. Jalloh then regurgitated a small bag containing 0.22 grams of cocaine. He was later charged with drug trafficking and the bag of cocaine was used as evidence in court proceedings.

The Court reiterated that *"a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading"* (*Jalloh v. Germany*, 2006, para. 69) if the medical necessity is convincingly shown. Since the aim of the forcible administration of emetics was to obtain evidence this was not a case involving medical necessity. Even so "the Court has found on several occasions that *the Convention does not, in principle, prohibit recourse to a forcible medical intervention that will assist in the investigation of an offence*. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny" (*Jalloh v. Germany*, 2006, para. 76). The administration of emetics was not necessary, as the "authorities could simply have waited for the drugs to pass through his system naturally" (*Jalloh v. Germany*, 2006, para 77). Furthermore, the alleged criminal offence was not a serious one, as it was *prima facie* clear, that the quantity of drugs Jalloh was hiding in his mouth could only be small. The procedure caused Jalloh physical and psychological pain and invoked in him feelings of inferiority, humiliation, and debasement. The Court found that the German authorities violated Article 3, as the forcible administration of emetics in the context of the case constituted an act of inhuman or degrading behaviour.

4.2 Bogumil v. Portugal

Bogumil was detained at Lisbon airport after arriving from Rio de Janeiro as several packages of cocaine were found in his shoes. He informed the authorities that he swallowed another package. Subsequently Bogumil was taken to a hospital, where he underwent a surgery that removed the cocaine pack from his stomach. It was unclear whether Bogumil gave consent for the operation. He claimed to have experienced severe physical distress on account of the surgery.

Bogumil's rights under Article 3 clearly would not have been violated had he in fact consented to the operation. Bogumil claimed he did not consent while the Government claimed he did. The matter was further complicated because Bogumil signed a written consent form only for an endoscopy but not for the operation. Finding adequate consent on the specific facts of the case, the Court noted that "it can not establish that the applicant gave his consent for the medical intervention in question. However, nothing indicated that he explicitly refused the operation he was about to be subjected to" (*Bogumil v. Portugal*, 2008, para. 76). The Court's line of reasoning established a *fiction of consent*, that lasted as long as the applicant did not prove beyond reasonable doubt, that he did not consent to the medical intervention taking place and that it was *ergo* forcibly executed. Concerning the surgery, the Court noted (*Bogumil v. Portugal*, 2008, para. 77) that the '*decision to perform surgery had been made by medical staff due to a possibility of the cocaine package rupturing and Bogumil dying of cocaine poisoning*'. Furthermore, the surgery was not performed with the purpose of gathering evidential material. The surgery not only was routine but Bogumil did not suffer any serious health effects. Based on that rationale, the Court ruled there was no violation of Article 3. The Court found a violation of Article 6; however, that violation was unrelated to the medical procedure.

4.3 R.S. v. Hungary

R.S. was detained on suspicion of driving under the influence of alcohol and drugs. He was forced to take a urine test via a catheter. R.S. claimed this constituted a serious intrusion into his physical integrity and constituted degrading and inhuman behaviour (ECHR Press unit, 2020: 12).

In paragraph 57 the Court reiterated that a '*forcible medical intervention is not per se a violation of convention rights, even if it is meant to produce evidential material*'. The authorities are however obliged to convincingly justify why such an intervention was necessary. When deciding whether a forcible medical intervention is necessary, the *authorities must take the following factors in consideration* "the extent to which a forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available, and the effects on the suspect's health" (*R.S. v. Hungary*, 2019, para. 58).

In this case the evidence obtained via the forced catheterisation could have been obtained in a less intrusive manner by taking a sample of the applicant's blood. R.S. was subjected to "to a serious interference with his physical and mental integrity, against his will…in a manner, that caused both physical pain and mental suffering" (*R.S. v. Hungar*y, 2019, para. 72), without any consideration being given to the possible risks the procedure posed. The Court concluded there had been a violation of Article 3, as R.S. was subjected to inhuman and degrading behaviour.

4.4 Dvořáček v. the Czech Republic

Dvořáček was prosecuted on several occasions for sexual offences against minors and was confined to psychiatric hospitals on several occasions. In 2007, the Olomouc Court ordered him to undergo protective sexological treatment instead of the outpatient treatment a Prague Court had ordered previously. He was confined to the Šternberk psychiatric hospital for a period of 10 months. Dvořáček first gave his consent to undergo an anti-androgen treatment – which would also reduce the time of his incarceration – but later changed his mind. He claimed having suffered fear of castration and hospitals, humiliation, and loss of dignity as well as a negative effect of the treatment on his sex life with his partner.

The Court reiterated that the applicant "had to face a difficult choice between an anti-androgen treatment that would reduce the time of his incarceration and treatment by psychotherapy and sociotherapy with the prospect of longer confinement only" (*Dvořáček v. the Czech Republic*, 2014, para. 102). The Court also noted that the '*medical staff found anti-androgen treatment to be a therapeutic necessity* and that

it *was not possible to establish, beyond reasonable doubt, that Dvořáček was forced to undergo the procedure'*. The court found Article 3 had not been violated.

4.5 Herczegfalvy v. Austria

The applicant, a Hungarian refugee, served a prison sentence in Austria, during which he threatened and assaulted numerous prisoners, guards, and a judge. He was placed under guardianship and confined to a mental health facility, where he remained for six months until his conditional release. He claimed he was, with the consent of his guardian, subjected to forced feeding, forced medical procedures, and handcuffed to bed for two weeks.

The Court found that it "is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary, by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit no derogation" (*Herczegfalvy v. Austria*, 1992, para 82). The Court also found that as a '*general rule a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading of no derogation'* (*Herczegfalvy v. Austria*, 1992, para. 82). Since the forcible medical procedures were employed under the standards of medical necessity, Article 3 was not violated.

4.6 Nevmerzhitsky v. Ukraine

Nevmerzhitsky was detained in the Kyiv Regional Temporary Investigation Isolation Unit between 1997 and 2000 on charges of several acts of white-collar crime. While in the isolation unit, he went on a hunger strike and was forcibly fed with the use of a mouth widener and a rubber tube inserted in his throat.

The Court found that the *medical necessity had not been demonstrated clear enough by the Government.* Furthermore, the method used in the process of forced feeding was considered *extremely invasive and unnecessary*. Accordingly, there had been a violation or Article 3.

5 Conclusion

Synthesising the reasoning of these cases allows us to identify the conditions that must be satisfied before an act of forcible medical intervention will not constitute a violation of Article 3.

If the person who underwent a medical procedure gave his (true) consent, an act of forcible medical intervention can *per definitio* not exist as the act was not executed forcibly. The Court extended this reasoning by stating that the applicant must prove beyond a reasonable doubt that he did not consent to the medical intervention; he must affirmatively prove his dissent. If the applicant fails to meet this evidentiary burden, the Court no longer has to consider either the necessity of the medical intervention or the means used. If the applicant does sustain the burden of establishing beyond a reasonable doubt that he dissented to the procedure being carried out, the Court then (and only then) must rule on whether the forcible medical intervention carried out was required out of a medical necessity. If such a necessity existed, the forcible medical intervention does not constitute a violation of Article 3. We can extrapolate from the case law that medical necessity exists if, without the forcible medical intervention, the life or health of the person who underwent a medical intervention would be at risk; for example, due to the possibility of a cocaine bag rupturing in the stomach and causing death by cocaine poisoning. However, even in such a case, the forcible medical intervention utilized must be proportionate, meaning it must achieve the goal with as little discomfort for the person it is performed on as possible.

The absence of a medical necessity does not automatically mean there was a violation or Article 3. A forcible medical intervention for the purpose of gathering evidential material can, in some cases, be in accordance with Article 3. For no violation to exist, the forcible medical intervention must be duly justified; that is, there must be compelling reasons for its necessity. The use of forced medical intervention to obtain evidential material will violate Article 3 if that same evidence can be gathered in less intrusive ways. A blood test, for example, would be less intrusive than a forced insertion of a catheter. Furthermore, the nature of the forcible medical intervention must be considered in the context of the gravity of the crime. Here, the Court appears to use a sliding scale. While a very intrusive, forcible medical intervention with the aim of obtaining evidential material of a less serious criminal offence (e.g.,

quantities of drugs used for self-purposes and not distribution, minor theft, loitering) would constitute a violation of Article 3, the same intervention may well be legal and accordance with Article 3 in the case of a serious criminal offence (e.g., murder, rape, arson). In assessing whether the forcible medical intervention was necessary, the Court considers the following criteria: the extent to which a forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the methods by which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available, and the effects on the suspect's health.

An act of forcible medical intervention, even in cases where a violation of Article 3 is found, does not constitute an act of torture, but rather only an act of inhuman or degrading behaviour. Pain resulting from the forcible medical intervention typically is not intensive enough to be considered as torture and furthermore is not the goal, but rather the by-product, of the act.

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Selected Aspects of Human Life in Civil and Criminal Law

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(eds.)

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Abstract The scientific monograph 'Selected aspects of human life in civil and criminal law' comprises ten contributions. The authors analyse various aspects of the meaning of human life in the light of selected topics in civil and criminal law. The Slovenian and Turkish authors, aware of the importance and sensitivity of the overarching theme of the scientific monograph, provide an analysis of selected pressing topics (e.g. honour killing, disinheritance, crimes against life and limb, vulnerability of certain social groups (elder persons)) in the light of both national, as well as of international regulation and relevant case-law. The scientific monograph thus provides the reader with an insight into historical, current and future aspects of human life.

Keywords:
right to life,
discrimination,
honor killing,
criminal offences against life,
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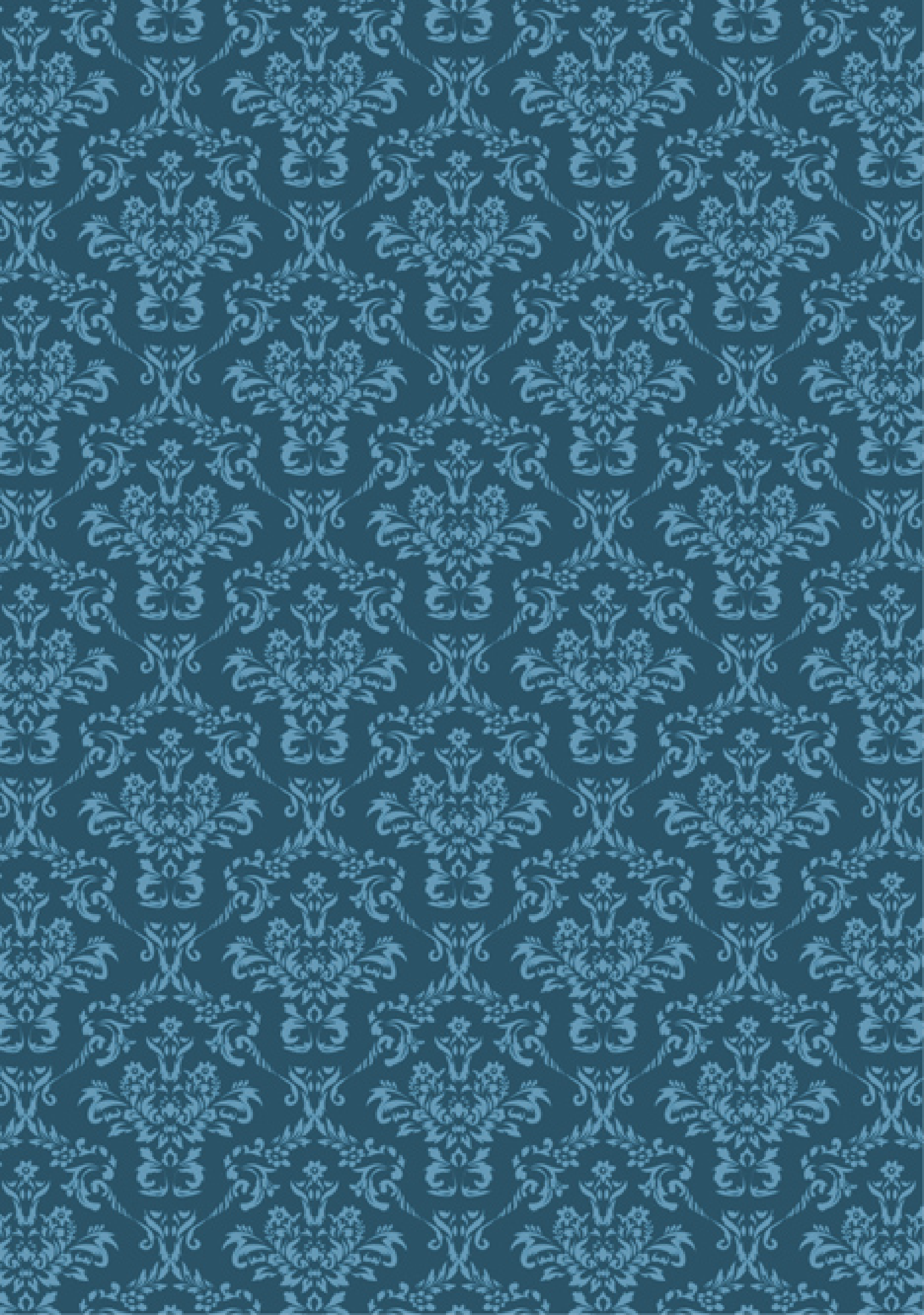

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