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EMOTIONALIZATION OF CRIMINAL LAW IN THE PROCESS OF ADOPTING AND AMENDING CRIMINAL LEGISLATION**

Abstract: *The authors of this paper examine the phenomenon of emotionalization of criminal law, which emanates in three stages: in the legislative process, within the content of respective legal provisions, and in criminal procedure. The third stage is well-identified as such and, here, procedural principles aim to guarantee impartiality of the judge. Regarding the content, discussions about negative feelings were part of the dogmatical upgrading of hate as an obligatory aggravating circumstance envisaged in prior amendments to the Serbian Criminal Code. On the other hand, the emotionalization of legislative procedure, perceived as the process of adopting and amending criminal legislation in an emotionalized context, has largely remained in the background. After elaborating on the relevance and topicality of this issue, the authors connect it with the basic goals of law and legitimacy of state power, provide various definitions and explain the notion of emotions by referring to examples from comparative law. Thereupon, the concept of emotionalization of law is analyzed with reference to the legal provisions from the latest amendments to the Criminal Code of the Republic of Serbia (2019).*

Keywords: *emotionalization, Serbian Criminal Code, Act on Amendments to the CC, state power, life imprisonment, Serbia, United States, urgent legislative procedure.*

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1. Introduction

The problem of emotionalization of positive law in general, and criminal law in particular, is not characteristic only for the former development of society, state and law because, if it were, only legal history would be dealing with it today. On the contrary, the development of modern law has been marked with an increasing reference to informal, socially anchored elements within the formal law-making process. It is especially evident in criminal law, where there is a tendency of corroborating or even grounding legislative decisions on feelings and irrational aspects. Such a trend can be called the emotionalization of criminal law, which *inter alia* leads to the so-called penal populism. This occurrence can be succinctly defined as follows: "Despite the widespread usage of the term 'penal populism' in much analytical work on contemporary punishment, what populism *might actually be* has to date received very little consideration. Instead, it is usually treated as a commonsense given, a label to attach to politicians who devise punitive penal policies that seem to be in any way 'popular' with the general public" (Pratt, 2007: 8). Such a phenomenon raises the following question: why a state government is reaching for or, even, succumbing to emotionalization, i.e. why a state government, driven by the specific social circumstances of emotionalization of society in concrete cases, decides to make changes of criminal legislation. Furthermore, in such circumstances, while the problem is still shaking the general public, state authorities strive to promptly amend the existing legislation; it is occasionally done in the course of urgent legislative procedure, which largely excludes the opinion of the experts.

In general, it has to be pointed out that the phenomenon of emotionalization is undesirable and raises concerns in the area of criminal law primarily due to its distinctive punitive and retributive function, which is emphatically based on rational and precisely defined legal grounds and limitations. It seems that a complete and adequate response to the posed question cannot be found entirely in the domain of criminal law theory. In order to fully understand its roots and scope, a part of the answer should be sought in the basic reasons for the existence of state power, its functions and goals. The research on this issue will show that emotionalization of criminal law is a broader social problem, specifically reflected in the purpose and justification of state power. In this paper, the process of adopting the latest amendments to the Serbian Criminal Code is presented as a striking example of emotionalization of law. The content of the Act on Amendments to the Criminal Code (2019) as well as the urgent legislative procedure (in May 2019) have been highly criticized. Prior to that, the authors will present a few comparative law examples from the USA legislative practice (in both historical and contemporary context), considering that the U.S. criminal justice system has directly or indirectly influenced the global understanding and

need for a more repressive criminal policy. It goes without saying that a detailed elaboration of such a significant problem requires a much larger framework than the one offered by a scientific article. Thus, this paper aims to shed more light on the issue and bring it closer to the domestic professional public.

2. The Basic Goals of Law and Legitimacy of State Power

The development of the human society and the state, as the highest political organization, also influenced the regulation of interpersonal relations. In earlier times, when social changes ensued more slowly, the largest number of social relations was regulated by customs. In conditions of slow social transformation, customs proved to be an adequate way of standardizing human relations because they imply long-term repetition of the same behavior in the same situation, which over time creates a general awareness of obligation as an internal attitude of individuals towards a certain pattern of behavior (*opinio necessitatis*).

The monopoly of power (force) is a distinctive feature of every legal order, but its existence and action cannot be explained only on the basis of this characteristic difference. For example, in his early works, Lukić rejects the viewpoint that positive law (as an expression of the state power will) can be based only on coercion; this point of view still prevails in the contemporary legal theory. As noted by Lukić, “some norm has a binding power when it forces us to apply it with its content, which is a value *per se*, but it does not have a binding power when it forces us to do so with its sanction because, then, it is only a simple fact; it does not obligate us as the *ratio legis* but as natural law” (Lukić, 1995(a): 379).¹ In other words, efficiency (and success) of the legal order cannot be explained on the grounds of the envisaged sanction for violation of the prescribed legal norms, but on the grounds of the citizens’ acceptance of these rules. Acceptance implies the citizens’ internal relation towards the prescribed rules, which primarily depends on their content, i.e. the values they declare and protect. Thus, in addition to the authority of the state power that is envisaged by the law and the monopoly of force embodied in the sanctions envisaged for inobservance of the law, the citizens’ internal relation towards legal rules is conceivable only when the envisaged rules reflect the same values that the citizens have.

As jurisprudence does not provide methods to explain the citizens’ acceptance of legal rules, the answer may be sought in the sociological findings, especially

1 In his last significant piece, Lukić notes that law is “paradoxically, the most efficient when it is the least applied with its basic means, the force, when its demands are more or less reduced to what people themselves want to do, when it mostly specifies what would have happened anyway if the law didn’t even exist, when it helps to make it happen faster, more precisely, more reliably than if it didn’t even exist” (Lukić, 1995 (b): 520).

in the area of sociology of law. One of the most significant sociologists of law, Denis Galligan, explains this question with his concept of the social sphere, which is defined as follows: "Among the various ways in which laws interact with other parts of society, two are of most interest here: one is when officials make, interpret, and apply the law, the other when groups, associations, or individuals conduct their activities subject to the law. In the first case, officials accept and make sense of the law, and then apply it to others, while in the second case, associations and individuals accept law to their own activities... A social sphere may be described as an area of activity in which participants share understandings and conventions about the activity, and which influence and guide the way they engage it" (Galligan, 2007: 103). Therefore, the social sphere is a framework that brings together different entities that are united in common interests and values, and that is the reason of their existence. Although social spheres have existed since the existence of the state as a political community, the development of modern society has influenced the formation of an endless multitude of social spheres; thus, today, almost every individual is regularly involved in a larger number of social spheres. Galligan points out that social spheres are formed for quite practical reasons, as a space where the mutual cooperation of individuals develops in the easiest way and where they can realize their personal and professional potentials. Individuals accept certain conventions and standards within these social spheres, but they equally affect the development of those conventions and standards with their common practices. As a member of certain social sphere (e.g. a church, a political party or movement, a professional association, an economic class, etc.), every individual builds a significant part of his/her own attitudes and values into the social sphere. Thus, the standards of conduct and accepted values of each individual are ingrained in the respective social sphere, and it would be wrong to think that individual attitudes can be developed in isolation, i.e. outside the impact of social spheres they are exposed to.

Considering the consequences of different perceptions of individual and collective values and interests, which are jointly developed by individuals within the social spheres, it seems that their mutual correlation directly affects the creation of the generally accepted values of the entire political society which is created, nurtured and protected through social spheres. As it is impossible to imagine absolutely fair and just society, except in some kind of utopian society, every important social interest should be sufficiently satisfied within a functional legal order. The other option may be to ensure the absolute satisfaction of certain interests to the grave detriment of others. Yet, as there is no universal way of reconciling the opposed interests in order to ensure absolute satisfaction of all, the state government should create a legal framework which provides for

satisfying different interests and ensures that the majority of citizens consider the legal order to be fair and just, particularly given that it immediately affects the effectiveness of positive legal rules. Consequently, an order that does not satisfy the interests of the majority of the population cannot be effective in the long run, regardless of the monopoly of power (force) that the government enjoys at a given moment.

However, while the material interests of different social spheres may have rational grounds, the common values that are nurtured in the society are not and cannot be rationally justified. The effects of the latter rest on two facts. First of all, emotions (rather than practical prudence) can have a large or predominant impact on the development of certain values. Secondly, there is no rational approach or method by which a hierarchy of different (often conflicting) values could be determined (e.g. the values of personal freedom and effective security). Therefore, it would be necessary to determine the relationship between state coercion (arising from the monopoly on the use of physical force) and the values which are developed within various social spheres (where individuals act as members of the society) and which should be secured by the state government via the monopoly of force. There is no legal order (including even the totalitarian regimes) that is not legitimized as being fair and just. The need for legitimacy arises from the basic purpose of law, which is to accomplish its goals by observing the principles of fairness and justice.

The relationship between law and coercion is most prominently expressed in the field of criminal law. Moreover, criminal law is a paradigm of law in general because its importance is so great that most laymen understand the legal order through the norms of criminal law; such a conception largely prevails among the greatest legal experts (e.g. Kelsen, Radbruch, Lukić) who developed their theoretical concepts on the analysis of criminal law norms. Such a paradigm can be easily understood due to the importance of criminal law in society. "Criminal law, appearing to be at the opposite end of the spectrum in specifying what constitutes criminal acts and punishments for transgression, protects fundamental social goods and the social norms to which they give rise. Integrity of person and property warrants the special protection criminal law and criminal justice provide. Without that integrity other social interactions are inhibited and settled social relations constituting a society become impossible to form. Criminal law has a dual task: to protect each person from the other and to sustain the foundations of society" (Galligan, 2007: 225).

Simply put, criminal law prohibitions aim to prevent certain undesirable acts or omissions (failure to act), and to ensure their less frequent occurrence. However, if criminal law provisions were viewed in a broader context of the entire legal

order, the prohibition of certain undesirable acts appears as a response to the demands of justice. The aspects of this relationship are diverse. In principle, there should be a strong and ongoing cooperation between the citizen representatives who are vested with the governing powers and other members of the community. It entails familiarizing the members of the community with the common good (assets, values) and informing them how they are to be accomplished. Criminal law, which certainly represents one of the ways of achieving the envisaged goals, must not be perceived by members of the community only as a system of punishment for disobedience, and nothing beyond that. In order to achieve and protect the common good, it is necessary to raise awareness of which behaviors are desirable and which are not. Also, in order to protect the rights of defendants (who are also members of their community), there must be certain rules which would preclude the abuse of the monopoly of force, by ensuring that the instruments of state coercion do not turn into unlawful activities that are contrary to the envisaged purpose. Some of these rules are: *nullum crimen, nulla poena sine lege; audiatur et altera pars*; the right to defense; limited duration of custody; the exclusion of a biased judge; presumption of innocence, etc.

Thus, in law, coercion has an obvious function. It is a necessary but not a sufficient condition for the effectiveness of the legal order. Also, the use of coercion can be justified only if it ensures the implementation of the principle of justice, but not if it ensures the satisfaction of some individual interests or the interests of some groups. Figuratively speaking, applicable laws may be perceived as the scales of justice, while coercion is the sword in the hands of *Justicia*, the Goddess of Justice; only together can they make the principles of justice effective and thus promote, ensure and protect the common good. Therefore, the usual legitimation formula applicable to modern states implies three basic elements. First, in order for political power to be considered legitimate in the first place, it must be acquired and performed according to predetermined rules, which means that such power is legal. The second element of the formula is the normative justification, which implies that the rules on acquiring and exercising power are justified according to socially accepted understandings concerning: a) a valid title of power, and b) proper goals and standards of exercising power (direct link to abuse). Finally, the third element of the formula stipulates that political power must be recognized "by explicit consent or through acts of appropriate subordination, as well as by recognition from other legitimate authorities." (Vasić, Jovanović, Dajović, 2014: 73).

As a dignified life in society could not be imagined without the effective operation of criminal law, its standardization and application always attract special attention. The general public, through the mass media, forms its views on the basic justice of the legal order precisely on the basis of criminal cases (e.g. the

title “*Useless Jury Allows Dangerous Criminal to Walk Free*” is one banner headline lambasting ineffective criminal justice policy or institutional incompetence that the tabloids never seem to run, perhaps because implying that one’s readers are gullible or stupid is not likely to sell many newspapers” (Roberts, Zuckerman, 2010: 95). In general, the ponderosity of the incriminated acts that endanger basic social values makes this area of law particularly sensitive because the social interest in, for example, the distribution of tax burdens can never induce an emotion as much as it can be done, for example, by a crime against a child.

This significance of criminal law opens the door to the great influence of emotionalization in the process of enacting and applying criminal legislation. Given that the creation of the law in modern times should be a planned, purposeful, well-studied and argued *lege artis* action, i.e. a rational activity aimed at achieving certain goals in society, the question of the purpose of the law should be reopened, which is ultimately the question of justice. The main initiator is the political will of the highest state officials, whose jurisdiction is to propose and change the criminal legislation, and ensure its application. Although we usually assume a legitimate legislator as a rational subject, the ways in which the state government often reacts in cases of conspicuous emotionalization shows the opposite. Namely, the political will of the highest representatives of the state government is expressed through the need to strengthen their legitimacy by enacting legislative acts whose main goal would be to satisfy the citizens’ sense of justice, given that citizens are the source of that legitimacy. However, the enactment and application of the law, which is guided by these motives, excludes numerous other arguments, primarily professional ones. Thus, for example, the enactment of amendments to the Serbian Criminal Code in 2019, which was adopted in the course of an urgent legislative procedure and without any public debate, opens a number of issues that will be highlighted later. At this point, however, it should be emphasized that the procedural nature of law is its essential feature because the application of procedures in the enactment and application of legal rules significantly ensures that official decisions are not rash and reckless but based on rational grounds. After all, too frequent amendments of some of the main laws governing a society, which was very reasonably pointed out by Fuller (Murphy, 2005: 240-241) affects the issue of legal reliability and certainty, and raises the issue of application of these laws by courts, which in such cases do not have enough space to establish a uniform practice. Finally, due to emotionalization, the legislature is able to act in an argumentatively impermissible way, i.e. by using the argument *pars pro toto*, where on the basis of only one case it reaches for unnecessary standardization of general nature, instead of ensuring that a concrete case gets its epilogue in court where a single act is rendered. All the aforesaid boils down to a kind of

abuse of the legal form, whose main goal is to legitimize state power in a populist way. Thus, an unconscientious state government reacts to the citizens' emotionalization of specific cases because their votes decide who will form the personal element (holders) of state power.

3. Comparative law examples from the United States legal history

Based on the previous section, it can be concluded that the performance of state powers and the functioning of the legislature as one of its three parts, especially in the field of criminal law, is subject to the emotionalization of society due to major social events. There is a huge number of examples that show the emotionalization of law. In this section, we briefly present some striking social events that marked this phenomenon.

Two well-known cases from the US judicial practice will serve as characteristic examples of the emotionalization of criminal law. The first case, which happened on 1st March 1932 shocked not only America but also the whole world. The twenty-month-old baby of the American pilot and public figure Charles Lindbergh, one of the greatest aviators in history, was abducted from his family home. Although the Lindberghs paid the requested ransom of 50,000 USD, the child was never returned. The emotional restlessness that the American society experienced at the time directly affected the urgent enactment of the Federal Kidnapping Act (1932), popularly known as the Lindbergh Act, or the Little Lindbergh Law. This Act was the amendment of the United States Code², the Criminal Code of the Federal Government of the United States. "Both houses, in committee

2 "(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

(5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment." (U.S. Code, Title 18, § 1201) LII, Cornell Law School.

and in debate on the floor, carefully considered the desirability of this further extension of federal power. Chairman Sumners of the House Judiciary Committee was opposed to it unless absolutely necessary. When the bill came up for debate, the opposition to enlarged federal powers was again evident. States'-rights advocates cried "usurpation" while proponents of the bill insisted on the necessity for such legislation" (Bomar, 1934: 436). This Act declared the transportation of abducted people across federal borders a crime. The trial, called the "trial of the century", ended with the death sentence for the accused Bruno Richard Hauptmann. The trial was unusually fast, and the jury's choice was debatable.³ After an extremely long jury deliberation, Hauptmann was found guilty. To this day, it is not known what exactly happened on 1st March 1932, which is largely a consequence of the emotionalization caused by this case.

The second event to be mentioned here can illustrate emotionalization on the global scale. It had such a huge global impact that it truly marked the beginning of the 21st century and shaped its characteristic features. On 11th September 2001, several synchronized terrorist attacks ensued in the United States, causing mass panic and fear. Al Qaeda claimed responsibility for the attacks, which were carried out with that very intent since all the chosen targets (the WTO and the Pentagon) represented symbols of US economic and political power. The fact that the terrorist attack (involving a huge number of victims) was broadcast live on numerous TV channels caused a state of collective shock worldwide. In the aftermath of the attack, the American authorities declared "the global war on terrorism", in which they attacked Afghanistan and Iraq. The feeling of insecurity was expressed in the global tightening of security measures and, *inter alia*, significant changes in criminal legislation. The Homeland Security Act (2002) was enacted, which further swayed a particular culture of fear, which had already been present in the American society.

In addition to major differences, it should be noted that these two examples show essential similarities. First, they both provoked a great emotional reaction from people. Secondly, in both cases, the legislature acted with the aim of preventing the consequences of such acts by adopting new legal solutions. Finally, in both cases, the court proceedings against the accused did not lead to unequivocal

3 "Flemington, N. J., Jan. 2. -Two years and ten months from the date of the tragedy at Hopewell, Bruno Richard Hauptmann was placed on trial for his life here today, charged with the murder of Charles A. Lindbergh Jr. With the sometimes ponderous machinery of criminal trials moving at an unusually rapid speed, ten jurors had been selected when court adjourned this afternoon, after having been in session for a little more than five hours. It was believed here tonight that the remaining two jurors would be chosen before noon tomorrow, and that the State of New Jersey would begin during the day its effort to prove the accused man "guilty beyond a reasonable doubt." (New York Times, January 3, 1935.)

knowledge on the committed crimes; in other words, they did not fulfill their basic purpose.

4. Emotions in a general context

Although everyone is basically familiar with the almost omnipresent term „emotion“, there is still a need to establish a common terminological ground. According to the Merriam-Webster dictionary, an emotion is “a conscious mental reaction subjectively experienced as a strong feeling usually directed toward a specific object and typically accompanied by physiological and behavioral changes in the body”.⁴ The same source defines it also as “the affective aspect of consciousness” and links it to the term “feeling”; the word “sentiment”, understood as “an often unreasoned opinion or belief;”⁵ underlying irrationality is even closer to the core of the notion.

The first ideas on emotional psychology had a strong biological focus and derived from the evolutionary approach pursued by Darwin, where emotions are dispositions which control the respective behaviour and which are, according to behavioristic theories, learnable (Singer, 2000:518-528). This physiological perspective was the leading paradigm until the 1970s, when a second component was included: the cognitive, situative assessment, or rather the cognitive interpretation of this arousal of feelings (Schachter, Singer, 1962:379-399). The physiological models see emotions as a sort of “energy supplier“, while the cognitive models regard them as complex reaction patterns that follow cognitive evaluations (Freundt, 2006: 24); as such, they are close to the common understanding of emotions and, consequently, more accepted than the previous concept. The central effect of emotions is that they reflect, as an “echo of the sentiment“, how the content is experienced. Consequently, emotions can be described as “intuitive, appraising statements of an individual pertaining to specific objects that have been experienced” (Freundt, 2006: 25).

In the 1980s, psychology (including emotional psychology) experienced a teleological paradigm shift, by focusing on the purpose, functions and results; thus, emotions were perceived in the framework of goal-meaning-context relations. In other words, emotions are activators, motivators and organizers of behavior; they are part of the regulation of human behavior. Nowadays, this enhanced functional aspect of emotions is considered to be disputable. It has implication in various areas of law, primarily in criminal law but also in other areas dealing

4 Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/emotion> (accessed 26 Sept. 2020).

5 Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/feeling> (accessed 26 Sept. 2020).

with intense emotions, like tort or family law. Even inheritance law recognizes (gross) ingratitude.

Apart from positive law, jurisprudence has also acknowledged the “sensitive” elements of actions in the legal surrounding. The Anglo-American legal science has established a distinctive field of research called “Law and Emotion“. The idea behind it was that the legal science, in order to do justice to the complexity of emotions, has to connect with the findings and insights of other disciplines, such as philosophy, psychology, social anthropology and neurobiology, on the complex interaction of emotion and cognition (Bernhardt, Landweer, 2017: 17). Thus, from the outset, the study of “Law and Emotion“ was laid out as an interdisciplinary endeavor. On the other hand, the programmatic demand to recognize the role of emotions in law does not mean that all *de facto* emotions occurring in law and jurisprudence will be assessed in a naively positive manner (Bernhardt, Landweer, 2017: 19).

5. Emotions in Criminal Law

Emotions occur at various stages affiliated with criminal law. Moreover, the edifice of penal law is erected on the strong undercurrent of emotions (Elster, 1999: 102). In fact, the entire history of criminal law is a history of restraining and controlling irrational behavior of both criminal offenders and the victims and their families. The survival of the fittest and *lex talionis* have been tamed by the most serious sanctions known to social orders. Vengeance is channeled by legal principles and procedures: *nullum crimen, nulla poena sine lege* is among the key principles of criminal law guaranteeing predictability and certainty.⁶ It does not mean that criminal law is deprived of or purged from emotions. Quite the reverse, “legal institutions and in particular the criminal justice system are the very institutions in society that are designed to deal with the most intense emotions and emotional conflicts, with individual as well as collective emotions” (Karstedt, 2002: 300). Karstedt describes criminal courts and procedures as a “prominent institutional space and institutional mechanism for emotions in society” (Karstedt 2002:300). This mechanism has selected and formalized which emotions are allowed (and to what extent) within the borders of penal law.

However, it would not be sufficient to restrict the role of emotions only to different phases of the criminal procedure, although it is the stage where we can immediately observe and lament over a biased handling of the judicial process by the judge. As previously noted, emotions also play a prominent role in the

6 Blagić presents three particular examples demonstrating how criminal offences recently introduced into the Serbian Criminal Code contradict the principle of certainty, and thus potentially weaken legal certainty and the rule of law. For more, see: Благић, 2020: 217–229.

law-making process, thus preceding the application of the law by the judge and, logically, influencing it by setting the normative frame before-hand. Therefore, emotions play a significant role in three distinctive stages.

Chronologically, the first one is the legislative procedure, where emotions may generate modifications of current legislation. The main actors in the legislative process are the legislator, the expert public, and the general (lay) public. The second stage is the content of criminal law itself, which is imbued by emotional elements in both the General Part and the Special Part. It derives from the acts and feelings of the perpetrator (e.g. mitigating and aggravating circumstances, excess of necessary defense, etc) and the victims (e.g. rape committed in a particularly cruel or particularly humiliating manner). Lastly, criminal procedure law also includes provisions, usually formulated as exemptions (such as the exemption of the judge, the exemption from the obligation to testify, etc.), which are aimed at enabling the most objective application of law possible. They mainly affect the judge but they are also applicable to the testimonies of the accused (who may lie), witnesses, experts, etc.

The legislative process is a potential field of conflict or, at least, from the dogmatic point of view, undesired sphere of interference to the detriment of an objective and impartial regulation. Legislation, certainly, can never be completely unbiased; the highest degree of impartiality is most likely to be achieved by a mechanical, AI-driven law-maker. But, a target-oriented appeal to citizens' feelings in order to invoke and/or promote the acceptance for the proposed legislation is a conscious act that differs from the formerly mentioned "emotionalized" situations. The influx often comes from the political spectrum, amenable to extra-scientific factors and followed by further shaping of criminal law provisions.

The Serbian criminal legislation of recent years is a good example of how both the legislative process and the content of the amended legislation can be filled with emotions. The first issue will be examined in more detail in the next section.

6. Emotionalisation of law in Serbian criminal legislation: the making of the Act on Amendments to the Criminal Code of Serbia (2019)

Since its adoption in 2005, the Criminal Code (hereinafter: CC)⁷ has been amended seven times: twice in 2009, once in 2012, 2013, 2014, 2016, and most recently, in 2019. The changes were of different scope, structure and background, but the latest amendments have put in the center of attention not only the content

⁷ Criminal Code of the Republic of Serbia, *Official Gazette RS*, 85/2005, 88/2005-cor., 107/2005-cor., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

of the new legal provisions but also the manner of enacting them. A few critical points can be identified:

a) *The timeline* - The biggest novelty to the criminal justice system in Serbia since 2005, the punishment of life imprisonment, was adopted less than half a year upon establishing the working group of the Ministry of Justice in December 2018, tasked with the preparation of the Act on Amendments to the Criminal Code (hereinafter: AACC).⁸ It came into force six months later, on 1st December 2019 (Art. 42 AACC). This means that the time used for drawing the bill equals the duration of the *vacatio legis*. In the Explanatory Statement of the Draft Act on Amendments to the Criminal Code (hereinafter: the Draft Act Explanatory Statement), it is stated that this six-month period was needed to “leave enough time for the expert public and the citizens to get to know the proposed changes and amendments, having in mind their importance and scope”.⁹ It turns out that the internal consultations, analysis and the written composition of the Draft Act needed as much (or as little) time as familiarizing the public with its content. Yet, the experts got officially acquainted with the provisions only after the law was adopted. Of course, the content was generally made public through the media beforehand, but the opportunity to raise objections and propose improvements was restricted by the character of the legislative process.

b) *The procedure* - Despite the importance of the proposed changes, both in terms of dogmatic consistence and adjustment of the existing penitentiary system, the legislative procedure in which the bill was passed was urgent. Article 167 of the Rules of Procedure of the National Assembly of the Republic of Serbia stipulates that a law can be adopted by urgent procedure if it regulates issues and relations that occurred as a result of unforeseen circumstances, and if failure to adopt the law by use of urgent procedure could have negative consequences on lives and health of the people, the security of the state, and the functioning of institutions and organizations, or for the purpose of meeting international obligations and the harmonization of regulations with the European Union *acquis*. Due to deviations from the regular procedure, the proposer of the law must state the reasons for the faster process. However, the Draft Act Explanatory Statement does not specify those reasons. This is contrary to the practice of enacting prior amendments (like those of 2016), where it was stated that the law was proposed in urgent procedure “for meeting the international obligations assumed in

⁸ Act on Amendments to the Criminal Code of the Republic of Serbia, *Official Gazette RS*, 35/2019.

⁹ Ministry of Justice RS: Draft Act on Amendments to the Criminal Code of 10 May 2019, (accessed 15 December. 2020), http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/1627-19.pdf

the process of accession to the European Union.”¹⁰ If we assume that this would also be the official reason for the legislative rush in enacting the most recent amendments, then we should take a look at it in the light of accession to the European Union.

In this regard, highly relevant and informative documents are the annual Progress Reports of the European Commission on Serbia’s progress in the accession process. One of the major problems underscored in several recent reports is the extremely frequent use of urgent procedures, amounting to 44% between February 2018 and February 2019 (EC, 2019:6).¹¹ Although the use of urgent procedure was lower than the 65% recorded in the year 2016 (EC, 2019:6),¹² it is still an excessively high share, which has been stagnating since 2017. In addition to the urgent procedures, the Report also pointed out to the deterioration in legislative debate in parliament and scrutiny of the executive, which “prevented the parliament from properly exercising its legislative function” (EC, 2019:6).¹³ Thus, the antagonistic reference to the EU accession as the reason for the overuse of urgent procedures, which ultimately diminishes the possibility of a public debate and the quality of legislation, is obvious.

c) *The wording* - The introductory part of the Draft Act Explanatory Statement states that the Foundation “Tijana Jurić” submitted a Peoples Initiative to the National Assembly with regard to amendments to the Criminal Code, which was supported by 158.460 citizens of the Republic of Serbia. This Initiative proposes life imprisonment for the most serious criminal offences against life and limb, as well as for sexual offences in cases where the crime results in the death of a child, a minor, a pregnant woman and a helpless person. The Initiative also proposes that persons sentenced to life imprisonment shall not be entitled to conditional early release from prison (Draft Act Explanatory Statement, 2019: 10). Apart from the careless mistake of enlisting the consequences of the offences cumulatively instead of alternatively, the text of the Draft Act Explanatory Statement underlined several times that the amendments have been made “upon the Initiative of the Foundation “Tijana Jurić”. It gives rise to an impression that the Foundation’s proposal is a (non-formal) source of law, which the legislator only formalizes, shapes and transfers into the Criminal Code. This impression is supported by the fact that everything that was proposed by the Initiative was

10 National Assembly of the R. Serbia: Draft Act on Amendments to the Criminal Code of Serbia of 23 November, 2016; http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2769-16.pdf, p. 20, (accessed 10 Jan 2021).

11 European Commission, Communication on EU Enlargement Policy, Serbia 2019 Report, 6 (accessed 30 September 2020). The publication of the Progress Report for 2020 was postponed to the fall of 2020.

12 European Commission, Communication on EU Enlargement Policy, Serbia 2018 Report, 6.

13 European Commission, Communication on EU Enlargement Policy, Serbia 2019 Report, 6.

also integrated into the amendments, despite its non-compliance with other provisions and standards.¹⁴

Another example of the legislator's highly sensitized approach is the history preceding the introduction of the punishment of life imprisonment. In the Draft Act Explanatory Statement (2019: 10), the legislator recalls that, in 2015 (long before the Foundation's initiative), the permanent working group for amending the Criminal Code discussed the introduction of life imprisonment as a substitute to the long-term imprisonment of 30-40 years, which had been instituted as a substitute for death penalty. Back then, in 2015, the issue was put up for the public debate; it "stirred up the expert public, made them think, talk, discuss, and naturally opened up many other issues" (Draft Act Explanatory Statement, 2019: 10). Thus, the Ministry of Justice concluded that "it is not possible finally decide upon it because the expert public is divided on this issue" (Draft Act Explanatory Statement, 2019: 10). The controversy over this proposal did not change in the meantime, so it is not clear why the issue was not properly discussed in 2019, especially if we take into account that the proposal from 2015 did not contain the exclusion of the possibility of conditional early release for certain offences, which is the most problematic part of the most recent amendments.

The polarization among the experts did not fade away four years later. It seems that the discourse on the necessity of implementing the strictest sanction known in our legal system has been planted on the terrain of the not less "stirred up" but seemingly unanimous general public. It has shown a very sympathetic, encouraging attitude towards the proposed tightening of criminal legislation, giving it complete media-supported moral legitimacy. Furthermore, especially in cases involving children as victims of crimes, we may still hear the demand for more repressive state response, even an urge for reinstating death penalty. This is in line with the 2015 proposal, which divided the expert public although did not even include the abolition of conditional early release. There is an impression that the 2015 proposal was followed by an emotional discussion rather than a rational debate on the *pro et contra* arguments.

d) *The content* – The 2019 amendments to the Criminal Code contain some inconsistencies and further tightening of the respective sanctions. Regarding the prohibition of conditional early release for certain offenses, the question arises on the main criterion for the selection of the enlisted crimes. A similar selective

14 Similarly, the proposal of the Serbian Bar Association for introducing an assault against a lawyer as a criminal offence (Explanatory Statement, 2019: 6) has found its way into Article 336(v) CC. The proposal was motivated by the assassination of the well-known Belgrade attorney-at-law Dragoslav Miša Ognjanović, in connection with his professional engagement as defense counsel in high-profile criminal cases. This proposal did not draw much attention, as the legal provision is not controversial either in theory or in practice.

approach was observed in 2009, when the the legislator introduced the prohibition on mitigation of punishment for certain offenses (Delić, 2010: 228–245). However, substantially, the most emotional content so far were the provisions of the 2012 amendments, when hatred was envisaged as an autonomous and obligatory aggravating circumstance in the sentencing process (Article 54a CC).¹⁵

7. Conclusion

The starting point of this paper was that the criminal legal system does not exist in a vacuum of rationality, where all procedures and decisions are led by reason. On the contrary, emotional factors, both positive and negative (such as: anger, shame, grief, remorse, empathy, etc.) directly or indirectly gain their confirmation in criminal law as well. After all, guilt (*culpa*) as the central notion of criminal law is a subjective element of the offense, which entails both awareness and will, and complete (together with other elements) the concept of crime.

The sphere of law and the sphere of emotion touch upon each other and overlap, similar to the spheres of law and morality. Feelings are even perceived as “valuable barometers of social morality” (Karstedt, 2002: 299). Moreover, emotions may take various forms; they may occur on various occasions and in various legal contexts; they originate from and influence different actors, as well as the society as a whole. The chain of emotions starts with the law-making process and the legislator as its key actor, extending to the content of the criminal provisions and ultimately to the decision-making process and the judge as its central figure. While there are protective mechanisms within the realm of the criminal procedures (exemption of the judge, *audiatur et altera pars*) aimed at ensuring the impartiality of the judge, the first link in the chain (the legislative process) easily remains out of focus. The process of creating intrinsically repressive criminal law draws much more (laymen) attention than other areas of law; ultimately, it is very attractive to use it in politically lucrative contexts. For these reasons, it has to be put under special scrutiny.

The historical and contemporary examples from the comparative and domestic law show that it is natural for the lawmaker to communicate in an emotional way. By passing the law in an urgent procedure without a public debate in 2019, the Serbian lawmaker basically skipped one line of legitimation - the valuable and critical comments of the expert public, and addressed (mostly through the media) the “moral” level of legitimation – the general public. The general (lay)

15 Miladinović-Stefanović rightly notices that this has marked a break with the traditional model of regular sentencing, based on an open list of relevant circumstances that are neutral in terms of values, which has been a characteristic of our system ever since the Criminal Code of 1951. (Миладиновић-Стефановић, 2013: 258)

public was not only supportive but demanded even stricter punishments in the prevailing atmosphere of “regret for the abolition of the death penalty”.

Despite the frequent legislative changes and emotional considerations, the lawmaker– content–courts chain is not a cohesive one. It may be illustrated by the mild penal policy of judges in Serbia; in judicial practice, punishments are often mitigated, or there is still a high percentage of suspended sentences. In other words, there is a discrepancy between the positive law and judicial practice. No matter how frequent and how publicity-driven the heightened repression is, the judges deal with it differently. Thus, in this phase of application of criminal law, emotions seem to have changed (from strict to mild punishment) as compared to the phase of creating the same law.

So, when Karstedt argues for a “return of emotions”, stating that feelings have been brought back to criminal procedures (Karstedt, 2002 : 299), it may be added that it is also the case in the legislative process, where provisions are commonly introduced or modified in a polarising spirit to satisfy the ideas of justice of particular stakeholders, taking into account dogmatic inconsistencies and problems in practice. Recognizing that a completely rational legislative process is difficult to achieve, an open discourse and identification of feelings would enhance transparency, the quality of legislation, and the will to participate in the legislative process. Otherwise, “when emotions remain invisible, they remain impervious to evaluation or change” (Brandes, 1999: 11).

References

Bernhardt, F., Landweer, H. (2017). Sphären der Verletzlichkeit. Recht und Emotion. In Landweer, H., Bernhardt, F. (Hrsg.) *Recht und Emotion II*. Freiburg: Verlag Karl Alber, 13-45.

Благоић, Д. (2020). Садржина начела одређености (lex certa) у погледу правне сигурности код појединих кривичних дела Кривичног законика Србије. *Зборник радова Правног факултета у Нишу*, 87/2020, 217–229.

Bomar, H. L. (1934). The Lindbergh Law. *Law and Contemporary Problems* 1934, 435-444.

Brandes, S. (1999). Introduction. In Brandes, S. (ed.). *The Passions of Law*, New York: New York University Press. 1 – 15.

Delić, N. (2010), Zabrana (isključenje) ublažavanja kazne u određenim slučajevima, *Crimen* 2/2010, 228 – 245.

Elster, J. (1999). *Alchemies of the Mind. Rationality and Emotions*. Cambridge: Cambridge University Press.

- Freundt, T. Ch. (2006), *Emotionalisierung von Marken*. Wiesbaden: Springer.
- Fried, A. (1997). *McCarthyism, The Great American Red Scare: A Documentary History*. Oxford: Oxford University Press.
- Galligan, D. (2007). *Law in Modern Society*. Oxford-New York: Oxford University Press.
- Karstedt, S. (2002), Emotions and criminal justice. *Theoretical Criminology*, 6 (3). 299 – 317.
- Lukić, R. (1995 a). *Obavezujuća snaga pravne norme i problem objektivnog prava*. Beograd: Zavod za udžbenike i nastavna sredstva, BIGZ, Beograd.
- Lukić, R. (1995 b). *Sistem filozofije prava*. Beograd: Zavod za udžbenike i nastavna sredstva, BIGZ, Beograd.
- Миладиновић-Стефановић, Д. (2013). Одмеравање казне за кривично дело учињено из мржње. *Зборник радова Правног факултета у Нишу*, 64/2013, 257 – 274.
- Murphy, C. (2005). Lon Fuller and the Moral Value of the Rule of Law. *Law and Philosophy*. 24 (3). 239 – 262.
- Pratt, J. (2007). *Penal Populism*, London-New York: Routledge.
- Roberts, P., Zuckerman, A. (2010). *Criminal Evidence*. Oxford-New York: Oxford University Press.
- Schachter, S., Singer, J. (1962). Cognitive, Social and Psychological Determinants of Emotional State. *Psychological Review*, 69 (5). 379 - 399.
- Singer, W. (2000). Wissen und seine Quellen aus neurobiologischer Sicht. In Mittelstrab, J. (Hrsg.). *Die Zukunft des Wissens. XVIII. Deutscher Kongress für Philosophie, Konstanz/Berlin*. Konstanz: Universitätsverlag Konstanz. 518 – 528.
- Vasić, R., Jovanović, M., Dajović, G. (2014). *Uvod u pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu.
- Zuckerman, A. (1989). *The Principles of Criminal Evidence*. Oxford: Clarendon Press.

Legal Sources

Кривични законик Републике Србије (Criminal Code of the Republic of Serbia), *Службени гласник РС*, бр. 85/2005, 88/2005-испр., 107/2005-испр., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 и 35/2019.

Zakon o izmenama i dopunama Krivičnog zakonika Republike Srbije (Act on Amendments to the Criminal Code), “*Službeni glasnik RS*”, br. 35/2019, <https://>

www.paragraf.rs/izmene_i_dopune/210519-zakon-o-izmenama-i-dopunama-krivичnog-zakonika.html

European Commission, Communication on EU Enlargement Policy, *Serbia 2019 Report*, 6, accessible at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf>, accessed 30 September 2020.

European Commission, Communication on EU Enlargement Policy, *Serbia 2018 Report*, 6, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>, accessed 30 September 2020.

Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/emotion>; <https://www.merriam-webster.com/dictionary/feeling>, accessed 26 September 2020.

Ministarstvo pravde Republike Srbije (Ministry of Justice of the Republic of Serbia): Предлог закона о изменама и допунама Кривичног законика (Draft Act on Amendments to the Criminal Code of 10 May 2019), accessed 15 Dec. 2020 http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/1627-19.pdf

Народна скупштина Републике Србије (National Assembly of the Republic of Serbia): Предлог Закона о изменама и допунама Кривичног законика (Draft Act on Amendments to the Criminal Code of Serbia of 23 Nov. 2016), accessed 10 January 2021 http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2769-16.pdf

U.S Code: the Federal Kidnapping Act, (18 U.S.C. § 1201(a)(1-5) - Kidnapping, Legal Information Insitute, Cornel Law School, <https://www.law.cornell.edu/uscode/text/18/1201>, accessed 30 September 2020.

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ЕМОЦИОНАЛИЗАЦИЈА КРИВИЧНОГ ПРАВА У ПОСТУПКУ ДОНОШЕЊА И ИЗМЕНЕ КРИВИЧНОГ ЗАКОНОДАВСТВА

Резиме

Аутори у раду истражују феномен емоционализације кривичног права, који се манифестује у три фазе: у законодавном поступку, садржински у оквиру саме норме и у кривичном поступку. И док је непристрасност судије предмет начела и механизма кривичног поступка, а субјективно обојена садржина кривичноправних норми постала предмет дискусије након низа измена и допуна КЗ, посебно након издвајања мржње као обавезне отежавајуће околности, дотле емоционализација законодавног поступка није била у центру пажње. Након увода у ком се указује на значај и актуелност теме, повезивања са основним циљевима и легитимношћу државне власти, те навођењу компаративно-историјских примера, анализирана је емоционализација, уз појашњење самог појма емоција, на примеру последњих измена и допуна Кривичног законика из 2019. године.

Кључне речи: емоционализација, Кривични законик, Закон о изменама и допунама КЗ, државна власт, доживотни затвор, Србија, Сједињене Америчке Државе, хитни законодавни поступак.