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THE EXPLANATION OF THE MAIN CHARACTERISTICS OF PENAL POPULISM AND EXAMPLES OF PENAL POPULISM IN SOME CRIMINAL LAW PROVISIONS AND PLANNED AMENDMENTS OF THE CRIMINAL CODE OF SERBIA

Abstract. The article explains the main characteristics of penal populism as one very interesting criminological phenomenon and the basic manifestations of penal populism in some amendments and provisions of the Criminal Code of Serbia. This is especially reflected in some areas of criminal-justice legislation: 1) Introducing the prohibition of mitigating the penalty for certain types of criminal offences; 2) Introducing the institute of multiple recidivism; 3) Significant limitation on possibilities of suspended sentencing; 4) Prescribing a lifetime imprisonment, in combination with introducing a legal prohibition on release on parole for certain categories of offenders sentenced to this penalty.

The paper also explains that the current Criminal Code of Serbia has been frequently amended and supplemented by numerous amendments. Some of these amendments of the Criminal Code of Serbia, culminating in the amendments from 2019, also contain elements of penal populism. The authors present an argumentative critique of the superfluous elements of penal populism within the Serbian Criminal Code, which are also evident in some of the proposed amendments. That tendency is also not in accordance with the prevailing understandings of modern criminal law, criminology, penology, or criminalistic doctrine, nor, more importantly, is such an approach of the legislator in line with the current state of crime rates and the need to respond to it in an adequate manner.

The article explains that populist penal provisions prescribed in the Serbian Criminal Code, as well as in the proposed amendments to the country's criminal legislation, directly contradicts Serbia's official efforts to strengthen the system of alternative criminal sanctions aimed at reducing prison overcrowding. Moreover, in certain respects, it conflicts with the

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restorative justice framework that Serbia has adopted. These contradictions provide a compelling reason to reconsider several provisions of the Criminal Code.

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

Key words: Penal Populism, Criminology, Criminal Law, Criminal Code, Amendments, Punishment.

1. INTRODUCTION

Penal populism is a type of populism and has all the main characteristics that every other type of populism ordinary has, as a sort of a political approach that strives to appeal to ordinary people who feel that their concerns are ignored by established, so-called elite social groups. In fact, penal populism is even and obviously a contemporary trend in many countries throughout the world. Populism in general is a range of political stances that emphasize the idea of the common people and often position this group in opposition to a perceived elite group. It is frequently associated with anti-establishment and anti-political sentiment. Some kind of pre-history to the 'punitive turn' is almost always campaign in the media stimulated by some politicians who exaggerate in explanations of the danger of crime in the concrete society and state, demanding harsher criminal law reaction and in the first line imposing of tougher penalties in general, but especially for some types of crime, as the crimes against sexual freedom, domestic violence etc. They do that mostly without any valid criminal justice policy reason. The primary motive for such politicians is often the pursuit of easy popularity among a generally punitive-oriented public, typically without any sound justification grounded in criminal justice policy.

Essentially, populism is most often based on very strong demagogy. It is essentially too, the same or very similar when it comes to penal populism. In criminological theory penal populism is explained as "a media driven political process whereby politicians compete with each other to impose tougher prison sentences on offenders based on a perception that crime is out of control."[1] The essence of penal populism lies in its strong connection to societal fears of crime and the public's demand for harsher penalties and punitive measures, fostering an intensely punitive atmosphere. This climate is marked by a disproportionate emphasis on retributive justice within the framework of criminal law.

The phenomenon of penal populism as a kind of a process that ignores or minimizes the views of relevant experts, as criminal law professors, criminologists, justice and penal professionals experts, claiming instead to represent the views of "the people" regarding the constant need for tougher punishment for criminal offending,

1 J. Pratt /2006/, *Penal Populism*, London, p. 2.

is explained from the historical point of view, with some typical examples, like the case of United Kingdom during 90s (populist punitiveness) and also the famous United States *war on Drugs*.[2]

The term 'war on drugs' was popularized by the media following a press conference on June 17, 1971, during which President Richard Nixon declared drug abuse as 'public enemy number one.' He emphasized that combating this threat required an entirely new, full-scale, and global offensive involving both nationwide and government-wide efforts. In line with this initiative, Congress subsequently passed the 'Drug Abuse Prevention and Control' Act. Namely, the war on drugs was a global anti-narcotics campaign led by the United States federal government. The initiative's efforts in the scope of war on drugs included policies intended to discourage the production, distribution, and consumption f psychoactive drugs that the participating governments, through instruments of international law have made illegal. Besides, that campaign included drug prohibition, foreign assistance and even in some cases military intervention. The goal was to reduce the illegal drug trade in the United States of America. The war on drugs in the USA was in fact not successful and the whole campaign has been widely seen as a large failure.[3]

In the United Kingdom in the time of the conservative Government of Margaret Thatcher, penal policy has been marked by what Stuart Hall once described as 'authoritarian populism', characterized by attempts to exploit popular fears and anxieties about crime and insecurity for political ends.[4] In 1995, Anthony Bottoms wrote of the existence of 'populist punitiveness' in Britain, whereby 'politicians tap into, and skillfully use for their own purposes, what they believe to be the public's generally punitive stance', especially with regard to violent and sexual offences.[5]

The roots of the modern phenomenon of penal populism in Italy may be traced back to the 80s and the 90s or even before and it is characterized that ardly no event of the Italian public life, and especially the so called crime news (*cronaca nera*), goes by without many voices calling for a tougher response by the government and the police, for new crimes to be included in the code or special laws, and for existing sentencing to be made harsher.[6]

Criminological doctrine explained that penal populism in Brazil is obvious, because an exemplary analysis examines 122 new criminal laws passed between 1940 and 2009, showing that 80.3% of them increased the severity of sanctions by creating new offenses or raising penalties and in some cases, the penalty was increased by up to eight times, while the justifications for these bills were based on moral val-

2 T. Newburn /2007/, *Criminology*, London, pp. 14–15.

3 *Ibidem*.

4 S. Hall /1988/, *The Hard Road to Renewal Thatcherism and the crisis of the left*, Verso, London, New York, p. 9.

5 A. E. Bottoms /1995/, The Philosophy and Politics of Punishment and Sentencing, in: *The Politics of Sentencing Reform*, Oxford, p. 17.

6 G. Pailli and A. Butelli /2024/, Penal populism in Italy: A few examples from the last 20 years, in: *Penal populism and Impact on the work of Institutions*, IX International Scientific Thematic Conference – Thematic Conference Proceedings of International Significance, Belgrade, p. 21.

ues, appealing to the abstract seriousness of the offense and emotional arguments.[7] Such data is often cited as evidence of penal populism in Brazil, typically without the need for further investigation.[8]

Of course, there are many other examples of penal populism around the contemporary world, which are most often the result of a failure to recognize that the maximum severity of punishment, by itself and without other adequate measures in the domain of not only criminal substantive law, but also criminal procedural law, which also implies greater success in detecting and evidencing criminal offenses,[9] is not a universal and absolutely effective remedy for combating crime. Finally, this is also important when it comes to the essence of criminalistic thinking in the direction of detecting and proving a criminal offense.[10] When it comes to the explanation of penal populism, it is very important not to forget two facts: „First, when thinking about crime and crime policy, it is always important to bear in mind the cultural and political context in which things take place", because "crime is socially constructed, politically-influenced and historical variable. " Second, there is no direct link between crime rates and types and levels of punishment."[11]

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

Penal populism, as both a social phenomenon and a phenomenon in the domain of criminal law reaction, is also related to a social phenomenon that is defined in criminological terms as moral panic, to which some means of public information also contribute significantly, and thus "the literature emphasizes that the media are the most important factor that determines citizens' attitudes on crime and the ways in which such acts are reacted to."[12] The phenomenon of moral panic involves a pronounced exaggeration of the threat posed by crime—either in general or in relation to specific offenses—often fueled by the systematic incitement of fear. This includes the stereotypical portrayal of particularly vulnerable groups, such as children, as potential victims. As a result, such fear-driven narratives lead to public

7 L. Simões Agapito, M de Alencar e Miranda, T Felippe Xavier Januário /2024/, Is Penal Populism a Species of Political Populism? Latim American Perspective, in: *Penal populism and Impact on the work of Institutions*, IX International Scientific Thematic Conference – Thematic Conference Proceedings of International Significance, Belgrade, p. 42.

8 *Ibidem*.

9 M. Škulić /2024a/, *Kriminalistika*, (*Criminalistics*), Beograd, p. 13. Traditionally, Criminalistics theory holds that a typical unknown offender is not primarily deterred by the severity of the prescribed penalty for the crime committed. Rather, the primary fear lies in the possibility of being identified, the crime being discovered, and the offense being properly documented and proven within the framework of criminal procedure law. Ž. Aleksić, M. Škulić /2020/, *Kriminalistika*, (*Criminalistics*), Beograd, p. 10.

10 H. Walder *et al.* /2020/, *Kriminalistisches Denken,* Heidelberg, p. 1.

11 T. Newburn /2007/, *op. cit*., p. 15.

12 Đ. Ignjatović /2017/, Kazneni populizam, (Penal populism), in: *Kaznena reakcija u Srbiji,* VIII deo, Beograd, p. 20.

pressure for tougher criminal policies, the adoption of 'zero tolerance' approaches, and an overall intensification of punitive measures.[13]

Besides, as it was also explained in the previous text, it is increasingly common and even usual for contemporary criminal law to be used for *preventive purposes*,[14] contrary to the principle that only exceptionally and for specific criminal offences, the criminal area/criminal law zone should be expanded to include the preparation of (such/specific) crimes/criminal offences. Thus, one of the novelties of the Serbian Criminal Code incriminated as a special/specific criminal offence – preparation of murder, despite there being essentially no valid or sound rationale (*ratio legis*) for its introduction

Over the last several years, and culminating in recent novelties of the Criminal Code of Serbia of May 2019,[15] normative requirements for a significant and, regretfully, far-reaching and more severe penal/criminal law policy have been constantly created. This is especially reflected in some areas of criminal-justice legislation:[16] 1) Introducing the prohibition of mitigating the penalty for certain types of criminal offences; 2) Introducing the normative institute of multiple recidivism; 3) Significant limitation on possibilities of suspended sentencing; as well as 4) Prescribing a lifetime imprisonment, in combination with introducing a legal prohibition on release on parole for certain categories of offenders sentenced to lifetime imprisonment.

2. EXPLANATION OF PENAL POPULISM FROM THE CRIMINOLOGICAL POINT OF VIEW

In criminological literature, the concept of penal populism is well recognized. It is mostly associated with political agendas in which crime control has been given a significant place, particularly in Anglo-Saxon countries. In the United States, it is linked to the 1960s and 1970s, when a noticeable shift occurred away from a punishment philosophy focused on resocialization and treatment, toward the *just deserts* model, embodied in the principle of *law and order*. From that period, American presidents began declaring already mentioned wars on crime and drugs, and the principle of *zero tolerance* for crime gained popularity. This was accompanied by legal reforms and the introduction of more repressive measures.[17] For drug-related crimes mandatory minimum sentences were introduced, determined by the quantity and type of illegal drugs. For example, a mandatory minimum sentence of five years in prison was prescribed for illegal possession of 500 grams of cocaine, 100 grams of heroin, or 5 grams of crack. Since crack was predominantly used by

13 F. E. Hagan /2008/, *Introduction to Criminology – Theories, Methods and Criminal Behavior,* Thousand Oaks, California, p. 450.

14 Z. Stojanović /2011/, Preventivna funkcija krivičnog prava, (The Preventive Function of Criminal Law), *Crimen – časopis za krivične nauke – Journal for Criminal Justice,* № 2., p. 5.

15 *Official Gazette of the RS, number* 35/2019, dated 21 May 2019.

16 M. Škulić /2024b/, The manifestations of penal populism in some amendments/provisions of the Criminal Code of Serbia*,* in: *Penal populism and Impact on the work of Institutions*, IX International Scientific Thematic Conference – Thematic Conference Proceedings of International Significance, Belgrade, 2024, p. 3.

17 Đ. Ignjatović /2017/, *op.cit.*, pp.13–17.

African Americans and cocaine by white offenders, this led to a phenomenon referred to in literature as "apartheid sentencing."[18]

In England and Wales, until the 1980s, a kind of agreement between the two major political parties (the Conservatives and the Labour) regarding crime control (bipartisan consensus) was mainly based on penal welfarism ideas, but these came under criticism, with claims that welfare dependency was a cause of the inability to resolve the problem of crime. These ideas gained further traction during the premiership of Tony Blair, who stated that "prisons work, protect us from killers, muggers, and rapists, and they influence anyone tempted to commit a crime to think twice."[19] During that period, the two main political parties competed over who had the tougher response to crime, and with heavy media coverage, a phenomenon labelled as penal populism emerged.[20] One of the consequences of adopting increasingly repressive legal solutions was a rise in the prison population.

Criminologists have attempted to provide explanations for the described changes in penal policy. The initial question was whether higher crime rates were the reason behind the tightening of criminal law measures. In the United States, crime rates began to rise in the 1960s and continued on that trend until the end of the first decade of the 21st century, after which a decline in crime rates was recorded.[21]Although such a situation might suggest that imprisonment has a deterrent effect, there is no consensus in the literature on this matter.[22] While it is true that long-term incarceration can incapacitate a certain number of offenders—particularly those with extensive criminal careers who commit a disproportionately large number of crimes—other factors explaining the decline in crime in the U.S. cannot be ignored.[23]It is important to consider that the shift in crime control approaches in the U.S. occurred during a period marked by civil rights movements, the Vietnam War, and the Watergate scandal—all of which, along with changes in crime trends, played a role. According to some perspectives, the rise in crime, combined with increasing unemployment or insecure employment during a recession, made it impossible to continue advocating for penal welfarism in crime control policies. [24] In England and Wales, on the other hand—as well as in many European countries—crime rates began to fall even before incarceration rates started to increase. This can be supported by data on sentencing for specific criminal offenses. England and Wales, along with Scotland, impose the harshest sentences for murder in Western Europe. However, this cannot be explained by the homicide rate, which is only slightly higher compared to other Western European countries.[25]

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18 T. Newburn /2017/, *Criminology*, London, p. 113.

19 *Ibid*, pp.115-118.

20 J. Pratt /2006/, *op.cit*, pp. 9-11.

21 M. Tonry /2004/, Has the Prison a Future? in: *The Future of Imprisonment*, Oxford, p.4.

22 M. Tonry /2003/, Evidence, elections and ideology in the making of criminal justice policy, in: *Confronting Crime, Crime control policy under New Labour,* Cullompton, p. 3.

23 Đ. Ignjatović /2023/, *Kriminologija*, Beograd, pp. 103-104.

24 N. Lacey /2008/, *The Prisoner's Dilemma, Political Economy and Punishment in Contemporary Democracies*, Cambridge, p. 22.

25 M. C. Cambell /2012/, Homicide and Punishment in Europe: Examining National Variation, in: M. C. A. Liem, W. A. Pridemore (Eds.), *Handbook of European Homicide Research, Patterns, Explanations and Country Studies*, New York, p.283.

The literature identifies several reasons that explain penal populism. First, in England and Wales, Anthony Bottoms, and in the U.S. David Garland, point to the insecurities in postmodern societies, which are characterized by risk, economic transformations, globalization, personal insecurity, and a loss of trust in state institutions.[26] Numerous economic, social, and cultural changes have affected people, generating anxiety, fear, and a sense of insecurity, and politicians have found convenient scapegoats in criminals.[27] This crisis is particularly present in neo-liberal economies, where social and economic inequality is significant. Punishment in such systems (though not necessarily in every country following the same model, as there are exceptions) acts as a negative reward. Societies that are willing to highly reward economic success also tend to harshly punish failure. Thus, the more equal a society is and the lower the economic inequality, the more inclusive it tends to be.[28] A second reason could be repressive public opinion and demands for harsher punishment in cases of serious crimes, to which political leaders are then expected to respond. However, it is a fact that the public often holds punitive views on crime response—especially in cases of severe crimes, which provoke emotional, and sometimes irrational, reactions along with strong moral condemnation.[29] Third, George Rusche and Otto Kirchheimer, in their work, emphasize that punishment is a social phenomenon, and that crime control should not be viewed solely as a penal issue.[30] Criminal policy is part of social policy, and penal institutions are simply one type of state institution. Criminal justice policy, therefore, should be understood in the context of social policy toward the poor. Punishment is not a tool solely for controlling crime but rather a mechanism for resolving conflicts between social classes. According to the same authors, the labour market influences methods of punishment. Corporal and capital punishment may be more acceptable during times when labour supply exceeds demand, whereas in the opposite scenario, penal institutions provide a large pool of free labour.[31] In the U.S., racism can also be added to this explanation, as punishment serves as a mechanism to control and keep Black people in a subordinate position.[32] Control over specific populations—whether lower social classes or ethnic groups—does not occur only in prisons but also through preventive measures undertaken in hospitals, schools, and through the general regulation of daily life, which affects social cohesion and trust.

Fourth, some authors argue that a repressive response to crime is intended to create the perception among citizens that the state is strong, despite prevailing insecurities and a loss of legitimacy. A strong state is characterized by internal and external security, the provision of public goods and services (education, healthcare,

26 M. Tonry /2003/, *op.cit*, p. 4.

27 R. Ruddell, M. Guevara Urbina /2007/, Weak Nations, Political Repression, and Punishment, *International Criminal Justice Review*, vol.17, n.2, p. 86.

28 M. Cavadino, J. Dignan /2006/, Penal policy and political economy, *Criminology and Criminal Justice*, vol.6, n.4, p.452.

29 Z. Stojanović /2023a/, *Politika suzbijanja kriminaliteta*, Beograd, p. 90.

30 G. Rusche, O. Kirchheimer /2003/, *Punishment and Social Structure*, London, pp.84-110.

31 *Ibid.*

32 M. Tonry /2003/, *op.cit*, p. 4.

infrastructure), an independent judiciary, a high degree of political freedom, and favourable economic conditions. Weak states, in contrast, exhibit opposite characteristics and therefore resort to harsh punishment to show solidarity with citizens' concerns and reaffirm core societal values.[33] Finally, crime is used as a tool of governance, and political opponents are discredited for adopting a lenient approach toward those who endanger citizens' security.[34] In recent times, penal populism has evolved compared to the earlier version promoted by the Nixon and Margaret Thatcher administrations. While they too advocated for a '*law and order*' philosophy and criticized judges for blaming society rather than the individual, they did not believe that the general public had the knowledge or capacity to decide on criminal justice matters. Today, however, citizens or their representatives are granted a much more active role in these issues. It is not uncommon for agreements to be made with citizens or their representatives, who are allowed to take the lead in such matters.[35]

In the former socialist European countries, an increase in punitiveness and the emergence of penal populism have also been observed. Due to the transition from one political-economic system to another, the situation did not unfold in the same way as in Western European countries. During the collapse of socialist regimes and the beginning of the transition period, some countries experienced a sharp decline in their prison populations. For example, Platek notes that in Poland, prior to 1989, overcrowding in prisons was a significant issue, which was resolved by passing an amnesty law that led to the release of more than half of the convicted prisoners.[36] However, because this mass release was not accompanied by adequate post-penal support, a large number of released individuals quickly returned to prison. Today, Poland belongs to the group of countries with higher incarceration rates, which Platek attributes to a weak initiative for strengthening independent and robust democratic institutions, and a habitual reliance on repression as the best response.[37] In the Russian Federation, following 1991, there was initially a decline in the prison population. However, from the mid-1990s, the number of inmates began to rise again, and at one point, Russia had the highest incarceration rate in the world. [38]

Regarding the situation in Serbia, amendments to the Criminal Code that began in 2009 were predominantly repressive, and as indicated by the previously discussed text, that trend has continued—at least when it comes to adult offenders. On the other hand, the overall crime rate has remained stable.

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33 R. Ruddell, M. Guevara Urbina /2007/, *op.cit*, pp.86-88.

34 M. Tonry /2001/, Symbol, substance, and severity in western penal policies, Punishment and Society, vol.3, n.4, pp.524-526.

35 J. Pratt /2006/, *op.cit*, p. 34.

36 H. Pepinsky /1993/, Norwegian and Polish Lessons from Keeping Down Prison Populations, *Humanity & Society,* vol.17, n.1, p. 78.

37 M. Platek /2013/, Poland: The Political Legacy and Penal Practice, in: *Punishment in Europe*, New York, pp. 183-202.

38 M. S. Dikaeva /2020/, Penal Policy in the Russian Federation: Trends and Perspectives, Archiwum Kryminologii, vol. XLII, n.1, p. 26; N. Lukić /2024/, Kazna zatvora u Srbiji – trendovi i odlike zatvoreničke populacije, *Revija za kriminologiju i krivično pravo*, vol.62, n.2, p.138.

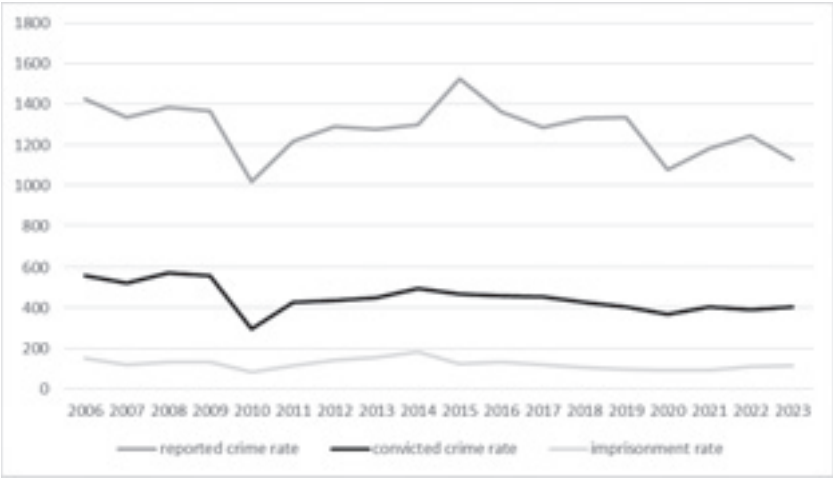
In Graph No. 1, we presented the rate of reported and adjudicated criminal offences from 2006, when the Criminal Code began to be implemented, until 2023, the most recent year for which data has been published by the Statistical Office of the Republic of Serbia. It is important to keep in mind that these are official crime statistics, and that victimization studies and self-report studies, which would provide more accurate data, are not conducted in Serbia. If we take domestic violence as an example, we can conclude that it was only with the adoption of the Law on the Prevention of Domestic Violence that there was a significant increase in criminal complaints. This does not mean that domestic violence was less prevalent before that, but rather that victims began to report it more frequently. According to the results of a study based on a representative sample of 4,000 women in Serbia, it was found that a quarter of the victims did not report partner violence.[39] To assess the effectiveness of the measures introduced, serious scientific research should be conducted to evaluate the impact of the Law on the Prevention of Domestic Violence.

Legislative reforms in recent years have predominantly focused on the intensification of penal sanctions for offenses involving elements of violence. One of the most notable changes was the introduction of the possibility of imposing a sentence of life imprisonment for the offense of aggravated murder, without the right to parole in certain cases. However, available statistical data indicate that this offense has been on a consistent downward trajectory—one that began prior to the enactment of this legislative change. This decline cannot be primarily attributed to modifications in the Criminal Code. Rather, it appears to result from broader structural and social factors, including: 1) Demographic shifts, particularly the aging population (with an average age of 44, demographic trends suggest a natural decline in the prevalence of criminal behaviour, especially violent offenses, which are most common among males in their twenties and early thirties); 2) Advancements in forensic science and criminal investigation techniques, which have increased the likelihood of detection and prosecution; 3) Improvements in medical care, reducing the lethality of violent assaults; 4) Overall socio-economic development and civilizational progress.

In contrast, for certain offenses such as rape, the increase in prescribed penalties was not only warranted but arguably overdue. Prior to the adoption of the 2006 Criminal Code, the minimum sentence for the basic form of rape was merely one year of imprisonment. In practice, sentencing trends were remarkably lenient. For instance, in 2004, out of 50 individuals convicted of rape, 36—approximately 70%—received prison sentences of three years or less. Unfortunately, although there was a justified need to increase the penalties, populist measures led to excessive severity in the case of these criminal offenses, which will be discussed further below. These findings however suggest that while some punitive reforms may reflect populist tendencies rather than empirical necessity, others can address long-standing deficiencies in the proportionality and seriousness with which specific offenses are treated by the criminal justice system.

39 *Жена жртва насиља из угла статистике*, Републички завод за статистику, Београд, 2022, стр. 65.

Graph 1: Crime trends in Serbia 2006–2023.



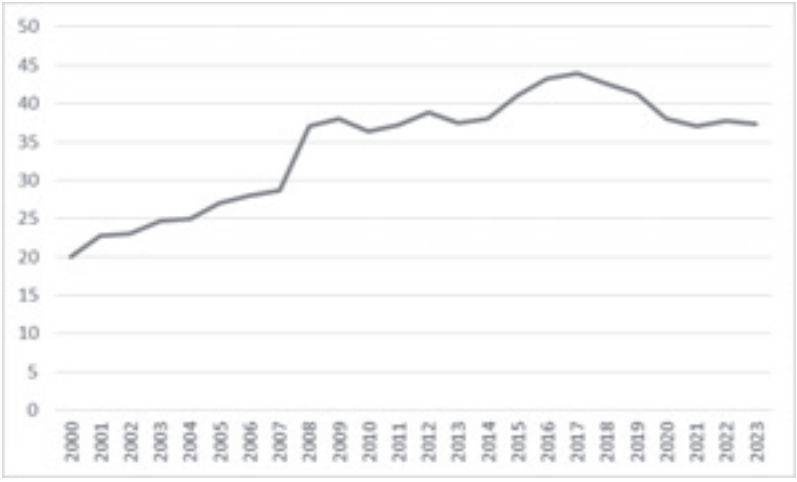
Source: Statistical Office of the Republic of Serbia

Interestingly, citizens most frequently do not perceive crime in general as the main societal problem. The opposite is truth for corruption. According to a 2021 survey supported by the Serbian Anti-Corruption Agency, nearly 50% of respondents believed that corruption was very widespread, while approximately 30% considered it to be widespread in Serbia. [40] Furthermore, 40% reported having had personal experience with bribery, and 65% stated that they were aware of one or more instances of corruption in their local communities. When extrapolated to the total adult population of Serbia, the findings suggest that over two million individuals have, at some point in their lives (given that the time frame in the survey was not specified), had personal experience with giving a bribe. According to 2023 judicial statistics, 29 individuals were convicted for accepting bribes and 70 for offering bribes.

A more repressive approach to crime does not solely result in an increase in the prison population. If the purpose of punishment is to serve not only general but also special prevention, then recidivism data should serve as an indicator of the effectiveness of that goal. Each year, several thousand offenders are released from Serbian prisons. Recidivism data are available for the entire population of convicted offenders. In Figure 2, we present the share of recidivists among all convicted individuals in Serbia over the past two decades. The data indicate an upward trend, which has only recently stabilized at around 37–38%.

40 https://acas.rs/eng/news/69 (16.5.2025.). Uporedi i: More in: *Istraživanje i analiza specifičnosti i oblika korupcije u Srbiji*, Agencija za borbu protiv korupcije, Republika Srbija, jul 2019, p. 6. Available at: https://www.acas.rs/storage/page_files/Istra%C5%BEivanje%20i%20analiza%20specifi%C4%8Dnosti%20i%20oblika%20korupcije%20u%20Srbiji_2.pdf (16.5.2025).

Graph 2: % of recidivism of all convicted adult offenders in Serbia



Source: Statistical Office of the Republic of Serbia

However, when looking exclusively at those sentenced to imprisonment, research shows a considerably higher recidivism rate—around 65% of formerly incarcerated individuals have prior convictions. [41] It is important to note that the absolute number of those sentenced to prison has declined over the last decade[42], which correlates with a general decrease in the number of convicted persons. Accordingly, considering that prison capacities have expanded in recent years, there is room for stricter sentencing without risking overcrowding of penal institutions. This view is also supported by Blumstein, who suggests that periods of declining crime rates often result in increased prison capacity, thereby providing opportunities for more stringent sentencing without overburdening the penal system.[43]

3. THE PENAL POPULISM IN SOME AMANDMENTS TO THE CRIMINAL CODE OF SERBIA FROM 2019 AND IN SOME PROPOSED AMANDMENTS IN THE DRAFT PROPOSAL OF THE LAW ON AMENDMENTS TO THE CRIMINAL CODE OF SERBIA

The last major amendments to the Criminal Code of Serbia from 2019 (prior to the currently planned amendments during 2024) are very important,[44] and they

41 S. Ćopić, I. Stevanović, N.Vujičić /2024/, *Kvalitet života u zatvorima u Srbiji: norma, praksa i mere unapređenja*, Beograd, p.85.

42 At the time when the Criminal Code entered into force, the number of convicted individuals was approximately 40,000. In recent years, however, this figure has decreased and now stands at around 25,000 annually.

43 A. Blumstein /2004/, Restoring Rationality in Punishment Policy, in: *The Future of Imprisonment*, Oxford, p.64.

44 *Official Gazette of the RS, number* 35/2019, dated 21 May 2019.

were mainly aimed at a significant tightening of the legal penal policy, which is particularly expressed in a special part of the Criminal Code, especially with regard to certain criminal offenses, such as crimes against sexual freedom. The most striking change of this type in the general part of the Criminal Code refers to the introduction of life imprisonment, in respect of which in fact, it cannot be simply concluded that this type of punishment, as a kind of 'capital criminal sanction', is really a form of tightening of penal policy, given that it is essentially very similar to the heaviest punishment that existed until then, which is a prison sentence of thirty to forty years. In this regard, first of all, as a form of a very specific tightening of the lawmaker's penal policy, the legal ban on conditional release stands out more when it comes to the sentence of life imprisonment imposed on those convicted of certain criminal offenses, which otherwise represents a very controversial legal solution, one that can be strongly criticized with well-founded arguments.

In accordance with the article 42 of Criminal Code, within the framework of the general purpose of criminal sanctions,[45] the purpose of punishment is: 1) To prevent an offender from committing criminal offences and deter him/her from future commission of criminal offences (*special prevention*); 2) To deter others from commission of criminal offences (*general prevention*); 3) To express social condemnation of the criminal offence, enhance moral strength and reinforce the obligation to respect the law, what are all some aspects of *general prevention* and 4) achieving justice and proportionality between the committed offence and the severity of the criminal sanction.

That last (4th) purpose of punishment, i.e. the achieving justice and proportionality between the committed offence and the severity of the criminal sanction clearly falls outside the preventive framework of criminal law sanctions, as it does not align with either special or general prevention. It was added in criminal law provisions in 2019 (amendments), with the obvious idea to promote the tightening the criminal law policy and of course it is too one of the formal manifestations of penal populism in the provisions of the Criminal Code.[46]

Crime prevention, both special and general, has always been the dominant purpose of punishment in our criminal law, which is now supplemented by a previously explained, retributive concept. This does not seem justified and, by all appearances, represents a basically declarative manifestation of penal populism. By the way, everyone should not forget that the famous Beccaria pointed to the preventive effect of punishment in the form of deterring current and potential perpetrators of a criminal offense from engaging in criminality in the future, the basic purpose of punishment. Namely, "Beccaria is generally considered the father of *deterrence theory* for good reason", because he "was the first scholar to write a work that summarized

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

46 In this way, retribution was prescribed in the Criminal Code of Serbia, as one of the formally proclaimed goals of punishment.

such extravagant idea in that time regarding the direction of human behavior toward choice, as opposed to fate or destiny."[47]

Finally, it should be borne in mind that when determining punishment, it is crucial in modern criminal law that there is an appropriate proportion between the specific punishment and the type/form of guilt and degree of guilt of the perpetrator. This is, for example, a key requirement contained in the German Criminal Code (§ 46. Abs. 1 *StGB*).[48] This represents one important aspect of the principle of guilt, immanent in modern criminal law. Otherwise, the eternal question of criminal law is what the essential purpose of punishment is, and this question, which at first glance seems simple, is not at all easy to answer, and in fact the answer to this question lies not only in the sphere of criminal law, but also in the domain of philosophy.[49] Otherwise, for the provisions related to the basic rules of sentencing in German criminal law (§ 46. *StGB*), it is emphasized that they represent a concretization of the general rules on sentencing, without delving into the controversy about the meaning and purpose of punishment.[50]

Of course, the purpose of criminal sanctions for juveniles, i.e. juvenile offenders, is not the same as the purpose for adult offenders. Within the framework of the general purpose of penal sanctions (Article 4 of the Criminal Code), the purpose of criminal sanctions against juveniles is to influence the development and enhancement of their personal responsibility, education and proper personality development through supervision, protection and assistance as well as by providing general and professional qualifications in order to ensure the juveniles' re-socialization (Article 10 of the Law on Juvenile Perpetrators of Criminal Offences and Criminal-Justice Protection of Minors).[51]

Since the introduction of life imprisonment, and its variant which includes the prohibition of parole, which is very controversial both in theory and in practical terms, the re-introduction of a variant of multiple recidivism in the criminal legislation of Serbia has attracted far less attention. In addition, this was not done according to the model of the once existing institute of multiple restitution in the criminal legislation of the SFRY (which in the practice of the former Yugoslavia almost did not experience practical application), but similarly to a concept in American criminal law, known under the slang name 'the three strikes system', which is otherwise extremely controversial in the United States itself.[52]

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47 S. G. Tibbetts, C. Hemmens /2010/, *Criminological Theory – A Text/Reader,* Thousand Oaks, California, p. 58.

48 A. Schönke H. Schröder (Hrsg), part written by J. Kinzig /2019/, *Strafgesetzbuch – Kommentar*, München, p. 763.

49 H. Frister /2020/, *Strafrecht – Allgemeiner Teil,* München, p. 18.

50 K. Lackner, K. Kühl, M. Heger /2018/, *Strafgesetzbuch – Kommentar,* München, p. 362.

51 Official Gazette of the Republic of Serbia, No. 85/05, Belgrade, September 2005. Application of this Law began on 1 January 2006, and the purpose of *vacatio legis* was to prepare all actors to the proceedings for the new legislative environment.

52 First experiences with that kind of law had American state California. California's famous „3-Strikes and You're Out Law" as one version of *habitual offender laws,* went into effect on March 7, 1994. Its purpose was formally to dramatically increase punishment for persons convicted of a

The fact that one part of the recent amendments to the Criminal Code of Serbia is quite weak in the legal and technical sense, and part is also very controversial in the essential aspect, inevitably leads to thinking about the future of our criminal law, which is otherwise part of an attitude, which is almost becoming a trend in contemporary criminal law. Namely, thinking about whether criminal law has a future has been present for some time in the science of criminal law in recent decades, and especially in recent years. For example, the famous German professor of criminal law *Claus Roxin*,[53] who even today, although he died a few months ago, is considered a kind of "icon" of modern criminal law, wrote in particular, about the crisis/future of criminal law.[54]

The concern for the future of criminal law stems primarily from the fact that today, unfortunately, there is an extremely strong influence of the so-called 'security criminal law', which is regularly reflected in legislative practice through often hasty amendments to criminal law, largely aimed at solving the so-called security problems, starting with terrorism and organized crime, and ending with some forms of crime, which are sometimes unnecessarily treated as some particularly great "danger", and which is often an expression of what is defined in criminology as the so-called moral panic[55]. Such is the case, for example, with an excessive focus on criminal offences against sexual freedom, especially some forms of those criminal acts/offences, etc.[56]

In the last few decades, criminal law has often been significantly influenced by penal populism, both in terms of comparative law and in the tendency towards a constant tightening of legal penal policy, as well as in the significant expansion of the criminal zone, which is especially evident when it comes to forcing the use of criminal law for security purposes, when, for example, criminal law norms tend to incriminate preparatory acts as punishable, etc. This has long been observed in criminal law theory, so for example, in the German doctrine of criminal law it is noted that "under the impression of growing crime, primarily organized crime, as well as violent, sexual and mass crime, since the 1980s there has been a tendency to activate substantive criminal law for the purpose of protecting internal security, which has been significantly strengthened, leading to the very controversial and de-

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felony and who were convicted of one or more "serious" or "violent" felonies. After California in the USA twenty-eight states have or had some forms of a "three-strikes" law and of course that significantly increased the prison sentences in the judicial practice and too the possibility for a life imprisonment. Additionally, origin of the expression "Three strikes and you are out" comes from some baseball rules. J. M. Scheb, J. M. Scheb Jr. /1999/, *Criminal Law and Procedure*, Belmont, Bonn, Boston, Waschington, p. 574.

53 Internet – source: T. Duve, *Ein Gaspräch mit Claus Roxin*, (*A conversation with Claus Roxin*), https://www.researchgate.net/publication/26443246_Ein_Gesprach_mit_Claus_Roxin. Accessed April 1st 2020.

54 B. Schünemann /2007/, Die Zukunft des Strafverfahrens – Abschied vom Rechtsstaat?, (The future of criminal proceedings – farewell to the rule of law?), *Zeitschrift für die gesamte Strafrechtswissenschaft*, (ZStW), Volume 119, Issue 4, pp. 945–958.

55 F. E. Hagan /2008/, *op. cit.*, p. 450.

56 M. Škulić /2019/, *Krivična dela protiv polne slobode*, (*Criminal Offences against Sexual Freedom*), Beograd, pp. 27–28.

batable concept of introducing the possibility of expanding the protective area of criminal law to contribute to the protection of values related to security."[57]

In the context of development of so called preventive criminal law and the promotion of the idea that the main purpose of the criminal law is the security of society and prevention of the crime in general way, the criminal– legal reactions becomes more and more focused on the danger of the criminality/crimes, and less and less on the concrete committed criminal offences. In the criminological theory is also noticed that "the populistic approach to crime problems suppresses the strategies which essentially deal with the causes of crime (poverty, inequality, unemployment) and gives advantage to the measures and techniques which are relatively simply introduced and applied, and work as a means of calming down the citizens and create the impression decisive actions are taken against crime."[58]

Since criminal law represents *the strictest instrument of power at the disposal of state repression*, it follows that *criminal law reaction/repression* should not be manifested/used in an excessively broad manner, but rather it is an *ultima ratio*, which means that it represents the most exceptional means or the last means of protecting the *most important social values*. Besides, the constitutional principle of proportionality implies giving priority to other milder means, when possible. Therefore, "the transformation of a part of criminal law into a kind of security law is sometimes not only an expression of penal populism, but is most often contrary to the *ultima ratio* character of criminal law."[59] Essentially, it is the same in Anglo-Saxon criminal law. Namely, in the criminal law theory in the Great Britain, nature and function of the criminal law are explained as connected terms, i.e. the nature and function of the criminal law are interrelated and hard to separate, but that also means that "what is a crime and what should be a crime are actually difficult questions to answer and any answer may change over time".[60]

The nature of criminal law is related to protective function of that branch of law and zone of criminal law protection depends too of the concrete social atmosphere, social attitudes etc. In the Britain criminal law theory, it is explained with the example of "consensual sex between homosexual adults, what was an offence until the Sexual Offences Act 1967 was passed and was once lawful, for example driving without wearing a seat belt, is now unlawful."[61] The explanation in relation to the first example of so called decriminalization of the one form of former sexual offence, in the criminal law theory of GB is that the Government undertook a major reform of the sex offences with the passing of the Sexual Offences Act 2003, because "the old law was archaic, incoherent and discriminatory."[62] The essence is, therefore, that every modern criminal law, whether European-continental or Anglo-Saxon, represents, on the one hand, the *ultima ratio*, while on the other hand, the

57 K. Lackner, K. Kühl, M. Heger /2018/, *op.cit.,* p. 333.

58 S. Soković /2013/, Penal populism: causes, characteristics and consequences, in: *Penal policy: law and practice*, Belgrade, pp. 185–232.

59 R. Rengier /2020/, *Strafrecht – Allgemeiner Teil,* München, p. 9.

60 C. McAlhone, R. Huxley-Binns /2010/, *Criminal Law – The Fundamentals,* London, p. 2.

61 *Ibidem*.

62 C. Elliot, F. Quinn /2012/, *Criminal Law,* Edinburgh, Essex, p. 173.

function of criminal law is the effective protection of those values that society at a certain time considers so significant that they must be protected by criminal law, as the most repressive branch of legislation. The protection of the most important legal values is also the principle goal of European-continental criminal law, which is specified in a special part of criminal law, when specific incriminations determine which legal goods are protected by criminal law and to what extent. Criminal law has an *ultima ratione* character in the protection of important social values, because it represents the strictest 'instrument of power' at the disposal of the state apparatus of coercion/power.[63]

In accordance with the Article 3. of Serbian Criminal Code, protection of a human being and other fundamental social values constitute the basis and scope for defining criminal acts, imposing criminal sanctions and their enforcement to a degree necessary for suppression of these offences. The protection of a human being and other fundamental social values is the normative expression of the basic function of criminal law and that is the protective function. Criminal law theory thus emphasizes that "through its protective function, criminal law serves to realize common values and protect legal peace."[64]

It is increasingly common for criminal law in the last decades generally and in many countries from the comparative criminal law perspective, to be in some situations used for "preventive purposes".[65] That concept is obviously contrary to the principal concept/idea that only exceptionally and for very specific crimes, the criminal zone should be extended to the preparation of (such/specific/special) criminal offences.[66]

The incorporation of elements of so-called security law into criminal law fundamentally contradicts the core function of criminal law, which is primarily protective rather than preventive. While punishment may indeed produce a preventive effect, the classical purpose of punishment—and of criminal sanctioning more broadly—remains prevention, both in its specific and general forms. However, such a preventive effect of criminal law is the preventive effect of punishment/criminal sanction which is a legal consequence of a previously/previously committed criminal offense, and it is *not a preventive effect of criminal law to prevent a possible/future criminal offense*. Namely, criminal law "consists of the sum of all provisions that regulate the assumptions or consequences of behavior that is threatened by a punishment or security measure."[67]

Some reforms of the criminal legislation disregard the *ultima ratio* character of the criminal law, so some delicts, which could rather be misdemeanours, are defined as criminal acts, i.e. criminal offences. Also, criminal law in practice is often 'broken' and by the fact that the effect of punishment is significantly overestimated,

63 R. Rengier /2020/, *op.cit*, p. 9.

64 J. Wessels, W. Beulke /2003/, *Strafrecht – Allgemeiner Teil – Die Straftat und Ihr Aufbau,* Heidelberg, p. 2.

65 Z. Stojanović /2011/, *op.cit*, p. 5.

66 Thus, the recent amendments to the Criminal Code of Serbia criminalized preparation of murder as a special crime, for which there is essentially no valid and correct *ratio legis*.

67 C. Roxin, L. Greco /2020/, *Strafrecht – Allgemeiner Teil. Band 1*., *Grundlagen – Der Aufbau der Verbrechenslehre,* München, p. 1.

which is considered not only as a 'basic criminal sanction', but even as a 'universal medicine' or 'hot medicine' for the problem of criminality (as a kind of 'angry wound'), and what is referred to in science as the so-called penal populism, accompanied by the creation of a kind of "punitive atmosphere" in a society. This so called *punitive social atmosphere* is generally based on the premise that increased severity of penalties, certainly means less crime. This is often accompanied even by a kind of "marketing campaign" in the public in support of the need for a significant tightening of punishment in general or for certain types of criminal acts, which, as a rule, is not based on any previously conducted serious empirical research, or even reliable statistical analyses. Therefore, constantly in many European countries, including in Serbia, every new criminal law reform is accompanied by, among other things, a significant tightening of the legal penal policy. A typical example is the already mentioned variant of multiple restitution into the criminal legislation of Serbia (Article 55a of the Criminal Code), which was done to some extent on the model of the concept of "three strikes" from the criminal law of the USA.[68]

4. BASIC MANIFESTATIONS OF PENAL POPULISM IN THE CRIMINAL CODE OF SERBIA AND IN SOME PROPOSED AMENDMENTS

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

1) Generally, very significant tightening of the legal penal policy;
2) The introduction of an absolute prohibition of the mitigation of punishment for certain criminal offences/some (aggravated) forms of these criminal offences;
3) Introduction of the multiple recidivism;
4) Legal prohibition of release on parole for certain categories of offenders sentenced to lifetime imprisonment, as well as
5) Limitation of the legal option of suspended sentence.

4.1. Tendency to the General Tightening of the Criminal Law Penal Policy in Serbia

In accordance with Article 54(1) of the Criminal Code of Serbia, the court shall determine the punishment for the offender within the legal limits prescribed for the specific criminal offense, taking into consideration the purpose of punishment and all circumstances that may influence the severity of the sentence (extenuating and aggravating circumstances), and particularly the following: 1) degree of culpability,[69]

68 M. Škulić /2023/, *Krivično pravo Sjedinjenih Američkih Država, (Criminal Law of the United States of America),* Beograd, p. 157.

69 In accordance with the Article 2 of Criminal Code of Serbia, Punishment and caution may be imposed only on an offender who is guilty of the committed criminal offence. Guilt is also subjective element in the general notion of the criminal offences which in accordance with the Ar-

2) the motives for committing the offence, 3) the degree of endangering or damaging protected goods, 4) the circumstances under which the offence was committed, 5) the past life of the offender, 6) personal situation of the offender, 7) the behavior of the offender after the commission of the criminal offence and particularly the attitude of the offender towards the victim of the criminal offence and also 8) all other circumstances related to the personality of the offender.

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

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

In addition, a few years ago, the amendment of the Criminal Code significantly narrowed the possibility of imposing a suspended sentence as a significant criminal sanction for crimes that are not too serious, which additionally leads to more frequent imposition of prison sentences, even when it is not fundamentally justified. This trend is particularly evident in the continual decline in the use of fines, which, among other factors, contributes significantly to prison overcrowding and the overburdening of institutions responsible for enforcing custodial criminal sanctions.

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

ticle 14 (1) of Criminal Code of Serbia is defined as an offence set forth by the law as criminal offence, which is unlawful and committed with guilty.

clude/limit such replacement of sentences. Fine, after all, is a basic sanction for misdemeanors. Also, when it comes to fines imposed for misdemeanors—which are generally much less serious than criminal offenses—these penalties are, in practice, sometimes replaced with prison sentences, although this is still quite rare.

When it comes to the prescribed penalties, there are some even more serious problems in a number of provisions of the Criminal Code than the previously explained general and often unnecessary prescribing of increasingly severe penalties. Here, the most notable is the failure to take into account, when prescribing penalties for the (most) serious forms of some criminal offenses, certain basic postulates of criminal law and criminal law reasoning. For example, for a number of criminal offenses against sexual freedom qualified by a serious consequence (death of a passive subject) or committed against a child, such as rape (Article 178, paragraph 4 of the Criminal Code), sexual intercourse with a helpless person (Article 179, paragraph 3 of the Criminal Code), etc., a penalty of at least ten years of imprisonment or life imprisonment is prescribed.

When it comes to the occurrence of death as a serious consequence of a committed criminal offense, the legislator does not take into account at all that in relation to such a serious consequence, the perpetrator must show negligence. This is meaningless in the criminal law sense. This equates, for example, the perpetrator of the most serious form of rape with the perpetrator who committed two serious criminal offenses in succession – both rape and aggravated murder, and for both crimes sentence of at least ten years in prison or life imprisonment is prescribed. For legal laymen or 'strict' populists, this is the same – the victim of a serious criminal offense is deprived of life, but it is not the same and must not be the same in the criminal law sense, at least it should not be that way in modern criminal law.

The planned amendments from 2024, which were only partially introduced into the Criminal Code by the Law on Amendments to the Criminal Code from November 2024, are predominantly aimed at tightening the legal penal policy, when it comes to a number of criminal offenses. In these amendments, there are examples of drastic tightening of the legal penal policy in a way that is realistically meaningless in the context of the relationship between criminal offenses of different types and the basic postulates of the legal penal policy. An obvious example is the proposal to prescribe a sentence of at least five years in prison or life imprisonment for murder (Article 113 of the Criminal Code), i.e. for so-called ordinary murder (in the current Criminal Code, it is punishable by a sentence of five to fifteen years in prison). In this way, the same most severe punishment in the system of criminal sanctions of the Republic of Serbia (a kind of 'capital' criminal sanction, as a normative equivalent to the death penalty as a classic capital criminal sanction/penalty), namely life imprisonment, would be prescribed for both (ordinary) murder and aggravated murder. What is the difference then between murder and aggravated murder, except that the legal minimum for murder would be/remain five years in prison, and for aggravated murder it would be/remain ten years in prison??? This is not only *an expression of penal populism*, but also represents pure lay reasoning.

The drastic tightening of the legal penal policy in Serbia, according to the planned amendments, (again) applies to criminal offenses against sexual freedom. Thus, even for the basic form of rape (Article 178, paragraph 1), for which a prison sentence of five to twelve years is currently prescribed, a sentence of at least five years in prison or life imprisonment is proposed. The same applies to sexual intercourse with a helpless person (Article 180, paragraphs 1 and 2 of the Criminal Code). Also, both the basic form of sexual intercourse with a child (Article 181 of the Criminal Code), and the more serious forms of this criminal offense, according to the proposed amendments, would all be threatened with the same maximum sentence – life imprisonment. This completely erases the difference between rape of a child and sexual intercourse with a child, which implies that there is no coercion in relation to the passive subject, and here, as in other situations concerning such a lay attempt to change that part of our criminal law, there are a whole series of other, very large, even drastic illogicalities. There are numerous other examples of pronounced penal populism in the part of the proposed novella concerning a large, and often drastic increase in penalties for a number of criminal offenses, most often without any real needs from the domain of penal policy, all of which represents a manifestation of obviously pronounced penal populism.

4.2. Absolute Prohibition of Mitigation of Punishment for Certain Criminal Offences in the Serbian Criminal Code

General rules for mitigation of penalty are prescribed in the general part of Criminal Code of Serbia. In accordance with the Article 56 of the Criminal Code of Serbia the court may pronounce a penalty under statutory limits or a mitigated penalty under next cumulative conditions: 1) if mitigation of penalty is provided by law; 2) if the law provides for remittance of punishment and the court decides otherwise and 3) if the court finds that particularly mitigating circumstances exist indicating that the purpose of punishment may be achieved by a mitigated penalty.

For certain criminal offenses, an absolute prohibition on the mitigation of penalties was introduced in 2009. This means that, under no circumstances, can a sentence be imposed below the statutory minimum—even when that minimum already appears high for some of these offenses. This category includes a number of criminal offenses that have been defined rather arbitrarily and for which "sound criminal policy justifications are lacking."[70]

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

1) for some criminal offences and aggravated/special forms of some criminal offences and
2) in the case of specific recidivism.

70 Z. Stojanović /2023b/, *Komentar Krivičnog zakonika*, (*Commentary on the Criminal Code),* Belgrade.

In the first instance, mitigation of penalty is exceptionally excluded from the general rules for certain serious offenses, including aggravated murder; specific forms of abduction, rape, sexual intercourse with a helpless person, or with a child; certain types of extortion; particular cases of unlawful production and distribution of narcotics; illegal border crossing; and human trafficking.

When it comes to restrictions on mitigation due to specific recidivism, the law also provides an exception to the general rules: the court may not impose a mitigated sentence on an offender who has previously been convicted of the same criminal offense or an offense of a similar nature.

4.3. One Form of Multiple Recidivism in the Criminal Code of Serbia

Article 55a of the Criminal Code of Serbia sets out relatively straightforward conditions regarding a specific form of multiple recidivism. It first defines the categories of criminal offenses for which stricter punishment may be imposed—effectively raising the special minimum within the statutory sentencing range, while maintaining the same maximum penalty as otherwise prescribed by law. The article then outlines the conditions that must be met, taking into account the impact of previous criminal sanctions.

Under the provisions of Article 55a of the Criminal Code of Serbia, more severe punishment for multiple repeat offenders was introduced. For a premeditated criminal offence punishable with imprisonment,[71] the court must impose punishment above the middle range of statutory punishment under the following conditions:

1) if the offender was already twice or more times sentenced to punishment of at least one-year imprisonment for criminal offences committed with premeditation (intent) and
2) if less than five years elapsed from the day the offender had been released from serving the pronounced punishment until a new criminal offence was committed.

The provisions of Article 55a of the Criminal Code of Serbia establish rules for stricter punishment in cases of a specific form of multiple recidivism. In such cases, the imposition of a stricter sentence is mandatory and not subject to the court's discretion or assessment of its expediency or justification based on penal policy considerations. However, this stricter punishment remains within the limits of the statutory sentencing range. In other words, it does not involve an increase in the maximum penalty prescribed by criminal law—whether in the Criminal Code itself or in secondary criminal legislation—but rather ensures that the minimum penalty applied is elevated, without altering the maximum.

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

Article 55a sets out relatively straightforward conditions concerning a specific form of multiple recidivism (or repeated offending). It first identifies the categories of criminal offenses for which stricter punishment may be imposed—effectively raising the special minimum within the statutory sentencing range, while maintaining the legally prescribed special maximum as the upper limit. It then specifies the conditions that must be met, taking into account the impact of prior criminal sanctions.[72]

In the case of a criminal offense for which, during criminal proceedings, the applicable punishment must exceed half of the statutory sentencing range, two cumulative conditions must be met. The first pertains to the form of culpability: the offense must have been committed with intent. The second relates to the abstract gravity of the offense, determined by the type of sanction prescribed by law—specifically, a prison sentence must be stipulated. In essence, these are 'minimal conditions'—a standard that is problematic and arguably inconsistent with the fundamental rationale (*ratio legis*) behind the introduction of the multiple recidivism mechanism. This is because the vast majority of offenses under Serbian criminal law are punishable by imprisonment, and most are typically committed with intent, which is the default form of culpability. Negligence, by contrast, is recognized as a form of guilt only exceptionally, and only when explicitly prescribed by law for certain offenses.

With regard to requests related to the effect of previous criminal sanctioning, the following conditions must be cumulatively met:

1) the perpetrator has been previously convicted twice for criminal acts committed with premeditation to imprisonment for at least one year, and
2) from the day of the perpetrator's release from serving the sentence punishment until the commission of a new criminal offense five years have not passed.

When it comes to the first condition regarding prior convictions, "it should be borne in mind that this concerns multiple convictions, not multiple criminal offenses," and therefore "a single conviction for multiple concurrent criminal offenses would not satisfy this condition."[73]

"The essence of multiple recidivism as prescribed in Article 55a of the Criminal Code of Serbia lies not in the optional imposition of harsher penalties—as was the case under the former Yugoslav criminal law—but in the significant alteration of the statutory sentencing range, primarily through a substantial increase in the minimum penalty. Specifically, if the prescribed conditions are cumulatively met, the court is obligated to impose a sentence that exceeds half of the statutory range. This means that, in cases of multiple recidivism, the sentencing range is not only shifted to the upper half of the legally prescribed range but is also considerably narrowed,

72 M. Škulić /2020a/, Višestruki povrat u krivičnom zakoniku Srbije: kontroverzne novele i uticaj američke krivičnopravne koncepcije „tri udarca, (Multiple recidivism in the Criminal Code of Serbia: controversial amendments and the influence of the American criminal law concept of "three strikes"), *KoPra – kontinentalno pravo – časopis za održiv i skladan razvoj prava*, № 4, p. 28.

73 I. Vuković /2021/, *Krivično pravo – opšti deo*, (*Criminal Law – General Part*), Beograd, p. 485.

thereby limiting judicial discretion and effectively mandating stricter sentencing."[74] As is typically the case with provisions that allow for (optional) or mandate (compulsory) harsher punishment for repeat offenders, the fundamental theoretical objection lies in the principle that imposing a more severe sentence solely due to the offender's criminal history constitutes a departure from the core sentencing rule—that the severity of the punishment should correspond to the gravity of the offense and the degree of the offender's culpability.[75]

The essential objection to the introduction of multiple recidivism in Serbian criminal legislation is that, although this institute does not lead to a harsher punishment (as was the case with multiple recidivism in the era of the former Yugoslavia, but only optional), because "the imposed sentence remains within the prescribed sentence, and the same principle objection can be made to such a decision, which is that someone is (additionally) punished for something for which he was already punished", i.e. "in other words, he is punished because the punishment for earlier criminal acts it did not have a (special) preventive effect on him".[76]

The normative mechanism of multiple recidivism in positive Serbian Criminal Law, introduced in 2019 is not only one of the manifestations of penal populism, but it is not correctly prescribed in legal-technical point of view. Namely, when it comes to the new variant of multiple recidivism in Serbian criminal legislation, apart from the objections in principle, the most important of which is that the perpetrator is punished in this way, in addition to being punished for the current criminal act, practically again (additionally), also punished for previously committed criminal acts, there are also certain quite practical problems faced by judicial practice. Namely, in practice it has already been noticed that a not insignificant 'mathematical' problem is the determination of what constitutes half of the range of the prescribed penalty, which becomes the minimum penalty when applying the institute prescribed in Article 55a of the Criminal Code of Serbia, because determining the specific 'number' is not at all simple considering the existing penal ranges in Serbian criminal legislation.

4.4. Legal Prohibition on Release on Parole for Certain Categories of Offenders Sentenced to Lifetime Imprisonment

In accordance with the Article 46 Criminal Code of Serbia, the court shall release on parole a convicted person who has served two thirds of the prison sentence if in the course of serving the prison sentence he has improved so that it is reasonable to assume that he will behave well while at liberty and particularly that he will refrain from committing a new criminal offence until the end of the imposed prison sentence. In deliberating whether to release the convicted person on parole, consideration shall be given to his/her conduct during serving the sentence, performance of

74 Z. Stojanović /2024/, *Krivično pravo – opšti deo,* (*Criminal Law – General Part*), Novi Sad, pp. 349–350.

75 I. Đokić /2020/, *Preventivno zatvaranje učinilaca opasnih po društvo – višestruki povrat i mere bezbednosti, Kaznena reakcija u Srbiji*, *X deo*, Beograd, pp. 279–280.

76 Z. Stojanović /2023b/, *op.cit*., p. 291.

work tasks relative to his/her work abilities, and other circumstances indicating that the convicted person will not commit a new criminal offence during release on parole. A convicted person who was imposed two sanctions for serious disciplinary offences or whose awarded benefits have been withdrawn shall not be released on parole.

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

In deliberating whether to release the convicted person on parole, consideration shall be given to his conduct during serving of the sentence, performance of work tasks relative to his work abilities, and other circumstances indicating that the convicted person will not commit a new criminal offence during release on parole. It is prescribed too in the Criminal Code,[77] that a convicted person who was imposed sanctions for serious disciplinary offences or whose awarded benefits that have been withdrawn shall not be released on parole.

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

But, according to the amendments to the Criminal Code of May 2019, the punishment of 30 to 40 years of imprisonment was replaced with life imprisonment. What is particularly disputable and subject to severe criticism is the fact that the legislator, quite unnecessarily, introduced an absolute prohibition on release on parole of those sentenced to life imprisonment for some of the gravest sexual offences which, essentially, represents succumbing to the influence of "moral panic".[78]

Release on parole has traditionally been an effective measure for reducing prison populations. Consequently, all official penal strategies in Serbia have included

77 Criminal Code, *Official Gazette of RS,* No. 85/2005, 88/2005 – corrected, 107/2005 – corrected, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 94/2024.

78 M. Škulić /2019/, *op. cit.,* pp. 54–55.

increasing the rate of parole releases as a key objective. Several decades ago, the parole release rate consistently exceeded 50%, but it later faced a significant decline, followed by a recent recovery. Since 2012, the number of parole releases has generally been on the rise.

The percentage of persons released from prisons on a parole, in comparison to the overall percentage of convicts in prisons varied from the very law 8% in 2012 up to 26.9% in 2016. The release on parole rate in 2013 was 16.25%; in 2014 – 20.6%; in 2015 – 26.4 %; in 2016 – 26.9%; in 2017 – 26.7%; in 2018. – 26.1%. In 2019 there was a slight drop in the number of persons released on a parole (24.5%).[79]

4.5. Expansion of Legal Limitation of the Option of Suspended Sentence in Serbia

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

Suspended sentence is one of the cautionary measures, besides judicial admonition. The cautionary measures have specific purpose. Namely, within the general purpose of criminal sanctions,[80] the purpose of a suspended sentence and judicial admonition is not to impose a penalty for less serious criminal offences to the offender who is guilty when it may be expected that an admonition with the threat of punishment (suspended sentence) or a caution alone (judicial admonition) will have sufficient effect on the offender to deter him from further commission of criminal offences.

In accordance with the article 65 of Criminal Code, by suspended sentence the court determines punishment of the offender and concurrently determines that it shall not be enforced provided the convicted person does not commit a new offence during a period set by the court, which may not be less than one or longer than five years (probationary period). Additionally, the court may order that the penalty be enforced if the convicted person fails to return any material gains obtained through the offense, fails to compensate for damages caused, or does not fulfill other obligations specified in criminal law. The court will set a deadline for fulfilling these obligations within the probationary period. Furthermore, any security measures imposed alongside the suspended sentence must be enforced.

Suspended sentence is not possible for all types of the criminal offences. In accordance with the article 66 of Criminal Code, a sentence of imprisonment of less than two years may be suspended. For criminal offences punishable by imprisonment of *up to eight years or more*,[81] the sentence may not be suspended. A sus-

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

80 Criminal sanctions in Serbian criminal law are: 1) punishment, 2) caution, 3) security measures and rehabilitation measures. The general purpose of prescription and imposing of criminal sanctions is to suppress acts that violate or endanger the values protected by criminal legislation.

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

pended sentence cannot be imposed if less than five years have passed since the final conviction in which the offender was sentenced to imprisonment or received a suspended sentence for an intentional criminal offense. In determining whether to pronounce a suspended sentence the court shall, having regard the purpose of suspended sentence, particularly take into consideration, the following circumstances: 1) the personality of the offender, 2) the previous conduct of the offender, 3) the conduct of the offender after committing the criminal offence, 4) the degree of culpability and also 5) other circumstances relevant to the commission of crime.

Although in practice suspended sentences have often been given for certain crimes with a maximum penalty of up to 8 years' imprisonment, it is realistic to expect that this may lead to a significant increase in prison sentences in the near future, since the previous limit was 10 years.

The planned amendments to Serbia's criminal legislation in 2024 aim to further and quite drastically restrict the use of suspended sentences by proposing that this sanction cannot be applied to offenses where the minimum prescribed sentence is two years' imprisonment or more. Under this proposal, suspended sentences would no longer be available for crimes with a minimum penalty of two years or greater.

While suspended sentences are generally intended for minor or moderately serious offenses, such a severe limitation on their use—which has a clear and well-founded purpose and aligns with modern criminal policy—is clearly unjustified and appears to be an example of penal populism. This restriction is introduced without any genuine criminal policy rationale.

If such proposals to radically restrict the use of suspended sentences were implemented through amendments to the Criminal Code, they would directly and rapidly result in a significant increase in the proportion of prison sentences in the overall structure of criminal sanctions, which would then contribute to a dramatic increase in the number of convicts in prison institutions, which is not only completely contrary to trends in modern European countries, but would also be associated with real, very serious problems in the process of executing prison sentences, i.e. in the complete system of Serbian penitentiary institutions.

5. THE PROBLEM OF POTENTIAL OVERCROWDING OF INSTITUTIONS FOR THE ENFORCEMENT OF INSTITUTIONAL CRIMINAL SANCTIONS

The total number of persons deprived of their liberty in Serbia as of 1 October 2020 was 10,600,[82] which includes persons sentenced to prison or juvenile prison

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

(7,376), as well as the defendants in detention (2002), while the remaining 1,222 persons deprived of their liberty fall under the following categories:

1) persons sanctioned for misdemeanor;
2) persons subjected to mandatory psychiatric treatment and custody in a medical institution, as well as
3) juveniles who have been subjected to the educational measure of remand to a correctional institution.[83]

Since, according to official population estimates, Serbia currently has 6,945,235 inhabitants,[84] it follows that there are about 150 persons deprived of their liberty per 100,000 inhabitants in Serbia. This is not a small number and, regretfully, it can be deemed that such a great number compared to the average number of persons deprived of liberty in Europe is exceptionally contradictory to official targets of the Government of Serbia formulated in current national strategies for achieving more extensive prison depopulation. This is particularly striking in view of the fact that, prior to the pandemic (when there were around 11,500 persons deprived of their liberty) the number of persons deprived of liberty was 165 per 100,000 inhabitants. For the purpose of depopulation of prisons and other facilities for the enforcement of criminal sanctions, in May 2017, the Government of the Republic of Serbia adopted a Strategy for depopulation of facilities for the enforcement of criminal sanctions in the Republic of Serbia until 2020.[85] The Strategy stipulates measures and activities that contributed to solving the issue of prison overcrowding and improving the accommodation conditions in correctional facilities.

Multiple recidivism, which enables a significantly heavier, i.e. more severe punishment of a certain category of recidivists, i.e. considering its mandatory char-

83 Namely, there are three categories of sanction for juvenile offenders: educational measures, juvenile prison and security measures. Only some of the educational measures and security measures are form of the deprivation of personal liberty. The juvenile prison sentence is not applicable to all juveniles. Only educational measures may be applied to younger juveniles. Primarily, educational measures are applied to older juveniles too, but they may be exceptionally sanctioned by being sent to the juvenile prison. M. Škulić /2024d/, *Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica* (*Commentary on the Law on Juvenile Perpetrators of Criminal Offences and Criminal-Justice Protection of Minors*), Beograd, p. 257.

One can notice that educational treatment is predominant, and repressive responses are exceptional. Similar to other modern legislation in other countries, the purpose of these measures is not repression, but rather they are primarily of educational importance. Within the framework of the general purpose of penal sanctions (Article 4 of the Criminal Code), the purpose of criminal sanctions against juveniles is to influence the development and enhancement of their personal responsibility, education and proper personality development through supervision, protection and assistance as well as by providing general and professional qualifications in order to ensure the juveniles' re-socialisation. For details see: M.Škulić /2010/, *National Report – Serbia* in: F.Dünnkel, J.Grzywa, P.Horsfield and I.Pruin (Eds.), *Juvenile Justice Systems in Europe – Current Situation and Reform Developments,* Vol.3, Greifswald, pp. 1195 – 1243.

84 Data of the Republic Statistical Office based on results of the population census and results of statistical processing of natural and mechanical population changes. Source: https://www.stat.gov.rs/sr-Latn/oblasti/stanovnistvo/procene-stanovnistva. Accessed on 29 November 2020.

85 *Official Gazette of the RoS, number* 43/2017, dated 5 May 2017, Belgrade, 2017, pp. 3 – 7.

acter, certainly leads to significantly heavier punishments for these offenders, but also some other relatively new rules of our criminal legislation aimed at the constant tightening of the penal policy, such as the prohibition of mitigation for certain criminal offences/aggravated forms of some criminal offences, will in any case lead, or could lead, especially in combination with an inefficient parole system, to practical problems with the execution of prison sentences, reduced essentially to the problem of "overpopulation".[86]

There is an old anecdote that once "judges used to empty prisons", but now that is in relatively modern times just a contrary – "judges are packing the prisons". This refers to the historical fact that in the past, deprivation of liberty was only a way of ensuring the presence of the accused for a trial, and then when the trial was over, and if guilt was established, the appropriate punishment would follow, either corporal, or death, or a fine, but certainly not a prison sentence, which is a product of a relatively recent era, which, among other things, is characterized by the fact that the freedom of a person as such has acquired a special value,[87] and then the deprivation of that freedom for a certain period of time could also acquire the character of a criminal sanctions, which over time becomes dominant in terms of legal norms, although it is not disputed that in modern countries various alternatives to prison sentences are increasingly dominating.

For a long time, the size of the so-called prison population has shown varying trends, but a noticeable and significant disparity exists between different countries and their criminal justice and penal systems. These differences are influenced by social values, specific national circumstances—which often vary considerably—and perhaps most importantly, by the overall social climate. This broader social context also shapes the actions of key state institutions involved in criminal justice: the legislative, executive, and, of course, the judicial branches, within the framework of the constitutional separation of powers.

Some countries could be considered "world champions" in terms of the number of individuals deprived of their liberty per 100,000 inhabitants—a standard metric used to assess potential prison overpopulation. For example: United States (698), Turkmenistan (583), Cuba (510), Thailand (461), Russia Federation (445), Rwanda (434) etc.[88] That is of course not a good example for Serbia as one con-

86 M. Škulić /2016/, Uslovni otpust sa stanovišta krivičnog materijalnog i procesnog prava, in: *Međunarodni naučni tematski skup (Palić, 2-3 jun 2016.): Krivične i prekršajne sankcije i mere: izricanje, izvršenje i uslovni otpust", zbornik Instituta za kriminološka i sociološka istraživanja*, Belgrade, pp. 363– 385.

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

88 Source: http://www.prisonstudies.org/news/more-1035-million-people-are-prison-around-world-new-report-shows. Accessed, 12th April, 2025.

tinental European country, especially because of in the EU the average number of persons deprived of their liberty per 100,000 inhabitants is about 100, what is far much lesser than in Serbia now days. That number is too, significantly lesser in the most countries of the former Yugoslavia.

6. ALTERNATIVE SANCTIONS AND RESTORATIVE JUSTICE IN THE „SHADOW" OF PENAL POPULISM

In complete contrast to the tendency to overcrowding prisons, which is typical of criminal law systems characterized by penal populism and yielding to penal populist pressures, contemporary criminal law, both substantively and procedurally, is characterized by an effort to create a wider "range" of criminal sanctions, but also measures whose effect is close to the effect of some criminal sanctions, and which do not constitute criminal sanctions either formally or in essence. In this way, it is possible to choose the sanction or the method of reaction in a specific case, i.e. to the specific subject of the criminal proceedings, which are most adequate in the given circumstances. This reflects a strong intent to "overcome" traditional punishment at all costs, leading to the development of appropriate alternatives within the normative framework of criminal law. These alternatives are designed in contrast to conventional punishment—often considered the "classic" or even the "most classic" criminal sanction. Their key advantages are that they are generally much more cost-effective and, in most cases, better suited to the offender. More importantly, they often prove to be significantly more appropriate for the victim, offering opportunities for various forms of redress or satisfaction.

As such, alternative sanctions and the broader trend of avoiding custodial sentences can serve the goals of restorative justice—an approach that has become an integral part of modern criminal law and criminal procedure systems.[89]

The relation between the concept of the restorative justice and penal populism is very interesting one. The concept of restorative justice first emerged in jurisdictions that are traditionally characterised by very weak legal protection for the enforcement of victims' rights in criminal proceedings. This is mostly the case in common-law systems, where there are often no possibilities for criminal courts to make decisions about restitution and compensation claims – that is only possible in civil court proceedings and often occurs completely independently of the outcome of criminal proceedings. Also, in a typical common-law system, the injured party or victim of a crime can only appear as a witness and has no right to initiate criminal proceedings, to interrogate, question or examine witnesses. The injured party can never be or become an authorised prosecutor in cases of offences for which prosecution is 'official', i. e. the decision to prosecute lies in the hands of the police or prosecuting agencies. Basically, in these systems the possibilities for victims and injured parties to play an active procedural role used to be very limited. This led to the development of a strong movement to improve the position of the victim.

89 L. Walgrave /2008/, *Restorative justice, Self-interest and Responsible Citizenship*, London, p. 27.

In contrast, the injured party or the victim[90] traditionally had a more important role in the Serbian system of criminal justice. The same applied to former Yugoslavian legislation. Therefore, long before the emergence of the restorative justice movement and its growth in popularity, in Serbia the injured party already had the following possibilities: 1. to file restitution claims in the criminal procedure, 2. to examine witnesses and propose other evidence (active role in evidential procedure), 3. to prosecute criminal offences themselves or through legal representation, either as a private or a subsidiary prosecutor.[91]

Restorative justice is not an entirely new concept. Even though 'the term gained popularity in most of the western world only in the past decade, restorative decision-making in the form of victim-offender mediation programs has a 30-year history in the United States' and it is considered that 'this history began in 1972 with an experimental program in the Minnesota Department of Corrections using victim-offender meetings as a component of a restitution program designed for adult inmates eligible for early release'.[92]

The most common practices that are associated with restorative justice are: 1) procedural law mechanisms for victim support, 2) provisions for victim-offender mediation, 3) restorative conferencing, 4) healing and sentencing circles, 5) peace committees, 6) citizens' boards, and 7) community service.[93] A few of these measures can be found in Serbia too.[94] However, although the Serbian criminal justice system has both a solid catalog of alternative criminal sanctions and adequate restorative measures, it is quite clear that the elements of pronounced penal populism that have penetrated the Criminal Code will, among other things, affect the weaker application of both alternative criminal sanctions in general and measures from the domain of restorative justice.

As already explained in the previous text, the Republic of Serbia has long officially adopted a strategy for developing and improving the system of alternative criminal sanctions, connected with the idea for depopulation of facilities for the enforcement of criminal sanctions.[95] Serbia has also committed to implementing key elements of the European Directive on establishing minimum standards on the

90 There is a difference between a 'victim' and an 'injured party'. While the victim is the passive subject of the crime – a person against whom a crime has been committed – the injured party is the person – natural or legal – whose rights have been breached by the crime/criminal offence. For example, in the case of murder, the victim is the person who has been killed, while the injured party is the members of his/her family, i.e. some close relatives of the victim.

91 M. Škulić /2024e/, *Krivično procesno pravo,* (*Criminal Procedural Law*), Beograd, p. 116.

92 G. Bazemore, M. Schiff /2005/, *Juvenile Justice Reform and Restorative Justice – Building theory and policy form practice*, Cullompton, p. 27

93 L. Walgrave /2008/, *op.cit.*, pp. 31–39.

94 M. Škulić /2015/, National Report – Serbia, in: *Restorative Justice and Mediation in Penal Matters – A stock-taking of legal issues implementation strategies and outcomes in 36 European countries,* vol. 2, Band 50/2, Forum Verlag Godesberg, Schriften zum Strafvolzug, Jugendstrafrecht und zur Kriminologie, Greifswald, pp. 803–804.

95 Strategy for depopulation of facilities for the enforcement of criminal sanctions in the Republic of Serbia – *Official Gazette of the RoS, number* 43/2017, dated 5 May 2017, Belgrade, 2017, pp. 3–7.

rights, support and protection of victims of crime,[96] into its criminal law/criminal procedure system, which also includes important normative elements from the restorative justice segment.[97] Of course, both of these goals, otherwise inherent in modern criminal law systems, are realistically difficult to achieve unless harmful penal populism is abandoned.

7. CONCLUSION

In criminological literature, the concept of penal populism is well recognized and it is mostly associated with political agendas in which crime control has been given a significant place. That concept is not only criminological phenomenon, but it is very significant in criminal law point of view. Criminal law, as the most repressive branch of legislation, serves to protect the most important social and human values from the gravest forms of harm and endangerment, and it encompasses the sanctioning of individuals who commit criminal offenses.

The shift toward more punitive criminal justice policies often does not correlate directly with actual crime trends but rather with broader societal transformations and public perceptions of safety and order. In neoliberal societies, punishment increasingly serves as a symbolic reaffirmation of state strength in times of institutional crisis or legitimacy deficits. Moreover, the role of the public—either as a perceived driver of punitive demands or as a target for political messaging—reinforces the cyclical nature of populist penal policies. Evidence from Serbia, the United States, the United Kingdom, and Central and Eastern Europe suggests that penal populism is not merely a legal or criminological development but a broader socio-political strategy that often overlooks long-term goals such as resocialization and reintegration. Future criminal policy must be based on empirical research, including recidivism data and the efficacy of penal measures, in order to move beyond populist narratives toward evidence-based and socially just solutions.

The authority to impose criminal sanctions—including the right to punish (*ius puniendi*)—belongs exclusively to the state. This authority is exercised by criminal courts, but only when the legally prescribed conditions are met. The imposition and enforcement of criminal sanctions are permitted solely under the conditions set out in the Criminal Code, which define both the general purpose of criminal sanctions and the specific purpose of punishment.

96 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. The rules contained in EU directives fall under the so-called "soft European law", when it comes to the legal space outside the EU itself, but for essentially political reasons, candidate countries for EU membership are also expected to align their legislation with such rules in the foreseeable future, and in accordance with specific action plans. M. Fletcher, R. Lööf with B. Gilmore /2008/, *EU Criminal Law and Justice,* Cheltenham, UK, pp. 58–59.

97 M. Škulić /2020b/, Oštećeni i krivičnopravni elementi zaštite (pojam i kriminalno-politički razlozi neophodnosti predviđanja posebnih instrumenata krivičnopravne zaštite), in: *Oštećeno lice i krivičnopravni instrumenti zaštite (Međunarodni pravni standardi, norma i praksa),* Zlatibor, pp. 11–12.

Although significant reductions in the prison population in Serbia had previously been achieved within the existing legal framework, the still disproportionately high number of incarcerated individuals relative to the overall population indicates that it is high time to move away from the harmful trend of penal populism, which reached its peak with the amendments to the Criminal Code in May 2019. These amendments directed at drastically harsher penal policy will, unless the damage already done has been repaired, lead relatively quickly to further, potentially even radical overcrowding of prisons. This is not only in direct contrast to the current state strategies for prison depopulation, but also rather in dissonance with the real situation of crime trends in Serbia, which can by no means be considered "dramatic" by any objective criteria.

The current Criminal Code of Serbia contains very striking elements of penal populism, which also dominates a large part of the planned amendments. Significant manifestations of penal populism are the amendments to the Criminal Code introduced in 2019 into the general part of Serbian criminal law, which primarily concern the redefined purpose of punishment, the institute of multiple recidivism, the absolute prohibition of conditional release certain categories of perpetrators of criminal offenses/convicted for certain criminal offenses, and the significant limitation of the possibility of imposing a conditional sentence.

Pronounced penal populism was previously manifested in the general part of Serbian criminal law in the amendments to the Criminal Code from 2009, when, without justified reasons and without clear criteria for selecting relevant criminal offenses, an absolute prohibition on mitigating punishment was introduced in relation to a series of exhaustively listed incriminations. Elements of penal populism have also long been present in the special part of the Serbian criminal law modified by the 2019 amendments, which is reflected in a significant increase in penalties for a number of criminal offenses, often without any relevant criminal-political reasons.

This very punitive oriented "direction" of criminal law in Serbia is also noticeable in the latest planned amendments, which mainly concern the tightening of legal penal policy. That is especially in the domain of the special part of the criminal law, but there are also ideas aimed at amending some provisions of the general part of the Serbian criminal law, which would even drastically tighten penal policy, as is the case with the planned additional and radical limitation of the possibility of imposing a suspended sentence, which could potentially very quickly, completely contrary to the publicly expressed intentions aimed at strengthening the system of alternative criminal sanctions, lead to the so-called prison overcrowding. Such tendencies realistically contain elements of penal populism. Besides, they obviously create a pronounced "punitive atmosphere" in society and on the other hand, that atmosphere itself is quickly becoming a special generator of new/future manifestations of penal populism in criminal legislation. Such tendencies are certainly not in accordance with the prevailing understandings of criminal law, criminology-penology and criminalistics' doctrine too. Even more important is that these tendencies are not in balance with the current state in the sphere of the state of crime and with the social need to respond to it in an adequate manner under criminal law, which is also immanent to a modern state, which is characterized by the rule of law.

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

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

There are biblical truths that "with what measure you judge, so will you be judged" and "do not judge, so that you will not be judged", but this does not mean that you really should not judge, but that it is not easy to neither judge nor judge. Judgment is probably more of a divine than a human function, but in the world as it is, people cannot wait only for the final judgment of God. In the rule of law, judges are entrusted with the right and duty of (re)trial.

When the judge is convinced that the defendant has committed a criminal offense, he delivers a verdict of guilt and imposes appropriate criminal sanction, which does not always have to be punishment, but can also be a warning measure, such as a suspended sentence and a court warning. In more serious cases, punishments follow, such as what is considered 'classic' and that is a prison sentence.

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

Mitigating and aggravating circumstances cannot be evaluated mechanically, automatically, or routinely, but must be viewed uniquely and in the light of all relevant circumstances. The opposite procedure would turn the judge into a kind of 'mathematician' who simply solves an 'equation' composed of a series of "positive"

and 'negative' points. An absolutely 'precise' punishment would follow as a 'result' of a little addition and a little subtraction. Professors of criminal law explain this to students with a tragicomic story about a judge who takes the defendant's fact that he is an orphan as an important mitigating circumstance, and he is prosecuted for the murder of his father and mother.

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

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

The manifestations of penal populism and even a kind of specific spirit of penal populism exist in numerous provisions of the Criminal Code of Serbia, but the most striking examples of penal populism is especially reflected in following areas of criminal-law provisions: 1) The prohibition of mitigating the penalty for certain types of criminal offences; 2) The institute of multiple recidivism; 3) Significant limitation on possibilities of suspended sentencing; as well as 4) Prescribing a lifetime imprisonment, in combination with introducing a legal prohibition on release on parole for certain categories of offenders sentenced to lifetime imprisonment.

The manifestations of penal populism in the Serbian Criminal Code, as well as in the planned amendments to Serbian criminal legislation, are in direct contradiction both with the official tendency of Serbia aimed at strengthening the system of alternative criminal sanctions, in order to eliminate prison overcrowding, and also, in some aspects, with the concept that Serbia has adopted, which refers to restorative justice. This also represents a significant reason for reconsidering a number of provisions of the Criminal Code that realistically represent manifestations of penal populism.

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OBJAŠNJENJE OSNOVNIH KARAKTERISTIKA PENALNOG POPULIZMA – PRIMERI U POJEDINIM KRIVIČNOPRAVNIM ODREDBAMA I PLANIRANIM IZMENAMA KRIVIČNOG ZAKONIKA SRBIJE

REZIME

Autori se u tekstu bave osnovnim karakteristikama kaznenog populizma kao jednog veoma interesantnog kriminološkog fenomena, i njegovim manifestacijama u određenim izmenama i odredbama Krivičnog zakonika Republike Srbije. Navedeno se naročito ogleda u pojedinim segmentima krivično-pravne regulative: 1) Uvođenje zabrane ublažavanja kazne za određene vrste krivičnih dela; 2) Uvođenje instituta višestrukog povrata; 3) Značajno ograničavanje mogućnosti za izricanje uslovne osude; 4) Propisivanje kazne doživotnog zatvora, u kombinaciji sa zakonskom zabranom uslovnog otpusta za određene kategorije učinilaca osuđenih na ovu kaznu.

U radu se takođe ukazuje na česte izmene i dopune Krivični zakonik Republike Srbije. Neke od tih izmena, koje kulminiraju izmenama iz 2019. godine, sadrže elemente kaznenog populizma. Autori iznose argumentovanu kritiku nepotrebnog uticaja kaznenog populizma u odredbama srpskog Krivičnog zakonika, koji su prisutni i u nekim predloženim izmenama. Takva tendencija nije u skladu sa savremenim shvatanjima krivičnog prava, kriminologije, penologije ili kriminalistike, a što je još važnije, takav pristup zakonodavca nije u skladu sa stvarnim stanjem kriminaliteta i potrebom da se na njega adekvatno odgovori.

U članku se ističe da populističke kaznene odredbe propisane u Krivičnom zakoniku Srbije, kao i u predloženim izmenama krivične regulative, direktno protivreče zvaničnim naporima Srbije da ojača sistem alternativnih krivičnih sankcija sa ciljem smanjenja preopterećenosti zatvorskog sistema. Štaviše, u određenim aspektima, ove odredbe su u suprotnosti sa konceptom restorativne pravde koji je Srbija usvojila. Te kontradikcije predstavljaju snažan razlog za preispitivanje više odredbi Krivičnog zakonika.

Autori posebno zaključuju da sudija u zemlji koja teži vladavini prava mora imati snage da se odupre takvim „očekivanjima javnosti" i da svoju odluku donese u skladu sa zakonom i svojim slobodnim uverenjem. Naravno, sudija mora takođe da odoli uticaju kaznenog populizma koji se promoviše u medijima ili od strane pojedinih političara, javnih ličnosti i slično. Međutim, poseban problem nastaje kada elementi kaznenog populizma prodru u samu krivičnu regulativu.

Ključne reči: kazneni populizam, kriminologija, Krivični zakonik, krivično pravo, izmene, kažnjavanje.

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