Medical power and criminal procedure

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Abstract

For a long time, one of the privileges characteristic of sovereign power was the right over life and death. In the classical era, the existing mechanisms of power were reshaped in the West; so, according to Foucault, instead of the old right to condemn to death or leave alive, the power to leave alive or reject to death entered the scene. The transformation of the mechanisms of power led to the transition to the investigative model of the criminal procedure in which the discussion of the *causa criminalis* moved to the territory of knowledge. The development of investigative methods in acquiring the first economic and administrative knowledge had a significant impact on the introduction of investigation in criminal matters. Certain authors state that in the 16th and 17th centuries, thinking about medicine, botany, and zoology was like a collection of testimonies. For this reason, even in criminal proceedings, special importance is attached to experts who have special non-legal knowledge, and as such are qualified to communicate the truth. The role of experts in the medical profession is specific in that, in addition to giving testimony on the subject matter of the expertise, they also have essentially judicial powers because their opinion has a decisive influence on the limitation of certain basic freedoms and human rights. The paper will also analyze the provisions of certain domestic laws, as well as the standards of the European Court of Human Rights expressed in connection with the legal institution of English law „*at Her Majesty's pleasure."*

Keywords: power, truth, criminal procedure, expert, medical power, basic freedoms and human rights.

Introductory considerations

The Roman Emperor Lucius Septimius Severus ordered that the ceiling of the ceremonial hall where he held receptions and dispensed justice be painted with the arrangement of stars at the time of his birth, as he believed that this determined his fate. In this way, he wanted to show that the logos, which governed the world order at the moment of his birth, organize, establish, and justify the judgments he pronounced. The painted ceiling, as Foucault notes, was meant to remind us that everything that is manifested on the floor of the hall as power represents necessity, so that judgments express truth. In other words, Septimius Severus dispensed justice and pronounced judgments by inscribing them into an absolutely visible order of the world that establishes them as law, necessity, and truth (Foucault, 2012, pp. 3–5).

The abandonment of the celestial logos manifested in the arrangement of stars has "lowered" the search for truth to the earthly level, and numerous philosophers have experienced the extent to which this notion, which is so commonly used in everyday conversation, is inaccessible and enigmatic. But it is not only philosophers who have always been attracted to the notion of truth. As noted, this deceptive notion has been a matter of interest to all those who desire to know about anything whatsoever (Ilić & Majić, 2013, p. 85). The special significance of establishing truth in the process, especially in criminal proceedings where the application of criminal law as ultima *ratio societatis comes to* the fore, is reflected in the fact that the distribution of justice, along with waging war, essentially represents the manifestation of one of the two functions of power that were associated with the sovereign, and later with the "social body" embodied in the republic (Foucault, 2021, p. 291).

The Justinian Code confirms that the administration of justice is originally connected to the ruler whose codification effort is referred to as *sacrificium iustitiae*, and the legal and judicial profession was considered a priestly order, as evidenced by the first statement of the Digest (Kantorovic, 2012, p. 169):

*"*With justice, we can rightly call ourselves the priests of this craft: for we serve justice and confess knowledge of what is good and just…*"*

*"*Priests of justice*"* are bearers of knowledge through which they express one of the functions of state power, and their actions are justified by the need to establish the truth in order to protect fundamental social values. In this regard, each society has its own regime of truth, specific mechanisms and instances through which it distinguishes true statements from false ones, that is, establishing techniques and procedures for arriving at the truth (Foucault, 1980, p. 131). In this context, there is a viewpoint that connects the model of judicial proceedings with a certain form of state organization. The difference between two types of states arises from the relationship between the state and society.

The first type is the reactive state, and its task is limited to providing a supporting framework within which its citizens pursue their chosen goals. The fundamental structural principle upon which the procedural edifice of the reactive state is erected thus becomes the idea that proceedings are a contest of two sides. On the other side, the extreme activist state espouses or strives toward a comprehensive theory of the good life and tries to use it as a basis for a conceptually all-encompassing program of material and moral betterment of its citizens. The activist proceedings must be structured so as to permit a search for the best policy response to the precipitating event. It is also clear that control over this search must be vested in state officials (Damaška, 1986, pp. 73, 79, 80, 87).

Irrational and rational evidentiary means for establishing the truth in criminal proceedings.

In the known Middle Ages, the church accepted the principle that Roman law applies to it (*ecclesia vivit lege romana*). However, in the field of criminal procedure, a certain exception was made, and irrational means of evidence were adopted, which were applied in medieval German law, justified by the necessity for the decisions of ecclesiastical courts to be accepted by the people (Bayer, 1943, p. 46). Among the irrational means of evidence, divine judgment (*judicia dei, ordalia*) was applied for a time, and for a longer period, the oath of purification (*juramentum purgationis*) and conjurators (*conjuratores*). In this case, conjurators were not required to have knowledge of relevant facts, but it was sufficient for them to swear to the innocence of the accused. From the13th century, judges began to use testimonies from individuals who had knowledge of relevant facts (*testes de scientia*), instead of individuals who were convinced of the accused's innocence (*testes de credulitate*) (Damaška, 2019, p. 13).This change could be marked as a hint at the application of different techniques in discussing causa criminalis, or as the establishment of a relationship between knowledge and truth in criminal proceedings.

This change was inevitable, and the criminal procedure, in the absence of a true judicial means to establish the truth, resorted to two non-judicial areas - alongside the aforementioned church, the influence on finding techniques for establishing the truth was exerted by secular administration. A significant contribution to the introduction of investigation in criminal matters was made by the development of investigative methods in acquiring the first economic and administrative knowledge. The doctrine emphasizes that in the 16th and 17th centuries, thoughts on medicine, botany, and zoology were like a

collection of testimonies (Boccon-Gibod, 2019, pp. 197-198). It should also be noted the emergence of the king's prosecutor (*le procureur du roi*) and the introduction of prosecution ex officio. In one word, faith in the supernatural element of the judiciary was abandoned, and it was reduced exclusively to the realm of human activity. There were also substantial differences in that upheaval, as in England, the voice of God gave way to the voice of the local community; that is, *vox populi* replaced *vox Dei*. In most countries of continental Europe, the evidentiary system of the Catholic Church was adopted, in which a professional judge established the facts (Damaška, 2019, p. 16).

Foucault emphasizes that the emergence of investigation represents a complex political phenomenon that must be analyzed based on power relations. It is about two successive shifts: one from the concept of dominant ideology to the concept of knowledge-power, and then another from the concept of knowledge-power to the concept of governance through truth. The concept of knowledge had the function of placing outside the visible field the opposition of scientific and unscientific, the question of illusion and reality, and the question of truth and lies. While the function of the concept of power is to replace the system of dominant representations with the question, the field of analysis of procedures and techniques through which power relations are realized (Foucault, 2012, pp. 12-13). Contemporary power is not so humanized that it would not be redirected and capillarized in order to exercise increasingly finer and more exhaustive control over its object (individuals and populations). The truth of the individual represents the ideal basis of that power (Foucault, 1976, pp. 78-79).

Biopolitics

In classical times in the West, there was a transformation of existing mechanisms of power, so that instead of the old right to condemn to death or leave alive, the power to leave alive or discard to death took center stage. Given that the main role of authority is to secure, support, strengthen, multiply, and organize life, the death penalty could be pronounced, among other things, for the preservation of societal security, that is, with the aim of eliminating biological danger (Foucault, 1976, p. 181).

The transformation of power mechanisms, or the power to keep alive, resulted in a shift to an investigative model of criminal procedure in which the accused moved from the battlefield to the territory of knowledge. This does not mean that power has diminished or become more humane, but rather it has only been redirected to objects that have become the center of its interest. The acknowledgment of truth is inscribed in the core of the individualization processes carried out by power, and arriving at that acknowledgment also implies the use of torture. The application of torture hinted in a certain way that the body would represent the object to which power would be directed (di Čezare, 2020, p. 116). In fact, power over life developed towards the disciplining of the individual body, which Foucault calls the anatomo-politics *of the human body* (*l'anatomo-politique du corps humain*), and later it was also directed towards the body-species, permeated by the mechanics of life, which he defined as bio-politics *of the population* (*la bio-politique de la population*). The disciplining of the body and the regulation of the population form two poles around which the organization of power over life develops (Foucault, 1976, p. 183).

It has been noted in the doctrine that one of the most pronounced constants in Foucault's work is the decisive abandonment of the traditional approach to the problem of power based on legal-institutional models (definition of sovereignty, theory of the state) and a focus on an impartial analysis of the concrete ways in which power penetrates the very bodies of the subject and the forms of their lives (Agamben,

2018, p. 12). While power penetrates the human body, there are situations in which the body and life remain outside the shelter of basic freedoms and human rights. This was pointed out by Arendt, who argues that the conception of human rights, based on the presumed existence of a human being as such, failed as soon as those who advocated it first faced people who had lost every other attribute and determination, except for the mere fact that they are human beings. In this regard, Agamben emphasizes that the refugee should be viewed as a boundary concept capable of provoking a radical crisis of the basic categories of the nation-state, from the connection between birth and nation to the connection between man and citizen, thus creating space for the now urgent categorical renewal, which aims to create a politics in which bare life will no longer be separated and excluded within the state order, not even through human rights (Agamben, 2018, pp. 141, 149).

Medical knowledge

In the court procedure characteristic of an activist type of state, the establishment of truth is carried out in accordance with classical realist theory. According to classical realist theory, the perception that is most frequently encountered. Expressed in philosophy as well as in other areas of knowledge, truth is realized as simply a matter of correspondence between statements or sentences and the world or parts of the world (correspondence theory). For traditionalists, truth in no way depends on our beliefs or on whether we are able to grasp it or not. Truth is objective and hinges only on the way the world is; it is like a „hidden piece of gold," waiting to be discovered and brought to light (Ilić & Majić, 2013, p. 86). Deficiencies of the classical correspondence theory caused the development of a number of anti-realistic theories, the most characteristic of which is the coherence theory of truth. The basis of this view is the negation of the stance according to which true facts exist *a priori*. According to these theories, truth is what reasonable people agree upon after a complete and fair discourse (Ilić & Majić, 2013, p. 86). The coherence theory of truth is characteristic of the judicial procedure that exists in a reactive state.

Regardless of the differences presented, a common feature of the exposed models of judicial procedure is the effort to establish the truth. Foucault believed that there is a technology of evidential truth that is one with scientific practice. He emphasizes that scientific proof is essentially just a ritual, that the universal subject of knowledge is in reality an individual historically qualified according to a certain number of modalities, and that the discovery of truth in reality is a certain modality of truth production. He calls this the archaeology of knowledge (*l'archéologie du savoir*), while the genealogy of knowledge (*la généalogie de la connaissance*) indicates how the technology of evidential truth effectively occupied and now exerts power over that truth whose technology is connected to the event, strategy, and hunt (Foucault, 2003, pp. 238-239).

One of the specific features of judicial truth is that, in contrast to scientific truth, which includes judgments about reality, it refers to normative conclusions that are partially based on factual conclusions. Therefore, it cannot be identified with scientific, philosophical, ethical, or aesthetic truth (Ilić & Majić, 2013, p. 92). Moreover, the conclusions reached in criminal proceedings are limited by the fact that none of them is characterized by a purely determinative nature, but the authority of a judged matter gives it a partially "normative" nature. Therefore, the determinative dimension of the conclusions forming the basis of the court judgment can be assessed in light of truth understood in a scientific sense, which justifies, at

least partially, attributing the presumption of truthfulness to the judged matter (van de Kerchove, 2000, pp. 95–96).

It can be said that since the end of the Middle Ages, there has been a general investigation of the entire surface of the Earth, down to the finest parts of things, bodies, and movements - the truth is everywhere and awaits us everywhere, at every place and at all times. A universal subject for this truth does not exist, as the ability to know it implies possessing the appropriate knowledge. The emergence of philosophers, scientists, intellectuals, professors, laboratories, etc. in the history of the West since the 18th century is directly related to this expansion of the position of scientific truth, with the thinning of those who can know the truth that is now present everywhere and at every moment. At that time, what can be called hospital and medical equipment was being built in Europe, which ensures general oversight of the population, creating the possibility for health investigations to be transferred in principle to every individual, and the hospital allows for the inclusion of the body of the living individual in illness and, above all, the body of the deceased (Foucault, 2003, pp. 246-247).

In the medical tradition of the 18th century, illness is presented to the observer according to *symptoms* and *signs*. A symptom is the form in which the illness presents itself: it is the closest to the essence of everything that is visible and represents the first transcription of the inaccessible nature of the illness. On the other hand, a sign announces: prognostically, what will happen; anamnestic, what has happened; diagnostically, what is currently happening. The education of the clinical method is associated with the emergence of the physician's view in the field of signs and symptoms (Foucault, 2007, pp. 89–90).

In medical practice, special importance is given to the crisis; that is, the moment when the evolution of the disease is resolved, when the question of life or death is decided, or when the disease transitions to a chronic state. In its general form, the technique of crisis in Greek medicine does not differ from the technique of a judge or arbitrator when it comes to a legal dispute. Here, in the test technique (*l'épreuve*) there is some kind of pattern, a judicial-political matrix, which is applied both in legal conflicts in a criminal law case and in medical practice. In confronting the crisis, the doctor takes on the role of an arbitrator - the word crisis essentially means "to judge,", and diseases are judged on the day of the crisis;they are assessed based on how the conflict was presided over, and the doctor can emerge as a winner or defeated in relation to the disease (Foucault, 2003, pp. 242, 244).

Special cases of expertise

Expertise is determined with the aim of establishing facts for which specialized knowledge or particular technical skills are required and/or providing expert opinions on such established facts. It is, therefore, about activities that assume expert knowledge or skill, the first of which involves establishing the fact (expert's finding - *visum repertum*), and the second deriving an expert conclusion about the established fact (expert's opinion - *parere*). It concerns a fact that is the subject of proof (Vasiljević, 1981, pp. 334-335).

One of the questions discussed in the doctrine relates to the legal nature of expert testimony. There were opinions that expert testimony is not a form of evidence, but this view has been abandoned. It is undisputed that expert testimony, like any other form of evidence, assists the authority in the proceedings (the court, but also the public prosecutor) in establishing facts. The findings and opinions of

the expert do not represent a final judgment on the subject of proof, but evidence like any other that the authority in the proceedings must evaluate to accept or reject it (Vasiljević, 1981, p. 335). In Anglo-American theory, it is emphasized that it is impossible to say what an expert is to be if he is not to be a witness. If he is to decide upon medical or other scientific questions connected with the case so as to bind either the judge or the jury, the inevitable result is a divided responsibility that would destroy the whole value of the trial. If the expert is to tell the jury what the law is - say about madness - he supersedes the judge. If he is to decide whether, in fact, the prisoner is mad, he supersedes the jury (Stephen, 1883, p. 575). Regardless of the doctrinal views presented, in the practice of Serbian courts, evidence obtained through expert testimony is often given precedence over other evidence, and it is not uncommon for their evidential value to be overestimated, so it is occasionally perceived that judges order expert testimony, but that experts actually render judgments (Banović & Ilić, 2019, p. 426).

The legislator in Serbia has anticipated several cases of expert evaluation that require the engagement of experts with medical knowledge. These are evaluations that most commonly occur (bodily injuries), are particularly significant (murder), or are especially complex (psychiatric evaluation). According to the provisions of the Code of Criminal Procedure (National Assembly of the Republic of Serbia, 2011, Art. 127, Art. 129 and Art. 131), this refers to the evaluation of bodily injuries, evaluation of corpses, and psychiatric evaluation.

Expertise in bodily injuries

An injury represents a violent damage to health caused exclusively by the action of external factors, whereby bodily injury encompasses any damage, separation, or destruction of any part of the body. On the other hand, health impairment includes all temporary or permanent physical and mental illnesses or exacerbations of existing physical and mental disorders (Veljković *et al*., 2010, p. 293). Given that this is an area that represents one of the most common subjects of evaluation, the legislator has dedicated several supplementary provisions to it. It is stipulated that the authority conducting the procedure will determine the evaluation of bodily injuries if there is doubt regarding the type and manner of occurrence of the bodily injury (National Assembly, 2011, Art. 127, para. 1). The position of judicial practice is that this type of evaluation can be performed by all doctors, whereby the expert specialist in forensic medicine is qualified for Expertise of all types of injuries. This view should not be understood as giving an advantage to forensic medicine specialists over other doctors (Ilić *et al*., 2024, p. 462).

The rule is that bodily injuries are to be assessed by examining the injured person. The ratio legis of this solution is that the diagnosis of injuries and their qualification can most reliably be carried out on the basis of an examination of the injured person, preferably immediately after the injury (Narodna skupština, 2011, Art. 127, para. 2). It is very important that the examination be carried out as soon as possible because, over time, injuries heal and lose their original features, and sometimes the examination needs to be repeated (Veljković *et al.,* 2010, pp. 299–300).

Autopsy

In addition to the terminological alignment with the condition for determining the expert opinion on bodily injuries, the expert opinion on a corpse differs in that the assessment of the existence of a "suspicious" death (*mors dubitationem*) is made by the public prosecutor or the court (i.e., not the police).

Depending on the conclusion it draws, the procedural authority decides whether there is a need for an expert opinion on a corpse. The legislator has provided that an expert opinion on a corpse is ordered in the following cases (National Assembly, 2011, Art. 127, para. 1):

a) if there is a suspicion that the death of a certain person is a direct or indirect consequence of a criminal offense;
b) if, at the time of death, the person was deprived of liberty;
c) if the identity of the corpse is unknown.

The reasons stated under b) and c) are, in the true sense of the word, the grounds for a mandatory autopsy. When it comes to the autopsy of a person who was deprived of his liberty at the time of death, it should be noted that the European Court of Human Rights held that there was a violation of the procedural aspect of the right to life (National Assembly of the Republic of Serbia, 2003, Art. 2) In the case where the investigation into the death of the applicant's husband was conducted by the Ministry of Internal Affairs and the public prosecutor's office, after taking over the investigation, relied exclusively on evidence collected by the police (*Shavadze v. Georgia*, 72080/12, §§35, 37, 19 November 2020, ECHR). Should we also recall the current case of the missing girl from Ćuprija, in which an indictment has been filed against the defendants, and the identity of the police officers who, as suspects, interrogated the brother of one of the defendants and, on that occasion, inflicted bodily injuries on him from which he died has not yet been established? An expert examination of the suspect's corpse determined that the suspect died as a result of torture, and since April 2024, when the expert examination was conducted, no decision has been made to initiate an investigation (National Assembly, 2011, Art. 295, para. 1(1)), nor has the public been informed of any progress in identifying the authorized police officers who did so (Ilić & Beljanski, 2025, p. 44).

A special feature of the autopsy is the identification of unidentified bodies in situations where, in the opinion of the competent public prosecutor's office, there is no doubt that the death was the result of a criminal act. It is often the case that the public prosecutor does not order an autopsy of a body, justifying this position by saying that identification is not within his jurisdiction and that he does not have the financial resources to do so (Ilić *et al*., 2024, p. 466). It should be noted that the examination and autopsy of a body is performed by a doctor specializing in forensic medicine. Incidentally, an autopsy (*obductio seu autopsio*) is a medical procedure that involves opening body cavities and cutting organs according to established rules for medical and legal-medical reasons. Considering the goals that are to be achieved, an autopsy is divided into pathological-anatomical (clinical) and forensic. A forensic autopsy is performed based on an order from the public prosecutor or court in order to determine and clarify the cause of death or when requested by a doctor and close relatives of the deceased (Veljković *et al*., 2010, p. 44).

Psychiatric expertise

For the determination of the psychiatric evaluation of the accused, it will occur if it is necessary to establish whether his accountability is excluded or diminished, or if he committed a criminal offense due to dependence on the use of alcohol or narcotic drugs, or if he is incapable of participating in the proceedings due to mental disturbances (National Assembly, 2011, Art. 131, para. 1). Although the legal wording allows for the psychiatric evaluation to be determined by the police, public prosecutor, or court,

this will usually be done by the public prosecutor or court. If doubt arises regarding the accountability of the suspect during the hearing and, as a consequence, the need to determine a psychiatric evaluation, the police are obliged to contact the public prosecutor to order the undertaking of this evidentiary action. In favor of this, it can also be stated that for the purpose of medical evaluation, it is possible to place the accused in a health institution, which is decided by the court, among other things, at the request of a party, and the police are definitely not that party (National Assembly, 2011, Art. 122, para. 1). If it is considered that a psychiatric evaluation can also be determined for a witness (National Assembly, 2011, Art. 131, para. 2), and that the possibility for the police to interrogate a witness is excluded unless entrusted to them by the public prosecutor, in this procedural situation there is no possibility for the police to determine the evaluation.

The accused can therefore be placed in a healthcare institution if necessary for medical examination (National Assembly, 2011, Art. 122, para. 1). This refers to a concept that, in addition to forensic psychiatric examination, also includes forensic medical examination. Accordingly, the placement of the accused in a healthcare institution may also occur for the examination of their mental states and psychological development that are necessary for assessing their personality or imposing certain security measures of a medical nature. On the other hand, since the subject of forensic medical examination can include, among other things, living persons and their parts, the placement of the accused in a healthcare institution could also occur if it is necessary to conduct their examination (for example, to determine the nature and type of bodily injuries), ascertain intoxication or poisoning, perform identification, and similar (Ilić *et al*., 2024, p. 449). The fact that there is a court decision does not always mean that placement in a healthcare institution is lawful, but this must be examined in each specific case (*D.R. v. Lithuania*, 961/15, §§ 71-72, 26 June 2018, ECHR).

The measure of placing the accused in a healthcare institution can originally last up to 15 days, with the court exceptionally able to extend it for another 15 days at most (National Assembly, 2011, Art. 122, para. 2). The condition *sine qua non* for extending the measure is a reasoned proposal from the expert, upon receiving which the court obtains, ex officio, the opinion of the head of the healthcare institution where the accused is placed. If the court accepts the expert's proposal, it extends the measure of placing the accused in the healthcare institution by a decision. *Ratio legis* for shorter time limits for placement in a healthcare institution, compared to the previous legal solution, arises from the ECHR's stance that placing the accused in a healthcare institution against his will is considered deprivation of liberty (*Winterwerp v. the Netherlands*, 6301/73, § 61, 24 October 1979, ECHR).

“At Her Majesty's pleasure”

In English law, the duty of a judge is to decide on all legal questions and to explain to the jury the law applicable to the case. One of the specific duties of a judge is the order that the person against whom a special verdict of insanity has been returned be kept in custody as a criminal lunatic until His Majesty's pleasure shall be known (Lawson & Keedy, 1910, pp. 752-753). The notion of detention during Her Majesty’s pleasure has its origins in statutory form in an Act of 1800 for "the safe custody of insane persons charged with offenses" (Criminal Lunatics Act), which provided that defendants acquitted of a charge of murder, treason, or felony on the grounds of insanity at the time of the offense were to be detained in "strict custody until His Majesty’s pleasure shall be known" and described their custody as being "during

His [Majesty's] pleasure." In 1908, detention during His Majesty's pleasure was introduced in respect of offenders aged between 10 and 16. It was extended to cover those under the age of 18 at the time of conviction (1933) and further extended to cover persons under the age of 18 at the time when the offense was committed (1948) (*Singh v. the United Kingdom*, 23389/94, §§ 27-28, 21 February 1996, ECHR). English law imposes a mandatory sentence for the offense of murder in respect of offenders under the age of 18 known as detention during Her Majesty's Pleasure (section 53(1) of the Children and Young Persons Act 1933); in respect of offenders between the ages of 18 and 20 years, custody for life (section 8(1) of the Criminal Justice Act 1982), and in respect of offenders aged 21 and over, life imprisonment (section 1(1) of the Murder (Abolition of Death Penalty) Act 1967) (*Waite v. the United Kingdom,* 53236/99, § 37, 10 December 2002, ECHR). Detention at His Majesty's Pleasure can also be applied to an adult offender, and such a possibility is provided by the Mental Health Act 1983.When someone is detained at His Majesty's Pleasure, especially under a mental health context, it's often because they've been found not guilty by reason of insanity or unfit to plead, or they've been convicted of an offense where a psychiatric disposal is deemed more appropriate than a penal sentence. Otherwise, the term "at His Majesty's Pleasure" originates from the power of the monarch to imprison subjects (Watts, 2025).

There is an opinion that the king, though invoked in sentencing, isn't personally aware of every prosecution upheld in his name. He might, in high-profile cases that have caught his attention, take some abstract pleasure in the knowledge that order is being maintained, and that those who challenge it are being separated from 'productive' society in prisons that theoretically belong to him (His Majesty's Prisons). His role here is predominantly as a vessel for interests and desires beyond his own. In short, his personal relationship to pleasure is not important, but when figured as a metonym, it serves a significant purpose for the state. In addition, to be sentenced "at His Majesty's pleasure" is an example of how the British state dominates time and harnesses suspense as a means of control. This sentence means that the point at which the convict's time will be returned to them to be disposed of as they choose is undetermined (Freedman, 2025, pp. 1, 54).

On several occasions, the institution "at His Majesty's pleasure" has expressed its position regarding human rights standards and the ECHR. In the case of *Singh v. the United Kingdom*, the court in Strasbourg stated that the Parole Board does not meet the requirements for deciding on deprivation of liberty because it cannot order the release of a prisoner (National Assembly, 2003, Art. 5, para. 4). The lack of an adversarial procedure before the Parole Board also prevents it from being considered a court or a body similar to a court that can decide on the justification of deprivation of liberty. It is crucial in cases where the assessment of the character or mental state of the applicant is being decided that they be present at the oral hearing. The Court's position is that in situations involving a significant prison sentence, where the characteristics related to the individual's personality and level of maturity are important for deciding whether they would pose a danger if released, an oral hearing within an adversarial procedure that includes legal representation and the possibility of calling and examining witnesses is necessary. The possibility for the applicant to receive an oral hearing in the proceedings for judicial review of the decision is not sufficiently certain to be considered to meet the Strasbourg standards (*Singh v. the United Kingdom*, 1994/ 1996, §§ 66-69). On the same day, a decision was made on the case of *Hussain v. the United Kingdom* (*Hussain v. the United Kingdom*, 21928/93, §§ 58-61, 21 February 1996, ECHR).

On 1 October 1997, section 28 of the Crime (Sentences) Act 1997 was brought into force in order to implement the judgments of the European Court in the Hussain and Singh cases. This section provides that, after the tariff period has expired, it shall be for the Parole Board, and not, as previously, for the Secretary of State, to decide whether it is safe to release on license an offender serving a sentence during Her Majesty's pleasure for an offense of murder committed before the age of 18. Over the years, the Secretary of State has adopted a "tariff" policy in exercising his discretion regarding whether to release offenders sentenced to life imprisonment. In essence, the tariff approach involves breaking down the life sentence into component parts, namely retribution, deterrence, and protection of the public. The "tariff" represents the minimum period that the prisoner will have to serve to satisfy the requirements of retribution and deterrence. The Home Secretary will not refer the case to the Parole Board until three years before the expiry of the tariff period and will not exercise his discretion to release on license until after the tariff period has been completed (*V. v. the United Kingdom*, 24888/94, § 40, 16 December 1999, ECHR).

The problem of "tariff" policy was considered in the case *V. v. the United Kingdom*. The Court recalls that where a national court, after convicting a person of a criminal offense, imposes a fixed sentence of imprisonment for the purposes of punishment, the supervision is incorporated in that court decision in accordance with the provisions of the Convention (National Assembly, 2003, Art. 5, para. 4). This is not the case, however, in respect of any ensuing period of detention in which new issues affecting the lawfulness of the detention may arise. The Court has already determined that the failure to have the applicant's tariff set by an independent tribunal gives rise to a violation of that provision (National Assembly, 2003, Art. 6, para. 1). Accordingly, given that the sentence of detention during Her Majesty's pleasure is indeterminate and that the tariff was initially set by the Home Secretary rather than the sentencing judge, it cannot be said that the supervision (National Assembly, 2003, Art. 5, para. 4) was incorporated in the trial court's sentence. Moreover, the Home Secretary's decision setting the tariff was quashed by the House of Lords on 12 June 1997 and no new tariff has since been substituted. This failure to set a new tariff means that the applicant's entitlement to access a tribunal for periodic review of the continuing lawfulness of his detention remains inchoate. It follows that the applicant has been deprived, since his conviction in November 1993, of the opportunity to have the lawfulness of his detention reviewed by a judicial body (National Assembly, 2003, Art. 5, para. 4) (*V. v. the United Kingdom*, 1994/ 1999, §§ 119–122).

In the case of *Waite v. the United Kingdom*, the applicant was released on life license in January 1994 after the expiration of his tariff. He was recalled to prison on 21 July 1997 by the Secretary of State on the recommendation of the Parole Board following concerns regarding his conduct, which included drug misuse, a sexual relationship with a minor, attempted suicide, and failure to maintain contact with his supervising probation officer. While the Parole Board considered the applicant's written representations regarding his recall on 5 September 1997, no oral hearing took place, and the applicant had no opportunity to examine or cross-examine witnesses relevant to the allegations that his conduct posed a risk to the public. The applicant should have received such a hearing under the administrative provisions in effect pending the entry into force of the Crime Sentences Act 1997. The Court is not persuaded by the Government's argument, which appears to be based on the speculative assumption that whatever might have occurred at an oral hearing, the Board would not have exercised its power to release. In matters of such crucial importance as the deprivation of liberty and where questions arise involving, for example, an

assessment of the applicant's character or mental state, the Court's case law indicates that it may be essential to the fairness of the proceedings that the applicant be present at an oral hearing. In such a case as the present, where characteristics pertaining to the applicant's personality and level of maturity and reliability are of importance in deciding on his dangerousness, the provisionas of the Convention (National Assembly, 2003, Art. 5, para. 4) require an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses (*Waite v. the United Kingdom*, 1999/2002, §§ 57–59).

In Serbian criminal law, the institution that has certain similarities to with the detention "during Her Majesty's pleasure" is the security measure of mandatory psychiatric treatment and custody in a healthcare institution (National Assembly of the Republic of Serbia, 2005, Art. 81). This security measure can be imposed on a person who has committed a criminal offense while in a state of significantly reduced accountability, or on a person who has committed an illegal act that is provided for as a criminal offense in the law. If there is a suspicion that the perpetrator was of diminished capacity or non-accountable at the time of committing the act, the public prosecutor or court will order a psychiatric evaluation (Vuković, 2021, pp. 514–515).

When it comes to a perpetrator who committed a criminal offense in a state of significantly diminished accountability, the court will impose mandatory psychiatric treatment and confinement in an appropriate health institution if, considering the committed criminal offense and the state of mental disorder, it determines that there is a serious danger that the perpetrator will commit a more serious criminal offense and that, in order to eliminate this danger, his treatment in such an institution is necessary (National Assembly, 2005, Art. 81, para. 1). The condition for assessing the severity of the criminal offense is not more closely defined in the law, and it concerns a future act. Although judicial practice does not accept the limitation that a prison sentence of at least five years must be prescribed for a future act, there is a view in doctrine that it is unacceptable for a measure *of unlimited* duration to be imposed if the risk relates exclusively to lesser criminal offenses (Vuković, 2021, p. 515). If the conditions for imposing this criminal sanction are met, the court will impose mandatory treatment and confinement in a health institution for a perpetrator who committed an illegal act provided for in the law as a criminal offense while in a state of non-accountability. The court will suspend the imposed measure when it determines that the need for treatment and the custody of the perpetrator in a health institution has ceased (National Assembly, 2005, Art. 81, para. 2-3). Since this is a security measure of a medical nature, the court does not determine its duration when pronouncing it, but the institution where the measure is executed and the success of the treatment gives the final word. If imposed alongside a prison sentence, this measure may last longer than the imposition of the sentence (Vuković, 2021, pp. 515–516).

The execution of the security measure of mandatory treatment and custody in a health institution is regulated by legal provisions relating to the execution of criminal sanctions. Thus, the obligation of the health institution, or the department to which the person is sent for treatment and custody, is prescribed to inform the court that imposed the measure at least once a year about the health status of the person to whom it applies (National Assembly of the Republic of Serbia, 2014, Art. 198). Regarding the suspension or execution of the imposed security measure, in addition to the mentioned law, there are several articles in the legal provisions on criminal procedure concerning this issue. According to the first provision, the proposal for suspension or replacement of the measure is sent to the court by the institution where the

measure is executed, and such an obligation exists when the institution believes that the treatment is completed (National Assembly, 2014, Art. 199, para. 1–2).

Although the procedure for suspending the security measure of mandatory psychiatric treatment and custody in a healthcare institution is regulated by the provisions of procedural legislation, there are noticeable differences compared to the legal provisions on the execution of criminal sanctions. These relate to a broader circle of authorized proposers, as well as the obligation of the court to *ex officio* examine the justification for the continued duration of the security measure. Namely, the court that adjudicated in the first instance in which the security measure was imposed will examine, at the proposal of the healthcare institution, the guardianship authority, or the accused to whom the security measure was imposed, or ex officio every nine months whether the need for treatment and custody in the healthcare institution has ceased. After taking a statement from the public prosecutor, the court will suspend this measure by decision and order the release of the accused from the healthcare institution if it determines, based on the doctor's opinion, that the need for treatment and custody in the healthcare institution has ceased, and it may also order his mandatory psychiatric treatment in freedom. If the proposal for the suspension of the measure is rejected, it may be resubmitted after six months from the date of the adoption of that decision (National Assembly, 2011, Art. 531, para. 1–2).

It has been pointed out in the doctrine that there is a discrepancy in these legal solutions, given that the accused has a legitimate interest in requesting a review of the need for further psychiatric treatment and detention in a healthcare institution; therefore, priority should be given to the solution contained in procedural legislation. The question is open as to what the legislator meant by the reason for the suspension of the security measure, i.e., whether it is only about the completion of treatment or whether it can also refer to cases such as the terminal stage of illness or the death of the accused (Ilić, A., 2022, pp. 365-366). If the solution regulates the decision-making process regarding the suspension of the security measure. Considering the obligation of psychiatric treatment and custody in a healthcare institution (National Assembly, 2011, Art. 531) in light of the standards set by the ECHR, it can be said that it does not fully meet the Strasbourg standards. The lack of an oral hearing for the accused and the absence of adversarial proceedings represent fundamental shortcomings that should be pointed out.

Finally, but no less importantly, attention will also be drawn to the legal provisions concerning the treatment of individuals with mental disorders. An individual with a mental disorder may be held in a psychiatric institution without consent, and the decision regarding this is made by a psychiatrist. Although the law stipulates that the psychiatrist has an obligation to appropriately communicate and explain the decision to the individual with a mental disorder and to inform them of their rights and duties (National Assembly of the Republic of Serbia, 2013, Art. 24, para. 1 and 3), the question is whether this solution can be effectively implemented in practice. If on the first subsequent working day the psychiatric institution's council decides to keep the individual for further hospital treatment, the institution is obliged to notify the competent court of their detention within 24 hours, along with the medical documentation and an explanation of the health reasons for the detention. The notification, but without the mentioned documentation and explanation, is provided by the psychiatric institution to the individual with a mental disorder, their legal representative if known, one of the close family members, and the competent guardianship authority (National Assembly, 2013, Art. 24, para. 4 and Art. 25, para. 2-3). It can be noted that in the case of an unknown or non-existent legal representative, an absent or non-existent member of

the immediate family, only a person with mental disabilities and the guardianship authority remain as recipients of the notification. There is not a word about the attorney appointed by the court ex officio, and there is no need to even mention the chosen attorney.

Given the urgency of the procedure and the court's obligation to hold a hearing at which, in addition to the members of the immediate family of the person with mental disabilities, a person whom the person with mental disabilities trusts may, *with the court's permission*, attend, provided that the mentally ill person or their representative does not object. Regarding the attorney of the person with mental disabilities, the possibility is prescribed that they can also attend (National Assembly, 2013, Art. 28, para. 1, 3-4), which in other words means that engaging an attorney is only an option; that is, there is no appointment of an attorney *ex officio*.

The court is obliged to hold a hearing in a psychiatric institution within three days from the date of receipt of the notification about the detention of a person with mental disorders (it should not be forgotten to include the appropriate documentation and justification of the reasons provided by the panel of psychiatrists) and to hear the person whose detention is being decided. Moreover, it is not specified whether and how individuals who may attend the hearing can contribute to the procedural discussion. That it is a secondary role can be concluded from the legal provision that stipulates the court's *obligation* to obtain the findings and opinion of a psychiatrist before making a decision on the detention or release of a person with mental disorders, while the court only has the *possibility* to request information from guardianship authorities, close family members, or other individuals who can provide information relevant to the decision-making process. The court is obliged to decide on the detention without the consent of the person with mental disorders within three days of holding the hearing (National Assembly, 2013, Art. 29 and Art. 32, para. 1 and 4).This decision determines the duration of detention in a psychiatric institution, which cannot exceed 30 days, but the detention can be extended for up to three months, and each subsequent extension can last up to six months, with the obligation of the psychiatric institution to submit quarterly reports on the health status of individuals with mental disorders, and more frequently if required by the court (National Assembly, 2013, Art. 33 and Art. 34, para. 3–5).

Final considerations

The expert knowledge that, unlike the prosecuting authority, an expert possesses raises the question of the extent to which the court is able to assess the evidentiary value of findings and opinions. Understandings regarding this are divided, from those in which science, through experts, becomes increasingly the judge in the area of facts, and the judge becomes the adjudicator, to the view that the court is invited to assess the findings and opinions of the expert according to its free judicial conviction. Although it has been theoretically emphasized that the assessment of the evidential value of the expert opinion is preceded by the assessment of the parties at the main hearing, this possibility only gained real meaning with the introduction of the institution of the expert advisor (National Assembly, 2011, Art. 125–126). In any case, the court's disagreement with the expert's opinion should result in the fact that a certain fact that was to be established by the expertise cannot be considered established, which opens the space for the application of the rule *in dubio pro reo*. On the other hand, it is undisputed that the findings and opinions represent evidence that has a "special treatment" in judicial practice. This is also evidenced by the views expressed in the practice of Serbian courts that, according to free judicial

conviction, the court does not have to accept the expert's opinion, but it cannot draw conclusions that are contrary to the expert's opinion, and in some decisions, it is expressed that the expert's opinion must be accepted as credible evidence unless proven otherwise, which greatly calls into question the free judicial conviction. In any case, before proceeding to assess the evidential value of the expertise, there is the possibility of taking certain measures aimed at eliminating potential deficiencies in the findings and opinions (National Assembly, 2011, Art. 124) (Ilić *et al*., 2024, p. 453).

It is emphasized in the doctrine that psychiatric expertise, unlike all other types of expertise, cannot be replaced by any other method, which serves as a justification for linking the determination of sanity exclusively to psychiatric expertise (Grubiša, 1964, p. 440). This opinion does not take into account that another special type of expertise - autopsy expertise, cannot be replaced by any other evidence (in this paper, an example of "suspicious" death (*mors dubitationem*) of a suspect who died due to police torture is mentioned). The cited author believes that in the absence of psychiatric expertise or when the court does not accept the findings and opinions of the expert, the way out of this procedural situation should be sought in the principle *in dubio pro reo*. In other words, the emergence of doubt about sanity can only be resolved by psychiatric expertise, and if sanity is not proven, it is assumed that the accused is insane. In the event that the court does not accept the expert's opinion, it is assumed that sanity has not been proven, and in that case, the procedure is conducted in accordance with the principle *in dubio pro reo* (Grubiša, 1964, p. 441).

The author acknowledges that courts do not act in this way but strive to eliminate deficiencies in the findings and opinions of experts or draw conclusions contrary to their opinion that the accused is not accountable (Grubiša, 1964, p. 448). It could be said that this, in a certain way, confirms the views expressed in this paper, particularly the term - medical power which is found in its title. It has been explained how the investigative model has become dominant in the countries of continental Europe, which is related, among other things, to the advancement of knowledge in various scientific fields, especially in medicine. In addition, the activist model of the state presupposes a criminal procedure in which experts, both legal and from other fields, particularly the medical profession, will play a leading role. It is not insignificant that the determination of expert opinions is in the hands of the procedural authorities, while the opposing party can, at best, use a procedural institution such as an expert advisor. In this way, at least to a certain extent, conditions are created for a debate regarding expert issues to which the court is unable to provide a satisfactory answer. Finally, but no less important, it should be noted that behind certain cases present in the Serbian public, where medical power has come to the fore, there is another kind of power, much stronger than medical knowledge. This is political power which, in systems resembling ours, is characterized, according to Arendt, that also been frequently observed that the relationship between the two sources of authority, between state and party, is one of ostensible and real authority, so that the government machine is usually pictured as the powerless façade that hides and protects the real power of the party (Arendt, 1973, p. 395).

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Kultura polisa
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Medicinska moć i krivični postupak

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Sažetak

Dugo vremena je jedna od privilegija karakterističnih za suverenu moć bilo pravo nad životom i nad smrću. U klasično doba je na Zapadu došlo do preoblikovanja postojećih mehanizama moći, pa je, prema Fukoovom mišljenju, umesto starog prava da se osudi na smrt ili ostavi u životu stupila na scenu moć da se ostavi u životu ili odbaci u smrt. Preobražaj mehanizama moći doveo je do prelaska na istražni model krivičnog postupka u kojem je rasprava o *causa criminalis* prešla na teritoriju znanja. Značajan uticaj na uvođenje istrage u krivičnoj materiji imao je razvoj istražnih metoda u sticanju prvih ekonomskih i upravnih znanja. Pojedini autori navode da su u XVI i XVII veku razmišljanja o medicini, botanici i zoologiji bila kao zbirka svedočenja. Zbog toga se i u krivičnom postupku poseban značaj pridaje stručnjacima koji imaju posebna nepravna znanja, i kao takvi su kvalifikovani da saopšte istinu. Uloga veštaka medicinske struke specifična je po tome što, pored davanja iskaza o predmetu veštačenja, raspolažu u suštini i sudskim ovlašćenjima, jer njihovo mišljenje ima presudan uticaj na ograničenje određenih osnovnih sloboda i ljudskih prava. U radu će biti anlizirane i odredbe pojedinih domaćih zakona, kao i standardi Evropskog suda za ljudska prava izraženi u vezi s pravnom ustanovom engleskog prava „*at Her Majesty's pleasure*".

Keywords: moć, istina, krivični postupak, veštak, medicinska moć, osnovne slobode i ljudska prava.