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HOMICIDE MOTIVES

Abstract

The "Homicide murders" by Aleksandar B. Djurić is dedicated to the research of a significant theoretical and practical relationship of criminal motives in the criminal law. Correct understanding of the delinquency motive (and its motivation as well) is imperative in upgrading the operation quality of public-law organs and courts in the sphere of criminal jurisprudence, especially related to the legal qualification of criminal offenses and meting out punishments for their commitment. However, the public-law doctrine does not offer uniform resolutions of the concept of criminal motives, their classification, the compulsory quality of their determination and legal procedural identification, etc. The actuality of investigating this component of the subjective aspect of delinquency and its motives is related to the reform of criminal legislation, implying the Serbian Criminal Legislation as well.

Key words: *criminal motive, motivation, delictual fault, intention, deliberate offense, in willful negligence, with possible intentional fault, murder in the first degree (willful homicide), murder in the second degree (manslaughter through negligence).*

УМЫШЛЕННЫЕ УБИЙСТВА

Абстракт

Данная статья посвящена исследованию важных теоретических и практических мотив проблемы взаимоотношений в области уголовного права. Правильное понимание мотивов преступности (равно как и его мотивации), это необходимо для улучшения качества деятельности всех конституционных органов и судов в сфере уголовной юриспруденции, особенно в юридической квалификации преступления и наказания за их исполнением. Однако, в доктрины уголовного права, нет единства в решении вопроса о концепции уголовной мотивы, их классификация, их обязательное выявление и раскрытие и так далее. Уровень значимости исследований компонентов субъективного преступности, а также его мотив, связанный с реформой уголовного законодательства в этой области и сербской уголовного законодательства.

Ключевые слова: *уголовный мотив, мотивировка, мотивация, вина, умысел, преднамеренность, умышленное убийство.*

УМИШЉАЈНА УБИСТВА

Апстракт

Чланак је посвећен истраживању важног теоријског и практичног односа проблема мотива у кривичном праву. Правилно разумевање мотива делинквенције (као и његове мотивације), неопходно је због побољшавања квалитета делатности државноправних органа и судова у сфери кривичне јуриспруденције, а нарочито код правне квалификације деликата и одмеравања казне за њихово извршење. Међутим, у кривичноправној доктрини нема јединства у погледу решења питања појма криминалних мотива, њихове класификације, обавезности утврђивања и процесног откривања итд. Степен актуелности истраживања такве компоненте субјективне стране делинквенције, као и његових мотива, повезана је са реформом кривичног законодавства, а у том смислу и српског кривичног законодавства.

Кључне речи: криминални мотив, мотивираност, мотивација, кривица, намера, умишљај, умишљајно убиство.

1. Introduction

The following empirical, comparative law research of the criminal acts in Ukraine and Serbian criminal jurisdiction practice has been carried out with the aim of clearer perception of the criminal motive phenomenon. The research was done on the territory of the Regional Court of Kiev and the District Court of Nis.

The subjects of the research were the facts relevant for determining the content of criminal motives of the concrete criminal affair.

The scope of the research included the practical fulfilling of the legal norms in Ukraine and Serbian criminal legislation that regulates the content and the importance of the criminal motives for the establishing of guilt in legal practice. The research also included the analysis of the justification of the scientific attitudes about criminal motives and criminal motivation.

We analyzed the most frequent forms of the incrimination from chapter II of the Special part of the Ukraine Criminal Code - ***Crimes against Human Life and Health***, and particularly ***willful homicide*** - (a) murder; (b) murder in the first degree (b-1) of two or more people, (b-2) under-age child or pregnant woman, (b-3) fiancé or fiancée, (b-4) committed with extreme fierceness, (b-5) committed in the way dangerous for a larger number of people, (b-6) out of utilitarian motives, (b-7) out of hooligan motives, (b-8) murder of a close relative of a person who performs official or civil service with the aim of preventing or disabling of undertaking measures or performing the official and civil service, (b-9) committed with the aim of concealing another crime or enhance its committing, (b-10) committed with rape or violent satisfaction of sexual drives in unnatural way, (b-11) ordered murder, (b-12) committed according to the previous agreement of a group, (b-13) committed by a person who has already committed an offence, not including the murder regulated in article 116-118 of this Code (article 115 of the Criminal code of Ukraine); and (c) Murder committed in the state if intense psychological excitement (article 116 of the Criminal Code of Ukraine); as well as the incriminations from the chapter 13 of The Special Part of the Criminal Code of

Serbia - *Criminal Acts against Life and Body*, and especially willful homicides - (a) murder (article 113. of the Criminal Code of Serbia); (b) murder in the first degree committed in (b-1) cruel and perfidious way, (b-2) in cold-blood, violent way, (b-3) by a willful endangering of another person's life, (b-4) during committing a criminal act of banditry or robbery, (b-5) out of a personal benefit, with the aim of committing or concealing another criminal offence, out of cold blood revenge or other base motives, (b-6) murder of a civil servant or a military person while on duty, (b-7) murder of a child or a pregnant woman, (b-8) murder of a member of murderer's own family, who he abused previously, (b-9) willful murder of more people if it is not a murder in an instant or infanticide during delivery or a murder out of mercy (Article 114 of the Criminal Code of Serbia); and (c) murder in an instant (Article 115 of the Criminal Code of Serbia).

The main aims of our research are: (1) analysis of the criminal law data existing in the criminal case documents ad act relevant for establishing the content of the criminal motives; (2) analysis of the contents and practical relevance of the concrete criminal motives and the establishment of the criminal motives in accordance with legal measures, in the criminal proceedings concerning the criminal case in question; (3) analysis of the contents and the establishment of the types of criminal motivation in accordance with the legal measures in the criminal proceedings concerning the criminal case in question.

Bearing in mind that the research was done for a period of five years 1992-1997, when the Criminal Code from 1960 was valid in Ukraine and the Criminal Code from 1997 with changes and additions was valid in Serbia together with the Organic Law from 2003 researched incriminations from the irrevocable judicial acts of these states were legally classified in the sections of the Criminal law not valid at present. That is why the numeration of the sections of the analyzed incriminations shown in the tables doesn't match the numeration of the sections of the analyzed incriminations of the irrevocable judicial acts-verdicts.

2. Research results

Empirical basis of our research on the territory of Ukraine consists of 157 criminal cases of willful homicide (article 115-116 of the Criminal Code of Ukraine) with 235 guilty people, found guilty of committing these incriminations or for complicity. These criminal cases were analyzed by the division of the Regional Court of Kiev. On the territory of Serbia there were 35 criminal cases of willful homicide (article 113-115 of the Criminal Code of Serbia) with 48 persons found guilty of committing these incriminations or for complicity. These cases were analyzed by the division of the District Court in Nis, during the period of 6 years, from 1992 till 1997 (table 1).

We also analyzed all the criminal law provisions connected with the willful homicides from the Criminal Code of Ukraine (article 13 of the Criminal Code of Ukraine - completed and uncompleted crime, article 14 of the Criminal Code of Ukraine- planning of the crime, article 15 of the Criminal Code of Ukraine - the attempt to commit the crime, article 16 of the Criminal Code of Ukraine - criminal law responsibility for the attempted uncompleted crime, article 17 of the Criminal Code of Ukraine - voluntary desistance from the crime that was not completed, article 18-19 of the Criminal Code of Ukraine - subject of the crime and the existence of the previous sentencing, article 20 of the Criminal Code of Ukraine - limited consciousness, article 21 of the Criminal Code of Ukraine – criminal law responsibility for the crimes committed under the influence of alcohol, narcotics etc., article 26-27 of the Criminal Code of Ukraine - complicity and different kinds of complicity, article

28 of the Criminal Code of Ukraine - committing the crime by a group of people, group formed according to a previous agreement, organized group or criminal organization, article 29 of the Criminal Code of Ukraine - criminal law responsibility of the accomplice, article 30 of the Criminal Code of Ukraine - criminal law responsibility of the organizers and the members of the organized group of the criminal organization, article 31 of the Criminal Code of Ukraine - voluntary desistance of the accomplice, article 32-35 of the Criminal Code of Ukraine- repetition, plurality of the offences or recidivism of the crime, article 36, part 3, articles 37-38, and article 39, part 2 of the Criminal Code of Ukraine - criminal law responsibility for the excessive self-defense, putative defense and exceeding the limits of the necessity, article 65 of the Criminal Code of Ukraine- general rules about the establishment of punishment, article 66-67 of the Criminal Code of Ukraine - mitigating and aggravating circumstances for the establishment of punishment, article 68 of the Criminal Code of Ukraine - establishment of punishment for the crime that was not completed and for the crime committed in complicity, article 69 of the Criminal Code of Ukraine - mitigating of the punishment prescribed by law, article 118 of the Criminal Code of Ukraine - willful homicide by excessive self- defense and exceeding the limits of necessity, article 120 of the Criminal Code of Ukraine- incitement of suicide, article 121 of the Criminal Code of Ukraine - willful serious bodily injury, article 122 of the Criminal Code of Ukraine - willful medium bodily injury, article 123 of the Criminal Code of Ukraine - willful serious bodily injury inflicted in the state of intense psychological excitation and other willful incriminations from the group of the crimes against human life and health) and Serbian Criminal Code (article 19, part 3 and article 20, part 3 of the criminal code of Serbia - willful murder by excessive self-defense or exceeding the limits of necessity, article 24 of the Criminal Code of Serbia - deviated limitation of consciousness, article 27 of the Criminal Code of Serbia - responsibility for a serious consequence, article 30-32 of the Criminal Code of Serbia - responsibility for attempted criminal act and voluntary desistance, article 33-37 of the Criminal Code of Serbia – complicity in a criminal act,)participation, incitement and help), article 55 of the Criminal Code of Serbia - establishment of the punishment for e repeated offence, article 56 of the Criminal Code of Ukraine - prolonged criminal offence, article 117 of the Criminal Code of Serbia - murder out of mercy, article 19 of the Criminal Code of Serbia- inciting of suicide and help in suicide, article 121 of the Criminal Code of Serbia - serious bodily injury, article 122 of the Criminal Code of Serbia - light bodily injures, article 123 of the Criminal Code of Serbia- participating in a fight, article 124 of the Criminal Code of Serbia - threatening with a dangerous weapon in a fight or argument, and other willful incriminations from the group of criminal offences against life and body).

Table 1. The number of criminal cases for which a sentence was delivered from 1992-1997

(1-a) The Regional Court of Kiev

YEAR	THE NUMBER OF CRIMINAL CASES (article 115-116 of the CC of Ukraine)	THE NUMBER OF THE ACCUSED-GUILTY
1992	30	42
1993	15	27
1994	26	40
1995	22	36
1996	34	53
1997	30	37
total	157	235

(1-b) The District Court of Nis

YEAR	THE NUMBER OF CRIMINAL CASES (Article 113-115 of the Criminal Code of Serbia)	THE NUMBER OF THE ACCUSED-GUILTY
1992	6	9
1993	4	5
1994	6	8
1995	5	7
1997	7	11
1998	7	8
total	35	48

Analysis of the data of the people found guilty of willful homicide contains following information (Tables 2-7): (1) number of the people found guilty of committing or complicity in committing willful homicide; (2) the sex of the accused; (3) marital status of the accused; (4) education of the accused; (5) social status of the accused; (6) previous conviction of the accused- repetition of an offence; (7) influence of the criminal motives on the content of the plea of guilty the degree of guilt establishment in preliminary investigation proceedings and criminal proceedings; (8) influence of the motives on the legal change of classification and on establishing the content of guilt in preliminary investigation proceedings and criminal proceedings; (9) kinds of criminal motives and types of criminal motivation.

Of 235 people accused for willful murder on the territory of Kiev, the majority of people are 18-25 years old, 81 or 31.46% (male sex 78 or 33.19%, and female sex 3 or 1.27%) while from 12 people charged with willful homicide, majority of the accused is 14-18 years old, 4 or 33,33%. The majority of the accused 18-25 years old is not married (65 or 27.65%) and the second group is 25-30 years old and they are married (21 or 8.93%) and in the end the accused who are 40 or more years old, and who are divorced (11 or 4.68%)-table 2-a.

On the territory of Nis, out of 48 people accused for willful homicide, the majority is 18-25 years old, 18 or 37.13% (male sex 17 or 35.07% and female sex 1 or 2.06) while out of 6 persons of female sex accused for willful homicide, the majority of people is 25-30 years old, 2 or 4.15%. The following group consists of people who are 25-30 years old and who are married (6 or 54.54%) and finally the accused older than 40 who are divorced (3 or 60%) - table 2-b.

Table 2. Age, sex and marital status of the accused for willful homicide

(2-a) Article 115-116 of the Criminal Code of Ukraine

AGE	NUMBER OF THE ACCUSED-GUILTY	SEX		MARITAL STATUS		
		male	female	married	not married	divorced
file number 1-6 (1992-97)	total 235					
14-18	41	37	4	-	41	-
19-25	81	78	3	13	65	3
26-30	44	43	1	21	18	5
31-35	25	25	-	10	8	7
36-40	13	12	1	4	6	3
over 40	31	28	3	13	7	11

(2-b) Article 113-115 of the Criminal Code of Serbia

AGE	NUMBER OF THE ACCUSED-GUILTY	SEX		MARITAL STATUS		
		male	female	married	not married	divorced
file number 1-6 (1992-97)	total 235					
14-18	8	7	1	-	8	-
19-25	18	17	1	1	16	1
26-30	11	9	2	6	4	1
31-35	4	3	1	2	2	-
36-40	2	2	-	1	1	-
over 40	5	4	1	1	1	3

Out of the total number of the accused, the majority of them has finished high school (133 or 56.59% on the territory of Kiev, and 26 or 54.16% on the territory of Nis, and the minority has graduated at university (9 or 3.82% on the territory of Kiev or 2.08 on the territory of Nis), The social status of the accused for willful homicide shows that the majority of the accused is unemployed (119 or 50.63% on the territory of Kiev or and 34 or 70.83% on the territory of Nis) while 102 or 43.40% are employed on the territory of Kiev and 15 or 31.25% on the territory of Nis (table 3).

Table 3. Age, level of education, social status of the accused for willful homicide

(3-a) Article 115-116 of the Criminal Code of Ukraine

AGE	LEVEL OF EDUCATION				EMPLOYMENT	
	primary	secondary	high school	university	employed	unemployed
file number 1-6						
14 - 18	35	6	-	-	19	22
19 - 25	28	45	8	-	28	53
26 - 30	6	32	4	2	22	22
31 - 35	1	20	2	2	10	15
36 - 40	1	10	1	1	9	4
over 40	4	20	4	4	14	17
total	75	133	19	9	102	119

(3-6) Article 113-115 of the Criminal Code of Serbia

AGE	LEVEL OF EDUCATION				EMPLOYMENT	
	primary	secondary	high school	university	employed	unemployed
14 - 18	7	1	-	-	-	8
19 - 25	6	11	1	-	4	14
26 - 30	4	6	1	1	6	6
31 - 35	1	3	-	-	2	2
36 - 40	-	2	-	-	1	1
over 40	1	3	1	-	2	3
total	19	26	3	1	15	34

People who are guilty of willful homicides are usually multiple recidivists (table 4). The repeated offences were most often on the territory of Kiev during 1993, 23 or 9.78% and on the territory of Nis during 1996, 6 or 12.05%. The period with the smallest number of repeated offences was 1996 in Kiev, 3 or 1.27% and in Nis 1992, 3 or 6.25%. First repeated offence in Kiev occurred only in two cases in 1997 and in Nis in 7 cases, for the period 1992 and 1997.

Table 4. REPEATED OFFENCES OF WILLFUL HOMICIDE

(4-a) Article 115-116 of the Criminal Code of Ukraine

YEAR	NUMBER OF THE ACCUSED-GUILTY	REPEATED OFFENCES		
		total 235	single	multiple
1992	42	-	5	33
1993	27	-	23	58
1994	40	-	18	26
1995	36	-	7	18
1996	53	-	3	10
1997	37	2	9	20

(4-6) Article 113-115 of the Criminal Code of Serbia

YEAR	NUMBER OF THE ACCUSED-GUILTY	REPEATED OFFENCES		
		total 235	single	multiple
1992	9	1	3	5
1993	5	-	4	1
1994	8	1	4	3
1995	7	2	1	4
1996	11	2	6	3
1997	8	1	4	3

Ukraine federal legislator regulates willful homicide committed by a person who has already committed offence, not including the murder regulated in the article 116-118 of this Criminal Code (article 115 of the Criminal Code of Ukraine). Very dangerous recidivist or special recidivist is a guilty person who has previously committed one or more offences regulated by article 115 of the Criminal Code of Ukraine. Under the expression 'person who has previously committed willful homicide' legislator implies: (1) that the previous crime and the new crime were committed by the same person in different time periods; (2) that the criminal law acts of the previous and the new crime were not caused by the same criminal intent; (3) that each of the committed offences has as a result willful homicide, attempted willful homicide or complicity in willful homicide - qualified in article 14, part 1 or article 15 or article 27 of the Criminal Code of Ukraine; (4) the first out of previous murders is qualified or has been qualified according to article 115 of the Criminal Code of Ukraine; (5) at the moment of committing the second or the next offence the period of prescription of legal action was not over for the first crime or for that crime the recidivists sentence is not yet over; (6) the second crime for which

legislator uses the term next offence contains elements of the incrimination from article 115 of the Criminal Code of Ukraine.¹

Identical to Serbian, criminal proceedings in Ukraine put accent on the necessity of establishing motives of criminal offences. In accordance with article 64, part 2 of the Code of Criminal proceedings of Ukraine, crime motives must be established and proved during carrying out and executing the acts in preliminary criminal proceedings criminal proceedings. Also, the motives of the committed crime must be produced in the accusing judicial act (article 223 of the Criminal Proceedings Code of Ukraine) and in judicial act of verdict. (article 334 of the Criminal Proceedings Code of Ukraine).

Going through the criminal cases related to the article 115-116 and article 113-115 of the Criminal Code of Serbia, we carried out analysis of the content and the degree of establishing of criminal motives in accusing and criminal acts of verdict (table 5). Depending on the intensity and the degree of the establishing of the criminal motives in analyzed criminal cases, we classified the motives for willful homicide in three groups: (1) directly labeled; (2) indirectly labeled; (3) unlabeled.

The results of the research show the same trend of the Ukraine and the Serbian legal criminal practice - in the majority of the committed willful homicides the content of the criminal motives is not established. Consequently, in preliminary criminal proceedings the state organs of Ukraine have directly established and in the arraignment labeled the criminal motives in 35 cases or 8.53% while state organs of Serbia established and labeled in arraignment the criminal motives in 36 cases or 7.51%; in 213 cases or 51.95% the state organs of Ukraine indirectly established and labeled in arraignment the criminal motives while the same was done by the state organs of Serbia in 243 cases or 50.73%; in 162 criminal acts or 39.51 the state organs of Ukraine didn't establish, nor label the criminal motives in arraignment, while the same wasn't done by the state organs of Serbia in 200 cases or 41.75%. In criminal proceedings the state organs of Ukraine have directly established and labeled in arraignment the criminal motives in 25 cases or 8.03% and the state organs of Serbia in 29 cases or 7.33%; the state organs of Ukraine have indirectly established and labeled the criminal motives in 167 cases or 53.69%, while the same was done by the state organs of Serbia in 193 cases or 51.46%; Ukraine state organs didn't establish, nor label the criminal motives in 119 cases or 38.26%, while Serbian state organs the same didn't do the same didn't do in 153 cases or 40.80%. The fact that raises special concern is that state organs of both states didn't establish, nor label in judicial acts the criminal motives of the guilty of willful homicide, age 35-40.

¹ Оценко С.С., НАУКОВО-ПРАКТИЧНИЙ КОМЕНТАР ДО КРИМІНАЛЬНОГО КОДЕКСУ УКРАЇНИ, 4-ге видання КИЇВ, 2005, стр. 228-229.

Table 5. The influence of the criminal motives on the degree of entering the plea of guilty of the accused-guilty and the degree of the establishment of the guilt of the sentenced-guilty person

(5-a) article 115-116 of the Criminal Code of Ukraine

YEAR	THE DEGREE OF ENTERING THE PLEA OF GUILTY			THE DEGREE OF ESTABLISHMENT OF THE CRIMINAL MOTIVES IN THE ACCUSING JUDICIAL ACT			THE DEGREE OF ESTABLISHMENT OF THE CRIMINAL MOTIVES IN THE VERDICT		
	completely	partly	doesn't enter a plea of guilty	directly	indirectly	established	directly	indirectly	established
1992	4	18	19	10	37	27	6	24	14
1993	8	33	40	14	87	55	9	68	41
1994	7	11	26	5	36	27	4	32	19
1995	-	11	14	4	25	14	4	21	11
1996	1	3	9	-	12	10	1	8	9
1997	1	16	14	2	16	29	1	14	25
total	235			410			311		

(5-6) Article 113-115 of the Criminal Code of Serbia

YEAR	THE DEGREE OF ENTERING THE PLEA OF GUILTY			THE DEGREE OF ESTABLISHMENT OF THE CRIMINAL MOTIVES IN THE ACCUSING JUDICIAL ACT			THE DEGREE OF ESTABLISHMENT OF THE CRIMINAL MOTIVES IN THE VERDICT		
	completely	partly	doesn't enter a plea of guilty	directly	indirectly	established	directly	indirectly	established
1992	1	4	4	11	40	29	8	34	20
1993	1	2	2	7	45	28	5	36	22
1994	1	2	5	6	42	32	5	36	22
1995	1	3	3	8	46	26	7	37	19
1996	1	2	8	-	43	36	3	28	31
1997	-	4	4	4	27	49	1	22	39
total	48			479			375		

For the case K-82/92 criminal judicial Division of District Court in Nis didn't establish the motive of the committed criminal offence. As a matter of fact, in the irrevocable verdict reached 31.08.1992 the court decided that the accused V.C. is guilty because in the period from 15.04.1989 till 30.07.1991. as a person in charge of the bank, B, by abuse of authority, gained illegal profit by creating 19 internal money orders of false content and verified them by her signature, and used them to direct a certain sum of money from savings books and current accounts of the citizens to her own saving book and current account and in that way profit of 90.000 dinars, by which she committed offence- abuse of authority (article 242, part 1 of the Criminal Code of Serbia). Court has done a judicial qualification of the offence and concluded that the accused V.C. committed a deliberate offence according to the plea of guilty of the accused, statement of the representative of the injured party- bank, T.M., as a witness, and by reading the minute book of the court. As a matter of fact, the accused has confessed to the deed completely and explained that she acted in the same way as described in the wording of a sentence. She said that her material situation was good. Only after the proceedings started did the accused pay the compensation to the bank. In the statement of the representative of the bank as an injured party, the court has concluded that the accused worked in the bank as an individual reporter on the preparation of the material and that in that period she committed the offence in the way that was described. The witness stated that the accused was in wealthy financial situation and that the usurped property was compensated only after the beginning of the criminal proceedings. By analyzing the record of the control of the transactions of current accounts and the savings book of the accused V.C., the court has decided that the offence was committed in the way described in the wording of a sentence. On the basis of the evidence the court has in the explanation of the verdict come to the conclusion that the acts of the accused have all the characteristics of the criminal act of abuse of authority and that the offence was deliberate. The court neither asked the accused why she committed the offence nor found out the reason of her committing the offence and not paying compensation before criminal proceedings.

Analyzing the facts of the statement of the accused and witness T.M., and the facts from the record of the banking transaction of the current account and the savings book of the accused V.C. we reached the following conclusions: (1) the accused was in a good financial situation at the time of the committed criminal offence; (2) the accused has paid compensation only after the criminal offence was revealed and after the beginning of the proceeding; (3) the accused has committed a deliberate offence with the intention of gaining illegal profit; (4) the motive for committing the offence was utilitarian.

The question that arises is how the court reached the conclusion that the committed a deliberate offence, without previously revealing the motives of the criminal behavior. In the same way it is illogical to qualify this offence as abuse of authority without previously establishing existence of the utilitarian motive.

Analyzing the case from this sample, we arrived at conclusion that the court during establishing the motive and the degree of guilt for the majority of offences concerning illegal profit. We think that the judicial practice is wrong. Having in mind that the majority of offences of illegal profit have been motivated by the utilitarian motive, the court has to establish, in each case, not only the specific elements of incrimination but also the criminal motive. The complete and precise establishing of all elements of the committed offence and the content of the criminal motives is a condition for a precise legal qualification of the

offence. Also, it is necessary to establish the motive, because it carries the quality of deliberate or willful guilt.

In the case K-64/92 by a verdict of the District court in Nis dating from the 18th of November 1992, the court has reached the decision that the accused P.Z. committed a criminal offence of murder (article 47, part 1 of the Criminal Code of the Republic of Serbia). As a matter of fact, the court has wrongly qualified the criminal offence, because the criminal motive of the offence was not established. From the statement of the witnesses S.M. and C.T. it is evident that the accused borrowed the woodworker from the late S.S. on October the 1st, 1990, and promised to give it back on October the 1st 1991. After the agreed period was over S.S. has twice asked the machine back from the accused P.Z. From the statement of the witnesses N.N, M.S. and P.J. it is evident that the accused had no intention of giving back the machine he borrowed, and when the deceased S.S. said that he would sue him, the accused threatened to kill S.S. if he does that. The witness K.K. and A.A. stated that after that the accused followed a couple of times the deceased S.S. and threatened to kill him and his family with his gun. On the critical day the deceased S.S. came to the house of the accused at 9a.m. together with the authorities to take back the machine he lent by court execution. On that occasion the accused stated that he would immediately hand over the machine and told the court executors and S.S. to wait for him in the yard. After a while the accused came back carrying in his right hand the gun of trade mark "zastava 7.65mm", came on the distance of 3m from S.S., and shooting once hit him in the left part of forehead, and then right after S.S. fell on his back the accused approached him and from the distance of half meter shot once again shooting him at the middle of forehead.

The court concluded that the offence was committed in the described way by hearing the court executors A.S. and M.R., statements of the witnesses C.S., Z.Z. J.N. and N.R., as well as evidences gathered on the basis of the investigation that was carried out and the reconstruction of the criminal incident. The report of the experts of forensic medicine B.D. shows that the death consequence happened violently from the first shot and the expert in psychiatry in his statement said that the accused was completely responsible. At the court's question why he killed S.S. the accused replied he didn't know. The accused said that he didn't want to return the borrowed machine to S.S. because the business was going well. When the court asked him about the reason for his threatening to the deceased the accused said that he did it with the intention of keeping the borrowed machine although he was aware that the machine wasn't his property. On the basis of the gathered evidence and actual position, the court has concluded in the explanation of the verdict that the accused committed the crime offence willful homicide by recklessness.

Criminal Court didn't deal with the problem of gathering evidence for the motive of the committed criminal offence although from the statement of the witnesses, from the evidence gathered by investigation and reconstruction of the criminal offence, from the report of the experts of forensic medicine and psychiatry, from the way of committing the offence and the statement of the accused the conclusion that can be made is that this is the case of the first degree murder (article 47, part 2, item 4 of the previous Criminal Code of Serbia and article 114, part 1, item 5 of the Criminal Code of Serbia) where our legislator overlooked the utilitarian motive as a qualifying circumstance.

The justification for not establishing criminal motives exists only in those cases when the court concludes that the person that committed the offence was at the moment completely mentally incompetent. We think the weaker professional capabilities of some

judges for establishing the criminal motives mustn't be valid for decision whether or not to analyze and establish the motives of the criminal offences in concrete cases processed in court.

According to article 367 of Code of Criminal Proceedings in Ukraine, when the facts of the criminal case in question aren't established with the highest degree of knowledge-veracity, the judicial act pronounced in the higher instances of the trial is liable to change and revision. Anyway, our research of those criminal cases for which the criminal motives aren't established shows the existence of the traditional attitude of the Ukraine and Serbian judicial practice and in higher instances of trial the content of the criminal motives is not determined for willful homicide. Also, a large number of criminal incidents in which criminal motives are established and labeled indirectly or abstractly shows insufficient level of education of the judges of the criminal court in the demarcation between criminal motives and other subjective elements of the criminal offence. Criminal motives are rather often identified with emotions, habits or beliefs of the guilty of willful homicide. The question remains how and on what basis the Criminal Court could establish intentional or willful guilt, fix the length of punishment of imprisonment for the guilty and deliver a sentence of guilty, without previously establishing the content and intensity of the criminal motives.

The statistic fact that is very obvious and worrying concerns the wrongly established content of the criminal motives in the analyzed criminal cases. This, as a consequence had a large number of changes of qualification of the committed offences, but during this new qualification the court has also made some substitution of the criminal motives by other criminal law elements of the committed offence (aim, motive or cause of the criminal offence, emotional state of the guilty person, or the injured person etc). In that way the judge has skillfully tried to conceal the non-existence of the established criminal motives that are the basis for the existence of incriminations from article 115-116 of the Criminal Code of Ukraine and article 113-115 of the Criminal Code of Serbia. This was a frequent trend in Ukraine and Serbian Criminal law practice (table 6).

Table 6. The influence of the motives on the change of legal qualification and on the quality of the establishing the content of guilt in criminal proceedings

(6-a) Article 115-116 of the Criminal Code of Ukraine

YEAR	CHANGE OF LEGAL QUALIFICATION IN CRIMINAL PROCEEDINGS (total number 26)	THE INFLUENCE OF THE MOTIVES ON THE CHANGE OF LEGAL QUALIFICATION IN CRIMINAL PROCEEDINGS	INFLUENCE OF THE MOTIVE ON THE CONTENT OF GUILT (total number of willful murderers 17)	THE ESTABLISHMENT OF THE MOTIVES IN COURT, FOR THE GUILT IN WILLFUL MURDERS
1992	31	24	5	4
1993	50	38	5	4
1994	13	9	2	1
1995	10	9	-	-
1996	11	8	2	2
1997	11	6	3	1

(6-b) Article 113-115 of the Criminal Code of Serbia

YEAR	CHANGE OF LEGAL QUALIFICATION IN CRIMINAL PROCEEDINGS (total number 25)	THE INFLUENCE OF THE MOTIVES ON THE CHANGE OF LEGAL QUALIFICATION IN CRIMINAL PROCEEDINGS	INFLUENCE OF THE MOTIVE ON THE CONTENT OF GUILT (total number of willful murderers 17)	THE ESTABLISHMENT OF THE MOTIVES IN COURT, FOR THE GUILT IN WILLFUL MURDERS
1992	6	5	5	2
1993	10	8	4	1
1994	3	2	2	1
1995	2	2	1	1
1996	2	1	2	2
1997	2	1	3	1

Out of the total number of 157 criminal cases in Ukraine (Kiev) for the analyzed period, court changed the qualification of the criminal acts in 126 cases or 78.34% of the cases, while in 94 or 59.87% of cases the change of qualification was caused by a legal nature of the criminal motives. In Serbia, from the total number of 35 criminal cases (the city of Nis) for the analyzed period, the change of qualification was done in 25 or 71. 42% of the cases, while in 19 or 54.28% of the cases the change of qualification was caused by a legal nature of the criminal motives.

Consequently, in the case number 2-37/92, the previous legal qualification was willful homicide of the injured person J. according to the article 93, part a, e, z of the Criminal Code of Ukraine and willful homicide of the injured person B. according to section 93, part a, e, z of the Criminal Code of Ukraine. During the criminal proceedings the court concluded that in the concrete criminal incident the willful homicide of the injured J. and B. is not out of utilitarian motives (article 93, part a of the Criminal Code of Ukraine) and the court has done a change of qualification of the criminal incident but didn't establish the criminal motives of the new legal qualification.

Out of the total number of 235 people found guilty in Kiev, 17 were found guilty of willful murder from section 115-116 of the Criminal Code of Ukraine, and for the 12 guilty-sentenced people (5.10%) the court ascertained the content of the criminal motives in the concrete criminal incident. The court didn't establish the following criminal motives: (1) in seven cases-utility (88%); (2) in three cases- concealing the criminal offence or facilitating the carrying out of the offence (25%); (3)once- the motive of terror (8.5%) and the motive of revenge (8,5%). From the total number of 48 guilty people accused in Nis, 17 were sentenced for committing willful homicide from article 113-115 of the Criminal Code of Serbia and for 8 guilty-sentenced people (16.66%) the court ascertained the content of the criminal motives of the concrete criminal incident.

In all cases where the motive appears as a qualifying, or a circumstance creating privilege, there is a more serious or lighter kind of the basic criminal offence. Consequently, the motive influences the enlargement or lessening the quantum of the intentional or willful guilt, as well as the more severe or mild punishment. However, the Serbian legislator very rarely prescribes the content of motives which appear as qualifying, or circumstances giving privilege. That is the reason why judge of the

criminal court must in each concrete case, according to his belief and experience find out whether the motive of the concrete criminal incident was in accordance with social, ethical and valid legal norms or not. Also, the judge has to perform legal qualification of the offence precisely and exactly, and one condition for successful realization of this is knowledge of the content of motive of the concrete criminal incident. For example, if the person A committed murder because of money, than this is murder in the first degree (article 114, part 1, item 5 of the criminal Code of Serbia), but if the person committed murder in the state of intense excitation, for which he was not responsible, but was caused by attack or a serious insult from the murdered person, that will be privileged kind of murder - murder in an instant (article 115 of the Criminal code of Serbia). The motives of the qualifying circumstance can be utility, cruelty, cunningness, enmity, hatred, blood or ruthless revenge and other, while motives of privilege include love, humanity, sacrifice, pity, altruism, friendship, mercy and other motives in accordance with legal and ethical norms of a state community. Serbian legislator uses the term base motives for all other motives contradicting social and legal norms of behavior and the motives that guide the delinquent behavior.

In comparative criminal law practice there are several ways for establishment and qualification of the motives. Firstly, when speaking about base motives, their existence is illustrated and eliminated in concrete cases in criminal practice by listing in judicial act. Secondly, a separate category of judicial practice includes the articles of judicial practice in which the nature of some criminal motives is more closely described. The most often are the articles on the motive of utility and base motives. Analyzing the motives in each concrete case, the court tries to find out whether the reasons were legal or illegal. The third category consists of court articles which give ethical mark to some kinds of motives. In that way the court ethically grades each motive in the negative as well as in the positive sense, giving it the quality of mitigating or aggravating circumstance. Finally, the fourth way of qualifying the motives consists in courts comparing the criminal motive of the concrete criminal offence with the social and ethical norms of behavior. This comparing helps the court to establish the ethical value of motives and their impact on the guilt and sentence.²

Content structure of criminal motives of willful homicide (table 7) is following: (1) utility (36.65%); (2) revenge (24.43%); (3) concealment (21.86%); (4) the rest (8.03%); (5) terror (6.43%); (6) jealousy (2.57%). Revenge for performed legal activity³ participates in the total number of criminal motives with 4%.

² Simić-Jekić Z., Utvrđivanje motiva dela i sudska praksa, Jugoslovenska revija za kriminologiju i krivično pravo nb. 1-2, Beograd, 1983, str. 119-120.

³ author's remark: By the term LEGAL ACTIVITY we refer to the LEGALLY ALLOWED ACTIVITY OR ACT or a LEGAL ACTIVITY OR ACT official action.

Table 7. Kinds of criminal motives and types of criminal motivation for willful murder

(7-a) Article 115-116 of the Criminal Code of Ukraine

YEAR	KINDS OF CRIMINAL MOTIVES (total 311)						TYPES OF CRIMINAL MOTIVATION (total 311)		
	U T I L I T Y	T E R R O R	R E V E N G E	C O N C E A L M E N T	J E A L O U S Y	T H E R E S S T	I N T E N T I O N A L	I M P U L S I V E	O U T O F H A B I T
1992	21	5	7	7	-	4	24	17	3
1993	49	6	22	31	1	9	71	33	14
1994	25	4	10	12	-	4	34	13	8
1995	10	-	11	8	4	3	15	17	4
1996	3	1	5	6	1	2	7	8	3
1997	6	4	21	4	2	3	9	21	10

(7-b) Article 113-115 of the Criminal Code of Serbia

YEAR	KINDS OF CRIMINAL MOTIVES (total 375)						TYPES OF CRIMINAL MOTIVATION (total 375)		
	U T I L I T Y	T E R R O R	R E V E N G E	C O N C E A L M E N T	J E A L O U S Y	T H E R E S S T	I N T E N T I O N A L	I M P U L S I V E	O U T O F H A B I T
1992	25	6	8	8	-	5	30	20	4
1993	59	7	27	37	1	10	86	40	17
1994	30	5	12	14	1	5	41	17	10
1995	12	1	13	10	5	4	18	20	5
1996	4	1	7	7	1	2	8	10	4
1997	7	4	25	6	2	4	10	24	11

During the process of establishing the utilitarian motive in willful homicide (article 93, part a of the previous Criminal Code of Ukraine or article 115 part 2 of the valid Criminal Code of Ukraine), the Criminal Court of Ukraine labeled utilitarian

motives by following terms: out of utility (criminal offence 2-79/94), with selfish purpose (criminal offence 2-21/93), with utilitarian interest (criminal offence 2-206/97).

Also in the case number 2-1/92 the court decided that the accused K. committed under aggravating circumstances murder of G out of utility, with the aim of obtaining the property of the murdered, while in case 2-42/7, the court amplifies the fact that the guilty P. and J. committed a willful homicide of V. out of utilitarian interest, with extreme fierceness, while committing the act of robbery.

In some criminal offences there is concurrence of criminal motives. Accordingly, in the case 2-46/97 the court decided that the guilty person K, a multiple recidivist, with murdered person G with extreme fierceness, under aggravating circumstances murdered person S. and then attacked with extreme fierceness life of two people, emphasizing that the criminal offences were committed out of utilitarian aims and utility.

The opinion of court in these cases is unacceptable and unreasonable because the description of the committed offences, undoubtedly points to the motive of utility.

The Ukraine legislator, by expression willful homicide out of utilitarian motives (article 115, part 2, item 6 of the Criminal Code of Ukraine) means illegal deprivation of life with the aim of obtaining any material benefit for himself or another person. The material benefit is obtained by committing the crime, while forms of appearance of material benefit may be: acquiring ownership of the murdered person's property – jewelry, works of art, etc, or getting ownership of the immovable property of the murdered person, immovable and movable family relics, etc), getting profit of property character by committing murder (acquisition of property rights, acquiring or losing the rights of actual governing and using property, illegal acquisition of property rights, etc), liberation from financial debt or expense by committing murder (Cessation of the obligation of paying the debt, exoneration of the property from the financial debts of the murdered person etc) murder ordered for money, or other material gain. For existence of this criminal offence it is not necessary that the guilty person acquired material gain in reality by committing willful homicide out of utility.⁴

Identical attitude to Ukraine judicial practice can be found when establishing the hooligan motive (article 115, part 2, and item 7 of the Criminal Code of Ukraine). Judges of the Criminal Court instead of term hooligan motive use terms hooligan coercion or hooligan determination. Why coercion or determination and not motive? Motive includes determining factors (interests, needs, coercion, etc) divers and versatile. If the court found out the determining factors of the hooligan motive, why didn't it ascertain the content of the motive *causa criminalis*? For a complete and unambiguous determination of the content of the willful or intentional guilt in a concrete criminal case, it is necessary to ascertain the content of the criminal motives which together with other elements influence the degree of guilt. We agree with Sergejevic who thinks that the court must in each concrete criminal act establish criminal motives with the highest degree of veracity, and in preamble of the judicial act, verbally define and describe the content of the established motives.⁵

⁴ Ценко С.С., НАУКОВО-ПРАКТИЧНИЙ КОМЕНТАР ДО КРИМІНАЛЬНОГО КОДЕКСУ УКРАЇНИ, 4-те видання КИЇВ, 2005, стр. 222-223.

⁵ Sergej~ P., *Iskustvo re~i na sude.* – М., 1988, str. 115-116.

According to the opinion of the Ukraine legislator, murder out of hooligan motives is a willful homicide committed not respecting moral, social, and legal norms of the community, murder committed by violating human and civil rights and freedom, murder committed without cause in brutal and ruthless way.⁶

In criminal cases that have legal qualification of willful homicide (article 115, part 1 of the Criminal Code of Ukraine) and murder in the first degree (article 115, part 2 of the Criminal Code of Ukraine), the content of the criminal motives of committed crimes is not completely ascertained. The described negative attitude of the Ukraine judicial practice about determining the content of criminal motives in criminal proceedings is confirmed by statistic data that in 2 out of 5 criminal incidents the court doesn't establish the criminal motives. This attitude of the judicial practice is strengthened by linguistically imprecise criminal law provisions about some incrimination in criminal legislative organs of Ukraine. So that the legislator in the article 115, part 1-3,5,8-13 of the Criminal Code of Ukraine prescribes murder in the first degree not giving precise description and kind of criminal motives. In accordance with the attitude of the Supreme Court of Ukraine from 01.05.1994, number 1, part 10, it was decided that the incrimination from the article 115, part 2, item 3 of the Criminal Code of Ukraine, can be committed only out of the motive of revenge because of performed legal action of the injured⁷, while in part 11 it is stated that the incrimination from the item 1, part 2 of this article can be committed either from diverse criminal motives which represent aggravating circumstances for establishment of guilt and fixing of penalty, or that the actual cases of this incrimination can be legally qualified as incriminations of any item of the part 2, article 115 of the Criminal Code of Ukraine.⁸

According to the attitude of the Ukraine legislator, willful homicide from the article 115, part 2, item 8 of the Criminal Code of Ukraine is unlawful deprivation of life of a person that performs legal act considered official or civil service, as well as the willful homicide of the injured out of revenge for performance of a lawful official act or civil service. Willful murder from article 115, part 2, item 1 of the Criminal Code of Ukraine is unlawful murder of two or more people which is connected to a single willful guilt and committed at one place without considerable time lapse between the beginning of the criminal law proceedings, while murder from item 2, part 2, of the same article represents unlawful murder of an under-age child or pregnant woman for whom the guilty person-murderer knew he is under-aged /pregnant at the moment of committing the unlawful act.⁹

Willful homicide with extreme fierceness (article 115, part 2, item 4 of the Criminal Code of Ukraine is unlawful murder by causing physical and psychological pain to the injured or to the people close to the injured (straining, breaking, cutting or burning of the human body, multiple intentional wounding during committing unlawful acts which represent bodily sufferance of the injured, long-term deprivation from eating

⁶ Qcenko S.S., НАУКОВО-ПРАКТИЧНИЙ КОМЕНТАР ДО КРИМІНАЛЬНОГО КОДЕКСУ..., стр. 223.

⁷ Zbirnik postanov Plenumu Vrhovnogo Sudu Ukraїni (1963-1997 roki). Iz zmin. i dop. Za stanom na 8 lwtoho 1998 roku. – Simferopolx: Tavriq, 1998, str. 180.

⁸ Ibid, p. 180

⁹ Qценко С.С., НАУКОВО-ПРАКТИЧНИЙ КОМЕНТАР ДО КРИМІНАЛЬНОГО КОДЕКСУ УКРАЇНИ, 4-ге видання КИЇВ, 2005, стр. 220-221, 224.

and drinking, psychological abuse, cynicism, cruelty while committing criminal law offence etc) while for willful homicide committed in the way dangerous for life of larger number of people, the same part of the same article, item 5, the guilty- murderer committed murder in the realistic way or by means which endanger not only the life of the injured but also other people's lives.¹⁰

Ordered willful homicide (article 115, part 2, item 9 of the Criminal Code of Ukraine) is considered committed independently from the fact whether the guilty person reached the goal by the criminal act or not, while the same crime from the item 10 of the same part and article is committed at the time of rape in the following cases: (1) when it is committed at the same time as the attempt of rape or the act of rape, with the aim breaking the victim's resistance; (2) when it is committed at the same time as the attempt of rape or performing the act of rape, or at a certain time after rape out of the motive of revenge because of the active defense of the injured¹¹.

Ordered willful homicide, (article 115, part 2, item 11-12 of the criminal code of Ukraine) consists of an agreement of at least two sides on committing the murder or planning the murder. main characteristics of cooperation or agreement are: (a) the object of agreement-death of one or more people; (b) contracting parties- ordering party or person who is interested for committing murder and the person who commits murder, or – the person that actually commits criminal act of murder; (c) basic content of the agreement- the person who commits murder takes on the obligation of committing of unlawful act of the murder of the injured, while the ordering party obliges to performing or not performing the action that helps committing the willful homicide. This kind of willful homicide is usually committed out of the motive of utility.¹²

Under the term willful homicide committed according to the previous agreement of a group, we understand a murder in whose committing are involved at least two accomplices, according to a previous plan and agreement for its committing, while willful homicide committed by an organized group refers to unlawful murder committed by a specially organized criminal group (article 115, part 2, item 12 of the Criminal Code of Ukraine). Criminal group founded with the aim of committing precise criminal action has strictly divided criminal roles (organizing, instigating, helping, committing criminal act). During the act of committing willful homicide by a criminal group all the co-accused accomplices in the incrimination have the status of the accomplices who committed the murder independently from their contribution in the criminal act of murder. Finally, murder in the first degree can be done by a recidivist, except incriminations described in the articles 116-118 of this Criminal Code¹³.

In the criminal case 2-7/87, the prosecutor qualified the act of the guilty N according to article 19 and 93, part a, g, z of the criminal code of Ukraine, showing that the accused N committed murder out of utility with the aim of robbery. Criminal proceedings have shown that the offence was committed by complicity (article 19 of the Criminal Code of Ukraine), but not out of the motives of utility and revenge (article 93, part z of the Criminal Code of Ukraine) of the previously committed offence of robbery.

¹⁰ Ibid, p. 221-222

¹¹ Ibid, p. 224-225

¹² Ibid, p. 225-227

¹³ Ibid, p. 227-229

That is why a change of qualification of the offence was performed, and in accordance with that, the court returned a verdict of guilty.

Analyzing the criminal cases we came to the conclusion that the occurring forms of the incrimination from article 93, part e, of the previous Criminal code of Ukraine or article 115, part 2, item 5 of the valid Criminal Code of Ukraine can be committed either out of the motive of sadism or revenge, while occurring form of incrimination from the article 93, part z of the valid Criminal Code of Ukraine can be motivated by concealment or facilitating of the performing of the offence or by a violent satisfaction of the sexual drives.

In the case 2-67/93, the guilty person L was accused for a willful homicide of K with extreme fierceness out of the hooligan motive- qualification according to the article 93, part e of the Criminal Code of Ukraine. The section of the court of Appeal didn't establish the motives of the criminal incident, and also didn't deny the existence of the hooligan motive according to the already mentioned legal qualification of the public prosecutor. From the documents of the proceeding we came to the conclusion that the accused L. under the influence of alcohol, committed willful homicide with extreme fierceness in the apartment of the injured K because of an argument over a bottle containing 1l of vodka. He committed the murder by hitting with hammer and causing severe bodily injures and sufferance of the injured which caused bodily suffering and violent death of the injured. According to the report of the expert, pathologist O., fifty blows of hammer were delivered in the area of head which caused fracture of the skull, and one hundred was delivered in the area of chest, stomach and shoulders which caused severe bodily injures of the lung lobes, damaging of the vital organs and rib cage, pleura, bruises, and finally the violent death of the accused. In the first phase of the attack the accused gave the injured 4 blows on the head and 11 blows in the chest which disabled the victim to run or to defend. After a pause of 30 minutes, the accused continued to injure the victim, and this phase lasted 120 minutes without stopping. When the injured K started calling for help, the accused covered his face with a pillow and hindered the breathing of the injured. The cause of the violent death of the accused are bodily injures, sufferance, pain which were caused by the incriminated person's acts. The court expert, psychiatrist N, in his report found out that the accused L. was in the state of complete responsibility before and after the offence and that the drunken state didn't have considerable influence on the lessening the capabilities of reasoning and deciding.

The accused L was at the time of the hearing in front of the Section of the Court of Appeal, as well as in the preliminary criminal proceedings, stated that during inflicting the bodily injures by hammer he felt pleasure and that he doesn't feel regret because of committed crime. All the objective and subjective circumstances of the committed incrimination, according to our opinion, point to unscrupulousness, ruthlessness, cruelty, cunningness, perseverance of the accused-guilty for willful homicide under aggravating circumstances. The previous life of the accused shows that he was not a person with a criminal past, that there were no inclinations toward criminal behavior, that he was neither alcoholic, nor drug addict, that he was a father of the two under-aged children, that he was in a successful marriage for 25 years. The wife of the accused said that her husband L. didn't show inclinations toward aggression and violence that he drank alcohol moderately, that he was a gentle father and manly, responsible husband. The injured K. knew the accused L. but there were no disputes or

arguments between them until the day of the opinion of the public prosecutor and the Section of the Court of Appeal, we think that the sadistic motives caused this terrible crime.

In the case 2-151/96 the guilty person M. was accused for willful homicide, article 93, part z of the Criminal Code of Ukraine. M. met the injured K of female sex on the street T.S. at Kiev, for the first time. He invited her to drink a half liter bottle of vodka at the park T.S. and she accepted. During the consummation the accused M. made a proposition of a sexual intercourse to the injured K. which she refused categorically. Then M. physically attacked the injured K, with the aim of performing a violent sexual intercourse, but the sexual act didn't take place because the injured K was constantly offering resistance. M. broke the resistance of the injured K, by hitting her on the head three times with a bottle of vodka which caused fracture of the skull and instant violent death of the injured. The violent sexual act didn't take place. Having in mind the fact that the court didn't establish the existence and content of the criminal motives of this crime; the question remains how the court accepted the legal qualification of the public prosecutor (article 93, part z of the earlier criminal code of Ukraine or article 115, part 2, item 9 of the valid Criminal Code of Ukraine) and established the existence of the willful homicide with the aim of concealing another criminal offence or enhancing perpetration. We think that in this case the content and the degree of willful guilt are shaped by the sexual motives- the violent performing of the sexual intercourse.

In the next part of the analyses of the criminal cases of the Regional Court of Kiev we reached the conclusion that the occurring forms of incriminations from the article 93, part g, d, e, z and article 94 of the valid Criminal Code of Ukraine, or article 115, part 1, item 1-4,9 12 of the valid criminal Code of Ukraine, are most often shaped by the motives of revenge and jealousy. Regrettably, in judicial practice these motives weren't or were abstractly established. Consequently, in the case 2-75/92 the section of the Court of Appeal performed a new qualification of the article 93, part a, e of the Criminal code of Ukraine and changed it into article 93, part e of the Criminal Code of Ukraine because it didn't establish the motive of the criminal behavior. In the verdict, the traditional, stereotype kind of explanation way was used for to describe the cause of the committed crime. This kind of explanation was used for all criminal incidents for which the court wasn't establishing and didn't establish the criminal motive- the crime committed on the basis of personal unfriendly relations of the accused B and the injured. Analyzing the court documents we came to the conclusion that the motive of the committed offence was revenge. The similar situation can be found in the case 2-17/94 where the court qualified the criminal incident under the article 93, part e of the Criminal Code of Ukraine concluding in the verdict that the crime was a reason of the personal relationship of the accused and the injured. Analyzing the court documents of this criminal case we came to the conclusion that the criminal offence was committed out of the motive of jealousy.

It is not a rare case that the court describes in the verdict the emotional state of the accused-guilty person instead of describing the criminal motives of the guilty person in the moment of committing the murder. For example, in the case 2-38/92, the criminal incident was qualified according to article 93, part g, d of the Criminal Code of Ukraine. In the verdict, the court concluded that the accused committed a willful homicide of his mother and sister on the basis of embitterment.

In some criminal cases the court qualifies the criminal motives as the Objective causes of criminality. For example, in the case number 2-145/97, the accused M, committed the criminal offence from the article 17 of the Criminal Code of Ukraine in relation to article 93, part e of the Criminal Code of Ukraine by throwing the grenade F1 through the window into the room of the injured was not in his room. The court reached the conclusion that the cause of the offence was the revenge of the accused M, and that the cause of committing the crime was the desire for revenge. This example confirms the justification of our hypothesis on the necessity of educating the court officials of the Regional court of Kiev in the domain of the criminal psychology referring to criminal motives and criminal motivation. Also, in the case 2-37/92 the legal qualification according to article 93, part g of the Criminal Code of Ukraine, the court concludes that the motive of murder of the injured M. and J. was enmity with the accused N.

The similar way of establishing the criminal motives can be found in the cases that have legal qualification according to article 94 of the previous Criminal Code of Ukraine, or according to article 115, part 2, and item 12 of the valid Criminal Code of Ukraine. Often, the court classifies conflicts, fights, drunken state of the perpetrator under the term criminal motives. Our opinion is that all these are only concrete situations in life that represent the consequence of criminal motives that the court didn't establish. We think that in this way the court doesn't establish the criminal motives, but only conceals the lack of their establishing. In our judicial practice the situation is identical.

On the basis of all this we made conclusions about the basic characteristics of establishing the criminal motives in Ukraine and Serbian judicial criminal practice:

(1) the replacement of the criminal motives by the aim of the criminal offence (for example, committed willful homicide with the aim of utility);

(2) Replacement of the criminal motives by emotional state of the accused or injured at the moment of committing the criminal offence (for example, on the basis of embitterment, under the influence of improper behavior of the injured, etc);

(3) Replacement of the criminal motives by objective elements of the occurring forms of the criminal offence (for example, the words of the injured that were referring to the perpetrator were the cause of the fight);

(4) Replacement of the criminal motives by the causes or reasons for the committed crime (for example, the accused had reasons for revenge);

(5) Replacement of the criminal motives by objective life situations which existed at the time of committing the criminal offence (for example in the argument, fight, on the basis of unfriendly personal relations);

Willful homicide out of utility (article 93, part a of the previous criminal Code of Ukraine or article 115, part 2, item 6 of the Criminal code of the criminal Code of Ukraine) are the most frequently committed in connection to banditry, while willful homicide out of the motive of concealment are most often committed in connection to robbery.

If we look at the content of the criminal motivation (table 7) then the intentional motivation occupies the first place (51.5%), impulsive motivation occupies the second place (35%) and finally, motive of habit (13.5%). The perpetrators of willful homicide up to 30 years old usually have the intentional motivation, while among perpetrators older than 30 the impulsive and motivation of habit are more often.

Impulsive motivation is specially analyzed by the Ukraine legislator in the case of willful homicide committed in the state of intense psychological excitation, that suddenly happened because of illegal violence or serious humiliating committed by the injured (article 116 of the criminal Code of Ukraine). In this case there is a willful homicide committed under mitigating circumstances and in the following cases: (a) willful homicide committed in the state of extreme psychological excitation; (b) the state of psychological excitation was caused suddenly by illegal violence or serious humiliating committed by the injured; (c) violent death of the injured person was committed. Under the expression the state of intense excitation the legislator refers to a state of physiological affect in which the power of reasoning was lessened while the emotions are intensified (fury and anger). The phenomenon of reduced consciousness appears, but the intensity of the reduction of consciousness doesn't completely exclude the possibility of reasoning-understanding of the real and legal meaning of the act and the possibility of deciding- governing and controlling of one's own actions. With the aim of solving the question of the quality of the physiological affect criminal court can use the help of an expert in psychology or psychiatry while during making the decision about the degree of the influence of physiological affect on the content of guilt the court has the responsibility to take into consideration all the individual psychological traits of the character of the accused person. The sudden appearance of an intense psychological excitation shows that the physiological affect appeared instantly as an immediate reaction to the incidents that happened unexpectedly for the personality of the accused-perpetrator (for example, state of extreme excitation can appear in parents after they hear that their under-aged daughter has been raped by the boys from the senior grades). By the term illegal violence the legislator refers to a physical (inflicting of bodily injures-straining, breaking, mutilating, burning, bending, etc of certain parts of the victims body) and psychological violence (endangering or threat of moral or material damage). By the term serious humiliation the legislator refers to a willful disrespect for the honor and dignity of a person, performed by a gesture, verbally or by an act of uncivilized form or by serious humiliation, degradation and insulting of one's personality. Illegal violence and serious humiliation can be committed against the personality of the guilty person-perpetrator or against the person close to the guilty person-perpetrator.¹⁴

In the case K-11/93, the court qualified the committed offence as a privileged murder by an irrevocable verdict of the District Court in Nis on May the 16th, 1993. On April the 1st, 1989, at 9a.m. in the street C. at the large market in Nis, when the accused N.N. was passing by the market stand of the injured T.T. the injured swore at him and the accused warned him to stop with the insults. However, the injured continued to swear, calling N.N to fight with him. N.N. continued to walk not paying attention to swearing and calling for fight, when the injured approached N.N. from the back, jumped in front of him and after a couple of insults and provocation slapped N.N. on the face with an open palm. Right after the second slap N.N. took out the jack-knife from his right pocket and stabbed the injured T.T. in the chest inflicting a wound which soon caused the death of the injured by which he committed a murder in an instant (article 48 of the Criminal code of Republic of Serbia)

¹⁴ Ibid, p. 229-231

When establishing the motive of the committed crime the court analyzed the evidences from the records of inquiry on the spot and the reconstruction of the criminal incident, from the statement of witnesses R.R, J.J, M.M, and the statement of the experts in forensic medicine, B.D. and the statement of the expert in psychiatry B.K, as well as the evidences from the statement of the accused. From the statement of witnesses the court got the impression that the injured T.T. was a person of an impulsive character. In the village, as well as at the market he was constantly arguing with people, swore at them, humiliated them and sometimes he attacked them physically although nobody gave him reason to behave that way. According to the statement of witnesses the injured and the accused didn't know each other, and they weren't in unfriendly relations.

From the statement of the accused we can see that he didn't know the injured, and they didn't have arguments before. N.N. stated that the injured insulted him and swore at him before inflicting of injury, that he called him to fight and threatened him. That is why the accused was upset and nervous and that affect situation was the only reason why he acted that way toward the deceased. Also, the accused said that he regretted the committed murder, that he was aware that he could wound the injured with the knife but that he didn't want to kill him. At the court's question why he carried the knife, the accused said that a couple of months before he was beaten by drunkards while he was walking along the street C. in which was the big market. Since then he constantly carried the knife because he was afraid for his life. From the report and opinion of the experts in forensic medicine it is obvious that the death consequence happened violently as a consequence of stabbing the knife in the area of chest, which caused the injure of the left auricle, so that timely medicine help wouldn't prevent the death consequence. In the same way, from the statement of the court expert on psychiatry who analyzed the psychological state of the accused N.N. it can be seen that the accused N.N. was responsible at the time of committing the offence.

The decision about committing the offence was made at the moment of an intense psychological excitation, suddenly without previous thinking. That psychological state of the accused was caused by the behavior of the injured, meaning that the accused was brought into the state of intense excitement without his guilt. Although he was aware that he could kill the injured, the accused N.N. didn't think about the consequences of his act, so he committed the offence under the influence of affect. The court expert in psychiatry points out that at the time of committing the offence the capability of the accused to understand his actions and to control his behavior was lessened, but not considerably lessened. On the basis of the evidence and the actual position the court concluded that the accused N.N. committed criminal offence of murder in an instant by being brought into a state of intense excitation by the behavior of T.T., which influenced and decided his incriminated behavior. The fact is that the injured T.T. by his own guilt (by serious insults, verbal and physical attack of the accused) caused the intense psychological excitation of N.N. which caused psychological excitement and overwrought psychological state so that the reasoning capabilities of the accused were lessened. The accused was aware that his actions could produce the death consequence but accepted it anyway. Another fact that the court proved was that the injured started calling for help after inflicting the wound to the injured since he became aware that the life of T.T. was in danger. The court concluded that the motive of the

offence was of a pathological character, because it occurred under the influence of state of affect, while the offence was committed by recklessness.

In this criminal incident, the court didn't ascertain the content of the affect or whether it was a physiological or pathological affect, and its effect on the content of the willful guilt. Contrary to pathological, physiological affect doesn't exclude responsibility and willful guilt. That is why it is contradictory and illogical that in this case the court establishes the existence of the pathological motive, and then concludes that the murder was committed by recklessness. On the other hand, the court expert in psychiatry has in his report and opinion clearly informed the criminal court that in this criminal incident there was a physiological affect. We think that there is a physiological affect in this case and impulsive criminal motivation.

In the verdict of the Supreme court of Serbia Kz. I. 1377/71 reached on the 14th of December, 1991. it is concluded that in all cases that include insults or attacks which didn't provoke aggressive instant reaction of the insulted or attacked person (as in this example), there is no possibility of treating later reactions even if it was the continuation of the provoked reaction, since it was not a reaction allowed by law. Also, the verdict of the District Court in Belgrade K. 172/91 reached on the 11th of July, 1991 and the verdict of the Supreme Court of Serbia Kz. 635/91 reached on the 8th of October, 1991, stress that if the attack of the injured has stopped at the moment when the accused shot, and the reaction of the accused happened as a consequence of the state of intense psychological excitation which was not provoked by the behavior of the injured the offence is classified as a murder in an instant¹⁵.

In the case of using of disproportionate force in self-defense there is a state physiological excitation on the part of the perpetrator and this state was provoked by attack of the injured person at the life and integrity of the perpetrator. By an irrevocable verdict k-75/95 reached on the 15th of December, 1995 the court stated that the accused C.S. committed crime offence- murder committed by the use of disproportionate force (article 47, part 1 of the Criminal Code of Serbia, in connection to the article 9, part 3, of the Criminal Code of Serbia). After a short argument and dispute between the accused, the injured J.J. took a hammer from the table nearby and started to walk toward the accused, swaying simultaneously up and down with the intention of striking the accused. The accused succeeded to avoid the strike by bodily maneuver and then to warn the injured not to attack him. The injured J.J. swayed again with the intention of hitting the accused, but the accused stopped him by shooting from a gun. The bullet hit the heart of the injured, which caused instant, violent death. After gathering evidence and establishing the actual position, the court concluded that the accused C.S. was in the state of intense psychological excitation during committing the offence and that in that state of affect, realizing his life was endangered, he committed the incrimination-murder. The state of intense excitation of the accused was provoked by a sudden, verbal and physical of the deceased J.J. or the injured person. From the report and the opinion of the court experts in psychiatry, the court concluded that the pathological state of intense excitation, in which the accused was, didn't cause drastically reduced

¹⁵ Jovanović Lj. and Jovašević D., Praktikum za krivično pravo II, Posebni deo, Beograd, 1996, str. 69-70.

responsibility. The motive of the offence was the fear for life, and the act was committed by recklessness.

It is still not clear how the accused-perpetrator could be responsible and commit murder by recklessness, by the use of disproportionate force in self-defense while being in the state of pathological affect. This is contradictory. We think that in this criminal incident there is physiological affect and impulsive criminal motivation.

By the verdict of the Supreme Court of Serbia, Kz. I 924/88 it is decided that when a murder committed by the use of disproportionate force in self-defense, provoked by the attack of the deceased coincides with the murder in an instant, then the act as the murder from the article 47, part 1 of the Criminal Code of the Republic of Serbia with the possibility of applying provision on the use of disproportionate force in self defense.¹⁶

The topic that occurs as a consequence of analyzing the criminal cases of the Regional Court of Kiev and the District Court of Nis is the scientific analysis of the importance and the role of the court in determining and assessing the quality of the motives of the committed criminal offence. According to article 124 of the Constitution of Ukraine, identically with the Constitution of Serbia, only the court can and must perform the jurisdictional function in the state. The court bears complete responsibility for the quality and the degree of the ascertained content of all criminal law facts about the concrete criminal incident, gathered in preliminary proceedings and criminal proceedings. All the criminal law facts of the concrete criminal incident the court must ascertain with the highest degree of knowledge-veracity, and reach the decision in the form of an individual judicial act.

Individual judicial act of reprobation must include, with veracity, the criminal motives and the criminal motivation of the concrete criminal incident. Only when the content of the criminal motives and the quality of the criminal motivation are established with veracity it can be said that practically all the major principles of material and criminal adjective law have been respected and that the justice is completely enacted in judging and reaching the verdict. The elements that can help in establishing the criminal motives of the concrete criminal offence, individually or as a group, are all the other facts of the committed criminal offence (for example, time, place, way in which the offence was committed, the aim of the criminal offence, emotions, inclinations and habits of the perpetrator, etc). The quality of the legal qualification, of the ascertainment of the content and the degree of guilt, of fixing of the criminal penalty for the committed crime offence, of the penalty and post-penalty treatment of the guilty-accused person, of policy of punishing of the state in question depend on the quality of ascertainment of the criminal motives and the criminal motivation in criminal proceedings, in each individual case.

3. Suggestions for Serbian criminal legislation

On the basis of everything that was already stated, we suggest a concrete regulating of the criminal motives in our criminal legislation:

(1) Prescribing the content motives and perform a strict classification of the motives, separating them in classes (negative and neutral) and subclasses; the negative motives are antisocial (criminal motives, while the neutral are the ones who are on the border between the negative (criminal) and the positive (not criminal) motives and which are still not

¹⁶ Ibid p. 69-70.

entirely accepted in legal and social norms of our society, and which represent the product of civilization and are regulated in the economically highly developed countries (for example, the motive of altruism or pity, or mercy); the criminal motives represent psychological, willing factors which influence the content and the degree of guilt, but also cause undertaking and realization of all the actions (performing or not performing) which are included in the criminal law act; the criminal motives are also the normative factors having in mind the fact that they are a basis for pronouncing the ethical, legal reproach which the criminal court addresses to the accused-guilty person.

- legally defining the motives of utility as an acquired character trait and immoderate, egoistic aim without reason or greed for acquiring material or immaterial gain; classifying them in the utilitarian behavior in the first degree (the criminal motive as a legal facultative qualifying circumstance), and the utilitarian behavior in the second degree (the criminal motives as a separate element of the criminal offence), and the utilitarian behavior in the third degree (the criminal motive as legal facultative aggravating circumstance);

- precise determining of the linguistically-legal meaning of the law term “base motives” or replacing it by the term “criminal motives”;

- defining the motives of hatred as a racial, ethnic or nationalistic, religion, enemy or other forms of hatred;

- defining the motives of terror as atrocity, cruelty, brutality, unscrupulousness, negligence, insolence, arrogance, and vandalism;

- prescribing and defining the motives of revenge and bestiality;

- prescribing and defining the motives of perfidy, malice, envy and venom;

- prescribing and defining of the motives of sadism;

- prescribing and the sexual motives;

- prescribing and defining the career motives as nepotism and adulation;

- prescribing and defining the motives of helping or enhancing the committing of the criminal offence;

- prescribing and defining the motives of concealment of the guilty person and the motives of concealing of the attempted or committed crime offence;

(2) Precise prescribing of the content of the criminal motives which are a separate element of the incrimination, legal qualifying circumstance, legal mitigating circumstance, for all the incriminations which contain intentional or willful guilt;

(3) In the incriminations which, as their body element have the behavior of the passive subject established as the cause of committing the criminal offence by the active subject, make linguistically precise the content of the behavior of the passive subject and the motivating influence of that behavior on the committing of the criminal law act by the active subject; in these cases analyze the possibility of regulating the behavior of the passive subject as a legal, restrictive, facultative basis of unlimited mitigating of punishment including the release from punishment;

(4) The Criminal Division of the Supreme Court of our country, should define, with the help of the native doctrine, the precise material and the rules of proceeding for establishing the criminal motives of the concrete criminal items in the criminal proceedings, as a part of the procedure for the establishment of guilt; we think that the solving of the questions we mentioned can be enhanced by paying greater attention to the importance of the judicial practice as the source of law (in other words, the law must prescribe the rule for judges, who would by respecting it be obliged to create, during the proceeding and reaching

of verdict, the special and general , material and the principles of the proceeding for the criminal motivation and the criminal motives on the basis of the previous decisions of the court res iudicata);

(5) Exacting the law on the criminal motivation. The verification of the explained view can be found in the work of M. Zvonarevic, who, by analyzing the motives in forensic psychology, created the characteristic psychological profiles of delinquency for intentional, or willful criminal offences according to the content and kind of the motives: utility, revenge, help to the others, duty, defense- of oneself or others, sexual pleasure, curiosity-inquisitiveness. The criminal motivation is, undoubtedly, the most important individual psychological factor and it represents, in many cases, the pith of the process in which the court experts make opinion about the case. The court experts, however, must still keep the necessary level of flexibility in their work, which is adjusted, above all to the individual characteristics of each perpetrator and its offence.

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