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RIGHT TO BODILY INTEGRITY AND CRIMINAL JUSTICE[**]

The discussion surrounding the right to bodily integrity has become a prominent and contentious issues within moral, political and legal spheres. The right is often considered one of the most fundamental rights that individuals possess, alongside the right to life. The right to bodily integrity encompasses the principle that individuals have the autonomy to control what happens to their own bodies and to be free from unwanted physical intrusion. Government-imposed bodily intrusion infringes upon this right and can have serious implications on individuals' rights.

Recent scholarly discourse has delved deeply into the content, scope, and significance of this right, recognizing that a nuanced understanding of it is crucial for determining the permissibility or impassibility of various activities, especially in the criminal justice, including rehabilitation of offenders through medical interventions. The scholarly debate has prompted exploration into the nature of the right to bodily integrity and its implications for a wider range of issues. While rehabilitation through medical interventions may be considered in certain contexts, it must be approved with caution and in accordance with ethical principles and human rights standards. Upholding individuals' right to bodily integrity and autonomy is paramount, and any interventions must be justified, proportionate, and respectful of individual's rights.

The aim of the article is to contribute to the ethical and legal dimensions of the right to bodily integrity, by examining theoretical frameworks and practical implications.

Keywords: *bodily integrity, criminal justice, human rights, government-imposed bodily intrusion, rehabilitation.*

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1. Introduction

The right to bodily integrity is a fundamental human right that encompasses the principle that every individual has the autonomy and sovereignty over their own body (Wall, Herring, 2017: 566). It guarantees that individuals have the right to make decisions regarding their own bodies without interference or coercion from others, including the government. The concept of bodily integrity has strong roots in classical liberalism, which emphasizes the autonomy and sovereignty of the individual. This philosophical tradition emerged as a response to monarchical rule, where rulers often exerted control over the bodies of their subjects through coercion and punishment, including public displays of torture (Patella-Rey, 2018: 787). John Stuart Mill, in his work "On Liberty" articulated the principle of bodily integrity in his work as the individual's sovereignty and autonomy over their own bodies and minds (Mill, 1859: 22).

The right to bodily integrity is enshrined in various international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR). It is also recognized in many national legal systems around the world. The ICCPR does not explicitly mention a right to physical or bodily integrity. However, the UN Human Rights Committee has recognized that certain provisions of the Covenant implicitly protect bodily integrity and autonomy. Specifically, the rights to privacy (Article 17) and security of the person (Article 9) in the ICCPR have been interpreted to encompass bodily integrity and autonomy (Frommer, et al. 2021: 27).[1]

Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, in Article 17 explicitly recognizes the right of persons with disabilities to respect for physical and mental integrity on an equal basis with others, which includes protecting them from exploitation or abuse that may compromise their bodily integrity. Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT), adopted by the UN General Assembly in 1984, specifically addresses the prohibition of torture and other forms of ill-

[1] Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), 112th Sess, UN Doc CCPR/C/GC/35 (16 December 2014); Human Rights Committee, General Comment No 28: Article 3 (The Equality of Rights between Man and Women) 68th Sess, UN Doc CCPR/C/21/Rev. 1/Add.10 para 20.

treatment. It defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes such as obtaining information or punishing. The CAT emphasises the importance of respecting bodily integrity. Convention on the Rights of the Child adopted in 1989 recognizes the right of every child to the enjoyment of the highest attainable standard of health and to facilitate for the treatment of illness and rehabilitation of health. This includes the protection of children's bodily integrity from harm or exploitation. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979, does not explicitly mention the right to bodily integrity, it addresses issues such as violence against women, including rape and other forms of sexual violence, which can violate women's bodily integrity.

In Serbia the right to bodily integrity is protected under various legal instruments, including the Constitution of the Republic of Serbia and international human rights treaties ratified by Serbia. Article 25 of the Constitution guarantees the inviolability of physical and mental integrity, stating that "*No one shall be subject to torture, inhuman or degrading treatment of punishment, medical or scientific experimentation without his or her free consent*". Serbia is a party to several international human rights treaties that protect the right to bodily integrity. For example, the European Convention on Human Rights and the International Covenant on Civil and Political Rights both contain provisions safeguarding individuals against torture, inhuman or degrading treatment, and arbitrary interference with their physical integrity (Dimitrijevic, et. al., 2005: 29). In addition to constitutional provisions, Serbian laws and regulations provide further protection for bodily integrity in specific contexts, such as healthcare, medical treatment, and criminal justice (Criminal Code, Chapter XIII, crimes against life and body, Chapter XXIV crimes against environment, Chapter XXV crimes against security, Chapter XXVI crimes against safety of public transport, etc.).[2]

Abovementioned legal instruments uphold the rights of individuals to have the freedom to make decisions about their own body, including health care,

[2] Criminal Code, Official Gazette No. 85/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

reproductive choices, and bodily modifications. It also protects individual from any acts against their body which they did not consent to.

Violation of right to bodily integrity can occur in various contexts, including medical settings, prisons, and during armed conflict. Governments and other entities have a duty to respect, protect, and fulfil this right for all individuals within their jurisdiction. Any infringement on this right should be subject to legal accountability and redress.

The scholarly debate has prompted exploration into the nature of the right to bodily integrity and its implications for a wide range of issues, especially in the criminal justice. The author tackles topics such as scope of the right to bodily integrity, government-imposed bodily intrusions, and controversial of rehabilitation of offenders and use of medical interventions to prevent reoffending. By examining theoretical frameworks and practical implications, the article provides valuable insights into the complexities surrounding this fundament rights and intersection with various aspects of ethics.

2. Scope of the right to bodily integrity

There is debate over the precise scope of protection afforded by the right to bodily integrity. Some argue that it should be narrowly constructed to protect against physical harm and invasive medical procedures without consent, while other advocate for a broader interpretation that includes protections for reproductive autonomy,[3] and bodily privacy.[4]

[3] The topics of reproductive autonomy pose challenging questions due to the presence of multiple human entities involved. Proponents of reproductive rights argue that individuals have the fundamental right to make decisions about their own bodies, including whether to terminate a pregnancy. They emphasize the importance of protecting the autonomy of pregnant individuals, as well as their physical and mental well-being. On the other hand, opponents of abortion often argue that the developing fetus has inherent moral worth and a right to life that must be protected. More information in Thomson, J. J. (2016). A defense of abortion, pp.133.

[4] This is because medial information is considered highly sensitive and falls within the scope of the right to privacy protected by Article 8 of the European Convention on Human Rights. The disclosure of medical records without patient's consent or in circumstances where it is not necessary or proportionate can constitute an interference with their right to privacy. More information in Marshall, J. (2016) p. 7.

The right to bodily integrity is closely related to the prohibition of torture.[5] These human rights often intersect in cases where individuals' physical autonomy and well-being are violated through acts of coercion, violence, or forced interventions (Marshall, 2016: 9).

Different legal and ethical frameworks may influence interpretations of the right to bodily integrity, leading to divergent views on its content and application. Debates may arise over whether the right is absolute or subject to limitations, how conflicts between individual rights and public interests should be resolved, and the role of government in protecting or restricting bodily autonomy (Wall, Herring, 2017: 568).

One area of controversy is the extent to which the right to bodily integrity should protect individuals from government-imposed or medically necessary interventions. For example, debates may arise over the legality and ethics of forced medical treatment, compulsory vaccination, or involuntary psychiatric interventions, balancing public health interests with individual autonomy.[6] According to the jurisprudence of the European Court of Human Rights the protection of the individuals' bodily integrity is not absolute.[7] Interference can be justified if it is in accordance with the law, pursue a legitimate and proportionate aim. In cases involving vaccinations or treatments aimed at controlling the spread of pandemic disease, a legitimate aim is present. The European Court of Human Rights has previously accepted non-consensual blood tests, vaccinations, and screening programs as justified measures aimed at protecting public health, public safety, and the rights and freedoms of others (Douglas, Frosberg, Pugh, 2021: 1).[8] However,

[5] In this regard the right to bodily integrity is overlapping with international prohibitions of torture which are absolute (Article 3 of the European Convention on Human Rights).

[6] More on bodily integrity and right to health in Vujovic, R. (2022) Mandatory Immunization of Children and Protection of the Right to Life, Health and Bodily Integrity. In: Pavlovic, Z. (ed.) *Yearbook Human Rights Protection - Right to Life,* Belgrade: Institute of Criminological and Sociological Research, pp. 567-584.

[7] The European Court of Human Rights for the first time indicated that the concept of private life (article 8) covered the physical and moral integrity of the person in the case of X and Y v. the Netherlands, Application no. 8978/80. More information available in the Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, home and correspondence (2022) European Court of Human Rights.

[8] Case *X v. Austria*, Application no. 8278/78; case *Acmanne v Belgium*, Application no. 10435/83.

non-consensual interventions that interfere with bodily integrity may fail the proportionality test if other equally effective and less restrictive alternative measures are available.[9]

Arguments often arise concerning reproductive rights and the right to bodily integrity, particularly regarding issues such as abortion, contraception, assisted reproductive technologies, and sterilization. Debates may center on the extent to which individuals have the right to make decisions about their own bodies and reproductive health free from state interference or moral judgement (Thomson, 2016:133).

The intersectionality of the right of bodily integrity with other human rights, such as the right to health, non-discrimination, and privacy, can give rise to complex controversies. For example, debates may occur regarding access to healthcare services, the impact of systemic inequalities on bodily autonomy, and the disproportionate effects of certain policies or practices on marginalized communities (Shaman, 2008: 246).

Advances in biotechnology, genetics, and medical research raise new ethical and legal questions about the scope of the right to bodily integrity. Controversies may arise regarding issues such as genetic testing, organ transplantation, human enhancement technologies, and bioengineering, prompting debates about individual consent, privacy, and equity (Kovacevic, 2020: 1571).

Controversies surrounding the content of the right to bodily integrity reflects broader tensions between individual freedoms, societal values, and ethical principles, highlighting the need for ongoing dialogue, debate, and engagement to navigate complex moral and legal issues related to bodily autonomy and human rights.

[9] The spread of COVID-19 pandemic in 2020 raised debate on possibility of compulsory vaccination due to the lack of evidence on benefits of vaccine to violate bodily integrity and fail the proportionality test.

3. Government-imposed bodily intrusion and right to bodily integrity

Government-imposed bodily intrusion refers to situations where governmental authorities, typically through law enforcement or correctional authorities, imposes physical interventions on individuals' bodies as part of criminal investigation, prosecution, punishment, or rehabilitation efforts (Borgmann, 2014: 1059). The government-imposed bodily intrusion in the context of criminal justice raises complex legal, ethical, and human rights issues, requiring careful consideration of individual rights, public interest, and the rule of law. Balancing the need for effective law enforcement and public safety with respect for fundamental rights and human dignity remains a central challenge in navigating disputes surrounding bodily autonomy within the criminal justice system.

Law enforcement agencies often conduct searches and seizures of individuals' bodies as part of criminal investigations, such as through par-downs, strip searches, or bodily fluid testing. Controversies arise over the scope and legality of these intrusions, with debates about privacy rights, probable cause, requirements, and the use of invasive search techniques.

Government authorities may perform various forensic procedures on individuals' bodies to gather evidence in criminal cases, such as DNA sampling, fingerprinting, or medical examinations. Debates arise over issues of consent, bodily integrity, and the potential for abuse or misuse of forensic evidence, particularly in cases involving vulnerable populations or marginalized communities (Matic Boskovic, 2019: 338).

In some jurisdictions, courts may order forced medical interventions on individuals as part of criminal sentencing or treatment programs, such as medication that replace drug addiction, chemical castration for sex offenders or psychiatric medication for individuals with mental health issues. In other jurisdictions, courts or parole boards may impose medical interventions on individuals' release from custody, such as mandatory drug treatment, HIV testing, or medical monitoring. Polemics arise over the balance between public safety concerns and individuals' rights to privacy, autonomy, and dignity, with questions about the necessity and proportionality of such conditions. Controversies surround the ethics and legality of such interventions, raising questions about bodily autonomy,

medical ethics, and the potential for coercion or harm (Douglas, 2014: 105). Some authors compare forced medical interventions with the imposition of medical correctives as a condition of parole or early release.[10] One common critique is centered around the notion of consent. Critics argue that when the only alternative for an offender is to remain incarcerated, their decision to undergo a medical corrective is not truly voluntary but rather coerced (Ryberg, Petersen, 2013: 79). In this context, the offender may feel compelled to consent to the intervention in order to secure their release from custody.

Correctional institutions may employ various punitive measures that involve bodily intrusion, such as solitary confinement, physical restraint, or forced feeding. Polemics arise over the use of these measures as punishment, rehabilitation, or security measures, with concerns about their impact on mental and physical health, human dignity, and prisoners' rights (Pavlovic, 2020: 45).

Law enforcement agencies may use coercive interrogation techniques that involve bodily intrusions, such as stress positions, sleep deprivation, or sensory deprivation (Matic Boskovic, 2020, 64). Disagreements surround the legality and morality of these techniques, with debates about their effectiveness, reliability of evidence obtained, and compliance with human rights standards (Guiora, 2008: 85). The European Court of Human Rights has established through its caselaw that the cumulative use of certain interrogation techniques over an extended period can lead to physical and psychological suffering, which may amount to inhuman and degrading treatment. Such practices would violate Article 3 of the European Convention on Human Rights. The jurisprudence underscores the importance of considering the overall context and consequences of interrogation techniques employed by authorities.[11]

[10] More on alternative sanctions and conditional release see: Matic Boskovic, M. (2022) Krivično procesno pravo EU, p. 83.

[11] Case *Ireland v United Kingdom,* application no. 5310/71.

4. Controversies on rehabilitation of offenders and use of medical interventions

The use of medical interventions for the rehabilitation of offenders is a highly controversial topic (Douglas, 2014: 109). Mandating medical interventions as part of criminal rehabilitation programs can be seen as a violation of the right to bodily integrity, particularly if the interventions involve invasive procedures or alter individuals' bodily functions without their consent. The use of medical interventions for the rehabilitation of offenders raises questions about the ethical obligations of healthcare provider, particularly if the interventions involve potentially harmful or controversial practices (Ryberg, 2012: 231).

There is debate about the effectiveness of medical interventions in rehabilitating offenders and reducing recidivism rates. The potential effectiveness of hormonal anti-libidinal agents in reducing sexual recidivism among certain groups of sexual offenders is supported by some research findings. However, the reliability of these conclusions is limited by several factors, including the methodological challenges and ethical considerations inherent in conducting research with this population.[12] Additionally, the use of hormonal anti-libidinal agents is associated with medically significant side effects, further complicating the assessment of their effectiveness and the ethical considerations surrounding their use (Chew, Douglas, Faber, 2018: 1). These side effects may include hormonal imbalances, metabolic changes, and other adverse reactions, which can impact the overall health and well-being of individuals receiving this treatment. Given these limitations and complexities, it is crucial to approach the use of hormonal

[12] One of the primary methodological challenges is the ethical dilemma of conducting randomized control trials involving high-risk sexual offenders. There are debates about whether it is ethical to leave certain individual untreated, as would be required in a control group, given the potential risk of reoffending. Additionally, ensuring that participation in research projects is fully voluntary and non-exploitive, particularly in the prison setting where power dynamics may be twisted, is crucial but challenging. Practical constraints within the prison system also present challenges for researchers. Disruption from factors such as early release or transfers can affect the continuity of treatment and research protocols. Furthermore, controlling for environmental conditions and demographics, which are important factors in understanding treatment outcomes, can be difficult in such setting. More in Chew, C., Douglas, T.,. Faber, N. S. (2018) Biological Interventions for Crime Prevention. In. Birks, D., Douglas, T. (eds), Treatment for Crime: Philosophical Essays on Neurointerventions in Criminal Justice, Oxford University Press, pp. 11-43.

anti-libidinal agents with caution (Ryberg, 2015: 619). While there may be potential benefits in reducing sexual recidivism, it is essential to weight these against the potential risks and ethical considerations involved in administrating such treatments to individuals with a history of sexual offending.

While some studies suggest that certain interventions, such as medication-assisted treatment for substances use disorder, can be effective in promoting rehabilitation, others question the long-term outcomes and unintended consequences of medical interventions (Bahr, Masters, Taylor, 2012: 155). Critics argue that focusing solely on medical solutions may overlook underlying social, economic, and environmental factors that contribute to criminal behaviour. Mandating medical interventions as part of criminal rehabilitation programs can lead to decrease the negative impact of stigmatization and discrimination against individuals with a history of criminal involvement (Moore, et al, 2023: 3). Recent study conducted by Moore showed that treatment improved family perception and reduced negative attitudes towards offenders and help regain trust that was harm during active addition. Furthermore, participants in the study reported improvement in the self-perception due to the engagement in the treatment. There was a general sense that treatment helped participants begin to heal from previous trauma and problems.

Over the last decades there is discussion on use of neurointerventions in criminal justice with the aim to assess, treat, or modify the brains of individuals involved in the criminal justice system. These interventions are designed to address issues related to criminal behaviour, such as assessing culpability, reducing recidivism, or altering behaviour (Douglas, 2014: 101). Some interventions are already enforcing in some European countries and USA for rehabilitation purposes within the criminal justice system, such as pharmacotherapy to address issues like aggression or impulsivity (Kastelic, Pont, Stoever, 2009: 68). Examples include chemical castration, which reduces testosterone activity of sex offenders in Denmark, Germany, Norway, Finland, Estonia, Iceland, Latvia, Sweden (Peters: 1992: 307). In addition, there are brain simulations like transcranial direct current stimulation and pharmacotherapy, which have been reported to reduce aggression (Birks, Buyx, 2018:133). There is a belief that there are practical reasons for employing neurorehabilitation, primarily because it can help protect the public from future crimes. In other words, the use of these interventions is seen

as a means to achieve the end goal of reducing recidivism and enhancing public safety (Dore-Horgan, 2022: 430).

The permissibility of using neurorehabilitation hinges on whether its implementation unjustifiably infringes upon the rights of offenders. This includes considerations of bodily integrity, autonomy, dignity, and freedom of thought. Critics argue that mandatory, coercive, and non-consensual use of neurointerventions may violate the rights of individuals (Bennett, 2018: 257), while proponents argue that the potential benefits to society may justify certain infringements on individua rights (McMahan, 2018: 117).

Neurointerventions can take various forms, including pharmacological and neurostimulation (transcranial stimulation), or neurosurgical interventions (deep brain stimulation) (Tesnik, Douglas, Frosberg, Ligthart, Maynen, 2023: 26). Each of these interventions carries different implication for bodily integrity.

Furthermore, there is discussion of classification of neurointerventions as treatment or punishment. Different authors have different views and arguments depending on various factors, including the purpose, context and effects of the intervention. Neurointerventions can be considered as a form of treatment when their primary aim is to address a medical condition or mental health issue and are perceived as a right of the offender to rehabilitation (Dore-Horgan, 2022: 432). In this context, neurointerventions might be used to alleviate symptoms, improve cognitive function, or enhance overall well-being. For example, neurointerventions such as medication or therapy may be employed to manage conditions like depression or anxiety, with the goal of improving the individual's quality of life.

On the other hand, neurointerventions may be viewed as a form of punishment when they are imposed as a consequence of criminal behaviour or as part of a legal sanction (Ryberg, 2019: 95). In this context, neurointerventions might be used to modify behaviour, reduce the risk of recidivism, or incapacitate individuals perceived as posing a threat to public safety. For example, chemical castration, a form of neurointerventions, has been used in some jurisdiction as a condition of parole for certain sex offenders, with the aim of reducing the likelihood of future sexual offenses.

The severity of the infringement of the right to bodily integrity varies across different forms of neurointervention. Pharmacological interventions, such as the administration of psychotropic medications, may be less invasive and thus

potentially less severe in their infringement of bodily integrity compared to neurosurgical procedures.

Although the legal principles and jurisprudence recognize offenders right to rehabilitation,[13] neurointerventions are not included in the list, except in the context of treating recognized mental health disorders and diseases.[14]

5. Conclusions

The development of neurointerventions as a method for preventing recidivism raises important ethical and practical questions about their use in the criminal justice system and its implication on bodily integrity. Traditional concept of bodily integrity often focusses on physical intrusions or interventions that involve direct manipulation with body. However, neurointerventions present a unique challenge because they involve interventions at the neural level. Neurointervnetions, such as brain stimulation or pharmacotherapy targeting neurological processes, raises questions about the boundaries of bodily integrity and the extent to which individuals have a right to control their neural processes. These interventions may not involve physical intrusion in the same way as traditional medical procedures, but they still have potential to affect individuals' cognitive and emotional functioning.

The scope of protection provided by the right to bodily integrity against neurointerventions are still uncertain and subject to ongoing debate. Some argue that the right to bodily integrity should encompass protection against any form of interference with bodily autonomy, including interventions at the neural level. Other contend that the unique nature of neurointervnetions requires a re-evaluation of traditional conceptions of bodily integrity and the development of new ethical frameworks to address these issues.

One of the key issues related to neurointerventions is whether it should be considered a form of treatment or punishment. From a treatment perspective,

[13] *Murray v. the Netherlands*, application no. 10511/10, para 104; *Harakchiev and Tolumov v. Bulgaria*, application no. 15018/11, para 264.

[14] United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 1958. Standard minimum rules for the treatment of prisoners and related recommendations. New York: United Nations, Deptartment of Economic and Social Affairs, rule 62.

neurointervenetions may be seen as medical interventions aimed at addressing underlying neurobiological factors that contribute to criminal behaviour. Proponents argue that intervening at the neural level could help prevent future offending addressing issues such as impulsivity, aggression, or other psychological factors. From a punishment perspective, neurointerventions may be viewed as a form of state-sanctioned coercion or control over individual's bodies. Critics argue that using medical interventions as a condition of parole or early release could infringe on individuals' autonomy and bodily integrity, particularly if they are not provided with genuine choices or alternatives. A crucial ethical consideration is whether individuals are provided with informed consent and genuine choice regarding participation in neurointerventions.

Various treatments are already offered to offenders serving prison sanctions, such as anger management or cognitive behavioural therapy. It is essential to ensure that individual's rights are respected, and that any interventions are voluntary and informed. It is crucial to determine whether participation in neurointeventions is truly voluntary or whether individuals may feel coerced to undergo treatment in exchange for leniency in their sentences. Coercion would undermine the ethical validity of any consent obtained.

The effectiveness and safety of neurointerventions must be rigorously evaluated. If these interventions are not proven to be effective or if they pose significant risks to individuals' health, their use in the criminal justice system would be ethically questionable. There are concerns about fairness and equity in offering different sentencing outcome based on whether individuals agree to undergo neurointerventions. This approach could disproportionately impact vulnerable or marginalized population.

It has to be stressed that any use of neurointerventions in the criminal justice system must adhere to existing legal and regulatory frameworks governing medical treatment, research ethics, and human rights. These frameworks should provide safeguards to protect individuals' rights and ensure ethical standards are upheld. The ethical evaluation of neurointerventions also depends on considerations of their effectiveness and potential risks. Finally, decisions about the use of neurointervetions should involve a careful balancing of competing interests, including the rights and well-being of individuals, public safety concerns, and principle of justice and fairness.

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