

THERAPEUTIC SURGICAL CASTRATION IN THE CZECH REPUBLIC – MUTILATION, OR DELIVERANCE?

David Elischer,* Martin Šolc**1

Abstract: *In spite of a long-lasting criticism by several international human rights bodies, the Czech Republic is the last EU member state which still perform therapeutic surgical castration of sex offenders and men suffering from certain paraphilias. While critics consider the practice medically unnecessary and inhuman, proponents claim that therapeutic surgical castration offers the last hope to patients in whom other treatment options failed. This paper analyses the question of whether and under what circumstances can surgical castration be considered permissible. After that, the legal regulation in the Czech Republic and the relevant international criticism are dealt with. The identified criteria of permissibility are then applied to the Czech regulation and practice of castration.*

Keywords: *surgical castration, human rights, paraphilia, sex offenders, health law*

I. INTRODUCTION

Historically, sterilization or castration was often used as means to protect the social order, punish criminals, or achieve eugenic goals.² In the 20th century, voluntary or compulsory castration of sex offenders was practiced in many European countries.³ When the gruesome experience of World War II sparked an international interest in bioethical matters, castration and sterilization started to be more critically discussed. Bioethical debates were further intensified by the experience of unethical post-war medical experiments in the USA,⁴ coining the term bioethics at the turn of the 1960s and 1970s.⁵ As a result of the development of bioethics and the advancement of human rights, castration for the pur-

* doc. JUDr. PhDr. David Elischer, Ph.D., is an associate professor at the Department of Civil Law, Faculty of Law, Charles University, Prague, Czech Republic

The contribution of David Elischer was supported by the Charles University project Progres Q03.

** JUDr. Mgr. Martin Šolc is a doctoral student at the Department of Civil Law and a researcher at the Centre for Medical Law, Faculty of Law, Charles University, Prague, Czech Republic

The contribution of Martin Šolc was supported by the Charles University project Progres Q04.

¹ This paper is based on the authors' speeches which were delivered and debated on 25 July 2019 at the XXXVIth International Congress on Law and Mental Health in Rome, Italy.

The authors would like to express their sincere gratitude to MUDr. Marek Páv, Ph.D., MBA, for his valuable insights and ideas.

² See KNAP, K. *Ochrana osobnosti podle občanského práva [Protection of Personality Rights in Czech Law]*. Prague: Linde, 2004, p. 242, DOUGLAS, T., BONTE, P., FOCQUAERT, F., DEVOLDER, K., STERCKX, S. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*. *Journal of Bioethical Inquiry*. 2013, Vol. 10, No. 3, pp. 393–405.

³ See DOUGLAS, T., BONTE, P., FOCQUAERT, F., DEVOLDER, K., STERCKX, S. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*, pp. 393–405.

⁴ See RESNIK, D. B. *The Ethics of Research with Human Subjects. Protecting People, Advancing Science, Promoting Trust*. Springer, 2018, pp. 21–28, ŠOLC, Martin. *Právo, etika a kmenové buňky [Law, Ethics, and Stem Cells]*. Prague: Wolters Kluwer, 2018, pp. 43–46.

⁵ See MUNZAROVÁ, M. *Lékařský výzkum a etika [Medical Research and Ethics]*. Prague: Grada Publishing, 2005, p. 11, DOLISTA, J. *Úvod do bioetického myšlení [Introduction to Bioethical Thinking]*. Pilsen: Západočeská univerzita v Plzni, 2012, p. 7.

pose of punishment or eugenics was abandoned in most of the Western world in the second half of the century. Therapeutic surgical castration followed this trend.

After Germany effectively stopped performing therapeutic surgical castration of sex offenders several years ago,⁶ the Czech Republic remains the last EU country which still carries out the practice (on a written request of the offender). It has been long and harshly criticised by international human rights bodies operating both within the Council of Europe and the United Nations. The critics are concerned that surgical castration is irreversible, highly invasive intervention, with several direct and indirect side effects related not only to the physical but also to the mental health of the patient. From their point of view, it is a barbaric and, for some time, an outlived medical intervention which amounts to a violation of human rights.⁷

On the other hand, surgical castration is understood by a part of the expert community as a means of deliverance for those who struggle in a similar way to a paraphilic patient who wrote that he is “seeking a permanent help in order to protect others from myself”. These words were written in a letter to the president of the Czech Republic by a 22-year old man who has been suffering from sexual sadism from an early age. The man used to torture and kill animals, and when fantasies arose about torturing a human being, he decided to undergo therapy. However, his fantasies persisted.⁸ He was not eligible for castration since, at the time, it was only legal from the age of 25, and only after committing a violent sexually motivated crime. Even if he had wanted to, the president could not have enabled the physicians to act contrary to the law. The fate of this young man is unknown, but his case illustrates a typical argument for the permissibility of surgical castration.

In 2017, the legal regulation was amended so that the eligibility criteria for surgical castration were loosened in order to make the intervention even more accessible to a wider range of people (see Chapter 2.1). The topic of Czech surgical castration was subjected to a relatively broad discussion after 2009, following the criticism issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁹. The above-mentioned 2017 amendment to the legal regulation has not been adequately addressed. In our opinion, it justifies the new assessment of the overall Czech practice of therapeutic surgical castration.

⁶ See Germany praised for ending surgical castration of sex offenders. In: *Independent* [online]. 1.6.2017 [2020-09-29]. Available at: <<https://www.independent.ie/world-news/germany-praised-for-ending-surgical-castration-of-sex-offenders-35777861.html>>.

⁷ See PFÄFFLIN, F. The surgical castration of detained sex offenders amounts to degrading treatment. In: *Sexual Offender Treatment* 2010, Vol. 5, No. 2. [2020-09-29]. Available at: <<http://www.sexual-offender-treatment.org/86.html>>.

⁸ See KARÁSKOVÁ, I. Nechte mě vykastrovat, žádá sexuální deviant prezidenta [Let Them Castrate Me, a Sexual Deviant Asks the President]. In: *iDNES.cz* [online]. 27.3.2014 [2019-09-29]. Available at: <https://www.idnes.cz/zpravy/domaci/tema-mf-dnes-sexualni-deviant-prosi-o-kastraci.A140327_114622_domaci_maq>.

⁹ See McMILLAN, J. The kindest cut? Surgical castration, sex offenders and coercive offers. *Journal of Medical Ethics*. 2014, Vol. 40, No. 9, pp. 583–590. 11. 5. 2013 [2020-09-29]. Available at: doi: <<http://dx.doi.org/10.1136/medethics-2012-101030>>, or RYBERG, J., PETERSEN, T. S. Surgical castration, coercion and ethics. *Journal of Medical Ethics*. 2014, Vol. 40, No. 9, pp. 593–594. [2020-09-29]. doi: <<http://dx.doi.org/10.1136/medethics-2013-101508>>.

This paper, therefore, is a case study of the regulation and situation in the Czech Republic in the broader context of relevant ethico-legal discussion. We will seek the answers to two basic questions. The first is whether the surgical castration can ever be ethically permissible, and if it can, under what conditions. The second is whether the current Czech legal regulation of surgical castration fulfils the criteria of ethical permissibility.

In the theoretical part of the paper, we will analyse the recent discussion on surgical castration in order to determine whether there can be an identifiable ethical justification for the practice. Based on this analysis, we will propose practical criteria for surgical castration to be permissible. In the second part of the paper, we will introduce the current Czech legal regulation on surgical castration, highlight its recent changes, and describe the most important issues raised by international human rights bodies. This will be done in order to assess the permissibility of the current Czech regulation.

From the terminological perspective, we use the term castration for the sake of brevity, understanding that castration is not always a precise term from the medical perspective (it can be specified as orchietomy, testicular pulpectomy etc.). If not explicitly specified, castration in this paper means surgical castration.

1. GENERAL ETHICO-LEGAL CONSIDERATIONS

The discussion on ethical (and, to a certain extent, legal) permissibility of surgical castration can be conceptualised as consisting of three main questions. First, it needs to be clarified whether castration can be considered medical necessity. Second crucial question is whether the consent to undergo surgical castration is autonomous or coerced. Finally, it can be argued that even if castration was medically necessary and validly consented to, it is categorically impermissible as contrary to human dignity. Based on this main topics of debate, we will analyse the current discussion on castration and propose the criteria for the permissible castration.

1.1. Medical necessity

The international criticism is partially based on the assumption that surgical castration is not a medical necessity.¹⁰ In this respect, there is a relevant general principle that the more serious the interference with physical integrity is, the stronger the therapeutic purpose needs to be¹¹. This criticism can be divided into several partial arguments. Firstly, it can be questioned whether castration even addresses the correct problem when a sex crime is importantly influenced by other than biological factors. Secondly, the effective-

¹⁰ See Council of Europe. *Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 11 October 2018*, p. 62 [online]. 4.7.2019 [2019-07-09]. Available at: <<https://rm.coe.int/168095aeb4>>, or HEIM, Nikolaus, HURSCHE, Carolyn J. Castration for sex offenders: Treatment or punishment? *Archives of Sexual Behavior*. 1979, Vol. 8, No. 3, pp. 281–304.

¹¹ See DOUBEK, P. Terapeutické kastrace ve světle novely zákona o specifických zdravotních službách [Surgical castration with respect to Specific Health Services Act amendment]. *Právní rozhledy*. 2016, Vol. 24, No. 6, pp. 218–224.

ness and safety of surgical castration might be questioned and compared to alternative treatments, especially chemical (hormonal) castration that is performed in several European countries.¹² Thirdly, it could be argued that castration is an inherently punitive measure and as such it should not be considered a medical procedure at all.

1.1.1. Does castration address the right problem? The role of biological factors in sex crimes

It could be argued that castration does not properly address the problem of sexual violence since most of sex crimes are not committed by paraphilics.¹³ Nevertheless, paraphilia treatment is an important factor in the prevention of sexually motivated crimes. The prevalence of paraphilias is higher in sex offenders than in general population.¹⁴ While non-deviant offenders usually have problems with general social maladaptation, the problem with deviant offenders is usually limited to sexual motivation and sexual socialisation. In comparison to non-deviant offenders, their professional, relationship, and social adaptation tends to be better.¹⁵ A Czech study from the 1990s found that from the sample of 60 sex offenders, 42 percent were sadists and only 27 percent did not have any paraphilia.¹⁶ In a study of American and British serial sadistic murderers, it was found that all of the subjects had a strong physical and psychological urge to realise sadistic fantasies.¹⁷ All these data suggest that paraphilia is an important factor contributing to sexually motivated crime.

Castration is not capable of altering the orientation of sexual desire. A paraphilic patient is not cured of his paraphilia. However, castration lowers the intensity of sexual motivation. It usually weakens the sexual urge to the level it can be better controlled.¹⁸ It is undisputed that a patient must be motivated to control his behaviour in the first place. This is often seriously complicated by a denial of their responsibility,¹⁹ even though the presence of certain form of denial is probably not necessarily linked to a higher likelihood of re-of-

¹² See ŠUSTEK, P. Poskytování zdravotních služeb v České republice ve světle Úmluvy OSN proti mučení [The Provision of Health Services in the Czech Republic from the Perspective of the UN Convention against Torture]. In: ŠTURMA, P., LIPOVSKÝ, M. (eds.). *Studie z lidských práv č. 11. Preventivní mechanismy dle Opčního protokolu k Úmluvě proti mučení [Studies in Human Rights Vol. 11. Preventive Mechanisms According to the Optional Protocol to the Convention against Torture]*. Prague: Výzkumné centrum pro lidská práva při PF UK, 2016, p. 85.

¹³ See WEISS, P. Deviantní a nedevariantní pachatelé sexuálního násilí vůči ženám [Deviant and Non-Deviant Perpetrators of Sexual Violence against Women]. In: KOVÁŘ, Petr (ed.). *Sexuální agrese [Sexual Aggression]*. Prague: Maxdorf, 2008, p. 88.

¹⁴ See DOUGLAS, T., BONTE, P., FOCQUAERT, F., DEVOLDER, K., STERCKX, S. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*, pp. 393–405.

¹⁵ See WEISS, P. *Deviantní a nedevariantní pachatelé sexuálního násilí vůči ženám [Deviant and Non-Deviant Perpetrators of Sexual Violence against Women]*.

¹⁶ NETÍK, K. K sexuálním vraždám. [To sexual murders]. In: *Proceecings of IXth Bohnice Sexuological Days*, 1997.

¹⁷ See HOLMES, R. M., HOLMES, S. T. *Murder in America*. Thousand Oaks: SAGE, 1994.

¹⁸ See ZVĚŘINA, J., WEISS, P., HOLLÝ, M. *Výsledky terapeutické kastrace u parafilních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]*. Prague: Sexuologická společnost, Česká lékařská společnost J.E.P [Sexological Society, Czech Medical Association of J. E. Purkyně]. 2014, p. 3 [online]. [2019-09-05]. Available at: <http://www.mzcr.cz/Odbornik/dokumenty/vysledky-terapeuticke-kastrace-u-parafii%20lnich-sexualnich-delikventu_10012_1045_3.html>.

¹⁹ See LEVENSON, J. S., MACGOWAN, M. J. Engagement, Denial, and Treatment Progress Among Sex Offenders in Group Therapy. *Sexual Abuse: A Journal of Research and Treatment*. 2004, Vol. 16, No. 1, pp. 49–63. [2020-09-29]. doi: <<https://doi.org/10.1023/B:SEBU.0000006284.33837.d7>>.

fending.²⁰ Denial can be understood as the acceptance of explanations that reduce accountability.²¹ It might be argued that surgical castration reinforces the understanding of sex offences as a direct result of the paraphilia and a paraphilic has little to no control over them. Such opinion could be very comfortable for sex offenders, who might use it to deny their moral responsibility for their actions.

While this argument needs to be taken seriously, we do not consider it entirely convincing. First of all, there is no difference between surgical and chemical castration in this regard: both practices are biologically oriented and as such, they could potentially reinforce denial. If they were abolished, the only remaining therapeutic approach would be psychotherapy and similar techniques which are shown by a number of studies to be significantly less effective than castration (see Chapter 1.1.3). Furthermore, sex offenders who are in denial of the wrongness of their actions are usually not eligible for castration anyway²² – they need to reflect on their crimes first so they can be motivated not to re-offend. Therefore, castration is not promoted as the sole treatment method. It needs to be accompanied by psychological and psychotherapeutic methods that can address the patient's problems with denial. If castration is used as a part of this complex therapeutic approach, it is arguably not likely to promote the offenders' denial.

For the above-outlined reasons, castration cannot be considered the sole therapy option for paraphilics. That is, however, a very consensual notion. As a rule, castration is accompanied by other treatment approaches as much as the resources of the psychiatric system allow. We believe that this fact does not render castration medically unnecessary. For an intervention to be necessary from the medical perspective, it is not imperative that this intervention is the only therapeutic option for all patients with the relevant health condition, nor is it necessary that the intervention can improve a patient's situation without any complementary treatment.

1.1.2. Effectiveness and safety of surgical castration

As a logical consequence of the prohibition of surgical castration in most Western countries, the studies on its effects have only been sparsely conducted in the last decades. The numbers of such studies are not high even in the Czech Republic. A study conducted in 2014 by the Sexological Society of the Czech Medical Association of J. E. Purkyně at the request of the Czech Ministry of Health was rather unique in Czech context. For this reason, we will analyse its results in more detail and compare it to the results of some of foreign studies.

²⁰ See YATES, P. M. Is sexual offender denial related to sex offence risk and recidivism? A review and treatment implications. *Psychology, Crime & Law*. 2009, Vol. 15, No. 2-3, pp. 183–199. [online]. doi: <<https://doi.org/10.1080/10683160802190905>>.

²¹ See SCHNEIDER, S. L., WRIGHT, R. C. Understanding Denial in Sexual Offenders: A Review of Cognitive and Motivational Processes to Avoid Responsibility. *Trauma, Violence, & Abuse*. 2004, Vol. 5, No. 1, pp. 3–20. [2020-09-29]. doi: <<https://doi.org/10.1177/1524838003259320>>.

²² See DOUGLAS, T., BONTE, P., FOCQUAERT, F., DEVOLDER, K., STERCKX, S. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*, pp. 393–405.

The 2014 study was conducted on 50 paraphilic male patients who had undergone surgical castration. The subjects were divided into two groups: in one group, the patients filled the questionnaire with their physicians, while in the other group they filled the questionnaire on their own.

Out of the fifty patients, only two committed another sexual offense after castration²³. However, the data on side effects from various studies from different countries vary widely. According to the data from the patients who completed the questionnaire with their physicians in the Czech study, the most usual somatic side effects were obesity (36% of patients), loss of weight (20%), and fatigue (18%)²⁴. Among the possible side effects, there are also, for example, osteoporosis or deterioration of secondary sex characteristics.²⁵ The overall mental state improved after castration in 60% of patients and deteriorated only in 6%.²⁶ The most common psychological problems were depression, irritability, and perceived isolation.²⁷

A small number of patients were still capable of coitus after castration. While nobody after castration can procreate, some patients could still reach orgasm.²⁸ This does not mean that castration does not achieve its aim since sexual appetite is nevertheless lowered and thus more easily controlled.

For the sake of complexity, we shall note that almost 88% of the 50 respondents stated that their decision to undergo surgical castration was voluntary; and 60% of them would do it again²⁹. Positive evaluation of castration from the patients was also found in most of foreign studies³⁰. At the same time, anonymous questionnaires (completed without physicians) showed that most men (i.e. about 85%) were satisfied with their physical and mental condition after castration. Satisfaction with sexual life was obviously somewhat lower, but most of the respondents (60% of the group) were satisfied with it despite the corresponding negatives.³¹

The authors of the study concluded that they believe “the current regulation of castration of paraphilic sex offenders in the Czech Republic meets all professional and ethical aspects” and that surgical castration “should not be excluded from our arsenal of possible ways of treatment because it demonstrates high efficiency and it is relatively well-tolerated and positively evaluated, both by patients and doctors”.³²

²³ ZVĚŘINA, J., WEISS, P., HOLLÝ, M. Výsledky terapeutické kastrace u parafileních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]. *Psychiatrie pro praxi*. 2016, Vol. 17, No. 1, p. 17.

²⁴ ZVĚŘINA, J., WEISS, P., HOLLÝ, M. Výsledky terapeutické kastrace u parafileních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders], 2014, p. 17.

²⁵ *Ibid.*, pp. 5, 17, 22.

²⁶ *Ibid.*, p. 18.

²⁷ ZVĚŘINA, J., WEISS, P., HOLLÝ, M. Výsledky terapeutické kastrace u parafileních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders], 2016, p. 16.

²⁸ ZVĚŘINA, J., WEISS, P., HOLLÝ, M. Výsledky terapeutické kastrace u parafileních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders], 2014, p. 8.

²⁹ *Ibid.*, pp. 23–24.

³⁰ See *ibid.*, p. 6, or WILLE, R., BEIER, K. M. Castration in Germany. *Annals of sex research*. 1989, Vol. 2, No. 2, p. 104.

³¹ ZVĚŘINA, J., WEISS, P., HOLLÝ, M. Výsledky terapeutické kastrace u parafileních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders], 2014, p. 25.

³² *Ibid.*, p. 29.

A single study based on a questionnaire obviously must be understood with a certain level of caution. Furthermore, the impartiality of the study might be questioned as it was conducted at the request of the Ministry of Health as part of the response to the international criticism of Czech practice of castrations (see Chapter 2.3). If we compare it to available international studies, we can come to two conclusions.

First, the Czech findings seem to correspond with the results of other studies. Also, several foreign studies show that castration is the most reliable therapeutic method from the perspective of prevention. Recidivism rates of castrated offenders are usually found to be very low, usually several percent,³³ even though some studies found the recidivism to be somewhat higher (e.g. 11 percent in the work of Wille and Beier).³⁴ For example, a meta-analysis of three extensive European studies published by Heim and Hursch in 1979 found recidivism rates of approximately 2.5–7.5 percent.³⁵ The prophylactic effectiveness of surgical castration is sometimes admitted even by its most ardent critics who oppose it on moral grounds.³⁶ Furthermore, some foreign studies also suggest that incarcerated offenders do not consider crime-preventing medical intervention coercive.³⁷

The second lesson from the foreign studies is that these optimistic results can be questioned when the broader context is taken into account. The effectiveness of particular sexological therapies is notoriously difficult to measure. For example, Heim and Hursch identified several potential methodological problems of the studies they used for their meta-analysis. Perhaps most interesting, they highlighted that self-reporting of sex offenders might not be entirely reliable since the offenders could have learned during their counselling by psychiatrists that they should define themselves as free from sexual urges.³⁸ Berner, Briken and Hill stress that in democratic societies, surgical castration is usually preceded by long-term psychotherapy and pharmacotherapy that can make the causation between castration and the offender's behaviour unclear.³⁹ This argument, nevertheless, can be considered rather unconvincing in actual practice in the Czech Republic, where castration is only permitted after all other therapeutic options have failed.

³³ See WEINBERGER, L. E., SREENIVASAN, S., GARRICK, T., OSRAN, H. The Impact of Surgical Castration on Sexual Recidivism Risk Among Sexually Violent Predatory Offenders. *The Journal of the American Academy of Psychiatry and the Law*. 2005, Vol. 33, No. 1, p. 28.

³⁴ See WILLE, R., BEIER, K. M. *Castration in Germany*, pp. 103–133.

³⁵ See HEIM, N., HURSCH, C. J. *Castration for sex offenders: Treatment or punishment?*, pp. 281–304.

³⁶ See SCHORSCH, E., PFÄFFLIN, J. Die sexuellen Deviationen und sexuell motivierte Straftaten. In: VENZ-LAFE, U., FOERSTER, K. (eds.). *Psychiatrische Begutachtung. Handbuch für Ärzte und Juristen*. 2nd edition. Gustav Fischer, Stuttgart, Jena, New York: Gustav Fischer, 1994, p. 362.

³⁷ See RIGG, J. Measures of perceived coercion in prison treatment settings. *International Journal of Law and Psychiatry*. 2002, Vol. 25, No. 5, pp. 473–490. [2020-09-29]. doi: <[https://doi.org/10.1016/S0160-2527\(01\)00094-2](https://doi.org/10.1016/S0160-2527(01)00094-2)>, or POYTHRESS, N. G., PETRILA, J., McGAHA, A., BOOTHROYD, R. Perceived coercion and procedural justice in the Broward mental health court. *International Journal of Law and Psychiatry*. 2002, Vol. 25, No. 5, pp. 517–533. [2020-09-29]. doi: <[https://doi.org/10.1016/s0160-2527\(01\)00110-8](https://doi.org/10.1016/s0160-2527(01)00110-8)>.

³⁸ See HEIM, N., HURSCH, C. J. *Castration for sex offenders: Treatment or punishment?*, pp. 281–304.

³⁹ See BERNER, W., BRIKEN, P., HILL, A. (eds.). *Sexualstraftäter behandeln mit Psychotherapie und Medikamenten*. Köln: Deutscher Ärzte-Verlag, 2007.

1.1.3. Effectiveness and safety of chemical castration

It is true that there exist alternatives to surgical castration, i.e. behavioural therapy – which, however, is very inefficient if provided alone⁴⁰ – and chemical castration. The effectiveness of chemical castration is rather unclear. The results from various studies are conflicting, ranging from those that suggest the effectiveness similar to that of surgical castration (especially when combined with psychotherapy)⁴¹ to studies that found no significant effect. There is not a robust body of evidence supporting the effectiveness of chemical castration.⁴² Recidivism after behavioural therapy is as high as dozens of percent.⁴³ An extensive meta-study of 69 studies found not only that surgical and chemical castration show greater effect on sexual recidivism than psychosocial intervention but also that surgical castration might be more efficient than chemical castration.⁴⁴

The effects of surgical castration might be partly reversed by hormonal treatment,⁴⁵ which, however, requires obtaining medication. On the other hand, the effects of chemical castration are reversible after mere discontinuation of medication,⁴⁶ opening a much wider space for non-compliance⁴⁷ and possibly leaving some patients with a sense of temporariness or incompleteness of the solution.⁴⁸ Moreover, after the discontinuation of chemical castration therapy, the production of testosterone becomes extremely high, leading to a very serious risk of sexual violence.⁴⁹

While chemical castration does not have irreversible effects in terms of sterility, it should not be overlooked that it requires a life-long provision of medication while its long-

⁴⁰ See Ministry of Health of the Czech Republic. Doporučený postup při provádění kastrací v souvislosti s parafilně motivovanými sexuálními trestnými činy [Recommended Procedure for Castration in Relation with Paraphilia-Motivated Sexual Offences], Article 4. In: *Věstník Ministerstva zdravotnictví ze dne 29. června 2012, č. 5/2012 [Bulletin of the Ministry of Health of 29 June 2012, No. 5/2012]*.

⁴¹ See LEE, J. Y., CHO, K. S. Chemical Castration for Sexual Offenders: Physicians' View. *Journal of Korean Medical Science*. 2013, Vol. 28, No. 2, p. 172. 29. 1. 2013 [2020-09-29]. doi: <<https://doi.org/10.3346/jkms.2013.28.2.171>>.

⁴² See DOUGLAS, T., BONTE, P., FOCQUAERT, F., DEVOLDER, K., STERCKX, S. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*, pp. 393–405, or EHER, R., GNOTH, A., BIRKLBAUER, A., PFÄFFLIN, F. Antandrogene Medikation zur Senkung der Rückfälligkeit von Sexualstraftätern: ein kritischer Überblick. *Recht & Psychiatrie*. 2007, Vol. 25, No. 3, pp. 103–111.

⁴³ See ZVĚŘINA, J., WEISS, P., HOLLÝ, M.. *Výsledky terapeutické kastrace u parafilních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]*, 2014, pp. 10–13.

⁴⁴ See KRUEGER, R. B., WECHSLER, M. H., KAPLAN, M. S. Orchiectomy. In: SALEH, F. M., GRUDZINSKAS, A. J. Jr., BRADFORD, J. M., BRODSKY, D. J. (eds.). *Sex offenders. Identification, risk assessment, treatment, and legal issues*. New York: Oxford University Press, 2009, pp. 171–188.

⁴⁵ See McMILLAN, J. *The kindest cut? Surgical castration, sex offenders and coercive offers*, p. 588, or WEINBERGER, L. E., SREENIVASAN, S., GARRICK, T., OSRAN, H. *The Impact of Surgical Castration on Sexual Recidivism Risk Among Sexually Violent Predatory Offenders*, p. 29.

⁴⁶ See LEE, J. Y., CHO, K. S. *Chemical Castration for Sexual Offenders: Physicians' View*, p. 171.

⁴⁷ See McMILLAN, J. *The kindest cut? Surgical castration, sex offenders and coercive offers*, p. 588.

⁴⁸ See *ibid.*, p. 589.

⁴⁹ See an interview with sexologist Petra Sejblová in: TRACHTOVÁ, Z. *Kastrací devianta nevyлéčíme. Lépe se pak ale ovládá, říká sexuoložka [We Can't Cure a Deviant With Castration. However, He Better Controls Himself After It, Says a Sexologist]*. In: *iDNES.cz* [online]. 17.7.2016 [2019-09-29]. Available at: <https://www.idnes.cz/zpravy/domaci/rozhovor-se-sexuolozkou-sejbalovou.A160714_145316_domaci_zt>.

term effects are not entirely known⁵⁰. It has been established that it has a number of negative side effects similar to those of surgical castration, including for example depression, weight gain, diabetes, or bone-demineralisation.⁵¹

Taking into account the outlined facts, we believe that chemical castration is not necessarily a more humane solution. Furthermore, the prohibition of surgical castration would abandon the patients who cannot undergo chemical castration due to medical contraindications⁵². The fact that chemical castration seems less invasive – indeed less “brutal” – could lead to emotional and, in effect, irrational decisions. It should not be a distraction from reasonably weighing the real benefits and harms inflicted by the two options.

1.1.4. Castration as an inherently punitive procedure

There are authors who believe that no matter the effectiveness of surgical castration, it always has the background in the talion (“an eye for an eye”) principle.⁵³ In this sense, Friedmann Pfäfflin compares surgical castration to the chopping off the thief’s hand which also “is undoubtedly effective as a prophylactic against the possibility of subsequent thefts”.⁵⁴ However, the historical background of certain procedure does not necessarily describe its current aim and nature. Even if the sense of revenge might have had a certain important role in surgical castration in the past, it does not mean that it is the leading principle today. Nowadays, castration is not considered a punishment, and this therapeutic understanding of the procedure is usually protected by legal safeguards. Paradoxically, it is rather the incarceration itself that could be rationally accused of being a mean of retribution. Furthermore, the comparison to a medieval thief is not convincing – while the loss of a hand did not help the thief in anything, the castration might be rationally wished for by the patient since it can help him control his sexual urges.

It should also be mentioned that according to some authors, the effect of castration is realised through the sexual delinquents’ subconscious desire to be punished.⁵⁵ It would mean that surgical castration works psychologically rather than biologically – and if this was true, it could suggest that suitable psychological interventions could have at least the same results. This argument should be rejected as speculative⁵⁶ and suspicious since surgical castration works in patients who never hurt anyone as well. Nevertheless, even if the argument was based on truth, it would not necessarily render the castration impermissi-

⁵⁰ See ZVĚŘINA, J., WEISS, P., HOLLÝ, M. *Výsledky terapeutické kastrace u parafilních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]*, 2016, p. 17, or LEE, J. Y., CHO, K. S. *Chemical Castration for Sexual Offenders: Physicians’ View*, p. 172.

⁵¹ See GARCIA, F. D., THIBAUT, F. Current concepts in the pharmacotherapy of paraphilias. *Drugs*. 2011, Vol. 71, No. 6, pp. 771–790. [2019-09-29]. doi: <<https://doi.org/10.2165/11585490-000000000-00000>>.

⁵² See ZVĚŘINA, J., WEISS, P., HOLLÝ, M. *Výsledky terapeutické kastrace u parafilních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]*, 2014, p. 29.

⁵³ See PFÄFFLIN, F. *The surgical castration of detained sex offenders amounts to degrading tretment*.

⁵⁴ *Ibid.*

⁵⁵ See SIGUSCH, V. *Therapie sexueller Störungen*. Stuttgart: Thieme Verlag, 1980, or PFÄFFLIN, F. *The surgical castration of detained sex offenders amounts to degrading tretment*.

⁵⁶ See ZVĚŘINA, J., WEISS, P., HOLLÝ, M. *Výsledky terapeutické kastrace u parafilních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]*, 2014, p. 3.

ble. If this kind of subconscious motivation was used in conjunction with psychotherapy accompanying the castration, it could arguably be used to maintain a broad psychological change and development. Such a deep psychological change might prove necessary if the patient is to resist the temptation, even if this temptation is significantly mitigated by the castration.⁵⁷ At the same time, the help in achieving psychological change is sometimes seen as the greatest benefit of therapeutic surgical castration (this broader understanding of beneficial effects of surgical castration is interestingly articulated by John McMillan).⁵⁸

1.2. Autonomous nature of consent

The autonomy-based argument against castration is straightforward: the consent is only free if it was not made under coercion; the (implicit) threat of continuing protective treatment or security detention amounts to coercion; therefore, the consent cannot be considered free. The patient for whom alternative treatment is not possible for various reasons⁵⁹ is seen as forced to make an allegedly unethical “Sophie’s choice” between the possibility of life in detention or never being able to father a child (besides other effects of the procedure)⁶⁰. The offer of castration is therefore considered a coercive one,⁶¹ without leaving enough space for true expression of personal autonomy.

1.2.1. The option of castration as a coercive offer

The concept of coercive offers should generally be approached with caution. The nature of coercion and offer is contradictive: while coercion aims at eliminating options, an offer creates new ones. As John McMillan asks, “[h]ow is it possible for something to create an option and remove an option at the same time?”⁶² In a similar manner, Thomas Douglas et al. point out that the offer of castration makes the offender more autonomous since it expands the number of alternatives open to him. It makes sense to compare the situation of the offender with his own situation should the offer never be made. It is, on the other hand, nonsensical to compare it to the situation of other people who do not suffer from paraphilia.⁶³

Nevertheless, there seem to exist offers which are coercive (“if you give me your money, I will let you live”). McMillan suggests that this dilemma can be solved by stating that if the offer is not independent of the threat (as is the case in the above-mentioned example of a robber’s threat), it ceases to be an offer. On the other hand, a psychiatrist (or the state) is not responsible for the paraphilic’s situation, and has no obligation to help the para-

⁵⁷ See WEINBERGER, L. E., SREENIVASAN, S., GARRICK, T., OSRAN, H. *The Impact of Surgical Castration on Sexual Recidivism Risk Among Sexually Violent Predatory Offenders*, p. 34.

⁵⁸ See McMILLAN, J. *The kindest cut? Surgical castration, sex offenders and coercive offers*, p. 589.

⁵⁹ See Ministry of Health of the Czech Republic. *Doporučený postup při provádění kastrací v souvislosti s parafilně motivovanými sexuálními trestnými činy [Recommended Procedure for Castration in Relation with Paraphilia-Motivated Sexual Offences]*, Article 4.

⁶⁰ See *ibid.*, Article 5.

⁶¹ See McMILLAN, J. *The kindest cut? Surgical castration, sex offenders and coercive offers*, p. 583.

⁶² *Ibid.*, p. 586.

⁶³ See DOUGLAS, T., BONTE, P., FOCQUAERT, F., DEVOLDER, K., STERCKX, S.. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*, pp. 393–405.

philic in any other way than medical (for example, a psychiatrist is not obliged to release the paraphilic from the protective treatment). The offer actually creates more options, not fewer. Therefore, the offer of castration should arguably not be considered coercive (except for cases when it was communicated in an explicitly threatening manner).⁶⁴ We may mention that McMillan comes to a conclusion regarding the consent to surgical castration that “[t]here is every reason to suppose that in the Czech Republic (...) this is a voluntary choice and there is no coercion.”⁶⁵

A slightly different method of distinguishing what are and are not coercive offers is suggested by Douglas et al. If someone creates certain situation and then offers an alternative to this situation, it is crucial whether the baseline situation is justified. The robber who asks for money undoubtedly increases the autonomy of the victim compared to the situation when he would kill them. However, the entire situation is not justified, hence the offer is coercive. The robber should cease the attack, not continue with it unless some conditions are met. The state puts an offender into detention and then offers castration as a way out. Of course, the state could simply release the offender from the detention, but the crucial question is whether there is a rational and just reason not to do it. The offender is not detained because of an arbitrary decision of society, but because it is necessary for the protection of other people. If the detention is justified, the offer of castration actually expands the possibilities open to the offender and, therefore, cannot be considered coercive. It could be coercive only if the detention was for some reason unjust.⁶⁶

1.2.2. Paraphilia as a restraint on autonomy

If a patient’s autonomy is not necessarily restricted by the offer of castration, we may ask whether the patient’s consent can actually increase his autonomy. The notion of non-autonomous consent is based on a negative concept of autonomy that bioethical literature sometimes calls default autonomy. This understanding of autonomy focuses solely on the absence of coercion, i.e. relevant undue external influences.⁶⁷ However, there exist different concepts of autonomy. For example, rationalist theories of autonomy stress that irrational desires (e.g. those based on false information or logical errors) restrict one’s autonomy.⁶⁸ From this perspective, a desire to perform paraphilic sexual activities is arguably irrational, while the decision to undergo castration (unless it is motivated by irrationally strong fear of detention etc.) can be rational and support the patient’s autonomy.

⁶⁴ See McMILLAN, J. *The kindest cut? Surgical castration, sex offenders and coercive offers*, p. 586.

⁶⁵ *Ibid.*, p. 587.

⁶⁶ See DOUGLAS, T., BONTE, P., FOCQUAERT, E., DEVOLDER, K., STERCKX, S. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*, pp. 393–405.

⁶⁷ See BEAUCHAMP, T. L., CHILDRESS, J. F. *Principles of Biomedical Ethics*. 7th edition. New York: Oxford University Press, 2013, pp. 102–105, or DOLEŽAL, Adam. Pojetí autonomie v moderní bioetice a jeho dopady na teorii informovaného souhlasu [The concept of autonomy in modern bioethics and its impacts on the theory of informed consent]. *Časopis zdravotnického práva a bioetiky [Journal of Medical Law and Bioethics]*. 2019, Vol. 9, No. 1, pp. 9–10. [2019-09-29]. Available at: <<http://medlawjournal.ilaw.cas.cz/index.php/medlawjournal/article/view/178/149>>.

⁶⁸ See SAVULESCU, J. Rational desires and the limitation of life-sustaining treatment. *Bioethics*. 1994, Vol. 8, No. 3, pp. 191–222. 7/1994 [2019-09-29]. doi: <<https://doi.org/10.1111/j.1467-8519.1994.tb00255.x>>.

The distinction between the autonomous and non-autonomous desires is also made by the so-called theory of authenticity (also known as split-level theory). According to this theory, there are two levels of desires:⁶⁹

- the first-order desires are the desires which directly aim at a certain action or a certain state; for example, a desire to buy a new car, to have a vacation in Costa Rica, or to become a parent;
- the second-order desires are reflective in their nature since they aim at the first-order desires; a second-order desire consists in wanting or not wanting certain first-order desire; for example, a second-order desire might be a desire to want to finish reading a textbook one actually finds exceedingly boring, a desire to be thrilled at the prospect of becoming a parent while one is indeed thrilled, or a desire not to crave the drug one craves hopelessly.

According to split-level theory, autonomous persons define themselves on the basis of second-order desires. This deeper level of desires enables the person to create the project of their life, to reflectively develop in order to realise this project, and to become their true self. The first-order desires, therefore, are only authentic as long as they are in accordance with the second-order desires. Any first-order desire which is not the object of a second-order desire (that is, which is not truly wanted by the person) is unauthentic.⁷⁰

Based on this theory, sexual desires stemming from paraphilia in the patients who do not welcome them are not authentic. These desires might severely limit autonomy, in many cases making it almost impossible to think about other matters.⁷¹ While the second-order desire of these men is to have a normal life (and not to represent a threat to others), their strong first-order desire to commit sexual violence actually prevents them from achieving their authentic life plan. From this perspective, surgical castration may enable these patients to finally free themselves from their unauthentic desires and to become truly autonomous.

For the above analysed reasons, Douglas et al. believe the castration could be justifiable even in cases where the consent would not be truly autonomous. They argue that such castration would constrain the offender's present autonomy, however, this problem could be balanced by its positive impact on his future autonomy.⁷² While this radical approach is interesting from theoretical perspective, we do not find it necessary. We believe the valid consent should always be required. We also believe that the consent, if granted with sufficient information and no coercion, is valid, given that the baseline situation of detention is justified.

As we have argued, the patient might autonomously decide to undergo castration in order to increase his chances to be released from detention. Furthermore, it can be rea-

⁶⁹ See DWORKIN, G. *The Theory and Practice of Autonomy*. Cambridge: Cambridge University Press, 1988, pp. 12–20, or BEAUCHAMP, T. L., CHILDRESS, J. F. *Principles of Biomedical Ethics*, pp. 102–104.

⁷⁰ See DOLEŽAL, A. *Pojetí autonomie v moderní bioetice a jeho dopady na teorii informovaného souhlasu [The concept of autonomy in modern bioethics and its impacts on the theory of informed consent]*, pp. 11–13.

⁷¹ See THIBAUT, E., DE LA BARRA, E., GORDON, H., COSYNS, P., BRADFORD, J. M. W., the WFSBP Task Force on Sexual Disorders. The World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for the biological treatment of paraphilias. *The World Journal of Biological Psychiatry*. 2010, Vol. 11, No. 4, pp. 604–655.

⁷² See DOUGLAS, T., BONTE, P., FOCQUAERT, F., DEVOLDER, K., STERCKX, S. *Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy*, pp. 393–405.

sonably assumed that some patients want to get rid of their sexual fantasies and urges because they do not want to harm others. This understanding of one's own dangerousness and the moral impermissibility of one's potential violent acts might be natural for some paraphilics while for others, it might be a result of a successful empathy training. This training is usually carried out as a part of the therapy and aims at improving the patient's ability to understand verbal and nonverbal communication and to enhance compassion with the victims.⁷³ Empathy training is also encompassed in the recommended procedures for the therapy of paraphilic sex offenders issued by the Sexological Society of the Czech Medical Association of J. E. Purkyně.⁷⁴ For the paraphilics who do feel empathy with others, it is the paraphilia itself rather than the psychiatrists and the law that “forces” them to consent to castration.

Such an influence of a health condition does not represent coercion in a legal sense. Otherwise, almost no informed consent in healthcare could ever be considered voluntary.⁷⁵ A person suffering from paraphilia who consents to the castration in which he sees the last hope is actually in the same – or at least a very similar – position to a person who consents to the removal of testicles because of testicular cancer.⁷⁶ We understand that the situation of both patients is very different from many important perspectives. Nevertheless, they both are pressured by their serious health condition to make a difficult decision of whether to undergo the sterilising procedure. And, in both cases, this decision might be autonomous, ethical, and legal.

1.3. Surgical castration as a contradiction to human dignity

Much of medical law and ethics uses the notion of human dignity as a fundamental concept. However, there is no consensual definition of dignity. Not only is the concept exceptionally vague but sometimes it is also used in a (seemingly) contradictory manner.

⁷³ See WARD, T., DURRANT, R. Altruism, Empathy, and Sex Offender Treatment. *International Journal of Behavioral Consultation and Therapy*. 2013, Vol. 8, No. 3-4, pp. 66–71. [2020-09-29]. doi: <<http://dx.doi.org/10.1037/h0100986>>, GERY, I., MILJKOVITICH, R., BERTHOZ, S., SOUSSIGNAN, R. Empathy and recognition of facial expressions of emotion in sex offenders, non-sex offenders and normal controls. *Psychiatry Research*. 2009, Vol. 165, No. 3, pp. 252–262. [2020-09-29]. doi: <<https://doi.org/10.1016/j.psychres.2007.11.006>>, or WASTELL, C. A. Empathy training, sex offenders and re-offending. *Journal of Sexual Aggression*. 2009, Vol. 15, No. 2, pp. 149–159. [2020-09-29]. doi: <<https://doi.org/10.1080/13552600902792599>>.

⁷⁴ See ZVĚŘINA, J., WEISS, P. *Doporučené postupy v terapii parafilních sexuálních delikventů [Recommended procedures for the therapy of paraphilic sexual offenders]*. Prague: Sexuologická společnost, Česká lékařská společnost J.E.P [Sexological Society, Czech Medical Association of J. E. Purkyně], 2015, p. 18.

⁷⁵ The concept of free and informed consent aims at enabling the patient to understand their situation, equalizing the information asymmetry between the patient and the health professional, and eliminating any coercion from the patient's decision-making. Nevertheless, the very reason the patient needs to make a decision is a health condition that the patient has never chosen to suffer from. The free decision takes places in the context that originated beyond the patient's control. For the aims of informed consent in Czech law, see SALAČ, J. Informovaný souhlas jako nástroj vyrovnání informačního deficitu ve vztahu lékař-pacient [Informed Consent as an Instrument of Equalizing the Information Asymmetry in the Physician-Patient Relationship]. In: *Paneurópske právnické listy* [online]. 2019, Vol. 2, No. 1. [2020-07-24]. Available at: <<https://www.paneurópskepravnickelisty.sk/index.php/salac-j/>>, or SALAČ, J. Souhlas [Consent]. In: ŠUSTEK, P., HOLČÁPEK, T. (eds.). *Zdravotnické právo [Health Law]*. Prague: Wolters Kluwer, 2016, pp. 250–251.

⁷⁶ See ZVĚŘINA, J., WEISS, P., HOLLÝ, M. *Výsledky terapeutické kastrace u parafilních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]*, 2014, pp. 8–9.

For example, it may be told that nobody can take someone else's dignity away, but at the same time human dignity seems to be in urgent need of being protected by the law. Because of this ambiguity of the term, some ethicists even call for its complete abandonment and believe it can be fully replaced by the concept of autonomy of will.⁷⁷

It does not seem very feasible or realistic to disregard the notion of dignity, though. If not for any other reason, it is treated as a basic value by contemporary human rights law: for example, the Explanatory Report to the Convention on Human Rights and Biomedicine declares that “[t]he concept of human dignity (...) constitutes the essential value to be upheld [by the Convention]” (point 9).

If we want to understand human dignity more clearly, we need to find out what specific and valuable content it has. That is an enormous task for a profound philosophical work. In this paper, we will only propose a Kantian line of reasoning which we believe might be useful in relation to the legal and ethical evaluation of surgical castrations and similar problems.

An interesting and influential understanding of dignity was elaborated by Immanuel Kant. In his understanding, dignity is an inherent value as opposed to a price which is a mere relative value:

“[E]verything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.”⁷⁸

In this sense, we may conceptualise dignity as a property of those phenomena which cannot be traded for anything else. It needs to be noted that equivalent does not need to be monetary or even tangible – otherwise, it would not be in principle possible to compensate for an immaterial harm.

A direct application of the concept of dignity to the question of surgical castration is problematic: it seems that even though we have somehow narrowed the term of dignity, we still can come to a variety of conclusions regarding the permissibility of castration. Nevertheless, we may find inspiration in similar cases of invasive medical interventions. According to certain bioethical theories (especially the theory of case-based reasoning and the theory of reflective equilibrium), decision-making is, in practice, informed by moral intuitions and experiences with similar cases rather than by universal moral principles. Moral reasoning, therefore, should in a way resemble the doctrine of precedent, being based on families of relevant cases which were resolved in the past. This moral experience may enable us to reflect on our moral principles and achieve balanced decisions.⁷⁹ We cannot analyse this approach in detail in this paper. However, in the situation of moral uncertainty regarding the relationship between castration and human dignity, we find it inspiring and potentially helpful.

In certain cases, it is legal and socially acceptable to trade the procreative function for survival (e.g. in case of testicular cancer). On the other hand, surgical castration does not (at least directly) save the life of the patient. It can significantly increase the quality of his

⁷⁷ See MACKLIN, R. Dignity is a useless concept. *The British Medical Journal*. 2003, Vol. 327, No. 7429, pp. 1419–1420. [2020-09-29]. doi: <<https://doi.org/10.1136/bmj.327.7429.1419>>.

⁷⁸ KANT, I. *Groundwork of the Metaphysics of Morals*. Cambridge: Cambridge University Press, 1997, p. 42.

⁷⁹ See BEAUCHAMP, T. L., CHILDRESS, J. F. *Principles of Biomedical Ethics*, pp. 397–410.

life, but here we may find a counter-example: a person suffering from unbearable, chronic, and untreatable pain in a limb cannot ask for the amputation on the sole basis of the pain. In order to get closer to a solution to this dilemma, we should find an example which would be closer to surgical castration other than testicular cancer and chronic limb pain.

We may find such a suitable example in the treatment of gender dysphoria. Mainly in European and North American countries, sex reassignment surgery (SRS) is widely accepted. In 2002, the ECtHR stated in its judgment in the case *Christine Goodwin v. the United Kingdom* that “transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief”.⁸⁰ In this judgment and several others, the ECtHR acknowledged the positive obligation of the states to “recognise the change of gender undergone by post-operative transsexuals”.⁸¹ In some countries (including the Czech Republic), SRS even represents a requirement for official gender change. This condition has not yet been removed from the law regardless the fact the ECtHR recently decided that the requirement to demonstrate an irreversible change in appearance violates the right to respect for private life under Article 8 of the European Convention on Human Rights.⁸²

In the summer of 2019, the World Health Organization decided to remove the diagnosis of gender identity disorder, listed under a chapter on mental disorders, from the international classification of diseases (ICD-11). Gender nonconformity was reframed as the so-called gender incongruence, which is classified as one of the conditions related to sexual health.⁸³ Nevertheless, this normalisation of transgenderism can hardly be expected to lead to tighter restrictions of SRS. Quite the contrary: SRS may eventually be seen not as a therapy for a disorder but simply as a medical intervention available to those for whom it can be beneficial.

We do not intend to say that there are no relevant differences between SRS and surgical castration. Our aim here is to highlight that SRS could not be legal if the legislators truly believed that the human body cannot be altered if there is a serious enough reason for it. While not all SRS include the removal of genital glands, their impact on the body is always very important and complex. The results of SRS would be understood as mutilation in a different context. The SRS is only legal because all the irreversible changes to the body are considered to be justified by the increase in the quality of life.

From this perspective, surgical castration should be considered permissible. It has basically the same function as SRS, i.e. achieving an increase in the quality of life after other solutions have failed. While SRS might be understood as a confirmation of one's identity, we have explained above that surgical castration also helps patients to live their authentic life. More generally, the legality of SRS shows us that even when it comes to the loss of re-

⁸⁰ *Christine Goodwin v. the United Kingdom*, the ECtHR judgment of 11 July 2002, application no. 28957/95, point 81.

⁸¹ *Hämäläinen v. Finland*, the ECtHR judgment of 16 July 2014, application no. 37359/09, point 68.

⁸² See *A. P., Garçon and Nicot v. France*, the ECtHR judgment of 6 April 2017, application nos. 79885/12, 52471/13, 52596/13.

⁸³ See FOWLKES, A. Being Transgender No Longer Considered A Mental Illness, Says World Health Organization. In: *Forbes* [online]. 30.5.2019 [2019-09-29]. Available at: <<https://www.forbes.com/sites/ashleefowlkes/2019/05/30/who-being-transgender-no-longer-considered-a-mental-illness/#3d19639f1c3b>>.

productive function, interference with the bodily integrity is not categorically prohibited but rather weighed against its benefits. While the permissibility of surgical castration should not be made dependent on the legality of SRS, there is a teleological connection between the two practices which should not be overlooked.

1.4. Criteria for the ethically permissible surgical castration

We have shown that biological factors play an important role in sexually motivated crime. The patient needs to be motivated to control his sexual urges but in many cases he also needs to be helped with this control. While surgical therapy alone does not ensure the motivation, it is probably the most effective therapeutic option to make sexual urges controllable.

We have also argued that the offer to undergo surgical castration should not be considered coercive (unless some additional factors are present, such as threatening, inappropriate persuasion etc.). If the baseline situation – usually a patient's detention – is justified, the offer of castration is actually extending the patient's options and therefore increases his autonomy. This view is supported by the fact that paraphilia can be reasonably considered a strong restraint of autonomy.

Finally, we have tried to show that surgical castration is not necessarily, in all cases, contrary to human dignity. We proposed a Kantian understanding of dignity as a property of phenomena which cannot be traded for anything else. Irreversible surgical interventions (including castration) are, under certain conditions, legal even if their aim is not a patient's survival but the increase in their quality of life (such is the case of sex reassignment surgery). If castration is effective in helping patients to reach the freedom from their sexual urges and their consent is autonomous, it might be considered ethical.

Therefore, we believe that therapeutic surgical castration should be considered permissible. In order to be truly therapeutic in nature, surgical castration must fulfil the following conditions:

- it is carried out as a means of last resort when all other treatment options have failed or the patient has medical contraindication to them
- it can only be carried out on the basis of the patient's written request which is subjected to a professional review
- the patient's consent is based on sufficient information and their understanding and there was no coercion involved in obtaining the consent (while coercion cannot consist in the mere fact that undergoing castration might alter the patient's dangerousness for others and therefore his chances to be released from protective treatment, security detention, or similar treatment)

It is also very highly commendable that the patient is provided with sound and continuing psychotherapy and, if necessary, pharmacological therapy after castration as well. These therapeutic options might, however, not be realistically available in some psychiatric systems.

2. CZECH LEGAL REGULATION AND ITS CRITICISM

Czech law considers castration a specific health service (Section 2 in connection with Section 17 of Act No. 373/2011 Coll., on Specific Health Services, hereinafter “Act on Specific Health Services”), only recognising therapeutic castration or therapeutic testicular pulpectomy (the removal of hormonally active tissue from the testes and not the whole testes, resulting in a less visible outcome⁸⁴). In practice, only testicular pulpectomy is performed in the Czech Republic. No punitive use of castration is known to Czech law. The procedure is understood as a means of last resort when all other therapeutic options have failed or are contraindicated for health reasons⁸⁵. It is only carried out in cases of the most dangerous paraphilics such as aggressive sadists or some paedophiles⁸⁶. The legal requirements for performing these interventions can be divided into material and formal conditions.

2.1. Material conditions

Castration can be performed on a patient who has reached the age of 21 (before 2017, the limit was 25 years of age) if several following conditions are met (Section 17 (2) and (3) of Act on Specific Health Services). A professional medical examination must have shown a specific paraphilic disorder. This disorder must have manifested itself by the commission of a sex crime (a violent sexual offense or a sexual abuse offense). Since 2017, the castration might also be admitted in especially justified cases without a previous sex crime be committed if a proven paraphilic disorder has a serious negative impact on the person’s quality of life – e.g. if it causes “clinically significant distress or impairment in social, occupational, or other important areas of functioning” (Explanatory Report to the amending law, Act No. 202/2017 Coll., cites the American Psychiatric Association’s Diagnostic and Statistical Manual for Mental Disorders DSM-5).

Furthermore, a medical examination must have demonstrated a high probability that in the future the person concerned will or could commit a sexual offense. Castration is the means of last resort. It is only permissible if other treatment methods have either been unsuccessful or could have not been used due to medical reasons (which must be demonstrated by the results of expert examinations).

2.2. Formal conditions

For castration to be performed, the patient must have made a written request and an expert panel must have issued a positive opinion on it (Section 17 (4) of Act on Specific Health Services).

⁸⁴ See WEISS, P. *Sexuologie [Sexology]*. Prague: Grada Publishing, 2010, p. 505.

⁸⁵ See ZVĚŘINA, J., WEISS, P., HOLLÝ, M. *Výsledky terapeutické kastrace u parafilních sexuálních delikventů [The Outcomes of Therapeutic Castration in Paraphilic Sex Offenders]*, 2014, p. 4, or Government of the Czech Republic. *Response of the Czech Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Czech Republic from 7 to 16 September 2010*, p. 62 [online]. 18. 2. 2014 [2019-09-29]. Available at: <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680695681>>.

⁸⁶ See an interview with sexologist Petra Sejbalová in: TRACHTOVÁ, Z. *Kastrací devianta nevléčtíme. Lépe se pak ale ovládá, říká sexuoložka [We Can't Cure a Deviant With Castration. However, He Better Controls Himself After It, Says a Sexologist]*.

Before issuing this opinion, the expert panel must provide the patient (again) with information on the nature of the medical procedure, its permanent consequences and possible risks, and verify whether the patient has fully understood this information and whether the patient has decided genuinely voluntarily to apply (Section 18 (4) of Act on Specific Health Services). In addition to this, castration can only be carried out if the patient gives written consent to it immediately prior to its commencement (Section 19 of Act on Specific Health Services).

Since 2012, it has been forbidden to carry out castration in the Prison Service's health care facilities and to persons in custody and imprisonment (it is also forbidden in case of a patient with limited capacity) (Section 20 of Act on Specific Health Services). However, in especially justified cases, the procedure can be performed on the patients placed in protective treatment or security detention, provided that the paraphilic disorder is proven to have a serious negative impact on their quality of life (provided that the above-mentioned conditions are met). Furthermore, there is an additional condition in these cases: a positive opinion of an expert panel must be accompanied by the consent of the court (Section 17 (5) of Act on Specific Health Services).

The aim of protective treatment and security detention is the protection of society rather than punishment. The precise duration of security detention is therefore not specified, or in other words, it should continue as long as the protection of society requires it (with the court verifying at least once every twelve months – and every six months in case of juveniles – whether the reasons for its continuation still exist) (Section 100 (5) of Act No. 40/2009 Coll., Criminal Code). Eventually, the persons in question may be left in the detention facility for the duration of their whole life if it is deemed necessary for the protection of society.

2.3. Criticism of Czech practice by international bodies

The reproaches of international authorities especially focus on the notion that the patients' consent cannot be considered truly free. According to the conclusions of the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "CPT") from 2009, virtually all patients surveyed indicated that:

"[T]heir application was at least partially instigated by fear of long-term detention. Some patients claimed that the treating sexologist had explicitly told them that surgical castration was the only available option to them and that refusal would mean lifelong detention. In this respect, some of the sexologists interviewed by the delegation themselves affirmed that for certain patients there was no alternative treatment to surgical castration." (point 35)

On a general level, the Czech Government's response to this argument was straightforward:

"A patient who is otherwise fully competent to give his/her free and informed consent cannot be automatically considered incapable of making a fully voluntary decision regarding his/her choice of treatment simply because the relief from the dis-

order that the treatment would provide would make release from detention a possibility.”⁸⁷

Moreover, in 2011, coming into effect one year later, the Czech Republic adopted – also in response to the above-cited criticisms – a recodification of medical law, by which many shortcomings of the previous legal regulation were mended. In the case of surgical castration, a kind of safety net was created in form of the above-mentioned legal prerequisites for its carrying out. The new system should effectively identify those persons who actually stand for this procedure and for whom a different treatment option is not possible. For example, there was a new requirement enacted, according to which an authorized expert committee instructs a patient who is in protective treatment or security detention that castration does not entitle him to be released (Section 18 (4) of Act on Specific Health Services).

At present, the Czech legal regulation arguably creates the conditions that enable a patient to make a relevant and truly free choice. This conclusion is also supported in a certain way by the comparison of the number of surgical castrations performed under the previous legislation and under the current legislation. Approximately 85 surgical castrations were carried out between 2000 and 2011, seventy of them in the first six years of the period⁸⁸. From 2012 to the present, the numbers of these interventions range within units (3–4 applications were approved between 2012 and 2018)⁸⁹.

In spite of these facts, criticism, or rather calling from the CPT or the United Nations Committee against Torture for the complete abolition of surgical castrations in the Czech Republic, does not cease.⁹⁰ The CPT keeps stressing that surgical castration “is a mutilating, irreversible intervention which could not be seen as a medical necessity in this context, and could therefore easily be considered as amounting to degrading treatment”⁹¹.

⁸⁷ Government of the Czech Republic. *Response of the Czech Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Czech Republic from 7 to 16 September 2010*, p. 65.

⁸⁸ Council of Europe. *Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 11 October 2018*, p. 62, footnote 90.

⁸⁹ Council of Europe. *Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 10 April 2014*, point 183 [online]. 31. 3. 2015 [2019-07-09]. Available at: <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069568c>>, Council of Europe. *Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 11 October 2018*, point 136.

⁹⁰ See United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *Concluding observations on the sixth periodic report of Czechia*, points 34–35 [online]. 6. 6. 2018 [2019-09-29]. Available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCZE%2fCO%2f6&Lang=en>, Council of Europe. *Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 11 October 2018*, points 135–136, or ŠUSTEK, P. Poskytování zdravotních služeb v České republice ve světle Úmluvy OSN proti mučení [The Provision of Health Services in the Czech Republic from the Perspective of the UN Convention against Torture], pp. 87–89.

⁹¹ Council of Europe. *Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 11 October 2018*, point 135.

3. DISCUSSION

In 2017, an important amendment to the law represented an interesting shift of the aims of surgical castration in the Czech Republic. The castration of detained offenders was strongly limited. For the imprisoned offenders or those placed into custody, castration is never a possibility. On the other hand, the option of castration was also opened to a new category of patients, i.e. paraphilics who suffer from sexual urges that are significantly decreasing their quality of life but who have never committed a sex crime. Furthermore, the age limit for the eligibility for castration was lowered. This might suggest that castration is indeed considered to be a therapeutic procedure rather than punishment. At the same time, though, it is necessary to acknowledge that most of the very few cases of castration that still take place in the country will most likely continue to take place in the context of protective treatment or security detention.

We have identified three criteria that need to be met for the surgical castration to be considered therapeutic and ethically permissible. These can be summed up as: a) the use of castration as a means of last resort, b) the patient's written request subjected to a professional review, and c) the provision of sufficient information to the patient and the absence of coercion. All of these are completely fulfilled by the Czech regulation. We suggest that the application of these requirements in practice is closely monitored. The criterion of last resort should always be assessed by experienced psychiatrists who can discern whether there is a reasonable hope of improvement without castration. Perhaps the most difficult to control is the absence of coercion, but multidisciplinary expert panels should be able to fulfil the task. Furthermore, surgical castration has been extremely rare in the last years so the effective control of the legal requirements should be realistically possible.

The problem of surgical castration needs to be understood in the broader context of Czech psychiatry. It is undeniable that the trend in many countries aims at an ever more individualised and sophisticated care for psychiatric patients. While the Czech Republic follows this development, it still lacks behind. The institutionalisation of psychiatric patients is relatively high, the financing of the psychiatric system is only slowly improving and there is a permanent problem with psychiatric facilities being seriously understaffed.⁹² The negative consequences of this situation encompass several conflicts with international human rights bodies not only regarding therapeutic castration but also the use of means of restraint in Czech psychiatric facilities.⁹³

⁹² See KOUBOVÁ, M. Kulatý stůl ZD: Transformace léčeben bude sisyfovská práce. Zkomplikuje ji nedostatek lidí i odliv financí z následných lůžek [Transformation of psychiatric facilities will be a Sisyphian work. It will be complicated by the insufficient staffing and the decrease of finances for the aftercare beds]. In: *Zdravotnický deník* [online]. 2. 5. 2018 [2020-09-29]. Available at: <<https://www.zdravotnickydenik.cz/2018/05/kulaty-stul-zd-transformace-leceben-bude-sisyfovska-prace-zkomplikuje-nedostatek-lidi-i-odliv-financi-naslednych-luzek/>>.

⁹³ See ŠUSTEK, P. Poskytování zdravotních služeb v České republice ve světle Úmluvy OSN proti mučení [The Provision of Health Services in the Czech Republic from the Perspective of the UN Convention against Torture], pp. 65–90, or ŠUSTEK, P. Restrictions of Personal Freedom in the Context of Psychiatric Care in the Czech Republic. In: ŠTURMA, P. (ed.). *Czech Yearbook of Public & Private International Law. Vol. 8*. Prague: Česká společnost pro mezinárodní právo [Czech Society of International Law], 2017, pp. 407–424 [online]. [2020-09-29]. Available at: <<https://rozkotova.cld.bz/CYIL-vol-8-2017/426/>>.

An important reform of Czech psychiatric system is currently being prepared. By 2030, up to one third of psychiatric patients should be transferred from psychiatric hospitals to newly established local mental health centres.⁹⁴ As a part of the reform, the practice of using forensic multidisciplinary teams will be tested.⁹⁵ For example in the United Kingdom, multidisciplinary psychiatric teams (composed of psychiatrists, psychologists, social workers, and other professionals) have long been a standard practice⁹⁶. In the Czech Republic, there is a long way ahead to effectively implementing these teams. If the competence of these teams will be extended to encompass paraphilic patients, it could represent an important step towards more effective individual prevention.

Another area for improvement in the Czech system of dealing with sex offenders lies in strengthening the cooperation between health professionals and involved agencies such as the police, court services etc. In many European countries,⁹⁷ the so-called multi-agency collaboration is developed much further than in the Czech Republic, where the psychiatric system has not been adequately complemented by the activities of the above-mentioned agencies. This problem is yet to be properly addressed.

It needs to be acknowledged that the underfinancing of Czech psychiatric system cannot fully explain the continuing use of surgical castration. There are other European countries with underdeveloped psychiatry that do not carry out the practice. Based on the complex historical experience, a deep-rooted part of the mentality of many Czech people is relativism, scepticism, and distrust to big ideas and issues beyond the everyday horizon.⁹⁸ Arguably, this may be connected to the distrust in anything that might be seen as modern trends coming from the ideological movements that – in the eyes of some Czechs – are accepted in foreign countries in an irrationally unquestioning way. Many Czech experts might see the international ban on the surgical castration as stemming from theoretical human rights concepts that are rather ideological in their nature and that do not reflect real needs of persons with sexual paraphilia in real life. Nevertheless, we believe that the approach to surgical castration might change if the new methods in treating patients with paraphilias prove effective.

The international criticism might have already helped the Czech Republic to amend its legislation in order to ensure that surgical castration truly works as a therapeutic option

⁹⁴ See FRAŇKOVÁ, R. Czech Mental Health Care to Undergo Major Reform. In: *Radio Prague International* [online]. 2. 4. 2019 [2020-09-29]. Available at: <<https://www.radio.cz/en/section/curraffrs/czech-mental-health-care-to-undergo-major-reform>>.

⁹⁵ See PETR, T. *Zpravodaj reformy péče o duševní zdraví [Mental Health Care Report Newsletter]* [online]. 2018, No. 1 [2020-09-29]. Available at: <https://www.psychiatrie.cz/images/Zpravodaj-reforma/Zpravodaj_duben.pdf>.

⁹⁶ See HAINES, A., PERKINS, E., EVANS, E. A., McCABE, R. Multidisciplinary team functioning and decision making within forensic mental health. *Mental Health Review (Brighton)*. 2018, Vol. 23, No. 3, pp. 185–196. [2020-09-29]. doi: <<https://doi.org/10.1108/MHRJ-01-2018-0001>>, or EASTMAN, N., ADSHEAD, G., FOX, S., LATHAM, R., WHYTE, S. *Forensic Psychiatry*. Oxford: Oxford University Press, 2012, pp. 256–257.

⁹⁷ See THOMSON, L. D. G., GOETHALS, K., NEDOPIL, N. Multi agency working in forensic psychiatry: Theory and practice in Europe. *Criminal Behaviour and Mental Health*. 2016, Vol. 26, No. 3, pp. 153–160. [2020-09-29]. doi: <<https://doi.org/10.1002/cbm.1998>>.

⁹⁸ See Stanislav Balík's comments on Czech mentality cited in Mentality, experience to blame for Czech Euroscepticism. In: *Prague Daily Monitor* [online]. 15. 7. 2016 [2020-09-29]. Available at: <<http://praguemonitor.com/2016/07/15/mentality-experience-blame-czech-euroscepticism>>.

and not a punishment. As the financing of Czech psychiatry is slowly improving and reform measures are being prepared, we may hope that in future, the more individualised and multidisciplinary care for paraphilics will become a reality. It seems to be likely that the sufficient preventive programs, the timely intervention and other suitable measures will make surgical castration unnecessary and obsolete. However, until that time comes, we believe that castration should be understood as a permissible and potentially beneficial option that needs to be open for extreme cases when the patients need it. At this time, its elimination would be rather harmful, depriving these patients of hope and the opportunity to live truly authentic lives.

4. CONCLUSIONS

We argued that surgical castration should be considered ethically permissible as long as it is truly therapeutic in its nature. In order to assess whether particular case of castration is really therapeutic, we identified three criteria regarding the medical necessity (when castration must represent a means of last resort), the patient's written requirement subjected to an expert review, and the informed and free consent. Czech legal regulation, even following its important change in 2017, fulfils all of these criteria. Taking into account the fact that surgical castrations have been rarely carried out in recent years, the control of the legal requirements is realistically possible. Nevertheless, as the Czech psychiatric system is about to undergo a slow but important reform process, surgical castration might be completely replaced by intensive and multidisciplinary individualised care in future.