UDK 34(058)

ISSN 0350-8501

UNIVERZITET U NIŠUPRAVNI
FAKULTET

ZBORNIK RADOVA
PRAVNOG FAKULTETA U NIŠU

BROJ 89 | GODINA LIX | 2020

COLLECTION OF PAPERS
FACULTY OF LAW, NIŠ

N^{o} 89 | YEAR LIX | 2020

NIŠ, 2020.

ZBORNIK RADOVA PRAVNOG FAKULTETA U NIŠU

Niš, 2020.

Izdavač
Pravni fakultet u Nišu

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CENTAR ZA PUBLIKACIJE Pravnog fakulteta Univerziteta u Nišu18 000
Niš, Trg kralja Aleksandra 11, tel. +381 18 200 501,
zbornik@prafak.ni.ac.rs
www.prafak.ni.ac.rs

COLLECTION OF PAPERS, FACULTY OF LAW, NIS
Niš, 2020

Publisher:
Faculty of Law, University of Niš

For the Publisher:
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Editor-in-Chief:
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E-mail: zbornik@prafak.ni.ac.rs
Website: http://www.prafak.ni.ac.rs

http://www.ebscohost.com/public/legal-source
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Uvodna reč

Poštovani čitaoci,

U fokusu broja 89/2020 Zbornika radova Pravnog fakulteta u Nišu nalazese dva naučna rada iz oblasti Ekološkog prava u kojima se analiziraju ljudska prava u kontekstu ekološke zaštite. U ovom broju nalazi se deo naučnih radova koji su prezentovani na Međunarodnoj naučnoj konferenciji „Odgovornost u pravnom i društvenom kontekstu“, održanoj 17-18. septembra, 2020. godine na Pravnom fakultetu u Nišu. Svi radovi ispunjavaju visoke standarde dvostrukog anonimnog recenziranja u Asistent3 sistemu onlajn uređivanja naučnog časopisa.

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Niš, februar 2021.

Glavni i odgovorni urednik
Prof. dr Irena Pejić

Editor's Introductory Note

Dear Readers,

This issue of the Collection of Papers of the Law Faculty, University of Niš (89/2019) comprises scientific articles on a range of research topics. The rubric In Focus features two articles in the area of Environmental law, focusing on the analysis of human rights issues in the context of environment protection. The issue includes a number of scientific papers presented at the International Scientific Conference "Responsibility in the Legal and Social Context", held at the Faculty of Law, University of Niš, on 17-18 September 2020. All papers meet the high standards of double-blind peer review in the SCI-Assistant3 online journal editing system.

The Editorial Board would also like to inform you that our LF journal has been indexed in another online register of open access scientific journals (Sherpa/Romeo Database), providing access to open access journal repositories worldwide. It will enhance the visibility and credibility of our LF journal within the support program for licencing SCIndeks journals.

Niš, February 2021

Prof. Irena Pejić, LL.D.
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originalni naučni rad
10.5937/zrpfn0-28636

UDK: 342.7:349.6
341.2
Rad primljen: 30.09.2020.
Rad prihvaćen: 02.12.2020.

STATE RESPONSIBILITY FOR HUMAN RIGHT VIOLATIONS IN CASES OF TRANSBOUNDARY ENVIRONMENTAL HARM: A NEW CONCEPT OF EXTRATERRITORIALITY REGARDING THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES?[**]

Abstract: *The paper provides an in-depth analysis of the issue of extra-territorial application of human rights treaties in the specific context of transboundary environmental harm. The classic criteria for extraterritorial jurisdiction established through the landmark judgments of the European Court of Human Rights are revisited and compared with the extensive extra-territoriality threshold introduced by the Inter-American Court of Human Rights in its 2017 advisory opinion on environment and human rights. The author examines the features, requirements and limits of the new extra-territoriality threshold which is based on the effective control over intra-territorial activities that result in extraterritorial human rights' violations. The paper attempts to offer arguments for perceiving the new extraterri-toriality threshold as a general standard of international human rights, as well as to examine whether it represents a (mis)interpretation of the duty to prevent transboundary environmental harm as a well-established rule of international environmental law. The author also discusses the prospects of expanding the application of the new jurisdictional threshold to other areas not necessarily linked to environmental degradation.*

Keywords: *extraterritorial jurisdiction, transboundary environmental harm, human rights, effective control, Inter-American Court of Human Rights, European Court of Human Rights.*

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[**] This paper is the result of research conducted within the scientific project "*Identity Transformation of the Republic of Serbia".* supported by the Faculty of Law, University of Belgrade. The paper was presented at the International Scientific Conference "*Responsibility in Legal and Social Context",* organized by the Faculty of Law, University of Niš, on 18 September 2020.

1. Introduction

In November 2017, the Inter-American Court of Human Rights (the Inter-American Court, IACtHR) issued an advisory opinion on the environment and human rights, outlining the scope of obligations of States parties to the American Convention on Human Rights (the American Convention, ACHR) under international environmental agreements, in the context of the right to life and humane treatment. *Inter alia*, the Court addressed the question of whether Article 1 of the American Convention could be construed as making a State party responsible for violations of human rights of persons outside its territory by reason of the environmentally harmful activities with transboundary effects undertaken in the territory of that State. Reaffirming the possibility of the extraterritorial application of the American Convention, the Inter-American Court has gone a significant step beyond the well-established criteria of the European Court of Human Rights (the European Court, ECtHR). In addition to effective control over the territory or persons, the IACtHR has established effective control over intra-territorial activities causing transboundary environmental damage as a valid criteria for the extraterritorial application of the American Convention.[1] The conclusion adopted by the IACtHR seems to confirm the position advocated by prominent international environmental lawyers: since "nuisances do not stop at borders, it makes little sense to treat the victims differently depending on where they happen to live" (Boyle, 2011: 635).

This broader concept of extraterritoriality will first be examined and revised in comparison with the narrow concept inherent in the European system (2). A meticulous analysis of the concept would follow, focusing on its features and limits (3). Given the lack of effective control over the territory or persons as traditional extraterritoriality thresholds, it will be examined whether the obligation to prevent transboundary damage is the sole basis for the extraterritorial application of the American Convention, or whether a general standard of extraterritorial application of this Convention has been affirmed, based on transboundary effects of acts taken within the territory of the State (4). Finally, the concluding remarks will touch upon future prospects of the new extraterritoriality threshold (5).

2. Revisiting the concept of extraterritoriality in the application of international human rights treaties

International human rights treaties may be divided into two categories depending on whether they contain a jurisdiction clause. On the one hand, certain treaties, such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights, do not contain

1 Advisory Opinion OC-23 [2018], § 102.

provisions dealing with the issue of jurisdiction, suggesting that their extraterritorial application is indisputable. On the other hand, most treaties do contain jurisdictional clauses that may limit their extraterritorial applicability.[2] Despite the fact that extraterritoriality is considered to be "a substantive question of the scope of a treaty" and "not a technique of interpretation" (Crawford, Keene, 2020: 945), the meaning and scope of provisions dealing with the issue of jurisdiction have been the subject of constant interpretation by international human rights courts and bodies; it resulted in an ongoing debate among scholars, some of whom qualify it as a "consistent but cautious evolution" (Heiskanen, Viljanen, 2014: 285; Hathaway, 2011: 390) while others criticize it for being inconsistent (Boyle, 2012: 638; Have, 2018: 96). The basic rule that the jurisdiction is primarily territorial but that it can, in exceptional circumstances, be exercized extraterritorially, has mainly been interpreted in a rather restrictive manner so far, with the ECtHR being at the forefront of such restrictive understanding of jurisdiction. However, the advisory opinion of the IACtHR seems to have introduced a novel, quite extensive interpretation of criteria necessary for establishing State party's jurisdiction for the purposes of applying the provisions of a human rights treaty extraterritorially.

2.1. Standards applied by the European Court of Human Rights – a restrictive concept of extraterritoriality and its applicability in environmental cases

The ECtHR case-law dealing with the issue of extraterritorial application of the European Convention on Human Rights has been a subject of considerable debate among scholars (Da Costa, 2013:93-252; Goodwin-Gill, 2010:299-300; Gondek, 2005:356-376; Hampson, 2011:178-180; Hathaway, 2011:405-408; Have, 2018:110-113; Wilde, 2010:333-337; Miller, 2010:1225-1241; Lawson, 2004:95-120), a detailed analysis of which surpasses the scope of this paper. *Grosso modo*, criteria established by the ECtHR encompass the effective control over an area test,[3] the test of effective control or authority over persons[4] and, as a variation

2 The exact wording may vary from treaty to treaty. For the purposes of this analysis, it is noteworthy to outline the jurisdictional clauses of those international treaties whose interpretation is relevant for considering different issues discussed in this paper. Article 1 of the European Convention on Human Rights provides that States parties "shall secure to everyone within their jurisdiction" the rights and freedoms guaranteed by the Convention. The American Convention on Human Rights obliges the States parties to "ensure to all persons subject to their jurisdiction" the full exercise of the guaranteed rights.

3 *Loizidou v. Turkey (Preliminary Objections)* [1995], § 62; *Cyprus v. Turkey* [2001], § 77-80; *Chiragov and Others v. Armenia* [2015], § 169-171, 186.

4 *Ocalan v. Turkey* [2005], § 91.

of the two – the exercise of public powers normally to be exercised by sovereign government[5].

None of the cases that have so far served the ECtHR to formulate the relevant criteria for extraterritorial application of the European Convention came even close, both factually and legally, to the situation dealt with by the IACtHR in its advisory opinion. First of all, they all concerned extraterritorial action of States in rather specific areas, such as extraterritorial activities of diplomatic and consular agents,[6] military presence in foreign territory,[7] military, political and economic influence on foreign soil leading to the exercise of effective control,[8] military intervention,[9] extraterritorial acts of state security forces[10] and acts in high seas[11]. The only time when the European Court came close to considering extraterritorial application in environmental cases was in *L.C.B. v. The United Kingdom* and *McGinley and Egan v. The United Kingdom,* in which the Court was to consider the influence of British nuclear testing on the health of service members and their children in the Pacific. However, in both cases, the Court did not consider the issue of extraterritorial application of the European Convention since the applications were declared to be inadmissible for other reasons.[12] Secondly, all of the cases dealing with the issue of extraterritorial jurisdiction of States parties to the European Convention concerned situations in which both the act causing the violation of human rights and the violation itself happened extraterritorially. On the contrary, under the scenario discussed by the Inter-American Court in its 2017 advisory opinion, the action that results in the violation of human rights is exercised intra-territorially whereas extraterritoriality is exclusively the feature of the consequences of such intra-territorial acts. In other words, only one of the two necessary elements happened abroad – the violation of human rights. Thirdly and finally, jurisdiction is conceived by the European Court as a necessary link between the State and the victim. Such link is established either through the effective control of the State over territory beyond its frontiers or through effective control over the victim itself. As rightly noted by certain scholars (Duttwiler, 2012: 152), even the effective control over territory criteria comes down to the control over a particular person since the State actually exer-

5 *Al-Skeini and Others v. the United Kingdom* [2011], § 149.

6 *M. v. Denmark* [1992].

7 *Manitaras and Others v. Turkey* [2008].

8 *Ilascu and Others v. Moldova and Russia* [2004].

9 *Banković and Others v. Belgium and 16 Other Contracting States* [2001].

10 *Ocalan v. Turkey* [2005].

11 *Hirsi Jamaa and Others v. Italy* [2012].

12 *L.C.B. v. The United Kingdom* [1998]; *McGinley and Egan v. The United Kingdom* [1998].

cises control over persons via control over the area in question. It is, however, difficult to conceive how such close and restrictively defined link between the State and the victim is to be fulfilled in cases of State's effective control over intra-territorial activities with extraterritorial consequences.

2.2. Extensive concept of extraterritorial jurisdiction as established by the Inter-American Court of Human Rights

By carefully reading paragraphs 101 and 102 of the advisory opinion, it may be concluded that the Inter-American Court requires a double degree link between the State and an individual for the purpose of applying the American Convention to cases of transboundary environmental damage. The first link is causal and relates to connecting the environmentally harmful activity carried out within the territory of a State with the "infringement of the human rights of persons outside its territory".[13] The second link refers to the connection between the harmful activity and the State and relies on the effective control that the State in question had over the activity, and thus the possibility to prevent the transboundary harm.[14] In other words, the effective control over the harmful activities serves as an indirect jurisdictional link between the State and the victim.

Therefore, the position taken by the IACtHR essentially redefines and broadens the traditional effective control test in two aspects. Firstly, it not only encompasses the usual understanding of effective control in international human rights law in the sense of its spatial and personal models but also includes the test of State control over the domestic activities with extraterritorial consequences (Banda, 2018), a test that may have serious repercussions for extraterritorial applicability of human rights treaties in numerous fields not necessarily confined to environmental protection. Such an extensive concept of extraterritorial jurisdiction could therefore hardly be qualified as "subtle" (Feria-Tinta, Milnes, 2018: 77). Secondly and less obviously, the IACtHR introduced a double degree jurisdictional link since the State exercises indirect jurisdiction over a person via effective intra-territorial control over harmful activities that caused the human rights violation, as opposed to a single jurisdictional link which is based on direct effective control exercised by a State over the victim.

13 Advisory Opinion OC-23[2018], § 101.

14 Advisory Opinion OC-23[2018], § 102.

2.3. Is the extensive concept of extraterritorial jurisdiction a genuine novelty? (Tracing its elements in the case-law of international courts and bodies)

Through a profound analysis of the abundant case-law of international human rights courts and bodies concerning the issue of extraterritoriality, a hardly noticeable tendency of its gradual widening may be discerned. This leads to a twofold remark. On the one hand, it appears that the extensive concept of extra-territoriality has already been present, at least partially, in the jurisprudence of international courts and bodies that preceeded the adoption of the 2017 IACtHR advisory opinion. On the other hand, the concept of extraterritoriality established by the said advisory opinion of the IACtHR could at the same time be considered as a novelty since it actually introduced certain elements that had not been present in the preceeding human rights jurisprudence.

The tendency to understand the extraterritoriality threshold in an extensive manner is present both at the universal and regional levels of international human rights protection. The United Nations Human Rights Committee (HRC) held in the 2009 case of *Munaf v. Romania* that "a State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction".[15] Whereas the 'link in the causal chain' or the so-called effects doctrine appears to be the common feature of the extensive extraterritoriality concept advocated by the IACtHR, it is important to notice that the Committee's position is not clear with regard to whether it encompasses extraterritorial as well as intra-territorial acts. However, judging by the facts of the case, there is no indication that the Committee had an intention to apply the same threshold to intra-territorial acts with extraterritorial consequences.

When it comes to the American system of human rights protection, the In- ter-American Commission on Human Rights has shown a significant level of flexibility with regard to treating cases with extraterritorial dimension in its earlier jurisprudence (Cassel, 2004: 177). Therefore, the advisory opinion may be understood as a tenable continuation of interpreting the provisions of the American human rights instruments in the same manner. The Commission has constantly focused in its analysis on "the State's control over a specific person *or situation* – not on the State's control over the territory in which the event occurred" (Hathaway, 2011: 414). In *Saldaño v. Argentina*, the Commission extended the jurisdiction to "acts and *ommissions* of agents *which produce effects* or are undertaken outside that State's own territory" (italics added by the author).[16]

15 *Mohammad Munaf v. Romania* [2009], § 14.2.

16 *Saldaño v. Argentina* [1999], § 17.

The relevance of this position, if compared to the one taken by the IACtHR in the advisory opinion, is obvious for two reasons. First, the Commission focuses not only on acts but also on ommissions, which is the expected scenario in cases of effective control over environmentally harmful activities with transboundary effects. Namely, State's jurisdiction will most often be established on the basis of its failure to take effective measures that could have prevented the damage to occur in the first place. Secondly and more importantly, the fact that the Commission used 'or' when it mentioned acts and ommissions producing effects outside the territory seems to suggest that not only extraterritorial but also intra-territorial acts with extraterritorial consequences count. Despite these similarities between the Commission and the Court in understanding the extraterritoriality threshold, the advisory opinion has definitely brought added value. The extensive concept of extraterritoriality has been specified further by the Court which, on the one hand, explicitly extended its applicability to human rights violations caused by transboundary environmental harm and, on the other, provided more precise requirements to be met for the American Convention to be applied extraterritorially in such specific circumstances.

Last but not least, the traces of the extensive extraterritoriality threshold seem to be present even in the case-law on extraterritoriality of the restrictively oriented ECtHR. The relevant case is *Andreou v. Turkey*, a case that concerned an applicant who was shot, while being in the UN buffer zone, by Turkish Cypriot troops firing from the territory of the Turkish part of Cyprus. Turkey claimed that the applicant was not within its jurisdiction for the purposes of Article 1 of the European Convention. However, the European Court disagreed. The Court found that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey within the meaning of Article 1".[17] The so-called cause and effect criteria, an element of the extensive concept proclaimed in the IACtHR's advisory opinion is definately present even in the ECtHR jurisprudence. What is more, the *Andreou* case is the only example in which an intra-territorial act with extraterritorial consequences was considered to meet the threshold necessary to establish jurisdiction of the State over a human rights victim. However, its applicability to transboundary environmental damage is questionable since the Court seems to consider 'close range' of the harmful act and the immediateness as important features of the case. Should this suggest that long-range transboundary harm and harm which is not immediately felt are out of the question?

17 *Andreou v. Turkey* [2008], p. 11.

It may be concluded that novel elements introduced by the advisory opinion are three-fold: substantial, content-related and spatial. Substantially, the extraterritoriality concept established by the IACtHR does not require effective control either over the territory or the person, only the effective control over activities which is added to the already present cause and effect requirement. This means that contrary to the scarce examples outlined above, the causal link will not establish extraterritorial jurisdiction in transboundary environmental harm situations unless there is effective control of the State over harmful activites. In other words, both elements need to be cumulatively present in order to establish the juridictional link. As regards the type of situations to which the extensive concept may apply, the novelty concerns it being reserved, at least for the moment, to transboundary environmental harm that results in human rights violations. Spatially, with the exception of the *Andreou* case as the only example, extraterritoriality was a feature of the consequences, not the act that caused human rights violations. Therefore, instead of a cumulative extraterritoriality of both the cause and the consequence, according to the new concept it appears to suffice that extraterritoriality relates to consequences only.

3. Specificities and limits of the extensive concept of extraterritoriality

In addition to the features of the extensive concept of extraterritoriality that have just been analyzed in the previous section for the purpose of presenting its basic elements, other specific characteristics of the new concept are identified. The IACtHR's qualification of the new extensive concept as exceptional leaves room for critique since exceptions are to be interpreted restrictively, not extensively.

3.1. Additional characteristics of the new extraterritoriality concept

Two additional and mutually inter-related features of the extensive concept of extraterritoriality may be identified. Firstly, the victim of human rights violation is not, at any time whatsoever, under the jurisdiction of the State in the way understood in the current restrictive case-law. As already explained, the victim is located extraterritorially at the moment when the violation happens, whereas the harmful activity takes place in the territory of the State. A parallel may be drawn with the *Soering* type of cases in which the violation of a guaranteed right happens outside State's territory, through the act of refoulement which is decided and executed within State's territory.[18] Although *Soering* type of cases is not considered as an example of the extraterritorial application of human rights treaties (Council of Europe, 2012: 113; Gondek, 2005: 355) but of "extraterritorial effect" (Janik, Kleinlein, 2009: 488-489), the State in question

18 *Soering v. The United Kingdom* [1989].

becomes responsible for exposing a person to a risk of his guaranteed rights being violated by a third State irrespectively of whether the violation actually happens.What distinguishes such cases from the transboundary environmental harm type of cases is the fact that the victim of human rights violations in the latter case has at no time been in the territory or within direct jurisdiction of the State. The jurisdictional link is indirect and depends on the exercise of State's effective control over the harmful activity. Secondly, there is no exercise of public authority *stricto sensu*, a feature of the jurisdictional link based on either the effective control over persons, which is quite obvious, or, less visibly, the effective control over territory. However, a valid argument may be raised that the State actually did exercise elements of public authority at the very moment when it failed to take appropriate measures to prevent the occurrence of transboundary environmental harm and, consequently, of human rights violations. In other words, failure to effectively control the harmful activities carried out in the territory of the State can be qualified as an indirect exercise of public authority over persons situated outside its territory. Such an interpretation of State's ommissions with regard to environmental harm that occurs within the territory of the State is indisputable even in the ECtHR practice (Krstić, Čučković, 2015:173-177).[19] It is not clear why this logic should change if environmental damage crossed national borders.

3.2. Exceptionality v. extensivness – what are the limits of the new concept?

Quite curiously, the IACtHR shares the position of its European colleagues that "the situations in which the extraterritorial conduct of a State constitutes the exercise of its jurisdiction are exceptional and, as such, should be interpreted restrictively".[20] However, the IACtHR departed from the ECtHR by assessing the situation of transboundary environmental damage as satisfying the exceptionality requirement and thus obviously "lowering the exceptional circumstances threshold" (Heiskanen, Viljanen, 2015). The question remains: what are the

19 It is indicative that, in *Fadeyeva v. Russia* case, the ECtHR considered the link between the State and the dangerous activity to be irrelevant. In fact, Russia did not own, control or operate the steel plant which was the source of pollution. However, the Court assigned significance to the fact that Russia failed to apply effective measures to protect the rights of persons affected by pollution. *Fadeyeva v. Russia* [2005], § 89. Application of effective measures may depend on the case circumstances. However, it obviously encompasses an assessment of whether the State failed to meet its environmental obligations to govern, set-up, operate and supervise the hazardous activity and to "make it compulsory for all those concerned to take practical measures to ensure the effective protection" of human rights. *Di Sarno and Others v. Italy* [2012], § 106. Acts taken by the State in order to apply environmental regulations, as well as a failure to do so, most certainly imply an exercise of public authority.

20 Advisory Opinion OC-23[2018], § 81.

limits of the extensivness of the new concept of extraterritoriality, i.e. how to further interpret an essentially extensive concept in a restrictive manner?

The parameters of the answer are partially provided by the IACtHR itself, and are twofold. One set of limitations is contained in the standard of significant environmental damage, whereas the other is determined according to the violated human rights criterion.

The IACtHR is clear: not every negative impact gives rise to jurisdiction and consequently to responsibility.[21] Taking into account that the entire advisory opinion was tailored under an immense influence of the rules of international environmental law, both customary and conventional, it did not come as a surprise that the IACtHR opted for the significant transboundary harm standard.[22] However, the Court made a number of unexpected and rather venturous contributions to the interpretation of the said standard. First of all, the Court took the position that "any harm to the environment that may involve a violation of the rights to life and to personal integrity (...) must be considered significant harm".[23] It goes without saying that such a statement would significantly simplify the otherwise complex process of proving that the significant damage threshold has been reached. Secondly, the Court expanded the notion of significant transboundary damage to encompass not only real but also possible damage.[24] In this regard, the Court was under an obvious influence of the precautionary principle as one of the most relevant guiding principles of international environmental law, a principle that has so far been rather cautiously used before other international courts and bodies (Krstić, Čučković, 2015: 176).

On the other hand, in line with considerations of the 'tailor and divide' approach previously discussed in the jurisprudence of the EctHR (Gondek, 2005: 369; Hampson, 2011: 171), the Court thought it pertinent to address the relationship between the extent of jurisdiction and the scope of protected human rights. As stressed by some scholars (Have, 2018: 93), in case a State exercises jurisdiction over a person, the same rights and obligations are owed by the State irrespective of whether the jurisdiction is territorial or extraterritorial. However, in cases of extraterritorial jurisdiction, there may be factors that disable States parties to ensure human rights in the same way as within their territory, just as they may not be in a position to ensure all rights guaranteed by the treaty in question. It is doubtful whether the IACtHR shares that view. It explicitly stated that extensive concept of extraterritoriality applies to the rights to life and personal integrity

21 Advisory Opinion OC-23[2018], § 102.

22 Advisory Opinion OC-23[2018], § 135-139.

23 Advisory Opinion OC-23[2018], § 140.

24 Advisory Opinion OC-23[2018], § 180.

to which Colombia referred to in its request for advisory opinion, while it did not exclude its applicability to other human rights qualified in the advisory opinion "as being particularly vulnerable in the case of environmental degradation".[25] Such a position, although criticised for leaving the door wide open for claims dealing with a whole range of rights (Berkes, 2018:3-4), can be explained by the fact that the State actually exercised control over activities carried out within its territory, thus partially equating this situation with circumstances inherent to cases of regular territorial jurisdiction. Therefore, since the State exercised full control over its territory and activities carried out within it, there seems to be no reason to limit the extraterritorial occurrence of transboundary consequences to the violation of certain human rights only.

It may be concluded that the Court does not seem to intend to continue treating extraterritorial obligations and claims as exceptional (Feria-Tinta, Milnes, 2016: 80) but instead perseveres in further expanding the limits of the concept by determining them in rather broad terms.

4. Extraterritoriality within or beyond jurisdiction?

Effective control over intra-territorial activities with transboundary consequences has been perceived by the legal doctrine both as a new link to establish extraterritorial jurisdiction and as an application of the customary no-harm rule. Although valid arguments can be found to support both stances, it appears that the most acceptable position combines elements of both.

4.1. The extensive extraterritoriality threshold as a general standard of jurisdiction?

According to the first position (Banda, 2018; Berkes, 2018: 1), the IACtHR has created a new extraterritoriality threshold based on effective control over intra-territorial activities, in addition to effective control over an area and effective control over persons. However, can it be considered as a general human rights standard?

Certain scholars advocated such an understanding of the term 'jurisdiction' contained in jurisdictional clauses of human rights treaties long before the IACtHR's advisory opinion saw the daylight. Boyle believes that, in cases of transboundary pollution, victims "fall within the 'jurisdiction' of the polluting State – in the most straightforward sense of legal jurisdiction", thus subsuming the effective control over activities criterion within classical thresholds for extraterritorial

25 Advisory Opinion OC-23[2018], § 243. The Court included into this list the right to property, right to private life, right to health, water, food, and right not to be internally displaced.

jurisdiction (Boyle, 2012: 638). Besson takes the position that the notion of jurisdiction should not be "conceived differently depending on whether it applies inside or outside the territory of a State party" (Besson, 2012: 866). If this argument is applied to the specific circumstances of environmentally harmful activities, it appears that the State does not exercise direct effective control over persons whose rights are violated as a consequence of pollution even when those persons are located on its own territory. In other words, the necessary link between a State and a particular person whose rights are infringed within that State's territory is also based on the effective control over harmful activities criterion. Why should a different criterion be applied if the pollution reaches victims beyond borders?

In addition, if the three extraterritoriality criteria are compared, it is obvious that the determinant 'effective control' is their common element, whereas they are distinguished by the objects of control, i.e. whether the control is exercised over territory, persons or activities. If control is perceived as "a notion that concerns the enforcement of a State's directives or orders", whereas a directive or order are understood as "a means to prescribe" someone's conduct, it may be concluded that effective control actually refers to "a State's capacity to enforce its directives", i.e. its legislation (Duttwiler, 2012: 160). Setting things up this way, there is no crucial difference between the classical effective control over territory and person criteria and a new one having activities as the object of State's control. The point is that all three are capable of satisfying the necessary link between the State and the victim since in all three cases it is the enforcement of State's legislation, regulations or orders, either through acts or ommissions, that result in the extraterritorial infringement of human rights. Such an understanding is in line with Hampson's interpretation of the relevant case-law of the ECtHR. Namely, the Court referred to the exercise of all or some of the public powers normally to be exercised by the State as the appropriate threshold to be applied in order for the activity to be an exercise of jurisdiction (Hampson, 2011: 179). Regulating hazardous activities, issuing relevant licenses, as well as supervising them, is, without any doubt, a prerogative of the State; thus, the exercise of public powers through which a victim of their transboundary consequences may be considered to be within State's jurisdiction.

A valid argument is offerred by Boyle who claims that the non-discrimination principle demands that victims of environmental harm, both within and beyond State's borders, should be treated equally and allowed the protection afforded by international human rights treaties. The author considers that claiming that the State has no obligation to take effective preventive measures, simply because the effects of activities carried out within its territory are extraterritorial, is not compelling (Boyle, 2012: 639-640). Similarly, a State would easily escape

responsibility for human rights violations, although it undertook to respect and ensure them, if the obligation ceases at the national boundaries (Feria-Tinta, Milnes, 2016: 75). Or, in quite abstract terms, it would be a paradox "to accentuate the fundamental, universal, and absolute character of human rights provisions and to simultaneously keep them within the frontiers of the concept of State jurisdiction" (Kanalan, 2018: 59).

4.2. Duty to prevent transboundary environmental damage as a criterion for extraterritorial application of human rights treaties?

According to the second proposition, the advisory opinion did not establish a new link for extraterritorial jurisdiction; it simply interpreted the due diligence obligation to prevent transboundary environmental harm in a manner to provide an additional, extraterritorial scope of human rights to life and humane treatment, and, at the same time, "effectively conflated the extraterritoriality threshold with the obligation to prevent transboundary damage" (Vega-Barbosa, Aboagye, 2018: 296). This line of reasoning stems from the sentence included in paragraph 102 of the Advisory opinion in which the IACtHR provided that "the potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the *possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage*" (italics added by the author).[26]

A number of arguments may be raised in favour of this second option, some of which relate to a confusion between criteria for establishing extraterritorial jurisdiction and conditions for establishing State responsibility for internationally wrongful acts.

First of all, the IACtHR is speaking of State responsibility for the violation of the duty to prevent transboundary harm, not the duty to respect and ensure human rights guaranteed by the ACHR. In case this is so, effective control over activities may be qualified as a condition of attribution, as an element of State responsibility, not as a criterion of extraterritorial jurisdiction. However, in cases of transboundary environmental harm, the effective control is not the appropriate condition to be applied for the purposes of attribution since the State is responsible for the conduct of its own organs, not the acts of private entities that actually caused transboundary pollution.

Secondly, there needs to be a specific relationship between a State party and an individual for the application of duties with regard to human rights to arise. In line with this argument, it might be that the IACtHR was "too quick to assimilate

26 Advisory Opinion OC-23[2018], § 102.

it to some kind of mere factual power or control test for some, or to a mere capability to respect human rights requirements for other" (Besson, 2012: 859). As previously noted, the IACtHR requires that the State "is in a position to prevent" hazardous activities from causing transboundary harm, thus implying that State's capability is among the conditions for the new jurisdictional threshold. However, Besson believes that "state jurisdiction is not merely about feasibility or capability" to respect human rights and that the "question of the concrete feasibility of duties only arises once jurisdiction has been established and the abstract rights recognized" (Besson, 2012: 868). Again, it would seem that the IACtHR conflated the jurisdictional threshold with the other condition for State responsibility – a breach of an international obligation.

Thirdly, not only the effective control and capability but causality as well might serve as an argument in favour of the hypothesis that the Court conflated jurisdiction requirements with conditions for establishing State responsibility. If cause and effect relationship is perceived as a requirement for extraterritorial jurisdiction, it would imply that "every directly and immediately caused harmful result amounts to an exercise of jurisdiction", which is hardly the case (Duttwiler, 2012: 153-154). As a counterargument, it must also be acknowledged that the IACtHR does not perceive causality as the only extraterritoriality threshold, but requires other conditions to be met cumulatively. In other words, not every act or ommission with transboundary consequences would lead to establishing extraterritorial jurisdiction, only those that can be qualified as acts of State authority, whereas the State had at its disposal certain measures to prevent the transboundary effects from occurring.

4.3. A compromise – combining the elements of the two positions

As seen from the considerations discussed above, each of the arguments offerred in favour of either the first or the second proposition is rebuttable. Therefore, a compromise based on certain elements of both approaches appears to be the most acceptable position.

On the one hand, effective control over intra-territorial environmentally harmful activities does represent a link for establishing extraterritorial jurisdiction of the State over the victim of human rights violations for the purposes of applying the ACHR, in addition to the two already firmly established criteria of effective control over territory and persons. On the other hand, duty to prevent transboundary harm is of relevance, but not in the context of establishing jurisdiction. The IACtHR profitted from the no-harm rule of international environmental law for the purposes of interpreting the content of specific human rights. The Court is quite explicit when it concludes that "although the principle of prevention in

relation to the environment was established within the framework of inter-State relations, the obligations that it imposes are similar to the general duty to prevent human rights violations".[27] In other words, rules of international environmental law provided precise content to human rights by defining very concrete negative and positive environmental obligations of States parties to the ACHR.[28]

However, the two elements are not equally represented in positive international systems of human rights protection. Whereas the additional threshold for the extraterritorial application of international human rights treaties is limited to the inter-American system (at least for the time being), the environmental dimension of human rights has been recognized by both universal and regional systems of human rights protection, all of which (with some minor differences) accept that human rights imply concrete negative and positive environmental duties. The only novelty in this regard, but a very significant one, is the IACtHR's position that positive environmental obligations exist not only in the context of environmental harm caused within but also outside State's borders and, most importantly, that victims of human rights breaches caused by environmental nuisances have the capacity to initiate proceedings before an international court.

5. Concluding remarks

First, the question is raised whether the extensive criterion for extraterritorial jurisdiction has the potential to develop into a general standard applicable in other systems of human rights protection, both universal and regional, and to expand to other areas of environmental degradation and even beyond environmental scenarios. Within the ambits of environmental protection, it is sensible to expect its applicability not only with regard to classic examples of cross-border pollution, such as pollution by hazardous substances of rivers or air, but also with regard to damage induced by global environmental threats, i.e. global warming and climate change. Although the causality condition will most surely be difficult to prove in such situations, the third extraterritoriality threshold opens the door towards international mechanisms that have so far been closed for victims of human rights violations caused by climate change.

Next, can it be expected that the effective control over activities criterion expands to other activities beyond the sphere of degradation of the environment? For example, why shouldn't the same principle be applied to situations concerning the use of drones without an exercise of jurisdiction in the classic sense, or surveillance over persons situated abroad by activities carried out in the territory of a State, even the activities of multinational corporations abroad? The HRC's

27 Advisory Opinion OC-23[2018], § 133.

28 Advisory Opinion OC-23[2018], § 123-241.

Concluding Observations on the fourth periodic report of the United States of America quite curiously demand that the USA should "*take all necessary measures* to ensure that its surveillance activities, *both within and outside the United States*, conform to its obligations under the Covenant, (...) *regardless of the nationality or location of the individuals* whose communications are under direct surveillance" (italics added by the author).[29] Though Kanalan understands this position of the HRC to be a confirmation that "human rights obligations of the US exist extraterritorially regardless of the exercise of jurisdiction" (Kanalan, 2018: 52), the HRC's conclusion can also be interpreted as expanding the threshold for exercising extraterritorial jurisdiction in the manner to encompass effective control over intra-territorial activities.

As already explained, elements of the new jurisdictional link can be found in the case-law of other international courts and bodies, which may suggest that (with the stimulus from the latest developments) its application might expand to other international bodies as well. Besides, there has so far been strong "evidence of convergence in the environmental case law and a cross-fertilization of ideas between the different human rights systems" (Boyle, 2012: 614). In this regard, let us hope that the analyzed advisory opinion would serve as an occasion for further cross-fertilization with respect to the issue of extraterritoriality even before the conservative ECtHR.

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ODGOVORNOST DRŽAVE ZA KRŠENjE LjUDSKIH PRAVA U SLUČAJU PREKOGRANIČNE EKOLOŠKE ŠTETE – NOVO SHVATANjE EKSTERITORIJALNOSTI U PRIMENI MEĐUNARODNIH UGOVORA O LjUDSKIM PRAVIMA?

Rezime

U savetodavnom mišljenju o ljudskim pravima i životnoj sredini kojeje usvojio krajem 2017. godine, Međuamerički sud za ljudska prava se bavio pitanjem da li država ugovornica Američke konvencije o ljudskim pravima može da odgovara za povrede ljudskih prava osoba koje se nalaze van njene teritorije, a koje su nastale kao posledica ekološki štetnih aktivnosti sa prekograničnim posledicama koje su preduzete u okviru teritorije države i nad kojima je država vršila stvarnu kontrolu. Rad pruža detaljnu analizu pozitivnog odgovora Međuameričkog suda i poredi ga sa restriktivnim shvatanjem kriterijumima za zasnivanje eksteritorijalne nadležnosti koje je nastalo u praksi Evropskog suda za ljudska prava. Autor, između ostalog, zaključuje da stav Međuameričkog suda redefiniše tradicionalni test stvarne kontrole nad teritorijom ili osobama i to u nekoliko aspekata. Novi elementi koje uvodi Sud se kvalifikuju kao trojaki – u suštinskom, sadržinskom i prostornom smislu. Predmet analize je i priroda novog koncepta. U radu se stoga istražuje da li se ekstenzivni koncept eksteritorijalnosti može smatrati opštim standardom međunarodnog prava ljudskih prava, ili je u pitanju (ne)ispravno tumačenje obaveze sprečavanja prekogranične ekološke štete kao jednog odnajvažnijih pravila međunarodnog ekološkog prava. Autor s tim u vezi nudi brojne argumente kako u prilog tako i protiv svake od dve teze, da bi potom, kao najprihvatljivije, izneo kompromisno rešenje zasnovano na odabranim elementima oba pristupa. Konačno, u radu su razmotreni i izgledi za dalje širenje ekstenzivnog koncepta eksteritorijalnosti na oblasti koje nisu nužno u vezi sa zaštitom životne sredine, kao i u druge sisteme zaštite ljudskih prava, kako univerzalne tako i regionalne.

Ključne reči*: eksteritorijalna nadležnost, prekogranična ekološka šteta, ljudska prava, stvarna kontrola, Među-američki sud za ljudska prava, Evropski sud za ljudska prava.*

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pregledni naučni rad
10.5937/zrpfn0-28616

UDK: 349.6
502.3(4-672EU:497.11)
Rad primljen: 29.09.2020.
Rad prihvaćen: 14.12.2020.

RIGHTS OF INDIVIDUALS AND OBLIGATIONS OF THE STATE IN PROTECTING AIR QUALITY[**]

Abstract: *The paper analyses the status of international agreements in the field of air protection, aiming to interpret the discord between the adopted legal standards and their application. Having in mind the harmonisation process of Serbian law with the EU law, the author further analyzes the obligations of Member States arising from Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe, the developed practice of the CJEU which embodies elements determining the rights of individuals to initiate a procedure for protecting the right to a healthy environment if states do not adopt an air quality action plan, as well as the measures that domestic courts may prescribe to ensure the implementation of decisions establishing the obligation to implement measures for reduction of emissions above the limit values. The concluding sections analyse the degree of harmonisation of our positive law with the adopted standards and the environmental acquis. Having in mind a substantial number of cases related to air protection in the practice of the Serbian Protector of Citizens (Ombudsman), the analysis of the application of recommendations arising from these cases may suggest the degree of harmonisation of commitments and their application, and serve as an instrument for amending positive law.*

Keywords: *right to clean air, active legal standing of individuals in drafting air quality action plans; state responsibility for transboundary air pollution; CJEU role in direct application of the Directive on Ambient Air Quality and Cleaner Air for Europe.*

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[**] The paper is the result of research activities under Jean Monnet Chair in European Environmental Law, organized with the support of the Erasmus+ Programme of the European Union. The paper was presented at the International Scientific Conference "*Responsibility in the Legal and Social Context*", organized by the Faculty of Law,University of Nis, on 18 September 2020.

1. Introduction

Environmental law regulates legal relations between individuals, the state and individuals, and between states, in matters involving unacceptable environmental quality or a threat of possible disturbance of the reached level of environmental quality. Such issues affect local communities (e.g. construction of a small hydropower plant), residents of one country (e.g. groundwater quality which can only be affected on the territory of that country), several countries (e.g. countries that share the course of the same river), or they can be of a global nature (e.g. climate change or the state of the ozone layer). One of the issues that is both local and global is the issue of air pollution. The elements which are taken into account when establishing the criteria for acceptable air quality are determined by laws and accompanying by-laws. Therefore, in the field of air protection the basis of the legal framework is found in domestic law. However, air is the medium of the environment that illustrates in the best way the interdependence of frameworks governing emissions management and air quality monitoring in different countries. The extent of unsatisfactory air quality impact on human health at the global level is illustrated by the World Health Organization data, stating that 4.2 million people die prematurely every year due to exposure to polluted air (Dechezleprêtre, *et al.* 2019: 44).

Back in the 1930s, the UK saw the development of a regulatory framework that was supposed to ensure a better control of emissions and improvement of air quality. One of the key bases for further development was the need to keep the existing industrial plants in the local communities, but to provide those communities with cleaner air by introducing new technology. They found the solution in introducing a new method of releasing emissions based on the high stacks concept. High stacks enabled industrial plants and thermal power plants to release emissions at high positions, which provides possibility of mixing emissions with air that carries currents of pollution above the zones that local population is susceptible to. Although the effect had been achieved in the medium term in local communities and air quality was improved, this, however, led to deforestation and significant water pollution in lakes across Germany and Scandinavia, registered throughout the decade from the 1960s to the 1970s (Fisher, *et al.,* 2003: 605). New research shows that emissions from thermal power plants located in the Western Balkans are not restricted to the region, but also greatly affect air quality in the EU (HEAL, 2019). This opened the question of transboundary impact of emissions on air quality and led to the development of a large number of agreements binding on Serbia.

Data underlined by the European Environment Agency (EEA) in its annual reports reveal the impact of emissions on public health in Serbia (EEA, 2017).

The recently published report of the Environmental Protection Agency (EPA) of Serbia on the state of air quality in 2019 shows that excessive air pollution was recorded in all agglomerations. The Agency assessed the quality of air as that of category III (EPA, 2020)

The presented data, both at the global and national level, raise the following question: which international acts serve as the basis for the responsibility of a state for the air quality on their territory, as well as the responsibility for transboundary emissions? Therefore, the first part of the paper is dedicated to the analysis of ratified international agreements that have a considerable impact on further development of this field of environmental law. Bearing in mind that an obligation of harmonisation with EU law arises from the Stabilization and Association Agreement between the EU and Serbia (2009), in the second part of the paper, we consider the application of the environmental *acquis* in the field of air protection and recent decisions in infringement procedures, in order to draw conclusions about the rights of individuals which could affect air quality. The question then arises regarding the obligatory activities of the state if the measurement results show that the prescribed limit and tolerance values have been exceeded in one or more pollutants to the extent that the air is excessively polluted. Therefore, the third part of the paper is dedicated to the analysis of domestic legal framework and practice of the Protector of Citizens (Ombudsman) of the Republic of Serbia in order to identify elements that have an impact on the consistent application of the domestic legal framework that guarantees air quality protection.

2. Status of international agreements in the field of air protection: between ratification and implementation practice

The field of environmental law that refers to the protection of air quality contains numerous sources. Depending on the object of protection, we can group them into those that dominantly regulate the values of concentrations of certain particles (PM10 and PM 2.5 particles, sulphur dioxide, nitrogen dioxide, etc.), which determine the consequences of air quality on public health. The second group consists of those related to the protection of the ozone layer. The third group consists of sources that regulate the concentration of greenhouse gases and the management of emissions that reinforce climate change. Having in mind the specifics of the issues related to the management of GHG, the paper does not analyse the sources that form the basis of the rights of climate change and the protection of the ozone layer (Drenovak-Ivanović, 2018) The international agreements that Serbia has acceded determine the principles and goals related to the protection of air quality. It is the obligation of each state to harmonise

the domestic environmental protection policy and air quality management strategies with them.

The Principle 21 of the Stockholm Declaration (1972) established a rule on the responsibility of a state for activities carried out under its jurisdiction or control, which must not harm the environment of another state or areas outside its jurisdiction. In this manner, the exercise of states' sovereign rights is limited if it harms the environment of another state, but also the high seas or areas under special jurisdiction, which includes liability for pollution that may occur due to ship navigation or flight of an aircraft registered on their territory (Sands, 2012: 32). After that, in 1979, the Convention on Long-range Transboundary Air Pollution followed (hereinafter: the Convention), which regulated issues of importance for limiting long-distance air pollution, i.e. in cases where emissions come from sources under the jurisdiction of one state and having harmful consequences which are within the legal jurisdiction of another state. The Convention was ratified by the Act on Ratification of the Convention on Long-range Transboundary Air Pollution.[1]

In international relations, the questions were raised about the procedure and methodology for monitoring the transfer of pollutants in the air, especially about the delimitation of inflows from individual and group sources of pollutants. The program and financing of international cooperation, which would lead to a unified methodology and international cost-sharing of transboundary pollution monitoring, was established by the 1984 Protocol on long-term financing of cooperation programs for monitoring and assessing long-range transboundary air pollution in Europe (EMEP). The Protocol entered into force in 1988 and was ratified by Serbia.[2] The Environmental Protection Agency is responsible for the implementation of the EMEP.

As the presence of heavy metals and long-lasting organic pollutants from production processes became more evident in industrial emissions, two protocols were signed along with the Convention, which were ratified by Serbia. The first one is the Protocol on Heavy Metals (1998), which entered into force in 2003.[3] The PHM protocol was adopted in order to reduce emissions of cadmium, lead

1 Act on Ratification of the Convention on Long-range Transboundary Air Pollution, *Official Gazette of SFRY- International Agreements*, No. 11/86.

2 Act on Ratification of the Protocol to the Convention on Long-range Transboundary Air Pollution on Long-Term Financing of the Cooperation Program for Monitoring and Assessment of Transboundary Air Pollutant Transmission in Europe (EMEP), *Official Gazette of SFRY - International Agreements*. No. 2/87.

3 Act on Ratification of the Protocol on Heavy Metals to the Convention on Long-range Transboundary Air Pollution, *Official Gazette of RS International Agreements*. No. 1/12. The protocol has been applied in Serbia since June 24, 2012.

and mercury from industrial processes. However, amendments to the 2012 Protocol, which introduce additional emission control mechanisms that may contain these heavy metals and provide a basis for defining the best available technology (BAT) in such production processes, have not been ratified. The second one is the Protocol on Persistent Organic Pollutants (POPs), adopted in order to eliminate the release of dioxins, furans, polycyclic aromatic hydrocarbons and hexachlorobenzene into the air. The POPs protocol was adopted in 1998 and entered into force in 2003.[4] In 2009, amendments were adopted to the POPs protocol that introduced restrictions on the emission of additional substances, restrictions on the emission of these gases in waste incinerators and parameters based on which the BAT can be determined in the production processes when these substances are emitted, but these amendments have not been ratified. What's more, neither the Gothenburg Protocol (1999) nor the 2012 amendments establishing maximum national emissions for sulphur oxides, nitrogen oxides, ammonia and volatile organic compounds have been ratified. The application of the Gothenburg Protocol has a significant impact on the production of paints and varnishes, as well as on the development of agriculture, bearing in mind that it envisages measures to reduce emissions of easily volatile organic compounds.[5]

The conducted analysis shows that the Protocols and amendments to the Protocols of the Convention on Long-range Transboundary Air Pollution adopted after 2012 have not been ratified.

3. EU legislation on Ambient Air Quality and lessons learned from recent CJEU jurisprudence on air quality

The legal framework that regulates the issues relevant for the protection of air quality with rules that EU Member States have in common are the rules contained in a number of directives. One of the most important directives is the Industrial Emissions Directive 2010/75/EU, which sets emission limit values within the rules on emissions of operators, i.e. introduces a ban on the emission of certain substances. Directive 2010/75/EU prohibits the emission of acid droplets from all installations, and allows the emission of defined substances from

4 Act on Ratification of the Protocol on Long-Term Organic Pollutants with the Convention on Long-range Transboundary Air Pollution, *Official Gazette of the RS - International Agreements*. No. 1/12. The protocol has been applied in Serbia since June 24, 2012.

5 Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent, 1985 and Protocol on Further Reduction of Sulphur Emissions, 1994; Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, 1988; Protocol Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, 1991to the Convention on Long-Range Transboundary Air Pollution were not adopted by the Republic of Serbia. See: https://unece.org/protocols.

industrial installations only when they are below the limit values presented in the subsequent Annex to the Directive.[6] In order for the competent authorities of the Member States to be able to determine whether the conditions of the permits determining the maximum values of emissions of individual elements into the air apply, Member States have an obligation to provide the monitoring of emissions into the air.[7] Limitation of sulphur emissions into the air was also introduced by EU Directive 2016/802 on the Reduction of sulphur content in certain liquid fuels.[8] The EU Directive 2016/2284 on the reduction of emissions of certain atmospheric pollutants introduces the possibility to define the emission balance for certain harmful substances at the level of Member State, and thus help reduce emissions in certain areas of industry.[9]

The basics of systemic air quality protection are laid down in Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe. As a primary responsibility of the Member State for air quality management, the Directive stipulates the obligation of establishing a system to ensure that the levels of sulphur dioxide, PM10, lead and carbon monoxide (in some cases PM2.5) in their zones and agglomerations do not exceed limit values set out in Annex XI to the Directive. The limit values for nitrogen oxides and benzene are set out in the same Annex.[10] If the levels of air pollutants in certain zones or agglomerations were to exceed the limit values, the Member State would need to draw up an air quality action plan for those zones and agglomerations in order to achieve the relevant limit values or target values. Air quality action plans should specify measures whose application makes the period of exceeding the limit values as short as possible.[11]

In order to understand the reasons for a state to exceed limit values and whether an individual has the right to request the adoption of an air quality action plan

6 Directive 2010/75/EU, Art. 69(1) Annex VIII, Part 2. Such standards exist for various areas of industrial activity, including special rules for combustion, special rules for waste incineration and co-incineration plants, special rules for plants and activities using organic solvents, special rules for plants which produce titanium dioxide, which are regulated by EU Directive 2010/75.

7 Directive 2010/75/EU, Art. 70(2)

8 Directive 2016/802/EU, Preamble and Art. 14.

9 Directive 2016/2284/EU, Art. 6(2) and Annex III Part 2. The model was specifically developed to establish balance as a measure of ammonia emission control in order to reduce emissions from agriculture.

10 Directive 2008/50/EC, Art. 13(1). For nitrogen oxide values, there was a period of 5 years starting from 2010 during which a Member State could request a transitional period;as for exceeding the limit values for benzene, the starting year for the application of thetime frame was set for each Member State.

11 Directive 2008/50/EC, Art. 23(1).

when the limit values are exceeded and the competent authorities do not adopt such a plan, we further analyse recent examples from the CJEU practice.

In the case of *Commission v. Bulgaria* (2017), the question was raised whether exceeding limit values of emissions in Bulgaria prescribed by the Directive violates the EU law.[12] The Commission argued that Bulgaria had systematically and persistently exceeded the limit values, supporting the claim with Bulgaria's annual air quality reports which showed that both daily and annual limit values of PM10 had been exceeded throughout the country for eight consecutive years (with the occasional exception of one of the zones), and that in the same period no downward trend was registered in terms of the number of days of overdraft (paras. 57, 58, 67)(Krämer, 2018). On this basis, the CJEU found that there was a systematic and continuous non-compliance with EU law. (par. 119) The court in the same case did not accept the argument that Bulgaria sought to justify the overdraft, by stating that the efforts to reduce the level of PM10 particles were restrained by the sensitive socio-economic situation of the country, given that PM10 emissions are difficult to reduce since the dominant source of these emissions are heating from individual fireplaces and traffic, and that mostly used fuel during the heating season were wood and coal due to the economic hardship of the Bulgarian population (para. 75). Arguing that Bulgaria had also breached its obligation to draw up an air quality action plan, the CJEU indicated that it was the State's discretion to choose measures which it considered would improve air quality and reduce unwanted emissions below the limit values, but that this discretionary assessment is limited by the obligation of the state that the plan be based on "balance between the goal of reducing the risk of pollution and other engaged public and private interests" (para. 106). In the case of *Commission v. Poland* (2018), the CJEU pointed to additional criteria for determining the measures to be included in the plan, which must be appropriate and effective (para. 82), and adequately selected to eliminate the case of overdraft as soon as possible (par. 118)[13] (Kirsten, 2018).

It then became necessary to introduce criteria to assess whether the measures prescribed by the air quality action plan have been adequately chosen. In the case of the *Commission v. France* (2019), the multiannual excess of nitrogen dioxide emissions by France was justified by the fact that the measures provided for in the air quality action plan to reduce emissions exceeding the limit values

12 Case C-488/15 *Commission v Bulgaria* [2017]

13 Case C-336/16 *Commission v Poland* [2018]. In that case, the reasons that led to the conclusion that the envisaged measures were not appropriate were pointed out: „ ... although individual heating of buildings was the main source of PM10 pollution in a large number of zones, the boiler replacement plan could only have an uncertain effect because quality criteria for boilers installed as a replacement for old ones were not prescribed" (para. 86).

have a limited effect, given the number of public transport users that cannot be increased in the short term, public transport routes that cannot be changed in the short term, and long-term investments that envisage new solutions for population mobility and transformation towards less car use, bearing in mind that traffic was identified as the main source of pollution (para. 29).[14]France also pointed out that when weighing the interests, it took into account that adopting stricter regulations implying higher fuel tax are not an option, having in mind the sensitivity of public opinion on that issue and the possibility that such measures would lead to new public unrest (para. 31). Arguing the decision that France had breached its obligations under Directive 2008/50/EC, the CJEU pointed to elements relevant for establishing liability for exceeding the limit values (paras. 50-61). First, exceeding the limit values over a long period of time and assessment regarding its further duration form the basis for drawing a conclusion on whether the state is executing its obligations under Art. 23 (1) of Directive 2008/50/EC. Second, in assessing whether the measures envisaged by the plan are adequate, one should observe the absolute limit value overdraft. If there is a rise of emissions which should be in accord with limit values, the measures are not adequate. The decreasing trend can also be an indicator whether the measures are adequate: if the reduction is not in line with the extent of the overdraft, the measures do not efficiently lead to a reduction as soon as possible. Third, the adequacy of the measures also depends on the content of the plans, indicating whether the causes that led to the overdraft and the envisaged measures are in accord, as well as whether measures stretch to all sectors relevant for overcoming the problem, and whether they are binding or not (Pedrosa, Vanheusden, 2020). The CJEU also pointed out that the Member State's structural difficulties in implementing emission reduction plans and knowledge if their violation is or is not intentional do not affect the decision on the existence of a violation of EU law (par. 42).

The question further arises: if there is a continuous excess of emissions, and the state fails to adopt air quality action plans, do individuals have the right to legal protection, and what would be the jurisdiction of the domestic court in that case? In the case of *Dieter Janecek v. Freistaat Bayern* (2008), a German citizen initiated an administrative dispute due to the failure of administrative authorities to adopt an air quality action plan.[15] In the ruling procedure, the CJEU considered whether, in cases where a Member State does not transpose

14 Case C-636/18 *European Commission v French Republic* [2019]

15 Case C–237/07 *Dieter Janecek v. Freistaat Bayern* [2008]. Mr. Janecek filed a lawsuit with the Munich Administrative Court for failure of the City of Munich to adopt an action plan to reduce excessive air pollution, although in 2005 and 2006 there were more than 35 cases of exceeding the particulate matter (PM 10) in the air, bearing in mind that German federal law stipulates that the maximum number of measurements in which an overrun may occur is 35.

the Directive provisions on the obligation to draw up an action plan, or it does transpose but does not apply them, there is a possibility that the provisions, envisaged in the Directive 96/63/EC on ambient air quality assessment and management (which was relevant at the time) apply directly? (Doerig, 2014). The CJEU held that the requirements of Directive 96/63/EC prescribing the obligation of Member States to draw up action plans are aimed at protecting human health, and that individuals whose health may be impaired by failure to do so have a subjective right to pursue their adoption and to file a lawsuit with such a request (Kurpus, 2019). Member States are given the discretion to choose the means to achieve the objective; therefore, the discretion must be within the limits of the competence and in accordance with the objective set out in the Directive. In that case, the individual may address the competent national court of the Member State with a request for drawing up an action plan, but not with a request for specific measures (paras 34-42).

If the court of a Member State has an obligation to directly apply the provisions of the Directive in these cases, the question arises whether the court of a Member State, directly applying the provisions of the Directive, along with a decision which determines the responsibility for failing to draw up an action plan and orders its adoption, has an obligation to impose additional obligations which would increase the chances for the adoption of the plan by the competent authorities. We find elements for answering this question in the CJEU's opinions provided in the *ClientEarth* case (2014).[16] In 2010, the level of nitrogen dioxide exceeded permitted values in 40 of the 43 zones and agglomerations in the UK, as a result of emissions from traffic and individual furnaces. The NGO ClientEarth has filed a lawsuit in a court of general jurisdiction over the failure of the competent authorities to adopt an action plan for reduction of emissions by 2015. The High Court and the Court of Appeals rejected the lawsuit, considering that these are issues that fall outside their jurisdiction. The UK Supreme Court addressed the CJEU with the preliminary issue regarding measures that should be imposed by a Member State court in the event that the competent authority does not comply with the provisions regarding drawing up the air quality action plan, bearing in mind the obligation under the Directive that the overdraft period must be as short as possible (paras 50-58). The CJEU replied that a court of a Member State must take "any necessary measure such as an order in appropriate terms, so that the authority establishes the plan" (para. 58) (Barrit, 2015). In the practice of EU Member States, we encounter cases where the competent administrative bodies and public authorities do not take the necessary actions for adopting air quality action plans or updating the existing ones, although they are bound by a

16 Case C-404/13 *ClientEarth v. The Secretary of State for the Environment*, Food and Rural Affairs [2014]

court decision of a Member State. Therefore, in the case of *Deutsche Umwelthilfe* (2019), the Higher Administrative Court of Bavaria, Germany, addressed the CJEU with a preliminary issue, asking whether fulfilling the obligation to provide an effective legal remedy in environmental protection, in circumstances which show that, despite the decision of the court ordering the drafting of the plan, it has not been carried out, even after the federal State which was required to fulfil such an obligation was fined, means that the national court may, or even has an obligation, "to impose coercive detention on office holders involved in the exercise of the official authority … of a German Federal Land in order thereby to enforce the obligation of that Federal Land?"[17] (par. 28). The CJEU took the view that " ... in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50, it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where provisions of domestic law contain a legal basis for ordering such detention..." (para. 56).

4. Application of obligations arising from the international legal framework in Serbia and the practice of the Protector of Citizens

The conducted analyses of the framework, consisting of international agreements and institutes developed under the auspices of the *acquis communautaire,* indicate the elements for identifying the basic obligations of the state in the field of air quality protection. In the process of harmonisation of our law with the EU law, we regard the transposition issues of the environmental *acquis* by observing the process of transposing the directives into domestic law, and we regard the issues related to its implementation by analysing Member States' responses to the challenges of transposing the environmental *acquis* into the domestic system and practice of CJEU. By regulating issues of importance for air protection, the legislator qualifies the protection and improvement of air quality as "a natural value of general interest that enjoys special protection" (Art. 1 of the Air Protection Act).[18] The same law prescribes the obligation of competent administrative bodies to perform continuous measurements of air quality and on that basis determine the list of air quality categories. If it is determined that the air quality in a certain agglomeration is excessively polluted, and is assessed as category III air, the competent administrative bodies are obliged to prepare

17 Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern* [2019]

18 Art. 1 of the Air Protection Act,*Official Gazette of the RS*, No. 36/2009 and 10/13.

an air quality action plan which envisages measures expected to improve air quality (Todić, Dujić, 2020).

The practice of the Protector of Citizens of the Republic of Serbia shows that in previous years there had been a violation of the state's obligations arising from ratified international agreements, which were analysed earlier, and violations of positive law. An example can be found in the procedure regarding control of regularity and legality of the actions of competent authorities regarding the release of emissions caused by fires at the Vinča landfill in 2017, which was introduced by the Protector of Citizens on his own initiative.[19] The objects of inspection were activities and absence of activities of the Ministry in charge of environmental protection, the Environmental Protection Agency, and the City Institute for Public Health in Belgrade. The Protector of Citizens pointed out the violations and sent an opinion to the Environmental Protection Agency, pointing to the need to implement measures in order to establish and maintain the National Register of Pollution Sources fully and adequately, which would contain data on all pollutant substances reported on, in accordance with the national regulations and signed international protocols.[20] Such opinion was also expressed in the Recommendation of the Protector of Citizens regarding the control of the regularity and legality of the work of the Ministry in charge of energy and the Environmental Protection Agency regarding the air quality due to emissions coming from the lead smelter in Zajača.

5. Conclusion

The conducted analysis shows that Serbia is a signatory to the basic international agreements that set the framework for air quality protection. The development of science and new professional analyses have, over time, indicated an increased impact of certain emissions on human health, which deteriorates public health considerably. In this regard, a number of protocols have made the necessary changes in order to gradually reduce emissions with the largest impact on human health and to introduce obligations that include the control of emissions and gases not envisaged by previous protocols. The conducted analysis shows that the Protocols and amendments to the Protocols of the Convention on Long-range Transboundary Air Pollution adopted after 2012 have not been ratified, and that the rules on reducing emissions that have a considerable impact on human health have not been introduced into our legislation. Bearing in mind that the envisaged rules are mostly part of the environmental *acquis*, as well as

19 Protector of Citizens, Serbia, Opinion no. 13-22-1952/17, no. 20818 dated June 27, 2018.

20 Recommendation of the Protector of Citizens, letter no. 14-541/12, no. 15408 dated 30 May 2013.

the intensive harmonisation of Serbian law with the EU law further to signing of the Stabilization and Association Agreement, it is expected that the rules envisaged in unratified Protocols and accompanying amendments will nevertheless become part of the domestic legal framework.

In the CJEU practice, we come across a number of cases initiated by the Commission against Member States regarding the application of directives in the field of air quality protection. The analysis indicates that a Member State cannot give up the application of these directives even when it encounters structural difficulties in the implementation of emission reduction plans, nor when the implementation is made difficult by the country's socio-economic situation. The CJEU pointed out in practice that individuals have the right to initiate proceedings before a Member State court and request the adoption of an air protection action plan if the air pollution exceeds the established limit values and the competent administrative body does not adopt an appropriate air protection action plan. In order to ensure the application of such a decision, the courts of Member States may take any necessary measure, including an order in the appropriate terms. If a national authority persistently refuses to comply with a judicial decision, it is incumbent upon the national court to order, under provisions of domestic law, the coercive detention of office holders involved in the exercise of official authority.

The practice of the Protector of Citizens of the Republic of Serbia indicates the need for further development of positive legal framework for air protection, which should lead to full implementation of the environmental *acquis* rules in this field, taking into account the views expressed in the practice of CJEU.

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PRAVA POJEDINACA I OBAVEZE DRŽAVE UZAŠTITI KVALITETA VAZDUHA

Rezime

U radu se analizira status međunarodnih sporazuma iz oblasti zaštite vazduha kako bi se utvdio stepen usaglašenosti pozitivnog prava sa standardima potvrđenih međunarodnih sporazuma. Imajući u vidu postupak harminizacije prava Srbije sa pravom EU, u radu se ukazuje na obaveze državačlanica koje proizilaze iz Direktive 2008/50/EZ o kvalitetu vazduha i čistijeg vazduha za Evropu. U rade se iznose rezulati analize bogate praksa Suda pravde Evropske unije u kojoj se ukazuje na elemente koji određuju pravo pojedinca da pokrene postupak zaštite prava na zdravu životnu sredinu ukoliko država članica ne donese plan zaštite kvaliteta vazduha, kao i mere koje domaći sudovi mogu naložiti kako bi osigurali primenu odluke kojom se utvrđuje obaveza primene mera u cilju smanjenja emisija kojeprevazilaze granične vrednosti. Imajući u vidu značajan broj predmeta u vezi sa zaštitom vazduha koje nalazimo u praksi Zaštitnika građana, analiza primene preporuka koje su proizašle iz tih predmeta ukazuje na stepen usaglašenosti preuzetih obaveza i njihove primene, kaoi pravce noveliranja pozitivnog prava.

Ključne reči*: pravo na čist vazduh, aktivna legitimacija pojedinaca kod izrade plana kvaliteta vazduha, odgovornost države za prekogranično zagađenje vaduha, uloga Suda pravde Evropske unije u direktnoj primeni Direktive o kvalitetu vazduha i čistijeg vazduha za Evropu.*

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originalni naučni rad
10.5937/zrpfn0-29684

UDK: 347.26
347.241(497.11)
Rad primljen: 02.12.2020.
Rad prihvaćen: 14.01.2021.

NEIGHBOURS' RIGHTS AND ABUSE OF RIGHTS[**]

Abstract: *The subject matter of this paper is the analysis of the ownership right and its limitations in neighbour-law relationships, including the restrictions on ownership and neighbours' rights due to the prohibition of abuse of rights. Neighbours' rights set boundaries to the content of the ownership right, whereas the prohibition of abuse of rights additionally restricts the freedom of exercising the recognised content of the ownership right. The paper aims to point out to the basic differences between neighbours' rights and the prohibition of abuse of rights, as well as to the occasional overlapping of their legal functions and effects.*

Key words: *ownership, neighbours' rights, abuse of rights.*

1. Introduction

Ownership is a socially regulated way of appropriating things (assets) which provides for satisfying the most diverse human needs, including both the primary (biological and physiological) needs and the derived "cultural" ones (psychological, spiritual, aesthetic, conventional, luxury-oriented, etc) (Gams, 1991: 12). Considering that ownership is the basic facet of life, freedom, power [...], it has always represented the object of the greatest factual and legal protection.

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[**] This paper is the result of research supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia (Agreement no. 451-03-68/2020-14/200120).

The notion of ownership *(*Lat. *dominium proprietas),* as an individual, absolute and exclusive right, may be traced back to Roman Law[1], but it received its full confirmation in the period of liberal capitalism and the first civil bourgeois codes[2]. Those codes treated property as a natural and eternal (imprescriptible) right of man[3].

Yet, freedom of an owner, particularly over immovable property (such as land and buildings), is necessarily limited by equivalent freedom of another owner. Thus, besides explicitly defining the content of the ownership right. legislators have always imposed some restrictions, pertaining to public and private ownership alike (Stojanović, 1987:80; Kovačević Kuštrimović, Lazić, 2008:73). Ownership seems to have always been "a progeny of its own time" (Stojanović, 1991:1176). Yet, given that the essential feature of ownership as an individual (sovereign) right is increasingly compromised[4], it has become a social category that is increasingly narrowed down in favour of a general social interest. Thus, owners are subjected to different legal and social restrictions, including both the explicit legal restrictions (e.g. on neighbours' rights) and the ones relying by virtue of law on the social morale (e.g. the prohibition of abuse of rights when exercising ownership powers, as well as those stemming from neighbours' rights). The subject matter of consideration in this paper are the restrictions pertaining to the content of ownership which is restricted by neighbours' rights and the manner of exercising ownership.

2. The Ownership Right and Neighbour-Law Restrictions

The relationship between neighbours is a complex social relationship entailing a set of different human interests and behaviours arising from the clash of two ownership rights over real estates. Given that customary law alone cannot

1 *Qui suo iure utitur, neminem laedit* (Dicta, Sec. Paulus - D. 50, 17, 155). "He who uses his own right harms no one" (Stojčević, Romac, 1984: 434, 325).

2 "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations" (Art. 544 of the French *Code Civil*). A similar definition exists in § 354 of the Austrian Civil Code/ABGB; § 903 of the German Civil Code/BGB; §§ 211 and 216 of the Civil Code of the Principality of Serbia (1844); and Art. 93 of the General Property Code of the Principality of Montenegro (1888).

3 Article 2 of the French Declaration of the Rights of Man and the Citizen (1789) envisaged: "The goal of any political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression."

4 The notion of ownership as an individual (sovereign) right is also an expression of the general understanding of the specific time and society, rather than a permanently acquired developmental value of the ownership right. The rule *Uti, non abuti* (Ulpianus - D.7,1,15,1), meaning "to use, not to abuse", has always been an integral part of the concept of ownership.

adequately regulate numerous neighbours relationships, the "law" (statutory legislation) had to respond and regulate these issues by relevant legal provisions. Thus, neighbours' relationship has become either a conceptual element of certain legal institutes (the regulation of boundary lines, neighbours' rights, the pre-emption right to purchase the adjacent agricultural land, etc.) or an element of factual circumstances (e.g. trespass to property, disturbance of possession, retention rights, compensation for damage, etc.) Consequently, neighbour law regulates only one aspect of neighbours' relations arising from the restriction of ownership.

The limitation of the ownership right content (imposed on the owner as a self-centred individual) was performed in the interest of the owner as a social being. After the First World War, the social character of ownership prevailed (Savić, 2012: 233). "Property obligates. Its use is to be at the same time service for the best good of the public" (Art. 153 para.3, Weimar Constitution).[5] However, the first limitations of the ownership right contents occurred much earlier, with the emergences of ownership rights, and these limitations primarily referred to neighbours' rights. "Our legal powers are not abstract; they have a social value; as such, they have to be exercised in a social context, in compliance with the goal that is changeable in different countries, times and legal relationships at issue, but that goal [...]makes the essence of our rights [...]" (Marković, 1978:1008).

Neighbour law is a specific legal limitation of ownership in private interest which ensues alongside with the ownership right, but the justification for the expansion of neighbours' rights is the frequent abuse of ownership. The abuse of rights originally emerged in neighbour-law relations pertaining to ownership over land, but it subsequently developed into a separate legal institute regulating a specific form of limitation in exercising the established content of the ownership right.

"Neighbour rights exist over the adjacent real estates whose use is interdependent because, according to local customs, they are deemed to be neighbouring properties" (Toroman, 1978:234). Neighbours' rights imply the power of the owner of one real estate to make use of the neighbouring real estate, or to request from the owner of the neighbouring real estate to take a specific action or to abstain from exercising a specific ownership power. It is a legal limitation of ownership that is introduced in the mutual interest of the owners of neighbouring estates (*praedia vicina*) for the purpose of preserving good neighbourly relations, but also in the general interest of preventing any confrontation of the real estate owners.

5 Art. 153 para. 3 of the Weimar Constitution, 1919 (Savić, 2012: 227-234).

The first neighbours' rights emerged in conjunction with ownership over real estate (e.g. boundary lines). Boundary lines are the key conceptual element of ownership, given that there is no ownership over land without the explicit demarcation of the subject matter of ownership. A more intensive development of neighbours' rights was the result of modern-day disputes over ownership, particularly in urban areas where a large number of people live in a relatively small space.

Neighbour-law limitations are legal restrictions aimed at accomplishing three goals: *the reciprocity of neighbours' rights and obligations, the prohibition of causing disturbance to the neighbouring property,* and *the correlation of neighbours' rights and obligations*. In legal theory, they are commonly classified into three groups:

1) neighbours' rights that prohibit causing disturbance to neighbours in their quiet and rational use of their real estate (the right to protection against digging beneath the ground jeopardising the stability of neighbouring buildings, protection against changing the natural water flow, and protection against emissions (private nuisance);

2) neighbours' rights characterised by the reciprocity of neighbours' rights and obligations (mutual use of the common fence, boundary lines, hedges, walls, etc.);

3) neighbours' rights characterised by the correlation of neighbours' rights and obligations; they are similar to easements and refer to the right to use the neighbouring land and the right of way (Toroman, 1978:235; Stojanović, 1991:121; Kovačević-Kuštrimović, Lazić, 2009:75).

The neighbours' rights in the second and third category are quite prone to being abused as they provide specific powers to the holders of these rights.

3. Prohibition of Abuse of Ownership Rights

Although Roman law did not recognize the institute of prohibition of abuse of rights, which is often disputed by many Roman law scholars (Jovanović, 1996:100), the concept *Malitis non est indulgendum* ("Malice is not to be indulged") may be traced back to Roman law[6] (Stojčević, Romac, 1984: 274). However, the prevalent rule in Roman law was: *Qui suo iure utitur, neminem laedit* ("He who exercises his legal rights harms no one") (Stojčević, Romac, 1984:434).[7]

Konstantinović (1925) noted that "it is a misconception that the prohibition of abuse of rights is of recent origin and that individualism and prohibition of

6 Celsus -D. 6,1,38. *Dicta et regulae iuris* (Stojčević, Romac, 1984:274, no. 69).

7 Sec. Paulus - D. 50, 17, 155, 1. *Dicta* (Stojčević, Romac, 1984:434, no. 325).

abuse of rights mutually exclude each other" (Anali PF u Beogradu, 1982:269).[8] However, the theory of abuse of rights started to take form in French law in the 19th century, on the basis of judicial decisions (case law), as a result of the growing understanding that the exercise of the ownership right must move not only within the limits set by the positive (objective) law, primarily by statutory legislation, but also in accordance with the purpose and the spirit of law, i.e. the social morality. This issue was first regulated in the German Civil Code (§ 226 BGB, amended in § 826). [9]

Konstantinović (1925) also noted that "the prohibition of abuse means a very simple thing. Anyone who has exercised one's own right only out of malice to the injured party, with the intention to cause damage, and, generally, every one who has exercised one's right without malicious intention but in an abnormal manner, thus causing damage to another person and preventing the other person to exercise his own right in a normal manner, shall be held liable for inflicting damage." (Anali PF u Beogradu, 1982:269).

Long ago, the population growth and modernisation of life "extinguished the notion of ownership as an individual (sovereign) right, i.e. its concept of ownership as a "fortress where it is forbidden to ask "how" and "why" something is done" (Rodier, 1960:7); the new limitations to ownership seem to be gradually turning into reality Rodier's prediction on "imminent disappearance of the purported absolute rights" (Rodier, 1960:7).

It is most difficult to determine the criterion for establishing the existence of abuse of rights, i.e. to distinguish between the permissible "use" and the impermissible use (abuse) of rights. Given that human creativity is inexhaustible (both in positive and negative terms), the first legal reactions to the malicious abuse of rights and the first legal criteria were developed in judicial practice (case law).

First of all, the judicial practice may dispute and bar the legally valid rights which have been exercised with the aim of inflicting damage to another (chicanery as a form of abuse of rights).[10] It is the so-called narrow (subjective) concept of abuse of rights. "Rights are social prerogatives intended for accomplishing

8 M. Konstantinović (1925). *Zabrana zloupotrebe prava i socijalizacija prava* (Prohibition of abuse of rights and socialisation of law), Arhiv za pravne i društvene nauke, Beograd, 3/1925, reprinted in *Anali Pravnog fakulteta u Beograd*u, 1982, vol. 30. br. 3-4 (261-281)

9 Notably, the General Property Code (GPC) of the Principality of Montenegro (1888) regulated the prohibition of abuse of rights a bit earlier, but V. Bogišić transposed this legal institute from German and French legal theory and practice. "You cannot exercise your right just to harm or disturb anyone (art. 1000 GPC);" Do not indulge in hair-splitting in your own right". (art. 1014 GPC) (Bogišić, 1898, in: Danilovic, 1998: 276, 277).

10 "When a right is intended to be exercised for its own sake, irrespective of its moral or at least utilitarian goals alone, it is called a *chicane"* (Radbruch, 1980:135).

social peace and a fair balance of interest in disputes; therefore, they must not be put into the service of malice; any deliberate act committed with intent to inflict harm to another cannot enjoy legal protection" (Marković, 1978:1009). As a legal institute, the abuse of rights emerged in the process of evolution of responsibility which imposed the need to recognise that "the rights are not granted to individuals by public authorities to exercise them arbitrarily, as they wish, but rather to exercise them for a specific purpose; created by the society, they also have a social task: a specific purpose and a specific goal which they cannot be and must not be separated from" (Joserand, 1935:328).

Further development of legal theory on the abuse of rights generated the broader concept, embodied in the so-called "ultimate goal" (objective) criterion. According to this conception, abuse exists where the subjective (individual) right is exercised contrary to the ultimate goal for which it is established. It may involve a lack of interest in the exercise of rights, a disturbance of the balance of interests, an abnormal exercise of rights, diverting the right from the designated function (social and economic goals), failure to exercise the right in a prudent manner, inadequate and disproportionate exercise of rights, etc. These are the sub-criteria developed by judicial practice for assessing the abuse of rights.

The institute of the prohibition of abuse of rights is widely accepted in contemporary law. It is a consequence of the fact that "subjective rights are not exercised in a vacuum but in a social environment; an individual is only one of its numerous cells; consequently, when an individual exercises his/her subjective rights, he/she simultaneously contributes to accomplishing a social function" (Marković, 1978:1005).

The Serbian law has adopted the broader (objective) concept of abuse of rights. "The owner shall exercise the right of ownership in accordance with the nature and purpose of the property asset. Exercising the ownership right contrary to the goal for which it has been established or recognised by the law shall be forbidden" (Art. 4 [11] In comparative law, the legal standard of "good practice" is a common method for preventing the abuse of rights.

The prohibition of abuse of rights was initially established in relation to the exercise of the ownership right as the broadest absolute civil subjective right, and its application was subsequently extended to other civil subjective rights.

11 Art. 4 of the Ownership and Real Property Relations Act, *Official Gazette of the SFRY* no.6 /1980, 36/1990; "*Official Gazette of the FRY*" no. 29/1996, and "*Official Gazette of the RS",* no. 115/2005 -other law.

4. Delimitation of Neighbours' Rights and Abuse of Rights

Neighbours' rights imply a legal restriction of the content of the ownership right which narrows down the owner's powers and renders any non-compliance an impermissible and illegal act. In relation to a breach of neighbours' rights, the court issues a judgement of declarative character. The abuse of ownership rights entails the performance of ownership-related powers in the manner that is prohibited by the positive (objective) law because the act is abusive in terms of the goal of performance, or the manner of performance. The abuse of rights does not entail a direct restriction of the content of ownership but of the manner of its performance, which imposes an additional obligation on the owner – the obligation to exercise the right in a civilised (considerate) manner *(civiliter modo).* It arises from the need for moralisation and socialisation of rights. Konstantinović (1925) noted that "the prohibition of abuse of rights has its basis in the general need for the greatest possible peace and security in each social community. It is a legal rule as much as a moral one (Anali PF u Beogradu, 1982:73; Lazarević, 1960:43).

Neighbours' rights entail a direct and concrete legal restriction of the content of the ownership right, while the abuse of rights entails a direct and general legal restriction of the manner of performing ownership powers. The abuse of rights institute enables the law to follow the dynamics of social life, and the law is put into effect by applying legal standards by a court-of-law, in accordance with local customs and circumstances of exercising ownership rights.

The neighbour-law restriction of ownership may be preceded by a specific abuse of the ownership right. For instance, opening windows on one's own building which are facing towards the neighbour's building is a permissible exercise of the ownership right which arises from the ownership powers on the use of things (*ius utendi*). Consequently, in our judicial practice (case law), it is deemed that "there is no disturbance when the owner makes an opening in his/her fence or opens a window in his/her aerial space and gets a view of the neighbour's yard."[12] However, "opening a window towards the neighbour's yard should be carried out in such a manner that it causes the least possible disturbance to the neighbour's ownership right; otherwise, it may constitute an abuse of rights."[13]

The abuse of the ownership power to open a window on one's building is the condition for the restriction of this right, by enacting a set of the urban-planning regulations which prescribe the conditions for opening windows towards the

12 Zbirka sudskih odluka (*Collection of Court Decisions*), Beograd, 1969, book 14, vol. 2, Decision no. 155

13 Odluka Višeg suda Vojvodine (Decision of the Higher Court of Vojvodina), Rev. 524/87, *Sudska praksa* (*Court Case Law*), Beograd, 10/1988, Decision no. 55

neighbouring estates. These regulations have a character of neighbour-law restrictions that narrow down the abuse of the ownership right related to opening windows; but, does it completely exclude the abuse of rights? The answer lies in shaping the owner's prospective conduct within the limits of these regulations. "Where the "law" explicitly prohibiting specific behaviour enters the "scene", the abuse of rights disappears as a stream sinking into subterranean watercourses, and unexpectedly springs out in another area" (Kovačević Kuštrimović, 1996: 17).

In terms of their legal nature, both the violation of neighbours' rights and the abuse of ownership rights are impermissible behaviour. In the former case, there is an explicit unlawful behaviour, and the consequences are eliminated by restoring the previous condition and seeking compensation for damage. In case of the abuse of rights, the most common sanction is the compensation for damage or elimination of the source of risk or danger. On the other hand, return to the previous condition cannot be attained in most cases (Strohsack, 1990: 1169) because the exercise of rights involving abuse is "shrouded" in a subjective right which distinguishes it from an unlawful action" (Marković, 1978: 1012).

The Serbian Ownership and Real Property Relations Act did not completely regulate neighbours' rights, except for the issues pertaining to emissions (private nuisance). The incomplete regulation sometimes gives rise to dilemmas in judicial practice, particularly in terms of whether the specific behaviour constitutes illegal conduct or malicious exercise of rights, a violation of neighbours' rights or an abuse of rights. The judicial practice yielded a number of decisions where the abuse of rights was "mixed" with the violation of neighbours' rights in a manner contrary to explicit legal prohibitions or restrictions on the content of ownership. Basically, the abuse of rights implies a legal restriction of the content of ownership; the restriction is not imposed directly but rather by means of a decision of the court which assesses the permissibility of the goal, or the manner of exercising the right.

In addition to autonomous and independent development of neighbours' rights, the justification for their further expansion was often found in judicial decisions on the abuse of rights. Behaviours that had initially been treated as the abuse of rights were explicitly prohibited over time, attaining the character of neighbour-law and other forms of restrictions on the content of the ownership right. However, the moment when a specific restriction on the content of ownership is explicitly prescribed by the law, any violation of the specified restriction is treated as unlawful behaviour, not as abuse of rights. The abuse of rights is a more general term that is most frequently regulated by legal standards, which enables the court to adapt the law to the social circumstances in order to ensure the basic

legal principles: to live honestly, not to offend anyone, and to give everyone what is due. At times, our judicial practice unnecessarily uses the institute of abuse of rights instead of neighbours' ownership restrictions, bit it is sometimes necessary given the absence of legal provision on neighbours' rights.

On the other hand, the abuse of neighbours' rights is possible with those neighbours' rights that provide mutual rights and obligations to the titleholders of ownership rights (e.g. the right to cut overhanging branches and lateral roots growing from the neighbour's tree, or trim overgrown trees overtopping the real estate of the holder of ownership rights, or the right to use the neighbour's real estate for fruit-picking, harvesting or catching a runaway swarm of bees).

It is a known fact that the conditions for using the right to cut branches were set in Roman law, which stipulated that it could be done only if branches lower than 15 feet, as they were considered to be obstructing sunlight, casting a shade over the land and hindering the growth of the neighbour's plants. According to the provision in German law, in order to be cut off, it is required that branches and lateral roots disturb the neighbour (§ 910 BGB al. 2; similarly, art. 687 of the Swiss Civil Code). A similar legal solution is expected to be introduced in the Serbian legislation upon the adoption of the Serbian act on real property rights.

5. Conclusion

In addition to the limits explicitly prescribed in statutory legislation regulating the content of ownership and mutual neighbour-law restrictions, ownership and other subjective rights have also been increasingly restricted indirectly, by the purpose of law and the general legal principles and standards of "good practice", "acting in good faith (*bona fides*)", "public order", "prohibition of abuse of rights", etc.

The prohibition of abuse of rights, as a restriction on exercising the recognised content of the ownership, has been extended from the ownership right into other real property rights (easements, neighbours' rights), and further into other private law areas (law of obligations, succession); over time, its outreach has extended from the sphere of private law into the sphere of public law. Like the sea-god Proteus, it gets transformed into various forms and goes on living in spite of the law and socially accepted morality. Yet, it facilitates the abuse of neighbours' rights, particularly those granting powers to take a positive action on the neighbour's real estate.

The abuse of rights is both a state of affairs (*factual* legal situation) and a dynamic process. It entails the *de facto* situation of impermissibility of immoral conduct in exercising one's right as well as the process of ongoing development of

law in the function of preventing any abnormality in exercising the rights and its permanent socialisation. The prohibition of abuse of right enables the judge to assess the regularity of the manner of exercising the right on the merits of each specific case, bearing in mind the "goal" of the recognised subjective right at the specific time and in the specific society. The prohibition of abuse of rights is aimed at moralization and socialisation of rights, by means of court proceedings and legal standards that enable the law to keep pace with the dynamics of social life changes.

The principle of mutual observance of neighbours' rights transforms neighbours' relations into a legal relationship, imposes sanctions for a violation of envisaged rights, and introduces the element of coercion (enforcement). Neighbour-law restrictions are an expression of "the morality of duty", translated into a direct legal prohibition. In addition to the "morality of duty", the prohibition of abuse of rights additionally expresses "the morality of will", as an expression of victory of the general (public) interest over the individual (private) interest. Good neighbour relations ultimately rest on the exercise of the ownership right and neighbours' rights within the limits of the envisaged legislation and without abuse.

Neighbour-law restrictions on the ownership right are a kind of "prevention" against the abuse of right. Notwithstanding all legislative efforts, any legal concept remains partially indeterminate; the limits of subjective rights cannot be set without raising issues about their content and the likelihood of various abuses by exercising neighbours' rights. The prohibition of abuse of rights is an ongoing process which constantly reasserts the social and cultural elements which, in view of the general (public) interest, call for consideration and civility in exercising one's own right.

The owner's refraining from the abuse of ownership and neighbours' rights is based on the balance of interests of private owners, the fear of reciprocity, and the "authority" of the proverb: "Do not do to others what you do not want to be done to yourself". Thus, the author considers that private property (i.e. privatization) objectively narrows down the "grounds" for the abuse of rights, whereas the development of legal culture narrows down the subjective presumptions of abuse, embodied in amorality and self-centeredness in exercising one's own right. The need to prohibit the abuse of the ownership right and neighbours' rights arises from the fact that positive law cannot fully anticipate and regulate the conduct of individuals in property relations; it is also based on the fact that no legal concept is all-inclusive and comprehensively specified, and that no legal institute is immune to abuse.

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SUSEDSKA PRAVA I ZLOUPOTREBA PRAVA

Rezime

Rad se bavi analizom svojine i potrebom za njenim ograničenjima u privatnom i opštem interesu. Analizira se odnos susedsko-pravnih ograničenja i zabrane zloupotrebe prava. Susedska prava postavljaju granice u sadržini prava svojine, dok zabrana zloupotrebe prava dodatno ograničava slobodu u vršenju priznate sadržine prava. Svrha rada je da se ukaže na osnovne razlike između susedskog prava i zabrane zloupotrebe prava, ali i srodnost njihovih funkcija.

Stvarna prava su apsolutna prava koja svom titularu garantuju neposrednu pravnu vlast na stvari kao objektu svojine, stvarnih i ličnih službenosti, založnog prava i drugih stvarnih prava. Iako je svojina najšire imovinsko pravo, što omogućava čitav spektar različitih oblika držanja, korišćenja i raspolaganja, moderno pravo ograničava vlasnika tako što mu nameće obavezu da svoja ovlašćenja vrši u skladu sa društveno prihvatljivim ciljem i na društveno dopušten način. Ovaj princip se potvrđuje ograničenjem svojine, ali i drugih stvarnih prava, putem instituta zabrane zloupotrebe prava.

Zabrana zloupotrebe prava nije unapred popunjena pozitivnom sadržinom već kao jedan standard ponašanja omogućava sudiji da u svakom konkretnom slučaju proceni ispravnost načina vršenja priznate sadržine stvarnog prava, sagledavanjem društvenog cilja subjektivnog prava u određenom vremenu i društvu. Zabrana (zlo)upotrebe prava je izraz pobede opšteg nad individualnim interesom, tako što se sprečava „sebičnost" i potpuna autonomija u vršenju stvarnih prava koja nije u skladu sa širim, društvenim interesima.

Ključne reči*: svojina, susedska prava, zloupotreba prava.*

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originalni naučni rad
10.5937/zrpfn0-28777

UDK: 347.921.8(497.11)
341.2:342.7
Rad primljen: 08.10.2020.
Rad prihvaćen: 16.12.2020.

BESPLATNA PRAVNA POMOĆ U KONTEKSTU PRAVA NA PRISTUP SUDU[**]

Apstrakt*: Ustav Republike Srbije izričito određuje da se besplatna pravna pomoć reguliše zakonom. U nizu izveštaja o napretku Republike Srbije u procesu pridruživanja Evropskoj uniji upozoravano je na nedopustivo nizak nivo kvaliteta i efikasnosti pravosuđa, a u tom kontekstu i na neophodnost zakonskog regulisanja sistema besplatne pravne pomoći. Konačno, ova materija je normirana posebnim zakonom koji se primenjuje od oktobra 2019. godine. U radu je pored pojmovnog određenja prava na besplatnu pravnu pomoć analizirana uslovljenost prava na pristup sudu, kao konstitutivnog elementa prava na pravično suđenje iz člana 6 Evropske koncvencije za zaštitu ljudskih prava i osnovnih sloboda, ostvarenjem prava na besplatnu pravnu pomoć. Regulisanje besplatne pravne pomoći na nacionalnom nivou mora ispunjavati standarde formulisane na nivou Evropske unije, ali i kroz praksu Evropskog suda za ljudska prava, pa su u radu analizirani referentni propisi i odluke, odnosno standardi koji su prepoznati i prihvaćeni. Zakon o besplatnoj pravnoj pomoći Republike Srbije analiziran je u kontekstu ispunjenosti standarda, posebno u odnosu na uslove za ostvarenje prava na besplatnu pravnu pomoć i kruga korisnika i pružalaca pojedinih vrsta pravne pomoći.*

Ključne reči*: pravo na pristup sudu, besplatna pravna pomoć, evropski standardi besplatne pravne pomoći, primena standarda u procesu donošenja zakona.*

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1. Uvodna razmatranja

Nesporno je da je pravo na pristup sudu (*right of access, access to court*) elementprava na pravično (pošteno) suđenje (*fair trial*) iz čl. 6, st. 1 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (nadalje: Konvencija). Navedena odredba ne pominje izričito pravo na pristup sudu van krivičnih postupaka, ali je Evropski sud za ljudska prava (nadalje: Sud), u slučaju *Golder v UK* (1975) 36 nedvosmisleno istakao da je „pravo na pristup sudu konstitutivni element prava iz čl. 6, st. 1". Reč je o jednom od tzv. imliciranih prava (Omejec, 2014: 1125) koje je „preduslov i neophodna pretpostavka u ostvarivanju svih ostalih procesnih ljudskih prava" (Petrušić, 2008: 164) (time i supstancijalnih), a vladavina prava teško je zamisliva ako nema mogućnosti pristupa sudovima (Šarin, 2015: 276). Istovremeno, pravo na pristup sudu je i polazna tačka za detektovanje prava na besplatnu pravnu pomoć (Jelinić, Knol Radoja, 2014: 187), stoga što „niko ne sme biti sprečen ekonomskim preprekama u svom nastojanju da ostvari ili odbrani svoje pravo pred bilo kojim sudom koji postupa ugrađanskim, trgovačkim, upravnim, socijalnim ili poreskim stvarima" (Resolution (78)8, I, art. 1–4). Besplatna pravna pomoć uvedena je i u sam sistem evropske zaštite ljudskih prava (Radivojević, Raičević, 2019: 77).

U domenu građanskih sudskih postupaka povreda prava na pristup sudu prvi put je analizirana u slučaju *Airey v Ireland* (1979) 26. Stav Suda je da, bez obzira što ne postoji pravo na besplatnu pravnu pomoć *per se,* autonomni zahtev za njenim pružanjem se postavlja naročito kada postupak primorava podnosioca predstavke da ga pred višim sudom zastupa advokat i kada je postupak složen, ali se kao kriterijumi prepoznaju i materijalno stanje, karakteristike stranke (npr. stepen obrazovanja i poznavanja prava i pravnih mogućnosti), sposobnost stranke da delotvorno štiti svoje interese u postupku i posebna obeležja slučaja. Neki od njih, naročito posebne okolnosti slučaja i sposobnost stranaka da štite svoje interese, teško se utvrđuju i ostavljaju prostor naknadne razrade za Sud (Jelinić, Knol Radoja 2014: 189).

Pravo na besplatnu pravnu pomoć nije apsolutno, pa su prihvatljiva njegova ograničenja na osnovu finansijskih prilika tražioca i izgleda na uspeh u sporu, na tražiocu je teret dokazivanja da nema dovoljno sredstava za angažovanje advokata, a obaveza države je da spreči arbitrernost pri odlučivanju o dodeli (Golubović, 2013: 294). Reč je o jednoj od pozitivnih obaveza države koja obezbeđuje ravnopravnost stranaka (Jakšić, 2017: 101, 102), koja pored normativnog priznanja podrazumeva i zaštitu u slučaju povrede (Vodinelić, 2007: 34). Da bi pravo na pristup sudu bilo

delotvorno „pojedinac mora imati jasnu i stvarnu mogućnost osporavanja akta kojim se narušavaju njegova prava“ *(Lesjak v Croatia* (2006) 35). Ono podrazumeva garantije ostvarenja svih prava izričito navedenih u čl.6, st. 1, ali i niz drugih konkretnih garantija: pravnu pomoć (posebno besplatnu[1]), pravo na savetovanje, pravo na prevođenje i druge mere praktične podrške (Priručnik, 2016: 27), pojednostavljivanje sudskih postupaka i obezbeđenje njihove transparentnosti, povećanje nivoa informisanosti pojedinaca o mehanizmima sudske zaštite ili smanjenje troškova samih postupaka.[2]

Besplatna pravna pomoć u kontekstu prava na pristup sudu uslovljava brojne dileme u odabiru efikasnog i delotvornog sistema pružanja ovog vida pomoći. U radu će biti analizirani najvažniji evropski standardi besplatne pravne pomoći u građanskim sudskim postupcima i zakonska rešenja u Republici Srbiji u kontekstu ovih standarda. Njihovo prihvatanje i delotvorna primena usvojenog modela omogućava dostupnost suda pre svega licima koja nisu u mogućnosti da snose troškove postupka.

2. Besplatna pravna pomoć (pojam, svrha i vrste)

Pravo na besplatnu pravnu pomoć može se odrediti kao pravo na korišćenje usluga organizovanih stručnih službi i nadležnih organa, bez naknade ili uz delimičnu naknadu, u skladu sa zakonskim kriterijumima za odobravanje (Lazić, Zdravković, 2008: 110). Reč je o „zakonom uređenom vidu zaštite kojim država omogućava da pojedina lica ostvare zaštitu povređenih, ugroženih ili osporenih prava i interesa u postupku pred nadležnim sudom“ (Stanković, 2015: 12) i čije troškove u celini ili delimično snosi država (Čizmić, 2010: 412). Troškovi nastaju tokom ili povodom postupka pravne zaštite, a oslobođenje je potpuno ili delimično – preko iznosa koji se ne bi mogao snositi bez znatnijih teškoća (Resolution (78)8, art. 2).

Efikasan sistem besplatne pravne pomoći je odgovor države na postojanje određenih kategorija stanovnika koji nisu u mogućnosti da ostvare pravo na pristup sudu bez organizovane pomoći zajednice (Adamović, 2008:149). Reč je o siromašnima, ali su oni često i nevični pravu i nedovoljno obrazovani, što ih dodatno sprečava u ostvarenju svojih prava u sudskim i drugim postupcima zaštite. Kao *conditio sine qua non* realizacije prava

1 Pravna pomoć koju pružaju advokati na osnovu ugovora i prema tarifi nije tema ovog rada.

2 Niz drugih načina ostvarenja prava na pristup sudu pominje, npr. *Recommendation No.R (81)7.*

na pristup pravdi besplatna pravna pomoć je način da se pravda učini faktički dostupnom i siromašnima, da normativno prihvaćeno pravo na pravično suđenje i pravo na jednaku zaštitu prava i na pravno sredstvo (Ustav RS, čl. 32 i 36) budu i ostvareni. Stoga su osnovni zahtevi sistema besplatne pravne pomoći efikasnost, kvalitet i funkcionalost, ali i pravičnost, kao i održivost i stalnost kroz obezbeđena materijalna i druga neophodna sredstva (Lazić, Zdravković, 2008: 110, 111). Obezbeđenje jednakosti, ravnopravnosti i pravičnosti u postupcima zaštite uvođenjem sistema besplatne pravne pomoći najdirektnije utiče na sprečavanje diskriminacije usled različitih imovinskih prilika stranaka, što je posebno aktuelizovano u uslovima porasta broja nezaposlenih, niske cene rada, ekonomskih kriza i konstantnog raslojavanja u savremenom društvu (Stanković, 2015: 13, 16; Buha, 2019: 160). Takođe, posebnosti određenih prava uslovljavaju uvođenje posebnih procedura (zaštita od diskriminacije, potrošački, medijski, sporovi o intelektualnim pravima i dr.), što komplikuje zaštitu i dodatni je razlog obezbeđenju besplatne pravne pomoći.

Besplatna pravna pomoć ne obuhvata samo snošenje ili participiranje u troškovima zastupanja u sudskim postupcima već i troškove sudskih taksa, izvođenja dokaza, prevođenja, obezbeđenja dokaza, kao i nekih specifičnih, npr. za plaćanje aktorske kaucije, ali uključuje i pravo na primerenu informaciju i pravni savet (Uzelac, Pristup pravosudju – Nacrt: 2).

Načelno, na normativnom nivou, razlikuju se primarna (davanje opštih pravnih informacija i pravnih saveta, sastavljanje podnesaka i zastupanje u vansudskim postupcima, npr. mirnog rešavanja sporova) i sekundarna besplatna pravna pomoć (pravni savet, sastavljanje podnesaka i zastupanje u sudskim postupcima, ali i oslobođenje od plaćanja troškova sudskog postupka i sudskih taksi).[3] Pored razlike prema vrstama radnji pravne pomoći, različit je i krug pružalaca usluga zastupanja korisnika u sudskim postupcima (tzv. sudska sfera, sekundarna pravna pomoć), koji je po pravilu ograničen prihvatanjem užeg ili šireg monopola advokata. U vansudskoj sferi krug pružalaca, ali i korisnika je najširi – primarna pravna pomoć nije uslovljena finansijskim cenzusom. Izvan advokature pružaoci usluga primarne pravne pomoći su nevladine organizacije, posebne službe, kancelarije, pravni zastupnici, pravne klinike, pri čemu je oni van državnog sistema ne smeju pružati u vidu zanata – sistemski i naplatno (Vodinelić 2007: 19), ali moraju biti registrovani

3 Tako čl. 12 Zakona o besplatnoj pravnoj pomoći Republike Hrvatske, NN, br. 143/13 i 98/19, (nadalje: ZBPPH).

i pružati pravnu pomoć organizovano.[4] Moguće je i razlikovanje na radnje pravne pomoći koje se tiču same stvari u vezi sa ostvarenjem prava (pomoć u pogledu merituma – obaveštenja, saveti, izrada akata i podnesaka, zastupanje) i one koje samo doprinose na drugi, posredan način, olakšanju i ojačanju položaja lica u vezi sa njegovim pravom (oslobađanje od snošenja troškova postupka – „siromaško pravo“) (Vodinelić, 2007: 16). Brojne razlike nacionalnih prava uslovljavaju zaključak da jedinstvenog modela besplatne pravne pomoći nema, da besplatna pravna pomoć „nije jednina nego množina“ (Vodinelić, 2007: 31). Treba, takođe, imati u vidu i da oslobođenje od plaćanja troškova postupka i besplatna pravna pomoć nisu istoznačni pojmovi, te je i zakonodavni pristup njihovom regulisanju različit (u zakonima o besplatnoj pravnoj pomoći ili procesnim zakonima). Oslobođenje od plaćanja sudskih troškova i sudskih taksi je „ekonomska pomoć ili socijalna mera koja bi za boljitak stranke u pravnoj sferi mogla imati tek posredni uticaj“ (Čizmić, 2010: 415–416) i samo jedan od načina da se najsiromašnijima olakša pristup sudu. Procesna ravnopravnost ili „jednakost oružja“ postiže se tek obezbeđenjem besplatnih usluga zastupanja koje ne bi smelo biti uslovljeno potpunim oslobađanjem od plaćanja troškova vođenja postupka.

Iz ekonomske perspektive pravna pomoć je „usluga koja se kupuje na tržištu od onih koji su ovlašćeni da je pružaju“, ali socijalne (ne) prilike, različiti nivoi obrazovanja i svesti o pravima, nepoznavanje prava i pravnih mogućnosti i brojnost propisa koji opterećuju moderne pravne sisteme uslovljavaju da građani zbog imovinskih prilika ove usluge ne mogu kupiti, pa je posledica neefikasnost zaštite njihovih prava (Jelinić, Knol Radoja, 2014: 190).

3. Evropski standardi besplatne pravne pomoći

Besplatna pravna pomoć nije „milostinja siromašnima“ već obaveza društva (Resolution (78)8), kako „niko ne bi bio sprečen smetnjama ekonomske prirode u nastojanju da ostvari ili odbrani svoje pravo pred bilo kojim sudom koji odlučuje u građanskim, trgovinskim, upravnim, socijalnim ili poreskim stvarima“ (Part I(1)). Budući da ekonomsko i socijalno stanje uslovljava neravnopravnost u pristupu sudu (Re- commendation (81)7) preporučuje se proširenje kruga lica koja imaju pravo na besplatnu pravnu pomoć (Recommendation (93)1). Pored državnog sistema dopušteni su i drugi, komplementarni oblici, kao što su usluge

4 Uporednopravni pregled za evropske države videti u Vodinelić, 2007: 15–28, a za postjugoslovenske države u Preložnjak, Šago, 2010: 789–812.

udruženja, centara za pravno savetovanje ili formiranje fondova kojima upravlja privatni sektor (Priručnik, 2016: 58). Kako su korisnici u najvećoj meri lica slabijeg imovnog stanja i ugrožene kategorije, od posebne je važnosti realna procena granice siromaštva i uvažavanje razloga pravičnosti, ali i ispunjenje obaveza koje proističu iz međunarodnih ugovora i obuhvatanje pravnih stvari sa elementom inostranosti (Lazić, 2009: 152).

Navedeno je da Konvencija ne predviđa izričito obavezu pružanja besplatne pravne pomoći u građanskim pravnim stvarima, ali je Sud u brojnim odlukama usvajao sukcesivno kriterijume koji opravdavaju ili čine neophodnom besplatnu pravnu pomoć i u ovoj materiji. Najčešće su to finansijsko stanje pojedinca, vrednost predmeta spora, neukost stranke, stvarne mogućnosti postulaciono sposobnih lica, stepen pismenosti i obrazovanja, pripadnost socijalno ugroženim kategorijama i marginalizovanim grupama, značaj samog spora za aplikante i složenost pravne stvari sa aspekta primene procesnih *(Steel and Moris v the UK*(2005) 61; *McVicar v the UK* (2002) 48, 50; *P.,C. and S v the UK* (2002) 89, npr., komplikovanost dokaznog postupka), kao i materijalnopravnih normi (*Airey v Ireland* (1979) 24, 27; Pristup pravdi, 10).

Tako, stav Suda je da nepružanje besplatne pravne pomoći od strane advokata može imati za posledicu kršenje čl. 6, st. 1 Konvencije, ako je ona neophodna za delotvoran pristup sudu, npr. kada je takvo zastupanje obavezno po zakonu (ograničena postulaciona sposobnost stranaka), ali i u posebnim vrstama parničnih postupaka (*P., C. and S. v UK* (2002) 88–91; Priručnik, 2016: 60). Sloboda država u određivanju kriterijuma i njihovoj primeni podrazumeva i ograničenja koja ne smeju narušavati samu suštinu prava na pristup sudu, cilj ograničenja mora biti legitiman i mora postojati proporcionalnost između sredstva ograničenja i cilja (*Ashingdanev UK* (1979) 57; Maširević protiv Srbije (2014) 46; Priručnik, 2016: 60). Kriterijumi Suda mogu se svesti na imovinski i interes pravičnosti.

U slučaju *Airey v Ireland* (1979) 26–28, Sud ukazuje da aplikantkinja nije imala sredstava da plati advokata, a „s obzirom na složenu proceduru i pravna pitanja koja se u ovom slučaju postavljaju, neophodna dokazna sredstva i posebnu (emocionalnu) osetljivost bračnih sporova, mogućnost da (gđa *Airey*) sama vodi postupak... ne bi obezbedila delotvorno pravno sredstvo". Postupak je bio „ekonomski nepristupačan i komplikovan", stranka je pravno neuka, a protivna stranka je imala advokata i stoga one nisu bile „jednake u oružju". „Interes pravde" Sud obrazlaže u brojnim

odlukama prema okolnostima slučajeva (*Artico v. Italy* (1980); *Pakelli v F R of Germany* (1981); *Croissant v FR of Germany* (1989); *Quaranta v Swityerland* (1991); *Steel and Morris v UK* (2005)). Praktičnu nemogućnost pokretanja postupka zbog prevelikih troškova Sud izjednačava sa pravnom nemogućnošću.

U nizu slučajeva Sud je ograničenja ocenio kao legitimna, odnosno opravdana i srazmerna potrebama: primena pravila o imunitetu, ograničenja lica sa duševnim smetnjama u pokretanju i vođenju postupka, zabrana zloupotrebe procesnih ovlašćenja, ograničena postulaciona sposobnost, pravila o aktorskoj kauciji, nesporno i slobodno odricanje od prava na pristup sudu ugovaranjem arbitraže, naplaćivanje primerenih sudskih taksi (Uzelac, Pravo na pošteno suđenje, 2010: 93). U slučaju *Kreuz v Poland* (2001) 62, npr., Sud je ocenio da procena poljskog suda po zahtevu za oslobođenje od plaćanja visokih sudskih taksi u kontekstu hipotetičkih mogućnosti zarade tražioca, a ne dokaza koje je on podneo predstavlja povredu prava na pristup sudu, ali ne i kada aplikant nije obuhvaćen programom besplatne pravne pomoći jer njegov prihod premašuje nacionalni limit, pod uslovom da to ne narušava suštinu prava na pristup sudu (*Glaser v UK* (2000) 99; *Santambrogio v Italy* (2005) 58). Apsolutno postavljen limit za podnošenje zahteva dovodi se u vezu sa kompleksnošću i stoga izuzetno skupim vođenjem postupka (Uzelac, Pra- vo na pošteno suđenje, 2010: 106; *Steel and Morris v UK* (2005) 62–72). Naime, države nemaju obavezu da javna sredstva troše radi obezbeđenja potpune jednakosti oružja kroz besplatnu pravnu pomoć jednoj od stranaka „pod uslovom da se svakoj strani omogući razumna mogućnost da iznese svoj predmet u okolnostima koje je ne stavljaju u znatno nepovoljniji položaj u odnosu na protivnika“ (*Steel and Morris v UK* (2005) 62). Stoga i dominiraju sistemi pravne pomoći u kojima korisnik učestvuje u njenom finansiranju manje ili više, uz mogućnost otplaćivanja troškova i na rate (Vodinelić, 2007: 24). Prihvatljivo je i odbijanje zahteva za pružanje pravne pomoći kada se zahteva preterano visok iznos, kada su uslovi naknade proizvoljni i nerazumni ili kada se situacija aplikanta popravila u meri da je mogao da podnese trošak (Legal aid in Europe, 2015: 5). Nedovoljna mogućnost za uspeh ili neozbiljno ili iz obesti pokretanje postupka takođe opravdava odbijanje zahteva za pružanje besplatne pravne pomoći (*Staroszczyk v Poland* (2007) 120), ali se odluka po zahtevu uvek mora doneti (*A.B. v Slovakia* (2003) 61–63). Arbitrernost pri odlučivanju je zabranjena pa kriterijumi moraju biti objektivizirani, telo koje odlučuje nepristrasno, a odluke podobne preispitivanju (Legal aid in Europe, 2015: 5; Vitkauskas, Dikov, 2012: 34). Nacionalni zakoni mogu izvesne tipove parničnih postupaka isključiti iz sistema besplatne pravne pomoći (Vitkauskas, Dikov, 2012: 34). Kod

malih vrednosti predmeta spora ni siromašni nemaju garantovano pravo na besplatnu pravnu pomoć, a imućni mogu biti oslobođeni plaćanja troškova u slučaju visoke vrednosti (Čizmić, 2010: 420; Legal aid in Europe, 2015: 7). I odnos aplikanta sa dodeljenim zastupnikom je od značaja za Sud, pa u okolnostima kada ih je promenjeno čak sedam jer aplikant nije želeo sa njima da sarađuje, država ne može biti odgovorna (*Renda Martinsv Portugal* (2002)).

U slučaju *Bertuzzi v France* (2003) 31, utvrđena je povreda prava na pristup sudu jer je aplikant sam vodio spor za naknadu štete protiv advokata, pravna pomoć mu je već bila odobrena, a tri advokata su odbila da ga zastupaju uz opravdanje ličnim vezama sa tuženim (Priručnik, 2016: 77). Mada država ne može da odgovara za ponašanje advokata koji je dodeljen stranci, moraju se obezbediti mehanizmi kontrole njihovog rada, pa i zamena ako posao ne vrše, ili ga vrše neadekvatno (*Artico v Italy* (1980) 33–37). Država mora uspostaviti neophodan balans advokatske nezavisnosti i savesnosti u vršenju profesije i poštovanja prava na pristup sudu, pa povreda postoji kada advokat dodeljen stranci odbije da podnese pravni lek samo tri dana pre isticanja zakonskog roka, smatrajući da nema osnova za podnošenje, a stranka nije mogla da nađe novog zastupnika i održi rok (*Sialkowskav Poland* (2007) 114).

I postupak za priznanje prava na besplatnu pravnu pomoć je predmet ocene Suda sa aspekta prekluzivnosti rokova i negativne procene uspeha u sporu koji se dovode u vezu sa pravnom sigurnošću (Golubović, 2013: 295–298; *Kozlowski v Poland* (2013) 26–32). Postupak odobravanja podrazumeva određeno vreme, pa se pravila sudskih postupaka moraju prilagoditi, npr. otklanjanjem dejstva prekluzivnosti rokova za procesne radnje, zakonski ili ujednačenom sudskom praksom, besplatni zastupnik mora obavestiti stranku u određenom roku o odbijanju da je zastupa usled negativne procene uspeha (npr. izjavljivanja pravnog leka), odnosno nepostojanja osnova za dalje postupanje.

4. Stanje u Republici Srbiji – Zakon o besplatnoj pravnoj pomoći

Ustav Republike Srbije (čl. 67) jemči pravo na pravnu pomoć, pod uslovima određenim zakonom, kao pružaoce određuje advokaturu i službe pravne pomoći jedinica lokalne samouprave i prepušta posebnom zakonu uređenje besplatne pravne pomoći. Situiranje ove odredbe nesporno upućuje na prihvatanje prava na pravnu pomoć kao jednog od osnovnih ljudskih prava. Donoseći Zakon o besplatnoj pravnoj pomoći[5] Srbija

5 Zakon o besplatnoj pravnoj pomoći, *Sl. glasnik RS*, 87/2018, nadalje: ZBPP.

se, uz nedopustivo kašnjenje,[6] priključila državama koje su ovakave propise usvojile, ali i stvorila preduslove za efikasnije ostvarenje prava na pristup sudu licima čiji je broj, prema dostupnim podacima, zabrinjavajuće veliki.[7] Takođe, izmene u opštoj parničnoj proceduri poslednjih desetak godina ne pogoduju neukim strankama i siromašnima – tužba i pravni lekovi ne mogu se više podnositi izjavom na zapisnik sastavljen u sudu, pisani odgovor na tužbu je obavezan, uvedena je presuda zbog propuštanja, ograničen period za iznošenje činjeničnih tvrdnji i predlaganje dokaza, favorizovano raspravno načelo i uvedena mogućnost privatne ekspertize i dr. (Stanković, 2015: 17).

Navedena ustavna formulacija (st. 2) uslovila je u vreme izrade ZBPP različita tumačenja u pogledu kruga pružalaca pravne pomoći. Advokatska komora je tvrdila da ustavne odredbe izričito i taksativno nabrajaju ko može da pruža pravnu pomoć, pa je svako drugo rešenje neustavno. U pravnoj teoriji stavovi su bili različiti, od onih koji podržavaju stav Komore (Petrov, Orlović, Stanković, 2018) do onih koji smatraju da Ustav samo obavezuje advokaturu i službe pravne pomoći lokalnih samouprava da je pružaju, ali ne zabranjuje drugima da, pod određenim uslovima, to isto čine (Gajin, 2007: 9; Vodinelić, 2007: 35; Pravo na besplatnu pravnu pomoć, 2016: 3). U osnovi konflikta je podela „kolača“, odnosno značajnih državnih sredstava koja besplatna pravna pomoć podrazumeva.[8]

U odnosu na standarde sistema besplatne pravne pomoći izdvaja se nekoliko ključnih pitanja na osnovu analize ZBPP. Pre svih to je širina kruga pružalaca usluga. Naime, širok krug svakako obezbeđuje viši nivo garantija realizacije prava na besplatnu pravnu pomoć, a konkurentnost omogućava poboljšanje kvaliteta usluga (Lazić, Zdravković, 2008: 114). Nesporno je da advokati i nadležna tela u lokalnoj samouporavi mogu da budu pružaoci praktično svih usluga (čl. 9, st. 1 ZBPP). Uključivanje

6 Izveštaji EK o napretku Srbije konstatuju u dužem periodu nedostatak kvaliteta i efikasnosti pravosuđa i pristupa pravdi između ostalog i zbog nedostatka zakona o besplatnoj pravnoj pomoći, npr. Izveštaj, 2016: 13). Nacionalna strategija reforme pravosuđa za period od 2013. do 2018. konstatuje da je dosadašnji napredak u ovoj oblasti nezadovoljavajući.

7 Prema podacima Tima za socijalno uključivanje i smanjenje siromaštva Vlade RS za 2017. god, četvrtina stanovnika je u riziku od siromaštva, 500.000 ljudi nema sredstva za osnovne potrebe, 12.045 din. je granica apsolutnog siromaštva, 286.000 ljudi prima novčanu socijalnu pomoć, a 35.300 je korisnika narodne kuhinje. Stopa tzv. apsolutno siromašnih je 7,1%.

8 Akcioni plan za poglavlje 23 predviđa da se u prve tri godine primene zakona godišnje izdvaja po 5,6 miliona evra, od čega najveći deo dobijaju pružaoci, *http://www.romskinacionalnisavet.org.rs/*

ovlašćenih udruženja kao i pravnih klinika svakako je korisno, ali je mogući obim različit, a ZBPP se opredelio da to bude u načelu tzv. primarna pravna pomoć. Čini nam se da nema smetnji da se u ograničenom vidu (u okviru registrovane delatnosti) udruženjima omogući i zastupanje u tzv. sudskoj sferi, posebno stoga što procesna pravila parnične procedure ne predviđaju monopol advokata kao punomoćnika (osim u postupku po vanrednim pravnim lekovima),[9] a ova pravila primenjuju se i u drugim građanskim sudskim postupcima. Odredbom čl. 9 ZBPP je predvideo da udruženja mogu pružati besplatnu pravnu pomoć u užem smislu (primarnu) samo na osnovu odredaba zakona koji uređuje pravo azila i zabranu diskriminacije, a da je u ime udruženja pružaju advokati, dok je neograničeno u okviru cilja osnivanja predviđeno samo popunjavanje formulara i pružanje opštih pravnih informacija (čl. 9, st. 5). Uključivanje usluga javnih beležnika, posrednika i pravnih fakulteta kroz tzv. besplatnu pravnu podršku od nesumnjivog je značaja u kontekstu ispunjenosti standarda (čl. 11 i 12). Međutim, zakonodavac se opredelio za model u kome monopol pružanja pravne pomoći u užem smislu (zastupanje, odbrana i sastavljanje podnesaka) ostaje u nadležnosti advokature i državnih službi, kao što je to i u većini evropskih država (Petrov, Orlović, Stanković, 2018).[10]

Za korisnike besplatne pravne pomoći osnovni postulat je da se primarna pravna pomoć obezbedi u svakoj pravnoj stvari i da se ne sme ograničavati isključivo imovinskim cenzusom.[11] Naš zakonodavac je predvideo (čl. 13) da se pravo na opštu pravnu informaciju, popunjavanje formulara, kao i pomoć koju mogu pružati udruženja (propisi o azilu i zabrani diskriminacije), pruža i licima koja ne ispunjavaju uslove (iz čl. 4). U odnosu na sekundarnu besplatnu pravnu pomoć cenzus pak ne sme biti previsoko određen jer se time svima koji realno nisu u mogućnosti da snose, u celini ili delimično, troškove postupka, uključujući i troškove zastupanja, onemogućava delotvoran pristup sudu. Imovinski cenzus mora biti egzaktan, odnosno ne sme se dopustiti arbitrerno tumačenje, ali je njegovo vezivanje za ostvarenje prava na besplatnu pravnu pomoć uz visinu naknade socijalne pomoći ili dečjeg dodatka primer veoma nisko određenog cenzusa koji značajan broj stvarno siromašnih

9 Čl. 85, st. 2–4 ZPP.

10 Ima i država koje uključuju i tzv. nevladin sektor (Grčka, Mađarska, Slovačka, Francuska, Hrvatska i Češka) (Petrov, Orlović, Stanković, 2018).

11 Videti, npr., odredbu čl. 10 (a) ZBPPH.

лишава могућности коришћења ових услуга.[12] Уз то, услови коришћења социјалне помоћи и дечјег додатка су све рестриктивниji (Radojević, 2018: 255). Непотпуна или неажурна евиденција социјалног положаја („социјалне карте“) не сме бити сметња остварењу овог права (Lazić, Zdravković, 2008: 116). Међутим, увођење ове евиденције код нас је неизвесно.

Околност да се законима о бесплатној правној помоћи не обухвата увек и ослобађање од плаћања трошкова поступка и плаћања судских такси,[13] што не чини ни ЗБПП Србије где ову материју реглишу процесни закони, захтева неophодно уједначавање критеријума.[14]

Интерес правичности примаран је у низу ситуација, пре свега ради заштите маргинализованих група, или када постоји посебна друштвена опасност или егзистенцијална угроженост лица (насиље у породици, дискриминација, корупција, трговина људима, злоупотребе органа власти и сл. (Lazić, Zdravković, 2008: 116).[15] Стога би и услуге секундарне правне помоћи, односно правних савета, писања поднесака и заступања морале бити доступне и лицима која немају способности да сама воде поступак, или у сложеним правним стварима или правним стварима од посебног интереса за странку, а не само сиромашним.[16] ЗБПП (чл. 4, ст. 3) набраја велики број категорија лица која би, према смислу Закона, правo остваривала без обзира на имовно стање (Radojević, 2018: 255). Обухваћена су и лица која немају домаће држављанастство, апатриди или страни држављани настањени код нас, као и лица која по другом основу имају право на бесплатну правну помоћ, као и случајеви тзв. прекограничних спорова

12 Најновији ценсус за дечији додатак је 9.271,83 дин, односно за једнороditeљске породице 12.053,40, а нпр. за једнороditeљске породице са дететом са инвалидитетом 11.126,21. дин.https://www.paragraf.rs/statistika/nominalni_iznosi_prava_na_finansijsku_podrsku_porodici_sa_decom_i_cenzusi_za_ostvarivanje_prava_na_deciji_dodatak.html. У 2019. год. ценсус висине новчане социјалне помоћи за носиоца права у породици био је 8.508 дин. Истраживања показују да би само око 1,3% грађана могло да оствари бесплатну правну помоћ ако се ценсус на овај начин рачуна (Lazić, Zdravković, 2008: 116).

13 ЗБППХ то, нпр. чини (чл. 12, ст. 2).

14 Тако Закон о парничном поступку (*Сл. glasnik. RS*, 72/2011, 49/2013 – одлука US, 74/2013 – одлука US и 55/2014) у чл. 168, ст. 1, омогућава ослобођење од плаћања трошкова поступка странци која према свом општем имовном стању није у могућности да снози ове трошкове, а чл. 170 омогућава да суд оној странци која је потпуно ослобођена од плаћања трошкова признаје право на бесплатну правну помоћ.

15 Videti i чл. 15 ЗБППХ.

16 Videti нпр. чл. 13, ст. 1 ЗБППХ.

(*Council Directive 2002/8/EC*).[17] Isključenje određenih kategorija pravnih subjekata (npr. pravnih lica), kao i postupaka čija pravna priroda je nespojiva sa usvojenim kriterijumima imovinskog cenzusa, pravičnosti i zaštite posebnih kategorija lica ili društevnih grupa,[18] je legitimno. Interes pravičnosti u odnosu na sekundarnu pravnu pomoć zahtevao je uvođenje delimičnog snošenja troškova od strane korisnika.[19]

Problematično je rešenje ZBPP da odluku po zahtevu donosi pojedinac bez obzira na predviđene kvalifikacije (čl. 29), jer može voditi arbitrernosti. Uz to, zakonodavac koristi i izraz „organ uprave" u kontekstu postupanja i donošenja rešenja, pa je nejasano da li je to i dalje pojedinac, odnosno fizičko lice.[20] Prikupljanje podataka po službenoj dužnosti ograničeno je na one iz „službenih evidencija" (čl. 31, st. 2), što se čini nedovoljnim.[21]

Finansiranje besplatne pravne pomoći mora podrazumevati stalne, odnosno stabilne i dovoljne izvore. Direktno finansiranje iz sredstava državnog budžeta i budžeta jedinica lokalne samouprave je najpovoljnije rešenje, ali se mogu koristiti i drugi načini, kao što su donacije i projektno finansiranje iz javnih prihoda (čl. 39 ZBPP), koje podrazumeva javni konkurs. Nedostatak može biti izuzimanje iz budžetskog i finansiranje sredstvima lokalne samouprave zastupanja u prvostepenom upravnom postupku, a problemi mogu nastati i usled netransparentnosti javnih konkursa, ako uslovi nisu unapred poznati i ako nije obezbeđen ravnopravni tretman svih potencijalnih davalaca usluga. Zajedničko finansiranje iz državnog i budžeta lokalne samouprave po sebi nije problematično (čl. 39, st. 2), ali je problematičan princip prethodnog snošenja ukupnih troškova od strane lokalne samouprave (čl. 41, st. 2).

Zakonom mora biti uspostavljen čvrst sistem nadzora nad zakonitošću rada pružalaca usluga i upravne i stručne kontrole kvaliteta usluga. Stručnu kontrolu, odnosno kontrolu stručnosti i savesnosti u pružanju

17 Za kritički prikaz odredaba o besplatnoj pravnoj pomoći u prekograničnim sporovima videti Stanković, 2020: 253–271.

18 Videti čl. 7ZBPP, čl. 13 ZBPPH.

19 Videti, npr. čl. 2 Zakona o besplatnoj pravnoj pomoći Crne Gore, iz 2011. god. (u daljem tekstu: ZBPPCG), koji već u definisanju pojma određuje da je reč o „obezbeđenju potrebnih sredstava za potpuno ili delimično pokrivanje troškova" različitih vidova pravne pomoći i troškova sudskih postupaka kao i čl. 19 ZBPPH.

20 ZBPPH npr. predviđa nadležnost upravnog organa (čl. 16).

21 ZBPPH, npr. predviđa i prikupljanje podataka od nadležnih organa ili pravnih lica iz jedinstvenog registra računa, podatke koji su bankarska tajna i sve druge podatke o imovini, čl. 18.

usluga trebalo bi da sprovode sudije koje vode postupak u kome je pomoć odobrena. Postupci kontrole moraju biti precizno uređeni, a kako se korisnik ne nalazi u ugovornom odnosu sa pružaocem, odnosno ne može, kao u slučaju punomoćnika, opozvati punomoćje, mora mu biti omogućeno da zahteva npr. zamenu advokata.[22] Nije dovoljno da je besplatni advokat „nominovan". Mora se obezbediti efektivno i efikasno reprezentovanje stranke, a interpretacija ovih standarda od strane države mora biti restriktivna, inače besplatna pravna pomoć ostaje bezvredna (up. Petrušić, 2008: 177, 178).

Postupak odobravanja je prema ZBPP hitan (čl. 32, 34, st. 4), a efikasnosti služi i odredba o skraćenom roku ukoliko za potencijalnog korisnika može nastati nenadoknadiva šteta ili mu preti prekluzija u postupku koji vodi. Pored opšte mesne nadležnosti za podnošenje zahteva uvodi se i mesto pružanja besplatne pravne pomoći (čl. 27), što olakšava ostvarenje prava. Odredba o oslobađanju od plaćanja takse za zahtev je u skladu sa standardima, ali se ne odnosi i na taksu za rešenje.[23]

5. Umesto zaključka

Pravo na pristup sudu je nesumnjivo konstitutivni element prava na pravično suđenje iz člana 6 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda. Efikasna i efektivna realizacija ovog prava u praksi podrazumeva, pored ostalog, i uspostavljanje i delotvorno sprovođenje sistema besplatne pravne pomoći kako bi se primarno licima koja nemaju finansijska sredstva za vođenje sudskih ili drugih postupaka zaštite omogućio pristup sudu. Srbija je 2018. godine konačno usvojila Zakon o besplatnoj pravnoj pomoći. Niz rešenja koja je zakon predvideo ukazuju na prihvaćene međunarodne standarde, ali prostora za određena prilagođavanja i poboljšanja svakako ima. Takođe, kratko vreme od usvajanja ukazuje da praksa nije mogla u dovoljnoj meri da ukaže na dileme, nejasnoće ili neadekvatnost pojedinih odredaba, pa ostaje da se u budućnosti o tome izjasni kako bi i takvi stavovi ukazali na moguće pravce izmena ili dopuna.

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FREE LEGAL AID IN THE CONTEXT OF THE RIGHT OF ACCESS TO COURT

Summary

The Constitution of the Republic of Serbia explicitly regulates that free legal aid shall be stipulated by the law. In a series of reports on the progress of the Republic of Serbia in the process of joining the EU, there are warnings about the unacceptably low quality level and efficiency of the judiciary, and indications that there is a need to regulate the legal aid system. Finally, this matter was regulated by enacting the Legal Aid Act of the Republic of Serbia, which came into force on 1st October 2019. In addition to the conceptual definition of legal aid, the paper analyzes the right of access to court as a constituent element of the right to a fair trial prescribed in Article 6 of the European Convention on Human Rights, which entails the right to legal aid. The regulation of legal aid at the national level has to meet the standards formulated at the European Union level as well as the standards formulated through the practice of the European Court of Human Rights. In that context, the paper analyzes the regulations and decisions, i.e. the widely recognized and accepted standards. The Legal Aid Act of the Republic of Serbia has been analyzed in the context of meeting these standards, especially in relation to the conditions for granting the right to legal aid and the circle of beneficiaries and providers of certain types of legal aid.

Key words*: the right of access to court, free legal aid, European standards on free legal aid, application of standards in the legislative process.*

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originalni naučni rad
10.5937/zrpfn0-28637

UDK: 347.4:[004.7:336.74
004.7
336.74
Rad primljen: 30.09.2020.
Rad prihvaćen: 02.12.2020.

LIABILITY IN THE CONTEXT OF BLOCKCHAIN-SMART CONTRACT NEXUS: INTRODUCTORY CONSIDERATIONS[**]

Abstract*: Blockchain technology becomes relevant in economic exchange as it lowers costs and contributes to cost-efficiency and effectiveness of economic transactions. The key quality of Blockchain lies in ensuring the authenticity of digital data: trust in the traditional legal relationship has been replaced by digital verification of data in blocks. As an important phenomenon, Blockchain calls for legal answers on the issues arising from its application. An example of this development is the legal regime of smart contracts. A smart contract is a transaction in which any rights and obligations of the contracting parties are programmed in a code. Being the result of Blockchain technology application, such a contract implies the need for trust between the contracting parties. As a legal phenomenon, Blockchain (smart contract) technology raises the issue of liability for performing contractual obligations. Smart contracts can minimize certain contract risks and additionally simplify contract execution. They are immediately put into effect, without the need for any further interaction between the parties. The essential components of smart contracts are the digitally verifiable data and the automatic performance of legally relevant actions based on digitally received and processed information. All of the enlisted issues are important for proper understanding of liability of Blockchain actors.*

Keywords: *Blockchain, smart contracts, liability, Distributed Ledger Technology, Ricardian contract, "If This, Than That" principle.*

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[**] The paper was presented at the International Scientific Conference "*Responsibility in the Legal and Social Context*", held at the Faculty of Law, University of Nis, on 18 September 2020.

1. Introduction

More than a decade ago, in one of the publications on cryptography, a group of unidentified authors (known under the pseudonym Satoshi Nakamoto) introduced the concept of a Blockchain-based contract (Ducas, Wilner, 2017: 544). The document proposed introducing a version of electronic money (bitcoin), which uses cryptography to allow direct peer-to-peer (P2P) payments to eliminate the participation of intermediaries in economic transactions.[1]

The development of information technologies influences all areas of human existence. One of the key breakthroughs in this regard is the emergence of Blockchain technology (Cvetković, 2020: 127-144). Blockchain technology is becoming relevant in energy production, health system, education, financing, public service management, logistics, and transport. The impact of this development is reflected in the legislative efforts, aimed at:

a) regulating the Blockchain-related processes;

b) standardizing the terminology used;

c) indicating the method for resolving disputes arising from the application of Blockchain technology.

2. General Features of Blockchain technology

2.1. Distributed Ledger Technology (DLT)

The development of information technology entered a mature phase when it was possible to transfer files from one to two or more computers, which boosted the power of computer networks. The so-called Metcalfe's law stipulates the premise that the effect of a computer network is proportional to the square of the number of connected computers (nodes). A computer node is an active electronic device which is connected to a network and enables the sending of information through communication channels to a computer network.

The term "Distributed Ledger Technology" (DLT) was first used in a Report prepared by an expert group for the United Kingdom Government. DLT is defined as a type of database that extends to multiple different locations, countries, or institutions, and is typically public. The data are stored one after the other in continuous records; new data are added when the participants reach a consensus (UK Government Office for Science, 2016: 17).[2]

1 Peer- to- Peer payment is the electronic transfer of money from one person to another through the use of a payment application without intermediaries.

2 UK Government Office for Science (2016): Distributed Ledger Technology: beyond block chain. A report by the UK Government Chief Scientific Adviser, London, UK, 2016.

DLT is associated with the modern meaning of the term "document". The starting point is the following: the method and security of data verification are more important than the formal characteristics of the document that contains the information. Access to information and prevention of altering it (by protecting the "integrity" of information) are more important than the document itself. The essence of the document is that:

- the content of the information it contains is constant and stable,
- it is possible to copy or transfer information to another medium (in the context of Blockchain technology, it is a computer on a network) so that it remains unchanged.

In case of DLT, data verification/validation occurs automatically through an information system based on cryptography and data protection. The information is approved after verification by the participants in the network (nodes, i.e. participants behind the computers that constitute the network) who are authorized to perform data verification.

2.2. Blockchain Mode of Operation

"Blockchain" is a compound of the words "block" and "chain". It is a concept based on the use of a cryptographically protected chain of transaction blocks. Transactions are packed into blocks, and blocks are tied into a chain. Blocks are bound cryptographically, through a hash function[3]: the contents of a block cannot be changed without changing the contents of all other blocks preceding it. Namely, each block is bound to the next block using a cryptographic signature. This allows the Blockchains to be used as a digital ledger which can be shared and verified by anyone with the appropriate permission to do so.[4]

A block consists of a title and transaction data.

A title contains:

3 The term *hash* ("hash value") comes from mathematics. It refers to a short string of a fixed length which represents the abbreviated form of a long string (checksum). A cryptographic hash value is used as a security mechanism in Blockchain technology. If a character has been changed in the original value (i.e. in the original content of the data recorded in the Blockchain), the corresponding hash value also changes. The hash value is used to compare two character strings (checksums) with one another in order to determine whether they are identical. On the Blockchain, the data record is converted into a hash value and stored inside of the block. New data shall be in the form of a block with hash value, taking into account the hash values of other data in the previous blocks (which are already part of the "chain"). If the hash value is not in accordance with the data contained in the previously inserted blocks, it cannot be verified; consequently, it cannot be part of the Blockchain at stake.

4 See more infra in this Part.

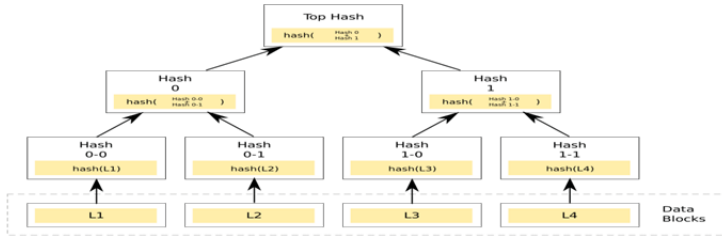
• references to the previous block in the chain, i.e a short combination of letters related to a certain set of data (hash).

• a time stamp indicating the time the block was entered into the "chain" of blocks, and

• a hash tree or "Merkle tree" which lays out all transactions included in the block.[5]

In Table 1, nodes L1 to L4 are external nodes (users), which are the point of further branching. In the Blockchain context, external nodes are the points for adding other blocks.

Table 1: Merkle Tree Concept



Source: Hash Tree, illustrated by David Göthberg, English Wikipedia, 20 August 2005

Including hashes in the block title enables the search for transactions through the hashes as their recognition signs; thus, there is no need to read all the data included in the Blockchain. In the search, the title and branches of the Merkle tree are automatically readable. This practice is analogous to searches in a traditional hard copy ledger; the title and data from the ledger are obtained by reviewing the contents of the ledger and page references. The only difference is in the search method; data from the Blockchain are searched automatically; in traditional ledgers, it is a physical search. However, unlike traditional hard copy ledgers, DLT functions as a decentralized system; each participant has its own

5 The concept of *hash tree* is named after Ralph Merkle, who patented it in 1979. In cryptography, "Merkle tree" denotes a network structure in which each external user (called a "node") is marked with a hash; any other node that branches further contains the particular hash marking all sub-branches arising from that other node. Hash-branches enable efficient and secure verification of the contents of voluminous files.

copy, or part of the register, identical to the copies of other participants (nodes). It means that everyone has access to all the data included into the digital ledger.[6]

The process of data verification and ensuring the consent of other participants in the Blockchain concerning the entry of new blocks of information is performed automatically. After the consent (approval) is obtained, the new blocks are registered in the chain and cryptographically secured by those participants who have carried out previous transactions by tying new blocks to previous blocks. The chain generated in this way is difficult to change. It is virtually impossible to destroy it due to the large number of copies of the same data (available in different blocks); destroying one copy would require a simultaneous and effective attack on other Blockchain participants; (as for this feature, the Blockchain design is similar to ARPANET; the latter is the forerunner of the modern Internet created in order to eliminate the loss of data in case of infrastructure network damage) (Leiner, *et al*, 1997:3)

2.3. Types of Blockchain

The most important typology distinguishes between public and private Blockhains.

The disruptive impact of the Blockchain concept is attached to the public Blockchain. The public Blockchain is fully accessible to everyone; it is based on the so-called open source code[7] and the software solutions are fully accessible. Anyone, without any personal or territorial restrictions, may install the appropriate software required for the operation of the public Blockchain on the device, record in whole or in part a fragment of the files, and make their copy available to other users. Anyone can request the addition of any block of information (transaction) to a chain of blocks. However, the transaction will be accepted when other Blockchain participants have agreed to it. No access

6 Verification of digital data by tracing them through blocks is identical to a hard copy ledger; blocks function analogously as bookkeeping inputs of a digital bookkeeper. Blocks are functionally equal to sheets of paper, used by all participants to enter their transaction and to sign it. In doing so, they grant authorization to all previous paper transactions. This process continues as long as there is space on paper available. When the sheet is filled in, it is secured with a stamp; new transactions are recorded on a new sheet of paper; once filled in, it is linked to the previous paper (secured with the signature and stamp at the boundary between the first and second paper). Functionally speaking, the identical activity is conducted in the framework of Blockchain technology.

7 Open source code is freely available to users; anyone can download the source code, modify it and distribute its modified version in an unlimited number of copies. There are no license fees or any other restrictions. A more detailed and technologically developed definition is given at the Open Source Initiative website: https://opensource.org/osd (accessed on 01. 05. 2020).

rights are required and no single entity manages the Blockchain. With no one in control of the network, public Blockchains are genuinely decentralized systems. New blocks are verified by the entire network. It is not necessary for a separate trusted party to monitor the operations. Accordingly, public Blockchains are trustworthy. Anyone who wants to change data on the Blockchain needs permission from other participants. As a result, manipulating data on public Blockchains is next to impossible.[8]

From a technical perspective, a private Blockchain is based on the same technology of linking blocks into chains as it is the case with a public Blockchain. However, there is a crucial difference: private Blockchains are owned by a central entity (one or more units). The owner can decide who can join the network; his function is analogous with the one of a central network administrator. A private Blockchain is used when the network contains confidential information; consequently, activities in the ledger require authorization by the administrator. The capacity of a particular person to use a private Blockchain usually arises from an agreement concluded between the users themselves. Private Blockchain is usually (but not only) used in projects and agreements of a lucrative character. A private Blockchain is not genuinely decentralized; actually, it is just a cryptographically secured distributed ledger. To carry out transactions, the participants in the network are still dependent on a third party - the Blockchain administrator.

2.4. Blockchain as a Trustless Concept

Blockchain creates a trustless system which may function without the need for mutual trust among contracting parties, The basic idea of the public Blockchain is to overcome the traditional aspects of trust that play a central role in everyday business life. The parties enter into contracts with partners who are expected to comply with the agreements. This expectation stems from the contracting party's reputation, data from public registers, or personal conviction. Trust plays a central role in traditional contract law. However, trust is not a prerequisite for entering into a Blockchain transaction. Due to the technical possibility of storing unaltered data, in a decentralized and distributed manner, there is no need to have trust in another party; trust is functionally replaced with reliance on the technology that Blockchain is based on. Ultimately, the Blockchain concept brings about a paradigm shift in contractual relations; trust in the human is replaced by reliance on technology. In case of a public Blockchain, trust is ascertained

8 Typical examples of public blockchains are Bitcoin and Ethereum. For more on Ethereum, see infra in footnote 13.

by numerous operators of the Blockchain network nodes; consequently, the Blockchain as a system is not dependent on a single participant.

The result of this paradigm shift is that costly intermediaries (such as banks) are no longer required. However, this result is not fully reflected in case of private Blockchain. The participation in a private Blockchain is subject to permission or fulfilment of certain conditions. It is operated by a limited network of participants, according to mutually defined rules. Trust is based on the closed community of participants who initiated the private Blockchain. Therefore, one can no longer speak of a "trustless" system, given that a single player (the administrator) is the one who is trusted. Consequently, in case of a private Blockchain, reliance on technology is of secondary importance.

From the present-day perspective, it is difficult to assess whether a "trustless" system can also have an impact on the basic principles of contract law. Given the rapid development of technology, it is highly unlikely for the time being. It should be noted that the trust aspect is an essential element in interpreting contracts. It is true that the automation of contracts by means of Blockchain technology (particularly in case of smart contracts) reaffirms the *pacta sunt servanda* principle. However, it cannot fully exclude the need for interpretation of the terms which are not based on the principle "If this, than that".[9]

3. Blockchain and Smart Contracts *Nexus*

Blockchain and smart contracts are two different technologies that are closely correlated.

A smart contract is a Blockchain-based computer program (hereinafter: a code) that authenticates, enables and implements the contract norms contained in program code. It is based on a cryptographic process enabling the execution of contracts once the terms and conditions contained in the code have been met. In compliance with the contracting parties' agreement, a smart contract automatically fulfils the envisaged obligation. Once the smart contract (in the form of a program code) is entered into the Blockchain, the contract can only be executed in line with the loaded program code. The main goal of applying Blockchain in the context of smart contracts is to make the contractual relationship more efficient and economically viable, with fewer opportunities for errors, delays or disputes.

The term "smart contract" dates back to 1996, when Nick Szabo defined it as a series of digitally recorded promises and protocols, by means of which the

9 For more about smart contracts and the principle "*If this, than that*", see infra in parts 3 and 4.

parties keep these promises without the involvement of intermediaries.[10] Szabo is the author of the canonical definition of a smart contract: it is a computer protocol (program) for carrying out a transaction in accordance with the terms of contract. The main goals of smart contracts are to: ensure the performance of contractual provisions (e.g. payment terms, surety, confidentiality, execution), and minimize the need for "honourable" impartial intermediaries. The basic idea of a smart contract is that many contract clauses (e.g. surety, advance payment, authorization specification, etc.) can be embedded into the code and uploaded into hardware, thus ensuring that the costs of contract breach are so high for the infringer that it makes the breach unlikely (Szabo,1996:1).

The key feature of smart contracts is that they can be presented in the program code and executed by computers; hence, they differ from traditional contracts usually established through negotiations, written documents and conclusive actions. Smart contracts are self-implementing and self-executing computer programs based on a program algorithm (Lauslahti, Mattila & Seppälä, 2017:2)

Self-service (vending) machines may illustrate the operation of a smart contract; these machines are computerized, thus avoiding the interaction and participation of a third party (intermediary); they are programmed to deliver the product without the need for human when certain conditions are met (i.e. when money is put into the machine slot).

The key features of smart contracts are as follows:

1) smart contracts are created (programmed) by using an open source code;[11] their standardization and execution are almost cost-free, thereby reducing the contract transaction costs;

2) smart contract potentially narrows the space for ambiguous or vague interpretations, thus increasing the efficiency of contract execution; when the parties agree on the content of the clauses, the smart contract program code executes those clauses without the possibility of breach of contract;[12]

10 Szabo described the idea of contracts that could be read and used by humans and machines alike; however, it was not technically implementable at the time. The term "smart contract" has resurrected in recent years, with the development of Blockchain technology.

11 See supra footnote 7.

12 Written in a programming language, smart contracts eliminate the ambiguity of natural language. This feature limits the usefulness of the smart contract conceptual framework; namely, parties may prefer the flexibility of legally binding contracts to the rigidity of automated software. For the time being, smart contracts cannot measure up with the discretion rooted in legally binding contracts or their linguistic ambiguity. Terms such as "the best possible effort" or "force majeure" cannot be reproduced in the code. See more infra in part 4. 2.

3) smart contracts are designed to operate without intermediaries (in a decentralized format);

4) a smart contract is a self-executing program, especially in Blockchain technology, which aims to ensure that the parties perform and execute automated transactions; the execution can be based on data from the program, or it be the result of data collected from the environment in which the transaction takes place; a smart contract benefits from the security of the underlying Blockchain infrastructure (the multiple Blockchain nodes): for example, its execution cannot be stopped by individuals or groups unless this option has been specifically integrated into the code.

3.1. Smart Contract: Legal Issues

The legal effect of smart contracts cannot be disputed and their validity cannot be *a priori* denied only because they comprise "smart instructions" or because the parties' consent is expressed in a way that is not in compliance with traditional contract law.[13] Although they have emerged quite recently, their importance has been recognized by national legal systems.[14]

13 After Szabo had published his conception of a smart contract, the idea was embraced by Vitalik Buterin, a co-founder of the Ethereum Blockchain. In his opinion, the original Bitcoin Blockchain had a limited use in software development. In response, the Ethereum Blockchain was launched in order to enable the use of the advantages of a distributed database together with a more versatile programming language, expanding thereby the areas of application of the Blockchain technology. Ethereum is the golden standard of smart contracts. It is a software platform based on an open source code providing the ability to create and activate decentralized applications. Ethereum allows the users to run various programs on Ethereum Virtual Mashine-EVM, regardless of the programming language. This feature creates space for the development of more applications on one platform instead of building a completely new application for each specific case. Ethereum allows parties to enter into an agreement, while guaranteeing the confidentiality of the transaction. It is an illustration of the evolution of the Blockchain from a payment mechanism to an effective instrument for regulating mutual relations. The Ethereum allows flexibility as a prerequisite for programming functionality, thus overcoming the immutability of the program code. The Ethereum platform enables the creation of smart contracts that define complex obligations of the contracting parties, sanction their arbitrariness, monitor the state of contract execution, and the like. Once entered in the program code, each contract term and condition is in a stand-by mode, waiting for a 'trigger" that it has been fulfilled. Once the "trigger" ensues, the rule contained in that condition applies automatically. Smart contracts are not a passive list of instructions enumerating the contracting parties obligations; rather, they are perceived as "autonomous agents" who execute a certain part of the program code ("smart contract") when they receive certain information defined as a "code trigger", which is the condition for the execution of the "smart contract" norm). See: Buterin (2014) Ethereum White Paper.

14 Definitions of smart contracts are incorporated in the legislation of some European countries, such as two legislative acts of the Republic of Malta regulating Blockchain issues:

From the technology-neutral perspective, a smart contract is understood as a computer code of contractual significance. Thus, smart contracts can exist independently from Blockchain technology, and they are already used in a variety of ways. In relevant literature, a smart contract is defined as a combination of the following properties: (1) a digitally verifiable event; (2) program code which processes the event; and (3) a legally relevant act that is carried out on the basis of the event (Kaulartz & Heckmann, 2016: 618). In contrast to this definition, the focus of the legal definition is not on technical details but on contractual effects of computer programs.

From the legal perspective, a smart contract is a computer program that is stored in a tamper-proof manner and guarantees that predetermined action will be taken when certain conditions (defined in the code) are met. The parties define (in the form of in a smart contract, i.e. a code) their fundamental contractual obligations as well as the consequences of breaches of duty or changes to essential contractual framework conditions. At the same time, they link the code to data sources enabling the code to automatically recognize the fulfilment of the stipulated conditions. If there is a breach of duty or a change in the contracted terms and conditions, the software can automatically trigger the legal consequences attached to the contracted obligations. In contrast to traditional contracts, which often require interpretation, smart contract concept offers a high degree of legal security; its legal consequences are clear, given that the code ensures that a certain clause will be put into effect when certain conditions are met. In contrast to traditional ones, the result of a smart contract is almost "guaranteed". This is beneficial in many ways. For example, in case of service contracts, when service delivery is disrupted, the resulting claims can be processed immediately. Owing to smart contracts, transaction costs are reduced, contracts are concluded more quickly, and legal certainty in business transactions is increased. Finally, thanks to the Blockchain technology, the traceability of transactions increases transparency and verifiability of transactions.[15]

the Malta Digital Innovation Authority Act C901, and the Virtual Financial Asset Act C778. Both include an identical definition of smart contracts; these contracts are a form of innovative technology consisting of: a) a computer protocol and b) an agreement concluded in whole or in part in electronic form that is automated and executable by the executing program code, although some parts may require human input and control; it can be enforced by the traditional legal method or by using both methods. The above definition adequately reflects the essence of a smart contract and can be considered a model. See: *Malta Digital Innovation Authority Act C901* of 11 November 2018 (accessed on 1. 09. 2019).

15 See more supra in part 2.1-2.2. Appropriate cost reductions can create new business models and markets, such as: Peer-to-Peer energy markets that use intelligent smart grids or solutions with micro payments; consumer contracts where the software can automatically carry out legally required reimbursements, etc. Furthermore, insurance providers are experimenting with products that are fully automated from contract conclusion to pay out;

The provisional legal definition of a smart contract is as follows: a smart contract is a contract connected to a computer protocol, written in a computer programming language, which automatically performs programmed functions in response to the fulfilment of certain conditions ("If this, than that" principle).[16] The concept described is not new but, when integrated with Blockchain technology, it builds the potential of smart contracts to automate and guarantee the fulfilment of a large number of different contractual obligations without the need for a central authority, legal system or external enforcement mechanism. Smart contracts potentially bring clarity, predictability and controllability, and ultimately facilitate the fulfilment of contractual obligations while reducing the risks associated with human participation (Sherborne, 2017: 3-4).

4. Liability as an issue in Blockchain-Smart Contract *Nexus:* key issues

The long-standing debate on whether human beings are responsible for the operation of machines has been part of legal discourse since the industrial revolution at least. In all jurisdictions, the answer to this question has been the same: the law will cover, and be applied to, new situations and inventions appropriately adapted to the new circumstances. However, conceptions of liability did not adequately keep pace with advances in technology. While increasingly relying on automated systems, the nearest human operators were being blamed for the accidents and shortcomings of the purported "fool proof" technology. There was a significant mismatch between attributions of responsibility and how physical control over the system was actually distributed throughout a complex system and across multiple actors in time and space.[17]

4.1. Code as Law

The metaphor "code is law" (ascribed to the Lawrence Lessig) rests on the functional equality between law and a code, given that a code controls behaviour just as law does (Lessig, 2000:1). Code design and structure define the users' freedom; thus, a code determines what users can and cannot do, and what they must and must not do when using it. Hence, some legislatures defined that smart

an example of this is flight delay insurance, which is linked to a publicly accessible air traffic database, which in turn initiates the claims settlement process as soon as a relevant delay has been detected from reliable database.

16 See more infra in the part 4. 2.

17 For example, while flight control increasingly shifted to automated systems, responsibility for the flight still rested with the pilot.

contracts are as legally effective as the traditional ones.[18] Such definition could lead to an extreme view: if a code defines what is the 'law', anything under the coded design could be considered as a legal rule. However, the institutionalized law-making bodies are vested with the power to make rules of the specific legal system; therefore, code is *not* law.

Furthermore, the unconditioned "code is law" approach could lead to embedding the *ex ante* normativity into the code. Namely, each code depends on the subjective value-judgments (social, economic, philosophical) of its designers. The importance and influence of this dependence is magnified when the code is widely adopted. Fixed in the technology parameters (code, access conditions), it causes systemic effects. Unlike the political decisions or legal documents (e. g. contracts), computer codes are often locked for future changes. Consequently, the approximation of values embodied in the code has to be conducted before the code concerned becomes operational (*ex ante)*. The legitimacy of values embedded in a code shall be conducted in the production phase, given that a code is often irreversible; once it is developed and applied in society, it is difficult to change or remove it. Law shall be able to secure the effective and efficient evaluation of the code. For the time being, there is not enough argumentation for a reliable and credible approximation of values embodied in the code.

4.2. De lege lata Limitations in the Application of Smart Contract: "*If This, Than That*" format

In addition to its numerous positive aspects, the automated execution of smart contracts has some disadvantages from a legal perspective. For example, it is impossible for the party to withdraw from the contract once it has become effective. Furthermore, it is also not possible to adjust a smart contract if the

18 For example, the Electronic Transactions Act of the State of Arizona defines Blockchain technology and specifies some of its consequences. Article 5 of this Act stipulates that Blockchain technology is a form of application of the DLT concept, which uses a distributed, decentralized, shared and duplicated database that can be public or private, with or without permission, run by a tokenized crypto economy or without a token. The data in the database are protected by cryptography, immutable and suitable for control, and provide uncensored accuracy. Article 5 allows smart contracts to be used in business relationships. Therefore, it is impossible to ignore the effects of contracts only because they are concluded as "smart contracts". Furthermore, notwithstanding other regulations, the data provided by using Blockchain technology are considered equivalent to other data whose integrity is protected in other ways. For example, this principle applies to a contract for the transfer of property rights. See: *An Act amending Section 44-7003, Arizona revised Statutes; amending Title 44, Chapter 26, Arizona revised Statutes, by adding Article 5; relating to Electronic Transactions;* (accessed on 01. 08. 2019).

circumstances affecting it have changed. In addition, there is also no possibility of intervention in the event that the code subsequently turns out to be faulty.

The most illustrative disadvantage of smart contracts in the legal discourse is their (current) inability to provide the necessary flexibility of contractual framework. As previously noted, a smart contract is a contract connected to a computer protocol, written in a computer programming language, which automatically performs programmed functions in response to the fulfilment of certain conditions ("*If this, than that*" principle). A single block in the chain is created without errors if it can be successfully linked with other blocks in the Blockchain. In this sense, the execution of a smart contract transaction cannot be incorrect; it is either successfully processed or not.

Another debatable issue is whether the legal flexibility embodied in legal standards can be transposed into a program code. By analogy with vending machines, where the execution relies on mathematical calculation (i.e. whether a sufficient amount of money has been paid to deliver the goods), smart contracts also rely on a precise and predefined execution logic. Yet, it raises the issue how some legal concepts (e.g. "reasonable conduct" or "best efforts"), which are used in traditional contracts to provide flexibility, may be transposed into the program code. The transposition of such concepts into the code by reducing them to a code algorithm may be difficult (if possible at all).

One of the ways to resolve this issue is to create the so-called hybrid forms of contract that can be "read" by both machines and humans. A typical example of such hybrid contracts is the so-called Ricardian contract. It was first introduced by the financial cryptographer Ian Grigg in 1995 (Grigg, 1996: 1, *passim*). The Ricardian contract is readable both by people (as any traditional paper contract) and by machine (a software program). The Ricardian contract does not automate the given elements of the agreement through the application of the program code. Instead, its goal is to provide flexibility for agreements in textual form, while providing them a certain degree of code identity; namely, the Ricardian contract converts an agreement in textual form into the program code, ensuring compliance to the extent which does not affect the flexibility of the norms contained in specific agreements. The ultimate result of this process is that program code complements rather than replaces agreements in textual form (by applying the formula "more rights/duties- less software").

The text of the contract which is not fully coded should be formulated in a way that corresponds to the minimalist semantics of the code. The described minimalist semantics enables the program code to guarantee the integrity of the information contained in the code (information contained in the contract itself and converted into a programming language) and verification of its origin. The

text of the agreement contains all the possibilities and nuances of the language used by the contract law to meet the parties' requirements. In this way, the immutability of the program code is combined with the flexibility of expression. Flexibility as a possibility of choice is materialized in the agreement itself; on the other hand, the program code ensures the immutability of information. It remains to be seen to what extent this approach is practically useful from a technology perspective.

4.3. Responsibility for Legal Compliance and Liability Standards

In decentralised networks, it can be burdensome to identify the actors liable for legal compliance (i.e. to define the so-called "regulatory access point"). Identifying a regulatory access point is, however, more complicated where there is no centralised legal entity responsible for the network. It is among the most important regulatory issues to have emerged in relation to Blockchain and smart contracts (European Commission, 2018:47).[19]

There are two types of liability for malfunction of the code and non-fulfilment of a smart contract: 1) strict liability for any fault in a code, and 2) liability based on the reasonable-care standard.

Under the strict liability standard, code designers may be held liable for any defect in the code which has been used to make the system operative. As a result, the costs of code developers would be so high that innovation would not be financially viable. Hence, subject to the prevailing application of strict liability principle, it is likely that any Blockchain/smart contract development would be disincentivized (European Commission, 2018:47).

An approach that limits liability of developers by establishing certain standards of conduct could help safeguard and promote innovation and risk-taking. Hence, in order not to make the costs of innovation too severe, the legislature might eventually develop the liability standard focussing on reasonable care and best efforts. For instance, it may be expected that industry will do its best to ensure that code-based systems are secure against cyber intrusions; yet, perfection as such may not be expected and a lack of it will not be legally sanctioned (European Commission, 2018:48).

5. Conclusion

Blockchain technology is increasingly relevant in different fields (energy, healthcare, education, financing, public services, logistics, transport). The ad-

19 European Commission (2018): Study on Blockchains: Legal, governance and interoperability aspects (SMART 2018/0038), European Commission; (accessed on 1. 05. 2020).

vantage of Blockchain technology lies in ensuring the authenticity of digital data: trust in the classic legal relationship has been replaced by a mechanism for verifying data in blocks without the participation of a third party. The potential of Blockchain development is clearly reflected in smart contracts. Smart contracts are Blockchain-based computer programs that authenticate, monitor, and implement contractual obligations which have been converted into a program code. The code automatically performs the obligation in accordance with the terms and conditions that the parties have decided in the agreement. Smart contracts are becoming a reality; therefore, an adequate legal response is required. But, the requisite response is highly specific because it lies on the brink between law and technology, two fields whose interaction has been exclusively technical for most of the history of their coexistence. Their intersection and overlapping open the plethora of new issues and demand the rephrasing of the old ones. As an example of this interaction which is as much important as it is intensive, Blockchain and smart contracts *nexus* creates a new reality and offers experience for further elaboration on the issue.

In terms of liability in the Blockchain/smart contract discourse, the basic question is whether legal flexibility embodied in legal standards (such as "reasonableness" or "best efforts") can be transposed into a program code. Converting those standards into a code means reducing them to the form and boundaries of the programming language. This reduction is complex and demanding, if it is possible at all. For the time being, the question of applying smart contracts as a complete replacement for traditional contracts is without a final answer. It is clear that traditional contracts cannot and should not be replaced overnight. There is no revolution in that sense. Changes must be made step by step. It is also necessary to devise the criteria for the identification of actors liable for legal compliance (to define the so-called "regulatory access point"). In addition, there are two possible suggestions regarding the types of liability in smart contract: strict liability for any fault in a code, and liability based on the reasonable-care standard. The former brings about legal clarity, but disincentivize the innovative potential of the Blockchain/smart contract technology; the latter may results in a vice versa outcome.

The main goal of Blockchain application in the context of smart contracts is to make the contractual relationship more efficient and economically viable, with fewer opportunities for contractual breach and subsequent disputes. With full respect towards national legislative efforts to define smart contracts, their legal conditions and consequences, the "state-of-the-art" approach is to allow for the smart contracts to reach maturity as a universal phenomenon. This process will sharpen its basic structure, clarify the most critical issues, and provide a catalogue of possible solution, the most important of which is liability.

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PRAVNA ODGOVORNOST U KONTEKSTU VEZE BLOKČEJN TEHNOLOGIJE I PAMETNIH UGOVORA: uvodna razmatranja

Rezime

Blokčejn je pojava koja svojom važnošću zahteva pravne odgovore na pitanja okrenuta njegovom primenom. Njegova ključna karakteristika je da donosi promenu paradigme u pogledu uloge poverenja ugovarača: poverenje u ugovornog partnera zamenjuje poverenje u tehnologiju. Primer navedene promene je koncept pametnih ugovora. Ključna karakteristika pametnih ugovora je da su samo-implementirajući. Ova karakteristika zasnovana je na tome da se obaveze strana izvršavaju kroz funkcionisanje kompjuterskog programa (koda). Ugovorne strane pametnog ugovora definišu prava, obaveze, dužnosti i odgovornosti upotrebom programskog jezika. U slučaju da nastupi događaj koji je predviđen kodom (na primer, kršenje ugovora), kod automatski izvršava naredbu koja je povezana sa navedenim događajem. Pravno dejstvo pametnih ugovora ne može da se negira isključivo s pozivanjem na činjenicu da saglasnost strana o ugovornim odredbama nije definisana na način kako je to uobičajeno u ugovornom pravu. Prepreku za implementaciju i potpuno prihvatanje pametnih ugovora predstavlja diskrepancija u razvoju pravnih koncepcija odgovornosti i napretka tehnologije (pri čemu jepotonja dinamičnija). Otvoreno pitanje kod pametnih ugovora je na koji način, i da li je uopšte moguće, obezbediti njihovu fleksibilnost kao elemenat gotovo svih kontraktualnih instrumenata. U pogledu tipova odgovornosti, postoje dva pristupa: princip odgovornosti dizajnera koda za njegovo funkcionisanje (pa i funkcionisanje pametnog ugovora koji se tim kodom uređuje) zasnovan na shvatanju njegove obaveze kao obaveze rezultata i princip odgovornosti zasnovan na prirodi obaveze dizajnera koda kao obaveze sredstva (standardi postupanja u skladu sa najboljim naporima, razumnosti i slično). Prvi princip stimuliše pravnu sigurnost, ali destimuliše inovativni potencijal blokčejn tehnologije (s obzirom na potencijalne troškove tog razvoja). Drugi pristup daje podsticaj za razvoj Blokčejn koncepta, uz manji stepen pravne odgovornosti dizajnera koda za štetu pričinjenu greškama u kodu (odnosno greškama u funkcionisnaju pametnog ugovora koji reguliše). Optimalan pristup pravne zajednice je nadgledanje procesa sazrevanja pametnog ugovora kao sveopšteg fenomena: očekivano je da će to sazrevanje doprineti definisanju osnovne strukture opisane tehnologije i obezbediti katalog odgovora za rešenje ključnih pitanja.

Ključne reči: *Blokčejn, "pametni" ugovori, pravna odgovornost, tehnologija distibuirane glavne knjige, Rikardijanski ugovor, princip "If this than that".*

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originalni naučni rad
10.5937/zrpfn0-28657

UDK: 340.12
Rad primljen: 01.10.2020.
Rad prihvaćen: 16.01.2021.

ODNOS KELZENOVOG I ŽIVANOVIĆEVOG SHVATANJA ODGOVORNOSTI - JEDNA OBEĆAVAJUĆA PARALELA –

„Čovek je osuđen da bude slobodan; jer jednom kad je bačen u svet, odgovoran je za sve što uradi"

Jean-Paul Sartre

Apstrakt*: Odgovornost predstavlja odnos čoveka prema vredno- stima. Tako u pravu ona znači uvođenje, najpre pravde i pravičnosti, a zatim i drugih pravnih vrednosti. Odgovornost u pravu je očigledna, budući da je pravo prinudnog karaktera, tj. počiva na sankciji države. Odgovornost je podložnost sankciji. Odgovornost postoji u svim granama prava. Najpre u ustavnom pravu, kao pravna ali i politička kada se odnosi na ponašanje suverena. Nakon ustavnog, odgovornost je najizrazitija u građanskom i krivičnom pravu. Kelzen obrađuje pretežno građanskopravnu odgovornost a Živanović krivičnopravnu. U razradi opšte i specijalne pravne odgovornosti oba autora su jako rečita. Upoređivanje njihovog shvatanja odgovornosti daje izvesne zajedničke konstatacije, ali, takođe, i osobenosti kod oba autora.*

Ključne reči*: prirodno pravo, pozitivno pravo, pravna odgovornost, delikt, delinkvent, sankcija.*

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1. Uvod

Reč odgovornost nema u svim jezicima isto značenje. Tako se u engleskom jeziku reč odgovornost (responsibility, liability, accountability) često vezuje za pojam nadležnosti. U našem jeziku reč odgovornost etimološki ima svoje korene u reči „govoriti, dati odgovor, odgovoriti" (Karadžić, 1969: 442). Na osnovu naznačenog pojma, može se dati definicija pravne odgovornosti. „Odgovarati znači polagati računa drugima za svoje postupke koji nisu u skladu sa društvenim pravilima i trpeti određene posledice zbog nepoštovanja istih" (Heck, 1958: 76).

U najširem smislu, odgovornost predstavlja svestan odnos čoveka prema društvenim vrednostima, bez kojih ono kao organizovana društvena zajednica ne može postojati. Odgovornost počiva na sposobnosti čoveka, kao svesnog društvenog bića, da razlikuje korisno od štetnog, racionalno od iracionalnog, pošteno od nepoštenog, a time i dozvoljeno od nedozvoljenog. Kao konstantna društvena kategorija, odgovornost je menjala svoje oblike ispoljavanja. Pri tome, njen zahtev ostaje uvek isti: da svako za svoj rad i ponašanje u društvu mora da polaže račune nekome. Ko će kome odgovarati zavisi od karaktera društva i odnosa koji u njemu vladaju. Najznačajniji kriterijum za razvrstavanje odgovornosti u društvu je način primene sankcije prema prekršiocu norme. Po tom osnovu razlikuju se moralna, politička i pravna odgovornost. Za razliku od pravnih normi, moralne norme nastaju neorganizovano, spontano u samom društvenom životu, tj. u interakciji ljudi i grupa ljudi. Moral je heterogena i fluidna kategorija jer svaka društvena zajednica ima svoj moral. A u jednoj istoj društvenoj zajednici svaka društvena grupa, pa i svaki pojedinac, ima svoj moral. Utoliko je moralna odgovornost ona koju svako oseća zbog izvršenog moralnog delikta, i to kako pred drugima tako i prema samom sebi. Moralna krivica se ispoljava u osećaju stida, nelagodnosti i griži savesti. Moralna i politička odgovornost se često mešaju, mada su dva različita pojma. Politička odgovornost se sastoji u polaganju računa zbog svog necelishodnog rada, neizvršenja zadataka ili štetnog rada pred odnosnom političkom organizacijom. Politička odgovornost se oslanja na moral. Ukoliko je politika više zasnovana na opšteljudskim moralnim principima utoliko ima više šansi za uspeh. To odgovornost čini efikasnom.

Kao konstantna društvena kategorija, odgovornost je tokom duge istorije ljudskog društva menjala svoje vidove i mehanizme dejstva na ljudsku svest. „Društvo, razvijajući se, ide iz nižeg u viši savršeniji oblik

odgovornosti, pa analogno tome i odgovornost prelazi iz nižeg u viši, suptilniji oblik ispoljavanja“ (Jovanović, 1973: 83).

2. Pojam pravne odgovornosti

Pitanje pravne odgovornosti jedno je od centralnih u konstrukciji pravnih pojmova odvajkada do danas. To je i razumljivo, ako se pravo, kako se najčešće čini, shvati kao prinudan poredak i sistem. U okviru pitanja pravne odgovornosti treba najpre nešto reći o onoj u prirodnom pravu. To je opravdano i naslovom rada, budući da su i Kelzen i Živanović pristalice prirodnog prava. Prirodno pravo kao večno, nepromenjivo, apriorno, univerzalno, apsolutno je u racionalističkoj varijanti stub kulture razuma kojim se gradi humana budućnost. “Odgovornost... obuhvaćena životom više od dva milenijuma, svojom moralnom i pravnom organizacijom, ispoljava dostignuti stepen individualne i opšte civilizacije“ (Perović, 2011: 862). Nema prirodnopravne vrednosti slobode pod nasiljem i nema slobode bez odgovornosti. Shvaćena u racionalnom smislu, sloboda je nerazdvojna od odgovornosti kao stanja kažnjivosti.

Odgovornost u pravu znači kršenje dispozicije i podložnost prekršioca sankciji. Odnos odgovornosti ima dve strane, objekat odgovornosti, odnosno stranu koja je prekršila dispoziciju i subjekat odgovornosti, tj. stranu kojoj objekat odgovara. Zato svaki ovakav odnos ima tri elementa: subjekat, objekat i osnov odgovornosti (kršenje pravila). Ova tri elementa daju odgovor na pitanje ko, kome i za šta odgovara.

Odgovornost uopšte, a posebno države, je institucija bez koje se ne može zamisliti jedna pravna država. „Ona predstavlja jednu etapu, i bez sumnje najvišu etapu u razvitku pravne države, naravno pod pretpostavkom da se uporedo razvijaju i ostale institucije koje odlikuju pravnu državu“ (Tasić, 1921: 3). Koncept pravne države i princip vladavine prava podrazumeva tri ključna merila i to: “važenje zakonskog prava koje prirodnopravnu doktrinu o ljudskim pravima zamenjuje konceptom subjektivnih javnih prava, zatim, demokratski princip narodnog suvereniteta i ideju o podeli vlasti“ (Dimitrijević, 2005: 17).

Još sa jednom značajnom idejom je povezano pitanje odgovornosti, naime sa principom podele vlasti. Kao prethodno pitanje ovde se javlja ono o podeli odgovornosti na horizontalnu i vertikalnu. Još je Levenštajn, razmatrajući kontrolu političke moći, definisao horizontalnu i vertikalnu odgovornost. Horizontalna odgovornost postoji kada jednu funkciju vlasti vrši više lica, odnosno kod kolektivnih državnih

органа gde se u okviru samog organa ustanovljavaju mehanizmi kontrole. Vertikalna odgovornost „obuhvata federalizam, pluralizam (kao oblik kolektivizacije delovanja pojedinaca kroz grupu) i garancije ljudskih prava“ (Lowenstein, 1969: 168). Odgovornost se ne može poistovetiti sa horizontalnom podelom vlasti jer se ne može govoriti o horizontalnoj odgovornosti uvek kad jedna od vlasti utiče na drugu, recimo kod zakonodavnog veta ili kada je potrebna saglasnost jednog organa za imenovanje koje vrši drugi organ.

Blizak pojam odgovornosti je pojam kontrole. „Na primer, ustavno sudstvo kontroliše rad parlamenta i može poništiti akte koje on donosi, no parlament nije odgovoran ustavnom sudstvu. To razdvaja pojmove kontrole i odgovornosti, a iz definicije horizontalne odgovornosti sledi da oni nemaju pravnu mogućnost da kazne onoga koga kontrolišu“ (Tripković, 2008: 824).

Pravna odgovornost se javlja gotovo u svim pravnim disciplinama, anaročito u građanskom i krivičnom pravu, porodičnom pravu, ustavnom i upravnom, prekršajnom i finansijskom, autorskom i pronalazačkom, međunarodno javnom i međunarodno privatnom. U relativno skorijoj istoriji socijalističkih država postojala je specifična neposredna odgovornost. U odnosu na druge, ona je karakteristična po jačem intenzitetu. Ona, kao društvena kategorija mora da postane element svesti svakog čoveka i da pored odgovornosti pred drugima bude i odgovornost pred samim sobom. Ovde je primetna jača veza sa moralnom odgovornošću.

Počev od prve velike civilne kodifikacije, francuskog Code civil- a, pa donekle i od austrijskog Opšteg građanskog zakonika, a potom i nemačkog Građanskog zakonika, građanska inkriminacija je definisana opštom zabranom nanošenja štete drugome. Od tog perioda menja se svrha građanskopravne odgovornosti. Ona se umesto dotadašnjeg penalnog pristupa orijentiše ka odštetnom cilju, u pravcu obeštećenja oštećenog.

„U materiji građanskopravne odgovornosti se vrši dalje razgranjavanje na nove vrste odgovornosti, kao što je vanugovorna (deliktna) i ugovorna (ili kontraktualna), u zavisnosti od toga da li je povređena opšta zabrana prouzrokovanje štete, tj. nekom zakonom zaštićeno dobro (svojina, ličnost, sloboda, zdravlje odnosno psihički, fizički ili imovinski integritet) ili pak individualna norma, pravilo ugovora“ (Salma, 2008: 80). U građanskom pravu se primećuje da nije dovoljno razrađen slučaj kada se radi o deliktu nečinjenja, posebno nevršenja korisnih tuđih poslova. Tu se „prije svega radi više o moralnoj, nego o pravnoj obavezi, obzirom

da se i za nevršenje tih takvih (korisnih) tuđih poslova u principu ne odgovara".

Što se tiče krivičnopravne odgovornosti, po principu nulum crimen, nula poene sine lege, neophodno je da postoji krivica. Krivica je subjektivni i konstitutivni element krivičnog dela. Inkriminacija krivičnog delikta ne može, zbog pravne sigurnosti, biti zasnovana na gipkim direktivama, tzv. kaučuk normama. U savremenom pravu ono što nije zabranjeno specijalnom inkriminacijom, dopušteno je. Do donošenja novog krivičnog zakonodavstva Republike Srbije, pored i iznad krivice, korišćen je pojam krivična odgovornost. „Krivična odgovornost je ranije predstavljala skup subjektivnih uslova kojima se označavalo psihičko stanje učinioca i njegov odnos prema krivičnom delu" (Jovašević, 2016: 121). Za razliku od krivice, krivična odgovornost može i da se izbegne. Krivična odgovornost je samo posledica vršenja krivičnog dela. Sastoji se od dva elementa, uračunljivosti i krivice (vinosti). Oba ova elementa su nužna, dakle moraju da postoje da bi postojala odgovornost. Odatle proizilazi da su kumulativni. Uračunljivost označava postojanje psihičkih svojstava kod učinioca krivičnog dela. Sastoji se u sposobnosti učinioca krivičnog dela da shvati značaj svog dela i da upravlja svojim postupcima. Krivica pak označava postojanje određenog odnosa učinioca prema svom delu kao svom ostvarenju. Bez postojanja uračunljivosti ne može postojati ni krivica jer je ona osnovica na kojoj se krivica gradi. S druge strane, uračunljivost može postojati i kada kod učinioca nema krivice. I u jednom i u drugom slučaju nema krivične odgovornosti, pa stoga ne može doći ni do kažnjavanja za delo koje je ostvareno u odsustvu ovih elemenata.

Najpregnantnijarazlikagrađanskopravneikrivičnopravneodgovornosti je ona po kriterijumu sankcije. Odgovornost u teoriji građanskog prava i zakonskoj regulativi je dvojaka, ugovorna i vanugovorna. Tradicionalno se zasniva na institutu krivice (subjektivna odgovornost) ili odsustva krivice (objektivna odgovornost). „Pod uticajem anglosaksonske precedentne prakse i na njoj zasnovane regulative (*common law*) kontinentalno pravo preuzima (pravni transplant) institut pravila poslovne odluke (*business judgment rule*)[1], koji u dobroj meri otvara pitanje mesta instituta krivice iz građanskog prava kao osnova ugovorne ili vanugovorne odgovornosti" (Vasiljević, 2011: 5).

1 Pravilo poslovne presude

2.1. Shvatanje pravne odgovornosti kod Kelzena

Hans Kelzen se katkad označava kao najznačajniji pravnik dvadesetog veka. Biće da je ova konstatacija primenjiva i na dvadesete godine dvadeset prvog veka. „Ipak, on je bio od istaknutog značaja ne samo kao pravnik nego i kao socijalni filozof i kritičar ideologije“ (Trajković, 2004: 226). „Kelzenovo delo i Bečka pravnoteorijska škola su tipičan proizvod Bečke moderne“ (Jabloner, 2001: 3). Kelzen sam za sebe kaže: „Ono što me je povezivalo sa filozofijom tog Kruga – a da u tome nisam od nje pretrpeo uticaj – bila je njena antimetafizička tendencija“ (Kelzen, 1998: 6). Međutim, za potrebe ovog članka treba reći nešto o Kelzenovoj čistoj teoriji prava i njegom imperativnom modelu prava.

Kako se odgovornost pojavljuje kao posledica delikta, progovorićemo par reči o Kelzenovom shvatanju pravne norme i podeli normi na primarne i sekundarne. Za Kelzena je pravna norma ona koja „ima za cilj da reguliše ljudsko ponašanje, propisivanjem akata prinude kao sankcije“ (Kelzen, 1951: 128). Osnovni element prava je sankcija iz koje se izvode ostali pravni pojmovi, naime pojam delikta, kao pretpostavke sankcije, pravne obaveze i subjektivnog prava. Ovde se radi o klasičnoj četvorodeobnoj logičko-semantičkoj strukturi pravne norme. U pogledu Kelzenovog shvatanja primarnih i sekundarnih normi i njihovog odnosa, primetan je potpuni zaokret u odnosu na shvatanje tradicionalne teorije. „Po Kelzenu, dva su elementa logički i značenjski dovoljna za poimanje pravne norme: delikt i sankcija, tj. označavanje jedne ljudske radnje kao uvjeta- prekršaja i druge radnje kao posljedice-sankcije“ (Visković, 1981: 176). To je Kelzenova primarna norma. Sekundarna norma, koja nije neophodna, se sastoji iz pravne obaveze i subjektivnog prava.

Nakon ove kratke digresije, prelazimo in media res, na Kelzenovo shvatanje odgovornosti koju on decidno tematizuje. Budući da je odgovornost normativnog karaktera, začuđuje to što o njoj malo i skrajnuto govore oni teoretičari prava koji daju višečlane šeme pravnih normi. Npr. Visković koji poznaje deset elemenata pravne norme samo se bukvalno u jednom pasusu bavi odgovornošću.

Po Kelzenu je pojam pravne odgovornosti vezan za pojam pravne obaveze. Subjekt pravne odgovornosti i subjekt pravne obaveze se poklapaju. U tradicionalnoj teoriji se razlikuju dve vrste odgovornosti: subjektivna odgovornost, kao odgovornost zasnovana na krivici i apsolutna odgovornost kod koje nije nužna nikakva veza između stanja svesti delinkventa i posledice njegovog ponašanja. Usavršena pravna tehnika zahteva razliku između slučaja kada je lice koje je izvršilo delikt

predviđalo i htelo posledicu svog ponašanja i slučaja kada je ponašanje tog lica izazvalo štetnu posledicu koju delinkvent nije predviđao niti hteo. „Individualistički ideal pravde zahteva da se sankcija veže za ponašanje nekog lica samo ako je lice koje je izvršilo radnju predviđalo ili htelo štetnu posledicu ponašanja i ako je htelo da nanese štetu drugom licu svojim ponašanjem, pod uslovom da je njegova volja imala karakter zle volje“ (Kelzen, 2010: 145).

U dva gore opisana slučaja različite su sankcije. Kad je sankcija vezana jedino za psihološki kvalifikovan delikt, govori se o odgovornosti zasnovanoj na grešci ili krivici. Psihološka kvalifikacija delikta postoji jedino u slučaju kada je delinkvent predviđao i hteo, sa ili bez zle namere, štetne posledice. „Ako se ne pokaže brižljivost koju naređuje pravo, to se zove nehat; i nehat se obično smatra kao druga vrsta „krivice“ (culpa)“ (Kelzen, 2010: 146). Nehat je delikt propuštanja. Odgovornost za nehat je pre jedna vrsta apsolutne odgovornosti nego oblik krivice. Ovo je vidljivo kada se delikt propuštanja koji ima karakter nehata uporedi s deliktom propuštanja koji sačinjava krivicu. Kod delikta propuštanja postoji pravni ili moralni a ne psihološki aspekt situacije. Kelzen podseća da se „prema primitivnom pravu sankcija vezuje za ponašanje i kad je njena štetna posledica prouzrokovana uprkos tome što je pokazana nužna brižljivost“ (Kelzen, 2010: 147). U modernom pravu pak postoji tendencija da se odgovornost ograniči na neispunjavanje obaveze da se preduzmu mere kojima se može izbeći štetna posledica. Kad je jedno lice svojim ponašanjem izazvalo štetnu posledicu u odnosu na neko drugo lice, ono će biti oslobođeno krivične ili građanske sankcije ako pokaže da nije predvidelo ili htelo štetnu posledicu svog ponašanja.

Posebno mesto u svom shvatanju odgovornosti Kelzen pridaje njenom odnosu sa obavezom. Terminološka razlika između pravne obaveze i pravne odgovornosti je nužna kad sankcija nije, ili nije jedino, uperena protiv neposrednog delinkventa, nego protiv lica koja su pravno vezana sa njim. Ukoliko se pravna situacija opisuje u terminima pravnih lica, subjekt pravne obaveze i objekt sankcije su identični. To se naročito dobro vidi kada je u pitanju odgovornost države kao pravnog lica. Ali, ako se odbaci personifikacija i pravni odnosi između subjekata se opišu bez pojma pravnog lica, onda razlika između neposrednog subjekta delikta i neposrednog objekta sankcije postaje očigledna. “Delikt je izvršio određeni pojedinac – organ društva ili organ države; sankcija je uperena protiv svih članova društva i protiv svih građana države“ (Kelzen, 2010: 148–149). Kolektivna odgovornost pak postoji onda kad delinkvent i lica koja su odgovorna za delikt pripadaju istoj pravnoj zajednici, odnosno

pravnom licu. Kelzen posebno podvlači da je kolektivna odgovornost uvek i apsolutna odgovornost.

Gornji navodi apsolviraju teškoću da se odredi ko je pravno obavezan da izbegne delikt. Ista pravna norma je postavljena i kao obaveza i kao odgovornost. Pravna norma implicira obavezu u pogledu potencijalnog subjekta delikta a odgovornost u pogledu potencijalnog objekta sankcije. Subjekt pravne obaveze je onaj ko je sposoban da se pokori ili ne pokori pravnoj normi i njegovo ponašanje jeste uslov sankcije. Odgovorno za delikt je lice protiv koga je uperena sankcija, čak i u slučaju da njegovo ponašanje nije uslov sankcije koja je uperena protiv njega. Taj uslov je pravno određeni odnos prema delinkventu. Dakle, postoje izuzeci „u kojima je neko lice učinjeno odgovornim za ponašanje koje čini obavezu nekog drugog, za delikt koji je izvršio drugi" (Kelzen, 2010: 150).

Kelzen posebno govori o odgovornosti u građanskom pravu. Kada neko lice odgovara za štetu koju je učinio neko drugi, nije u pitanju slučaj odgovornosti za nečiji tuđi delikt. Kako se delikt sastoji u činjenici da obaveza za naknadu štete nije bila izvršena, to je onaj ko je podložansankciji sposoban da je izbegne odgovarajućim držanjem, tj. naknadom štete koju je neko drugi pričinio. Ovde se, po Kelzenu, poklapaju subjektobaveze i subjekt odgovornosti.

Kao kritičar analitičke teorije (Austin) Ostina, Kelzen se bavi njegovim shvatanjem pravne odgovornosti. Ostin je predstavnik esencijalističkog načina definisanja prava. On razlikuje pravo pravilno nazvano od prava nepravilno nazvanog. Još je (Kantorowicz) Kantorovič pisao da „između naziva neke stvari (predmeta mišljenja i stvari koja se naziva postoji neka metafizička veza koju je opasno i bogohulno zanemarivati" (Visković, 1981: 18). Kod Ostina je svaki pozitivni zakon zasnovan, direktno ili zaobilazno, od suverene osobe ili tela nezavisnog političkog društva pri čemu je njen autor vrhovni.

Postoji nekoliko toposa Kelzenove kritike Ostina. U Ostinovoj teoriji pravna norma čini zapovest koja obavezuje ljude. Sankcija je uvek uperena protiv delinkventa. On ne zna da sankcija može biti uperena i protiv lica koja stoje u nekom pravnom odnosu sa delinkventom. Tako po njemu ova druga lica nemaju nikakvu pravnu obavezu. Pojam pravne obaveze je, s gledišta analitičke jurisprudencije, čisto normativan pojam, tj. on izražava izvestan odnos koji spada u sadržinu pravne norme" (Kelzen, 2010: 152). Ostin ne uspeva da dođe do pojma norme kao bezlične zapovesti jer pravnu obavezu shvata kao psihološku vezu. On uvažava strah od sankcije kao motiv za ponašanje adresata pravne norme. Po Ostinu je

pravo sistem zapovesti, a nikakva sadržina zapovesti ne može utvrditi psihološku činjenicu straha. Međutim, po Kelzenu je to irelevantno za pravnu teoriju. Bitno je samo da pravna norma izvesno ponašanje nekog lica povezuje sa sankcijom.

Ovo je povezano i sa pitanjem nepoznavanja prava. Prema Ostinu princip da nepoznavanje zakona nikog ne izvinjava je princip pozitivnog prava. Po Kelzenovim rečima on daje izvrstan razlog za taj princip: „Kad bi neznanje zakona bilo usvojeno kao osnov za oslobođenje od krivice, neznanje zakona bi stranke uvek navodile, i sud bi u svakom slučaju bio obavezan da reši da li je to tačno ili ne“ (Kelzen, 2010: 153). Posebno u engleskom pravu Ostin ne poznaje nijednu instancu pred kojom bi neznanje zakona predstavljalo osnov za oslobođenje optuženog. Princip da nepoznavanje zakona ne oslobađa obaveze je nužan za primenu i efikasnost prava.

Logika u kojoj su i Ostin i Kelzen vrhunski „majstori“ nameće kao dalje pitanje ono o retroaktivnosti pravnih normi. Ostin usvaja mogućnost retroaktivnih pravnih normi. On smatra da su takve norme punovažne ali postoje izvesni pravno-politički razlozi protiv njih. Budući da zakon nije postojao u trenutku kad je izvršeno činjenje ili propuštanje,adresat nije znao niti je mogao znati da je prekršio zakon.

Kelzen odaje priznanje Ostinu zato što je ovaj shvatio protivurečnost između psihološkog pojma obaveze i analitičkog izlaganja prava i time izložio sebe samokritici. Po Ostinu postoje dva kumulativna uslova delotvorne obaveznosti. Prvo, da adresat zna da postoji zakon koji nameće obavezu i za koji je vezana sankcija. Drugo, da adresat zna ili može znati da bi njegovo činjenje ili propuštanje bili u suprotnosti sa ciljevima zakona i sa obavezom. Kelzen, međutim kritikuje ovaj stav: „da bi se sankcija učinila efikasnom, nužno je da subjekti poznaju zakone... neznanje ili greška u pogledu stanja prava ne može subjekta osloboditi odgovornosti“ (Kelzen, 2010: 154). Ostin daje samo pravnopolitičko opravdanje principa ignoration iuris nocet. Prihvatanje ovog principa kao razloga za oslobođenje odgovornosti vodi beskrajnom ispitivanju nerešenih faktičkih pitanja. To bi vodilo sprečavanju vršenja pravosuđa i oslobođenju prava. Kelzen zaključuje da se ova teškoća u Ostinovom shvatanju ne može rešiti. Ona je posledica Ostinove definicije prava kao zapovesti.

2.2. Shvatanje pravne odgovornosti kod Živanovića

Toma Živanović se bavi pitanjem odgovornosti u svom monumentalnom Sistemu sintetičke pravne filozofije. Kao poznati krivičar, tvorac

tripatritnog pojma krivičnog dela, posebnu pažnju i u pitanjima sankcije, krivca i odgovornosti poklanja ovoj grani prava. U svojoj analizi Živanovićevog shvatanja pustićemo uglavnom samog autora da „govori". Ovo zbog toga što je njegov stil minuciozan i jasan. Ta jasnost je najvidljivija kad se Živanovićevo sintetičko filozofsko- sociološko-antropološko-evolucionističko gledište o pravu uporedi sa Hegelovim shvatanjem. U svojoj teoriji Živanović, naime, polazi od Hegela razvijajući i precizirajući ali i menjajući neke njegove ideje o pravu. Najkraće rečeno, za Hegela je pravo stupanj ideje, odn. objektivnog duha, a za Živanovića podideja koja proizilazi iz Ideje kao opštijeg pojma. Ali, dok je Hegel „doista mračan i težak za razumevanje, Živanović je kristalno jasan i precizan u svojim konstrukcijama" (Lukić, 1992: 398).

Po Živanoviću su nepravo, odn. delikt, prekršilac prava i pravna sankcija osnovni pravni pojmovi. „Svaka *povreda* (a eventualno i samo ugroženje) subjektivnog prava (pravne norme) sačinjava (prema „materijalizaciji" prava njemu shodno aktima) *nepravo* (delikt), bilo u pitanju norme ma koje grane prava o *pravu,* tj. privatnog, javnog ili procesnog prava o pravu" (Živanović, 1959: 325). Deliktno pravo daje sankciju svim povredama prava. Različit je stepen težine sankcije, od lakših kao što je novčana kazna do težih kazni i mera bezbednosti,do najtežih krivičnih dela. U anglosaksonskoj pravnoj književnosti je učenje o privatnom nepravu zasebna pravna nauka koja poznaje samo vanugovorne delikte.

Živanović smatra da je krivično pravo osnovno u odnosu na druge granepрava. Svakako da je u pravu, budući da su krivična dela najizrazitija jerse sankcijom oduzimaju ili ograničavaju najznačajnija dobra, kao što su život i sloboda. Utoliko on ističe da u pitanjima pojma delikta, krivca i sankcije treba poći od njega. Na terenu krivičnog prava treba razlikovati krivično delo od ostalih delikata. Živanović razrešava dilemu da li je razlika u pitanju kvalitativna ili kvantitativna i dolazi do zaključka da se „krivično nepravo pojavljuje kao *osoben rod* (genus) delikta (protivpravnog dela)" (Živanović, 1959: 326). U definisanju krivičnog dela postoje dve teorije: realistička i juristička. Te dve teorije se mogu primeniti i na druge delikte. Realistička, odn. naturalistička teorija polazi od toga da je nepravo jedan prirodan, realan fenomen, naime jedan događaj. Juristička teorija, koju Živanović podrobnije razrađuje, je ona po kojoj je pravo čisto pravni fenomen, carstvo pravnih normi. Autor odavde izvodi pojam krivičnog neprava, koje je u logičkom sledu osnovnoza izvođenje ostalih delikata: „Samo je izraz norma naime upotrebljiv za krivično pravo... Izrazi kao propis, pravilo neupotrebljivi su ovde, jer

se pre svega krivičnim nepravom napada na *prećutne* u kaznenom zakonu sadržane propise zvane normama („ne ubij“ npr.) (Živanović, 1959: 327). Krivično delo je ljudsko delo, odn. radnja. Izraz radnja nije, međutim, najprikladniji, jer ne obuhvata posledicu te radnje kao sastojak pojma krivičnog dela, odnosno drugog delikta. Delo uopšte je prouzrokovanje posledice ljudskom radnjom i obuhvata tri elementa: radnju, posledicu i uzročnu vezu među njima.

Prekršilac prava, odn. subjekt neprava je po Živanoviću sledeći osnovni pravni pojam. Prekršilac prava je objekt sankcije. Živanović je inovirao bipatritni pojam i stvorio tripatriciju, kako u oblasti krivičnog prava tako i ostalih grana prava. Inovacija se sastoji u tripatriciji, odnosno izdvajanju prekršioca kao zasebnog osnovnog pravnog pojma, uz delikt i pravnu sankciju. Živanović daje dugi i iscrpni pojam prekršioca prava, ne zaboravljajući i na prirodno pravo: „*Prekršilac prava* (subjekt neprava, pozitivnopravni i prirodnopravni) je *osnovni* pravni pojam i može se definisati kao *izvršilac* svršenog ili pokušanog neprava (delikta) ili *saučešća* u istome, koji ispunjuje *objektivne lične* uslove *deliktne odgovornosti* (kojih mora biti i u prirodnom pravu)“ (Živanović, 1959: 337).

Postoje, dakle, tri elementa pojma prekršioca. Prvi je pokušajni prekršilac prava. Pokušaj, kako kod krivičnog prava, tako i kod ostalih delikata može naneti izvesnu materijalnu ili moralnu štetu i tako biti osnov za sankciju. Drugi je saučešće. Saučesnik može biti podstrekač i pomagač. Saučešće je pravno relevantno samo kod privatnog delikta i međunarodno pravnog delikta. Prekršilac prava može biti i pravno lice, kako kod privatnog, tako i kod javnog delikta. Treći element pojma prekršioca prava je po Živanoviću ispunjavanje objektivnih ličnih uslova odgovornosti. Živanović prelazi i u polipatriciju navodeći kao moguć i četvrti element izvršioca delikta. On je fakultativnog karaktera a sastoji se u predviđenosti izvršioca u zakonu (nulllus de- linquens sine lege).

I najzad, u vezi sa pravnom odgovornošću Živanović daje osnovni pojam sankcije. Po njemu je pravna sankcija “pravna *posledica* neprava (delikta) u *zakonu predviđena*, koja se *izriče* od nadležne državne (javne) *vlasti zbog* izvršenog neprava i prekršioca prava protiv *prekršioca* prava subjekta neprava (pojedinca ili pravnog lica), koju ovaj ima *lično* da izdrži i koja se *izriče* i izdržava *neposredno* ili *posredno* u *opštem* interesu“ (Živanović, 1959: 340.) U sledu svojih osnovnih pravnih pojmova, Živanović pominje i sankciju u prirodnom pravu i moralu.

Sankcija kao pravna posledica neprava se sastoji iz sedam elemenata. Prvi element koji postoji kod sankcija u svim granama prava je u tome što se sankcija sastoji u nanošenju zla, kao u krivičnom pravu, ili otklanjanju zla, odnosno povraćaja u pređašnje stanje u drugim granama prava, posebno u građanskom pravu. Drugi element sankcije je princip zakonitosti. Naime, sankcija mora biti predviđena u zakonu i to kako u krivičnom pravu tako i u građanskom pravu. Razlika je samo u tome što u građanskom pravu predviđenost sankcije nema politički značaj, odn. značaj zaštite čovekove slobode od samovolje državne vlasti i zakonodavca. Treći element sankcije je, najkraće rečeno, u tome što se sankcija izriče od nadležne državne vlasti, sudske ili administrativne. Četvrti element je, po Živanoviću, da se sankcija izriče zbog delikta, tj. da su oni njen pravni osnov. Peto obeležje je da se sankcija izriče protiv prekršioca prava. Šesto obeležje sankcije je princip personaliteta, što znači da je prekršilac prava lično izdržava. I najzad, sedmo obeležje sankcije je u tome što se ona izriče u opštem interesu i izdržava neposredno ili posredno kod odštete.

Svoje izlaganje o sankciji Živanović završava napomenom da pored kazne postoje i mere bezbednosti. Od sedam elemenata sankcije, gore navedenih, kod mera bezbednosti postoji pet: nanošenje zla, princip zakonitosti, izricanje od nadležne državne vlasti, delikt kao pravni osnov i izricanje u opštem interesu. Međutim, poslednja dva su u izvesnom smislu modifikovana. Naime, mere bezbednosti se izriču zbog opasnog stanja ali posredno. I drugo, mere bezbednosti se izriču ne samo u opštem nego i u ličnom interesu izvršioca.

3. Odnos Kelzenovog i Živanovićevog shvatanja

Prvo zapažanje, kada se uporede Kelzenovo i Živanovićevo shvatanje odgovornosti, je to što Kelzen izričito govori o odgovornosti a Živanović je pominje na par mesta. Međutim, u razradi pravne odgovornosti Živanović govori kroz osnovne pravne pojmove delikta, delinkventa i sankcije. Iste pojmove u analizi pravne odgovornosti nalazimo i kod Kelzena. U tom smislu, moguće je upoređivati ova dva shvatanja. Na prvi pogled takođe je očigledno da Kelzen govori o pravnoj odgovornosti u opštem i pravnom smislu, dok Živanović pored opšteg pojma odgovornosti razrađuje krivičnopravnu odgovornost. U metodološkom pogledu, oba pisca koriste analitičko-sintetički metod i induktivno-deduktivni. Zapaža se da Živanović odvojeno govori o deliktu, delinkventu i sankciji, a Kelzen u obrađivanju odgovornosti

ove pojmove stalno kombinuje. Utoliko nije lako pratiti Kelzenovu misao po Živanovićevoj šemi.

Po Živanoviću je delikt u svim granama prava povreda ili ugrožavanje subjektivnog prava. Ovaj pojam ima tri elementa: radnju, posledicu i uzročnu vezu među njima. Posebno ističe anglosaksonsko pravo po pitanju delikta i izvodi zaključak da tu postoje samo vanugovorni delikti. Naravno, kao krivičar svetskog glasa govori podrobnije o krivičnom deliktu kao osobenom rodu, koji se kvalitativno razlikuje od ostalih delikata. Kelzen polazi od toga da su delikt i sankcija dva elementa logički i značenjski povezana. Pravna odgovornost za delikt i pravna obaveza se poklapaju. Postoji i delikt propuštanja, poznatiji kao nehat. Odgovornost za nehat je pre jedna vrsta apsolutne odgovornosti nego oblik krivice. Za razliku od Živanovića, Kelzen je naklonjeniji građanskom pravu. U njemu nije u pitanju odgovornost za nečiji tuđi delikt kada subjekt prava odgovara za štetu koju je učinio neko drugi. Upoređujući Živanovićevo i Kelzenovo shvatanje, dolazimo do konstatacije da oni dotiču razne „tačke" delikta, odnosno prekršaja prava. To samo govori da se radi o jednom izuzetno višeznačnom pojmu koji se može posmatrati sa različitih strana. U suštini, međutim, njihova shvatanja su bliska. Odgovorno lice koje je podložno sankciji se i kod jednog i kod drugog stepenuje po težini i izaziva različite vrste odgovornosti.

U razradi delinkventa, odnosno prekršioca prava, Živanović nalazi da je on objekt sankcije. Daje kompleksnu definiciju istog koja se sastoji od tri, odnosno četiri elementa: pokušaj, saučesništvo, ispunjavanje objektivnih ličnih uslova odgovornosti i četvrti, fakultativan, predviđenost delinkventa u zakonu. Živanović, kao što je napred rečeno, zastupa tripatriciju. Prekršilac, odnosno delinkvent je zaseban element uz delikt i sankciju. Kelzen, u duhu svoje stroge logike, nalazi da se, kao što se poklapaju pravna odgovornost i pravna obaveza, poklapaju i delinkvent i subjekt pravne obaveze. Međutim, neophodna je terminološka razlika kad sankcija nije jedino uperena protiv delinkventa, već i protiv lica koja su u pravnoj vezi sa njim. To je slučaj kod pravnih lica. Odgovornost je u ovom slučaju kolektivna i apsolutna. Iz poređenja dvaju shvatanja delinkventa opet imamo zaključak kao i u pitanju delikta. Velika razuđenost i kod jednog i drugog.

Izrazito analitičko shvatanje Živanović daje o pojmu, vrstama i elementima sankcije. Sankciju određuje kao pravnu posledicu delikta. Razlikuje sankciju u prirodnom pravu i moralu od pravnih sankcija. Pravne sankcije mogu biti različite težine. Najteže, odn. najizrazitije

su sankcije u krivičnom pravu. Postoji čak sedam elemenata sankcija: 1. Nanošenje zla u krivičnom pravu, odnosno povraćaj u pređašnje stanje u građanskom pravu, 2. Princip zakonitosti koji u građanskom pravuštiti slobodu čoveka od zakonodavca i državne vlasti, 3. Izricanje od nadležne sudske ili administrativne vlasti, 4. Sankcija kao pravni osnov delikta, 5. Izricanje protiv delinkventa, 6. Personalitet, odn. lično izdržavanje od prekršioca i 7. Izricanje neposredno ili posredno u opštem interesu.

Kod Kelzena se u pogledu sankcije opet zapaža gradacija. Naime, kao što se poklapaju pravna odgovornost i pravna obaveza i delinkvent i subjekt pravne obaveze, tako se poklapaju i subjekt pravne obaveze i objekt sankcije. Ovo poslednje kod pravnih lica. Odgovorno za delikt je lice protiv koga je uperena sankcija. Kelzen uvodi u razmatranje vrednosni element, pravdu. Ona zahteva različite sankcije u slučaju postojanja krivice i nehata. U slučaju nehata, kao delikta propuštanja, Kelzen govori o drugoj vrsti „krivice". Nehat ima pravni ili moralnia ne psihološki element. Sve u svemu, očigledno da se i u pojmu sankcije prepoznaje velika pronicljivost oba autora.

4. Zaključak

Na opštem nivou definisanja odgovornosti i tri pojma koja je razrađuju, suštinski isto, ali terminološki različito postupaju Živanović i Kelzen. Tako postoji „skriveni" identitet u Kelzenovom shvatanju da se poklapaju delikt i subjekt obaveze i odgovornosti i Živanovićeve konstatacije da je delikt objekt sankcije. Naime, po Kelzenu je takođe subjekt pravne obaveze isto što i objekt sankcije kod pravnih lica. I dalje, po Kelzenu se poklapaju pravna odgovornost i pravna obaveza.

Integralna, odn. sintetička shvatanja uvek pružaju bolji uvid u istraživane pojave i veze, dajući bogatije pojmove i zakone. Utoliko, skupno shvatanje odgovornosti kod Živanovića i Kelzena daje puno znanja o ovom kompleksnom problemu. Kada se ovome dodaju i bogate klasifikacije, uvid u odgovornost postaje još bogatiji. Osnovna razlika Živanovićevog i Kelzenovog shvatanja odgovornosti je u tome što prvi daje apstraktnija saznanja, a drugi pored apstraktnih daje i podrobna znanja posebno o pravnoj odgovornosti.

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THE CONCEPTION OF LEGAL RESPONSIBILITY IN THE OPUS OF HANS KELSEN AND TOMA ŽIVANOVIĆ

Summary

The concept of legal responsibility (liability) implies a violation of the dispositive norm and subjecting the offender to envisaged sanctions. Legal responsibility is based on three key elements: the subject, the object, and the legal grounds of responsibility. The legal state (Rechtsstaat) is inconceivable without responsibility, which is present in all areas of law. In constitutional law, it is reflected in the legal and political responsibility of the state authorities. Civil and criminal liability differ in terms of sanctions. In civil law, there is subjective liability based on culpability and objective (strict) liability. As a consequence of committing a crime, criminal liability includes two elements: sanity and guilt. While guilt is a subjective element of a crime which cannot be avoided, criminal liability can be avoided.

According to Kelsen, the subject of legal responsibility and the legal obligation are equivalent. He distinguishes between subjective liability based on culpability and absolute (objective) liability. This distinction rests on the individualistic ideal of justice. Logically, the sanctions also differ in these two cases. Kelsen also recognizes collective responsibility (especially of legal entities), which is always absolute. In civil law, the subject of obligation and the subject of liability correspond. Živanović provides detailed accounts on the concepts of delict, delinquent, and sanction. According to Živanović, a delict (in all branches of law) is a violation or endangerment of a subjective right. A delinquent, i.e. the infringer of legal norms, is the object of sanction. In analyzing the concept of sanction, he identifies seven distinctive elements of a sanction. The comparison of Kelsen and Zivanovic's conceptions of legal responsibility yields notable results. Both authors were aware of many aspects of legal responsibility. In spite of the obvious terminological differences, they essentially discuss the same legal issues. When observed jointly, these two authors provide a wide-branching "scheme" of both legal responsibility in general and area-specific liability in particular.

Keywords: legal responsibility, natural law, positive law, delict, delinquent, sanction.

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originalni naučni rad
10.5937/zrpfn0-30740

UDK: 349.22:331.108.644.7(497.11)
331.106.44(497.11)
Rad primljen: 06.02.2021.
Rad prihvaćen: 16.02.2021.

POSLEDICE NEZAKONITOG OTKAZA U SLUČAJU DISKRIMINATORSKOG POSTUPANJA POSLODAVCA[**]

Apstrakt: *Svoje Ustavom zagarantovano pravo na rad zaposleni koji smatra da je dobio nezakoniti otkaz štiti u posebnom parničnom postupku regulisanom Zakonom o parničnom postupku Republike Srbije. Ako sud u toku postupka utvrdi da je zaposlenom prestao radni odnos bez pravnog osnova, može odlučiti da se zaposleni vrati na rad, da mu se isplati naknada štete i uplate pripadajući doprinosi za obavezno socijalno osiguranje za period u kome zaposleni nije radio, a sve u skladu sa odredbama Zakona o radu. Prekluzivni rok za pokretanje parničnog postupka jeste 60 dana. Nezakoniti otkaz može, između ostalog, biti posledica diskriminatorskog postupanja poslodavca. Zakon o zabrani diskriminacije ne predviđa rok za pokretanje parničnog postupka za zaštitu od diskriminacije, a kao jedan od pravozaštitnih zahteva stipuliše i izvršenje radnje radi uklanjanja posledica diskriminatorskog postupanja. Otkaz bez valjanog razloga predstavlja posledicu nezakonitog postupanja poslodavca, a njeno otklanjanje podrazumeva vraćanje zaposlenog na rad. Osnovno pitanje kojim se autori u radu bave jeste pitanje konkurentnosti Zakona o zabrani diskriminacije i Zakona o radu. Po zaposlenog i poslodavca različite su pravne posledice ukoliko se*

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zauzme stav da je Zakon o radu lex specialis za sve slučajeve nezakonitog otkaza, pa i one nastale u slučaju diskriminacije, a sasvim druge ukoliko se stane na stanovište da je Zakon o zabrani diskriminacije lex specialis za sve slučajeve diskriminacije, uključujući i one povodom radnih odnosa. Autori se u radu bave upoređivanjem odredaba Zakona o radu, Zakona o zabrani diskriminacije, ali i Zakona o parničnom postupku, pitanjem njihove kolizije i mogućim rešenjima za prevazilaženje dilema koje su se pojavile u teoriji i praksi povodom ostvarivanja prava na zaštitu od nezakonitog otkaza u slučaju diskriminacije.

Ključne reči: *diskriminacija, otkaz, vraćanje zaposlenog na rad, lično svojstvo.*

Prolog

Po povratku sa porodiljskog odsustva, Marta Mitić dobila je otkaz ugovora o radu. Dva i po meseca kasnije, na isto radno mesto primljen je Ratko Perić. Shvativši da je obmanuta kada joj je rečeno da je otkaz dobila zbog nepostojanja potrebe za radom, Marta Mirić odlučila je da svoje pravo zaštiti pred sudom. Ona smatra da je otkaz posledica činjenice da je koristila pravo na porodiljsko odsustvo i odsustvo sa rada radi nege deteta, kao i najave da želi ubrzo da proširi porodicu. Dok je prikupljala dokaze za svoju tvrdnju, rok od 60 dana za pokretanje posebnog parničnog postupka je protekao. Da li Marti stoji na raspolaganju još neki mehanizam zaštite?

1. Diskriminacija na radu – pojam i osnovna obeležja

Diskriminacija, kao negativna društvena pojava, svoje pravno uobličavanje i zabranu na međunarodnom planu dobija u XX veku. Od Univerzalne deklaracije o zaštiti ljudskih prava iz 1948. godine[1], preko Međunarodnog pakta o građanskim i političkim pravima[2] i Međunarodnog pakta o ekonomskim, kulturnim i socijalnim pravima[3],

1 Univerzalnu deklaraciju o ljudskim pravima usvojila je Generalna skupština UN 10. decembra 1948. (A/RES/217), a ovaj datum u svetu se obeležava kao Dan ljudskih prava.

2 Zakon o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima, *Sl. list SFRJ*, br. 7/71.

3 Zakon o ratifikaciji Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima, *Sl. list SFRJ*, br. 7/71.

te Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda i pratećeg Protokola 12[4] do danas, zaštitnici prava na nediskriminaciju prešli su trnovit put da se diskriminacija prepozna, definiše i izdiferenciraju njeni pojavni oblici.

Načelo jednakosti u zapošljavanju i zanimanju se, obično, određuje kao mogućnost jednakih šansi i postupanja u zapošljavanju i na radu. Na negativan način, ovo načelo određuje se kao načelo zabrane diskriminacije u zapošljavanju i na radu (Lubarada, 2016: 38).

U oblasti radnih odnosa, zloupotreba prava najčešće se dešava u vezi sa uslovima za zapošljavanje i očuvanje već zasnovanog radnog odnosa, kao i sa raspoređivanjem, profesionalnim napredovanjem, zaradom i drugim pogodnostima. Zloupotreba prava u ovoj oblasti realizuje se putem diskriminacije, odnosno putem davanja neosnovanih prvenstava (Paravina, 1996: 177).

Iako ne postoji univerzalna definicija diskriminacije, ona se najčešće stipuliše kao svako neopravdano pravljenje razlike ili stavljanje u nepovoljniji položaj jednog lica aktom, radnjom ili propuštanjem na osnovu nekog njegovog stvarnog ili pretpostavljenog ličnog svojstva. Za potrebe ovog rada, koristićemo određenje iz Zakona o zabrani diskriminacije, prema kome je zabranjena diskriminacija u oblasti rada, odnosno narušavanje jednakih mogućnosti za zasnivanje radnog odnosa ili uživanje pod jednakim uslovima svih prava u oblasti rada, kao što su pravo na rad, na slobodan izbor zaposlenja, na napredovanje u službi, na stručno usavršavanje i profesionalnu rehabilitaciju, na jednaku naknadu za rad jednake vrednosti, na pravične i zadovoljavajuće uslove rada, na odmor, na obrazovanje i stupanje u sindikat, kao i na zaštitu od nezaposlenosti[5].

Najnovija istraživanja pokazuju da akteri na tržištu rada u velikoj meri percipiraju diskriminaciju u sferi rada i zapošljavanja. Da je diskriminacija u ovoj oblasti prisutna smatra 92% poslodavaca, 84% zaposlenih i 86% nezaposlenih. Isto istraživanje pokazuje da među zaposlenima izraženiju percepciju imaju žene (86%), mlađi (91%) i stariji radnici (87%). Najzastupljenija oblast doživljene diskriminacije za nezaposlene je zasnivanje radnog odnosa, a zaposlenih

4 Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda i pratećih protokola, *Sl. list SCG – Međunarodni ugovori*, 9/2003, 5/2005, 7/2005 – ispr. i *Sl. glasnik RS – međunarodni ugovori*, 12/2010, 10/2015.

5 Čl. 24Zakona o zabrani diskriminacije, *Sl. glasnik RS*, br. 22/2009, u daljem tekstui ZZD.

sam proces rada. Važno je naglasiti da su rezultati istraživanja pokazali da je svest aktera na tržištu rada o zabrani diskriminacije veća od proseka u opštoj populaciji. Ipak, zabrinjava činjenica da svaki peti poslodavac u Srbiji smatra da diskriminacija nije zabranjena zakonom(Diskriminacija na tržištu rada, 2019: 16–26).

Imajući tu činjenicu u vidu, važno je dati pregled normativnog okvira zabrane od diskriminacije koji će u prvi plan staviti one akte koji se tiču diskriminacije na radu. Već Univerzalna deklaracija o pravima čoveka ističe da „Svako, bez ikakve razlike, ima pravo na jednaku platu za jednak rad“[6]. Ova odredba može se smatrati uvertirom u Konvenciju MOR br. 100 o jednakoj naknadi za jednak rad[7] iz 1951. godine.Smatra se prvim obavezujućim međunarodnim instrumentom sa ciljem da se promoviše jednakost, kao i da se elimiiše diskriminacija (Petrović, 2009: 179). Međutim, ubrzo je shvaćeno da se jednaka plata ne može postići bez eliminacije diskriminacije u svim oblastima zapošljavanja, kao i da ostali vidovi diskriminacije moraju biti zabranjeni. Zbog toga je 1958. godine Međunarodna organizacija rada usvojila Konvenciju o diskriminaciji u pogledu zapošljavanja i zanimanja (br. 111)[8] (Petrović, 2009: 180).

Naredni značajan dokument donet pod pokroviteljstvom Ujedinjenih nacija jeste Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima iz 1977. godine. U čl. 7 Pakta, koji se odnosi na uslove rada, naročito se ističe pravična i jednaka zarada za rad jednake vrednosti bez ikakve razlike, uz naglašavanje da se rad žena mora vrednovati na isti način kao i rad muškaraca. Konvencija o eliminisanju svih oblika diskriminacije žena (CEDAW Konvencija)[9] u čl. 11 utvrđuje obavezu

6 Čl. 23, st. 2 Univerzalne deklaracije.

7 Ukaz o ratifikaciji Konvencije o jednakosti nagrađivanja muške i ženske radne snage za rad jednake vrednosti, *Sl. vesnik Prezidijuma Narodne skupštine FNRJ,* br. 12/52.

8 Uredba o ratifikaciji Konvencije Međunarodne organizacije rada koja se odnosi na diskriminaciju u pogledu zapošljavanja i zanimanja, *Sl. list FNRJ – Međunarodni ugovori*, br. 3/61.

9 Zakon o ratifikaciji Konvencije o eliminisanju svih oblika diskriminacije žena, *Sl. list SFRJ – Međunarodni ugovori*, br. 11/81. Naročito se apostrofira: a) Pravo na rad kao neotuđivo pravo svakog ljudskog bića; b) Pravo na jednake mogućnosti zapošljavanja, uključujući primenu istih kriterijuma za odabir po pitanju zapošljavanja; c) Pravo na slobodan izbor profesije i zaposlenja, pravo na unapređenje, sigurnost na poslu i sve beneficije i uslove za usluge i pravo na profesionalnu obuku i prekvalifikovanje, uključujući pripravnički staž, naprednu profesionalnu obuku i rekurentnu obuku; d) Pravo na jednaku platu, uključujući beneficije, i na jednak

država članica da preduzmu sve potrebne mere kako bi se eliminisala diskriminacija žena u oblasti rada i zapošljavanja.

U okviru normativnog okvira zaštite od diskriminacije na radu neizostavno je pomenuti akta doneta u okviru Međunarodne organizacije rada (MOR). Još 1938. godine Opšta konferencija je pozvala države članice da usvoje princip jednakog postupanja prema svim radnicima, da bi u nizu dokumenata koja su kasnije usvajana (Filadelfijska deklaracija ili Deklaracija o osnovnim principima i pravima na radu) ovaj princip ponavljan ili proširivan. Ipak, najznačajnija dokumenta predstavljaju Konvencija br. 111 o diskriminaciji iz 1958. godine i Konvencija br. 100 o jednakom plaćanju iz 1951. godine (Opširnije: Petrušić, Obradović, Raičević, Miladinović Stefanović, Tasić, 2017: 98–102; Priručnik za borbu protiv diskriminacije na radu, 2012: 47–55).

Na nacionalnom planu, svakako je najznačajniji Ustav Republike Srbije[10], koji zabranjuje svaku diskriminaciju, neposrednu ili posrednu, po bilo kom osnovu, a naročito po osnovu rase, pola, nacionalne pripadnosti, društvenog porekla, rođenja, veroispovesti, političkog ili drugog uverenja, imovnog stanja, kulture, jezika, starosti i psihičkog ili fizičkog invaliditeta. Da princip nediskriminacije ne ostane samo Ustavom proklamovano načelo, zakonodavac se postarao donošenjem Zakona o zabrani diskriminacije, opšteg i osnovnog zakona u ovoj oblasti. Osim ovog krovnog zakona, diskriminacija je zabranjena i Zakonom o ravnopravnosti polova[11], Zakonom o sprečavanju diskriminacije osoba sa invaliditetom[12] i Zakonom o radu[13].

tretman u radu jednake vrednosti, kao i jednak tretman u proceni kvaliteta rada; e) Pravo na socijalnu zaštitu, naročito u slučajevima penzionisanja, nezaposlenosti, bolesti, invaliditeta, starosti i drugih nemogućnosti za rad, kao i pravo na plaćeno odsustvo; f) Pravo na zdravstveno osiguranje i sigurnost u radnim uslovima, uključujući zaštitu reproduktivne funkcije.

10 Čl. 21Ustava Republike Srbije, *Sl. glasnik RS*, br. 98/2006.

11 Zakon o ravnopravnosti polova, *Sl. glasnik RS*, br. 104/09. Ovaj Zakon, u Glavi II – Zapošljavanje, socijalna i zdravstvena politika bavi se i pitanjem diskriminacijena radu.

12 Zakon o sprečavanju diskriminacije osoba sa invaliditetom, *Sl. glasnik RS*, br. 33/2006 i 13/2016. Članovi 21–26 ovog Zakona posvećeni su diskriminaciji u vezi sa zapošljavanjem i radnim odnosima.

13 Čl. 18–23 Zakona o radu, *Sl. glasnik RS*, 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – odluka US, 113/2017 i 95/2018 – autentično tumačenje, u daljem tekstu i ZR.

2. Sudska građanskopravna zaštita od diskriminacije

Zakon o zabrani diskriminacije predstavlja opšti i osnovni zakon u sferi zaštite od diskriminacije. Osim normi supstancijalnog karaktera, njime je uređen i poseban parnični postupak za zaštitu od diskriminacije. Ovaj postupak uređen je fragmentarno – propisana su odstupanja od pravila opšteg parničnog postupka i shodna primena Zakona o parničnom postupku[14]. Pravilima ZZD propisan je krug aktivno procesno legitimisanih subjekata, apostrofiran značaj pojedinih procesnih načela i navedene vrste zahteva koji u postupku mogu da se istaknu. Uvedena su i posebna pravila o mesnoj nadležnosti, izricanju privremenih mera, izjavljivanju pravnih lekova i preraspodeli tereta dokazivanja[15].

Na osnovu Zakona o uređenju sudova[1617], u prvom stepenu nadležan je viši sud. U ovim postupcima, u skladu sa pravilima ZPP, sudi sudija pojedinac[18]. Uvedena su pravila o elektivnoj mesnoj nadležnosti, pa je, pored suda opšte mesne nadležnosti, nadležan i sud na čijem je području sedište, odnosno prebivalište tužioca[19].

14 Zakon o parničnom postupku, *Sl. glasnik RS,* br. 72/2011, 49/2013 – odluka US, 74/2013 – odluka US, 55/2014, 87/2018 i 18/2020, u daljem tekstu i ZPP.

15 Bez obzira što se proučavaju u okviru procesnog prava, pravila o teretu dokazivanja smatraju se materijalnopravnim pitanjem, dok je stav da je reč o procesnopravnoj kategoriji izuzetno redak u kontinentalnom pravnom krugu. Sledeći materijalnopravni propisi se najčešće navode kao oni koji sadrže pravila o teretu dokazivanja: čl. 37, st. 2 Zakona o osnovama svojinskopravnih odnosa, *Sl. list SFRJ,* br. 6/80 i 36/90, *Sl. list SRJ,* br. 29/96 i *Sl. glasnik RS*, br. 115/2005 – dr. zakon ili čl. 154 Zakona o obligacionim odnosima, *Sl. list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Sl. list SRJ*, br. 31/93, *Sl. list SCG*, br. 1/2003 – Ustavna povelja i *Sl. glasnik RS*, br. 18/2020 – o osnovima odgovornosti za štetu (Poznić, Rakić Vodinelić, 2010: 320). O teretu dokazivanja u antidiskriminacionim parnicama Tasić, 2018: 325–336.

16 Čl. 23, st. 1, t. 7 Zakona o uređenju sudova, *Sl. glasnik RS*, br. 116/2008, 104/2009, 101/2010, 31/2011 – dr. zakon, 78/2011 – dr. zakon, 101/2011, 101/2013, 106/2015, 40/2015 – dr. zakon, 13/2016, 108/2016, 113/2017, 65/2018 – odluka US, 87/2018 i 88/2018 – odluka US, u daljem tekstu i ZUS.

17 Kada je postupak u parnicama za zaštitu od diskriminacije kreiran, za postupke iz ove oblasti bio je nadležan osnovni sud u prvom stepenu. Izmenama ZUS koje su stupile na snagu 2013. godine, ovi postupci prešli su u nadležnost višeg suda.

18 Čl. 35, st. 3 ZPP.

19 Čl. 42 ZZD. Opšte mesno nadležan je sud prema mestu prebivališta, a pod određenim uslovima i boravišta tuženog (čl. 39. ZPP), a u parnicama iz vanugovorne odgovornosti za štetu sudi i sud na čijem je području štetna radnja izvršena ili sud na čijem je području štetna posledica nastupila (čl. 44, st. 1 ZPP).

Načelo hitnosti, na kome insistira ZZD[20], nije konkretizovano kroz utvrđivanje preciznih rokova. Tako, na primer, nema roka u kome mora biti održano prvo ročište, nije propisan maksimalan broj ročišta koji može da bude održan tokom prvostepene glavne rasprave, niti ukupan period vremena u kome prvostepeni postupak treba da bude okončan[21].

Osim Marte, sa početka našeg rada, koja u skladu sa ZZD predstavlja lice koje smatra da je povređeno diskriminatorskim postupanjem, sudsku građansko-pravnu zaštitu od diskriminacije mogu tražiti još i Poverenik za zaštitu ravnopravnosti, organizacija koja se bavi zaštitom ljudskih prava, odnosno prava određene grupe lica, i lice koje se svesno izložilo diskriminatorskom postupanju, u nameri da neposredno proveri primenu pravila o zabrani diskriminacije[22].

Vrsta zahteva koja se može istaći zavisi od subjekta koji pokreće konkretnu parnicu. Mogu se istaći deklarativni zahtev, kojim se traži od suda da utvrdi da je tuženi izvršio diskriminaciju prema tužiocu ili drugome; zahtev za propuštanje diskriminatorske radnje kojim se traži zabrana radnje od koje preti diskriminacija, zabrana daljeg vršenja diskriminacije, odnosno zabrana ponavljanja radnje diskriminacije; zahtev za uklanjanje posledica diskriminatorskog postupanja; odštetni zahtev i zahtev za objavljivanje presude[23]. Odštetni zahtev može istaći samo diskriminisano lice. Sve ostale zahteve mogu istaći i ostali aktivno procesno legitimisani subjekti.

Zakonodavac nije propisao rok za podizanje tužbe i pokretanje postupka u parnicama za zaštitu od diskriminacije. Tužilac, dakle, u ovim parnicama ne može da bude prekludiran[24]. To, ipak, ne znači da on ne mora

20 Čl. 41, st. 3 ZZD.

21 Ovakvih primera ima u pojedinim domaćim zakonima. Tako, u skladu sa čl. 204, st. 3, 4 i 5 Porodičnog zakona, *Sl. glasnik RS*, br. 18/2005, 72/2011 – dr. zakon i 6/2015, postupci u vezi sa porodičnim odnosima sprovešće se, po pravilu, na najviše dva ročišta. Prvo ročište zakazuje se tako da se održi u roku od 15 dana od dana podnošenja inicijalne parnične radnje (tužbe ili predloga), a drugostepeni sud je dužan da odluči o žalbi u roku od 30 dana od dana kada mu je dostavljena. Prilikom donošenja Zakona o radu 2005. godineu čl. 195, st. 3 bilo je propisano da se postupak u parnicama iz radnih odnosa pravnosnažno okončava u roku od šest meseci od dana pokretanja postupka. Od ovog rešenja se, međutim, odustalo u kasnijim novelama zakona.

22 Čl. 41 i 46 ZZD.

23 Čl. 43 ZZD.

24 Zakon o zabrani diskriminacije Bosne i Hercegovine, *Sl. glasnik BiH*, br. 59/09 i 66/16, primer je antidiskriminacionog zakona u regionu koji predviđa rok za podizanje tužbe. U skladu sa čl. 13, st. 4 ovog zakona, rok za podizanje tužbe za

da vodi računa o rokovima ukoliko želi da uspe u parnici. U parnicama u kojima je istaknut odštetni zahtev važe rokovi zastarelosti obligacionog prava, propisani Zakonom o obligacionim odnosima. Subjektivni rok zastarelosti potraživanja naknade prouzrokovane štete jeste tri godine od kada je oštećenik saznao za štetu i štetnika,a objektivni rok pet godina od kada je šteta nastala[25].

Za predmet ovog rada posebno je važna mogućnost tužioca da istakne zahtev za otklanjanje posledica diskriminatorskog postupanja. Cilj ovog zahteva jeste ponovno uspostavljanje stanja koje je postojalo pre povrede prava na nediskriminaciju. Ovaj zahtev podrazumeva određenu aktivnost, izvršenje tačno određene radnje. Sa aspekta izvršenja odluke, ta radnja može biti ona koju može da izvrši samo tuženi i ona koju može da izvrši i neko treće lice.

Revizija je uvek dozvoljena. Poseban paricioni rok za dobrovoljno izvršenje činidbe nije određen, te on iznosi osam dana od dana dostavljanja izvršne isprave izvršnom dužniku[26].

3. Postupak u parnicama iz radnih odnosa

Postupak u parnicama iz radnih odnosa predstavlja poseban parnični postupak regulisan pravilima ZPP-a. Njime se, između ostalog, pruža zaštita u sporovima povodom zasnivanja, postojanja i prestanka radnog odnosa, uključujući i zaštitu od nezakonitog otkaza.Novija teorija radnog prava pravi razliku između „nezakonitog“ otkaza (otkaza datog protivno izričitim zakonskim odredbama) i „neopravdanog otkaza“. Potonji pojam, teško odrediv i u teoriji i u praksi, svoje utemeljenje

zaštitu od diskriminacije jeste tri meseca od dana saznanja za učinjenu povredu (subjektivni rok), odnosno godinu dana od učinjene povrede (objektivni rok). Kada je u pitanju kontinuirana diskriminacija, rok se računa od dana poslednje učinjene radnje. Rokovi se ne računaju u slučaju sistemske diskriminacije. Unošenje pravila o kontinuiranoj i sistemskoj diskriminaciji rezultat je izmena i dopuna ovog zakona iz 2016. godine. Upravo se na nejasan kriterijum za određivanje početka toka roka u slučaju kontinuirane diskriminacije ukazivalo u literaturi po donošenju inicijalne verzije zakona (Hanušić, 2013: 29), tako da se nova redakcija teksta može smatrati malim „trijumfom“ na putu ka pravnoj sigurnosti.

25 Čl. 376, st. 1 i 2 ZOO.

26 Čl. 47, st. 1Zakona o izvršenju i obezbeđenju, *Sl. glasnik RS*, br. 106/2015, 106/2016 – autentično tumačenje, 113/2017 – autentično tumačenje i 54/2019, u daljem tekstu i ZIO. O paricionom roku detaljnije: Keča, Knežević: 2015, 49–73.

nalazi u Konvenciji 158 MOR o prestanku radnog odnosa na incijativu poslodavca[27] (Obradović, Kovačević Perić, 2014: 201).

Pravne posledice nezakonitog otkaza i obaveze poslodavca propisane su čl. 191 ZR. U skladu sa ovom odredbom, tužilac može da istakne zahtev za vraćanje na rad, zahtev da mu se isplati naknada štete, kao i zahtevda mu se uplate pripadajući doprinosi za obavezno socijalno osiguranje za period u kome zaposleni nije radio. Zahtev za vraćanje zaposlenog na rad i zahtev za naknadu štete ne mogu se istaći kumulativno. U slučaju da sud u toku postupka utvrdi da je zaposlenom prestao radni odnos bez pravnog osnova, a zaposleni ne zahteva vraćanje na rad, sud će, na zahtev zaposlenog, naložiti poslodavcu da zaposlenom isplati naknadu štete u iznosu od najviše 18 zarada zaposlenog. Visina dosuđene naknade zavisiće od vremena provedenog u radnom odnosu kod poslodavca, godina života zaposlenog i broja izdržavanih članova porodice[28].

U postupcima u parnicama iz radnih odnosa proklamovano je, ali ne i konkretizovano, načelo hitnosti, budući da je ranija odredba ZR o maksimalnoj dužini trajanja postupka do pravnosnažnosti odluke prestala da važi.

U skladu sa pravilima ZPP, u prvom stepenu sudi sudija pojedinac[29]. Rok za dobrovoljno ispunjenje obaveza iznosi osam dana. Revizija je dozvoljena u parnicama povodom sporova o zasnivanju, postojanju i prestanku radnog odnosa.

Dopunska pravila propisana su Zakonom o radu. Prekluzivni rok za pokretanje postupka za zaštitu prava iz radnog odnosa jeste 60 dana od dana dostavljanja rešenja, odnosno saznanja za povredu prava[30]. Po svoj prilici, zakonodavac je odredio samo subjektivni, ne i objektivni rok za pokretanje parničnog postupka. Sumnjamo da je tendencija zakonodavca bila da se ovaj postupak može pokrenuti kad god zaposleni sazna za razloge nezakonitog otkaza, te ovo smatramo propustom ili nedorečenošću zakona. Interes poslodavca, ali i zaposlenog jeste da se egzistencijalno pitanje, poput vraćanja zaposlenog na rad, reši ušto kraćem roku. Na taj način bi se pružila efikasna pravna zaštita,

27 Zakon o ratifikaciji Konvencije Međunarodne organizacije rada broj 158 o prestanku radnog odnosa na inicijativu poslodavca, *Sl. list SFRJ – međunarodni ugovori*, br. 4/84.

28 Čl. 191, st. 5 ZR.

29 Postupak u parnicama iz radnih odnosa: čl. 436– 441 ZPP.

30 Čl. 195, st. 2 ZR. Ovaj rok je izmenama i dopunama Zakona o radu sa 90 skraćen na 60 dana.

ali i zaštitilo eventualno savesno treće lice koje je poslodavac u međuvremenu zaposlio.

4. Konkurentnost ili komplementarnost sudske zaštite povodom nezakonitog otkaza zbog diskriminacije?

Centralno pitanje ovog rada jeste po kojim pravilima se pruža pravna zaštita licu koje je dobilo nezakoniti otkaz zbog diskriminacije. Pred Martom Mitić sa početka rada stoje dva puta – postupak u parnicama za zaštitu od diskriminacije, prema pravilima ZZD, i postupak u parnicama iz radnih odnosa, prema pravilima ZR.

Ukoliko se opredeli da se protiv posledica nezakonitog otkaza „bori" u parnici iz radnih odnosa, tužilja će, prema okolnostima ovog konkretnog slučaja, biti prekludirana. Rok od 60 dana od dana prijema rešenja, odnosno saznanja za povredu prava, protekao je. Sud će, po prethodnom ispitivanju tužbe, doneti rešenje o njenom odbacivanju[31].Da nije protekao, postavilo bi se pitanje na koji način bi se sud u ovoj radnopravnoj parnici odnosio prema pitanju diskriminacije. To bi, po svojoj prirodi, bilo prethodno pitanje. To je ono pitanje o postojanju prava ili pravnog odnosa od koga zavisi donošenje odluke, a o kome sud ili drugi nadležni organ još uvek nije doneo odluku (čl. 12 ZPP). „Prethodno pitanje" kod prethodnog pitanja jeste da li je sud nadležan da ga rešava. Ukoliko jeste, to nije pitanje izbora, a od parničnih stranakazavisi da li će se on o tome izjasniti u dispozitivu ili obrazloženju odluke (Keča, 2014: 155). U slučaju da, međutim, nije nadležan, sudu na raspolaganju stoje dve mogućnosti – da sam reši prethodno pitanje ili da prekine postupak i sačeka da sud ili drugi nadležni organ reše prethodno pitanje kao glavno. Ukoliko odluči da sam reši prethodno

31 Čl. 294, st. 1, t. 2 ZPP. U sudskoj praksi se, međutim, može naći i ovakva odluka: „Prema članu 195, stav 1 i 2 Zakona o radu („Službeni glasnik RS", broj 24/05...) protiv rešenja kojim je povređeno pravo zaposlenog ili kad je zaposleni saznao za povredu prava, zaposleni, odnosno predstavnik sindikata čiji je zaposleni član ako ga zaposleni ovlasti, može da pokrene spor pred nadležnim sudom. Rok za pokretanje spora jeste 90 dana od dana dostavljanja rešenja, odnosno saznanja za povredu prava. Kako je tužiocu rešenje o prestanku radnog odnosa uručeno 15.07.2009. godine, a tužbu sudu je podneo 29.07.2010. godine, protekao je rok od 90 dana predviđen članom 195, stav 2 Zakona o radu za pokretanje spora pred sudom, pa je pravilno odbijen tužbeni zahtev tužioca kojim je tražio da se utvrdi da je nezakonito rešenje o prestanku radnog odnosa." (Presuda Vrhovnog kasacionog suda, Rev2 424/2014 od 03.12.2015. godine). Smatramo da se blagovremenost može isključivo tretirati kao procesna, a ne kao materijalna posledica, te da njen nedostatak dovodi do odbacivanja tužbe, a ne odbijanja tužbenog zahteva.

pitanje, odluka ima dejstvo samo u parnici u kojoj je to pitanje rešeno. O njemu će se sud izjasniti u obrazloženju, a ne u dispozitivu presude. Pravnosnažno, odnosno konačno rešenje prethodnog pitanja, različito od onoga koje je doneo sud pred kojim se prethodno pitanje pojavilo, predstavlja razlog za ponavljanje postupka[32]. Sa druge strane, ukoliko odbije da sam reši prethodno pitanje, to je razlog za prekid postupka. Postupak će se nastaviti kada se pravnosnažno okonča postupak u kome se to pitanje pojavljuje kao glavno ili ako sud nađe da više ne postoje razlozi da se čeka njegovo okončanje[33]

Prekid postupka zbog rešavanja prethodnog pitanja kosio bi se sa proklamovanim načelom hitnosti u postupcima povodom rešavanja sporova iz radnog odnosa. „Razuman rok" u kome stranka ima pravo da bude odlučeno o njenim zahtevima i predlozima predstavlja pravni standard[34]. Ovaj standard zavisi od okolnosti konkretnog slučaja – složenosti činjeničnih i pravnih pitanja, celokupnog trajanja postupka i ponašanja stranaka, suda i drugih državnih organa, prirode i vrste predmeta suđenja ili istrage, njihovog značaja za stranku, poštovanja rešavanja redosleda rešavanja predmeta i zakonskih rokova za zakazivanje ročišta i glavnog pretresa i donošenje odluka[3536].

Dakle, prekid postupka u parnicama iz radnih odnosa da bi sud odlučio o postojanju diskriminacije kao prethodnom pitanju mogao bi da dovede

32 Čl. 426, st. 1, t. 9. ZPP.

33 Čl. 225 ZPP.

34 Jedan od mehanizama obezbeđivanja da se postupak sprovede u razumnom roku jeste i institut vremenskog okvira parnice. Sankcija za nepostupanje sudije u vremenskom oviru je osnov za pokretanje disciplinskog postupka, u skladu sa odredbama Zakona o sudijama (čl. 10, st. 3 ZPP).

35 Čl. 4 Zakona o zaštiti prava na suđenje u razumnom roku, *Sl. glasnik RS*, br. 40/2015.

36 Vrhovni kasacioni sud predstavio je *Kriterijume za ocenu povrede prava na suđenje u razumnom roku Evropskog suda za ljudska prava prema izveštaju CEPEJ-a.* Dostupni na https://www.vk.sud.rs/sites/default/files/attachments/Kriterijumi%20za%20ocenu%20povrede%20prava%20na%20sudjenje%20u%20razumnom%20roku_0.pdf, preuzeto 15.01.2021. U ovim Kriterijumima navedeno je, između ostalog, da se u „jednostavnim" predmetima razumnim rokom smatra trajanje postupka do dve godine. U prioritetnim pak predmetima, razumnim rokom smatraće se (nedefinisani, *prim. aut*) kraći rok od dve godine za okončanje prvostepenog postupka. Prioritenim predmetima smatraju se, između ostalog, i radni sporovi (otkaz, prestanak radnog odnosa, otpuštanje, isplata zarada). Navedeni su još i nakanda štete za žrtve nesreća, slučajevi u kojima su podnosioci predstavke u kasnijem životnom dobu ili su ugroženog ili kritičnog zdravstvenog stanja, porodični sporovi, slučajevi u kojima podnosioci predstavke imaju određeni psihički ili fizički invaliditet, slučajevi policijskog nasilja ili slučajevi u kojima se podnosilac već nalazi na odsluženju zatvorske kazne.

do odugovlačanja postupka, posebno imajući u vidu dve činjenice – sporovi za zaštitu prava na ravnopravnost se uopšte ne nalaze na (gorenavedenoj) listi prioritetnih sporova za rešavanje u razumnom roku, a načelo hitnosti nije ni na koji način konkretizovano; sa druge strane, u ovim postupcima važe specifična pravila o dokazivanju, a dokazivanje je, po pravilu, složeno. Prema pravilima o preraspodeli tereta dokazivanja, tužilac treba da učini verovatnim da je tuženi učinio akt diskriminacije, nakon čega teret dokazivanja da usled tog akta nije došlo do povrede načela jednakosti, odnosno jednakih prava i obaveza, snosi tuženi[37].

Naredno pitanje koje se može postaviti jeste pitanje objektivne kumulacije. Otvara se, naime, problem da li je prvostepeni sud koji rešava spor u parnici povodom radnopravnih odnosa nadležan da reši antidiskriminacioni spor, te da li se zahtev za utvrđenje diskriminacije i zahtev za poništaj rešenja o nezakonitom otkazu mogu kumulirati. Mogu se izdvojiti dva sporna pitanja. Prvo se tiče stvarne nadležnosti. Za radnopravne parnice u prvom stepenu nadležan je osnovni sud. Sa druge strane, za antidiskriminacione parnice nadležan je viši sud.Po pravilima opšteg parničnog postupka, sud u toku celog postupka vodi računa o svojoj stvarnoj nadležnosti. Viši sud se, nakon upuštanja tuženog u raspravljanje, ne može proglasiti stvarno nenadležnim u pravnim stvarima iz nadležnosti nižeg suda prvog stepena iste vrste. *Argumentum a contrario*, niži sud se može, ili, rađe, mora oglasiti stvarno nenadležnim ukoliko je u pitanju pravna stvar koja je u nadležnosti višeg suda u prvom stepenu. To, po našem mišljenju, predstavlja prepreku da osnovni sud može da o postojanju ili nepostojanju povrede prava na ravnopravnost odlučuje u postupku u parnicama iz radnih sporova i o tome se izjasni u dispozitivu odluke. Na istom stanovištu stoji i hrvatsko antidiskriminaciono pravo, kada u Zakonu o suzbijanju diskriminacije[38] propisuje da se zahtevi za zaštitu prava na ravnopravnost mogu istaći zajedno sa zahtevima za zaštitu drugih prava o kojima se odlučuje u parničnom postupku ako su svi zahtevi u međusobnoj vezi i ako je istisud stvarno nadležan za njih, bez obzira da li je za te zahteve propisano rešavanje u redovnom ili u posebnom parničnom postupku.

Osim toga, za ove dve pravne stvari nije predviđena ista vrsta postupka. Propisana su dva posebna parnična postupka, uz shodnu primenu Zakona o parničnom postupku.

37 Čl. 45, st. 2 ZZD.

38 Čl. 17, st. 3 Zakona o suzbijanju diskriminacije, *Narodne novine*, br. 85/08, 112/12, u daljem tekstu i ZSD.

Sa aspekta pravne sigurnosti, najbolje bi bilo da se zakonodavac sam odredio prema pitanju po kojim pravilima se sprovodi postupak za zaštitu od diskriminacije na radu. To ne bi predstavljalo presedan – već je u hrvatskom ZSD naglašeno da će se posebni postupci za zaštitu od diskriminacije u području rada i zapošljavanja smatrati sporovima iz radnih odnosa[3940].

Zbog čega je problem postupka u kome se vodi spor povodom diskriminacije na radu praktično, a ne samo teorijsko pitanje? Ukoliko je Marta Mitić prekludirana u mogućnosti da pokrene postupak u parnicama iz radnih odnosa, njoj i dalje na raspolaganju stoji postupak u parnici za zaštitu od diskriminacije. U tom postupku ona može istaći utvrđavni zahtev da sud nađe da je poslodavac diskriminatorski postupio prema njoj; zahtev da se poslodavac uzdrži od budućih akata diskriminacije; zahtev za objavljivanjem presude u medijima. Ukoliko budu usvojeni, svi ovi zahtevi doneće joj ličnu satisfakciju. Sem njih, ona može istaći zahtev za naknadu materijalne i nematerijalne štete. Postojanje štete se ne podrazumeva, već se mora utvrditi uzročna veza između povrede prava na ravnopravnost i nastalih posledica[41]. Naposletku, Marta može istaći i zahtev za otklanjanje posledica diskriminatorskog postupanja.

U zahtevu za otklanjanje posledica diskriminatorskog postupanja nalazi se suština problema. Da bismo mogli da govorimo o potpunom uspostavljanju stanja koje je postojalo pre nastupanja čina diskriminacije (otkaza), zaposlena mora biti vraćena na rad. Hipoteza od koje polazimo jeste

39 Čl. 16, st. 2 ZSD. U literaturi se ističe da se antidiskriminacioni zahtevi mogu istaći i u redovnim i u posebnim parničnim postupcima, zajedno sa posebnim zahtevima iz tih postupaka. Sporovi će se rešavati po pravilima koja bi bila merodavna za kumulirane zahteve (na primer, po pravilima za rešavanje radnih sporova), a uz odstupanja koja proizilaze iz pravila posebnog parničnog postupka za zaštitu od diskriminacije (Uzelac, 2009: 98).

40 Sa druge strane, u pravnoj teoriji je zastupljen i stav da „spor povodom diskriminacije u oblasti rada nije radni spor". Povlači se paralela sa postupcima u parnicama iz porodičnopravnih odnosa – „kao što veće za porodične sporove neće suditi u slučajevima diskriminacije po osnovu bračnog i porodičnog statusa, tako nema nikakve logike da u slučajevima diskriminacije u oblasti rada sude veća za radne sporove" (Reljanović, 2014: 99).

41 Iako se u pojedinim odlukama, uključujući i odluke Vrhovnog kasacionog suda (Rev 117/16 od 31.08.2016. godine) može sresti stav da „se revizijom neosnovano ukazuje da je tužilac bio u obavezi da dokaže da je pretrpeo nematerijalnu štetu…povreda bilo kog prava ličnosti, pa samim tim i vršenje diskriminacije u odnosu na neko lice ili grupu lica predstavlja vid nematerijalne štete", ovakav stav se ne može prihvatiti jer se ni u antidiskriminacionim parnicama postojanje i visina štete ne podrazumevaju (Tasić, 2018: 325–336).

da je jedino vraćanje zaposlene na rad izraz otklanjanja protivpravnog stanja. Da bi ostvarila ovaj cilj, Marta je, dakle, uspela da izbegne rok od 60 dana i posledice prekluzije. Šta je ona još postigla odlučivši se za pokretanje antidiskriminacione parnice? Obezbedila je, najpre, primenu pravila o preraspodeli tereta dokazivanja. Na njoj je, dakle, (samo) da učini verovatnim da ju je poslodavac otpustio zbog njene porodične situacije. Ona će to uraditi korišćenjem različitih dokaznih sredstava saslušanjem stranaka i svedoka ili upotrebom statističkih podataka (Petrušić, 2014: 33–50). Svakako, da bi postojanje diskriminacije učinila verovatnim, potrebno je da postoje konstitutivni elementi diskriminacije: nejednak tretman i lično svojstvo. U tu svrhu koristi se komparator, lice koje se nalazi u uporedivoj situaciji sa diskriminisanim licem, a ne poseduje isto svojstvo kao to lice, te nije stavljeno u nepovoljniji položaj. Ipak, komparator nije uvek neophodan. Tako, Evropski sud pravde stao je na stanovište da komparator nije neophodan u slučajevima trudnoće[42], porodiljskog odsustva[43] i odsustva radi podvrgavanja vantelesnoj oplodnji[44]. Smatra se da se sve ove okolnosti vezuju isključivo za ženu, pa se ona ne komparira sa drugim licem, već se postavlja pitanje da li bi se prema njoj diskriminator ponašao na isti način da se nije našla u jednoj od navedenih situacija. Ono što tužilja, zapravo, ne može da dokaže jeste postojanje razloga, odnosno motiva kod poslodavca da joj da otkaz. Upravo zbog toga teret dokazivanja, u smislu navođenja zakonitog i opravdanog razloga za otkaz, leži na poslodavcu. Opredeljujući se za vođenje antidiskriminacione parnice, Marta Mitić otvara mogućnost da Poverenik za zaštitu ravnopravnosti uzme učešće u parnici kao umešač. Međutim, i pre nego što je pokrenula postupak, ona je mogla da se pritužbom obrati Povereniku, pozivajući ga da sprovede postupak za utvrđivanje postojanja diskriminacije. Ukoliko Poverenik nađe da je postupak od suštinske važnosti za podizanje svesti društva o štetnosti diskriminatorskog postupanja, on može sam, po dobijanju saglasnosti diskriminisanog lica, da pokrene parnični postupak. Dakle, osim što može sama da se bori za zaštitu prava na ravnopravnost, Marta to može učiniti i uz pomoć nezavisnog državnog organa čiji je osnovni

42 Slučaj *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (C-177/88) predstavlja prekretnicu u pogledu neophodnosti komparatora. Gospođa *Dekker* nije dobila posao zbog trudnoće, iako je bila najbolja kandidatkinja. Sud je našao da, budući da samo žena može biti trudna, svaka takva diskriminacija ima se smatrati neposrednom diskriminacijom na osnovu pola, bez obzira na pol drugih zainteresovanih kandidata.

43 Case *North Western Health Board v. Margaret McKenna (*C-191/03).

44 Case *Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG* [GC] (C-506/06).

zadatak zaštita ravnopravnosti. Takođe, tužilja, pokretanjem postupka u parnici za zaštitu od diskriminacije, dolazi u situaciju da, prema pravilima o elektivnoj mesnoj nadležnosti, može da pokrene postupaki pred sudom koji je mesno nadležan prema njenom prebivalištu ili boravišu, umesto da se primene pravila o opštoj mesnoj nadležnosti.

Dakle, budući da je sam zakonodavac predvideo uklanjanje posledica diskriminatorskog postupanja kao jedan od pravozaštitnih zahteva, deluje da pravnoj teoriji, a i praksi, ne ostaje ništa drugo do da pristane na ovaj „pravni manevar" tužilje. Pa opet, kakav je odnos između ZZD i ZR? Da li je Zakon o zabrani diskriminacije *lex specialis* za sve slučajeve diskriminacije, pa i za diskriminaciju na radu, ili je Zakon o radu *lex specialis* za radne odnose, uključujući i one „kontaminirane" diskriminacijom? Ne treba zanemariti ni činjenicu da je ZZD *lex posterior* u odnosu na ZR. Da li, međutim, ovde treba sagledati odnos dva zakona u celosti, ili samo odnos normi koje se tiču nezakonitog otkaza i vraćanja zaposlenog na rad?

Ili, ipak, vraćanje zaposlenog na rad nije isključivi način za otklanjanje posledica diskriminatorskog postupanja? Ako se taj aksiom, ta hipoteza, može dovesti u pitanje, onda je pitanje šta je Marta, zapravo, postigla odabirom antidiskriminacionog postupka? Da li sud Marti može dosuditi nešto drugo na ime otklanjanja posledica diskriminatorskog postupanja, a ne vraćanje na rad? U slučaju da Marta ne zahteva vraćanje na rad, u skladu sa čl. 191, st. 5 ZR, sud joj može dosuditi naknadu štete, na njen zahtev. Postavlja se, međutim, pitanje, da li sud, čak i ako Marta zahteva povraćaj na rad, može da postupi u skladu sa čl. 191, st. 6. ZR? Može li sud, na zahtev poslodavca, da odlučiti da, bez obzira što je našao da diskriminacija postoji, postoje okolnosti koje opravdano ukazuju da nastavak radnog odnosa, uz uvažavanje svih okolnosti i interesa obe strane u sporu, nije moguć, i ne vrati Martu na rad? U tom slučaju dosudiće joj zakonom propisanu odgovarajuću naknadu. Dakle, odabirom antidiskriminacione parnice, Marta jeste u mogućnosti da ostvari neki vid kompenzacije, ali nema garancija da će je svaka utvrđavna presuda kojom je odlučeno da diskriminacija postoji dovesti i do faktičkog vraćanja na rad.

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Pitanje odnosa normi Zakona o radu i Zakona o zabrani diskriminacije u pogledu dikriminacije učinjene na radu ili povodom rada predstavlja kompleksno teorijsko i pravno pitanje. Kreirajući odredbe posebnih parničnih postupaka u parnicama za zaštitu od diskriminacije, odnosno

parnicama povodom radnih sporova, zakonodavac je propustio da uoči nužnu povezanost pojedinih odredaba i odredi odnos jednih pravnih normi u odnosu na druge. Nedovoljna senzitivnost iskazana ka ovom pitanju dovešće kako žrtve diskriminacije i nezakonitog otkaza, tako i neposredne primenjivače prava u nezavidan položaj. Pokušavajući da izađu iz lavirinta kontradiktornih zakonskih propisa, potencijalni tužioci postaju žrtve ograničavajućih zakonskih odredaba i ostaju bez mogućnosti da im se pravna zaštita pruži. Nadamo se da će neka naredna redakcija ovih pravnih propisa doneti jasna i nedvosmislena rešenja kojima će kreatori zakonskih propisa pokazati da im pojam „jedinstvo pravnog poretka" nije stran.

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THE CONSEQUENCES OF TERMINATION OF EMPLOYMENT RELATIONSHIP DUE TO DISCRIMINATION

Summary

This article focuses on the procedural norms concerning antidiscrimination and labour rights protection. By analyzing concrete legal norms, the authors attempt to address the key question: what is the appropriate way of ensuring legal protection for victims of unlawful termination due to discrimination? The fact is that two different legal procedures contain different rules about time limit for initiating civil proceedings, filing a claim or motions, as well as didderent rules on the burden of proof. These complex issues have been insufficiently addressed in theory and practice. For the purpose of overcoming this problem, the authors provide an insight into the comparative law solutions which may be used as guidelines in prospective legislative efforts and adjusted to the specific features of the legal system in the Republic of Serbia.

Key words*: discrimination, termination of employment relationship, returning an employee to work, personal characteristics.*

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originalni naučni rad
10.5937/zrpfn0-29394

UDK: 347.234
342:347.234
Rad primljen: 15.11.2020.
Rad prihvaćen: 11.01.2021.

EXPROPRIATION IN A MATERIAL SENSE[**]

Abstract: *Expropriation as a legal institute is both narrower and broader than expropriation in a formal sense (formal expropriation). Expropriation in a formal sense implies a due legal process of revoking or restricting the ownership right in a particular legal case by the operation of the law. Formal expropriation generates the establishment of various legal institutes, one of which is expropriation in a material sense. On the other hand, expropriation as a legal institute emerges outside the scope of formal expropriation), which occurs within the framework of restricting one's private ownership, as a result of direct statutory regulation (legislation) in particular areas of the legal order, and a result of the legal regulation in particular cases in judicial and other legal proceedings. Expropriation in a material sense exists only in cases where the transformation of private ownership into public ownership occurs through expropriation in a formal sense, for the purpose of achieving a specifically designated general interest, including the possibility of return to the previous state of affairs (de-expropriation). De-expropriation takes place at the request of the former owner if it is established that the intended purpose of expropriation has not been achieved. In effect, the possibility of de-expropriation is the differentia specifica that separates expropriation in a material sense from other legal institutes related to expropriation in a formal sense, as well as from quasi-expropriation and other forms of revoking and restricting the private ownership right under the legal authority of the state.*

Keywords: *formal expropriation, expropriation in a material sense, quasi-expropriation, expropriation as a legal institute, de-expropriation.*

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[**] This paper is the result of research supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia, under Agreement, No. 451-03-68/2020-14/200120

1. Expropriation as a legal institute

Expropriation is a legal institute with highly complex structure and a broad application in the existing legal orders of European countries, involving numerous aspects of its manifestation and various legal regulation regimes. In line with the constitutional private ownership guarantees,[1] expropriation in a formal sense (formal expropriation), as an unavoidable element of *Rechtsstaat* (a legal state governed by laws), entails a legal process of revoking or restricting the ownership right in a particular case, for the purpose of achieving a public interest. The legal process includes: (1) establishing public interest for revoking or restricting the ownership right, (2) adopting an individual legal act on revoking or restricting the ownership right, and (3) establishing compensation for the expropriated real estate or restricted ownership right.

In the author's opinion, *public interest* is a regulatory determinant of a legal order and a static expression of general welfare! *General interest* is a dynamic expression of general welfare, while *private interest* is a dynamic expression of individual (private) goods. General interest should not be equalled with public interest, bearing in mind that the projected purpose of expropriation involving the characteristics of general interest may be (but does not necessarily have to be) in the public interest. Public interest as a regulatory determinant is woven into all the stages of legal regulation of expropriation, including the assessment of the projected purpose of expropriation, the expropriation enforcement procedure, and particularly the compensation of the owner of the expropriated real estate.

Expropriation in a formal sense implies establishing the actual public interest for revoking or restricting the ownership right in a particular case by assessing the projected purpose of expropriation in relation to other legal interests and legal goods. Thus, public interest is a regulatory determinant in balancing the opposed legal interests in the expropriation procedure. For instance, constructing a hospital (as an expression of general welfare) reflects a general interest and justified purpose for expropriation, but it is still necessary to assess whether constructing a hospital is in the public interest when compared to the interests of private real estates proposed for expropriation. If the answer to this question is negative, it means that expropriation is not in the public interest. However, it is established that the answer is affirmative, public interest (as a regulatory determinant) further implies making a lawful decision on expropriation and a valid decision on the compensation for the expropriated real estate. Thereby,

1 Article 58 of the Constitution of the Republic of Serbia (2006) guarantees a peaceful enjoyment of ownership and other property rights acquired by the law, stipulating that the ownership right may be revoked or restricted in the public interest established by the law, and with compensation which cannot be less than the market value.

if the decision on expropriation is justified by a reason which could not have a character of a general interest as an expression of general welfare (e.g. construction of a shopping mall or a complex of residential and commercial buildings in a specific area), it does not mean that the reason could not be in the public interest. Considering that such construction does not involve a general interest as an expression of general welfare, the initiation of an expropriation procedure would be impermissible in such a case. Yet, in order to ensure that the legal regulation would attain the character of public interest, the projected goal may be achieved in another legally permitted manner (e.g. through legal regulation of the use of real estate in public ownership and exercising free will to contract in terms of objects in private ownership) (Prica, 2020: 157-186).

Legal institutes of intrinsically complex structure or permanent nature often generate myriads of legal cases involving various forms of legal regulation of particular legal matter. The complexity of legal regulation is most prominently manifested in the legal regime of formal expropriation. In this area, we may observe a powerful transference of features underlying the legal regulation of expropriation, which may include: administrative matters (in proceedings for establishing the public interest and adopting a decision on expropriation), contractual matters (regarding the compensation for expropriated real estate), judicial matters (extrajudicial proceedings on compensation for expropriated real estate, and litigation on disputes concerning the legal relationship between the expropriating authority and the expropriated party), and administrative, contractual and litigation matters in de-expropriation procedure.

Formal expropriation generates the establishment of different legal institutes,[2] one of which is expropriation in a material sense. It means that expropriation in a material sense is narrower than expropriation in a formal sense. On the other hand, expropriation as a legal institute emerges outside the scope of formal expropriation, within the framework of restricting one's private ownership as a

2 For instance, easements in general interest (administrative easements) are established in expropriation proceedings but these easements are further adjusted to the legal regime of easement, which is regulated under the Ownership and Real Property Relations Act, as the general legislative act regulating all easements in the Serbian legal order. It means that the relationship between administrative easements and typical civil law easements may be described as a relationship of a special legal institute *versus* a general legal institute. On the other hand, the legal regime of lease as a legal institute emanating from the Obligation Relations Act (ORA) cannot be applied to any lease in general interest, which is based on the expropriation procedure, bearing in mind that Serbian systemic legislative act on obligations excludes any possibility of applying general provisions to leases regulated otherwise by subject-specific legislation (Art. 568 ORA). Hence, administrative lease is a special legal institute whose relationship with the typical civil law lease cannot be defined in terms of a subject-specific legal institute versus a general legal institute.

result of direct statutory regulation (legislation) and a result of legal regulation of particular legal cases in judicial and other legal proceedings.

Quasi-expropriation refers to legal cases which emerge outside the scope of formal expropriation, but which rest on the legal grounds of expropriation in a formal sense. It distinguished such cases from the cases on revocation and restriction of private ownership right, which have a form of expropriation in a formal sense. Quasi-expropriation involves cases of legally permitted revocation and restriction of private ownership or other property rights, entailing the obligation to provide compensation. Thus, quasi-expropriation includes the forms of revocation or restriction of private ownership and property rights which are followed by compensation; the valid criteria for quasi-expropriation is the legal nature of expropriation as a legal instrument, i.e. its legal ground or the constituent elements of its legal regime.

The identification of legal institutes comes as a result of the functional analysis of relevant legal grounds, which reveals the correlation of legal grounds underlying the legal regimes in different areas of the legal order. In that context, the author posits that expropriation as a legal institute encompasses the entirety of legal matters and legal situations in different areas of the legal order (Prica, 2016: 83-365). Quasi-expropriation, expropriation in a formal sense, and expropriation in a material sense are correlated on the basis of the nature of the legal object, the legal case and the legal ground. The legal object is private ownership and related property rights, while the specific revocation or restriction of the ownership right has the character of a legal case. The legal ground is the excessive burden ("sacrifice") imposed on the titleholder of the ownership right, who is consequently entitled to compensation for the expropriated real estate. The compensation for expropriation aims to establish a balance between the opposed legal interests. In that context, it is important to clearly distinguish among expropriation in a formal sense, expropriation in a material sense, and quasi-expropriation, which is the focal point of examination in this paper.

2. Expropriation in a formal sense (Formal Expropriation)

Expropriation in a formal sense is envisaged as revocation or restriction of the private ownership right (in favour of general welfare), followed by compensation to the titleholder for the revoked or restricted ownership right. Historically speaking, the concept of formal expropriation emerged long before the creation of the liberal *Rechtsstaat*. But, it was only in the legal order of the liberal state that formal expropriation was fully established as a legal regime composed of goals, prerequisites, legal requirements, legal rules, and legal proceedings. Moreover, expropriation is a "shadow" that follows private ownership, as one

of the strong pillars of liberal *Rechtsstaat*. During the 19th and 20th century, the legal structure of expropriation experienced significant changes. Building upon its "beautiful youth " in the legal order of the liberal *Rechtsstaat*, expropriation reached its full maturity in the 20th century, gaining impressive presence in all European legal orders.

In the current European-continental legal orders, apart from the complete revocation of the ownership right (the so-called full expropriation), expropriation may also emerge in the form of restriction of the ownership right, by means of the legal institutes of easements, lease and temporary possession of land (the so-called incomplete expropriation). An additional feature in the existing European legal orders is the expansion of the legal regime of expropriation to other types of property; thus, besides immovable property (real estates), formal expropriation may include movable property, as well as individual property rights. For example, France allows the expropriation of patents for inventions pertaining to national defence and maritime cultural heritage (goods) located on a maritime property (Chapus, 1995: 618). Yet, the appropriation of movable property may only be allowed in case of urgency, whereby it produces the effect of requisition (as a special form of expropriation). The state of urgency is the only legal ground that can justify the expropriation of movable assets without undermining the *Rechtsstaat* doctrine.

When speaking about movable property as the subject matter (object) of expropriation, there are several forms of formal expropriation. First, considering the scope of expropriation, formal expropriation may be full and partial. The subject matter (object) of expropriation does not have to be the entire real estate; it can be one part of the estate if the general interest is met thereby. For example, in the expropriation of a real estate, it may be established that there is no need to expropriate the entire estate); as a result, the partition of the estate will ensue, and a newly created parcel of land will be designated as the subject matter (object) of expropriation. In the European-continental legal orders, as well as in Serbian law, the owner of the expropriated real estate is allowed, under the conditions prescribed by the law, to file a claim for expropriation of the remaining part of the immovable property.[3]

3 "In the legal order of the Republic of Serbia, the authority conducting the expropriation procedure is obliged to instruct the real property owner that he/she may file a claim for expropriation of the remaining part of the real estate. By acting otherwise, the authority substantially violates the rules of procedure; as a result, the first instance decision will be annulled in appeal proceedings" (Judgment of the Supreme Court of Serbia, U. 572/92 and U. 573/92, dated 10.6.1991, *Bulletin of judicial practice*, no. 1/1993, r. 69.)

The second form of formal expropriation are easements in general interest (administrative easements).[4] For the purpose of exploration works, lease of land in general interest (administrative lease)[5] can be established through formal expropriation, and provisional occupation of another's land may be allowed for the sake of public interest. As a specific form of expropriation in a formal sense, the transfer of public ownership from one public entity to another has taken root in Serbian law. It is the so-called administrative conveyance of ownership (formerly designated as societal ownership, now designated as public ownership).[6]

The subject matter (object) of expropriation in a formal sense is not the same in all legal orders; moreover, even if the subject matter of expropriation is the same, the legal character of individual forms of expropriation may vary in different legal orders. In France, for example, easements cannot be established in an expropriation procedure, which is possible in Serbian law and many other legislations. Similarly, French jurists commonly perceive the owner's claim for the expropriation of the remaining part of the real estate as an ordinary sale-purchase agreement, which does not fall within the concept of expropriation in a formal sense and expropriation in a material sense (Gjidara, 2008:102).

Furthermore, in the European legal orders, there is a need for several formal expropriation regimes. The basic formal expropriation regime is established by enacting the systemic legislative act on expropriation, which *inter alia* envisages a special legal regime of expropriation in extraordinary situations, for reasons of urgency (e.g. natural disasters). In France, for instance, the Environment Protection Act (1995) prescribes that the state may expropriate the land that is threatened by specific and substantial natural risks. In addition, bearing in mind that the legal regime of expropriation with a foreign element is based on the provisions of international treaties and international legal source, such expropriation regime should be differentiated from the basic formal expropriation regime based on the systemic legislative act on expropriation. In Switzerland, in addition to the formal expropriation in general interest, the legislation has

4 "A real estate easement for a specific period may be established through expropriation." (Judgment of the Supreme Court of Serbia, U. 3951/2005, dated 7.6.2006).

5 "In case of exploration works, only an incomplete expropriation may be allowed, including the lease of land for a specific period" (Judgment of the Supreme Court of Serbia, Už.1933/65, dated 11.6.1965, *Bulletin* no. 6/1966, p.49).

6 "Any organisation which, at the time of establishing compensation, uses the land on the basis of administrative conveyance, performed in compliance with the Expropriation Act, is obliged to pay the compensation for the expropriated land." (Legal opinion of the Department for Administrative Disputes of the Serbian Supreme Court, dated 14. 4. 1993, *Bulletin* no. 1/2010, r. 28).

envisaged a special legal regime of expropriation of neighbours' rights in the public interest (Vučković, 2016: 659-674).

Considering all the above, it is important to bear in mind that some forms of formal expropriation are only linked to a particular legal area, or particular legal order. As a specific form of formal expropriation, the French legislation envisages the expropriation of abandoned immovable property (*expropriation d'immeubles abandonnés*), which is subject to expropriation upon the decision of the local self-government authorities. English legislation envisages expropriation upon the autonomous application of the real estate owner, which is even more unusual from the aspect of Serbian law, where the owner's request for expropriation of the remaining estate has a secondary effect (given that the owner is entitled to file a request only after a part of the real estate has been expropriated).

Namely, in English law, the real estate owner, whose application for obtaining a construction permit is refused by the authorities, may request the public authorities to expropriate the particular real estate, i.e. to purchase it (which is more likely in the spirit of English law).

Thus, in terms of the subject matter and the purpose of expropriation, formal expropriation may be: permanent and provisional, and full and incomplete. According to the characteristics of the legal regime, it may be: basic formal expropriation, expropriation with a foreign element, and expropriation in extraordinary situations justified by urgency. As for the legal institutes which are established by means of formal expropriation, we should distinguish expropriation in a material sense and several forms of expropriation in a formal sense: administrative easements, administrative lease, provisional occupation of land in the public interest, and administrative conveyance of property.

3. Quasi-expropriation

Quasi-expropriation includes cases of legally permitted revocation and restriction of ownership and other property rights, which entails the obligation to provide relevant compensation. The legally permitted forms of expropriation are as follows: 1) expropriation as a legal principle which generates a norm for legal regulation of particular civil law matters (expropriation as a settlement of opposed private interests), 2) the so-called factual expropriation, involving *de facto* confiscation of the substance of private ownership, and 3) indirect expropriation, involving the restriction of ownership and other property rights, due to which the titleholders of such rights consequently suffer an excessive burden for the sake of legal and public order. Therefore, quasi-expropriation includes different forms of revocation or restriction which are followed by compensation; the valid criteria for quasi-expropriation is the legal nature of expropriation as

a legal instrument, i.e. its legal ground or the constituent elements of its legal regime (Prica, 2016: 102-117).

It further entails the need to differentiate between formal expropriation, factual expropriation and indirect expropriation. Thus, if there is no formal expropriation, but the effects of taken acts and actions deprive the titleholder of the substance of private ownership, there is factual expropriation at work rather than formal (direct) or indirect expropriation. Indirect expropriation is the result of legal activities (acts and actions) outside the scope of formal expropriation, and the consequence of such acts and actions is unfair restriction of the titleholder's rights.

Indirect expropriation is a response of the legal order to the effect of statutory regulation of private ownership. Thus, due to excessive burden imposed by such regulation, the principle of fairness imposes an obligation to provide adequate compensation to the titleholder of the ownership right. Indirect expropriation entails the restriction of the ownership right and other real property rights, whereas "factual expropriation" entails *de facto* interference with private ownership which occurs outside the scope of the formal expropriation regime, but its legal effect is equal to the effect of expropriation in a formal sense. Generally speaking, the distinction between indirect expropriation and "factual expropriation" corresponds to the distinction between the extensive scope of substantive ownership right (on the one hand) and the very substance of the ownership right (on the other hand). Thus, "factual expropriation" occurs in case where the effect of an act or action brings the owner into the state of the so-called "bare ownership" (*proprietas nuda*), where the owner has mere title without the right of use. On the other hand, indirect expropriation is in action in case where the restriction of private ownership imposes a particular and excessive burden on the titleholder.

Indirect expropriation is used in regulating different property-law relations, such as: the right of way, reversal of a decision in extraordinary proceedings for the protection of public interest, and private nuisance (emissions) as the most distinctive form of indirect expropriation, where the titleholder is indemnified for excessive damage caused by industrial companies in the course of performing activities in the public interest (Petrović, 2011: 163, *passim*).

Unlike indirect expropriation, "factual expropriation" implies the legal effect of legal and material acts, which deprive the owner of real estate of the possibility to use property-related authorisations, even though formal revocation of the ownership right has not officially occurred through these acts. In regular situations, the titleholder of the ownership right is entitled to hold the property, to use it, and freely dispose of the ownership right, with the *erga omnes* legal effect.

In legal reality, although not exposed to the impact of formal expropriation, the owner of a real estate may be prevented (by means of particular acts and actions) from holding the real estate, using it or freely disposing of it; consequently, the titleholder has only "bare ownership" (*proprietas nuda)*, which is the legal grounds for recognizing the so-called factual expropriation and its doctrinary development in legal orders (Prica, 2018: 361-387).

"Factual expropriation" includes cases where the legal effect of statutory regulation is not aimed at revoking the ownership right but at legally regulating its legal regime, as a result of which the owner suffers the same consequences as if formal expropriation has taken place. Yet, "factual expropriation" is not only a consequence of the effect of legal regulation of the ownership regime (as a mental activity in a legal order); it may also be a result of material (physical) activity of the subjects of the legal order.

Considering the aforesaid, "factual expropriation" implies an analogue application of formal expropriation in related but legally atypical matters. In other words, the establishment of "factual expropriation" has been procured by the need to find a fair solution for legal cases where there is no revocation of the ownership right, but where the restriction of the owner's legal position has such a powerful impact that the ownership right is deprived of its substance and reduced to the so-called "bare ownership" (*proprietas nuda*), without leaving any possibility to the titleholder of the ownership right to use any authorisations.

Besides indirect expropriation and "factual expropriation" in property cases, quasi-expropriation is also present in certain civil law matters; thus, the legal regulation of these matters entails an analogous application of formal expropriation, its legal ground or individual elements of its legal regime (Jering, 1998: 230, *passim*)."

Considering the nature of things (*rerum natura*), expropriation is a principle which generates the norm for legal regulation of specific civil law cases. Yet, there are civil law cases where the revocation of private ownership is followed by compensation for the expropriated estate, but there are also cases where private ownership right is restricted and accompanied by compensation to the owner. In both cases, there is antagonism of legal interests but the prevailing interest takes precedence, including an obligation to compensate the owner for the revocation or restriction of private ownership. Here, expropriation rests on the prescribed legal ground or analogous use of the applicable rules on compensation for expropriated real estate.

Expropriation, as a principle which gives rise to the norm for regulating civil law matters is also present in the legal institute of accession *(accessio).* Thus, in terms of the civil law institute of *specificatio,* Kovačević-Kuštrimović and Lazić

point out: "In the event of *specificatio*, the legislator authorises the owner of the building material to seek return to the previous condition if no substantial damage or costs have been caused. If it is not possible, the resolution of ownership disputes depends on the conscientiousness of the contractor, i.e. the owner of material. The conscientious (*bona fides*) party is entitled to choose, to keep the new thing as an exclusive owner and to pay the value of labour or the value of material to the other party, or to leave the asset to the unconscientious (*mala fides*) party. When the value of material is inconsequential in relation to the value of labour, the new asset belongs to the contractor, irrespective of his/her conscientiousness, whereby he/she owes compensation to the owner of material." (Kovačević-Kuštrimović, Lazić: 2006: 114-115).

Expropriation as a principle is also present in the legal institute of consolidation; thus, if the real estate of the owner whose property has been subjected to consolidation has an inconsequential value, the owner of such property is only entitled to receive compensation for the property value, while the newly created property belongs to the new owner. Further, expropriation as a principle is also reflected in the *superficies solo cedit* rule: everything that is physically attached to the land shares its legal destiny. This refers to the legal regime of constructing on another's land, which envisages several legal situations. (Kovačević-Kuštrimović, Lazić, 2006: 115-116).

4. The concept of expropriation in a material sense

Let us examine the difference between quasi-expropriation and expropriation in a formal sense. First, in terms of expropriation as a principle which gives rise to the norm for legal regulation of particular civil law matters, there is antagonism of private interests. The public interest is a regulatory determinant and static expression of these interests. It entails the need to establish a legal rule (norm) for the legal regulation of civil law matters as typical legal cases, so that the balance of opposed private interests could be established in a concrete case. It is the goal of legal regulation, while the revocation of the ownership right is an expression of the need to enact reasonable legal solutions; consequently, compensation for the expropriated real estate is a means of reconciling the opposed interests and settling the dispute.

In case of the so-called "factual expropriation", generated as a result of statutory regulation, the *ratio iuris* is the excessive burden imposed on the titleholder of the ownership right, whose right is reduced to "bare ownership" (*proprietas nuda).* Thus, for reasons of fairness and justice, he/she is provided with compensation which accompanies expropriation in a formal sense.

The difference between expropriation in a formal sense and the so-called indirect expropriation as a form of quasi-expropriation is manifested as follows: a) expropriation in a formal sense is concrete, while quasi-expropriation is abstract; b) expropriation in a formal sense affects a designated titleholder of the ownership right, whereas quasi-expropriation affects a typical real estate owner; and c) expropriation in a formal sense entails a direct and designated revocation or restriction of private ownership, which is not applicable in legal regulation of ownership where the indirect effect of such regulation may be qualified as excessive interference with the ownership right (which is the reason for compensation in formal expropriation).

Bearing in mind the aforesaid, there are three reasons for the existence of expropriation in a formal sense; they are as follows: 1) exercising a general interest related to the specific real estate, without establishing the existence of public interest which would jeopardise the principle of equality before public burdens and equality before the law in general; 2) given that the purpose of proposing expropriation (by the nature of things) entails the issue of justifiability, formal expropriation is a means of establishing whether the general interest reflects the public interest (by including publicity); 3) expropriation in a formal sense is a means of preventing the risk of state authorities' "escape" into private law. Thus, there is no reason that would justify the possibility of having the direct effect of the law regarding expropriation in a formal sense. It may be concluded that the enactment of an individual legal act is the distinctive feature of expropriation in a formal sense.

Why is compensation provided for expropriation in a formal sense and for quasi-expropriation? Given that the titleholder of the ownership right bears an excessive burden, it is in the interest of justice to establish a balance of interests, which is the condition for preserving public order and the state as a territorial (legal and political) community. In order to trigger the effect of the obligation to provide compensation to the titleholder, the imposed burden has to be excessive and specific. Prof. Petrović, a distinguished expert on German and French legal literature, concludes: "[...] in certain hypotheses, the excessive burden itself is not a sufficient condition for the occurrence of state obligation to provide compensation. An additional requirement, which is to be met cumulatively, is that the burden has to be particular and specific, i.e. imposed on an individual or a specific group [...] A modern state cannot survive without enacting regulations and imposing more or less substantial burdens on its citizens. If the compensation were to be paid every time when the imposed burden is "excessive", without taking into account the number of affected persons or the political, economic and other functions of the burden, the state would soon end up in a dead-end track. Irrespective of financial strength and stability, no state treasury would

be able to withstand it [...] Hence, the specific and particular nature of the imposed burden may be viewed only as a supplement to the criterion of excessive burden which makes it practically applicable in specific cases, i.e. when a fully constitutional or legal state measure affects an exceptionally large number of members of a society/state." (Petrović, 2011: 162).

The imposed burden generates the request for justice, i.e. establishing a balance between legal assets (values), legal interests and legal order goals. Public order resembles the scales, balancing order and peace (on one of the plates) and chaos (on the other plate). Thus, the principle of opportunity keeps surfacing in legal order and in public order, reflecting the need to balance the plates of the scales, which is actually a precondition for the existence of legitimacy of a *Rechtsstaat* (legal state, state governed by laws/the rule of law). In this regard, Prof. Petrović says: "There are, in fact, two ideas of legal equality. One form of equality (equality in a narrow sense) is a full, arithmetic, democratic-egalitarian equality, the Greek "*isonomia*"," which may be designated as both equal legal rights and equality of law. The other form of equality is "good equality", embodied in Solon's concept of "*eunomia*", which implies good and valid distribution and settlement within the polis as a whole, as "a political state of proper distribution of equal and unequal." While *isonomia* is abstract and static, *eunomia* is concrete and dynamic, linked to the specific situation. It reveals the primordial, social and protective function of law" (Petrović, 1981: 264). Thus, compensation for expropriation in a formal sense and for quasi-expropriation is an expression of "good equality", i.e. Solon's *eunomia*.

In order to establish the concept of expropriation in a material sense, it is necessary to compare the legal institutes established through expropriation in a formal sense, both mutually and with other legal institutes, which are used for revoking or restricting private ownership.

In establishing the concept of expropriation in a material sense, it would be good to start by establishing the legal relation between *nationalisation* and *expropriation*, as well as between *agrarian reform* and *expropriation.* The compensation for the expropriated real estate can be applied in case of reimbursement of owners in the nationalisation or denationalisation procedure; the compensation for the expropriated real estate is even more likely to be applied in the agrarian reform procedure. In this context, a renowned legal writer, Slobodan Jovanović, distinguishes "expropriation for administrative need" and "expropriation in the interest of social justice". Jovanović says: "Expropriation for administrative need is allowed in all the cases that may be envisaged by the law; expropriation in the interest of social justice is only allowed in cases that are expressly provided by the Constitution. [...] Such measures are not directed against the capitalistic

estate, but against its size. Capitalistic estate is tolerated, provided that it does not exceeds certain boundaries. The maximum of a landed estate is to be determined by the law; any estate exceeding that maximum will be expropriated. In the feudal estate, the conveyance of property is made from the landowner to farmers; in the capitalistic estate, the conveyance of property is made from the landowner to the state. It is one case of expropriation for the sake of social justice, not for administrative needs, which is permitted by the Constitution as an exception. In the expropriation of large estates, the expropriated landlord is entitled to compensation, just like any owner in common expropriation. In common expropriation, the Constitution guarantees a "fair compensation"; in the expropriation of large estates, the Constitution leaves to the legislator to establish the principles of compensation (thus, compensation may be less than "fair"). Exceptionally, compensation is not given "for large estate that belonged to members of former foreign dynasties and for those donated to individuals by foreign authorities" (Jovanović, 1924: 452-455). Thus, expropriation under the umbrella of the agrarian reform differs from expropriation in a material sense; agrarian reform is an act of reforming the economic order, while expropriation is an act undertaken for the purpose of achieving a concrete objective goal that has the character of a general and public interest.

The goal of agrarian reform and nationalisation is the reform of property ownership regime and economic order; the reform is aimed at regulating private ownership of specifically designated real estates. The goal of expropriation in a material sense is not to reform of economic order or property ownership regime, but to exercise a concrete general interest. Denationalisation is also a reform of property ownership regime and economic order, but it does not necessarily follow nationalisation. In contrast, expropriation is commonly and necessarily correlated with de-expropriation.[7]

On the other hand, expropriation differs from land *consolidation* and *arrondation,* as legal institutes aimed at the regulating the use of agricultural land. While expropriation in a material sense aims to achieve a specific general interest, the goal of land consolidation and arrondation is to regulate how the agricultural land will be used and to ensure its more rational use.

The difference between *expropriation* and *confiscation* is reflected in the fact that confiscation represents a punitive measure which is pronounced in specific legal cases. Except for cases where confiscation is legally permitted, confiscation is the most severe form of interference with the *Rechtsstaat* doctrine. Thereby, in the expropriation process, if the real estate owner is acknowledged the com-

7 The denationalisation procedure commonly entails a referral to analogous application of individual elements of expropriation in a formal sense (Prica, 2016: 173-193).

pensation for expropriation as a " naked (bare) right" (which was the case in Yugoslav law in the period after the WWII), then it is confiscation clad in the garment of expropriation, i.e. "confiscatory expropriation", which is absolutely incompatible with the *Rechtsstaat* doctrine (Petrović, Prica, 2014: 178-186).

Consequently, the attainment of a concrete general interest is a relevant feature of expropriation in a material sense and it is, concurrently, the difference between expropriation in a material sense and other legal institutes which are established through formal expropriation.

Administrative easements are a legal institute established through expropriation in a formal sense but, after being established, they are brought into conformity with the legal regime of civil law easements; as previously noted, such regulation entails the relationship of a specific legal institute versus a general legal institute. It means that easement established in an expropriation procedure does not bring about any changes in the ownership title (private ownership); in case of possible disputable issues, the established legal situation (e.g. the erection of transmission lines on the land parcel owned by the titleholder of the ownership right) will be subject to the application of the legal regime which is in force for classical civil law easements, save for the issues where it is impossible due to the specific nature of legal matter.

Hence, in administrative easements, there is a restriction of private ownership, either provisional or permanent. Similarly, private ownership restriction is also present in cases of provisional occupation of land and administrative lease (in general interest), as legal institutes which are also established through formal expropriation. Expropriation in a material sense does not entail private ownership restriction, but a transformation of private ownership into public ownership for the purpose of exercising a specified general interest. Expropriation in a material sense also is not a legal regulation of the use of public ownership between the public law subjects, which is characterised by the so-called administrative conveyance of (public) ownership as a legal institute which is established through expropriation in a formal sense.

Expropriation in a material sense exists only where the transformation of ownership (from private into public ownership) occurs through expropriation in a formal sense, for the purpose of exercising a specified objective goal having a character of general and public interests. It includes the possibility of return to the previous condition (de-expropriation), upon a request filed by the former owner, if it is established that the purpose of expropriation is not achieved or if, in the meantime, the expropriated real estate has been designated for a different purpose (use).

In the author's opinion, the possibility of *de-expropriation* is a distinctive characteristic of expropriation in a material sense. To support this stance, it is important to refer to the legal stance rooted in judicial practice (jurisprudence), which posits that the purpose of expropriation must be stated in the dispositive (operative) part the judgment and specifies that the transformation of ownership is not the ultimate goal but a means for achieving the goal which is the reason for opting for formal expropriation. Thus, a possible change of the purpose (use) of the expropriated real estate would represent a form of "simulated legal regulation". At this point, it is important to draw attention to several legal standpoints on this matter which are present in Serbian jurisprudence: (1) "The dispositive (operative) part of a first-instance decision does not contain the purpose for which the expropriation is carried out, which is significant in terms of applying the provision envisaged in Article 72 (para.1) of the Expropriation Act[8], in order to assess under which law the procedure will be completed. In addition, the case files do not include a valid excerpt from the detailed urban-development plan regulating the area where the expropriated real estate is located [...]. The said shortcomings point to the unlawfulness of the first-instance decision; therefore, the administrative court admitted the appeal filed in administrative proceedings and annulled the first-instance decision"[9]; (2) "The dispositive (operative) part of the first-instance decision on an expropriation must also contain the purpose for which the expropriation is carried out"[10]; (3) "Request for nullity of the decision on expropriation is evaluated against the purpose of expropriation set forth in the decision on expropriation, and not against the subsequent change of the detailed urban-development plan"[11]; (4) The Supreme Court of Serbia (U. no. 67/1999) specifies as follows: "if considerable work was performed on an object for the construction of which an expropriation had been conducted within a three-year period from the valid decision on compensation, or from the date of concluding a compensation agreement, the purpose of expropriation has been accomplished, and any subsequent alteration of the purpose of the expropriated object may not serve as a reason for rescission or for alteration of a valid decision on expropriation." (Pljakić, 2000: 339).

On the other hand, judicial practice (jurisprudence) contains evidence supporting the author's standpoint that de-expropriation is indeed *differentia specifica,* which separates expropriation in a material sense from all other legal institutes

8 Expropriation Act, *Official Gazette of the RS*, 53/95.

9 Judgment of the Supreme Court of Serbia, U. 7110/96, dated 1 Oct. 1997, *Bulletin*, no.1/1998, r.66.

10 Judgment of Supreme Court of Serbia, U. 7110/96, dated 1 Oct. 1997, *Bulletin,* no. 1/1998, r. 66.

11 Judgment of the Supreme Court of Serbia, U. 402/2003, dated 13. 5. 2004.

established through expropriation in a formal sense, given that the possibility of de-expropriation is not recognized in other legal institutes established through expropriation in a formal sense. Here, we may have a look at some significant judicial standpoints on this matter: (1) "The decision, on the basis of which the administrative conveyance of real estate to another titleholder has been conducted, may not be annulled under the terms of and in the manner prescribed in the provision of Art. 36 para. 3. of the Expropriation Act."[12]; (2) "The provision of the Expropriation Act on the rescission of a valid decision for failure to achieve the projected purpose of expropriation, does not refer to the land conveyed on the basis of administrative conveyance."[13]; (3) "Nationalised undeveloped construction land (without buildings), confiscated in a procedure pursuant to Article 38 of the Nationalisation Act, may not be returned to the former owner by applying the Expropriation Act provisions."[14]; (4) "The process of deciding on a request for rescission of a valid decision on relinquishment of nationalised land and the process of deciding on the requests pursuant to Article 84 and Article 86 (para. 7) of the Planning and Construction Act[15] are two separate proceedings, where the competent authority issues separate decisions."[16]; (5) "Article 34 of the Expropriation Act cannot be applied to any land confiscated pursuant to Article 38 of the Act on Nationalisation of Leased Buildings and Construction Land; thus, the rescission of decision and return of the estate which has not been used for the designated purpose cannot be requested, given that the Act on Nationalisation of Leased Buildings and Construction Land does not envisage the return on the same ground."[17]; (6) "The decision on the basis of which administrative conveyance of real estate is made to another titleholder cannot be annulled under the terms and in the manner prescribed by Article 36 (para. 3) of the Expropriation Act."[18]; (7) "When submitting the proposal for exemption of undeveloped construction land, the competent authority is not obliged to present evidence that the funds have been provided for payment of compensation for the exempted land." [19]; (8) According to the Court's understanding, "the right to file a

12 Judgment of the Supreme Court of Serbia, U. 3257/97, dated 29. 11. 1999; Judgment of the Supreme Court of Serbia no. 3420/01, dated 08. 05. 2002.

13 Judgment of the Supreme Court of Serbia, U. 2054/2002, dated 27. 2 2003.

14 Judgment of the Supreme Court of Yugoslavia (VSJ), Uis-2540/68, dated 25. 4. 1969.

15 Planning and Construction Act, *Official Gazette of the RS,* no. 47/03

16 Judgment of the Supreme Court of Serbia, U. 6195/04 dated 19 Oct.2005, *Bulletin*, no. 4/2005, 154

17 Judgment of the OVSS – Novi Sad, U. 575/65 dated 29. 6. 1965.

18 Judgment of the Supreme Court of Serbia, U. 3257/97, *Bulletin*, no. 1/1998, r. 70-71

19 Legal opinion of the Department for Administrative Disputes of the Supreme Court of Serbia, dated 24. 11. 1988, *Bulletin of judicial practice of the Administrative Court*, no. 1/2010,

request for rescission of the valid decision on expropriation of real estate, which (in terms of Article 38 of the Expropriation Act) belongs to the former owner of the expropriated real estate, does not fall into the scope of non-transferable personal rights; in effect, both according to the provision in Article 38 and by the nature of things, the exercise of that right is exclusively linked to the real estate and not to the legal personality of the former owner. Therefore, although it is not a property-related right, the right to file a request for rescission of the valid decision on expropriation passes onto successors, who are entitled to file a request for deexpropriation."[20]

Legal importance of deexpropriation in relation to expropriation is recognised in French and German laws, on the same legal grounds. In French law, the legal importance of deexpropriation is reflected in the time limit for attaining the goal of expropriation, and the time limit for changing the purpose of expropriation by the expropriating authority; a violation of these time limits may be the reason for initiating the return to the previous state. The same legal ground also exists in German law; thus, in case of failure to attain the purpose of expropriation, the former owner is entitled to request deexpropriation (*Rückenteignung*) (Staničić, 2015: 185-212).

The significance of deexpropriation as opposed to expropriation was not recognized in the judicial practice of the State Council (the third-instance administrative court): "In the Law on Expropriation, there is no single provision on the basis of which a former owner of the expropriated land would be entitled to purchase it from the state, in case the state (after a period of time) did not use it for the intended purpose, on the basis of which it had acquired that land through expropriation; so, the state is now the landlord with unlimited power over the land, since it possesses a land deed. In such cases, even if we assume that there is a possibility of instituting restitution (return into the previous state of affairs), such a possibility cannot be allowed in the given circumstances because, even though the state did not use the estate for the intended purpose, it does not mean that the state would not - considering the current regulatory plan of Belgrade - use that same property for a purpose which is envisaged in the Law on Expropriation, irrespective of the fact that the original purpose of expropriation was the erection of Saint Sava Seminary."[21] This standpoint was

r. 19

20 Judgment of the Supreme Court of Serbia, U. no. 3873/74 dated 29. 5. 1975, *Bulletin of judicial practice of the Supreme Court of Serbi*a, no. 1/1976, r. 41-42. Judgment of the Supreme Court of Serbia, U. no. 8164/74 dated 20 February 1976, *Bulletin of judicial practice* of the Supreme Court of Serbia, no., 1/76, p. 20-21.

21 Decision of the State Council, no. 7722/27, dated 16 March 1927, *Decisions of the State Council* 1924-1928, Belgrade, 1930, r. 327-328.

criticized by Lj. Radovanović, who noted: "The reasons of the State Council are contrary to the institute of expropriation in general. By its very nature, expropriation represents an exception from a fundamental principle of today's social regime - the principle of private ownership. It is allowed only if it is prescribed by the law. However, it is allowed under the law only if it has been subject to the prescribed procedure and if the expropriated estate is used for the purpose for which the expropriation has been approved. Since expropriation can only be conducted if the purpose of expropriation is approved in advance, it is clear that the expropriated estate cannot be later used for any other purpose; in order to change the goal, it is necessary to follow the same procedure which was used when specifying the previous one. The administrative authority cannot change the goal of expropriation of its own accord; hence, any expropriation, where the administrative authority uses the power of the law to achieve a goal which is not envisaged by the law, constitutes an abuse of power. In this specific case, the State Council provided its interpretation, according to which the administrative authority does not have to stick to the goal of expropriation, which further implies that the expropriated estate even may not be used in the public interest. In that way, all the guarantees that exist for the purpose of safeguarding the private ownership right would be compromised."[22]

It is important to bear in mind that, without the possibility of de-expropriation, a danger of simulated legal regulation would occur, considering that the expropriation would be approved for achieving one goal and the beneficiary of expropriation could use the expropriated real estate for the purpose of accomplishing some other goal. The *causa* of legal regulation of expropriation concerns the legal relationship between the expropriating authority and the expropriated party; consequently, when the expropriation beneficiary does not achieve the goal which has given rise to expropriation, the former owner of the real estate is authorised to request the return to the previous state of affairs. The significance of de-expropriation may also be observed in terms of the *causa* of conduct of public law subjects; as these subjects do not have free will or private autonomy (legal standing), de-expropriation is a plea for a legally binding norm against the abuse of public powers by state authorities and holders of public offices. Finally, deexpropriation is an expression of striking a balance between the necessity of interventionism of the state power and the autonomy of the civil society subjects. Public interest as a regulatory determinant of the public order has to take into consideration both the general interest and the private interest. Consequently, if expropriation is approved in the name of a general interest, it means that the achievement of the specific goal is the public interest as a static expression of general welfare. However, if it is established that such

22 *Decisions of the State Council*, 1924-1928, Belgrade, 1930, p. 328.

a goal has not been achieved, it is in the public interest (as a static expression of general welfare) to recognize the importance of the private interest and institute the return to the previous state of affairs. Hence, expropriation in a material sense is characterised by the transformation of private ownership into public ownership, including the possibility of deexpropriation. Without the possibility of instituting de-expropriation, expropriation would be a severe interference with the *Rechtsstaat* doctrine.

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EKSPROPRIJACIJA U MATERIJALNOM SMISLU

Rezime

Eksproprijacija kao pravni institut je i uža i šira od formalne eksproprijacije (eksproprijacije u formalnom smislu), pod kojom podrazu- mevamo pravni put za oduzimanje ili ograničavanje prava svojine u pojedinačnom pravnom predmetu. Putem formalne eksproprijacije se uspostavljaju različiti pravni instituti, a jedan od tih pravnih instituta je eksproprijacija u materijalnom smislu. S druge strane, eksproprijacija kao pravni institut ispoljava se i van formalne eksproprijacije, pod okriljem ograničavanja privatne svojine do kojeg dolazi neposrednim zakonskim uređivanjem pojedinih oblasti pravnog poretka, kao i povodom pravnog uređivanja pojedinih pravnih predmeta u sudskim i drugim pravnim postupcima. Eksproprijacija u materijalnom smislu postoji samo kada putem eksproprijacije u formalnom smislu nastupa preobražaj privatne svojine u javnu svojinu, radi ostvarivanja jednog preciziranog opšteg interesa, sa mogućnošću vraćanja u pređašnje stanje. Vraćanje u pređašnje stanje (deeksproprijacija) nastupa po zahtevu ranijeg sopstvenika, ako se utvrdi da svrha eksproprijacije nije ostvarena. Upravo mogućnost deeksproprijacije je differentia specifica koja odvaja eksproprijaciju u materijalnom smislu od drugih pravnih instituta pripadajućih eksproprijaciji u formalnom smislu, kao i od kvazieksproprijacije i drugih oblika oduzimanja i ograničavanja privatne svojine.

Ključne reči*: formalna eksproprijacija, eksproprijacija u materijalnom smislu, kvazieksproprijacija, eksproprijacija kao pravni institut, deeksproprijacija.*

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originalni naučni rad
10.5937/zrpfn0-28670

UDK: 343.1:343.8(497.11:73)
Rad primljen: 01.10.2020.
Rad prihvaćen: 05.01.2021.

EMOTIONALIZATION OF CRIMINAL LAW IN THE PROCESS OF ADOPTING AND AMENDING CRIMINAL LEGISLATION[**]

Abstract: *The authors of this paper examine the phenomenon of emotionalization of criminal law, which emanates in three stages: in the legislative process, within the content of respective legal provisions, and in criminal procedure. The third stage is well-identified as such and, here, procedural principles aim to guarantee impartiality of the judge. Regarding the content, discussions about negative feelings were part of the dogmatical upgrading of hate as an obligatory aggravating circumstance envisaged in prior amendments to the Serbian Criminal Code. On the other hand, the emotionalization of legislative procedure, perceived as the process of adopting and amending criminal legislation in an emotionalized context, has largely remained in the background. After elaborating on the relevance and topicality of this issue, the authors connect it with the basic goals of law and legitimacy of state power, provide various definitions and explain the notion of emotions by referring to examples from comparative law. Thereupon, the concept of emotionalization of law is analyzed with reference to the legal provisions from the latest amendments to the Criminal Code of the Republic of Serbia (2019).*

Keywords: *emotionalization, Serbian Criminal Code, Act on Amendments to the CC, state power, life imprisonment, Serbia, United States, urgent legislative procedure.*

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[**] The paper was written for the strategic project "*Identity Transformation of Serbia"* of the Faculty of Law, University of Belgrade (Ivana Marković).

[**] The paper was orally presented at the International Scientific Conference "*Responsibility in Legal and Social Context",* held at the Faculty of Law, University of Nis, on 18th September 2020.

1. Introduction

The problem of emotionalization of positive law in general, and criminal law in particular, is not characteristic only for the former development of society, state and law because, if it were, only legal history would be dealing with it today. On the contrary, the development of modern law has been marked with an increasing reference to informal, socially anchored elements within the formal law-making process. It is especially evident in criminal law, where there is a tendency of corroborating or even grounding legislative decisions on feelings and irrational aspects. Such a trend can be called the emotionalization of criminal law, which *inter alia* leads to the so-called penal populism. This occurrence can be succinctly defined as follows: "Despite the widespread usage of the term 'penal populism' in much analytical work on contemporary punishment, what populism *might actually be* has to date received very little consideration. Instead, it is usually treated as a commonsense given, a label to attach to politicians who devise punitive penal policies that seem to be in any way 'popular' with the general public" (Pratt, 2007: 8). Such a phenomenon raises the following question: why a state government is reaching for or, even, succumbing to emotionalization, i.e. why a state government, driven by the specific social circumstances of emotionalization of society in concrete cases, decides to make changes of criminal legislation. Furthermore, in such circumstances, while the problem is still shaking the general public, state authorities strive to promptly amend the existing legislation; it is occasionally done in the course of urgent legislative procedure, which largely excludes the opinion of the experts.

In general, it has to be pointed out that the phenomenon of emotionalization is undesirable and raises concerns in the area of criminal law primarily due to its distinctive punitive and retributive function, which is emphatically based on rational and precisely defined legal grounds and limitations. It seems that a complete and adequate response to the posed question cannot be found entirely in the domain of criminal law theory. In order to fully understand its roots and scope, a part of the answer should be sought in the basic reasons for the existence of state power, its functions and goals. The research on this issue will show that emotionalization of criminal law is a broader social problem, specifically reflected in the purpose and justification of state power. In this paper, the process of adopting the latest amendments to the Serbian Criminal Code is presented as a striking example of emotionalization of law. The content of the Act on Amendments to the Criminal Code (2019) as well as the urgent legislative procedure (in May 2019) have been highly criticized. Prior to that, the authors will present a few comparative law examples from the USA legislative practice (in both historical and contemporary context), considering that the U.S. criminal justice system has directly or indirectly influenced the global understanding and

need for a more repressive criminal policy. It goes without saying that a detailed elaboration of such a significant problem requires a much larger framework than the one offered by a scientific article. Thus, this paper aims to shed more light on the issue and bring it closer to the domestic professional public.

2. The Basic Goals of Law and Legitimacy of State Power

The development of the human society and the state, as the highest political organization, also influenced the regulation of interpersonal relations. In earlier times, when social changes ensued more slowly, the largest number of social relations was regulated by customs. In conditions of slow social transformation, customs proved to be an adequate way of standardizing human relations because they imply long-term repetition of the same behavior in the same situation, which over time creates a general awareness of obligation as an internal attitude of individuals towards a certain pattern of behavior (*opinio necessitatis*).

The monopoly of power (force) is a distinctive feature of every legal order, but its existence and action cannot be explained only on the basis of this characteristic difference. For example, in his early works, Lukić rejects the viewpoint that positive law (as an expression of the state power will) can be based only on coercion; this point of view still prevails in the contemporary legal theory. As noted by Lukić, "some norm has a binding power when it forces us to apply it with its content, which is a value *per se*, but it does not have a binding power when it forces us to do so with its sanction because, then, it is only a simple fact; it does not obligate us as the *ratio legis* but as natural law" (Lukić, 1995(a): 379).[1] In other words, efficiency (and success) of the legal order cannot be explained on the grounds of the envisaged sanction for violation of the prescribed legal norms, but on the grounds of the citizens' acceptance of these rules. Acceptance implies the citizens' internal relation towards the prescribed rules, which primarily depends on their content, i.e. the values they declare and protect. Thus, in addition to the authority of the state power that is envisaged by the law and the monopoly of force embodied in the sanctions envisaged for inobservance of the law, the citizens' internal relation towards legal rules is conceivable only when the envisaged rules reflect the same values that the citizens have.

As jurisprudence does not provide methods to explain the citizens' acceptance of legal rules, the answer may be sought in the sociological findings, especially

1 In his last significant piece, Lukić notes that law is "paradoxically, the most efficient when it is the least applied with its basic means, the force, when its demands are more or less reduced to what people themselves want to do, when it mostly specifies what would have happened anyway if the law didn't even exist, when it helps to make it happen faster, more precisely, more reliably than if it didn't even exist " (Lukić, 1995 (b): 520).

in the area of sociology of law. One of the most significant sociologists of law, Denis Galligan, explains this question with his concept of the social sphere, which is defined as follows: "Among the various ways in which laws interact with other parts of society, two are of most interest here: one is when officials make, interpret, and apply the law, the other when groups, associations, or individuals conduct their activities subject to the law. In the first case, officials accept and make sense of the law, and then apply it to others, while in the second case, associations and individuals accept law to their own activities… A social sphere may be described as an area of activity in which participants share understandings and conventions about the activity, and which influence and guide the way they engage it" (Galligan, 2007: 103). Therefore, the social sphere is a framework that brings together different entities that are united in common interests and values, and that is the reason of their existence. Although social spheres have existed since the existence of the state as a political community, the development of modern society has influenced the formation of an endless multitude of social spheres; thus, today, almost every individual is regularly involved in a larger number of social spheres. Galligan points out that social spheres are formed for quite practical reasons, as a space where the mutual cooperation of individuals develops in the easiest way and where they can realize their personal and professional potentials. Individuals accept certain conventions and standards within these social sheres, but they equally affect the development of those conventions and standards with their common practices. As a member of certain social sphere (e.g. a church, a political party or movement, a professional association, an economic class, etc.), every individual builds a significant part of his/her own attitudes and values into the social sphere. Thus, the standards of conduct and accepted values of each individual are ingrained in the respective social sphere, and it would be wrong to think that individual attitudes can be developed in isolation, i.e. outside the impact of social spheres they are exposed to.

Considering the consequences of different perceptions of individual and collective values and interests, which are jointly developed by individuals within the social spheres, it seems that their mutual correlation directly affects the creation of the generally accepted values of the entire political society which is created, nurtured and protected through social spheres. As it is impossible to imagine absolutely fair and just society, except in some kind of utopian society, every important social interest should be sufficiently satisfied within a functional legal order. The other option may be to ensure the absolute satisfaction of certain interests to the grave detriment of others. Yet, as there is no universal way of reconciling the opposed interests in order to ensure absolute satisfaction of all, the state government should create a legal framework which provides for

satisfying different interests and ensures that the majority of citizens consider the legal order to be fair and just, particularly given that it immediately affects the effectiveness of positive legal rules. Consequently, an order that does not satisfy the interests of the majority of the population cannot be effective in the long run, regardless of the monopoly of power (force) that the government enjoys at a given moment.

However, while the material interests of different social spheres may have rational grounds, the common values that are nurtured in the society are not and cannot be rationally justified. The effects of the latter rest on two facts. First of all, emotions (rather than practical prudence) can have a large or predominant impact on the development of certain values. Secondly, there is no rational approach or method by which a hierarchy of different (often conflicting) values could be determined (e.g. the values of personal freedom and effective security). Therefore, it would be necessary to determine the relationship between state coercion (arising from the monopoly on the use of physical force) and the values which are developed within various social spheres (where individuals act as members of the society) and which should be secured by the state government via the monopoly of force. There is no legal order (including even the totalitarian regimes) that is not legitimized as being fair and just. The need for legitimacy arises from the basic purpose of law, which is to accomplish its goals by observing the principles of fairness and justice.

The relationship between law and coercion is most prominently expressed in the field of criminal law. Moreover, criminal law is a paradigm of law in general because its importance is so great that most laymen understand the legal order through the norms of criminal law; such a conception largely prevails among the greatest legal experts (e.g. Kelsen, Radbruch, Lukić) who developed their theoretical concepts on the analysis of criminal law norms. Such a paradigm can be easily understood due to the importance of criminal law in society. "Criminal law, appearing to be at the opposite end of the spectrum in specifying what constitutes criminal acts and punishments for transgression, protects fundamental social goods and the social norms to which they give rise. Integrity of person and property warrants the special protection criminal law and criminal justice provide. Without that integrity other social interactions are inhibited and settled social relations constituting a society become impossible to form. Criminal law has a dual task: to protect each person from the other and to sustain the foundations of society" (Galligan, 2007: 225).

Simply put, criminal law prohibitions aim to prevent certain undesirable acts or omissions (failure to act), and to ensure their less frequent occurrence. However, if criminal law provisions were viewed in a broader context of the entire legal

order, the prohibition of certain undesirable acts appears as a response to the demands of justice. The aspects of this relationship are diverse. In principle, there should be a strong and ongoing cooperation between the citizen representatives who are vested with the governing powers and other members of the community. It entails familiarizing the members of the community with the common good (assets, values) and informing them how they are to be accomplished. Criminal law, which certainly represents one of the ways of achieving the envisaged goals, must not be perceived by members of the community only as a system of punishment for disobedience, and nothing beyond that. In order to achieve and protect the common good, it is necessary to raise awareness of which behaviors are desirable and which are not. Also, in order to protect the rights of defendants (who are also members of their community), there must be certain rules which would preclude the abuse of the monopoly of force, by ensuring that the instruments of state coercion do not turn into unlawful activities that are contrary to the envisaged purpose. Some of these rules are: *nullum crimen, nulla poena sine lege; audiatur et altera pars*; the right to defense; limited duration of custody; the exclusion of a biased judge; presumption of innocence, etc.

Thus, in law, coercion has an obvious function. It is a necessary but not a sufficient condition for the effectiveness of the legal order. Also, the use of coercion can be justified only if it ensures the implementation of the principle of justice, but not if it ensures the satisfaction of some individual interests or the interests of some groups. Figuratively speaking, applicable laws may be perceived as the scales of justice, while coercion is the sword in the hands of Justicia, the Goddess of Justice; only together can they make the principles of justice effective and thus promote, ensure and protect the common good. Therefore, the usual legitimation formula applicable to modern states implies three basic elements. First, in order for political power to be considered legitimate in the first place, it must be acquired and performed according to predetermined rules, which means that such power is legal. The second element of the formula is the normative justification, which implies that the rules on acquiring and exercising power are justified according to socially accepted understandings concerning: a) a valid title of power, and b) proper goals and standards of exercising power (direct link to abuse). Finally, the third element of the formula stipulates that political power must be recognized "by explicit consent or through acts of appropriate subordination, as well as by recognition from other legitimate authorities." (Vasić, Jovanović, Dajović, 2014: 73).

As a dignified life in society could not be imagined without the effective operation of criminal law, its standardization and application always attract special attention. The general public, through the mass media, forms its views on the basic justice of the legal order precisely on the basis of criminal cases (e.g. the

title "*Useless Jury Allows Dangerous Criminal to Walk Free"* is one banner headline lambasting ineffective criminal justice policy or institutional incompetence that the tabloids never seem to run, perhaps because implying that one's readers are gullible or stupid is not likely to sell many newspapers" (Roberts, Zuckerman, 2010: 95). In general, the ponderosity of the incriminated acts that endanger basic social values makes this area of law particularly sensitive because the social interest in, for example, the distribution of tax burdens can never induce an emotion as much as it can be done, for example, by a crime against a child.

This significance of criminal law opens the door to the great influence of emotionalization in the process of enacting and applying criminal legislation. Given that the creation of the law in modern times should be a planned, purposeful, well-studied and argued *lege artis* action, i.e. a rational activity aimed at achieving certain goals in society, the question of the purpose of the law should be reopened, which is ultimately the question of justice. The main initiator is the political will of the highest state officials, whose jurisdiction is to propose and change the criminal legislation, and ensure its application. Although we usually assume a legitimate legislator as a rational subject, the ways in which the state government often reacts in cases of conspicuous emotionalization shows the opposite. Namely, the political will of the highest representatives of the state government is expressed through the need to strengthen their legitimacy by enacting legislative acts whose main goal would be to satisfy the citizens' sense of justice, given that citizens are the source of that legitimacy. However, the enactment and application of the law, which is guided by these motives, excludes numerous other arguments, primarily professional ones. Thus, for example, the enactment of amendments to the Serbian Criminal Code in 2019, which was adopted in the course of an urgent legislative procedure and without any public debate, opens a number of issues that will be highlighted later. At this point, however, it should be emphasized that the procedural nature of law is its essential feature because the application of procedures in the enactment and application of legal rules significantly ensures that official decisions are not rashed and reckless but based on rational grounds. After all, too frequent amendments of some of the main laws governing a society, which was very reasonably pointed out by Fuller (Murphy, 2005: 240-241) affects the issue of legal reliability and certainty, and raises the issue of application of these laws by courts, which in such cases do not have enough space to establish a uniform practice. Finally, due to emotionalization, the legislature is able to act in an argumentatively impermissible way, i.e. by using the argument *pars pro toto*, where on the basis of only one case it reaches for unnecessary standardization of general nature, instead of ensuring that a concrete case gets its epilogue in court where a single act is rendered. All the aforesaid boils down to a kind of

abuse of the legal form, whose main goal is to legitimize state power in a populist way. Thus, an unconscientious state government reacts to the citizens' emotionalization of specific cases because their votes decide who will form the personal element (holders) of state power.

3. Comparative law examples from the United States legal history

Based on the previous section, it can be concluded that the performance of state powers and the functioning of the legislature as one of its three parts, especially in the field of criminal law, is subject to the emotionalization of society due to major social events. There is a huge number of examples that show the emotionalization of law. In this section, we briefly present some striking social events that marked this phenomenon.

Two well-known cases from the US judicial practice will serve as characteristic examples of the emotionalization of criminal law. The first case, which happened on 1st March 1932 shocked not only America but also the whole world. The twenty-month-old baby of the American pilot and public figure Charles Lindbergh, one of the greatest aviators in history, was abducted from his family home. Although the Lindberghs paid the requested ransom of 50,000 USD, the child was never returned. The emotional restlessness that the American society experienced at the time directly affected the urgent enactment of the Federal Kidnapping Act (1932), popularly known as the Lindbergh Act, or the Little Lindbergh Law. This Act was the amendment of the United States Code[2], the Criminal Code of the Federal Government of the United States. "Both houses, in committee

2 "(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—
(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;
(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;
(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or
(5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment." (U.S. Code, Title 18, § 1201) LII, Cornel Law School.

and in debate on the floor, carefully considered the desirability of this further extension of federal power. Chairman Sumners of the House Judiciary Committee was opposed to it unless absolutely necessary. When the bill came up for debate, the opposition to enlarged federal powers was again evident. States'-rights advocates cried "usurpation" while proponents of the bill insisted on the necessity for such legislation" (Bomar, 1934: 436). This Act declared the transportation of abducted people across federal borders a crime. The trial, called the "trial of the century", ended with the death sentence for the accused Bruno Richard Hauptmann. The trial was unusually fast, and the jury's choice was debatable.[3] After an extremely long jury deliberation, Hauptmann was found guilty. To this day, it is not known what exactly happened on 1st March 1932, which is largely a consequence of the emotionalization caused by this case.

The second event to be mentioned here can illustrate emotionalization on the globas scale. It had such a huge global impact that it truly marked the beginning of the 21st century and shaped its characteristic features. On 11th September 2001, several synchronized terrorist attacks ensued in the United States, causing mass panic and fear. Al Qaeda claimed responsibility for the attacks, which were carried out with that very intent since all the chosen targets (the WTO and the Pentagon) represented symbols of US economic and political power. The fact that the terrorist attack (involving a huge number of victims) was broadcast live on numerous TV chanels caused a state of collective shock worldwide. In the aftermath of the attack, the American authorities declared "the global war on terrorism", in which they attacked Afghanistan and Iraq. The feeling of insecurity was expressed in the global tightening of security measures and, *inter alia,* significant changes in criminal legislation. The Homeland Security Act (2002) was enacted, which further swayed a particular culture of fear, which had already been present in the American society.

In addition to major differences, it should be noted that these two examples show essential similarities. First, they both provoked a great emotional reaction from people. Secondly, in both cases, the legislature acted with the aim of preventing the consequences of such acts by adopting new legal solutions. Finally, in both cases, the court proceedings against the accused did not lead to unequivocal

3 "Flemington, N. J., Jan. 2. -Two years and ten months from the date of the tragedy at Hopewell, Bruno Richard Hauptmann was placed on trial for his life here today, charged with the murder of Charles A. Lindbergh Jr. With the sometimes ponderous machinery of criminal trials moving at an unusually rapid speed, ten jurors had been selected when court adjourned this afternoon, after having been in session for a little more than five hours. It was believed here tonight that the remaining two jurors would be chosen before noon tomorrow, and that the State of New Jersey would begin during the day its effort to prove the accused man "guilty beyond a reasonable doubt." (New York Times, January 3, 1935.)

knowledge on the committed crimes; in other words, they did not fulfill their basic purpose.

4. Emotions in a general context

Although everyone is basically familiar with the almost omnipresent term „emotion", there is still a need to establish a common terminological ground. According to the Merriam-Webster dictionary, an emotion is "a conscious mental reaction subjectively experienced as a strong feeling usually directed toward a specific object and typically accompanied by physiological and behavioral changes in the body".[4] The same source defines it also as "the affective aspect of consciousness" and links it to the term "feeling"; the word "sentiment", understood as "an often unreasoned opinion or belief;[5] underlying irrationality is even closer to the core of the notion.

The first ideas on emotional psychology had a strong biological focus and derived from the evolutionary approach pursued by Darwin, where emotions are dispositions which control the respective behaviour and which are, according to behavioristic theories, learnable (Singer, 2000:518-528). This physiological perspective was the leading paradigm until the 1970s, when a second component was included: the cognitive, situative assessment, or rather the cognitive interpretation of this arousal of feelings (Schachter, Singer, 1962:379–399). The physiological models see emotions as a sort of "energy supplier", while the cognitive models regard them as complex reaction patterns that follow cognitive evaluations (Freundt, 2006: 24); as such, they are close to the common understanding of emotions and, consequently, more accepted than the previous concept. The central effect of emotions is that they reflect, as an "echo of the sentiment", how the content is experienced. Consequently, emotions can be described as "intuitive, appraising statements of an individual pertaining to specific objects that have been experienced" (Freundt, 2006: 25).

In the 1980s, psychology (including emotional psychology) experienced a teleological paradigm shift, by focusing on the purpose, functions and results; thus, emotions were peceived in the framework of goal-meaning-context relations. In other words, emotions are activators, motivators and organizers of behavior; they are part of the regulation of human behavior. Nowadays, this enhanced functional aspect of emotions is considered to be disputable. It has implication in various areas of law, primarily in criminal law but also in other areas dealing

4 Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/emotion (accessed 26 Sept. 2020).

5 Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/feeling (accessed 26 Sept. 2020).

with intense emotions, like tort or family law. Even inheritance law recognizes (gross) ingratitude.

Apart from positive law, jurisprudence has also acknowledged the "sensitive" elements of actions in the legal surrounding. The Anglo-American legal science has established a distinctive field of research called "Law and Emotion". The idea behind it was that the legal science, in order to do justice to the complexity of emotions, has to connect with the findings and insights of other disciplines, such as philosophy, psychology, social anthropology and neurobiology, on the complex interaction of emotion and cognition (Bernhardt, Landweer, 2017: 17). Thus, from the outset, the study of "Law and Emotion" was laid out as an interdisciplinary endeavor. On the other hand, the programmatic demand to recognize the role of emotions in law does not mean that all *de facto* emotions occurring in law and jurisprudence will be assessed in a naively positive manner (Bernhardt, Landweer, 2017: 19).

5. Emotions in Criminal Law

Emotions occur at various stages affiliated with criminal law. Moreover, the edifice of penal law is erected on the strong undercurrent of emotions (Elster, 1999: 102). In fact, the entire history of criminal law is a history of restraining and controlling irrational behavior of both criminal offenders and the victims and their families. The survival of the fittest and *lex talionis* have been tamed by the most serious sanctions known to social orders. Vengeance is channeled by legal principles and procedures: *nullum crimen, nulla poena sine lege* is among the key principles of criminal law guaranteeing predictability and certainty.[6] It does not mean that criminal law is deprived of or purged from emotions. Quite the reverse, "legal institutions and in particular the criminal justice system are the very institutions in society that are designed to deal with the most intense emotions and emotional conflicts, with individual as well as collective emotions" (Karstedt, 2002: 300). Karstedt describes criminal courts and procedures as a "prominent institutional space and institutional mechanism for emotions in society" (Karstedt 2002:300). This mechanism has selected and formalized which emotions are allowed (and to what extent) within the borders of penal law.

However, it would not be sufficient to restrict the role of emotions only to different phases of the criminal procedure, although it is the stage where we can immediately observe and lament over a biased handling of the judicial process by the judge. As previously noted, emotions also play a prominent role in the

6 Blagić presents three particular examples demonstrating how criminal offences recently introduced into the Serbian Criminal Code contradict the principle of certainty, and thus potentially weaken legal certainty and the rule of law. For more, see: Blagić, 2020: 217–229.

law-making process, thus preceding the application of the law by the judge and, logically, influencing it by setting the normative frame before-hand. Therefore, emotions play a significant role in three distinctive stages.

Chronologically, the first one is the legislative procedure, where emotions may generate modifications of current legislation. The main actors in the legislative process are the legislator, the expert public, and the general (lay) public. The second stage is the content of criminal law itself, which is imbued by emotional elements in both the General Part and the Special Part. It derives from the acts and feelings of the perpetrator (e.g. mitigating and aggravating circumstances, excess of necessary defense, etc) and the victims (e.g. rape committed in a particularly cruel or particularly humiliating manner). Lastly, criminal procedure law also includes provisions, usually formulated as exemptions (such as the exemption of the judge, the exemption from the obligation to testify, etc.), which are aimed at enabling the most objective application of law possible. They mainly affect the judge but they are also applicable to the testimonies of the accused (who may lie), witnesses, experts, etc.

The legislative process is a potential field of conflict or, at least, from the dogmatic point of view, undesired sphere of interference to the detriment of an objective and impartial regulation. Legislation, certainly, can never be completely unbiased; the highest degree of impartiality is most likely to be achieved by a mechanical, AI-driven law-maker. But, a target-oriented appeal to citizens' feelings in order to invoke and/or promote the acceptance for the proposed legislation is a conscious act that differs from the formerly mentioned "emotionalized" situations. The influx often comes from the political spectrum, amenable to extra-scientific factors and followed by further shaping of criminal law provisions.

The Serbian criminal legislation of recent years is a good example of how both the legislative process and the content of the amended legislation can be filled with emotions. The first issue will be examined in more detail in the next section.

6. Emotionalisation of law in Serbian criminal legislation: the making of the Act on Amendments to the Criminal Code of Serbia (2019)

Since its adoption in 2005, the Criminal Code (hereinafter: CC)[7] has been amended seven times: twice in 2009, once in 2012, 2013, 2014, 2016, and most recently, in 2019. The changes were of different scope, structure and background, but the latest amendments have put in the center of attention not only the content

7 Criminal Code of the Republic of Serbia, *Official Gazette RS*, 85/2005, 88/2005-cor., 107/2005-cor., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

of the new legal provisions but also the manner of enacting them. A few critical points can be identified:

a) *The timeline* - The biggest novelty to the criminal justice system in Serbia since 2005, the punishment of life imprisonment, was adopted less than half a year upon establishing the working group of the Ministry of Justice in December 2018, tasked with the preparation of the Act on Amendments to the Criminal Code (hereinafter: AACC).[8] It came into force six months later, on 1st December 2019 (Art. 42 AACC). This means that the time used for drawing the bill equals the duration of the *vacatio legis*. In the Explanatory Statement of the Draft Act on Amendments to the Criminal Code (hereinafter: the Draft Act Explanatory Statement), it is stated that this six-month period was needed to "leave enough time for the expert public and the citizens to get to know the proposed changes and amendments, having in mind their importance and scope".[9] It turns out that the internal consultations, analysis and the written composition of the Draft Act needed as much (or as little) time as familiarizing the public with its content. Yet, the experts got officially acquainted with the provisions only after the law was adopted. Of course, the content was generally made public through the media beforehand, but the opportunity to raise objections and propose improvements was restricted by the character of the legislative process.

b) *The procedure* - Despite the importance of the proposed changes, both in terms of dogmatic consistence and adjustment of the existing penitentiary system, the legislative procedure in which the bill was passed was urgent. Article 167 of the Rules of Procedure of the National Assembly of the Republic of Serbia stipulates that a law can be adopted by urgent procedure if it regulates issues and relations that occurred as a result of unforeseen circumstances, and if failure to adopt the law by use of urgent procedure could have negative consequences on lives and health of the people, the security of the state, and the functioning of institutions and organizations, or for the purpose of meeting international obligations and the harmonization of regulations with the European Union *acquis*. Due to deviations from the regular procedure, the proposer of the law must state the reasons for the faster process. However, the Draft Act Explanatory Statement does not specify those reasons. This is contrary to the practice of enacting prior amendments (like those of 2016), where it was stated that the law was proposed in urgent procedure "for meeting the international obligations assumed in

8 Act on Amendments to the Criminal Code of the Republic of Serbia, *Official Gazette RS*, 35/2019.

9 Ministry of Justice RS: Draft Act on Amendments to the Criminal Code of 10 May 2019, (accessed 15 December. 2020), http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/1627-19.pdf

the process of accession to the European Union."[10] If we assume that this would also be the official reason for the legislative rush in enacting the most recent amendments, then we should take a look at it in the light of accession to the European Union.

In this regard, highly relevant and informative documents are the annual Progress Reports of the European Commission on Serbia's progress in the accession process. One of the major problems underscored in several recent reports is the extremely frequent use of urgent procedures, amounting to 44% between February 2018 and February 2019 (EC, 2019:6).[11] Although the use of urgent procedure was lower than the 65% recorded in the year 2016 (EC, 2019:6),[12] it is still an excessively high share, which has been stagnating since 2017. In addition to the urgent procedures, the Report also pointed out to the deterioration in legislative debate in parliament and scrutiny of the executive, which "prevented the parliament from properly exercising its legislative function" (EC, 2019:6).[13] Thus, the antagonistic reference to the EU accession as the reason for the overuse of urgent procedures, which ultimately diminishes the possibility of a public debate and the quality of legislation, is obvious.

c) *The wording* - The introductory part of the Draft Act Explanatory Statement states that the Foundation "Tijana Jurić" submitted a Peoples Initiative to the National Assembly with regard to amendments to the Criminal Code, which was supported by 158.460 citizens of the Republic of Serbia. This Initiative proposes life imprisonment for the most serious criminal offences against life and limb, as well as for sexual offences in cases where the crime results in the death of a child, a minor, a pregnant woman and a helpless person. The Initiative also proposes that persons sentenced to life imprisonment shall not be entitled to conditional early release from prison (Draft Act Explanatory Statement, 2019: 10). Apart from the careless mistake of enlisting the consequences of he offences cumulatively instead of alternatively, the text of the Draft Act Explanatory Statement underlined several times that the amendments have been made "upon the Initiative of the Foundation "Tijana Jurić". It gives rise to an impression that the Foundation´s proposal is a (non-formal) source of law, which the legislator only formalizes, shapes and transfers into the Criminal Code. This impression is supported by the fact that everything that was proposed by the Initiative was

10 National Assembly of the R. Serbia: Draft Act on Amendments to the Criminal Code of Serbia of 23 November, 2016; http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2769-16.pdf, p. 20, (accessed 10 Jan 2021).

11 European Commission, Communication on EU Enlargement Policy, Serbia 2019 Report, 6 (accessed 30 September 2020). The publication of the Progress Report for 2020 was postponed to the fall of 2020.

12 European Commission, Communication on EU Enlargement Policy, Serbia 2018 Report, 6.

13 European Commission, Communication on EU Enlargement Policy, Serbia 2019 Report, 6.

also integrated into the amendments, despite its non-compliance with other provisions and standards.[14]

Another example of the legislator's highly sensitized approach is the history preceeding the introduction of the punishment of life imprisonment. In the Draft Act Explanatory Statement (2019: 10), the legislator recalls that, in 2015 (long before the Foundation´s initiative), the permanent working group for amending the Criminal Code discussed the introduction of life imprisonment as a substitute to the long-term imprisonment of 30-40 years, which had been instituted as a substitute for death penalty. Back then, in 2015, the issue was put up for the public debate; it "stirred up the expert public, made them think, talk, discuss, and naturally opened up many other issues" (Draft Act Explanatory Statement, 2019: 10). Thus, the Ministry of Justice concluded that "it is not possible finally decide upon it because the expert public is divided on this issue" (Draft Act Explanatory Statement, 2019: 10). The controversy over this proposal did not change in the meantime, so it is not clear why the issue was not properly discussed in 2019, especially if we take into account that the proposal from 2015 did not contain the exclusion of the possibility of conditional early release for certain offences, which is the most problematic part of the most recent amendments.

The polarization among the experts did not fade away four years later. It seems that the discourse on the necessity of implementing the strictest sanction known in our legal system has been planted on the terrain of the not less "stirred up" but seemingly unanimous general public. It has shown a very sympathetic, encouraging attitude towards the proposed tightening of criminal legislation, giving it complete media-supported moral legitimacy. Furthermore, especially in cases involving children as victims of crimes, we may still hear the demand for more repressive state response, even an urge for reinstating death penalty. This is in line with the 2015 proposal, which divided the expert public although did not even include the abolition of conditional early release. There is an impression that the 2015 proposal was followed by an emotional discussion rather than a rational debate on the *pro et contra* arguments.

d) *The content* – The 2019 amendments to the Criminal Code contain some inconsistencies and further tightening of the respective sanctions. Regarding the prohibition of conditional early release for certain offenses, the question arises on the main criterion for the selection of the enlisted crimes. A similar selective

14 Similarly, the proposal of the Serbian Bar Association for introducing an assault against a lawyer as a criminal offence (Explanatory Statement, 2019: 6) has found its way into Article 336(v) CC. The proposal was motivated by the assassination of the well-known Belgrade attorney-at-law Dragoslav Miša Ognjanović, in connection with his professional engagement as defense counsel in high-profile criminal cases. This proposal did not draw much attention, as the legal provision is not controversial either in theory or in practice.

approach was observed in 2009, when the the legislator introduced the prohibition on mitigation of punishment for certain offenses (Delić, 2010: 228–245). However, substantially, the most emotional content so far were the provisions of the 2012 amendments, when hatred was envisaged as an autonomous and obligatory aggravating circumstance in the sentencing process (Article 54a CC).[15]

7. Conclusion

The starting point of this paper was that the criminal legal system does not exist in a vacuum of rationality, where all procedures and decisions are led by reason. On the contrary, emotional factors, both positive and negative (such as: anger, shame, grief, remorse, empathy, etc.) directly or indirectly gain their confirmation in criminal law as well. After all, guilt (*culpa*) as the central notion of criminal law is a subjective element of the offense, which entails both awareness and will, and complete (together with other elements) the concept of crime.

The sphere of law and the sphere of emotion touch upon each other and overlap, similar to the spheres of law and morality. Feelings are even perceived as "valuable barometers of social morality" (Karstedt, 2002: 299). Moreover, emotions may take various forms; they may occur on various occasions and in various legal contexts; they originate from and influence different actors, as well as the society as a whole. The chain of emotions starts with the law-making process and the legislator as its key actor, extending to the content of the criminal provisions and ultimately to the decision-making process and the judge as its central figure. While there are protective mechanisms within the realm of the criminal procedures (exemption of the judge, *audiatur et altera pars*) aimed at ensuring the impartiality of the judge, the first link in the chain (the legislative process) easily remains out of focus. The process of creating intrinsically repressive criminal law draws much more (laymen) attention than other areas of law; ultimately, it is very attractive to use it in politically lucrative contexts. For these reasons, it has to be put under special scrutiny.

The historical and contemporary examples from the comparative and domestic law show that it is natural for the lawmaker to communicate in an emotional way. By passing the law in an urgent procedure without a public debate in 2019, the Serbian lawmaker basically skipped one line of legitimation - the valuable and critical comments of the expert public, and addressed (mostly through the media) the "moral" level of legitimation – the general public. The general (lay)

15 Miladinović-Stefanović rightly notices that this has marked a break with the traditional model of regular sentencing, based on an open list of relevant circumstances that are neutral in terms of values, which has been a characteristic of our system ever since the Criminal Code of 1951. (Miladinović-Stefanović, 2013: 258)

public was not only supportive but demanded even stricter punishments in the prevailing atmosphere of "regret for the abolition of the death penalty".

Despite the frequent legislative changes and emotional considerations, the lawmaker– content–courts chain is not a cohesive one. It may be illustrated by the mild penal policy of judges in Serbia; in judicial practice, punishments are often mitigated, or there is still a high percentage of suspended sentences. In other words, there is a discrepancy between the positive law and judicial practice. No matter how frequent and how publicity-driven the hightened repression is, the judges deal with it differently. Thus, in this phase of application of criminal law, emotions seem to have changed (from strict to mild punishment) as compared to the phase of creating the same law.

So, when Karstedt argues for a "return of emotions", stating that feelings have been brought back to criminal procedures (Karstedt, 2002 : 299), it may be added that it is also the case in the legislative process, where provisions are commonly introduced or modified in a polarising spirit to satisfy the ideas of justice of particular stakeholders, taking into account dogmatic inconsistencies and problems in practice. Recognizing that a completely rational legislative process is difficult to achieve, an open discourse and identification of feelings would enhance transparency, the quality of legislation, and the will to participate in the legislative process. Otherwise, "when emotions remain invisible, they remain impervious to evaluation or change" (Brandes, 1999: 11).

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EMOCIONALIZACIJA KRIVIČNOG PRAVA U POSTUPKU DONOŠENjA I IZMENE KRIVIČNOG ZAKONODAVSTVA

Rezime

Autori u radu istražuju fenomen emocionalizacije krivičnog prava, koji se manifestuje u tri faze: u zakonodavnom postupku, sadržinski u okvirusame norme i u krivičnom postupku. I dok je nepristrasnost sudije predmet načela i mehanizama krivičnog postupka, a subjektivno obojena sadržina krivičnopravnih normi postala predmet diskusije nakon niza izmena i dopuna KZ, posebno nakon izdvajanja mržnje kao obavezne otežavajuće okolnosti, dotle emocionalizacija zakonodavnog postupka nije bila u centru pažnje. Nakon uvoda u kom se ukazuje na značaj i aktuelnost teme, povezivanja sa osnovnim ciljevima i legitimnošću državne vlasti, te navođenju komparativno-istorijskih primera, analizirana je emocionalizacija, uz pojašnjenje sâmog pojma emocija, na primeru poslednjih izmena i dopuna Krivičnog zakonika iz 2019. godine.

Ključne reči: *emocionalizacija, Krivični zakonik, Zakon o izmenama i dopunama KZ, državna vlast, doživotni zatvor, Srbija, Sjedinjene Američke Države, hitni zakonodavni postupak.*

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pregledni naučni rad
10.5937/zrpfn0-28911

UDK: 331.5.024.5(497.6:485:489)
Rad primljen: 18.10.2020.
Rad prihvaćen: 17.12.2020.

RESPONSIBLE EMPLOYMENT POLICY: Comparative Analysis of Croatian, Swedish and Danish Active Labour Market Policies[**]

Abstract: *In the past decades, the reduction of unemployment has been one of the crucial areas of social policies of the EU Member States because it is a key to economic growth and development. Taking into consideration the fast-changing labour market needs and the rapid transformation of labour relations, European public employment services are continuously creating new measures of active employment, with the aim to assist as many unemployed beneficiaries as possible and to swiftly re-integrate them into the labour markets. The main goal of active labour market programs is to make the matching process more efficient and to increase the number of successful matches of job vacancies and job seekers. Referring to examples of selected active employment measures in Croatia, Sweden and Denmark, this paper provides a comparative analysis of active labour market measures. The paper is divided into four sections. Section 1 provides an overview of measures to reduce unemployment; section 2 outlines the purpose of active labour market measures; section 3 provides a comparative analysis of five active labour market programs in Croatia, Denmark and Sweden, and a brief description of new activation strategies during Covid-19 in Croatia. The conclusion is that the creation of impactful social policies for employment substantially rests on conducting comprehensive analysis of the impact of active labour market measures from the perspective of new employment*

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[**] The paper was presented at the International Scientific Conference *"Responsibility in Legal and Social Context",* (online),organized by the Faculty of Law, University of Niš, on 18 September 2020.

opportunities and the acquisition of new skills, as well as the analysis of the level of social inclusion of jobseekers.

***Keywords**: active labour market policies, activation strategies, unemployment, social policy, Covid-19.*

1. Measures to Prevent Unemployment

Unemployment is one of major social risks because it can lead to the poverty, discrimination and social exclusion. Unemployment is a result of discrepancies between education attainment and labour market needs, and a mismatch of labour supply and labour demand (Spicker, 2015: 100). Unemployment was traditionally seen as a structural problem that could be solved by job creation, economic development and strengthening of the social protection system; but, gradually, a more individual approach was taken in which special measures were developed aimed at "activating" the unemployed and reintegrating them into the labour market(*cf.* Gilbert, Von Voorhuis, 2001 in Spicker, 2015:85; Hudson, *et al*, 2015:42).

Responsible social policies in the area of reducing unemployment usually comprise two sets of measures: passive or reactive policies (unemployment benefits aimed at income protection), and active policies (vocational trainings, apprenticeships, youth programs, subsidized employment, job retention programs, measures for disabled workers, re-skilling or requalification programs, public works, specially designed programs for vulnerable categories of workers) (*cf.* Obadić, 2003:535; Hudson, *et al*, 2015:37-38). Too generous unemployment benefits might discourage the unemployed people from job seeking and stimulate them to remain unemployed, while insufficient ones would lead to income insecurity and poverty. It is a task of a modern state to engage in the development of targeted and purposeful policies for labour market reintegration, and to perform periodic evaluation and impact assessment of each measure, together with the analysis of impact of labour market regulations, education policies, family policies and immigration policy on demand for employment (Hudson, *et al.,* 2015: 40). Thus, states have the task to create a right set of measures aimed at reducing unemployment; but, in times of the Covid-19 pandemic, it is further exacerbated with significantly higher rates of unemployment due to lockdowns and quarantines.

2. Purpose of Active Labour Market Programs

The primary purpose of active employment measures is to contribute to a well-functioning labour market by assisting unemployed people to find work, to

provide services to employers seeking labour or wishing to retain employees, and to support people with special needs, or a reduced ability to work, to find work (Danish Public Employment Service, 2020). Active labour market policy includes measures such as employment training and publicly subsidized employment, direct job creation, enterprise or work incentives, and employment rehabilitation (*cf.* Immervoll, Scarpetta, 2012: 1-2; Hill, Irwing, 2020: 97). The purpose of these measures is to strengthen people's motivation to look for and make use of existing earnings opportunities, to address specific employment barriers on the labour-supply side by improving the capabilities of jobseekers, and to expand the set of earning opportunities that are available and accessible to jobseekers (Immervoll, Scarpetta, 2012:1-2). On the other hand, employment incentives and rehabilitation programmes incentivize the unemployed to accept jobs, while high expenditure on active labour market policies in the areas of employment incentives, rehabilitation measures and training can compete and, more importantly, diverge from public responses to unemployment, such as a job creation (*cf.* Vlandas, 2013; Griggs, 2014). Therefore, the creation of activation strategies has to be approached with particular caution and strategic perspective of achieving higher employment rates and social inclusion of jobseekers, but job creation cannot be replaced by active labour market measures.

Active labour market policies and measures are closely linked to the receipt of income-replacement benefits, and they are usually made conditional on compliance with employment- and job-search related requirements(*cf.* Immervoll, Scarpetta, 2012: 3). Hill and Irving argue that northern countries have introduced "punitive range of job-seeking conditionality attached to the receipt of income support measures...grounded on the assumption that...labour supply rather than labour demand is the problem and, therefore, adaptive behaviours by employees are required more than those by employers"(Hill, Irving, 2020: 98). This remark is important when we analyse active labour market policies and measures adopted to implement such a policy. We can notice a trend in making job-seeking conditionality more stringent upon the unemployed who are expected to be as flexible as possible, willing to engage in professional specialization, acquire new skills and, if necessary, even change profession if this is required by the employers or labour market needs. In Sweden, for example, the initial aim of active labour market programs was to transfer labour from stagnating low productivity sectors to expanding high-productivity sectors through training programmes and other mobility-enhancing measures (Calmfors, 2001:80).

We also have to be aware of the risks of benefit dependency, the loss of human capital among the long-term unemployed people and, ultimately, of higher public spending on labour market and social policies; in particular, if unemployment benefits and the possible use of activation measures for job seekers are long-

lasting or of indefinite duration, we shall try to prevent the negative effects when creating employment social policies (Immervoll, Scarpetta, 2012: 3). We should also not underestimate the fact that active labour market policies often do not adequately interact with other types of public interventions (e.g. in education systems), which can potentially limit their reach and effectiveness (Pignatti, Van Belle, 2018: 2), given that even perfect active labour market programs cannot replace education credentials for which there is high labour demand. The lack of interaction and mutual correlation between other parts of public social policy and employment policies can be detrimental not only to the implementation of the active labour market measures but also to the overall employability of the job seeker, leading possibly to his/her non-employable status in case of extreme discrepancy between education attainment and labour market demand. Finally, complementarity and interaction between passive and active labour market policies (*cf.* Pignatti, Van Belle, 2018: 2) needs to be closely examined and evaluated when creating targeted and impactful employment measures.

There are multiple benefits of participation in the active labour market program. In addition to the increase in competitiveness, skills and employability in general, we should not neglect another very important aspect, which implies that active labour market programs may help to maintain the job seeker's motivation to seek work actively, i.e. it may counteract the discouraged-worker effect of unemployment (Calmfors, *et al*, 2001:78). Participants in active labour market programs may experience a higher degree of psychological well-being than the openly unemployed people because programme participation is considered more meaningful (Korpi, 1997). This is particularly important for long-term unemployment where negative effects of exclusion from the labour market and low-level of productivity are multiplied.

3. Comparative Analysis of Croatian, Swedish and Danish Active Labour Market Policies

Croatia currently has a total of 150,139 registered unemployed persons and 10,314 available jobs in the labour market; prior to the Covid-19, the quota for employment of foreign workers in 2020 was set to 78,470 labour permits and 38,794 beneficiaries of active labour market measures. Currently, we have six active employment policy programs, and three Covid-19 related activation programs. The Government of the Republic of Croatia adopts strategic plans and programs, including measures of active employment policy which is regulated by the provisions of Articles 34-43 of the Labour Market Act (Official Gazette, No. 118/18, 32/20). In 2019, the unemployment rate was 6.6%, but we need to emphasise that decrease of unemployment rate from 17.3% in 2014 and 16.2%

in 2015 (Croatian Bureau of Statistics, 2018) is not the result of efficient labour market policies but rather of very active emigration of Croatian labour force towards other EU Member States.

Sweden is one of the most active countries in creation and implementation of programs aimed at preventing and reducing unemployment. In 2019, the unemployment rate was 6.48%. The Swedish government is currently implementing six different categories of active labour market measures, including employment with support, work experience placement, start-up business incentives, vocational training, Swedish for immigrants, and general training and education.

Denmark had an unemployment rate of 3.7% in 2019. Targeting all categories of unemployed persons, their active employment measures include: education, guidance and upgrading of skills; wage subsidies at public or private employers, and practical work training at public and private enterprises.

3.1. Traineeship and Internship Activation Programs or Subsidies for Young Job Seekers

3.1.1. Croatia

There are three active labour market programs for young jobseekers: traineeship, internship, and activation program for the unemployed. The cost of internship is fully subsidized only to public offices, while in the private sector it covers half of the salary of trainees for the first year of the employment. In traineeship programs, which can last up to six months, the cost of employer's mentoring and exam preparatory teaching (if applicable) is covered, while the beneficiary can claim transportation costs. The purpose of the activation program is to train unemployed persons to acquire practical knowledge and skills necessary for their active inclusion in the labour market; the measure covers transportation costs and financial aid for the jobseeker. Activation program can last up to 2 months, while the individual participation of candidates is limited to 15 days (Croatian Public Employment Service, 2020).

3.1.2. Sweden

Sweden has an extensive program of activation measures designed for young jobseekers. Programs target jobseekers above the age of 25 who are unemployed or at risk of becoming unemployed, jobseekers under the age of 30 with a disability that affects their ability to work, jobseekers who are 18 years old, unemployed and need extra support to enter the labour market, and newcomers to Sweden who take part in establishment programs and those participating in speciali-

zed youth employment programs. Important part of all activation measures is that they include not only job placement but also competence assessment by a supervisor during the work experience, which takes up to three weeks and can be done at a workplace, a vocational college or a similar place. Jobseekers need to find a workplace either with private or public employers, on their own or with the help of public employment service, which also plans the structure of the work experience together with the beneficiary and the employer, consulting the trade union. All persons participating in this measure are entitled to activity support, development allowance or establishment allowance, a certificate from the workplace which describes the work experience and whether the work experience programme includes an assessment of the professional competence in writing.

An introductory job is available for persons who have been unemployed for a long period of time and for those who recently arrived in Sweden. It can be combined with studies, training and education, vocational course, and upper secondary school studies in order to take the upper secondary school exam or studies in Swedish. The Employment Office, together with the jobseeker and employer, assesses whether a workplace is suitable; if the results are positive, the employer receives the wage subsidy. The common duration of an introductory job is up to 12 months, which can be extended to 36 months if the Employment Office assesses that a person needs continued support(Swedish Public Employment Service, 2020).

3.1.3. Denmark

In Denmark, there are two equivalent activation measures for young jobseekers. The first one is practical work training at public and private enterprises, which can be used to re-train jobseekers and upgrade their qualifications. The jobseeker continues to receive unemployment insurance benefits for the duration of an internship to develop the skills. The second program is an adult apprenticeship scheme for those who have turned 25 years at the commencement of the programme. Employers are eligible for a subsidy for the salary paid in the practical training period when they enter into a training agreement with jobseekers.

Another youth activation program is the "youth guarantee initiative", based upon early intervention after three months of unemployment, as compared with six months for older unemployed persons. The program entails mandatory activation of those under the age of 30 and a stronger focus on motivating young people without a vocational education to enter one. Interventions target young people who are inactive on the labour market but who are not registered as unemployed persons. For unskilled young unemployed persons, the focus is

on improving their formal skills through vocational education in the regular educational system. Unemployed persons under the age of 25 who have not completed secondary education are under the obligation to undertake regular tests of skills in reading, writing, and arithmetic. If the test reveals shortcomings, the jobseeker is obliged to participate in a relevant training programme. Unemployed persons who face multiple challenges are categorised as 'ready for activation', which entitles them to receive additional support of a coordinating case-worker at the job centre and job training or 'building bridge to education', and a mentor support.

Denmark also has active labour market measures for youth between the age of 15-17,who are obliged to be in education, employment or another activity in accordance with their personal education plan. When a young person leaves primary and lower secondary education to begin vocational or upper secondary education, the youth guidance centre must assess whether he/she possesses the educational, personal and social skills to do so. In case of young people who are assessed as not yet being ready to move into further education, the municipality must provide training or other assistance needed in order to help them achieve a positive assessment. The youth guidance centres provide guidance services for young people up to the age of 25, focusing in particular on the transition from compulsory to upper secondary education or to the labour market (Danish Agency for Labour Market and Recruitment, 2020).

3.1.4. Comparative analysis

If we analyse the basic requirements for implementation of activation measures for young jobseekers, we can notice that in Sweden and Denmark there is a strong emphasis on initial assessment of professional competences and a subsequent mandatory evaluation of achieved competencies, and development of a personal education plan. The main reasons for the development of youth labour market activation programs are exactly what Swedish and Danish programs have at their core: opportunity for an inexperienced jobseeker to enter the labour market and acquire a certain level of professional competencies. If activations measures do not end with thorough assessment of increase in competency level, they are considered not to have achieved the intended goals. In a survey aimed at analyzing the subsidized internship programs in Croatia between 2010 and 2013, one sixth of surveyed beneficiaries pointed out that they were conducting menial jobs, unrelated to their education, and did not learn enough, mainly working in public offices (Croatian Public Employment Office, Ipsos, 2016:32-33). If initial assessment and mandatory evaluation of internship performed and if negative experiences should lead to the future exclusion of employers from internship

subsidies, this measure can become purposeful and result in increase of professional competencies of young jobseekers.

Further, the Danish obligation of conducting regular tests and introducing obligatory training in reading, writing and arithmetic for insufficiently educated youth is a good example of providing additional education while implementing activation programs. The practice of inclusion of young people who are not registered as unemployed into the activation programs and vocational training shows that activation programs can achieve much more if we open them to all young beneficiaries because this is how social exclusion can be successfully mitigated.

3.2. Active Labour Market Programs for Disabled Job Seekers

3.2.1. Croatia

In Croatia, the Employment Office currently does not have any active labour measures specifically designed for the integration of disabled persons into regular jobs, apart from the special Covid-19 measure to retain all employed in sheltered employment (integrative workshops) and the general provision of preferential access to jobs in public offices, if disabled person is equally qualified.

In Croatia, 496,646 persons are registered as disabled. There is a total of 11,529 employed disabled persons, and a total of 5,498 registered unemployed persons; 30% of the latter are without any working experience (Ombudsperson for Persons with Disabilities, 2020: 135). It is difficult to understand why Croatia, as an EU State which ratified the Convention on the Rights of Disabled Persons in 2007 (Article 27 regulates the obligation to promote employment of disabled persons), does not currently have any specialized active labour market program for employment of disabled persons in regular jobs, apart from self-employment subsidy.

According to the Ombudsperson's 2019 report, the most used general activation measure by disabled people was self-employment support. The Institute for Professional Rehabilitation also covers subsidies for sustainable self-employment of disabled persons. In the last year's report, the Ombudsperson for disabled persons emphasized a large disparity between the number of people with disabilities in the working age and the number of people with disabilities who are active jobseekers, as well as a lack of social inclusion programs for disabled persons reported by the Professional Rehabilitation Centres (Ombudsperson for Persons with Disabilities, 2019: 126).

3.2.2. Sweden

Sweden has six active labour market programs specifically created for disabled jobseekers, and each of them is an example of excellent state policy for labour integration of persons with various degrees of disabilities.

The first program is a grant for personal assistants by which disabled jobseekers can get support and help from a person at the workplace, if they have reduced working capacity. The purpose of the program is to give a grant to the employer who then allocates staff for the role of personal assistant in order to make the job easier for disabled persons and to ensure that he/she actually keeps a job. The personal assistant acts as a support for a worker in repetitive tasks or work situations that disabled workers cannot manage on their own. The grant can also be used for disabled persons to participate in a programme or in school's practical orientation in working life. The grant is applicable to self-employed disabled persons under the same conditions; if they have a disability that causes significant communication difficulties, the grant amount can be doubled.

The second available activation program is wage subsidy for disabled workers, with three types of wage subsidies: to develop the competence and ability to work in order to facilitate job seeking or studying, to increase chances of getting and keeping a job that suits jobseekers' competence and skills, and to ensure security in employment for those with a need for long-term support to get and keep a job. This measure has a strong component of competence development, supervision and adaptation of work. Together with a jobseeker, the Employment Service draws up a plan on how he/she can increase the ability to work and regularly ensures follow-up support to the employed and the employer. Initially, this is a one-year long incentive, but the Employment Service has set as a goal the conversion of subsidized employment into regular non-subsidized employment.

The third activation program is psychosocial adjustment support for jobseekers who feel uncomfortable in social situations at work or unsure about what psychosocial requirements apply in the workplace. The Employment Service assesses whether psychosocial adjustment support is appropriate by getting in touch with the employer and psychologist or social consultant, who jointly assess how the psychosocial environment in the workplace and the psychosocial demands affect the work performance of a jobseeker (Swedish Public Employment Service, 2020).

The fourth activation program for disabled people is protected work at a public employer, which entails specially adapted, subsidized and fixed-duration job, with a goal to develop the beneficiary's ability to work and improve the chances of the disabled person to get a regular job. The Employment Service, together

with jobseeker and the employer, assesses the suitability of a workplace and tasks, and provides regular follow-up support to the jobseeker and the employer.

The fifth available program involves a special support person who helps disabled persons to train for tasks, provides other things that are needed at the introductory stage, and ensures a follow-up support during job search and at the outset of employment. The support comes in two parts: introductory support of six months, and a follow-up support for maximum of one year after the start of the employment.

The sixth available program includes individual pedagogical support when a disabled person participates in training and education programmes. The jobseeker is supported by a person who can help structure the course of study, study techniques and learning approach; the support can be complemented with various aids and facilities (such as: spelling programmes, speech synthesis software, preparatory training and education, labour market training or high school education). The initial plan includes specific needs of and the support for the jobseeker, while continued guidance and follow-up support are provided during the training or education programme.

Finally, sheltered employment is available at the state-owned company Samhall. They train up to 1,500 employees per year and match them to the right jobs and the right co-workers in cleaning, care, logistics and manufacturing. The long-term aim is that a jobseeker becomes able to get a regular job with another employer (Swedish Public Employment Service, 2020; Samhall, 2020).

3.2.3. Denmark

Denmark has a whole range of particular measures for placing disabled persons in employment, including: access to personal assistance, wage subsidies for employers, preferential access, and counteractions towards differential treatment. The Employment Service supports the municipalities to help unemployed disabled people enter the labour market. Subsidies may be granted to a business for the wages of a personal assistant for a disabled employee. Personal assistance can be offered to unemployed people, wage earners and self-employed businesspersons who have a need for special personal assistance on account of physical or mental handicap. The objective of the scheme is to offer persons with disabilities the same possibilities of pursuing a trade or a profession as persons without disabilities. The role of this personal assistance is to assist the disabled employee with work-related tasks, for the performance of which he/she requires special personal assistance due to his/her functional impairment.

Support may also be offered to employees who, due to permanent and severe physical or mental handicap, require personal assistance outside normal working hours in order to take part in general supplementary and further training in connection with the job in question. The objective of these compensation schemes is to enhance and stimulate the possibility of employing persons with disabilities and retaining them in the labour market, and to offer them the same possibilities of pursuing a trade or profession as persons without disabilities.

Wage subsidies for the employment of newly educated persons are developed with the aim of gradually integrating disabled persons who have completed an educational programme of at least 18 months' duration, which can entitle such individuals to membership in an unemployment insurance fund. This support may be granted to a public or private employer for a period of up to two years after the completed educational programme. Employment with subsidies will only be approved if the person has not succeeded in obtaining employment in the professional field for which the education programme has qualified him or her.

According to the Danish Act on Active Employment Measures, subsidies are also granted for aids, tools, small-scale workstation design and layout, or teaching equipment (Danish Agency for Labour Market and Recruitment, 2020).

3.2.4. Comparative analysis

Integration of disabled persons into the regular labour market should be a goal of all developed societies. Sheltered employment has numerous positive aspects as the entry point to the labour market for disabled persons, but the negative ones are segregation and isolation of disabled workers (*cf.* Visier, 1998), which can be prevented by creating sheltered employment (such as the opportunity offered by Samhall in Sweden) with a clear prospect of ensuring the worker's smooth transition to a regular job.

In addition to sheltered employment, it is important to introduce elaborate and well-designed activation policies for disabled job seekers, which place particular emphasis on availability of job assistants for disabled and promote availability of training and further education or specialization (as illustrated by the examples from Sweden and Denmark). Finally, disabled jobseeker should be provided ongoing support in advancement of professional skills. We cannot develop an inclusive society without providing activation measures for disabled persons, who are often marginalized and socially excluded.

3.3. Wage Subsidies

3.3.1. Croatia

In addition to the already described internship program wage subsidy, another subsidized employment program in Croatia is the program for permanent seasonal workers. It was created with the aim to provide subsidy to employers of workers who are employed only during the seasonal work, and who can use subsidy during the period when they are not actually working. The measure is available to employers from all industries who have periods of reduced workload during the year due to the seasonal nature of the business. This measure can last six months, with the possibility of extension for the duration of the special circumstances caused by COVID-19.

3.3.2. Sweden

In Sweden, subsidized employment is available through two activation programs. In the first program, the employer receives a wage subsidy for the employment of long-term unemployed persons or newcomers, who become an extra resource for an employer in the welfare sector, the public sector, cultural sector, or non-profit sector. In the second program, new start-up jobs are offered for long-term unemployed persons who have been away from working life because of illness or other reasons. The employer receives a contribution towards the salary(Swedish Public Employment Service, 2020).

3.3.3. Denmark

In Denmark, subsidized employment entails wage subsidies for public or private employers to re-train the professional and social competences of unemployed people. Wage subsidies in the private and the public sector are provided to employers when they hire a person who has been unemployed for at least 6 months. Public and private companies are eligible for a wage subsidy if they hire an unemployed person for a period of 4 or 12 months, depending on the category of unemployment (Danish Public Employment Service, 2020).

3.3.4. Comparative analysis

In addition to subsidies applicable to employment of youth, the active labour market measure in the form of wage subsidies is frequently used to support employment of jobseekers who are not easily employable, due to long-term unemployment, age, illness or other reason. While in Denmark and Sweden wage subsidies are used to support employment of long-term unemployed, in Croatia

that category of jobseekers was formerly included in activation measures, but this is no longer the case. In 2019, 15.9% of jobseekers were unemployed for 12 months or longer, while 13.9% of jobseekers were unemployed for 24 months or longer (Croatian Bureau for Statistics, 2020), which means that we had almost 30% of long-term unemployed persons. It is unlikely that this rate has been reduced lately. The Danish approach to the term "long-term unemployment" is particularly interesting because it starts six months after the start of unemployment. This is in line with Danish early intervention strategy (previously described in the sub-section on youth activation measures), which clearly shows the commitment to implementing the activation policy as early as possible because it is only then that it can lead to employment of a jobseeker.

The Swedish approach is even more comprehensive because it differentiates between the long-term unemployed persons and those who are away from the labour market for justified reasons preventing them from working. The first activation program has excellent "selling point" for employers because jobseekers are labelled as "additional resource" for employers; in effect, this is what subsidized employment is, but it is not often advertised like that. This presentation of a jobseeker as an additional resource has a significant impact on social inclusion, given that the long-term unemployed persons are often stigmatized and marginalized due to their inability to get a job. The selection of sectors of employment eligible for such wage subsidies (welfare, public sector, cultural sector or non-profit sector) points to the commitment of the Swedish government to support sectors with lower wages and less interest in employment.

In Scandinavian examples, we should also take into consideration the equal availability of wage subsidies for all public and private employers. In Croatia, a clear and unfair distinction was made between wage subsidies for internships in the private sector (eligible only for 50% wage subsidy) and public sector (eligible for 100% wage subsidy). It is difficult to understand and justify a very dissuading policy of employment incentives only in the public sector, knowing that an increasing number of professions are eligible for employment only in the private sector due to the nature of specific jobs. Furthermore, the non-profit sector cannot offer wages at the same level as private employers; therefore, it should be additionally supported to participate in youth internships as a less attractive sector of employment. Finally, it seems that the primary goal of such measures was not to have efficient labour market policies and increase employability of jobseekers but rather to establish unjustified preferential treatment of public offices.

In Croatia, the selection of partial wage subsidies in the tourism sector is closely linked to the importance of tourism revenues for the country. But, taking

into consideration the problems of long-term unemployment and existence of a large group of difficult-to-employ jobseekers in other sectors, it is difficult to find justification for inclusion of the seasonal sector in wage subsidies activation programs as, in its substance, it is not an activation program but rather another type of supported program.

3.4. Support for Self-Employment

3.4.1. Croatia

The Croatian active labour market program on self-employment aid includes financial support granted to unemployed persons who are registered as unemployed, and who decide to start their own business. Business expansion grants are granted to businesses which are expanding their existing business, and which have already received self-employment support. Financial support can be received for a period of 24 months (in the first 12 months, the beneficiary needs to justify the support; in the remaining 12 months, the support is used for the maintenance of business activity); but, the financial support is provided only for some predetermined employment sectors. The measure can be combined with on-job training, and the applicant needs to submit a sustainable business plan (Croatian Public Employment Service, 2020).

3.4.2. Sweden

Sweden has an activation program for the self-employment of unemployed persons. The Employment Service pays a contribution to start-up costs (purchase of equipment or other costs) at the start of a profitable business. The requirement for receiving the contribution is the submission of a good business plan and relevant experience, consideration of the labour market needs, and competition in chosen industry. An interesting aspect of this measure is the possibility to benefit from an initial work placement aimed at increasing one's work experience in the industry where the applicant wants to work. If a jobseeker has never run a business prior to the application for a grant, the Employment Service offers information meetings, consultancy, and a start-up course to help the jobseeker describe his/her business concept, draw up a budget for the business, and learn about taxes, accounting, marketing, and similar important business aspects. For disabled persons with reduced work capacity, an additional requirement is to have a sound business plan of at least three years, while all other requirements and applicable rights are the same as for persons without disability (Swedish Public Employment Service, 2020).

3.4.3. Comparative analysis

The Croatian activation measure for self-employment is used to promote and support employment in sectors that are of interest to the state; thus, it cannot be fully qualified as self-employment, given that the range of beneficiaries largely depends on the state decision which sectors are to be funded. While the Croatian self-employed persons can benefit from on-job training, the Swedish concept is to support the initial work placement in order to increase work experience in the sector where the activation measure is applied. Even if the applicant does not have relevant experience in the specific sector, there is a high likelihood of receiving funding even for an entrepreneurial idea, which clearly reflects the Swedish government support to start-up businesses. Thus, if we continue to approach self-employment from the old-fashion perspective of giving priority to applicants with specific work experience in the sector, which is the case in Croatia, we will not be able to move forward and support innovative business concepts through entrepreneurial activation measures.

3.5. Education and Training Support

3.5.1. Croatia

Croatia has two sets of active labour market measures aimed at providing education to unemployed persons, as well as to employed persons. These measures are aimed at increasing the level of employability of unemployed persons by providing relevant vocational training, re-training or advanced training programs in the required occupations in accordance with the development of the labour market, or raising the employability and competitiveness of persons without completed primary school by creating conditions for completing primary education and acquiring the first professional qualification.

As for already employed person, the goal of active labour market measure is to increase the level of competitiveness and expertise of employees by referring them to vocational training, re-training or advanced training programs in accordance with the development of the labour market. In addition to financing the full cost of education and medical examinations, the measure also covers transportation costs and financial assistance.

Another activation program is on-the-job training; this measure is aimed at training unemployed persons to acquire practical knowledge and skills needed to perform the tasks in a particular job, which may result in obtaining a certificate of entrepreneurial support institution (business incubators and development agencies), an employer's confirmation of acquired knowledge and skills, or an

official public document (training certificate) (Croatian Public Employment Service, 2020).

3.5.2. Sweden

Sweden has several activation measures aimed at providing education and training opportunities to unemployed persons. These measures include: labour market training (tailor-made together with a specific employer, which often leads to employment); student support for education at primary and secondary school level; and student aid with grants and loans for studies in adult education, public high schools, universities or vocational universities, and certain courses abroad. Vocational introductory employment is available for those under the age of 25, long-term unemployed persons or newcomers to Sweden, where jobseekers may learn a trade or profession, get experience, get paid, and increase their chances of getting a job (Swedish Public Employment Service, 2020).

3.5.3. Denmark

In Denmark, education, guidance and upgrading of skills may include brief guidance and clarification activities, education and training (certified informal educational institutions, specifically arranged projects, and training periods). Unskilled unemployed persons over the age of 30 who receive unemployment benefits are given a chance to apply for and complete one of the 107 vocational training programmes. The curiosity of this program is that unemployed persons have to "pay" for these vocational programmes with a cut in their unemployment benefit. A loan is offered to allow unemployed people to draw the full rate of unemployment benefit for the duration of their course of education. This loan is to be repaid upon completion of the course of education.

Unemployed people over the age of 30 are eligible for an assessment of their non-formal and informal competences; the assessment is aimed at giving credit for competencies acquired through education, on the labour market, or from activities pursued in one's spare time. Recognition of prior learning by competence assessment programme will also support the individual training plan, including one or several adult vocational training programmes.

Denmark also implements job rotation scheme; thus, a company benefits if it supports the employees' continuing professional training and, at the same time, temporarily employs an unemployed person as a substitute. The temporary employee is required to have been unemployed for a minimum of six months, and is permitted to work as a temporary employee for up to six months.

Employers can obtain subsidies for upgrading employees' skills through employment. A condition for granting subsidies is that the upgrading of skills goes beyond what the employer would normally be required to provide (for example, on-the-job training schemes or work tools that are specific to the individual employer). Unemployed persons under the age of 30 or people who are at risk of becoming long-term unemployed persons can get into the scheme after six months of unemployment.

Finally, Denmark also has the right to six weeks' job-oriented vocational training (from the first day of unemployment) for low-skilled and skilled unemployed people who are members of an unemployment insurance fund. In this training, participants are provided with relevant skills and competences required in the labour market; the training is primarily aimed at specific sectors and job functions. Social partners play a major role in determining which specific adult vocational training programmes are offered (Danish Agency for Labour Market and Recruitment, 2020).

3.5.4. Comparative analysis

Vocational trainings are one of the most common activation measures, which are used in majority of countries implementing active labour market programs. The problem with vocational trainings is the low commitment of unemployed persons to participate in additional training; this issue may be counteracted by introducing the obligation to participate in training costs (as illustrated in the example of the Employment Service in Denmark, where the costs of vocational training are deduced from the unemployment benefits). This actually has multiple benefits because it sends a message to jobseekers that additional training brings additional value to their professional competencies and, as such, needs to be paid for; it also empowers jobseekers to move from the position of passive recipients of income-substitute benefits and vocational training to the position of active members of society who are able to contribute towards their specialization; finally, considering the financial implications for the jobseeker, it entails a more serious approach to participation in the training.

On the other hand, we also have frequent resistance of employers to allow their employees to participate in professional trainings, primarily for fear that it may have negative implications for the work process. In that regard, the Danish innovative strategy is substitute worker practice, which encourages training of present employees and concurrently provides an opportunity to unemployed persons to get employed on a temporary basis.

3.6. Specific Measures Related to the Impact of Covid-19 Pandemic on the Labour Market in Croatia

In March 2020, Croatian authorities adopted an *ad hoc* active labour market measure to support job retention due to Covid-19 lockdown. The initial three-month wage subsidies were implemented in a rather chaotic manner, but they did not explicitly regulate the prohibition of dismissal within a certain period after awarding the wage subsidy. After the expiry of the wage-subsidy period, a large number of dismissals ensued in the tourism sector. The subsequently adopted package of new activation measures was expanded to include job retention measures for micro-entrepreneurs, introduction of subsidized short-time work, and support for retention of sheltered workplaces, integrative workplaces and work units for employment of disabled persons. Currently, wage subsidies include the following sectors: passenger transport, accommodation, food and beverage preparation, administrative and support service activities, event industry, arts, entertainment and recreation, micro-entrepreneurs and all other employers who cannot work or whose work has been restricted. The requirement is that their income has decreased by at least 50 or 60 percent.

Short-time work was introduced as a new activation measure, with the aim of preserving jobs for employers whose work has been temporarily reduced due to the pandemic. Employers who employ more than 10 workers can benefit from this measure, but only if they can prove that they have a decline in revenues and the number of employed workers due to the pandemic. The subsidy amounts to the equivalent of 266,00 EUR. The employer is prohibited to terminate the employment contract of the employee on whose behalf the support has been obtained at least 30 days from the day of termination of the use of the support.

Given that there are no available data on the use of this measure, we can notice several structural problems at the very beginning of implementing this measure, which might eventually lead to a low rate of using this activation program. The first possible issue is a flat rate subsidy amount which could be attractive only in lower paid sectors of employment, and will not be used for retention of higher skilled and higher paid workers. Secondly, the application procedure seems overly complicated, with employers being requested to prove several different things, such as a link between the drop in revenues and working hours and Corona-virus lockdown. Thirdly, the employer is obliged to pay all contributions for the subsidized support, which may discourage employers to use this measure. If we look into the Swedish experience with Covid-19 response, their Government proposed a system of support for short-term layoffs, with the aim of ensuring the survival of more businesses and dismissal of fewer employees. In order to achieve this, the Government introduced a temporary reduction of employers'

social security contributions and the general salary contribution for the first 30 employees and self-employed people for four months, along with full coverage of employers' sick pay costs. Measures on a temporary increase of the number of people entitled to unemployment benefits and on a temporary increase in benefit levels were introduced in 2020.

In the Budget Bill for 2021, the Government proposed funding for increased access to employment training programmes and announced the introduction of an 'intensive year' for newly arrived immigrants, which will help them enter the labour market more quickly. It also proposed the allocation of funds for introductory jobs and extra jobs, aimed at creating more job opportunities for newly arrived immigrants and long-term unemployed persons, which may in turn strengthen their position in the labour market (Government of Sweden, 2020).

4. Conclusion

Active labour market policies are not only a powerful tool for employment but also a very important tool for social inclusion, education and empowerment of jobseekers. Activation programs need to be developed with a great deal of social responsibility, taking into consideration the complexities of the labour market, the complex structure of unemployed labour force, as well as the correspondence between labour market needs and jobseekers' education attainments, professional skills and competencies.

The second crucial phase is the implementation of activation measures because their inadequate implementation can be more detrimental to the labour market than the absence of any measures. Namely, if procedures are not streamlined and simplified, activation measures will not be used and will not achieve the intended purpose of (re)integration of a jobseeker into the labour market.

The third crucial phase is the evaluation of effectiveness of each labour activation measure and its impact on employability and/or professional competencies of a jobseeker. This assessment is probably the central part of active labour market programs because, without in-depth analysis of their impact, they remain just an expensive attempt to increase level of employment and justify the existence of usually robust state employment service.

The paper has attempted to provide comparative analysis of the most used activation measures in three European countries: Sweden and Denmark as the most advanced countries and Croatia, one of the least advanced countries in terms of active labour market policies. The last analysis on the impact of activation measures by Croatian Public Employment Service was done for the period 2010 - 2013, which means that we did not have a comprehensive analysis of labour

activation measures for the past seven years. In the meantime, the Covid-19 crisis severely affected (un)employment rates and now, more than ever before, we need to use comparative examples of well-functioning, well-developed, innovative and inclusive labour activation programs. Danish and Swedish labour activation programs certainly qualify for that description.

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ODGOVORNE SOCIJALNE POLITIKE: UPOREDNA ANALIZA HRVATSKIH, ŠVEDSKIH I DANSKIH MERA AKTIVNE POLITIKE ZAPOŠLJAVANJA

Rezime

Rad se bavi uporednom analizom hrvatskih, švedskih i danskih mera aktivne politike zapošljavanja u području podrške mladima, osobama sa invaliditetom, dugoročno nezaposlenima, kao i mera subvencija zarada za određene kategorije zaposlenih, subvencija za samozapošljavanje i obrazovanje, te provođenja programa profesio- nalnog usavršavanja kao pripreme za ulazak na tržište rada. Zbog uticaja Covid-a 19 na stopu nezaposlenosti na tržištu rada, moramo se usredsrediti na uporedne primere funkcionalnih, dobro razvijenih, inovativnih i inkluzivnih programa aktiv-nog traženja posla na tržištu rada, kao što su švedski i danski.

U radu su analizirane prednosti mjera aktivnog traženja posla sa detaljnom procenom nivoa kompetencije za tražioce zaposlenja bez prethodnog iskustva, kao i koristi od uključivanja neregistrovanih tražioca zaposlenja u programe aktivnog traženja posla i stručnog osposobljavanja. Takođe se ukazalo da se negativni ishodi tzv. zaštićenog zapošljavanja osoba sa invaliditetom mogu sprečiti stvaranjem programa sa jasnom perspektivom prelaska zaposlenih osoba sa invaliditetom na redovan posao. Razrađene i dobro osmišljene aktivne politike tržišta rada za osobe sa invaliditetom koje traže posao takođe treba da uključuju angažovanje pratilaca

za posao za zaposlene sa invaliditetom, dostupnost programa stručnog osposobljavanja, dalje obrazovanje ili specijalizaciju, i kontinuiranu podršku u unapređenjuprofesionalnih veština.

U radu se naglašava važnost strategija rane intervencije i predstavljanje dugoročno nezaposlenih kao „dodatnog resursa" za poslodavce koji primaju subvencije za njihove zarade jer se tako sprečava stigmatizacija i marginalizacija navedenih lica. Konačno, mogućnost dobijanja sredstava za preduzetničku ideju za čiju realizaciju tražilac zaposlenja nema relevantno iskustvo vrlo je napredna jer pokazuje podršku idejama za osnivanje preduzeća. U radu se ističe da se socijalna inkluzija nezapo- slenih može postići i njihovim učešćem u troškovima stručnog osposobljavanja, te da poslodavci mogu biti motivisani da zaposlenima omoguće stručno usavršavanje ako su obezbeđeni zamenski radnici. Rad se završava kratkim pregledom najnovi- jih politika aktivnog traženja posla na tržištu rada uzrokovanim pojavom virusa Covid-a u Hrvatskoj.

***Ključne reči**: aktivna politika tržišta rada, aktivacijske strategije, nezaposlenost, socijalna politika, Covid-19.*

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pregledni naučni rad
10.5937/zrpfn0-28603

UDK: 340.440(497.6)"04/14"
Rad primljen: 29.09.2020.
Rad prihvaćen: 30.12.2020.

O TEMELJIMA ODGOVORNOSTI VJEROVNIKA KOD BESPLATNIH UGOVORA U HRVATSKOM SREDNJOVJEKOVNOM PRAVU[**]

Apstrakt: *Besplatni ugovori najučestaliji su pravni poslovi u svakodnevnom pravnom prometu. Neformalnost koja ih razlikuje od ostalih pravnih poslova s jedne strane olakšava njihovu primjenu, dok s druge strane otežava pravni položaj ugovornih stranaka u slučaju povrede ugovornih obveza. Odgovo-rnost zbog povrede ugovorne obveze jednako pogađa oba ugovaratelja, vjerovnika i dužnika. No, kako je dužnik sukladno načelu utiliteta ugovorna strana koja od zaključenja besplatnog pravnog posla ima ponajviše koristi, rasprave o obvezama kao i kriterijima odgovornosti vjerovnika još su od nastanka najranijih pravnih sustava rijetke su. To ne iznenađuje obzirom da se kod besplatnih ugovora gotovo bez iznimke radi o poslovima zaključenim između prijatelja i poznanika obilježenim povjerenjem ugovornih stranaka. Temelji privilegirane odgovornosti vjerovnika u zapadnoeuropskim pravnim sustavima, tako i u hrvatskom pravu počivaju na rimskim pravnim načelima koja su posredstvom pravnih normi ius commune recipirana u moderne odredbe obveznog prava.*

Kako je problematika odgovornosti vjerovnika kod besplatnih ugovora izostala u hrvatskoj znanstvenoj literaturi ovim će se istraživanjem, pravno povijesnom raščlambom dostupnih izvora hrvatskog srednjovjekovnog prava te njihovom komparacijom nastojati utvrditi temelji odgovornosti

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[**] Rad je pod istim nazivom izložen u vidu usmenog saopštenja na međunarodnoj naučnoj konferenciji „Odgovornost u pravnom i društvenom kontekstu", održanoj 18. septembra 2020. godine u organizaciji Pravnog fakulteta u Nišu.

posuditelja i ostavodavca u hrvatskom pravu ali i pobliže obrazložiti razlozi za jedinstvena rješenja sadržana u Zakonu o obveznim odnosima.

***Ključne riječi*:** *besplatni ugovori, načelo utiliteta, odgovornost vjerovnika, srednji vijek, zakon o obveznim odnosima.*

1. Uvodna razmatranja

Besplatni ugovori po svojoj pravnoj prirodi isključivo pogoduju dužnicima olakšavajući im položaj time što za vjerovnikovu činidbu ne podrazumijavaju protučinidbu dužnika. Besplatni su ugovori najčešće zaključeni iz prijateljskih pobuda i isključivo između osoba koje zbog nekog ranijeg privatnog odnosa najčešće ni ne predviđaju budući nastanak spora koji iz takvih poslova može uslijediti. Kako se kod posudbe i ostave o pravnim poslovima koji uključuju vjerovnikovu činidbu kojom se pogoduje drugoj ugovornoj strani s razlogom je pozornost zakonodavca, kao i pravnih teoretičara kod ovih pravnih poslova primarno usmjerena na ugovoru stranu koja prima uslugu, tj. onu kojoj se pogoduje. Položaj vjerovnika spomenutih besplatnih ugovora rijetko se razrađuje u hrvatskoj pravnoj literaturi te mu osim pozornosti zakonodavca te površne udžbeničke obrade gotovo nije bilo moguće pronaći traga. No, u čemu leži uzrok marginalizaciji pravnog položaja jedne ugovorne strane kod ovakvih pravnih poslova? Zanemarimo li činjenicu da je u praksi zaista i zabilježen malen broj slučajeva koji pozivaju na odgovornost vjerovnika u odnosu na one koji su temeljeni na odgovornosti dužnika besplatnih ugovora uočit će se kako je vjerovnikov položaj temeljen na određenim obvezama, iz kojih shodno tomu, proizlazi i značajnarazina odgovornosti.Dakako, mora se primijetiti kako su vjerovnici besplatnih ugovora o kojima je riječ u nastavku ipak posebne ugovorne strane koje od pravnog posla ni ne očekuju posebnu korist, tj. ne ostvaruju interes te je stoga opravdano očekivati vrlo ograničen obujam ugovornih obveza ove strane, kao i tome odgovarajuću razinu odgovornosti. Pri tome se mora uzeti u obzir kako su temeljna načela navedene ugovorne odgovornosti u hrvatskom pravu još od razdoblja srednjeg vijeka od kad potječu najraniji pravni tekstovi u velikoj mjeri preuzeta iz rimskih pravnih izvora te su tijekom dugog razdoblja bila izložena samo marginalnim prilagodbama.

U nastavku istraživanja temeljem analize dostupnih izvora nastojat će se utvrditi u kojoj mjeri hrvatsko srednjovjekovno pravo zaista sadrži rješenja kada je riječ o položaju vjerovnika nekih besplatnih ugovora, tj. posuditelja i ostavodavca te pronaći uzroke tvrdnji kako navedena rješenja, uz dakako vremensku pri- lagodbu, zadovoljavaju svrhu i smisao modernih zakonskih tekstova. Pri tome se mora naglasiti kako je razlog za prikaz i komparaciju položaja vjerovnika samo navedenih besplatnih ugovora okolnost da ih najstariji

izvori kontinuirano navode, dok su ostali pravni poslovi uz oznaku besplatnosti izostavljeni iz njihova sadržaja.

2. Položaj vjerovnika kod besplatnih ugovora u rimskom pravu

Kako je shema odgovornosti ugovornih strana kod besplatnih ugovora, *commodatum*[1] i *depositum*[2]u klasičnom rimskom pravu poslužila kao dominantan okvir na kojem je izgrađen moderni sustav odgovornostiu nastavku će se kratko prikazati. Brojne su znanstvene rasprave posvećene odgovornosti posudovnika u rimskom pravu. Nasuprot tome, one koje se bave odgovornosti posuditelja kao i drugih vjerovnika besplatnih ugovora izrazito su rijetke. Čak i dostupni pravni izvori ovom pitanju posvećuju tek minimalnu pozornost.

2.1. Pravni položaj posuditelja

Detaljna analiza fragmenata koji se u pojedinim rimskim izvorima bave problematikom odgovornosti posuditelja upućuje na sljedeće zaključke u pogledu obveza koje su ga teretile. Prva i najznačajnija obveza posuditelja bila je trpiti posudovnikovu uporabu stvari tijekom ugovorenog razdoblja te se suzdržati od smetanja posudovniku. Posuditelj je bio obvezan omogućiti posudovniku ugovorenu uporabu stvari, ali i suzdržavati se od bilo kakvog djelovanja kojim bi posuđena stvar bila dovedena u stanje u kojem je mogla biti manje korisna posudovniku. Ulpijan, premda u fragmentu D. 13, 6, 5 raspravlja isključivo o odgovornosti posudovnika, navodi pojedine slučajeve koji utemeljuju odgovornost posuditelja zbog nastale štete, a koja je posljedica kršenja obveze posuditelja (Wiaecker, 1934: 57–62, Nörr: 1956: 68 i 119).U razdoblju u kojem je *commoda- tum* postojao samo kao posao socijalne prakse te prirodom podsjećao na *bene- ficium* određene obveze mogle su se pripisati posuditelju, kao što je naprimjer omogućavanje besplatne uporabe stvari, koja je bila jednostavno opoziva. No, nakon što je *commodatum* postao dijelom pravne sfere[3]omogućeno je ograničavanje položaja posuditelja prilikom dobrovoljnog pregovaranja radi sklapanja pravnog posla u smislu onemogućavanja prijevremenog vraćanja stvari od

1 *Commodatum* je ugovor kojom se stvar besplatno prepuštala na uporabu. (Zimmermman, 1996: 189).

2 *Depositum* je ugovor kojim se ostavoprimac obvezao besplatno čuvati ostavodavčevu stvar. (Zimmermman, 1996: 215). U dijelu rada koji analizira rimske izvore za ugovorne strane koristit će se naziv deponent i depozitar.

3 *Formula in factum* nastala je prema pravnim izvorima, najvjerojatnije u razdoblju kasne Republike. Točnije, krajem prvog stoljeća pr. Kr.; Kaser-Knütel, 2003: 246.Buckler smatra da je *commodatum* kao utuživi ugovor spomenut već u vrijeme Kvinta Mucija, Buckler, 1893: 184.; Isto smatra i Watson navodeći kako je razdoblje oko 100 god. pr. Kr. *commodatum* sadržan kao ugovor u pretorskom ediktu. (Watson, 1974: 38–39 i 43–44).

strane posuditelja jer se posuditelja obvezalo pridržavati se ugovora u skladu s postavljenim uvjetima i trajanjem posudbe. To je u potpunosti potvrđeno u D. 13, 6, 5, 8. Posuditelj je prema odredbama izvora bio obvezan predati stvar posudovniku. Obveza prepuštanja stvari uključuje prepuštanje stvari primjerene za ugovorenu uporabu. Time se nastojalo spriječiti prepuštanje stvari s nedostacima (materijalnim ili pravnim) ili prepuštanje one stvari s kojom nije bilo moguće ostvariti ugovorenu uporabu (Kritz,1835: 424). U tom je pogledu posudovnik imao mogućnost otkloniti ih te prema pravilima o *negotium gestio* zahtijevati naknadu troškova. S druge strane, ako je posuditelj svjesno posudio stvar s nedostatkom, naravno da je morao odgovarati za prouzročenu štetu posudovniku (Schwartz, 1954:129).

Troškovi koje je posudovnik bio obvezan snositi povezani su s njegovom obvezom da stvar po završetku uporabe vrati u neoštećenu stanju.Posudovnik nije bio odgovoran za redovito habanje i potrošnju posuđene stvari. No, nerijetko su se vezano uz uporabu stvari pojavljivali određeni troškovi koji su pridonosili njezinoj uporabi i očuvanju. Ovisno o tome je li se radilo o redovitim ili izvanrednim troškovima vrednovala se i odgovornost posuditelja u tom pogledu. Iz bogate rimske kazuistike ističe se Gajev fragment u D. 13, 6, 18, 2 koji raščlanjuje odgovornost posuditelja za redovite ili izvanredne troškove u pogledu posuđene stvari (Schwartz, 1954: 124, 126, 127).Gaj je obvezao posudovnika na poduzimanje redovitih troškova u pogledu posuđene stvari. Obrazloženje ovog slučaja utemeljeno je na općem načelu prema kojem onaj tko nešto želi mora se o tome i brinuti. Ipak u pogledu izvanrednih troškova stvari u rimskoj kazuistici zastupljena su drugačija rješenja. Ako troškovi održavanja posuđene stvari nisu premašivali korist posudovnika, posudovnik ih je bioobvezan platiti. Nasuprot tome,u pogledu ostalih troškova koji premašuju korist posudovnika onje imao pravo na njihovu naknadu, no samo prema pravilima o *negotium gestio.* Time se nastojalo rasteretiti posudovnika plaćanja drugih troškova koji nisu bili nužni za očuvanje ili uporabu posuđene stvari (Santarelli, 1972: 343).

Odgovornost posuditelja u klasičnom rimskom pravu, analogno onoj posudovnikovoj, vrednovana je sukladno primjeni načela utiliteta. Analizirajući detaljno primjenu utiliteta na *commodatam*Zimmerman uspoređuje dva modela odgovor- nosti ugovornih stranka. U prvom slučaju, kada je ugovor o posudbi bio zaključen u isključivom interesu posuditelja, posudovnik je odgovarao samo za najteži stupanj krivnje, dolozno (Zimmermann, 1996: 198–199, Kaser, 1955: 447, Nörr, 1956: 73, Detaljnije o primjeni načela utiliteta na ugovor o posudbi vidjeti: Wieacker, 1934: 57–62,Kübler 1910: 235, Birks, 2014: 138–140). Ako je pak posudba koristila obama strankama Zimmermann se zalaže za Gajev prikaz srednjeg puta, naime za kulpoznu odgovornost posudovnika. Sukladno tome, posuditelj je primjenom istog načela, a i okolnosti da mu ugovor nikako nije išao u korist

odgovarao dolozno, tj. prema najblažem stupnju krivnje. Dolozno i kulpozno u slučaju ako je posudba zaključena u interesu obiju ugovornih strana. U istom smislu analizirajući načelo utilitarnosti u okviru usporedbe između dvaju pravnih poslova, *depositum* i *commodatum*Kaser ističe da je *depositum* zaključen u isključivom interesu deponenta te da zbog toga čuvar povjerenih stvari (depozitar) snosi doloznu odgovornost samo u slučaju nestanka ili oštećenja stvari, dok u slučaju posudbe, posudovnik ostvaruje korist od uporabe stvari te zbog toga odgovora kulpozno (Kaser, 1955: 424; Romac, 1994: 301).

2.2. Pravni položaj deponenta

Pravna narav ugovora o ostavi stvari, u rimskom pravu *depositum,* uz napomenu kako se ovdje analizira samo ugovor kojim se dužniku povjeravaju pokretne stvari bez ostvarivanja prava na njihovu uporabu, bitno se razlikuje od posudbe unatoč tome što su oba ugovora u klasičnom pravu besplatna, realna i nepotpuno dvostrano obvezna. (O pravnoj naravi ostave u brojnoj literaturi:Zimmermann, 1996: 205–208, Von Eberhard, 1937, Litewski, 1978, Volume 2 di Festschrift Paul Koschaker, 1939)[4]. Temeljna razlika jest u tome što isključivi interes od zaključenja ovog pravnog posla ima vjerovnik, deponent.[5] Klasično poimanje prava i obveza stranaka kod depozita temeljilo se na shvaćanju ostave kao nepotpuno dvostrano obveznog posla što je rezultiralo time da su obveze vjerovnika, deponenta različito od dužnikovih, shvaćene samo kao incidentalne(Schmidt, 1947: 78).[6] Što je to zaista značilo? Je li vjerovnik imao obvezu predati stvar na čuvanje prvo je pitanje koje proizlazi iz obilježja ovog pravnog posla. Ostava je u rimskom pravu realni ugovor koji je da bi bio perfektan uključivao prijenos pokretne imovine (Zimmermann, 1996: 205). Različito od toga, pružanje stvarne vlasti nije bilo povezano s prijenosom imovine ili davanjem posjeda u pravnomsmislu (possessio), uključujući i prava koja su iz toga proizašla. Deponent je i predajom stvari ostao vlasnik, depozitar je bio detentor.[7]

Jedna obveza deponenta, koja između ostalog proizlazi iz sadržaja tužbenog zahtjeva *actio depositi contraria* jest obveza naknade troškova te štetenastalih depozitarutijekom čuvanja stvari.Deponent je morao depozitaru nadoknaditi svu štetu koju je potonji pretrpio na vlastitim stvarima. S tim u vezi, deponent

4 D. 16, 3, 1: "*Depositum est, quod custidiendum alicui datum est*."

5 Gai, Institutiones III, 207.

6 S druge strane, depozitar je bio obvezan čuvati stvar te ju vratiti po završetku ugovorenog roka ili na zahtjev vjerovnika. Bio je odgovoran dolozno i kulpozno (*culpa lata*). Za slučajnu propast ili oštećenje stvari u pravilu je odgovarao vjerovnik, osim u slučaju u kojem je dužnik prešao granice ili način ugovorenog čuvanja stvari svjesno ili nepažnjom, tj. ako prilikom čuvanja stvari nije upotrijebio pažnju koju bi u istom slučaju primijenio prosječan čovjek.

7 Vidi: D.16, 3, 17, 1.

je odgovarao neovisno o tome je li štetu sam prouzročio. Kako depozitar nije ostvarivao nikakvu korist od pravnog posla nije morao ni trpjeti štetu na vlastitim stvarima (Mommsen, 1879: 69). Kao vlasnik stvari, deponent je odgovarao i za njezinu slučajnu propast ili oštećenje kao za one koji su posljedica nepažnje za koju ostavoprimac nije odgovarao.Prema Sohmu ostavodavac je u klasičnom pravu bio odgovoran za *omnis diligentia*, sukladno pravnom standardu *culpa levis (Sohm,* 2017: 365).[8] (Vidi tumačenje odgovornosti ostavodavca: Dernburg, 1889: 245).

Kako je ostava ugovor zaključen redovito u interesu ostavodavca razumno je očekivati kako su svi troškovi koji su mogli nastati prilikom čuvanja stvari, neovisno o *tome* jesu li redovni ili izvanredni, trebali isključivo pogađati depozitara. U rijetkoj jurisprudenciji koja se bavila ovom problematikom moguće je izdvojiti dva izvora.[9] Modestin uočava razliku između utuživih nužnih troškova poduzetih za izlječenje bolesnog roba te onih koje nije moguće utužiti (Više vidjeti: Biondi, 1918: 120. Prema: Schwarz, 1954: 123. D`Ors, 1953: 194., Honsell, 2013: 123).Odgovornost deponenta za svaki rizik koji uslijedi tijekom čuvanja stvari zaključak je koji proizlazi iz oba izvora (Mommsen, 1879: 69).

Troškove vezane za vraćanje stvari koja je čuvana u mjestu drugačijemod mjesta predaje imao je snositi deponent.[10] Sadržaj fragmenta bez sumnje potvrđuje kako je odgovornost deponenta, kao što tvrdi Mommsen, ista kao odgovornost nalogodavca kod ugovora o nalogu (Mommsen, 1879: 69).[11] Odgovornost deponenta nije bila ograničena na slučajeve koji su se mogli smatrati njegovom krivnjom, već je odgovarao za svako oštećenje stvari koje nije prouzročeno namjerom ili krajnjom nepažnjom depositara.

Deponent je bio obvezan, ali i ovlašten zahtjevati povrat stvari dane na čuvanje u bilo kojem trenutku, neovisno o tome je li nastupio ugovoreni rok ili ne.[12] U romanističkoj literaturi postavlja se pitanje je li vjerovnik time prekršio granice ugovornog odnosa. U slučaju u kojem nije vratio stvar na vjerovnikov zahtjev depozitar se može osloboditi odgovornosti za prijevarno postupanje.[13] Primjerice, ako se stvar nalazi u drugom mjestu ili u skladištu koje nije moguće otvoriti u vrijeme vjerovnikova zahtjeva, ali u slučaju u kojem se nije ispunio uvjet pod kojim je ostava zaključena (Više o odgovornosti dužnika kao i pravu vjerovnika zahtijevati povrat stvari u bio kojem trenutku: Litewski, 1978: 31).

8 D. 47, 2, 65, 5.

9 D. 16, 3, 23. Usporedi s: Mosaicarum Et Romanarum Legum Collatio 10, 2, 5**.** (= D. 16, 3, 23).

10 D. 16, 3 , 12.

11 Vidi: D. 47, 2, 62, 5.

12 D. 16, 3, 1, 46.

13 D. 16, 3, 1, 22.

2.3. Regulacija posudbe i ostave u hrvatskim srednjovjekovnim statutima

U nastavku istraživanja nastojat će se posredstvom raščlambe dostupnih izvora srednjovjekovnog prava, uglavnom statutarnog, utvrditi primjena posudbe i ostave na hrvatskom području. Uz uvažavanje okolnosti kako hrvatsko područje nije imalo jedinstvenu primjenu prava, područja važenja pojedinih izvora u nastavku su podijeljena na nekoliko temeljnih krugova: područje Dalmacije, istarske regije te Slavonije. Svrha detaljne interpretacije pojedinih izvora jest utvrditi u kojoj mjeri isti odstupaju od klasične regulacije odgovornosti vjerovnika koja je nesporno recipirana te postala dijelom pravnog sustava *ius commune*.

2.3.1. Regulacija posudbe i ostave na području Dalmacije

Splitski statut detaljno obrađuje brojne institute obveznog prava, pa tako i besplatne pravne poslove posudbu, darovanje te ostavnu pogodbu (ostavu). Iz odredaba obveznog prava jasno je vidljiv utjecaj pravila iz recipiranoga rimskog prava, a što nam potvrđuje i činjenica da su neki instituti gotovo identični odgo- varajućim institutima Justinijanova prava (Cvitanić, 2002: 82). Posudba i ostava (ostavna pogodba) su zakonski regulirane u glavi 75 u Trećoj knjizi Statuta, pod naslovom „O posudbi i ostavi".[14] Međutim, ni posudba ni ostava nisu normirane u navedenoj glavi, ali iz statutarnih odredbi proizlazi da je ostavna pogodba („*depositum*") ugovor kojim deponent (ostavodavac) predaje depozitaru (ostavoprimcu) neku stvar na besplatno čuvanje pod uvjetom da je u određenom roku u istom stanju vrati. Ovdje se dakle, kao i kod posudbe, prenosi samo detencija stvari (Horvat, 1958: 311). A shodno tome, prema Statutu posudba je ugovor kojim komodant (posuditelj) predaje komodataru (posudovniku) neku stvar na besplatnu uporabu, pod uvjetom da je komodatar nakon isteka određenog vremena ili nakon dogovorene upotrebe vrati.[15] Dakle, oba ugovora su primjer nepotpuno dvostrano obvezujućih ugovora.

Sadržajno, regulacija glave 75 Statuta odnosi se na odgovornost posuditelja/ ostavodavca u slučaju propasti stvari. Naime, statutarnom odredbom je bilo propisano da depozitar/ komodatar nije odgovarao za propast i pogoršanje stvari, makar se šteta dogodila i nakon isteka ugovorenog roka povrata, ako deponent/komodant nije htio primiti natrag deponiranu/ posuđenu stvar poslije dospjelosti toga roka.[16] Dakle, u tom slučaju teret odgovornosti za naknadu štete bio je na deponentu/komodantu prema rimskopravnom načelu, *periculum creditoris.* Navedena odredba regulacije odgovornosti posuditelja razlikuje se od regulacije posudbe u rimskom pravu, jer je u istoj izričito naglašena odgovornost

14 Statut grada Splita, srednjovjekovno pravo Splita, 2. Izdanje, Split, Književni krug, 1987.

15 Splitski statut, knjiga III, gl. 75.

16 Isto.

nost posuditelja za razliku od izvora rimskog prava gdje je bila samo sporedno područje interesa (Kasap, 2016: 81).

Slične odredbe, samo još konkretnije glede odgovornosti posudovnika, ali i posuditelja sadrži Zadarski statut. Tako je odredbom propisano da nijedan vjerovnik ne smije u ispravu o posudbi odnosno najmu, dodati veću kaznu nego što iznosi četvrtina vrijednosti posuđenoga, odnosno iznajmljenoga. Dakle, ukoliko je vjerovnik odredio veću kaznu, istu nije smio potraživati.[17] Također, regulacija ugovora o ostavi (depositum) sadržajno je bila vrlo slična odredbi Splitskog statuta o tome. Naime, odredba Zadarskog statuta sadrži pravilo da ukoliko je gospodar pologa (vjerovnik) odbio primiti polog koji mu je ponuđen u roku, a taj je polog u međuvremenu propao (u cijelosti ili djelomično), bio odgovoran za naknadu štete. I ovdje je stoga, vrijedilo pravilo o odgovornosti vjerovnika (*periculum creditoris*).[18] Isti stupanj odgovornosti vjerovnika vrijedio je u slučaju ukoliko polog propadne prije isteka roka određenog u ispravi.

Da je Šibenskom statutu iz 1378. služio kao uzor Zadarski statut te da je sličan i statutima drugih dalmatinskih gradova, vidljivo je i iz odredbi koje uređuju insti- tute obveznog prava, a osobito ugovor o posudbi te ugovor o ostavi (Novak, 1976: 222). Konzekventno tomu, spram ugovora o ostavi, Šibenskim statutom bila je isto predviđena odgovornost vjerovnika za naknadu štete ako stvar propadne prije roka određenog u javnoj ispravi. S druge strane, u pogledu odgovornosti vjerovnika u slučaju kada mu depozitar vrati pohranjenu stvar prije roka, a ovaj je ne želi preuzeti, Šibenski statut nije ništa predvidio. U tom kontekstu, dužnik(depozitar) nije bio odgovaran ni za kakvu štetu.[19] Međutim, Šibenski statut ne regulira odgovornost posuditelja kod ugovora o posudbi, nego samo odgovornost posudovnika, a za kojeg je određeno da ne odgovara za slučajnu propast stvari na koju nije mogao utjecati.[20]

Različito od Splitskog i Zadarskog statuta, koji u potpunosti ili djelomično reguliraju pitanje obveza i odgovornosti posudovnika/ostavoprimca, Brački statut nije ovim ugovorima posvetio pozornost. Pohrana (ostava) se spominje u dvije glave Statuta.[21] Statut doduše nije ni ugovoru o posudbi posvetio posebnu pažnju.[22] No, premda posudba i ostava nisu bile regulirane u statutarnim odredbama, ne

17 Zadarski statut, knjiga II, gl. I, II, III, IV, V i VI.

18 Isto, knjiga III, gl. XI.

19 Šibenski statut, knjiga IV, gl. XXXI.

20 Isto, knjiga IV, gl. III.

21 Isto, knjiga I, gl. VIII.

22 Isto, knjiga I, gl. II.

može se zaključiti da nisu bili dio svakodnevnog pravnog prometa, već da su u promatranom razdoblju 13. i 14. stoljeća bili regulirani običajnim pravom.[23]

Nimalo različitu statutarnu regulaciju posudbe i ostave donosi i Hvarski statut. Isto tako, čini se da Trogirski statut nije poznavao institut ostave (depozita) rimskog prava, ali ni institut posudbe.[24]

U odnosu na ostale spomenute statute dalmatinskih komuna, Paški statut je posvetio ugovoru o posudbi najopsežniju zakonsku regulativu te kao i neki prethodno spomenuti statuti regulira posudbu u kontekstu posuđivanja konja, drugih životinja ili stvari.[25] Shodno tome, Paški statut sadrži preciznu regulaciju odgovornosti posudovnika (dužnika) s jasno utvrđenim kriterijima potrebne pozornosti i odgovornosti za štetu. Spomenuta je odredba identična odredbi Šibenskog statuta, odnosno može se utvrditi da je ista prenesena (Cvitanić, 1965: 140–143). Ali, za razliku od Šibenskog statuta, Paški statut ne sadrži odredbe oodgovornosti posuditelja.

Statut poznaje i ugovor o čuvanju (ostavi), odnosno predaju trećoj osobi na čuvanje pojedinih grla stoke pastira koji je udružio rad s vlasnikom stvari.[26] Svrha navedenog ugovora je bila čuvanje preuzetih grla do određenog vremena. Drugi oblik ovog ugovora bilo je čuvanje ovaca na zemljištu vlasnika ovaca, tj. u njegovu toru.[27]U nastavku iste knjige, glava LXIV regulira odgovornost čuvara (ostavoprimca) koji je ima obvezu „dobro i brižno“ čuvati ovce te je u slučaju propusta takve dužne pažnje bio odgovoran za svako izgubljeno grlo, osim ako neka od životinja ugine.[28] Iako su obje vrste ugovora primjenjivale i tijekom 20. stoljeća, Statut ni ovdje ne govori ništa o odgovornosti vlasnika ovaca (odnosno vjerovnika).

Za razliku od splitskog pravnog područja, dubrovačko pravno područje[29] vrlo površno razrađuje brojne obveznopravne odnose ili uopće ne navodi brojne op-

23 Bračko pravo je poznavalo i one pravne poslove za koje bi Rimljani kazali da stvaraju obvezu tek „re“, tj. tek predajom stvari. Od takvih ugovora nalazimo zajam, posudbu, pohranu, zalog i mijenu. Vidjeti više: Brački statut, str. 99–100.

24 Statut grada Trogira, str. 325.

25 Isto, knjiga IV, gl. II.

26 Statut Paške općine, knjiga IV, gl. 63.

27 Isto, knjiga IV, gl. 58–59.

28 Isto, gl. 64.

29 Otoci Lastovo i Mljet imali su neki posebni iznimni pravni status u okviru srednjovjekovne Dubrovačke Komune, kasnije Republike. Ti su otoci, za razliku od ostalog dubrovačkog područja, uživali posebnu samoupravu. S obzirom na to, i Mljetski i Lastovski statut imali su uzor u Statutu grada Dubrovnika, ali u usporedbi s njime, ti su statuti samo njegova „blijeda slika“ u pogledu sadržaja, a osobito u pogledu sustavnosti. Vidi više: Mljetski statut,

ćepoznate ugovore (primjerice, zajam, kupoprodaja i posudba) (Kasap, 2016: 78). Međutim, iako nisu bili predviđeni Statutom, to ne znači da se navedeni instituti obveznog prava nisu primjenjivali, već da su najverovatnije bili dio običajnog prava. Što se tiče reguliranja instituta posudbe u Dubrovačkom statutu i dubrovačkom pravu, prema mišljenju Kasap, za posudbu se pogrešno upotrebljavao izraz latinski *mutuum* ili talijanski *prestitum* koji je u prijevodu označavao zajam (Kasap, 2016: 79)[30], a što je vidljivo iz podataka u arhivskim knjigama (Cvejić, 1957: 230–231). Naime, očigledno je iz navedenih ugovora da se radi o ugovoru o posudbi jer su se na besplatnu upotrebu predavale nepotrošne stvari, a koje su se nakon proteka određenog vremena morale vratiti posuditelju. No, ono što je teško utvrditi iz dostupnog arhivskog gradiva jest o odgovornosti posudovnika. O odgovornosti posudovnika može se posredno zaključiti iz mješovitog ugovora, tj. ugovora o ostavi i ugovora o posudbi (Cvejić, 1957: 232), prema kojem je ostavoprimac (depozitar) odgovarao za *culpa levis in concreto,* a posudovnik za svu moguću štetu, bez obzira na stupanj krivnje. Uslijed toga, moglo bi se zaključiti i o stupnju odgovornosti posuditelja/deponenta, a koji bi bio odgovoran za svaku štetu. Doduše, kako je ovdje riječ o primjeru samo jednog ugovora, teško se mogu donositi konkretniji zaključci o odgovornosti posudovnika, ali i posuditelja.

Različito od regulacije posudbe,institut ostave se ipak spominje u dvije odredbe Statuta.[31] Ali, Statut ne predviđa samostalnu regulaciju instituta ostave (*depositum*), niti navedene odredbe sadrže elemente prema kojima je ovaj ugovor prepoznatljiv. No unatoč tome, u dubrovačkom arhivu dostupni su nam mnogi ugovori o ostavi, primjeri tužba zbog neizvršavanja obveza iz ovog ugovora te presuda, što govori u prilog činjenici da se navedeni obveznopravni institut ostave primjenjivao u svakodnevnom pravnom prometu (Cvejić, 1957: 239). Iz sadržaja arhivskih spisa proizlazi da je deponent (ostavodavac), kao i u rimskom pravu, bio dužan nadoknaditi troškove oko čuvanja stvari koje je imao depozitar (ostavoprimac). S druge strane, iz dostupnih izvora ne može se jasno zaključiti o stupnju odgovornosti ostavoprimca (depozitara), ali nam dva dostupna dokumenta (Cvejić, 1957: 240) sugeriraju da je stupanj odgovornosti depozitara bio veći nego u rimskom pravu gdje je depozitar odgovarao samo za *culpa lata.* Posljedično, prema odredbama Statuta, depozitar je bez odlaganja morao odgovoriti na tužbu, a što ukazuje i na fiducijarni karakter ovog ugovora.[32]

Književni krug Split, Split-Dubrovnik, 2002, str. 5, 33; Lastovski statut, Književni krug Split, Split, 1994, str. 183.

30 Također, u tom smislu vidjeti četiri odredbe druge knjige (11–13, 20, 25, 27, 28) te odredbe prve knjige (XXX), druge knjige (XIII) i pete knjige (XXII), u: Statut grada Dubrovnika.

31 U tom smislu vidjeti odredbe Statuta grada Dubrovnika: knjiga 3, XVIII; knjiga 5, XXXV; knjiga 8, XCIII.

32 Statut grada Dubrovnika, knjiga 3, XVIII.

O određenom dubrovačkom utjecaju, možemo govoriti i kad je riječ o Korčulanskom statutu, našem najstarijem pravnom zborniku iz 1265.[33] O uređenju instituta posudbe u Korčulanskom statutu ne možemo pronaći ništa, ali ni o drugim obveznopravnim ugovorima.[34]

2.3.2. Regulacija posudbe i ostave na području Kvarnera

U statutarnom uređenju obveznopravnih odnosa na području Kvarnera može se primjetiti očigledan utjecaj odredbi rimskoga prava. U Krčkom statutu predmet posuđivanja su bile životinje te su primijenjivana rimska pravila o odgovornosti posudovnika. Krčki statut regulira pravne ustanove obveznog prava, posudbu i zajam u zajedničkoj glavi pod naslovom *De mutuo vel commodato*.[35] Tako, unutar odredbe o definiranju bitnih značajki posudbe (*commodatum*), Satut razmatra i pitanje odgovornosti posudovnika, a prema kojoj je on odgovoran za propast ili oštećenje konja ili drugih životinja u slučaju kada bi iste bile upotrijebljene za putovanja u ona mjesta koja nisu bila predviđena ugovorom o posudbi. Posudovnik je bio odgovoran za posuđenu stvar, i u slučaju kada nije upotrijebio onupažnju koju bi upotrijebio da se radi o vlastitim stvarima. Ali, nije bio odgovoran za slučaj, nego samo za nepažnju (*culpa*).[36] Znači, posuditelj je bio odgovoran za štetu na stvari do koje je došlo ako je stvar slučajno propala (Margetić, 1997: 136–137).[37]

U Krčkom statutu nalazimo i posebne odredbe o ostavi (*depositum*).[38] Navedeni je ugovor opširno razrađen pa tako razlikujemo nekoliko tipova depozita, i to: deponiranje sporne stvari kod nekoga; deponiranje stvari i alata potrebnih za proizvodnju i trgovanje te „pravi depozit".[39] U slučaju deponiranja sporne stvari kod nekoga, depozitar je bio odgovoran samo za krivnju, ako je stvar propala kod njega. Tada je depozitar morao dati zakletvu da nije kriv za nestanak stvari, te je bio oslobođen odgovornosti. Nadalje, kod „pravog depozita", Statut je razradio odgovornost za propast deponirane stvari, ovisno o tome je li stvar vraćena u ugovorenom roku utvrđenom u ispravi ili nije. Ovdje je bila predviđena odgovornost za krivnju, a ne i za slučaj. U skladu s tim, ako je depozitar vratio stvar

33 Korčulanski statut – Statut grada i otoka Korčule, str. VIII.

34 Isto, Reformacija korčulanske komune, gl. CLXIX., str. 145.

35 Krčki statut (lat.), knjiga I, 43, stav 5.

36 Prema D. 13, 6, 23, Pomponije kaže da će posudovnik odgovarati za oštećenje konja ako mu se može pripisati neka krivnja (*culpa)*.

37 U Krčkom statutu na još jednom mjestu možemo pronaći identičnu odredbu o posudbi konja ili druge životinje.

38 Krčki statut (lat.), knjiga I, 3, stav 2.

39 Isto, knjiga I, 38–39.

u roku, tada će odgovornost za slučajnu propast stvari pasti na deponenta. I u ovom slučaju, depozitar mora položiti zakletvu analognu onoj koju smo naznačili kod deponiranja sporne stvari.[40] Međutim, Statut daje mogućnost ugovornim strankama i za drugačije ugovaranje, odnosno dozvoljeno je ugovaranje depozitareve odgovornosti i za slučaj.[41]

Uređenju ugovora o posudbi u Rapskom statutu, za razliku od uređenja u statutima komuna južne Dalmacije, posvećena je zamjetna pozornost.[42] Iako Statut predviđa zajedničku regulaciju posudbe, zaloga i otuđenja pokretnine te je navedena odredba sadržajno razmjerno kratka, upućuje na neke posljedice u slučaju posuđivanja tuđih pokretnih stvari, a koje nisu predviđene statutarnim odredbama spomenutih komuna (Kasap, 2016: 86). No, kao i više drugih dalmatinskih statuta u vezi s odgovornosti posuditelja (vjerovnika), Rapski statut također nedonosi odredbe o tome. Rapski statut izravno ne govori ništa o ugovoru o ostavi (pohrana, čuvanje), već jedva spominje odgovornost dužnika u kontekstu da ako se netko obvezao nekom za dug ili je primio nešto na čuvanje ili na povjerenje te isto ne može vratiti ili zlonamjerno izgubi stvar koju je dobio na čuvanje i ne može ju vratiti, tada se morao osobno predati vjerovniku (osobni zalog).[43]

Statutarna regulacija instituta posudbe i ostave, također nije bila predviđena u regulaciji Vinodolskog zakonika, Zakona grada Kastva od Letta 1400. te Veprinačkog zakona.

2.3.3. Regulacija posudbe i ostave na području istarske pravne regije

Istarsko pravno područje posjeduje neke karakteristike koje ga značajno razlikuju od ostalih pravnih područja. To naglašava i Margetić (Margetić, 1987: 1) prema kojem srednjovjekovno istarsko obvezno pravo uključuje utjecaje rimskog, bizantskog, slavenskog i germanskog prava. Ali, kada govorimo o regulaciji instituta posudbe i ostave u statutima istarskih gradova, nezahvalno je bilo što od spomenutoga konstatirati. Drugim riječima, raščlambom nekih statuta istarskih gradova razvidno je da su kompilatori statuta uzimali iz teorije i prakse samo one slučajeve koje su smatrali osobito važnima te da generalno javne vlasti nisu utjecale na definiranje obveznih odnosa i određivanje pojedinih ugovora. Premda je izostala njihova statutarna regulacija, to ne znači da se navedeni i još neki ugovori nisu primjenjivali u praksi(Kasap, 2016: 87).[44]

40 Isto, knjiga I, 39, stav 2.

41 Isto, knjiga I, 39, stav 3.

42 Statut rapske komune, knj. III, gl. IX.

43 Statut Rapske komune, knj. III, gl. XI.

44 Gotovo isti pristup reguliranju obveznopravnih odnosa možemo zamijetiti u statutarnoj regulaciji odredaba grada Venecije između 14. i 16. stoljeća.

Usporedbe radi, iako se u Pulskom statutu posudba (*commodatum*) spominje u četiri odredbe[45], navedeni latinski izraz nema nikave veze s rimskopravnim shvaćanjem instituta posudbe. I u pogledu ostave (*depositum*), vrijedi sve ovo što je izrečeno za posudbu.[46]

2.3.4. Regulacija posudbe i ostave na području srednjovjekovne Slavonije

Proučavanje srednjovjekovnog obveznog prava na području Slavonije dosad nije bilo predmetom pomnije obrade u relevantnoj pravno-povijesnoj literaturi, a naj- vjerovatnije iz toga razloga što je ono bilo pod jakim utjecajem ugarskog prava. Tako Lanović uopće ne spominje slavonsko pravo, a mnogi mađarski autori čak i smatraju slavonsko pravo sastavnim dijelom ugarskog prava (Lanović, 1929: 272–299). S obzirom na to, kao izvori slavonskog prava uz Tripartit i zakone hrvatsko-ugarskih kraljeva, uzimaju se u obzir i odredbe tzv. Slavonskog statuta iz 1273, Iločkog statuta iz 1525, te odredbe gradskih vlasti zagrebačkog Gradeca (Margetić, 1992: 25).

Na temelju Verbecijeva Tripartita iz 1514. godine, ali i tzv. Iločkog statuta, zapravo Iločke pravne knjige, pristupit će se raščlambi instituta posudbe i ostave u daljem tekstu, budući da navedeni izvori sadrže važne podatke o slavonskom obveznom pravu. Isto tako, da bi se moglo utvrditi pravno relevantna obilježja navedenih obveznopravnih instituta, te kao značajno pravno vrelo za tumačenje onih pravnih instituta koji nisu uređeni u odredbama Tripartita, uzet će se u obzir i odredbe djela *Institutiones iuris Hungarici*, autora Imre Kelemena iz 1818. godine.

Prema par. 294. djela *Institutiones iuris Hungarici,* posudba je definirana kao imenovani, realni ugovor u kojem se posudovniku besplatnopredaju stvari na uporabu i na određeno vrijeme, pod uvjetom da ih posudovnik vrati u istom stanju (Kelemen, 1818: 565). Stoga, on je morao snositi troškove redovite uporabe stvari, dok je izvanredne troškove snosio posuditelj. Što se tiče odgovornosti posudovnika, isti je bio odgovaran za najviši stupanj krivnje (*culpa levissima*), dok je posuditelj odgovarao samo za *dolus i culpa lata*.[47]

Ostava (*depositum*) je definirana kao imenovani, realni ugovor kojim se predaju jednoj stranci (depozitaru) na besplatno čuvanje pokretne stvari, a koje je de-

45 Pulski statut, knjiga 3, glava 42 i 50, knjiga 4, glava 9 i 30.

46 Isto, knjiga 1, gl. 20.

47 Odgovornost posudovnika i posuditelja određena je u glavi XXIX, §. 294, 5. β – γ : *Omni diligentia Commodatarius cavere debet, me res pereat , aut deterior fat, ideo; Damnum etiam levissima culpa sua datùm in regula refundit; Commodans vero do Ium tantum et latam culpam praestat.*

pozitar obvezan vratiti na deponentov zahtjev i u istom stanju (*in specie*).[48] Tako je depozitar prema utilitetnom načelu bio odgovoran samo za *dolus i culpa lata,* a deponent za svaku krivnju *(ad levissimam*) (Kelemen, 1818: 569). Nasuprot tomu, Tripartit je sadržavao odredbu o regulaciji ostavne pogodbe (*de deposito*), a kada je riječ o odgovornosti depozitara, isti je snosio odgovornost u slučaju da nije htio vratiti povjerenu mu stvar, te bi mu bila određena kazna zbog nasilja.[49] Između ostalog, u težim je slučajevima mogao biti proglašen i nečasnim te osuđen na plaćanje iznosa u visini dvostruke vrijednosti stvari.[50] U pravilu je depozitar preuzimao stvar na besplatno čuvanje, ali ukoliko je stvar bila dana u pohranu sudu ili nekom drugom vjerodostojnom mjestu, onda je deponent bio dužan platiti dvadesetinu u ime čuvarine.[51]

Osim navedenih pravnih vrela, za upoznavanje slavonskog obveznog prava u njegovoj primjeni, te zbog nepostojanja drugih kodifikacija običajnog prava, korisno je uzeti u obzir i odredbe Iločkog statuta iz 1525. I ovdje se može reći da je ugarsko pravo imalo snažan utjecaj na oblikovanje odredbi Statuta, a što i proizlazi iz knjige II, glave 1, u kojoj se navodi kako su odredbe o građanskim pravima i običajima osam gradova, i to: Buda, Pešta, Kašova, Bartfa, Trnava, Požun, Eperjš i Šopronj; poslužile kao izvor za normiranje odredbi Statuta koje se odnose na nasljeđivanje, proljevanje krvi, oporuke i dugove.[52]

U Iločkom statutu ne nalazimo izravnu regulaciju instituta posudbe, već isti sadrži odredbe kojima je ovaj institut neizravno reguliran.[53] Međutim, niti jednu formulaciju ne možemo naći o odgovornosti posuditelja. Sukladno, Statut ne donosi ni posebne odredbe o depozitu (ostavi), ali kao što ni inače ne daje posebne definicije o pojedinim ugovorima. Međutim, u tekstu Statuta mogu se pronaći odredbe na temelju kojih se rješavaju obvezni odnosi nastali protupravnim djelovanjem stranke. Navedeno se vidi iz sadržaja sljedećih odredbi: kada su novac i nekretnine dane na čuvanje pa je dio tih stvari depozitar vratio, a preostale zanijekao, tada je deponent mogao označiti količinu stvari koje je dao na čuvanje[54]; nadalje, ako su nekretnine dane na čuvanje nekomu bez dokaza, dokaz je bio

48 Ostava (depositum) je definirana u glavi XXX, §. 295 na sljedeći način: *Contractus nominatus, beneficus, realis, quo res mobilis gratis custodienda ab uno datur, et ab alio suscipitur, ea lege, ut quandocunque rite repetenti eadem in specie, et statu quo, restituatur.* Kelemen, I., Instututiones iuris Hungarici privati, Budae, 1818, str. 568.

49 1638:28; 1647: 106, 107, v.: Lanović, M.,Privatno pravo Tripartita, Zagreb, 1929, str. 280.

50 1622:16.

51 1609:74; 1638: 31, v.: Lanović, M., Privatno pravo Tripartita, Zagreb, 1929, str. 280.

52 Statut grada Iloka, str. 51–52.

53 Statut grada Iloka, knjiga V, glava 26, str. 105–106.

54 Isto, knjiga V, glava 20.

zakletva tuženoga;[55] te, ako je stranka uložila protest na odluku suca, sudac je stvar prepuštao arbitrima, a njihove se odluke morao držati i sudac i stranka.[56]

3. Regulacija odgovornosti posuditelja i ostavodavca u Zakonu o obveznim odnosima

Kako kontinentalnoeuropski obveznopravni poretci običavaju odgovornost posuditelja značajno ublažiti, te ga podvrgavaju privilegiranim pravilima odgovornosti zbog besplatnosti i hrvatski je zakonodavac uredio odgovornost posuditelja prema istim načelima. Odstupivši od kazuističke interpretacije odgovornosti vjerovnika ranije analizirane posredstvom srednjovjekovnih izvora, hrvatski je zakonodavac uredio oba instituta po uzoru na austrijski i njemački građanskizakonik. Time su temeljna načela odgovornosti posuditelja i ostavodavca dobila prepoznatljiv i stalan oblik više po uzoru na regulaciju odgovornosti vidljivu u sustavu *ius commune* nego u hrvatskom srednjovjekovnom pravu.

Kako je posudba u hrvatskom pravu konsenzualan ugovor, predaja stvari na uporabu primarna je obveza posuditelja (Perović, 1986: 692).[57]Nadalje, posuditeljeva odgovornost u ZOO-u koncipirana je u okviru zabrane prešućivanja materijalnih i pravnih nedostataka posuđene stvari (Gorenc et al., 2014:868). Nastane li šteta posudovniku koja je uzrokovana prešućivanjem nedostataka posuđene stvari, te posudovnik time bude onemogućen upotrebljavati stvar tijekom razdoblja posudbe, posuditelj će biti obvezan nadoknaditi tako nastalu štetu. No, naknada štete neće teretiti posuditelja u svakom slučaju, već onda kada je namjerno ili s tim izjednačeno krajnje nepažljivo prešutio nedostake stvari (Perović, 1986: 704). Tome ide u prilog odredba sadržana u čl. 516, st. 2 koji određuje da posudovnik neće imati pravo na naknadu štete ako je zbog nedovoljnog stupnja pažnje propustio uočiti nedostatak stvari. Prema općim pravilima obveznog prava zakašnjenje s primitkom posuđene stvari bez za to opravdanog razloga također bi bila okolnost koja se može pripisati posuditeljevom zlonamjernom ponašanju. U navedenom slučaju je posuditelj obvezan naknaditi štetu i troškove koji su zakašnjenjem prouzročeni posudovniku.[58] Standard odgovornosti posuditelja nije definiran zakonskim odredbama, no jasno kako je posuditelj kao vlasnik stvari odgovoran za njezinu propast ili

55 Isto, glava 21.

56 Isto, glava 22.

57 Zakon o obveznim odnosima (dalje u tekstu ZOO), pročišćeni tekst zakona, NN 35/05, 41/08, 125/11, 78/15, 29/18. Posudba je definirana od čl. 509–518. ZOO-a.

58 Posuditelj je odgovoran za naknadu izvanrednih troškova učinjenih za stvar tijekom tajanja posudbe. Vidi iz sudske prakse: Vrhovni sud, Rev 880/90 od 30.08.1990. i Vrhovni sud Rev 392/90 od 12.06. 1990.

oštećenje koje nije uzrokovano krivnjom posudovnika.Standard pažnje kojeg je posudovnik obvezan primijenjivati prilikom uporabe posuđene stvari proizlazi iz općih odredaba obveznog prava. Stupanj pažnje koji se očekuje od posudovnika u hrvatskom pravu izjednačen je s pažnjom dobrog domaćina čime je hrvatski zakonodavac posudovnika učinio odgovornim prema poznatom standardu *culpa levis.*(Klarić, Vedriš, 2006: 599).

Ugovor o ostavi definiran je u čl. 725 Zakona o obveznim odnosima kao ugovor kojim se ostavoprimac obvezuje primiti stvar od ostavodavca, čuvati ju i vratiti kada to ovaj bude zahtijevao.[59]Različito od rimskih rješenja, gdje je ostava bila shvaćena kao realan ugovor, u modernom pravu ostava je konsenzualan ugovor (Perović, 1986: 746–747, Gorenc, 1998: 920, Crnić, 2016: 1187, Crnić, 2018: 1187,). Drugačijom kvalifikacijom ugovora zakonodavac obvezuje ostavodavca na predaju stvari, a čin predaje nije više uvjet za perfekiju pravnog posla, već zasebna obveza ostavodavca (Crnić, 2018: 1190). Ovaj ugovor je neformalan i imenovan(Crnić, 2016: 1187). Prava ostavoprimca, kao i tome korespondirajuće obveze ostavodavca definirane su u čl. 732 ZOO-a. Sukladno zakonskom uređenju, ostavoprimac ima pravo zahtijevati od ostavodavca naknadu troškova opravdano učinjenih radi očuvanja stvari, te naknadu štete koju je imao zbog ostave. Zanimljivo je primijetiti kako zakonodavac u zakonskom uređenju nije predvidio obveze ostavodavca, kao što je to slučaj kod drugih ugovora, već prava ostavoprimca čime se jasno primjećuje obrazac vidljiv još u rimskim izvorima gdje su se obveze ostavodavca morale tumačiti posredstvom prava koja je ostavoprimac mogao procesno utužiti. Obrazloženje pristupa jest okolnost da je ostava u modernom pravu dvostranoobvezni ugovor pri kojem su obveze ostavodavca manjeg obujma i važnosti od ostavoprimčevih. Obveze ostavodavca slijede načela ranije formulirana još u rimskim izvorima. Ostavodavac je ovlašten zahtijevati naknadu troškova ili štete nastale ako mu ostavoprimac po zahtjevu nije vratio stvar.[60] Isto tako ostavoprimac je ovlašten zahtijevati naknadu troškova učinjenih za stvar kao i naknadu štete na vlastitim stvarima koje je pretrpio tijekom trajanja ostave (Crnić, 2016: 1192, Crnić, 2018: 1192, Gorenc, 1998: 922, Gorenc et al., 2014: 1126). Pod troškovima se redovito misli na opravdane troškove koje je ostavoprimac učinio kako bi održao stvar u uporabnom stanju, te one koje je imao prilikom vraćanja stvari(Crnić, 2016: 1192, Crnić, 2018: 1192, Gorenc, 1998: 922, Gorenc et al., 2014: 1126).U pogledu standarda odgovornosti

59 Premda zakon poznaje različite vrste ostave, u nastavku ovog istraživanja naglasak je na besplatnoj ostavi pokretnih stvari.

60 Vidi čl. 731, st. 1 ZOO-a. Ostavodavac ima pravo zahtjevati vraćanje stvari kada on to želi, osim ako rok vraćanja nije posebno ugovoren u interesu ostavodavca. O modalitetima vraćanja stvari idjeti neki od slučajeva u praksi Vrhvnog suda RH: VS Rev-929/03 od 30.03.2015, VS Revt-119/04 od 19.01.2005. O pravu na naknadu štete ostavodavca Visoki trgovački sud, Pž-3205/96 od 15.04.1998. Zbirka 5/44.

zakonodavac nije precizirao položaj ostavodavca, no posredno se, temeljem raščlambe ostavoprimčeva položaja može zaključiti kako je ostavodavac kao vlasnik stvari obvezan snositi sve troškove njezina oštećenja ili propadanja koje ne terete ostavoprimca.[61]Ostavodavac kao vlasnik stvari odgovoran je za slučajno oštećenje ili propast stvari (Crnić, 2016:1190).[62] Ostavoprimac je dužan čuvati povjerenu mu stvar kao svoju vlastitu (st. 1, čl. 727 ZOO) (Klarić, Vedriš, 2006: 599). Za štetu će odgovarati ako stvar nije čuvao barem onako kako bi čuvao svoju vlastitu. [63] Takva nepažnja naziva se *culpa levis in concreto*.

4. Zaključne napomene

Konstrukcija odgovornosti ugovornih stranaka kod besplatnih ugovora o kojima je riječ u rimskoj kazuistici uspostavlja privilegiranu odgovornost ugovorne strane koja od pravnog posla nije ostvarivala korist. Posuditelj je posredstvom načela utiliteta u klasičnom pravu bio odgovoran samo za namjerno prouzročenu štetu. Isti standard odgovornosti posuditelja vrijedio je i u ostalim razdobljima rimskog prava. Ostavodavac je nasuprot posudovniku ona ugovorna strana koja je od pravnog posla ostvarivala gotovo isključivu korist, pa je shodno tome odgovarao u svim slučajevima u kojima se nije mogla utvrditi odgovornost ostavoprimca, koja je ograničenastandardima *dolus* i *culpa lata*. Odgovornost vjerovnika kod besplatnih ugovora u srednjovjekovnom hrvatskom statutarnom pravu temeljena je na justinijanskim odredbama, što je posebice vidljivo u statutima dalmatinskih komuna. Interpretacijom kazuističkih odredaba stautarnog prava može se konstatirati kako je odgovornost posuditelja bila ograničena na slučajeve doloznog i time izjednačenog kulpoznog postupanja, dok je ostavodavac odgovarao u svim slučajevima oštećenja ili propasti stvari koje nisu prouzročene ostavoprimčevom namjerom ili krajnjom nepažnjom. Statutarnim pravom normirana je i odgovornost za slučajnu propast stvari koja je teretila posuditelja ili deponenta (*periculum creditoris*) u svim slučajevima izostanka dužnikove odgovornosti. Premda Zakon o obveznim odnosima nije posebno

61 Ostavoprimac je primjenom čl. 714 ZOO-a dužan stvari čuvati kao svoje vlastite, inače odgovara za štetu, pa čak i za slučajnu propast ili slučajno oštećenje. Nadalje, obvezan je obavijestiti ostavodavca o svim opasnostima koje prijete oštećenju stvari. Budući su stvari primljene na čuvanje (besplatna ostava) uništene od strane trećih osoba koje je angažirao tuženik, postupanje trećih osoba ne oslobađa tuženika odgovornosti za naknadu štete primjenom čl. 154, st. 1 i 155 ZOO-a. Iz sudske prakse vidjeti: Visoki trgovački sud, Pž-3205/96 od 15.04. 1998. Zbirka 5/44.

62 Iz sudske prakse vidjeti: Vrhovni sud, Rev 20/08 od 02.07.2008. Odgovornosti ostavoprimca za slučajnu propast stvari nastupit će u slučaju u kojem je ostavoprimac predao stvar na čuvanje trećoj osobi bez da je ostavodavca obavijestio o tome, a stvar je u međuvremenu propala. Vrhovni sud, Rev 268/91 od 05.09.1991.

63 Vidi čl. 727, st. 1 ZOO-a.

pripisaostandard pažnje kojeg je posuditelj ili ostavodavac obvezan primijenjivati prilikom trajanja ugovora,on proizlazi iz općih odredaba obveznog prava. Vjerovnik je u slučaju posudbe i ostave obvezansnositi sve troškove njezina oštećenja ili propadanja koje ne terete dužnika kao i opravdane troškove koji prelaze odgovornost dužnika opisanu standardom *culpa levis*. Temeljem provedenog istraživanja može se konstatirati da je rimski model koji je definirao odgovornost posudovnika i ostavodavca jedan od najvažnijih temelja na kojem je izrađena obveznopravna regulacija dvaju modernih ugovora unatoč okolnosti što je kvalifikacija ugovornih odnosa drugačija. Kako su se sastavljači modernih kodifikacija koje su poslužile kao uzor hrvatskom zakonodavcu u regulaciji obveznopravnih odnosa oslanjali na rješenja *ius commune,* rimski privatnopravni institute *commodatum,* te *depositum* polazne su točke za regulacijski okvir dvaju modernih instituta, a i time i polazne točke za tumačenje obveza i odgovornostivjerovnika tih besplatnih ugovora.

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THE FOUNDATIONS OF CREDITOR'S LIABILITY IN GRATUITOUS CONTRACTS IN CROATIAN MEDIEVAL LAW

Summary

Gratuitous contracts (bailments) are the most common legal affairs in everyday legal transactions. On the one hand, their informal nature that distinguishes them from other legal affairs facilitates their application; on the other hand, it complicates the legal position of the contracting parties in case of breach of contractual obligations. Liability for breach of contractual obligation equally affects both contracting parties: the creditor and the debtor. In accordance with the principle of utility, the debtor is a contracting party that benefits most from the conclusion of a gratuitous contract. However, the discussions about the creditor's obligations and the liability criteria have been quite rare ever since the development of the earliest legal systems. This is not surprising given the fact that the gratuitous contracts are, almost as a rule, concluded between friends and acquaintances, and marked by the trust of the contracting parties. The foundations of the privileged liability of creditors, both in Western European legal systems and in Croatian law, are based on Roman law principles, which have been entered into the modern law of obligations through reception of the ius commune legal norms. As the issue of creditors' liability in gratuitous contracts has not been sufficiently examined in the Croatian scientific literature, this research is aimed at exploring and establishing the legal grounds of liability of the lender (creditor), the depositor, and the donor in Croatian law, by analyzing and comparing the available historical sources of Croatian medieval law. In that context, the authors will also discuss in more detail the reasons for enacting the unique legal solutions contained in the Croatian Obligations Act.

Keywords*: gratuitous contract (bailment), principle of utility, creditor's liability, Middle Ages, Croatian Obligations Act.*

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pregledni naučni rad
10.5937/zrpfn0-28713

UDK: 339.922(410:4-672EU)
Rad primljen: 05.10.2020.
Rad prihvaćen: 09.12.2020.

WITHDRAWAL FROM THE EUROPEAN UNION: CONSEQUENCES UNDER EU LAW AND INTERNATIONAL LAW

Abstract: *This article provides analysis of the most prominent legal issues arising as a consequence of a voluntary withdrawal of a Member State from the European Union pursuant to Article 50 TEU. Particular attention is given to the aspects which have not been explicitly regulated, as well as to those that remain unclear due to the complex wording of Article 50 TEU. Following the introduction, the first section focuses on the termination of application of EU law. The second section provides a more detailed insight into the consequences of the voluntary withdrawal on the issues related to the EU citizenship. The next section elaborates on the legal framework for establishing relations between the withdrawing state and the EU under international law. Finally, the last section of the paper analyzes the consequences for the position of the withdrawing state vis-à-vis international organizations and under international law in general.*

Keywords: *voluntary withdrawal from the EU, Article 50 TEU, Withdrawal Agreement, EU law, EU citizenship, external relations of the State withdrawing from the EU.*

1. Introduction

Withdrawal of a Member State from the European Union (EU) seems to be a phenomenon which is rather unexpected and difficult to grasp from the standpoint of the concept of the EU as an "ever closer union", which is the only conceptual definition of the EU that can be found in the founding treaties. Over the course of seven decades, the ties between the Community and EU member states have continually grown stronger, involving a gradually increasing transfer of sover-

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eign powers to the Union and creating an entity that is today perceived even as possessing certain attributes of sovereignty.[1]

Nowadays, when withdrawal from the EU is mentioned, the first thing that comes to one's mind is the so-called "Brexit" – the withdrawal of the United Kingdom from the EU following the UK membership referendum which took place on 23 June 2016. Brexit is the first association not only because it is the first ever withdrawal of a state from the EU but also due to the highly contentious way inwhich it has unfolded thus far.

The subject matter of the paper is not Brexit *per se*, but legal regulation of withdrawal from the EU in general, which shall be analysed from several perspectives. The first perspective entails the issue of cessation of effectiveness of EU law. The second one pertains to the consequences of withdrawal of a Member State upon citizenship-related rights and obligations of individuals. The third one refers to the establishment of the legal framework for relations between the withdrawing state and the EU, and the fourth one analyses the consequences ofwithdrawal under international law.

The first three enumerated perspectives assume two principal steps, both of which may but do not need to be undertaken in each particular situation: the first is the conclusion and performance of a withdrawal agreement, while the second is the conclusion and performance of an agreement on relations between the EU and the withdrawing state following the withdrawal.

According to Article 50 of the Treaty on the European Union (TEU)[2], EU law shall cease to apply after two years from the notification on withdrawal by the withdrawing state, unless it is otherwise stipulated by the withdrawal agreement.

The unfolding of Brexit permeates the analysis that shall be presented in this paper, not only because it represents the first ever withdrawal of a Member State from the European Union but also due to the fact that its generally contentious unfolding has already generated an abundance of research material.

Finally, withdrawal from the European Union should be differentiated from a possible withdrawal of a country from the Euro area. Presently, the Euro area is composed of nineteen EU Member States, out of the total of twenty-seven states. Since the adoption of Euro comprises a substantially greater level of coordination and harmonization of economic policy and specific legal and institutional arrangements (Dashwood, 2013: 741-745), a possible withdrawal from the Eu-

1 For a specific discussion on the approximation of sovereignty in the form of constitutionalization of the EU, see: Lukić, 2015.

2 TEU – Treaty on the European Union. Consolidated version of the Treaty on European Union
OJ C 326, 26.10.2012, p. 13–390

rozone would entail considerable legal and political issues. In contrast to the withdrawal from the EU, withdrawal from the Eurozone has not been regulated in advance by the EU treaties or by any other instrument.

2. Termination of application of EU law

2.1. Article 50 TEU

Article 50 TEU was introduced in primary EU law in 2009, by virtue of the Lisbon Treaty. It sets forth the only legal mechanism for a Member State to withdraw from the EU. Opinions of academics are divided on the question whether the right to withdraw from the Union had existed under general international law prior to the inclusion of Article 50.[3] According to Wyrozumska (2012), such a right had not existed due to the specific contents of the founding treaties, so that inclusion Art. 50 TEU marked a substantial change in the overall institutional nature and structure of the Union (Wyrozumska, 2012: 362-363).

The basic structure of the mechanism is the following: after the withdrawing state files a notification on withdrawal, either a withdrawal agreement may be concluded between the Union and such state, or the effect of EU law in relation to that state ceases after expiry of two years. The transition period is an inevitable step, and may either be regulated by the withdrawal agreement, or, if such agreement is not concluded, the transition period lasts for two years following the withdrawal notification by virtue of Article 50(3) of the TEU.

In relation to the withdrawal agreement, Art. 50(2) TEU explicitly refers to the procedure for negotiating agreements between the Union and third countries or international organizations, set forth in Article 218(3) TFEU.[4] Article 50 TEU supplements Article 218 TFEU by requiring the consent of the European Parliament for conclusion of the withdrawal agreement, thus expanding the list of situations for which such consent is required in accordance with Art. 218(6) (a) TFEU. As any other agreement with a third country or an international organization, the withdrawal agreement is concluded on behalf of the Union by the Council, deciding by the higher of the two thresholds for qualified majority provided in Article 238(3) TFEU – the one applicable to proposals that do not come either from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy.

3 For an overview of mutually opposed opinions on the subject, see: Wyrozumska, 2012.

4 TFEU – Treaty on the Functioning of the European Union. Consolidated version of the Treaty on the Functioning of the European Union *OJ C 326,* 26.10.2012, pp. 47–390.

By stipulating the same competence and procedure for conclusion of the withdrawal agreement as for the agreements between the Union and third countries or international organizations, Article 50 clearly assumes that, starting from the moment the notification of withdrawal is filed by the withdrawing state, such state needs to be deemed to have interests different from those of the EU and not different from those of any other third country, so that interests of the EU in relation to such country need to be protected accordingly.

2.1.1. Is the withdrawal notification revocable?

Academic literature diverges in respect of the question of whether the withdrawal notification is revocable during the transition period. Perakis (2018) argued in favor of irrevocability of the withdrawal notification; he based his view on the interpretation of Article 50 TEU, citing both the wording thereof, the reference to Article 218(3) TFEU as well as the drafting history of the text, i.e. the fact that inclusion of explicit possibility of revocation of said notification was indeed discussed and rejected. He rejects the claim that the possibility of revocation may be based on the Vienna Convention on the Law of Treaties and customary international law by citing the principle of autonomy of EU law (Perakis, 2018).[5] A contrary interpretation has been offered, among others, by Craig, who based his view on the textual meaning of the provisions of Article 50(3) TEU and Article 50(1) TEU. According to his opinion, the fact that during the transition period the withdrawing state may conclude a withdrawal agreement also means that it may revoke the notification and abandon withdrawal negotiations altogether, in accordance with its own constitutional requirements (Craig, 2016: 34-35). Benrath argues in favour of revocability of withdrawal notification by rebutting the claim that revocation and re-notification may be abused. According to his interpretation of Art. 50 TEU, the European Council may interpret any revocation, as well as re-notification, in line with the principle of good faith; thus, a revocation of withdrawal issued contrary to that principlemay simply be deemed void by the European Council (Benrath, 2018: 247).

The Court of Justice of the European Union (CJEU) affirmed the view that the revocation was indeed allowed, provided that it is issued prior to entry into force of a possible withdrawal agreement or, if such agreement remains absent, prior to the expiry of the two-year default transition period.[6] The CJEU issued this opinion pursuant to a reference for preliminary ruling procedure, upon the request of the Scottish Inner Court of Session pursuant to a petition by a number

5 For a detailed insight into the key judgments of the CJEU concerning the concept of „autonomy" of EU law, see: Lukić, 2011.

6 Case C-621/18, *Wightman v Secretary of State for Exiting the European Union* [2018], par. 76.

of Scottish MPs. The opinion was issued on 10 December 2018, within three months from the day on which the request was filed and prior to the adoption of the EU – UK Withdrawal Agreement in the House of Commons (Garner, 2018).

2.2. Withdrawal agreement

Article 50 TEU remains ambiguous in relation to the contents of the withdrawal agreement. As noticed by Craig, it leaves room for a broad spectrum of possibilities in relation to its scope, ranging from a very limited regulation on the cessation of effect of EU law in respect of the withdrawing country to a wide-ranging regulation of future relations between the EU and the withdrawing country (Craig, 2016: 37-38). Perakis points out to the exact wording of Article 50(2) TEU, where it is prescribed that the withdrawal agreement sets out "the arrangements" for the withdrawal of a member state, "taking account of the framework for its [referring to the withdrawing country] future relationship with the Union"; Perakis concludes that the terms of the future relationship are not the primary subject matter of the withdrawal agreement, and therefore may but need not be included in it (Perakis, 2019: 40-41). There are also authors, such as Dammann, who argue in favor of a strict interpretation of the permissible scope of withdrawal agreements, which would limit the said scope to terms of withdrawal and prevent the inclusion of provisions on the future relations between the EU and the withdrawing country. Dammann bases his claim on the view that a wider scope of a withdrawal agreement would enable circumventi- on of terms for conclusion of international agreements by the EU, primarily of unanimity requirements in Art. 218(8) TFEU (Dammann, 2018: 174-175).

The primary purpose of the withdrawal agreement is to prescribe terms of cessation of effectiveness of EU law in respect of the withdrawing country, which needs to include in particular terms of commerce, rights and obligations of individuals, timeline for possible gradual cessation of such effectiveness of EU law, etc.

In the opinion of Perakis, which the author of this paper agrees with, Article 50 TEU bestows upon the Union a best-efforts obligation to achieve an agreement with the withdrawing country, and not a duty to achieve the agreement at any cost (Perakis, 2019: 38).

In view of the explicit reference to Art. 218(3) TFEU included in Art. 50 TEU, it is clear that a withdrawal agreement, once it is concluded, constitutes an international agreement to which the EU is a party and, therefore, in line with Art. 216(2) TFEU, acquires direct effect in the EU legal system, including the EU Member States.

2.3. The unfolding of Brexit

The UK referendum on leaving the EU of 23 June 2016 was not legally binding upon the UK Government, in terms of UK constitutional law. It served the UK Government to learn the will of the electorate in respect of the subject issue (UK Institute for Government, 2020). On 13 March 2017, the result of the referendum was confirmed by the UK Parliament in the form of the Notification of Withdrawal Bill, which was passed by both houses of Parliament and received the Royal Assent on 16 March 2017. The Prime Minister of the UK then addressed the President of the European Council with the Article 50 Notification Letter (Letter of 29 March 2017). That letter triggered the process envisaged by Art. 50 TEU.

A withdrawal agreement was first agreed with the UK Government led by Prime Minister Theresa May in March/April 2019. A total of three extensions of the two-year period following the notification of withdrawal were agreed, the last until 31 January 2020. The withdrawal agreement was revised following the UK elections in the Fall of 2019 and the entry of Boris Johnson into the Prime Minister's office. Eventually, the EU – UK Withdrawal Agreement was agreed on 17 October 2019. The Council enacted a decision on conclusion thereof on 30 January 2020.[7] The agreement entered into force on 1 February 2020, a day after the end of the period prescribed by Art. 50(3) TEU, as had been extended by the European Council in agreement with the UK.[8] The Withdrawal Agreement allowed for the possibility that the UK-EU joint committee could extend the transition period by up to two years, provided that agreement was reached prior to 1 July 2020. Failing such agreement, the Withdrawal Agreement explicitly stipulated that the transition period shall end on 31 December 2020, at which point in time EU law shall cease to be applicable in the UK.[9] A separate declara- tion, titled the "Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom" (2020)[10], was agreed by the EU and the UK together with the Withdrawal Agreement.

2.3.1. The EU–UK Withdrawal Agreement

The EU–UK Withdrawal Agreement was not necessary for Brexit to take place. The actual unfolding of Brexit emphasises the importance of the issue of the legal nature of the withdrawal agreement. The current dispute over the UK's compliance with the Withdrawal Agreement in respect of the powers conferred upon the UK Government ministers by virtue of the envisaged

Internal Market

7 Council Decision 2020/135, 2020

8 The Agreement on the Withdrawal, 2020

9 Articles 126, 127, The Agreement on Withdrawal, 2020

10 Political declaration, *OJ L 34,* 2020

Bill, pertinent to trade and state aid in Northern Ireland, challenges the upholding of duties of sincere cooperation and acting in good faith, as the principles of EU law which remain in force in relation to the withdrawing state during the transition period.

The EU–UK Withdrawal Agreement has covered several subject areas. First, it ensured the continuation of rights acquired by the UK and EU citizens (as a result of their exercise of the right of free movement), who started living in the EU or in the UK, respectively, up to the end of the transition period. Such persons and their family members shall be able to continue to live, study, work and travel freely after the transition period ends. For this purpose, recognition of professional qualifications and coordination of social security systems have also been agreed upon.[11] Second, under the title "Separation issues", the agreement regulates the fate of several specific regulatory regimes: treatment of goods placed on the market prior to the end of the transition period, including the ending of ongoing storage and customs procedures and application of ongoing VAT and excise duties rules; the continuation of protection of certain intellectual property rights, such as trade marks, registered designs, geographical indi- cations, designations of origin, as well as of databases (etc.); winding down of ongoing police and judicial cooperation in criminal matters, as well as of judicial cooperation in civil and commercial matters; the use of data exchanged before the end of the transition period, the finalization of ongoing public procure- ment procedures, specific Euratom-related issues; applicability of ongoing EU judicial and administrative procedures to the UK; privileges, immunities and other issues relating to the functioning of the institutions, bodies, offices and agencies of the EU.[12] Third, the agreement spells out a number of institutional arrangements specific to the transitional period, including those relating to EU external action and to fishing opportunities, as well as to the possible extension of the transition period.[13] Furthermore, the agreement comprises provisions on settlement of financial obligations and on dispute resolution, which shall be examined in greater detail.[14] Finally, specific protocols have been executed in relation to Northern Island, and the Sovereign Base Areas in Cyprus and Gi- braltar. Particularly sensitive was the protocol on Northern Ireland because it represented a major revision of the Withdrawal Agreement originally agreed in March 2019. Instead of the initially devised solution whereby Northern Ireland would have essentially remained part of the Single Market, the final mechanism is based on two principles that may generate conflicts in the future: Northern

11 Articles 9 – 39, The Agreement on Withdrawal, 2020

12 Articles 40 – 125, The Agreement on Withdrawal, 2020

13 Articles 126 – 132, The Agreement on Withdrawal, 2020

14 Articles 133 – 181, The Agreement on Withdrawal, 2020

Ireland shall be treated as part of the UK customs and VAT area, but most EU customs and VAT rules will remain applicable. At the same time, no tariffs or restrictions will apply to the trade between Northern Ireland and the Republic of Ireland, whereas customs checks will be necessary between Great Britain and Northern Ireland.

The fact that the EU–UK Withdrawal Agreement has not encompassed provisions on the relations between the EU and the UK following the transition period may be regarded as a practical confirmation of the doctrinal position that withdrawal agreements under Art. 50 TEU should not regulate the future relationship between the EU and the withdrawing country. It may, however, in practice increase probability that the future relationship shall not involve certain areas, such as common foreign and security policy, since its conclusion required only a qualified majority under Art. 50(2) TEU, whereas conclusion of an agreement involving common foreign and security policy would require unanimity, under Art. 218(8) TFEU.

Certain authors have argued that dispute resolution in respect to any withdrawal agreement must lie in the hands of the CJEU, once a withdrawal agreement ine-vitably becomes part of EU law (Perakis, 2019: 42-43, 47). Such a position has only partially been materialized in the EU–UK Withdrawal Agreement. In that instrument, a distinction has been made in its dispute resolution provisions between the general dispute resolution competence of an arbitral panel of the Permanent Court of Arbitration and the specific competence of the CJEU. The former shall be competent to resolve a dispute "regarding the interpretation and application of the provisions of this Agreement." As an exception to that general rule of competence, the CJEU shall be competent to decide a "question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2) [of the Withdrawal Agreement]." The decision of the CJEU will be binding upon thearbitral panel.[15] The reference to Art. 89(2) of the Withdrawal Agreement leads to Art. 86 and Art. 87 of that instrument, which prescribe competence of the CJEU for proceedings brought by or against the UK during the transition period, and for proceedings brought by the European Commission against the UK wit- hin 4 years after the end of the transition period for failure to fulfil obligations under the Treaties or under Part Four of the Withdrawal Agreement, as well as for failure to comply with a legally binding decision of an EU institution during the transition period. Part Four of the Withdrawal Agreement prescribes the terms of the transition period, including applicability of EU law in relation to the UK, institutional arrangements, specific arrangements relating to the Union's

15 Articles 169, 170, 174, The Agreement on Withdrawal, 2020

external action and to fishing opportunities, supervision and enforcement of EU law during the transition period, as well as the possibility that the transition period be extended.[16]

2.3.2. The dispute over the UK Internal Market Bill 2019-2021

In September 2020, the draft United Kingdom Internal Market Bill 2019-2021 entered the procedure for enactment in Parliament. In its present form, the bill would confer upon UK Government ministers powers that would allow them to unilaterally change the protocol to the EU–UK Withdrawal Agreement that pertains to Northern Ireland. If it is enacted, it would grant the ministers the power to unilaterally decide whether to notify the EU Commission of any government subsidy that could affect the trade of goods in Northern Ireland, as well as whether the requirement for export summary declarations for goods sent from Northern Ireland to the rest of the UK may be waived. On 1 October 2020, the EU Commission started infringement proceedings against the UK, while expressing hope that the dispute would be resolved by way of negotiations (The Guardian, *Brexit: EU launches legal action against UK for breaching withdrawal agreement*). In essence, the subject provisions purport to enable disapplication of EU law in respect of Northern Ireland, as well as to remove an important part of customs controls between Northern Ireland and the rest of the UK.

In a public statement of 10 September 2020, issued following a session of the EU–UK Joint Committee, the EU Commission declared that "Violating terms of the Withdrawal Agreement would break international law, undermine trust and put at risk the ongoing future relationship negotiations", and noted that "If adopted as proposed, the draft bill would be in clear breach of substantive provisions of the Protocol: Article 5 (3) & (4) and Article 10 on custom legislation and State aid, including amongst other things, the direct effect of the Withdrawal Agreement (Article 4). In addition, the UK government would be in violation of the good faith obligation under the Withdrawal Agreement (Article 5) as the draft Bill jeopardises the attainment of the objectives of the Agreement" (European Com- mission, 2020a). On 1 October 2020, the EU Commission sent a letter of formal notice to the UK, stating its position that the UK is in breach of the Withdrawal Agreement and thus commencing a formal infringement process against the UK(European Commission, 2020b).

Regulation of trade in respect of Northern Ireland was a major point of contention throughout the negotiations in respect of the EU–UK Withdrawal Agreement. A blunt violation of the agreed solution by the UK has the potential to substantially

16 Art. 126-132, The Agreement on Withdrawal, 2020

diminish the scope and depth of the partnership that the two sides will agree upon for the post-transition period.

3. Consequences of the withdrawal on issues of EU citizenship

From the very beginning, the cornerstone of EU law have been certain freedoms afforded to citizens of Member States. Formal EU citizenship was introduced by the Maastricht Treaty in 1992. Thereafter, the CJEU further developed the concept and importance on EU citizenship. One of the key developments in the CJEU case-law is perhaps the doctrine whereby the Union citizenship has become more than a mere addition to citizenship of a Member State. Precisely due to the fact that Union citizenship is dependent on citizenship of a Member State, the CJEU has afforded itself the right to review Member State decisions regarding citizenship of an individual on the basis of certain minimum standards that have been developed by the Court itself. The doctrine was promulgated in *Rottmann*[17] and more recently confirmed in *Tjebbes.*[18]

Although the Union citizenship status has not evolved to become independent from Member State citizenship, so that Union citizenship status of citizens of a withdrawing state would be unaffected by that state's withdrawal, its legal and political significance has strengthened the legal relevance of individual rights acquired as result of that status. Considering the great significance of citizenship-related rights for lives of individuals (including the right to residence, to work or to study), proper regulation of the acquired rights of Union citizens that maybe affected by a withdrawal is a greater challenge than any other institutional or public law issue.

3.1. Implications of Brexit on citizenship-related rights of EU and UK citizens

It is estimated that at the beginning of 2019 there were 3.4 million EU Member-State nationals (excluding Irish citizens) living in the UK, as well as 1.2 million UK nationals living in the remainder of the EU (Cîrlig, 2020: 2).

17 Case C-135/08, *Janko Rottman v Freistaat Bayern*, [2010]; For a detailed analysis of *Rottmann*, see: Lukić, 2012.

18 Case C-221/17, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* [2019]. Some authors argue that the CJEU case law on citizenship has created a situation of reverse discrimination, whereby citizens of Member States who find themselves in situations lacking intra-EU cross-border dimension are afforded a lower level of protection than those finding themselves in intra-EU cross-border situations (Rakić, 2020).

During the transition period, most rights based on EU citizenship remain unchanged, with the exception of certain political rights of UK nationals in relation to EU bodies.[19] The EU–UK Withdrawal Agreement guarantees almost all rights acquired by UK citizens who have resided in the remainder of the EU and of EUcitizens who have resided in the UK prior to the end of the transition period for at least five years, based on their exercise of rights arising from the free movement of persons principle.[20] The rights are guaranteed to the persons who acquired them for their entire lifetime, under conditions prescribed in the Withdrawal Agreement, and to their family members, including future children. While the right of residence of UK nationals in an EU country, existing at the end of the transition period, is guaranteed by the Withdrawal Agreement, the right of such persons to move their residence to another EU country in the future has not been guaranteed by the Withdrawal Agreement (Cîrlig, 2020: 5). The choice of a constitutive system for confirming residence and related rights under the Withdrawal Agreement by the UK has been criticized, mostly as been non-inclusive in respect of vulnerable social groups. Out of the 27 remaining EU Member States, 13 have opted for a declaratory system, while 14 have resorted to a constitutive system, requiring that UK nationals file applications for determination of their status and rights under the Withdrawal Agreement (Cîrlig 2020: 8-14).

After the end of the transition period, EU citizens arriving in the UK and UK citizens arriving in the EU will not benefit from the protection of the Withdrawal Agreement, and will be subject to rules applicable to third-country immigrants, unless the EU and the UK agree on a new mobility regime.

4. Future partnership between the EU and the UK

In October 2019, together with the Withdrawal Agreement, the EU and the UK agreed upon the "Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom". According to its introductory provisions, the declaration purports to establish "parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation." The declaration cites "respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation" as shared values which should

19 Article 127, The Agreement on Withdrawal, 2020

20 Articles 13 – 15, The Agreement on Withdrawal, 2020

underpin the future relationship. The fields of future cooperation are outlined in two sections, dealing with economic and security partnership.[21]

As with most other declarations on future intentions (and as suggested in the title), the significance of the declaration is almost entirely political, while the only legal effect thereof may be regarded as an obligation to attempt negotiations on the subject of future relationship in line with the declared intentions, in good faith and on a best-efforts basis. Such obligation was explicitly stipulated in the Withdrawal Agreement as well: the EU and the UK agreed to "use their best endeavours, in good faith and in full respect of their respective legal orders", to take necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the Political Declaration of 17 October 2019...".[22]

As has been already pointed out, EU rules on voting requirements in respect of conclusion of international agreements with third parties shall, from a practical perspective, influence the scope of the agreement on future relationship. An association agreement, as well as coverage of the area of common foreign and security policy, would require unanimity in accordance with Art. 218(8) TFEU, which may be difficult to attain in respect of the UK in view of the resolve of UK leaders to prevent the application of the free movement of persons principle. Recent CJEU case law confirms the view that there may not need be a unanimityrequirement on the part of the EU Member States for the EU to conclude a wide-ranging free trade agreement with the UK (Hughes, 2018: 15).

EU Member States in the General Affairs Council approved the European Commission's Draft Agreement on the New Partnership with the United Kingdom on 25 February 2020. The document was transmitted to the UK on 18 March 2020. Several rounds of negotiations have taken place since. If it is eventually concluded, the agreement shall represent a blueprint of what any other withdrawing state may expect to end up with in relation to the EU. By the same token, if the two parties fail to reach agreement, the EU will be forced to take a harsh position vis-á-vis interests of EU persons and entities in order to provide a clear lesson to any other Member State which envisages to resort to a non-consensual withdrawal.

If, however, an agreement on the future relations in respect of trade is not agreed prior to end of transition period, WTO rules shall be applicable to EU–UK trade relations, since both the EU and the UK are WTO members (Hughes 2018: 15).

21 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 2020

22 Article 184, The Agreement on Withdrawal, 2020

For the UK, the issue of particular concern is the ability of its financial sector to do business in the EU. The financial sector in the UK accounts for between 8 and 12% of GDP (Peihani, 2018: 89). According to Peihani, the UK financial sector may be able to rely on three basis in order to preserve access to the EU market following Brexit: membership in the European Economic Area (the EEA), reliance on EU legislation that allows access based on equivalence of regulatory terms, and a bespoke trading arrangement, whereby only the membership in the EEA is likely to be able to allow the continuation of a wide market access and passporting rights for UK financial services firms (Peihani, 2018: 93-100). The prospect of a no post-Brexit deal between the EU and the UK seems parti- cularly dire for the financial services industry, since the WTO rules of the EU, which would represent the fallback option, do not allow access to the market for financial services (Peihani, 2018: 103).

5. Consequences of withdrawal under international law

The simplest account of the legal effect of Brexit would be to say that it shall mean the cessation of effect of EU law in relation to the UK and to the relations between the UK and the EU, the EU Member States and international organizations, so that the latter would be governed by international law. This account would be, however, only true from a distant perspective, while a closer look would reveal numerous exceptions.

Mutually opposed views exist in academic literature in respect of whether the UK would, by way of succession, continue to be bound by international treaties concluded by the EU during the time the UK was a UK member. An argument in favor of such succession would assume that the EU does not possess legal personality independent from the personalities of its Member States. According to Odermatt, the answer to this question will depend on specific circumstances pertinent to each international treaty (Odermatt 2017: 1056-1059). A similar lack of consensus exists in relation to the fate of mixed agreements, concluded both by the EU and the UK with third parties. Particularly significant, from the economic perspective, is the question of whether the UK shall need to renegotiate its trading relationships with third countries, or it will be able to succeed the preferential trading arrangements of the EU. Some authors, such as Hughes, firmly claim that the UK will lose any preferential status it enjoyed while being represented in the WTO by the EU, so that it would need to negotiate its own arrangements (Hughes, 2018: 15). One solution would certainly be that the EU and the UK agree on a common approach to third states and international organizations (Odermatt, 2017: 1060-1061).

The thesis put forth by a number of authors, including Cottier, that the UK will be worse off once it finds itself in the situation to negotiate its trading relations via bilateral agreements, seems plausible in view of the relative market size and the resulting bargaining power of the UK vis-à-vis the US, the EU, Japan, etc. (Cottier, 2018: 83-84).

In the area of environmental protection, as concluded by Gehring and Phillips, the UK will most probably need to adhere to EU rules in order to preserve market access for its goods, while at the same time it shall lose the ability to influence EU regulation from within (Gehring, Phillips, 2018: 223-224).

6. Concluding remarks

Article 50 TEU, as the sole legal mechanism for withdrawal provided by EU law, affords substantial flexibility to the withdrawal process in general, and to the scope of a possible withdrawal agreement in particular. The unfolding of Brexit thus far has created a number of contentious situations, both at the level of UK constitutional law and in relations between the UK and the EU. While the conten- tious situations at the level of UK constitutional law remain outside of the scope of this paper, their relevance lies in the tensions they have generated for the UK vis-à-vis the EU. Considering the unfolding of Brexit thus far, it appears that the flexibility of Article 50 TEU has withstood the test of practice and proven to be wisely devised. On the other hand, the deliberately undertaken ongoing steps of the UK Government to breach the Withdrawal Agreement and, consequently, EU law, show that the binding effect of EU law is not a legal phenomenon *per se*, but rather a direct consequence of the political and value-based significance of the EU for its Member States and their citizens.

The agreed detailed regulation of rights of individual persons (EU nationals re- siding, working or studying in the UK, and *vice versa)* in the EU–UK Withdrawal Agreement shows the strength of the phenomenon of acquired rights, despite failures to reach agreement in relation to numerous other areas. Brexit has demonstrated that there is still no supranational EU citizenship, independent and different from Member State citizenship.

The peculiar and complex institutional setup of the EU causes significant issues in respect of the relations of the withdrawing state with the EU and its remaining Member States, third states and international organizations. The fate of inter- national obligations in relation to third parties, acquired prior to withdrawal by the EU, as well as by the withdrawing state together with the EU, by virtue of mixed agreements, remains unclear and thus creates great uncertainty.

Numerous difficulties, disputes, costs and uncertainties created by Brexit seem to confirm the view that the true essence of the EU lies in a political and value-based union which aspires to an even stronger unity than the one that exists at present. A withdrawal from such a union is a phenomenon that is difficult to imagine and regulate.

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NAPUŠTANjE EU – POSLEDICE U SKLADU SAPRAVOM EU I SA MEĐUNARODNIM PRAVOM

Rezime

Član 50. UEU, kao jedini pravni mehanizam za napuštanje EU koji pruža pravo EU, omogućuje značajno visok nivo fleksibilnosti za proces napuštanja uopšte, i, posebno, za sadržinu eventualnog sporazuma o povlačenju. Imajući u vidu način na koji se „Bregzit" odvijao do sada, čini se da je član 50. UEU izdržao test prakse i dokazao se kao mudro rešenje. S druge strane, koraci koje Vlada Ujedinjenog Kraljevstva svesno preduzima u pravcu kršenja zaključenog Sporazuma o napuštanju EU i prava EU pokazuju da obavezujući karakter prava EU nije čisto pravna pojava, već pre svega neposredna posledica političkog i vrednosnog značaja koji EU ima za njene članice i državljane.

Detaljno uređenje prava pojedinaca – državljana EU koji imaju prebivalište,rade ili studiraju u Ujedinjenom Kraljevstvu i obratno, sadržano u Sporazumu o napuštanju zaključenom između EU i Ujedinjenog Kraljevstva, nasuprot neuspesima da se postigne saglasnost o mnogim drugim pitanjima, pokazuje snagu fenomena stečenih ličnih prava. Bregzit je u praksi potvrdio da još nije nastalo nadnacionalno građansko pravo EU, koje bi bilo nezavisno od državljanstva neke od država članica.

Specifična i složena institucionalna struktura EU otvara značajna pitanja na planu odnosa države koja napušta EU sa EU i njenim preostalim članicama, trećim državama i međunarodnim organizacijama. Sudbina međunarodnih obaveza prema trećim stranama, stečenih pre napuštanja od strane EU, kao i od strane države koja napušta EU zajedno sa EU, na osnovu mešovitih sporazuma, ostaje nejasna, uzrokujući veliku pravnu nesigurnost.

Brojne teškoće, sporovi, troškovi i neizvesnosti nastali usled Bregzita potvrđuju stvar da suština EU leži u političkom i na vrednostima zasnovanom savezu, koji teži mnogo većem jedinstvu od onog koje postoji danas. Napuštanje takvog saveza je pojava koju je teško zamisliti i pravno urediti.

Ključne reči: *Dobrovoljno napuštanje EU, Član 50. UEU, Sporazum o napuštanju EU, Pravo EU, Pravo građanstva EU, Spoljni odnosi države koja se povlači iz EU.*

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pregledni naučni rad
10.5937/zrpfn0-28664

UDK: 271.2-58
271.2-472
Rad primljen: 01.10.2020.
Rad prihvaćen: 02.12.2020.

RESPONSIBILITY OF MONKS IN THE CONTEXT OF LAW AND SOCIETY[**]

Abstract: *In the course of history, ecclesiastical life has been imbued by secular beliefs, embodied in human endeavour to get a strong foothold in the Church. Since Emperor Constantine's era, the idea that matured in the ecclesiastical consciousness was that the fundamental principle underlying the organization of ecclesiastical life lay in the domain of law. Nevertheless, in contrast to positive law, canon law is not an expression of the will of an individual or the congregation; instead, it comprises rules deriving from the nature of the Church. The Church, just like any other organism, is governed by two tenets: the static organization, and its dynamic life function. Thus, the responsibility of monks can be perceived either in line with canonic law or within the social context, whereby these tenets are inalienable since there can be no life without organization, nor can there be organization without life. In case a member abandons an organization, regardless of the reasons behind such action (be it voluntary or through the power of law), positive law prescribes that all ties between the said organization and its former member are to be dissolved. On the other hand, in case a penalized monk is obliged to leave the monastery due to the gravity of the pronounced sanction, he is entitled (as a former member) to preserve the status of a Christian. This point derives from the fact that baptism constitutes an indelible fact of spiritual life. This paper examines the subject matter of monks' responsibility for violation of canon law, by comparing the mediaeval and contemporary sources of the Serbian canon law, in view of identifying changes in the said period and drawing the most accurate conclusions.*

Keywords: *monk, sanctions, disciplinary-criminal jurisdiction, responsibility, St. Sava's typika, decree on monastic life.*

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[**] The paper was presented at the International Scientific Conference "*Responsibility in the Legal and Social Context*", held at the Faculty of Law, University of Nis, on 18 September 2020.

1. Introduction

The responsibility of monks fully aligns with the legal maxim "*Nullum crimen, nulla poena sine lege.*" This type of responsibility is determined by the Church Court. However, since the (static) structure and (dynamic) life functions of the Church are inseparable canon law principles, the judge must take into account the social responsibility of monks because: "to judge means to appropriate shamelessly the right of God, and to condemn means to ruin one's soul" (Lestvičnik, 2008: lesson 10). At the same time, given that the purpose of punishment can be *talionis* ("I punish you because you sinned") and *praevenire* ("I punish you so that you would not sin"), it is important to point out that another view is accepted in the Canons.[1] Prevention is achieved by punishment, given that the goal of retribution (*τιμωρία*) is to better the monk in order to regain the lost goodness (virtue) that can only be found in monastic life.

Legislation prescribes specific conditions that must be met in order to find a defendant liable, impose sanctions and punish the perpetrator for the committed act. This paper provides an analysis of medieval Canon law sources, such as: the Karyes *Typikon*, Saint Sava's Hilandar Monastery *Typikon* and Studenica Monastery *Typikon,*[2] *Syntagma Canonum* of Matthew Blastares,[3] and Tsar Dušan's Code.[4] Thus, the paper provides a comprehensive overview of landmark documents regulating monastic life and punishment of monks during the reign of

1 The first point of view, retaliation, was characteristic of the earliest legal codes, which implied *talionis* punishment («an eye for an eye, a tooth for a tooth»).

2 Saint Sava first wrote the *Typikon* for the Karyes hesychasty (1199/1200), which was the fruit of his independent legislative creative work; then, he wrote the Hilandar *Typikon* (1199/1200) and the Studenica *Typikon* (1208) which contain «The Life of St. Simeon.» Notably, monks in the Karyes cell live a solitary life, unlike the monks in Hilandar and Studenica who live in the monastery.

3 The Syntagm of Matthew Blastares, a monk of Mount Athos, was compiled in 1335 in Thessaloniki; it is a collection of Byzantine laws, which included *Prochiron, Vasilik*i and *Novella,* written during the Macedonian dynasty. The Abridged Syntagma is an integral part of Tsar Dušan's Code, demonstrating the influence of the reception of Byzantine law on Serbian law. In the Abridged Syntagma, the monasic life is depicted in Chapter M-7. This paper presents the provisions of the Complete Syntagm, which regulates the monastery life and punishment of monk in Chapter M-15. Such a presentation was necessary because a large number of provisions relating to monastery life and punishment of monks were deleted from the Abridged Syntagma. In order to get a comprehensive insight into Tsar Dušan's legislation, the concluding remarks point to the provisions of the Complete Syntagma, which are preserved in the Code and the Abridged Syntagma.

4 In the period between the creation of the *Typikon* and these two landmarklegal documents from the XIV century, St. Sava wrote the *Nomocanon* (Rulebook), thus rounding off the legal organization of the Serbian church. This ecclesiastical law document is not treated in this paper because it is highly specific in many ways.

the Nemanjić Dynasty (1168-1371). The reason for including Matthew Blastares' *Syntagma* and Dušan's Code in the analysis is that the issue of punishing monks is also related to the wider problem of Byzantine-Roman law reception among Serbs and its harmonization with legal knowledge and inherited norms of Serbian customary law. Today, punishable acts of monks and sanctions are in accordance with the Canon Law prescribed by the Constitution of the Serbian Orthodox Church (2007), Rulebook on Church Court Proceedings (2008), and the Decree on Monastic Life (2008).

2. Punishing Monks: Rules and Procedures

According to the Rulebook on Church Court Proceedings (2008), punishing a monk for committing a crime under the Criminal Code or other statutory legislation does not exclude him from his ecclesiastical guilt.[5] This means that a monk can be held legally liable twice: under positive law and under Serbian Canon Law. However, if we consider the punishment of monks under Serbian Canon Law, we will notice a multifold purpose of punishment: 1) individual prevention: the competent entity punishes the monk in order to persuade him to better himself; in addition to legal responsibility, it also encourages social responsibility because the monk is made to think about his guilt and subject it to the judgment of his conscience; 2) general prevention: realizing his social responsibility, a monk influences not only other monks from the fraternity but also novices (the first-reformed) and pious people who may have thought about becoming monks, so as not to deviate from the path of righteousness, i.e. not to put themselves in a position where they can be found liable; and 3) educational function: punishment protects the reputation of the monastery; the legal responsibility of monks is equated with social responsibility; one who has decided to dedicate his life to God cannot give this kind of life up so easily and thus belittle the reputation of the monastery providing the nonbelievers with a reason not to respect the will of God.

The punishment for monks prescribed by the medieval and modern-day sources of Serbian Canon Law can be divided in two groups: corrective (disciplinary) and vindictive (retaliatory, punitive).[6] The forms of punishment falling into the first group are less harmful as they serve to better the perpetrator, while those falling into the second group serve to retaliate against the perpetrator of a more serious act which can lead to the monk losing all or certain rights granted to him upon admission to the religious order. It can be noticed that the disciplinary

5 Art. 4. Rulebook on Church Court Proceedings (2008).

6 Art. 56 of the Rulebook divides the punishment into disciplinary and other punishments for church offenses.

punishments provided for in medieval legal documents are less stringent; the least stringent among them are warning, reprimand, and penance. In the contemporary sources of law, they are mentioned only in the Decree on Monastic Life.[7] The Decree stipulates that the Abbot (head/superior of a monastery), alone or in front of the brotherhood, first imparts milder measures (advice, warning, or penance); the stricter ones are imposed only after careful consideration, taking into account that punishment is a means and not an end.[8] The most stringent punishment is excommunication, perhaps not so much in a physical sense as in a psychological sense because the culprit is excluded from participating in worship services for a period of time and is denied the secret of the Holy Eucharist (communion) due to his unworthiness (Granić, 1998: 221-222).

In modern day Canon Law, this punishment is designated as temporary revocation of certain church rights and honors, which can include: excommunication, exclusion from common prayer with the believers, ban on carrying out a memorial service, deprivation of church ranks, deprivation of service by monastic authorities, membership in associations, revocation of the right to sit at a table in the monastery so that no one from the fraternity can meet, talk or pray with the punished monk (Art. 58. Rulebook, 2008; Art. 71 Decree, 2008). In modern canon law, life-long deprivation of monasticism is a form of disciplinary punishment which is especially emphasized, which was not the case with medieval canonical documents where this punishment was considered vindicative (Granić, 1998: 222). At the same time, modern day sources impose a sentence of deprivation from monasticism jointly with vindicative punishments: expulsion from the church community for a period of time (*suspensio*),[9] and final exclusion from the church community (*degradatio*). In medieval sources, these forms of punishment were referred to as excommunication and denunciation (*anathema*). In the former case, the culprit was deprived of only certain rights received through service

7 Notably, in medieval sources, warnings and reprimands were aimed at reproaching and rebuking the monks who had to correct their behavior, and reprimanding the recidivists with a threat of a more strict punishment, while penance was applied in the form of stricter fasting, repetition of a large number of *metanoia* (bows) or complete starvation with confinement in a cell. On the other hand, in modern canon law, these forms ofpunishment are mostly provided for clergy, and penance is to be endured at a monastery determined by the Bishop (Article 57 of the Rulebook, 2008). The Decree mentions warning and reprimand, and penance is broken down into several forms of punishment (penalties).

8 The Decree stipulates some stricter measures, such as: standing in a church or at a table, strict fasting on dry and raw food, multiple bows, strict fasting on dry and raw food with large bows, monastic silence combined with multiple bows, excommunication, and prohibition of communion (Article 71 of the Decree, 2008).

9 This punishment can be imposed for a period ranging from 3 to 10 years, but if the culprit becomes terminally ill and sincerely repents, he may be pardoned by the Archbishop (Article 58 of the Rulebook, 2008).

and his hierarchical rank; in the latter case, the punishment deprived him of all the rights received during his ordination as a servant of God.

The medieval canon law provided for a one-tier trial process for monks by the so-called external monastery court of the abbots (*forum externum*),[10] whose decision could not be appealed, nor could the monk claim any other legal remedy; all decisions of the *forum externum* on the violation of internal monastic discipline immediately became legally binding and enforceable (Milaš, 2004: 529). The Hilandar *Typikon* prescribes that the trial of a monk in the Karyes cell, due to the specifics of his solitary life, is performed by the Abbot and the fraternity of the Hilandar Monastery (Chapter 42 Hilandar *Typikon,* Bogdanović, 2008: 101-102). In accordance with this rule, the *modus procedendi* and the judicial body responsible for the trial of the Abbot is collegial, comprising the most senior monks from the monastery brotherhood.

Modern day canon law sources provide for a two-tier trial process: in the first instance, a more lenient disciplinary penalty is imposed by the diocesan Archbishop;[11] a more stringent one is imposed by the Diocesan Ecclesiastical Court in a collegial composition;[12] in the second instance, depending on the legal remedy, it is imposed by he Grand Ecclesiastical Court. Given that the Diocesan Archbishop presides over the Diocesan Church Court, decisions made at sessions he did not attend must be submitted to him for consent. In case of disagreement between the Archbishop and the Court, the execution of the decision of the Diocesan Court is suspended until the decision of the Grand Church Court is passed (Article 128 of the Constitution of the Serbian Orthodox Church, 2007). The second instance judgment is final and enforceable (Article 87 of the Rulebook, 2008).However, although it is not explicitly mentioned anywhere in modern day sources, it can be said that today there is a three-tier judiciary. Namely, as in the Middle Ages, the Abbot is the first one to investigate the violation of monastic rules. This is evidenced by the provisions saying that, in order to establish the truth, a monk or a novice can present to the Abbot all the evidentiary facts that

10 Since the Abbot can also exercise his judicial power over secular persons when they come to confession, a distinction should be made between that procedure and the court procedure for accused monks who may need to be punished. In the first case, it is about the internal monastery court (*forum internum*) where sins are confessed.

11 Art. 108, Point 19 of the Constitution of the Serbian Orthodox Church, 2007 prescribes that the Archbishop may impose punishments: warning, reprimand and penance. These sentences are immediately enforceable.

12 The members of the Diocesan Church Court make a decision by a majority vote. Anyone who does not agree with the decision has the right to file a separate reasoned opinion in writing (Article 127 of the Constitution of the Serbian Orthodox Church, 2007). Penalties imposed by the Diocesan Ecclesiastical Court are subject to consideration and trial by the Grand Ecclesiastical Court (Article 79 of the Constitution of the SOC, 2007).

they know about the accused who is a member of their fraternity. Saint Basil the Great ordered: "Do not hide your brother's sin so that he does not turn his brother's killer instead of the one who loves his brother!" At the same time, no one can be punished by any ecclesiastical punishment without a prior hearing (Article 218 of the Constitution of the Serbian Orthodox Church, 2007) and the Abbot has the right to impose measures in accordance with the canons. Anyone who faults out of ignorance should be forgiven but, despite the presented and applied measures, if it is believed that the Monk is guilty, it is necessary to initiate proceedings before the competent Archbishop (Articles 72-74 of the Decree, 2008).

The procedure is initiated and conducted *ex officio,* except for the proceedings which can be prosecuted in a private lawsuit, as prescribed in the Rulebook.[13] Just like positive law, canon law provides for a trial in the absence of a fugitive monk, and a summary judgment in case of failure to respond to summons (Article 66 of the Rulebook, 2008). Aggravating and mitigating circumstances are taken into account when sentencing (Article 59 of the Rulebook, 2008). Also, canonical legislation prescribes that anyone who intentionally induces, encourages, or aids another to commit a church offense will be punished as if he had done it himself (Article 7 of the Rulebook, 2008).

The right to punishment by disciplinary sanctions has a five-year statute of limitation if the perpetrator is not punished within 5 years from the time when he committed the act, provided that he did not commit any other offence during this time (Article 60 of the Rulebook, 2008). Regardless of the committed offense, corporal punishment of monks is prohibited by canon law(Art. 73 of the Decree on Monastic Life, 2008)

3. Types of punishable acts committed by monks

Positive law systematically prescribes criminal offences and sanctions, which is not the case with canon law. Chapters of *typikons*, articles of the Church Constitution, laws, decrees, and rules regulating various aspects of monastic life usually include provisions on offenses against orders and prohibitions, as well as appropriate sanctions. Unlike modern day canonical legislation, in the Middle Ages, church authority did not interfere with the autonomy of monasteries[14] and

13 An example of initiating proceedings as a private lawsuit could be when a monk was in charge of movable or immovable property, designated for monastery use, which he embezzled. The ecclesiastical court can make its decision only following a private lawsuit filed by the interested party, based on the available evidence, since it examines the whole matter (Article 75 of the Rulebook, 2008).

14 The Hilandar *Typikon* (Chapter 12) defines the autonomy of monasteries, in the sence that Hilandar is free from Rulers and *Protas* (from Mount Athos), and from other monasteries and

the organization of monastic life: instead, the standardization of this matter was completely left to the monastic statutory legislation. In case of legal gaps, customary law was most likely applied as a corrective measure, and the abbot was probably an interpreter of penal norms. In accordance with his role, his social responsibility was large and his legal responsibility was stricter.

If it turned out that the abbot was unsuitable and incapable of administration, or if it was established that he acquired some property while managing the monastery, that property was confiscated in favor of the monastery and the fraternity had the right to remove him from the monastery administration. The same provision was prescribed for the ruthless and condescending trial of an abbot (Chapters 14 and 19 of the Hilandar *Typikon*, Bogdanović, 2008:73-75, 80-81). In the Syntagma of Matthew Blastares, the punishment was specified only in case an abbot acted contrary to the rules for performing tonsures. In the same legal monument, excommunication was prescribed as punishment if the abbot did not investigate the reason for the monk's escape and did not return him to his flock: "because he heals a sick lamb with appropriate remedies." (Rules 3 and 5 from Chapter M-15 of the First-Second Parliament, Blastares' *Syntagma*, SANU, 2013: 293-294, 297). According to the Hilandar *Typikon,* excommunication was also a punishment for an abbot who unjustifiably and unnecessarily disposed of monastic things and money (Chapter 20 of the Hilandar *Typikon*, 2008: 81-82), while Blastares 'Syntagma prescribed the punishment of penance for an abbot who was not ordained as a priest (Rule 19 from Chapter M 15, Blastares' *Syntagma,* SANU, 2013:: 295). In Dušan's Code, a stricter punishment was prescribed for the abbot who was placed at the head of the monastery by bribery. In that case, both the abbot and the one who appointed him were to be excluded (anathematized) from the church community, but the exclusion of the abbot was not to be done without the participation of the church (Articles 13 and 14 of Dušan's Code) (Novaković, 1898: 17-19). In the Studenica *Typikon,* Saint Sava especially emphasized that the abbot was not to be expelled, unless his guilt was over a grave matter, or it could not be remedied, or it was a matter for which he was rebuked in front of everyone, or he could not repent for his deed (Chapter 13 of Studenica *Typikon,* Bogdanović, 2008: 111-118). In modern canon law, Article 53 of the Rulebook points out that the autonomy of the monastery is violated when the Abbot/Abbess is punished by being deprived of monasticism due to accepting someone into the fraternity/sisterhood without the approval of the competent Archbishop or for a bribe, or if he/she is a mentally impaired

from personal rulers (persons distinguished by high position or great wealth), and that the monastery must not come under the right of disposal or imperial or ecclesiastical authorities, or any private persons. In a similar way, the freedom of the monastery is emphasized in Chapter 12 of the Studenica *Typikon*.

person, or if he/she is bound by marriage, or if he/she does not supervise the fraternity/sisterhood, or if he/she treats someone inhumanely or does not adhere to monastic rules (Article 53 of the Rulebook, 2008).[15]

If we compare the Hilandar *Typikon* with the Studenica *Typikon,* we can see observe differences in a few provisions only. In the former, exclusion from the monastic community was prescribed in case someone wanted to endanger the freedom of the monastery. In addition to the punishment of excommunication, the Studenica *Typikon* mentioned that the culprit should be cursed. The Hilandar *Typikon* explicitly stated that the culprit should be anathematized, without mentioning excommunication. In the Hilandar Typikon, exclusion was also envisaged in other cases: for violation of the vow of obedience, for recidivism after the repeated imposition of milder punishments, and for first-time offenders where no prior disciplinary punishment was awarded. If the monk argued with the Abbot, did not wait for his orders, or was not satisfied with the place he was given at the table, he was to be excluded after the third warning. If a monk was late for prayer or dinner, he was pronounced a penance; if he repeated his transgression, the monk was to be punished by expulsion. The same provision applied to those who did not get up on time for the morning service; they were to be expelled after the third penance. However, those monks who were "lawless" had to be expelled instantly, at the cost of leaving behind only a few of monks in the monastery (Chapters 9, 25 and 28 of the Hilandar *Typikon,* Bogdanović, 2008: 65-67, 85, 87). Blastares *'Syntagma* stated that those who abandoned their children under the pretext of asceticism (joining a monastic order) were to be punished with anathema: "If someone does not care about his family, he has renounced his faith and is worse than an non-believer." (Rule 13 from Chapter M-15 of Blastares' *Syntagma,* SANU, 2013: 298).

In modern day canonical documents, final exclusion (as the most serious vindicative punishment)is provided for those monks who violate the church order, work against church interests or the church in general (Article 49 of the Rulebook, 2008). Article 47 of the Rulebook specifies that monks who renounce obedience to the diocesan ecclesiastical authority, rebel or conspire against it, deny it due respect, insult it, slander it, humiliate it, do not recognize it or will not carry out its decisions or orders, do not accept the competent parish priest, or generally neglect their religious and ecclesiastical duties may be punished by disciplinary action; in more severe cases, they can be punished at the discretion of the court. The possibility of awarding disciplinary measures is also prescribed for those who engage in cheating, arbitrary dissolution of the marital union, inhuman

15 In modern canonical legislation, the autonomy of the monastery has been violated but, unlike the medieval legislation, gender equality has been fully respected.

treatment of relatives or other persons; in more serious cases, the prescribed punishment is anathema (Article 51 of the Rulebook, 2008).

The basic elements of the monastic system are the vows of the one who consecrates himself, pledging that he will a life of celibacy,[16] poverty and obedience (Grigorian, 2011: 36). Every crime against these elements requires punishment of monks. According to the medieval canonical documents, the validity of these obligations ceased to exist either by an arbitrary act of leaving the monastery or by the decision of the abbot who decided on one's deprivation of the monastic rank. Blastares' *Syntagma* stipulates that, if a monk left a monastery and moved to another, and it turned out in the meantime that he owned some property, the property was to belong to the first monastery (Blastares' *Syntagma,* SANU, 2013: 303-304). Violation of the vow of poverty is even more difficult to punish when it comes to theft. The Hilandar *Typikon* prescribes that the culprit who steals items used for worship should be punished according to the law(without further specification). It also remarks that it is possible to alienate such property in cases of *vis maior* (e.g., fire or earthquake), but then the abbot cannot decide alone but only in agreement with more senior monks (Chapter 21 of the Hilandar *Typikon,* Bogdanović, 2008: 82). The rule from the Euergetism *Typikon* was probably applied here; thus, in case of theft of monastery property, exclusion was pronounced after a warning (Gautier, 1982: 63-66). This claim can be supported by the rule that "whoever takes, be it one coin or fruit," will be punished with penance in line with the monastic rules, and if "he steals from the monastery and does not better himself", he will be excluded (Chapter 24 of Hilandar *Typikon,* Bogdanović, 2008: 84). Thus, medieval canonical sources provide for warning of the monks, penance, or having them expelled, depending on the gravity of the offense and the type of items that are illegally taken from the monastery.

In accordance with the medieval rule stating that in case of violation of the vow a monk will be punished by deprivation of monasticism, modern day canonical sources prescribe that this punishment shall also be imposed on those who establish a monastery without the approval of the competent Archbishop, or a monastery from the Church, or release monks/nuns voluntarily from Archbishop's authority, or start a mixed-gender monastery where monks and nuns live together (Article 52 of the Rulebook, 2008). Deprivation of monasticism is prescribed for someone who violates the vow of poverty: commits theft, embezzlement, or evasion (Article 22 of the Rulebook, 2008). Disciplinary penalties are provided for those monks who appropriate monastery money or property,

16 Given that celibacy implies a voluntary vow of sexual abstinence and remaining unmarried, the *Syntagma* envisaged that those men and women who vowed to virginity and did not wear monastic clothes were punished with penance if they renounced their vows and entered into a legal marriage (*Syntagma,* SANU, 2013: 300).

handle it improperly and to the detriment of the church, keep books and forge documents incorrectly or destroy them, lose or alienate property without the approval of the church authorities. If the court deems it necessary, more severe punishment may be imposed for the commission of these acts (Article 48 of the Rulebook, 2008).

The vow of obedience is perhaps the most important one. According to the monastic legal order, every act contrary to this vow is considered *ipso iure* null and void. As Jesus Christ said, "He that eateth my flesh and drinketh my blood abideth in me," and "If you do not eat my flesh and drink my blood, you have no life in you" (John 6:56; 6.53). Relying on these words, in the Studenica *Typicon,* St. Sava envisaged the punishment of excommunication for anyone who does not approach fully or does not approach at all the mystery of the Holy Eucharist (communion)within the specific period of time[17] because he did not cleanse himself of shameful thoughts, words, and gossips, or anyone who lies or who is wrathful, abusive, or consumed by passion (Chapter 12 of the Studenica *Typikon*). Excommunication was also prescribed for monks who arbitrarily distribute or unjustifiably take for themselves monastic property (Chapters 5 and 20 of the Hilandar *Typikon,* Bogdanović, 2008:57-58, 81-81). As the Studenica Typikon insisted on the monastery autonomy and right to monastery property, anyone who wanted to take something from the monastery was punished by excommunication and cursed, even if he were in power: "Three times he is miserable and three times cursed" (Chapter 12 of the Studenica *Typikon,* Bogdanović, 2008: 110-111).

The *Syntagma* prescribes excommunication in case a monk leaves the monastery on his own initiative and moves to another one or starts living secularly. In this case, the one who received the monk would be punished with the same punishment (SANU, 2013: 297-298). This is in accordance with the previously mentioned rule on the exculpation of the abbot who is not able to return the fugitive monk. Dušan's Code builds on the Chapter of the Hilandar *Typikon* dedicated to the monastic care for the poor, prescribing the punishment of excommunication from the "dream" (deprivation of monasticism) (Novaković, 1912: 367).

Unlike the medieval rules, in modern-day canonical sources, one can find the provision envisaging excommunication of a fugitive monk; but, if he returns and repents, he receives the blessing again that he can wear a monastic suit (Article 58 of the Decree, 2008). Therefore, in the Middle Ages, there was no possibility of repentance for this type of disobedience but only the punishment

17 As emphasized in the Studenica *Typikon*, a monk who does not receive communion within a 40-day period is subject to a one-year expulsion from participation in worship services (Granić, 1998 c: 222).

of excommunication. The modern-day provisions also state that a monk will break the vow of obedience if he goes to indecent places (cafes, bars), engages in usury, ridicules the helpless, fights, plots, slanders, lies, bribes, swears, and cheats; for these offences, one can be punished with disciplinary penalty; in more serious cases or in case of recidivism, one may be punished at the discretion of the court (Article 25 of the Rulebook, 2008). The same applied to monks who associated with infamous persons, fornicators, bullies, drunkards, squanderers, gamblers, criminals); thus, should a monk incite or assist such persons in committing immoral deeds or crimes, conceal or befriend such persons, the monk shall be punished by deprivation of the monastic rank (Article 26 of the Rulebook, 2008). Given that monks can may be held responsible both under positive law and canon law, Articles 27, 46 and 50 of the Rulebook specify that anyone who falsely testifies or commits murder or perjury, falls into heresy, schism or blasphemy, engages in witchcraft or spiritualism, gets involved in usury, engages in capricious litigation, engages in some other type of employment outside of the monastery without the consent of the Archbishop, or goes hunting with fire weapons, is to be punished with a disciplinary penalty, or more severely at the discretion of the court.

4. Conclusion

The diversity of monastic rules testifies about the vigilance of the church to prescribe different rules in different epochs and under various conditions. These rules regulated the relationship between monks and the vows they voluntarily made, as well as the legal/social responsibility that they willingly took upon themselves. Starting from the period of St. Sava through all historical turbulences (such as: the pressure of Islamization during the Ottoman conquest of the Balkans, unification and major migration processes that threatened the stability and the functioning of monastic communities, as well as the general spiritual state of being), there was a need to interpret and modernize monastic rules as evidenced in the modern day sources of Canon law.

Although canons are a unique true expression of the authority of the church, they cannot replace the church, which has the power and responsibility to adopt new canons when necessary. In that light, throughout its history, the Serbian Orthodox Church has also passed new provisions on church court proceedings which were binding on its members. The church finds nothing inappropriate in constantly renewing and adapting the judicial tradition to the specific needs of each epoch. In judicial theory and practice, it is generally accepted that the Orthodox canonical tradition encourages constant renewal and free adaptation of the Canon essence to the special problems that arise in each epoch because

that adaptation reveals *par excellence* the spiritual and dynamic character of canon law.

Both medieval canon law and modern-day canon law first prescribe disciplinary penalties for a monk who sins. In medieval documents, they are less stringent probably because there was a one-tier decision-making process (performed by the abbot); so, the monk bettered himself more easily among his fellows. More severe forms of punishment were received only in exceptional cases, when a monk showed persistence in his sin even after being issued a warning. On the other hand, the Serbian Orthodox Church Constitution, the Decree on Monastic Life, and the Rulebook on Church Court Proceedings have taken over some rules from positive law (such as consideration of aggravating and mitigating circumstances); thus, in most cases, modern-day canon rules prescribe disciplinary penalties, primarily because the monk's legal responsibility is closely associated with his social responsibility. However, an anathema may be imposed for the committed act if the court deems it necessary.

Exclusion, as a vindicative punishment, was pronounced in the Middle Ages for those who violated the autonomy of the monastery. Today, it is imposed on those who undertake something against the church order. The development of Serbian Canon Law through history may be observed through some of the earliest written documents and how they envisaged the autonomy of Serbian monasteries. In the Hilandar *Typikon* and the Studenica *Typikon,* the autonomy of the monastery was envisaged as possession of unlimited legal and business capability and complete administrative independence and the exclusion of any authority of church and state authorities in this sphere. In the Hilandar *Typikon*, autonomy was protected from any secular and spiritual authority; in the Studenica *Typikon,* Saint Sava placed trust in the ruler and entrusted him with preserving the autonomy of Studenica Monastery. For this reason, we can observe slightly different regulations on monastery life and punishment of monks in these two documents. In the Hilandar *Typikon*, the process of choosing the Abbot was internal (he was chosen by the *collegium* of monks); in the Studenica *Typikon,* it was an external process (he was chosen by the ruler, bishop and Abbots of other monasteries). The approach presented by St. Sava in the Studenica *Typikon* is closer to the one we find in modern-day canon law sources.

Given that monasticism is a special and very important form of church rank, which significantly differs from other ranks in a number of voluntarily given vows (celibacy, poverty and obedience), monks live in accordance with these vows until the end of their lives. As stated in Canon IV of the Fourth Ecumenical Council (451 AD): "Let those who truly and sincerely lead the monastic life be counted worthy of becoming honor".

In order for a monk to constantly reside in a blessed state of calm, he is required to always show unquestioning obedience to his abbot, and to ask for his blessing for everything he does, in line with the vows he made when he received the holy skhima. Hence, as St. Sava specified, the one who does not confess and does not take communion should be "thrown out of the monastery and cut off like a festering limb, and removed and discarded as a wound that is difficult to heal or a completely incurable." However, St. Sava gave up this kind of punishment and prescribed penance, as a punishment for those who do not take communion.

Violation of monastic rules can result in punishment. The spiritual character of church penalties in the canonical tradition is inextricably linked with the character of the sacramental experience as a whole. Church penalties that have the Eucharist (communion) at their center, one of the most important Christian sacred secrets, express the spiritual content of the church laws: for this reason, such penalties cannot be compared to sanctions of punitive nature. Church penalties help a person who a transgressor to get back on the right path. Thus, the multiple purpose of punishment (expressed through triple prevention) constantly encourages monks to take legal and social responsibility. Individual prevention directly encourages the monk's social responsibility through legal responsibility; namely, it is only if he is punished that the monk regains the lost goodness that he can only find in the monastery life. The general prevention is aimed at making the monks and those who intend to become monks think carefully about whether they will leave the monastery; thus, due to his social responsibility, the monk also takes into account the legal responsibility. Finally, the deductive function may be observed in the fact that a legally and socially responsible monk protects the reputation of the monastery; thus, someone who has decided to dedicate himself to God cannot give up his monastic life so easily. A monk who is ultimately excluded from a monastery forever, or affected by the anathema, does not remain permanently excommunicated from the church community due to the fact that he was baptized. Given that monasticism is the "second baptism", it renews the grace of baptism.

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ODGOVORNOST MONAHA U PRAVNOM I DRUŠTVENOM KONTEKSTU

Rezime

Tokom istorije u život Crkve prodirala je ljudska volja, želeći da se u njoj utvrdi. Od epohe imperatora Konstantina u crkvenoj svesti stasava ideja da se osnovno načelo organizacije crkvenog života nalazi u sferi prava. Međutim, za razliku od pozitivnog prava, kanonsko pravo ne predstavlja izraz volje pojedinačnih osoba ili crkvenog naroda, već su to pravila proistekla iz prirode Crkve. Pošto Crkva, kao i svaki organizam, poseduje dva načela: statičko – svoje ustrojstvo i dinamičko – svoje životne funkcije, može se sagledati odgovornost monaha u skladu sa kanonskim pravom, a može i u društvenom kontekstu. Pritom, ova načela su neodvojiva, budući da nema života bez ustrojstva niti ustrojstva bez života.

Pozitivno pravo nalaže u slučaju izlaska člana iz neke organizacije, bez obzira na razlog (dobrovoljno ili po sili zakona), da svi odnosi između nje i bivšeg člana bivaju prekinuti. S druge strane, ukoliko kažnjeni monah, zbog težine izrečene sankcije, mora da napusti manastir, on i kao bivši član ostaje hrišćanin. Ovo proizilazi iz toga da krštenje predstavlja neizbrisivu činjenicu duhovnog života.

U radu se pitanje odgovornosti monaha sagledava poređenjem srednjevekovnih i savremenih izvora srpskog kanonskog prava, da bi se u određenom periodu mogle uočiti promene i izveli što precizniji zaključci.

Ključne reči*: monah, kazna, disciplinsko-kaznena jurisdikcija, odgovornost, tipici Svetog Save, Uredba o manastirskom životu.*

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pregledni naučni rad
10.5937/zrpfn0-26955

UDK: 331.5:349.2
331.106
Rad primljen: 07.06.2020.
Rad prihvaćen: 14.12.2020.

ZAŠTITA UČESNIKA OGLASA ILI KONKURSA I PRAVO NA DELOTVORNO PRAVNO SREDSTVO U OPŠTEM REŽIMU RADNIH ODNOSA

Apstrakt**:** *Javni oglas, odnosno konkurs za zasnivanje radnog odnosa predstavljaju instrumente posredstvom kojih se može ostvariti ustavno načelo da svakom pod jednakim uslovima moraju biti dostupni svi slobodni poslovi. Primena tog načela najtešnje je povezana s delotvornim ostvarivanjem slobode rada i prava na rad, zbog čega postupak zasnivanja radnog odnosa ne može biti van domašaja kontrole koja omogućava neposredno uklanjanje nepravilnosti i nezakonitosti u ovom postupku. U tom smislu je u članku razmotreno pitanje prava učesnika oglasa ili konkursa na delotvorno pravno sredstvo, i to ne samo kroz pravo na pravosudne i vanpravosudne pravne lekove, već i kroz pravo na prigovor ili žalbu, kao sredstva kojima se ostvaruje interna zaštita prava. U Republici Srbiji, ovo pitanje je posebno delikatno, jer Zakon o radu ne poznaje dvostepenost, dok sudska zaštita prava učesnika oglasa ili konkursa nije neposredno uređena, uz izuzetak zaštite od diskriminacije, kao i zaštite radnika kojima je kod poslodavca prethodno prestao radni odnos kao višku zaposlenih, zbog čega uživaju prvenstvo pri zapošljavanju za obavljanje istih poslova. Takvo rešenje prati niz otvorenih pitanja, posebno što učesnici oglasa ili konkursa u posebnim režimima radnih odnosa uživaju dvostepenost u istoj situaciji, čime se dovodi u pitanje delotvorna primena načela jednakosti i jednake zakonske zaštite. U članku su, otud, formulisani predlozi de lege ferenda za stvaranje uslova za delotvorno ostvarivanje prava na rad, slobode rada i zaštite od diskriminacije u postupku u kom radnik nastoji da stekne status*

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koji će mu obezbediti sredstva za izdržavanje, kao i mogućnost da kroz rad razvija svoju ličnost.

Ključne reči: *pravo na rad; sloboda rada; zasnivanje radnog odnosa; oglas; konkurs; pravo na delotvorni pravni lek; dvostepenost; sudska zaštita prava radnika.*

1. Uvod

Potreba za ekonomskom sigurnošću jedna je od osnovnih potreba svakog čoveka, a podrazumeva mogućnost da se na osnovu slobodno izabranog zanimanja i zaposlenja obezbeđuju sredstva za izdržavanje (Cieslar, Nayer, Smeesters, 2007: 126). Ova potreba može se zadovoljiti, između ostalog, i zasnivanjem radnog odnosa, pri čemu postupak zasnivanja radnog odnosa obuhvata različite faze kroz koje se odnos radnika i poslodavca preobražava od određene pravne veze, preko uspostavljanja građanskopravnog odnosa do postanka radnog odnosa (utvrđivanje odluke o potrebi zasnivanja radnog odnosa; prijavljivanje slobodnih poslova; podnošenje prijave na oglas ili konkurs; prethodna provera radnih sposobnosti; odlučivanje o prijavama; zaključenje ugovora o radu ili donošenje odgovarajućeg upravnog akta/ rešenja o premeštaju ili o prijemu u radni odnos/; i stupanje na rad, Šunderić, 2009: 73–77).

Za poslodavca, zasnivanje radnog odnosa ima za cilj izbor i angažovanje kandidata od kojih se može očekivati da će na najbolji način obavljati poslove i doprinositi stvaranju dobiti (ako je reč o toj vrsti poslodavca), tj. da će njegov rad doprineti dobrom funkcionisanju preduzeća. Garantije slobode preduzetništva i slobode ugovaranja, kao i odgovornost za dobro funkcionisanje radne sredine obezbeđuju poslodavcu široku slobodu izbora saradnika, koju možemo smatrati i *slobodom zapošljavanja drugih za obavljanje poslova iz delatnosti preduzeća* (Badinter, 2017: 33–34). Potonja sloboda može ugroziti interese radnika, posebno u smislu rizika da ne budu izabrani kao kandidati za zasnivanje radnog odnosa zbog vanprofesionalnih razloga, a, naročito zbog stvarnih ili pretpostavljenih (urođenih ili stečenih) ličnih svojstava koja predstavljaju osnov diskriminacije. Pravo nastoji da spreči takvu praksu, a, u pogledu određenih lica, poslodavcima čak nameće obavezu (ponovnog) zapošljavanja. U ovim granicama, poslodavcu pripada čitav niz ovlašćenja, koja treba da mu omoguće da na najbolji način oceni sposobnosti učesnika oglasa ili konkursa – od uređivanja postupka izbora kandidata za zasnivanje radnog odnosa, preko

утврђивања посебних услова за заснивање радног односа, до избора лица која ће ангажовати за обављање послова, будући да расписани оглас или конкурс не стварају обавезу запошљавања чак ни најбољег кандидата. Таква позиција послодаваца одређена је не само његовом економском моћи, већ и тиме што су ретки појединци који себи могу да приуште луксуз да не зарађују за живот на основу свог рада. То је и разлог што правна правила која се односе на заснивање радног односа имају велики значај за делотворно остваривање *права на рад*, а, посљедично, и других економских и социјалних права, али и грађанских и политичких права, имајући у виду повезаност и међузависност људских права и основних слобода.

Упркос томе што је заснивање радног одоса изузетно значајно за интересе државе, правном уређивању овог питања посвећено је недовољно простора, те се државна интервенција неректо своди на уређивање послова запошљавања и заштите незапослених лица и на обезбеђивање лакшег повезивања понуде и потражње на тржишту рада, док се послодавцима остављају широка овлашћења везана за избор канидата за заснивање радног односа (Lord Wedderburn of Charlton, 1986: 172). Тако, у позитивном праву Републике Србије, послодавац није обавезан да јавно огласи слободан посао, већ је само дужан да носиоцима послова запошљавања пријави потребу за запошљавањем једног или више лица за обављање послова из његове делатности.[1] Повреда те обавезе представља прекршај, али не утиче на валјаност радног односа који је заснован без пријављивања потребе за запошљавањем, што значи да пријављивање потребе за запошљавањем нових радника није конститутивни елемент поступка заснивања радног односа, већ пре свега доприноси праћењу стања на тржишту рада од стране Националне службе за запошљавање. Законом о запошљавању и осигурању за случај незапослености, као ни Законом о раду[2] нису уређене ни фазе поступка заснивања радног односа, ниту су потврђена начела вредновања способности учесника огласа или конкурса, што угрожава делотворно остваривање слободе рада и права на рад, као и њиховог битног елемента који се тиче доступности слободних послова свима под једнаким условима. Поступак заснивања радног односа, отуд, прати ризик повреде права и на правну заснованих интереса учесника огласа или конкурса, односно ризик повреде обавеза и дужности које послодавац има у вези са заснивањем радног односа. Повођом тако насталог спора може се захтевати отклањање повреде права или интереса, односно отклањање повреде обавеза или дужности учињене одлуком о избору кандидата за заснивање радног

1 Чл. 4 и чл. 34, ст. 1, тач. 3 Закона о запошљавању и осигурању за случај незапослености, *Сл. glasnik RS*, 36/09, 88/10, 38/15, 113/17 и 113/17.

2 Закон о раду, *Сл. glasnik RS*, 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 и 95/18.

odnosa (Šunderić, 1993: 21–22). Ovo pitanje je posebno delikatno imajući u vidu izostanak dvostepenosti odlučivanja o kandidatu za zasnivanje radnog odnosa, kao i nejasna pravila vezana za sudsku zaštitu prava učesnika oglasa ili konkursa.

2. Pravo na pravno sredstvo protiv odluke o izboru kandidata za zasnivanje radnog odnosa

Odluka o izboru kandidata za zasnivanje radnog odnosa može biti nepovoljna po učesnika oglasa ili konkursa, najpre zbog *nepravilne ocene ispunjenosti uslova za zasnivanje radnog odnosa*. To, pre svega, vredi za slučaj da je poslodavac ocenio da lice koje je podnelo prijavu na oglas ili konkurs ne ispunjavava uslove za zasnivanje radnog odnosa i da mu zbog toga ne može biti povereno obavljanje slobodnog posla, dok to lice smatra suprotno. U tom slučaju, učesnik oglasa ili konkursa treba da bude u mogućnosti da osporava ispravnost poslodavčeve odluke u pogledu ocene da ne ispunjava uslove za zasnivanje radnog odnosa (Frimerman, 1981: 61–62). Ako je doneta odluka o izboru drugog kandidata, učesnik oglasa ili konkursa za kog poslodavac smatra da ne ispunjava uslove za zasnivanje radnog odnosa treba da ima mogućnost da osporava odluku o izboru ukoliko smatra da izabrani kandidat ne ispunjava uslove za zasnivanje radnog odnosa. Konačno, učesnici u postupku za zasnivanje radnog odnosa moraju imati pravo na pravno sredstvo i ako su *povređena pravila postupka za zasnivanje radnog odnosa*, primera radi, time što je izabran kandidat koji se nije prijavio na oglas ili konkurs u propisanom roku, ili što u propisanom roku nije doneta odluka o izboru, ili što je odluku o izboru doneo nenadležni subjekt, ili što uslovi za zasnivanje radnog odnosa koji su objavljeni u oglasu ili konkursu ne odgovaraju uslovima utvrđenim zakonom i/ili pravilnikom o organizaciji i sistematizaciji poslova, ili su na drugi način povređena pravila postupka, a što može da utiče na odlučivanje po oglasu ili konkursu.

Iz *garantije dostupnosti poslova svima pod jednakim uslovima* proizlazi obaveza poslodavca koji je raspisao oglas ili konkurs da o njihovom ishodu (tj. o odluci o izboru, ili o neuspehu oglasa ili konkursa) obavesti sve učesnike oglasa ili konkursa, dok bi oni morali imati pravo da podnesu *prigovor ili žalbu* nadležnom organu kod poslodavca (Popović, 1990: 102). Prigovorom ili žalbom može se, naime, saopštiti poslodavcu da je odlukom o izboru ili odlukom o neuspehu oglasa ili konkursa povređeno neko pravo učesnika oglasa ili konkursa ili njihov interes zasnovan na pravu, zbog čega se može zahtevati da se povreda utvrdi i da se, u skladu

s tim, izmeni poslodavčeva odluka. U internom postupku (postupku interne zaštite),[3] odluka o izboru kandidata za zasnivanje radnog odnosa može biti potvrđena (ako se utvrdi da je doneta u svemu u skladu s merodavnim propisima), poništena (ako se utvrdi da je doneta suprotno merodavnim propisima, jer je npr. izabran kandidat koji ne ispunjava uslove ili kandidat kod kog postoje smetnje za zasnivanje radnog odnosa ili kandidat koji je podneo neblagovremenu ili neurednu prijavu i sl.), preinačena ili ukinuta (ako postoje razlozi za ponovno odlučivanje o prijavama na oglas ili konkurs, u smislu saznanja za nove okolnosti ili potrebe da se otklone uočeni propusti u postupku zasnivanja radnog odnosa).

Prigovor ili žalba, pritom, mogu biti *devolutivna pravna sredstva*, a u slučaju da kod poslodavca nije formiran drugostepeni organ, oni deluju kao *remonstrativna pravna sredstva*. Potonje rešenje se, s pravom, kritikuje u literaturi, jer postoji rizik da isti organ, u istom sastavu, neće moći da objektivno ponovo odlučuje o određenom pitanju (Nikolić, 1988: 350). Isto vredi i za praksu Evropskog suda za ljudska prava, u kojoj se redovno ukazuje na institucionalnu komponentu delotvornosti pravnog sredstva. Reč je, preciznije, o potrebi da se obezbedi institucionalna nezavisnost organa koji odlučuje o pravnom sredstvu, a koji mora biti dovoljno nezavisan od vlasti koja je navodno odgovorna za povredu određenog prava, dok se tzv. remedijalna delotvornost vezuje za sposobnost subjekta koji postupa po pravnom leku da pruži odgovarajuću zaštitu, u smislu ispravljanja povrede prava. Osim toga, postoji i suštinska delotvornost, koja se tiče sposobnosti garantovanja nekog prava tako da ono bude stvarno, a povodom čega Korljan, s pravom, ističe da nije reč o različitim oblicima delotovornosti pravnog leka, već o različitim nivoima delotvornosti, koji su međusobno komplementarni (Korljan, 2017, 352).

Učesnici oglasa ili konkursa imaju i pravo na tužbu protiv odluke o izboru koja je po njih nepovoljna i za koju smatraju da je nepravilno i nezakonito doneta. Ovo pravo, kao i pravo na prigovor ili žalbu, predstavljaju važna i moćna procesna sredstva, ali i osnovno ljudsko

3 Izraz *interni postupak* označava skup pravila po kojima poslodavac donosi odluke koje mogu biti preipsitivane na nivou preduzeća. Reč je, preciznije, o postupku u kom učestvuju donosilac i adresat odluke, a, u slučaju da progovor ili žalba imaju devolutivno dejstvo, onda i drugostepeni organ kod poslodavca. U svakom slučaju, pridev „interni" u sintagmi interni postupak treba da omogući razgraničenje ovog postupka od sudskog ili nekog drugog postupka u kom, pored donosioca i adresata odluke, učestvuje i nepristrasno treće lice, koje ne funkcioniše pod okriljem preduzeća (Lafuma, 2008: 10).

pravo radnika, jer bi u suprotnom, garantije slobode rada i prava na rad bile iluzorne. U tom smislu, garantije prava na prigovor, odnosno žalbu i prava na sudsku zaštitu, te stvaranje uslova za njihovo delotvorno ostvarivanje, doprinose postizanju dvojakih ciljeva. Prvi cilj se tiče delotvorne primene *načela jednake dostupnosti poslova* i *načela zakonitosti*, jer se korišćenjem ovih procesnih sredstava omogućava uklanjanje nepravilnosti i nezakonitosti u postupku zasnivanja radnog odnosa. S tim u vezi, može se uočiti i drugi cilj, a to je *zaštita ustavom zajemčenih i na zakonu zasnovanih prava učesnika oglasa ili konkursa*. Isto vredi i za postupke zaštite koje ova lica mogu pokrenuti pred nezavisnim kontrolnim institucijama, jer, pored pravosudnih, i *nepravosudni pravni lekovi* omogućavaju zaštitu prava radnika.

Interesantno je uočiti da u nekim državama zaštiti prava učesnika oglasa ili konkursa doprinose i predstavnici sindikata ili saveta zaposlenih, i to kroz ostvarivanje *prava na participaciju u odlučivanju o zapošljavanju u preduzeću*. Tako, primera radi, u Nemačkoj, poslodavci sa svojstvom privatnog lica koji redovno zapošljavaju više od 20 zaposlenih imaju zakonsku obavezu da obaveste savet zaposlenih o nameravanom zapošljavanju, napredovanju i premeštaju radnika, dok su u tzv. javnom sektoru ograničenja slobode ugovoranja posredstvom pravila o participaciji još ekstenzivnija (Weiss, Schmidt, 2010: 86–87). U pogledu zapošljavanja, ova obaveza u opštem režimu radnih odnosa, preciznije, podrazumeva dostavljanje obaveštenja o kandidatu za zasnivanje radnog odnosa i poslu za koji se angažuje, pre nego što s njim bude zaključen ugovor o radu, kao i obavezu poslodavca da zatraži saglasnost saveta zaposlenih s odlukom o zapošljavanju.[4] Ukoliko se savet zaposlenih saglasi, ugovor o radu može da bude zaključen, pri čemu saglasnost može biti uskraćena ako se poslodavčevom odlukom krše merodavni propisi, kao i ako postoje stvarni razlozi zbog kojih se može očekivati da će, usled zasnivanja radnog odnosa s novim radnikom, doći do otpuštanja zaposlenih u preduzeću ili da će oni na drugi način biti dovedeni u nepovoljniji položaj.[5] Isto vredi i za slučaj da se novi radnik zapošljava na neodređeno vreme, iako nije uzeta u obzir mogućnost da na tom poslu bude zaposlen radnik koji već radi za poslodavca na određeno vreme, kao i za slučaj da zaposleni u preduzeću nisu bili obavešteni o slobodnom

4 Deo 99, st. 1 Zakona o uspostavljanju saveta zaposlenih od 25. septembra 2001. godine (Betriebsverfassungsgesetz**,** *Bundesgesetzblatt*, I, 2518; I, 2651). Preuzeto 17. 5. 2020. https://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.html#p0562

5 Deo 99, st. 2, Betriebsverfassungsgesetz**,** *Bundesgesetzblatt*, I, 2518; I, 2651. Prvi slučaj, zapravo, ukazuje na obavezu saveta zaposlenih da kontroliše saglasnost nameravanog zapošljavanja s merodavnim propisima.

poslu ili da postoje objektivni razlozi zbog kojih se može očekivati da će kandidat za zasnivanje radnog odnosa svojim ponašanjem, a pre svega rasističkim i ksenofobnim aktivnostima, izazvati poremećaj u preduzeću. U slučaju da savet zaposlenih uskrati saglasnost, odluka o izboru ne može biti izvršena, s tim što izuzetno, poslodavac ima mogućnost da privremeno angažuje radnika i pre nego što se savet zaposlenih izjasni ili, čak, uprkos tome što je savet zaposlenih uskratio saglasnost za zapošljavanje.[6] U tom slučaju, poslodavac bez odlaganja obaveštava savet zaposlenih o ovom radnom angažovanju i u roku od tri dana podnosi zahtev radnom sudu da donese odluku koja će zameniti saglasnost saveta zaposlenih (koju je savet uskratio) i kojom će biti potvrđeno da je poslodavčeva radnja bila hitno potrebna. Ukoliko sud odbije da donese odgovarajuću odluku ili utvrdi da nisu postojali objektivni razlozi koji opravdavaju zapošljavanje radnika bez saglasnosti saveta, poslodavac mora inicirati prestanak ugovora u roku od dve nedelje (Lingemann, von Steinau-Steinrück, Mengel, 2016: 16).

3. Zaštita prava učesnika oglasa ili konkursa u opštem režim radnih odnosa u Republici Srbiji

3.1. Izostanak prava na prigovor (žalbu) i neprecizan pravni okvir sudske zaštite

Da bi postojali uslovi za delotvornu zaštitu prava učesnika oglasa ili konkursa, poslodavac ima obavezu da svakog učesnika obavesti o donetoj odluci o izboru, da mu omogući razmatranje materijala o izboru i da ga pouči da ima pravo da uloži sredstvo za zaštitu svojih prava, u slučaju da smatra da su ona povređena u postupku zasnivanja radnog odnosa. Naš zakonodavac u opštem režimu radnih odnosa ne predviđa ove obaveze poslodavca, ali smatramo da one proizlaze iz načela savesnosti i poštenja. Kada je pak reč o postupku za zaštitu prava učesnika oglasa ili konkursa, najpre treba imati u vidu da Zakon o radu izričito ne uređuje ovo pitanje. Iz Zakona o radu su, naime, izostale odredbe o mogućnosti sudske zaštite učesnika oglasa ili konkursa, već je po ovom zakonu sudska zaštita rezervisana samo za zaposlene, tj. za zaštitu njihovih prava iz radnog odnosa, kroz radni spor.[7] Od ovog pravila postoje i dva izuzetka
– prvi se tiče zaštite učesnika oglasa ili konkursa od diskriminacije,

6 Deo 100, Betriebsverfassungsgesetz**,** *Bundesgesetzblatt*, I, 2518; I, 2651.

7 Čl. 195 Zakona o radu, *Sl. glasnik RS*, 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 i 95/18.

dok se drugi izuzetak odnosi na zaštitu učesnika oglasa ili konkursa kojima je kod poslodavca koji je raspisao oglas ili konkurs prethodno prestao radni odnos zbog smanjenja obima posla ili ukidanja poslova usled ekonomskih, tehnoloških, strukturnih ili drugih sličnih promena u preduzeću, zbog čega uživaju prvenstvo pri zapošljavanju za obavljanje istih poslova.

Za razliku od prava na zaštitu od diskriminacije i prava na prvenstvo prilikom ponovnog zapošljavanja viška radnika, zaštita drugih prava učesnika oglasa ili konkursa *nije* uređena Zakonom o radu. Ova pravna praznina mora se tumačiti u svetlu ostalih odredaba Zakona o radu. S tim u vezi, najpre, valja imati u vidu da u opštem režimu radnih odnosa ne postoji mogućnost podnošenja prigovora ili žalbe drugostepenom organu kod poslodavca ili istom organu koji je doneo odluku, ako kod poslodavca ne postoji drugostepeni organ. U postupku zasnivanja radnog odnosa nema, naime, dvostepenosti, jer ona nije predviđena ni u pogledu ostvarivanja i zaštite prava zaposlenih iz radnog odnosa (Jovanović, 2015: 197). To predstavlja značajan propust, na koji se u našoj literaturi istrajno ukazuje još od stupanja na snagu Zakona o osnovama radnih odnosa (1996) i Zakona o radnim odnosima Republike Srbije (1996), kojima je prvi put bila ukinuta dvostepenost. To, je, istina, isprva bilo učinjeno samo parcijalno, jer je ovim zakonima interna zaštita bila zadržana u postupku izricanja disciplinske mere prestanka radnog odnosa, dok u domaćem pozitivnom pravu nijedna odluka poslodavca ne može biti pobijana prigovorom ili žalbom. Ovo rešenje se, s pravom, kritikuje, jer sudska zaštita prava ne može da nadomesti dvostepenost u internom postupku kod poslodavca. Sud, naime, pruža zaštitu samo povodom već donetih odluka o pravima, obavezama i odgovornostima radnika, i to u postupku koji je i sam dvostepen, za razliku od prigovora i žalbi koje omogućavaju ostvarivanje prava na pravno sredstvo u postupku u kom se donosi odluka o pravu ili interesu radnika (Ivošević, 1997: 927–928; Šunderić, 1997: 13–32; Simonović, 2010: 155–170; Kovačević, 2016: 580–581). Osim toga, prigovor i žalba, u načelu, imaju suspenzivno dejstvo, te se njihovim izjavljivanjem izvršenje prvostepene odluke odlaže do donošenja drugostepene odluke.

Za razliku od prigovora, odnosno žalbe, učesnici oglasa ili konkursa imaju na raspolaganju drugo pravno sredstvo protiv odluke o izboru kandidata za zasnivanje radnog odnosa. Reč je o *sudskoj zaštiti prava*, jer je Ustavom Republike Srbije zajemčena jednaka zaštita prava pred sudovima, kao i pravo svakog na "žalbu ili drugo pravno sredstvo protiv odluke kojom se odlučuje o njegovom pravu, obavezi ili na zakonu zasnovanom

interesu".[8] Budući da javni oglas ili konkurs predstavljaju sredstvo putem kog se može ostvariti ustavno načelo da je svakom pod jednakim uslovima dostupno svako slobodno radno mesto, da je primena tog načela najtešnje povezana s delotvornim ostvarivanjem slobode rada i prava na rad, i da ustavne slobode i prava moraju uživati sudsku zaštitu, postupak zasnivanja radnog odnosa ne može biti van domašaja sudske kontrole (Ivošević, 1997: 121–122). U tom smislu je i Zakonom o uređenju sudova predviđena nadležnost osnovnog suda za rešavanje sporova povodom zasnivanja radnog odnosa.[9] Po nekim autorima, spor povodom javnog oglasa ili konkursa treba smatrati radnim sporom (Baltić, Despotović, 1971: 207; Kulić, 1998: 26, 29; Palačković, 1998: 65), jer učesnik javnog oglasa ili konkursa ima „pravo da pokrene tužbom *sui generis* spor o zasnivanju radnog odnosa, bez obzira što nema status zaposlenog" (Lubarda, 2013: 786–787). Ova vrsta spora se, pritom, kvalifikuje kao tzv. *nepravi radni spor*, jer tužilac nema status zaposlenog, pri čemu se tužbom može zahtevati poništavanje konkursa i nezakonite odluke o izboru kandidata. Postoje, međutim, autori koji kao subjekta individualnog radnog spora uočavaju samo zaposlene i radnike kojima je prestao radni odnos, što vodi zaključku da spor u kom učestvuje učesnik oglasa ili konkursa smatraju građanskopravnim (a ne radnim) sporom, iako se o tom pitanju nisu izričito izjasnili (Šunderić, 1991: 355–356; Kalamatiev, Jovevski, 2015: 9–10; Božović, 2016, 43–45; Kovačević Perić, 2018: 338–339; Lazarević, 2019: 308–309).

Učesnici oglasa ili konkursa mogu ostvariti sudsku zaštitu i na osnovu Zakona o zapošljavanju i osiguranju za slučaj nezaposlenosti. Iako ovaj zakon ne potvrđuje načelo javnog oglašavanja poslova, Nacionalna služba za zapošljavanje je dužna da u roku od 24 sata od dobijanja informacije o potrebi poslodavca za zapošljavanjem tu informaciju učini dostupnom licima koja traže zaposlenje objavljivanjem na oglasnoj tabli, internet adresi i u narednom periodičnom izdanju oglasa Nacionalne službe za zapošljavanje.[10] U tom slučaju, svaki učesnik oglasa ili konkursa mora imati pravo na sudsku zaštitu ukoliko je poslodavac doneo odluku da po oglasu ili konkursu bude izabrano lice koje ne ispunjava javno objavljene uslove za zasnivanje radnog odnosa (Ivošević, 2015: 110). To, konačno, znači da bi bez sudske zaštite učesnika oglasa ili konkursa

8 Čl. 36 Ustava Republike Srbije, *Sl. glasnik RS*, 98/06.

9 Čl. 22, st. 3 Zakona o uređenju sudova, *Sl. glasnik RS*, br. 116/08, 104/09, 101/10, 31/11, 78/11, 101/11, 101/13, 106/15, 40/15, 13/16, 108/16, 113/17, 65/18, 87/18 i 88/18.

10 Čl. 10 Zakona o zapošljavanju i osiguranju za slučaj nezaposlenosti, *Sl. glasnik RS*, 36/09, 88/10, 38/15, 113/17 i 113/17.

bila povređena Ustavom zajemčena garantija jednake zakonske zaštite, jer neki građani već uživaju sudsku zaštitu u istoj situaciji (kandidati u postupcima zasnivanja radnog odnosa u posebnim režimima radnih odnosa).

U svakom slučaju, sudska zaštita prava učesnika oglasa ili konkursa ne podrazumeva ovlašćenje suda da ceni celishodnost odluke poslodavca, jer on ima suvereno pravo da odlučuje o izboru i da kao kandidata za zasnivanje radnog odnosa izabere lice koje smatra najsposobnijim za obavljanje slobodnog posla. Pravna legitimacija za osporavanje poslodavčeve odluke o izboru, pritom, pripada učesnicima oglasa ili konkursa koji smatraju da je po oglasu ili konkursu izabran kandidat koji ne ispunjava uslove ili da je povređen postupak za izbor prijavljenih kandidata. Tužilac, pritom, ne mora ispunjavati uslove za zasnivanje radnog odnosa, već je dovoljno da je podneo blagovremenu prijavu, nezavisno od toga da li je i sam mogao biti izabran po oglasu ili konkursu. Takođe, tužbu može podneti i učesnik oglasa ili konkursa koji je izabran kao kandidat za zasnivanje radnog odnosa. On može osporavati odluke o izboru drugih kandidata za zasnivanje radnog odnosa, ukoliko je izabrano više kandidata, a on smatra da je odluka o njihovom izboru nezakonita (Šunderić, 1993: 23). Osim toga, izabrani kandidat može podneti tužbu i ako smatra da je odluka kojom je izabran nezakonita (primera radi, zato što je raspisan oglas ili konkurs za zasnivanje radnog odnosa na neodređeno vreme i s punim radnim vremenom, a on je izabran kao kandidat za zasnivanje radnog odnosa na određeno vreme i/ili s nepunim radnim vremenom, ili je izabran kao kandidat za zasnivanje radnog odnosa na poslu za koji nije bio raspisan oglas ili konkurs i tsl.). U domaćoj sudskoj praksi je afirmisan stav da ovaj spor ne treba kvalifikovati kao spor povodom zasnivanja radnog odnosa, već kao spor o zaštiti prava iz radnog odnosa.[11] Profesor Lubarda smatra da je ovo varijetet radnog spora, koji se, međutim, ne može smatrati sporom o zaštiti prava iz radnog odnosa, jer „teorijski posmatrano, radni odnos nije zasnovan sve dok zaposleni ne stupi na rad“ (Lubarda, 2013: 787–788). Ova rezerva se čini prihvatljivom, s tim što radni odnos nije zasnovan zato što izabrani kandidat nije zaključio ugovor o radu, dok će tek stupanjem na rad moći da ostvaruje prava i preuzima obaveze iz radnog odnosa.

Konačno, u ulozi tužioca može se naći i *zaposleni kome je odlukom o izboru povređen neposredni pravni interes*, primera radi, zato je, pod ekonomskim pritiskom, prihvatio poslodavčevu ponudu za premeštaj na drugi posao

11 Rešenje Vrhovnog suda Srbije, Rev. 3278/93, od 22. oktobra 1993. godine (nav. prema Ivošević, 1994: 236).

za koji je navodno postojala potreba procesa ili organizacije rada, ali je poslodavac nakon toga raspisao oglas ili konkurs za popunjavanje posla s kog je zaposleni premešten na drugi posao, i zbog toga u sudskom postupku osporava zakonitost aneksa ugovora o radu. Isto vredi i ako je zaposlenom izrečena mera udaljenja s rada, a poslodavac donese odluku o izboru kandidata za zasnivanje radnog odnosa upravo na poslu zaposlenog koji je udaljen s rada, iako on ima pravo da se u propisanom roku vrati na rad. Treće lice koje nema neposredni radnopravni interes ne može biti tužilac, jer *actio popularis* nije dopuštena u radnim sporovima.

3.2. Zaštita učesnika oglasa ili konkursa od diskriminacije

Poslodavac ima suvereno pravo da odlučuje o izboru kandidata za zasnivanje radnog odnosa. To pravo nije, međutim, bezobalno, već ga poslodavac može vršiti samo u skladu s načelom jednakosti, načelom zakonitosti, načelom pravne sigurnosti, načelom savesnosti i poštenja i drugim pravnim načelima unutrašnjeg i međunarodnog prava. Zakonom o radu je, otud, zabranjena neposredna i posredna diskriminacija lica koja traže zaposlenje, uz izričito potvrđivanje njihovog prava da u slučajevima diskriminacije, pred nadležnim sudom pokrenu „postupak za naknadu štete od poslodavca, u skladu sa zakonom“ i uz prebacivanje tereta dokazivanja da nije bilo ponašanja koje predstavlja diskriminaciju – na tuženog.[12] Citiranu zakonsku odredbu prati, međutim, dilema da li spor koji nastaje između poslodavca i učesnika oglasa ili konkursa koji smatra da je diskriminisan treba kvalifikovati kao diskriminacioni spor ili kao spor povodom zasnivanja radnog odnosa, budući da diskrimi- nacioni spor nastaje povodom osporavanja, ugrožavanja ili povrede prava na zaštitu od diskriminacije, bez obzira na to šta je konrektan predmet neslaganja među stranama spora (Tasić, 2016: 167), što znači da se i spor zbog povrede prava tražilaca zaposlenja na zaštitu od diskriminacije

12 Čl. 18 i 23 Zakona o radu, *Sl. glasnik RS*, 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 i 95/18. Interesantno je uočiti da je i u slovenačkom Zakonu o radnim odnosima, zaštita učesnika oglasa ili konkursa neposredno uređena samo u pogledu neizabranog kandidata koji smatra da je pri izboru kandidata za zasnivanje radnog odnosa prekršena zakonska zabrana diskriminacije. Ovo lice ima pravo da u roku od 30 dana od prijema poslodavčevog obaveštenja o ishodu oglasa ili konkursa zahteva sudsku zaštitu pred radnim sudom (čl. 200, st. 5 Zakon o delovnih razmerjih, *Uradni list RS*, št. 21/13, 78/13, 47/15, 33/16, 52/16, 15/17, 22/19, 81/19. Preuzeto 18. 5. 2020.
http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5944). U sudskom postupku se, pritom, ne utvrđuje nezakonitost izbora i zapošljavanja radnika, tako da kandidat koji nije izabran po oglasu ili konkursu ne može da izdejstvuje poništaj odluke o izboru kandidata za zaposlenje, već samo može zahtevati naknadu štete (Robnik, 2016: 1057, 1060–1061).

може квалификовати као дискриминациони спор. То додатно отежава по- uzdanu квалификацију спора који постоји између послодавца и учесника огласа или конкурса о одређеним правним или фактичким питањима која се могу отворити у вези с актом и последицама дискриминације у поступку заснивања радног односа. Ово тим пре што меродавним законодавством *није* уређен однос између Закона о забрани дискриминације[13] (и других антидискриминационих закона), с једне стране, и осталих закона који изричито забрањују дискриминацију (укључујући и Закон о раду и Закон о запошљавању и осигурању за случај незапослености), с друге стране, а што је скопчано с ризиком повреде начела правне сигурности и појавом неправичних решења у пракси. С тим у вези, valja имати у виду да се у до- маћој судској пракси, спор поводом повреде права запосленог на заштиту од дискриминације сматра некомврстом техничке подгрупе радних спорова, због чега се на њих примењују правила Закона о раду, по којима се спор против решења којим је повређено право запосленог, односно спор поводом повреде права за коју је запослени saznao – може покренути у року од 60 дана од дана достављања решења, односно saznanja за повреду права (Reljanović, 2017: 7, 34, 43). У Закону о забрани дискриминације, одговарајући рок није предвиђен, док је подношење тужби за заштиту запослених од дискриминације по isteku roka утврђеног у Закону о раду имало за последицу њихово одбацивање. У том светлу, може бити про- блематична и квалификација спора који постоји између послодавца и учесника огласа или конкурса који сматра да је дискриминисан, ако имамо у виду особености спорова поводом заснивања радног односа и дискрими- национих спорова, као и различите циљеве и начела ка којима је усмерено, односно на којима почива решавање ових спорова.

С тим у вези, интересантно је уочити да је одредбама Директиве Савета 2000/78/ЕЗ о успостављању општег оквира за једнако постуπање у запошљавању и занимању, која је снажно uticala на нормирање ове материје у нашем Закону о раду, потврђено право радника који сматра да му је у поступку заснивања радног односа повређено право на заштиту од дискриминације да покрене судски и/или управни поступак за заштиту права.[14] Државе чланице Европске уније, притом, могу задржати процесна правила којима се уводе прекluзивни рокови за покретање одговарајућих поступака, под условом да та правила нису неповољнија од правила о роковима у којима се могу покренути слични поступци за заштиту

13 Zakon o zabrani diskriminacije, *Sl. glasnik RS*, 22/09.

14 Čl. 9, st. 1 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Official Journal* L 303, 2. 12. 2000, 16–22).

prava radnika (*načelo ekvivalentnosti*), i da su rokovi utvrđeni tako da u praksi ne onemogućavaju ili preterano ne otežavaju ostvarivanje prava potvrđenih Direktivom (*načelo delotvornosti*).[15] Utvrđivanje razumnih rokova, dakle, treba da omogući delotvornu primenu načela pravne sigurnosti, dok su države slobodne da utvrde duže ili kraće rokove, uzimajući u obzir, između ostalog, i značaj koji odluka o zaštiti prava ima za strane u sporu, složenost postupka u kom se odlučuje o pravima radnika, broj lica na koja određena odluka može uticati, i druge javne i/ili privatne interese koji moraju biti uvaženi.[16] Tako je i Evropski sud pravde bio u prilici da razmatra primerenost pravila sadržanog u kolektivnom ugovoru zaključenom za jedno preduzeće u Nemačkoj da učesnici oglasa imaju pravo da zahtevaju naknadu štete zbog diskriminacije u roku od dva meseca od prijema odluke o odbijanju njihove prijave na oglas. Ovaj poslodavac je u oglasu za posao naveo da za svoj „mladi tim" traži motivisane radnike i radnice starosti od 18 do 35 godina života, zbog čega je četrdesetjednogodišnja radnica čija je prijava bila odbijena pokrenula protiv poslodavca postupak za naknadu (materijalne i nematerijalne) štete zbog starosne diskriminacije, ali po isteku propisanog roka, tj. nakon što je videla da je poslodavac, u narednom periodu, u dnevnim novinama objavljivao, jedan za drugim, više oglasa slične sadržine, uvek zahtevajući da kandidati za različite poslove budu mlađi od 35 godina. S tim u vezi, otvorilo se pitanje da li su predmetna pravila kolektivnog ugovora usklađena s načelima ekvivalentnosti i delotvornosti, posebno što rok za podnošenje pravnog sredstva ne sme biti odviše dug, jer je za poslodavca izuzetno važno da bude brzo obavešten o podnetom pravnom sredstvu i da ne mora preterano dugo da zadržava dokumente koji se tiču postupka zasnivanja radnog odnosa.[17] S druge strane, treba imati u vidu i ciljno tumačenje merodavnog propisa, koje podrazumeva da rok za podnošenje tužbe protiv poslodavca počinje da teče od dana prijema rešenja o odbijanju prijave na oglas ili od dana saznanja za navodno diskriminatorsko ponašanje poslodavca. Evropski sud pravde je konstatovao da bi, u slučaju da nije bio zaključen kolektivni ugovor, na zaštitu prava radnice bila primenjivana opšta pravila o rokovima za pokretanje sudskog postupka za zaštitu prava iz radnog odnosa, pri čemu su neki od tih rokova vrlo kratki (npr. rok za pokretanje postupka za zaštitu od nezakonitog otkaza iznosi tri nedelje

15 St. 27–28 Case C-246/09 *Susanne Bulicke v. Deutsche Büro Service GmbH* [2010].

16 St. 36 Case C-246/09 *Susanne Bulicke v. Deutsche Büro Service GmbH* [2010].

17 St. 38 Case C-246/09 *Susanne Bulicke v. Deutsche Büro Service GmbH* [2010].

od dostavljanja rešenja o otkazu).[18] Sud je, otud, zaključio da procesno pravilo predviđeno kolektivnim ugovorom nije nepovoljnije od sličnih procesnih pravila u nemačkom radnom zakonodavstvu, tim pre što se može protumačiti i na način da rok za podnošenje tužbe počinje da teče od trenutka u kom je učesnik oglasa saznao za diskriminatorsko ponašanje poslodavca.[19]

3.3. Zaštita prava učesnika oglasa ili konkursa kojima je kod poslodavca prethodno prestao radni odnos kao višku zaposlenih

Poslodavčeva sloboda izbora saradnika može biti ograničena pravilom o prioritetnom zapošljavanju lica koja su otpuštena kao višak zaposlenih, a koja, u slučaju da kod poslodavca nastane potreba za zapošljavanjem novih radnika, imaju prednost u odnosu na druge kandidate, tokom određenog razumnog perioda. *Ratio legis* ovog rešenja treba tražiti u opravdanom razlogu za prestanak radnog odnosa, tj. u činjenici da se taj otkazni razlog ne tiče sposobnosti ili ponašanja zaposlenog, već potreba poslodavca, u smislu smanjenja obima posla usled ekonomskih, organizacionih, strukturnih, tehnoloških i drugih sličnih razloga (Lord Wedderburn of Charlton, 1986: 183–184). Osim toga, vodi se računa i o činjenici da je otpušteni radnik uložio u preduzeće svoj rad, zbog čega, ako želi da ponovo radi za istog poslodavca, mora imati prednost u odnosu na druge kandidate (Tintić, 1969: 93). Ovo ograničenje poslodavčeve slobode izbora i zapošljavanja saradnika poznaje i Preporuka Međunarodne organizacije rada (MOR) broj 166 o prestanku radnog odnosa na inicijativu poslodavca,[20] s tim što je zakonodavcima i socijalnim partnerima u državama članicama MOR prepušteno utvrđivanje kriterijuma za primenu ove obaveze zapošljavanja, zadržavanja prava u slučaju ponovnog zapošljavanja, posebno u skladu s načelom senioriteta, kao i zarada ponovno angažovanih radnika. Tu obavezu poznaje i naš Zakon o radu, te radnici za čijim je radom prestala potreba, tri meseca po otpuštanju, imaju prednost prilikom zasnivanja radnog odnosa kod poslodavca koji ponovo ima potrebu za obavljanjem istih poslova.[21] Stoga učesnici oglasa ili konkursa kojima ova prednost bude uskraćena imaju pravo da tužbom zahtevaju zaštitu u sporu o zasnivanju radnog odnosa (Ivošević, 2015: 110). Zakon o radu sadrži, međutim, i pravilo da poslodavac može da

18 St. 31 Case C-246/09 *Susanne Bulicke v. Deutsche Büro Service GmbH* [2010].

19 St. 48 Case C-246/09 *Susanne Bulicke v. Deutsche Büro Service GmbH* [2010].

20 Tač. 24, st. 1 Preporuke MOR broj 166 o prestanku radnog odnosa.

21 Čl. 182 Zakona o radu, *Sl. glasnik RS*, 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 i 95/18.

otkaže ugovor o radu zaposlenom – osobi s invaliditetom koji odbije posao koji mu je poslodavac obezbedio prema radnoj sposobnosti,[22] tako da se u slučaju da poslodavac nema mogućnosti da zaposlenom obezbedi odgovarajući posao, kao osnov prestanka radnog odnosa pojavljuje prestanak potrebe za obavljanjem određenog posla usled tehnoloških, ekonomskih ili organizacionih promena.[23] Invalidi rada su, pritom, dovedeni u nepovoljniji položaj u odnosu na ostale zaposlene za čijim je radom prestala potreba, jer su, u slučaju da su otpušteni zato što poslodavac nije mogao da im obezbedi odgovarajući posao – isključeni iz područja primene pravila o prioritetnom zapošljavanju. Takvo rešenje suprotno je Ustavom zajemčenoj garantiji prava osoba s invaliditetom na posebnu zaštitu, jer ona, pored obaveze zapošljavanja osoba s invaliditetom, uključuje i očuvanje zaposlenja ovih lica (Jovanović, 2015: 942).

4. Zaključak

Javni oglas ili konkurs za zasnivanje radnog odnosa doprinose delotvornoj primeni ustavnog načela o jednakoj dostupnosti svih slobodnih poslova, kao i delotvornom ostvarivanju slobode rada i prava na rad, kao prava svakog čoveka da zarađuje za život na osnovu slobodno izabranog zanimanja i zaposlenja. Postupak zasnivanja radnog odnosa, otud, ne može biti van domašaja kontrole koja će omogućiti neposredno uklanjanje nepravilnosti i nezakonitosti u ovom postupku. Učesnici oglasa ili konkursa, stoga, moraju imati na raspolaganju pravosudna i vanpravosudna pravna sredstva koja omogućavaju da garantovanje odgovarajućih radnih prava bude stvarno, a, ne samo teoretsko, da njihova primena obezbeđuje odgovarajuću zaštitu, u smislu ispravljanja povrede prava, i da o pravnom sredstvu odlučuje subjekt koji je dovoljno nezavisan od organa poslodavca koji je navodno odgovoran za povredu određenog prava. Zakon o radu Republike Srbije ne poznaje, međutim, dvostepenost odlučivanja o izboru kandidata za zasnivanje radnog odnosa, dok sudska zaštita prava učesnika oglasa ili konkursa nije neposredno uređena zakonskim odredbama, uz izuzetak zaštite od diskriminacije, kao i zaštite radnika kojima je kod poslodavca prethodno prestao radni odnos kao višku zaposlenih, zbog čega uživaju prvenstvo pri zapošljavanju za obavljanje istih poslova. Time je ugrožena Ustavom zajemčena garantija jednake zakonske zaštite, jer neki građani već uživaju dvostepenost u

22 Čl. 102, st. 1 Zakona o radu, *Sl. glasnik RS*, 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 i 95/18.

23 Čl. 102, st. 2 Zakona o radu, *Sl. glasnik RS*, 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 i 95/18.

istoj situaciji. Reč je, preciznije, o učesnicama oglasa ili konkursa u postupcima zasnivanja radnog odnosa u posebnim režimima radnih odnosa. To, najpre, vredi za državne službenike, iako u Zakonu o državnim službenicima pitanje dvostepenosti nije jedinstveno uređeno u pogledu svih lica iz personalnog područja primene ovog zakona. Pravo na žalbu je, naime, priznato samo *kandidatima za izvršilačka radna mesta*, dok kandidati za poslove državnih službenika na položaju samo mogu da pokrenu upravni spor.[24] Pravo na žalbu uskraćeno je i kandidatima za poslove nameštenika, koji sudsku zaštitu prava ostvaruju kao učesnici oglasa ili konkursa u opštem režimu radnih odnosa. Slično, po Zakonu o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave, pravo na žalbu imaju kandidati koji su učestvovali u postupku internog ili javnog konkursa, kako u slučaju izbora kandidata, tako i u slučaju neuspeha konkursa.[25] Takođe, žalba (koja, doduše, ne zadržava izvršenje) se može podneti i na zaključak kojim se odbacuje prijava kandidata koji nije ispunio uslove internog konkursa, odnosno nije dostavio sve potrebne dokaze ili je njegova prijava bila neblagovremena ili nedopuštena.[26] S druge strane, žalba nije dopuštena protiv rešenja o postavljenju na položaj organa autonomne pokrajine, odnosno gradskog ili opštinskog veća,[27] a pravo na žalbu nemaju ni učesnici u postupku javnog konkursa za radno mesto nameštenika, već zaštitu prava ostavaruju samo pred sudom opšte nadležnosti (Andrejević, 2018, 193). Konačno, dvostepenost uvodi i Zakon o zaposlenima u javnim službama, tako da učesnici konkursa imaju *pravo na prigovor* na rešenje konkursne komisije, s tim što, za razliku od zaposlenih u autonomnim pokrajinama i jedinicama lokalne samouprave, kandidati mogu pobijati rešenje o neuspehu konkursa samo u sudskom postupku.[28] Pravila koja se tiču kandidata u izbornom postupku u javnoj službi ne primenjuju se, međutim, na zasnivanje radnog odnosa

24 Čl. 59, st. 4, čl. 60, st. 3, čl. 73, st. 1, čl. 75, st. 1, i čl. 143, st. 1-2 Zakona o državnim službenicima, *Sl. glasnik RS*, br. 79/05, 81/05, 83/05, 64/07, 67/07, 116/08, 104/2009, 99/14, 94/17 i 95/18.

25 Čl. 87, st. 2, čl. 89, st. 1. i čl. 108 Zakona o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave, *Sl. glasnik RS*, br. 21/16, 113/17, 95/18 i 113/17.

26 Čl. 89, st. 2-3, čl. 103, st. 2-3, i čl. 111 Zakona o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave, *Sl. glasnik RS*, br. 21/16, 113/17, 95/18 i 113/17.

27 Čl. 98 Zakona o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave, *Sl. glasnik RS*, br. 21/16, 113/17, 95/18 i 113/17.

28 Čl. 55, čl. 59, st. 2 i čl. 61, st 4 Zakona o zaposlenima u javnim službama, *Sl. glasnik RS*, br. 113/17, 95/18 i 86/19.

истраживача у научноистраживачким институтима.[29] Како Закон о науци и истраживањима[30] не уређује поступак заснивања радног односа, нити потврђује начело двостепености, запослени у овим радним срединама не уживају одговарајућу заштиту, већ се она остварује само у вези с избором у научноистраживачка звања, од ког зависи и заснивање радног односа. Такво решење не чини се прихватљивим, и поред особености које одликују радни однос у научноистраживачким институтима, јер *начело јединствености система радних односа* налаже да се у свим областима у којима се запошљавање врши на основу јавног конкурса, обезбеди заштита права учесника конкурса. То, наравно, вреди не само за запослене у јавним службама (при чему је у некима од њих ово питање уређено специјалним законима и општим актима установа), већ и за запослене у општем режиму радних односа. Ово тим пре што без признавања права на приговор или жалбу, слобода рада и право на рад учесника огласа или конкурса остају без одговарајуће заштите. То не може бити прихватљиво ни из угла гарантија овог људског права и основне слободе, нити из угла начела једнакости, једнаке доступности послова и законитости (Simonović, 2007: 1011–1012; Jovanović, 2015: 198; Ivošević, 2015: 110-111). У том смислу се *de lege ferenda* може учинити предлог да се у матични закон за област радних односа врати двостепеност, у смислу признавања права учесника огласа или конкурса на приговор против одлуке о избору или одлуке о неуспеху огласа или конкурса, при чему би предност требало дати уређивању приговора као деволутивног правног средства.

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29 Čl. 63 Zakona o zaposlenima u javnim službama, *Sl. glasnik RS*, br. 113/17, 95/18 i 86/19.

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PROTECTION OF JOBSEEKERS PARTICIPATING IN JOB ANNOUNCEMENTS AND ADVERTISEMENTS, AND THE RIGHT TO AN EFFECTIVE REMEDY IN THE GENERAL EMPLOYMENT REGIME

Summary

Public job announcements and advertisements are instruments which provide for exercising the constitutional principle that all available jobs must be accessible to everyone under equal conditions. The application of this principle is most closely connected with the effective exercise of freedom of work and the right to work. For this reason, recruitment procedure cannot be beyond the scope of control which enables immediate elimination of irregularities in this procedure. In that context, this article discusses the issue of the right of participants in public announcements or job advertisements to an effective legal remedy, not only via the right to judicial and extrajudicial remedies, but also via the right to object or appeal, as the means to achieve internal protection of rights.

In the Republic of Serbia, this issue is particularly delicate because the Labour Act does not recognize the two-instance internal procedure, while judicial protection of the rights of jobseekers has not been directly regulated, with the exception of protection against discrimination, and protection of workers whose employment was previously terminated due to redundancy, resulting in their employment priority when hiring for the same jobs. This legal solution is accompanied by a number of open questions, especially as the participants in public announcements and job advertisements procedures in special employment regimes enjoy the two instance internal protection in the same situation, which calls into question the effective application of the principle of equality before the law. Therefore, the article formulates proposals de lege ferenda to create conditions for effective exercise of the right to work, freedom of work, and protection against discrimination in a procedure in which a worker seeks to acquire a status that will provide him with the means of subsistence as well as an opportunity to develop his personality through work.

Keywords**:** *right to work, freedom of work, entering into employment relationship, job advertisements, right to an effective remedy, two-instance protection of labour rights, judicial protection of labour rights.*

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pregledni naučni rad
10.5937/zrpfn0-28035

UDK: 349.22:331.108.6
Rad primljen: 18.08.2020.
Rad prihvaćen: 26.11.2020.

ODGOVORNOST U RADNOM ODNOSU – OSOBENOSTI DISCIPLINSKE ODGOVORNOSTI U OPŠTEM I POSEBNOM REŽIMU RADNIH ODNOSA

Apstrakt**:** *Od momenta zasnivanja, radni odnos podrazumeva sticanje, odnosno preuzimanje određenih prava, obaveza za obe strane u radnom odnosu, u skladu sa zakonom, kolektivnim ugovorom, opštim aktom poslodavca, ugovorom o radu. Autor u radu izlaže disciplinsku odgovornost u opštem i posebnom režimu radnih odnosa, kroz distinkciju materijalnih i procesnih disciplinskih normi za utvrđivanje iste. Naime, ranijim radnopravnim zakonodavstvom Republike Srbije disciplinska odgovornost u opštem režimu radnih odnosa je detaljno regulisana. Novim zakonodavstvom praksa uređivanja disciplinske odgovornosti u potpunosti je napuštena - svodi se na skraćeni postupak, sumiran u tzv. otkaznom postupku. Nasuprot tome, Zakon o državnim službenicima sadrži brojne odredbe posvećene disciplinskoj odgovornosti državnih službenika i pravila „klasičnog disciplinskog postupka", proceduralna pravila kroz koja se odvija „disciplinsko suđenje" za disciplinsko delo. Osim toga, njime su uređena i procesna pitanja koja se odnose na pravila pokretanja i vođenja disciplinskog postupka, upis disciplinske kazne u kadrovsku evidenciju, njeno brisanje i dr. Intencija autora ovog rada je da ukaže da takva normativna distinkcija nema uporišta u ideji vladavine prava i načelu jedinstvenosti sistema radnih odnosa. Svojinskom osnovom radnog odnosa ne mogu se pravdati razlike u uslovima i postupku utvrđivanja disciplinske odgovornosti, kao ni u opsegu (obimu) zaštite prava.*

Ključne reči: *disciplinska odgovornost, disciplinski postupak, disciplinske sankcije, vladavina prava.*

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1. О disciplinskoj odgovornosti – uvodna razmatranja

Disciplinska odgovornost, njeno pojmovno određenje i definisanje nije naročito sporno u radnopravnoj teoriji. Ona se najčešće definiše kao odgovornost za utvrđene povrede radne obaveze i druge povrede radne discipline, za koje se od ovlašćenih organa u zakonom propisanom postupku izriču propisane disciplinske kazne, ili kao posebna odgovornost zaposlenog za povredu propisane radne discipline (radnih obaveza), za koju se prema zaposlenom mogu da preduzmu određene mereod strane poslodavca i sl.[1] Ona predstavlja specifičan vid pravne odgovornosti, jer se primenjuje samo na fizička lica koja su u radnom odnosu, kao posledica nesavesnosti i nepridržavanja utvrđenih pravila ponašanja. Kako ističu prof. Baltić i Despotović (1968: 253), za razliku od odnosa u kojima istupaju kao građani u svom privatnom životu, van preduzeća i ustanova, naše pozitivno pravo predviđa posebnu disciplinsku odgovornost, odgovornost za štetu i krivičnu odgovornost koje *proizilaze po osnovu radnog odnosa, iz svojstva zaposlenog i njegovog položaja.* Zaposleni, dakle, odgovara za povrede propisanih radnih obaveza, ali isto tako i za druge povrede radne discipline, pri čemu se disciplinska razlikuje bitno od drugih odgovornosti koje se mogu primeniti prema zaposlenom i prema svakom drugom građaninu. Pravnim propisima utvrđeni su i odgovarajući postupci za utvrđivanje tih odgovornosti – krivični, prekršajni, disciplinski postupak i slično (Baltić, Despotović, 1968: 253, 254).

Nesporno je da svaki pravni odnos, a u najvećoj meri radnopravni – usled antagonizma ugovornih strana koji proističe iz odnosa subordinacije/ hijararhije, podrazumeva prava i obaveze, ali i odgovornost zaposlenih usled kršenja istih. Zato je „disciplinska odgovornost, kao i svaki oblik odgovornosti, uvek individualna i konkretna, a intervencija pravnog poretka javlja se u tri stadijuma: (1) u određivanju odgovornosti, dela i kazni (sankcija, mera) za slučaj povrede radne discipline; (2) u određivanju organa i pravila postupka; (3) u pravilima i merama izvršenja izrečenih sankcija“ (Tintić, 1972: 588). U ova tri pravna standarda utkan je princip legaliteta. Shodno ovom principu, povreda mora biti propisana pre nego što je učinjena (Ivošević, Ivošević,2000: 9). Ako povrede radne obaveze nisu propisane, nema ni uslova za utvrđivanje disciplinske odgovornosti zaposlenih. Prema tome, povreda radne obaveze postoji ako je zaposleni izvršio radnju kojom

1 U tom smislu više: (Kulić, Perić, 2016: 273–275); (Vlatković, Brković, Urdarević, 2013: 179–180); (Bezbradica, 2007: 151–196); (Šunderić, 2005: 193); (Brajić, 2001: 333); (Ivošević, 1992: 487); i dr.

se propisana radna obaveza povređuje ili ugrožava. Stoga se povrede radne obaveze smatraju objektivnim uslovom disciplinske odgovornosti. Radnja izvršenja povrede radne obaveze (može se izvršiti činjenjem i/ili nečinjenjem) određuje se u zavisnosti od načina, mesta, vremena, težine, opasnosti i značaja učinjene povrede prava i obaveza iz radnog odnosa. Za njeno postojanje značajna je i krivica zaposlenog. Iz navedenog proizilazi da disciplinska odgovornost podrazumeva postojanje povrede radne obaveze i krivice zaposlenog (Kulić, Perić, 2016: 273). Bez krivice nema ni disciplinske odgovornosti, ni disciplinske sankcije. Da bi se utvrdila krivica, subjektivni element u disciplinskoj odgovornosti, potrebno je da postoji određeni zakonom propisan postupak, tj. disciplinski postupak za utvrđivanje iste, koji se vodi pred za to ovlašćenim disciplinskim organom/organima. Zaposlenom koji je odgovoran za učinjenu povredu radne obaveze izriču se zakonom propisane disciplinske sankcije. Sankcionisanje je moguće samo pod uslovom da se prethodno utvrdi disciplinska odgovornost zaposlenog. Takva odgovornost utvrđuje se u disciplinskom postupku, u skladu sa zakonom. Dakle, osim iznetog, disciplinska odgovornost podrazumeva i primenu određenih pravila o disciplinskim merama, disciplinskim organima i disciplinskom postupku. Disciplinski organi su organi koji pokreću i vode disciplinski postupak, kao i organi koji odlučuju o disciplinskoj odgovornosti zaposlenog. I najzad, disciplinski postupak podrazumeva preduzimanje radnji i aktivnosti vezanih za pokretanje, vođenje i okončanje prvostepenog i eventualnog drugostepenog postupka. Ova pravila vremenom su pojednostavljivana, tako da je sada moguće da isti organ pokreće i vodi disciplinski postupak. Ranijim radnim zakonodavstvom Republike Srbije disciplinska odgovornost zaposlenih bila je detaljno uređivana. Preciznije rečeno, poslednji zakon o radu koji je sadržao kompletne materijalne i proceduralne norme o disciplinskoj odgovornosti i utvrđivanju iste bio je Zakon o radnim odnosima iz 1996. godine.[2] Taj napušteni koncept, može se reći „klasično disciplinsko suđenje za disciplinsko delo", prvi put je doveden u pitanje donošenjem Zakona o radu iz 2001. godine, jer u njemu nije postojala nijedna odredba o takvoj odgovornosti zaposlenih. Takva koncepcija primenjena je i prilikom donošenja Zakona o radu 2005. godine. I poslednjim izmenama i dopunama tog zakona od 2014. godine stvari su neznatno promenjene

2 Zakon o radnim odnosima, *Službeni glasnik RS,* Br. 55, 1996. U Zakonu su pod rubrumom „*Odgovornost zaposlenih*" (član 87–99) sadržane norme o odgovornosti za povredu radne obaveze (87); disciplinske mere (član 88); disciplinski organi (član 90); disciplinski postupak (član 92); zastarelost pokretanja i vođenja disciplinskog postupka (član 98); evidencija o izrečenim merama i rok za brisanje istih (član 99).

(Kulić, Perić, 2016: 272). U osnovi, sva naša novija radnopravna regulativa sve manje sadrži odredbe o toj vrsti odgovornosti. Tako da važeći zakon uopšte ne sadrži odredbe o disciplinskoj odgovornostiu smislu disciplinskog postupanja, mada po nekim shvatanjima ove odredbe su sadržane u jednom sumarnom postupku, kod razloga za otkaz ugovora o radu od strane poslodavca. Za razliku od Zakona o radu, Zakon o državnim službenicima sadrži brojne odredbe posvećene disciplinskoj i materijalnoj odgovornosti državnih službenika, čemu se osnovano može prigovoriti. Kako je s početka istaknuto, pojam disciplinske odgovornosti nije sporan u radnopravnoj teoriji, sporne su odredbe kojima se (ne)reguliše disciplinska odgovornost u opštem režimu radnih odnosa i reguliše (detaljno) u posebnom režimu radnih odnosa, čime normotvorac odstupa od fundamentalnog radnopravnog načela jedinstvenosti sistema radnih odnosa i nekih od postulata vladavine prava.

2. Koncept disciplinske odgovornosti i disciplinskog postupka – kritički osvrt na opšti režim radnih odnosa

Polazeći od pojmovnih određenja disciplinske odgovornosti – disciplinska odgovornost je specifična vrsta pravne odgovornosti zaposlenog za povredu radne obaveze, odnosno radne discipline; i/ili utvrđivanje odgovornosti za povredu radne discipline i izricanje sankcije u zakonom propisanom postupku od za to utvrđenih disciplinskih organa, može se konstatovati da disciplinske odgovornosti zaposlenog nema bez ispunjenja određenih uslova. Pod tim uslovima podrazumevamo: (1) propisivanje povreda radne dužnosti; (2) utvrđivanje disciplinskih organa, disciplinskog postupka i disciplinskih mera; (3) postojanje povrede radne obaveze, odnosno radne discipline; (4) pokretanje disciplinskog postupka od strane nadležnog organa, u skladu sa zakonom ili drugim propisom; (5) vođenje disciplinskog postupka pred nadležnim disciplinskim organom, odnosno organima; (6) postojanje krivice zaposlenog za učinjenu povredu radne obaveze. U načelu, ovi uslovi treba da budu jedinstveni za sve zaposlene, bez obzira na vrstu radnog odnosa, trajanje, svojinski domen, oblast rada i sl. To nalaže univerzalnost, nedeljivost i nepovredivost ljudskih prava, koja između ostalog impliciraju i pravo na zakonom garantovani postupak. Iz navedenog se može reći da disciplinska odgovornost predstavlja sistem odgovornosti koji prema karakteru i sadržini normi sublimira dve vrste odredbi: (1) materijalnopravne odredbe, tzv. materijalno disciplinsko pravo, koje obuhvata (a) materiju disciplinskog dela; (b)

uslove disciplinske odgovornosti; (v) disciplinske mere, izvršenje mera, gašenje disciplinske mere; i (2) procesnopravne odredbe, tzv. disciplinsko procesno pravo, koje sadrži materiju o načelima i principima disciplinskog postupka, o disciplinskim organima i uopšte o organizaciji disciplinske vlasti, o pravnim lekovima i još o nekim drugim, procesnim pitanjima.[3] Regulativa kojom se uređuje disciplinska odgovornost, „disciplinski postupak ima za cilj da pruži neophodne garancije, zaštitu zaposlenom od nezakonitog postupanja poslodavca, odnosno zloupotrebe disciplinskih ovlašćenja disciplinskog organa, posebno diskrecionih ovlašćenja u vezi sa udaljavanjem sa rada kao privremenom i akcesornom disciplinskom merom, kao i da disciplinski organ u odgovarajućem postupku pribavi odgovarajuće dokaze“ (Lubarda, 2012: 240). Disciplinski postupak je jedna faza između povrede radne obaveze i izricanja disciplinske sankcije, u kojoj disciplinski organ u odgovarajućem postupku pribavlja dokaze o disciplinskom delu – „procesna forma preko koje se ostvaruje sadržina materijalnopravnih normi o odgovornosti zaposlenih za povredu radne obaveze“.[4] Kao i svaki postupak utvrđivanja odgovornosti (krivični, prekršajni, upravni i dr.) i disciplinski postupak je zakonski postupak. To znači da su procesne norme i pravila unapred utvđena zakonom, da su jedinstvena a ne *ad hoc* pravila, da se primenjuju u svakom postupku i prema svakom zaposlenom a ne selektivno od slučaja do slučaja. Time je postupak utvrđivanja odgovornosti garantija zakonitosti, objektivnosti, negacija arbitrernosti i samovolje, jednakosti, nepristrasnosti. Sprovođenje disciplineskog postupka treba da omogući da se utvrdi (ne)postojanje krivice zaposlenog za disciplinsko delo koje mu se stavlja na teret, da povreda radne obaveza i narušavanje radne discipline ne ostane bez sankcije, da se prema učiniocu disciplinskog dela izrekne odgovarajuća zakonom ili opštim aktom propisana sankcija. Ka ostvarivanju tih standarda determinisana je celokupna međunarodna aktivnost zaokružena u aktima Međunarodne organizacije rada (MOR). U tom smislu, najznačajnija je konvencija MOR-a br. 158 o prestanku radnog odnosa na inicijativu poslodavca iz 1982. godine,[5] koja propisuje da radni odnos radnika neće prestati zbog razloga vazanih za ponašanje radnika ili njegov rad pre nego što mu se omogući da se brani od iznetih navoda, osim ako se s razlogom ne može očekivati od poslodavca da mu pruži

3 Slično i u rady: (Baltić, Despotović, 1981: 240–241).

4 Slično i: (Ivošević, 1991: 40).

5 Konvencija br. 158 o prestanku radnog odnosa na inicijativu poslodavca iz 1982. godine, *Službeni list SFRJ –Međunarodni ugovori*, Br. 4, 1984, Br. 7, 1991.

tu mogućnost (član 7). Otuda, sprovođenje disciplinskog postupka doprinosi objektivizaciji disciplinske odgovornosti, zakonitosti odluke i individualizaciji sankcije (Obradović, Perić, 2016).[6] Time se doprinosi da utvrđivanje disciplinske krivice poprimi sve atribute jednog humanog postupka, u kome se shodno postulatima vladavine prava poštuje dostojanstvo ličnosti, štite fundamentalne sloboda i prava čoveka. Proceduralna pravila su izraz vladavine prava, ona su utemeljena u fundamentalnim pravima čoveka, stoga njih ne diktira pravo svojine, već nepovredivost i neotuđivost univerzalnih ljudskih prava na radu. Razlike u opsegu prava, obimu obaveza i ovlašćenja – mogu da budu pravnoutemeljene na svojinskim razlikama, ali ne i razlike u postupku za utvrđivanje odgovornosti.

U domaćem pravu u jednom dužem periodu koji se poklapa sa socijalističkim razvojem i samoupravljanjem radnika, zakonom se detaljno uređivao disciplinski postupak, koji je umnogome podsećao na krivični postupak. To je bio klasičan sudski postupak, akuzatorni postupak,[7] jer se bazirao na načelu kontradiktornosti, odnosno raspravnosti – predviđala se faza pokretanja, vođenja postupka, usmena rasprava, poziv stranaka, prisustvo ovlašćenih branilaca, odbrana okrivljenog zaposlenog, udaljenje s rada, dvostepenost disciplinskih organa u odlučivanju, pravo na žalbu, itd. Usvajanjem Zakona o radu 2001. godine, a potom i Zakona o radu 2005. godine, napušta se praksa „suđenja za disciplinsko delo“, a postupak postajekrajnje liberalizovan. Uvodi se svojevrstan disciplinski postupak, kao „skraćena-sumarna“ disciplinska procedura koja se sprovodi u postupku otkaza ugovora o radu od strane poslodavca zbog opravdanih razloga koji se odnose na ponašanje zaposlenog (povreda radne obaveze, nepoštovanjeradne discipline).

Ni izmene i dopune Zakon o radu iz 2014. godine[8] nisu mnogo promenile regulativu u pogledu disciplinske odgovornosti. Zakon ne propisuje izričitu disciplinsku odgovornost, već govori o disciplinskoj odgovornosti posredno kroz regulisanje odgovornosti za povredu radne obaveze, odnosno nepoštovanje radne discipline i primenu mera za njihovo narušavanje. Zakon o radu ne samo što ne govori o disciplinskoj odgovornosti, već ne predviđa ni postupak za njeno utvrđivanje, tj.

6 Više o osobenostima disciplinske odgovornosti zaposlenih i disciplinskom postupku, videti u udžbeniku autora: (Obradović, Kovačević Perić, 2016).

7 Akuzatorni postupak je vrsta postupka u kome je naglasak na iznošenju dokaza dve ravnopravne strane –tužioca i okrivljenog. Odvija se pred nezavisnim organom.

8 Zakon o radu, *Službeni glasnik RS,* Br. 24 (2005), 61 (2005), 54 (2009), 32 (2013), 75 (2014), 13 (2017) – odluka US, 113 (2017) i 95 (2018) – autentično tumačenje.

postojanje povrede i krivice radnika. Faktički, postoji jedan skraćeni disciplinski postupak, normativno sumiran pod rubrumom: "Postupak pre prestanka radnog odnosa ili izricanja druge mere".[9] On se svodi na proceduralnu obavezu poslodavca da pre otkaza ugovora o radu zaposlenog pisanim putem upozori na postojanje razloga za otkaz ugovora o radu, i da mu ostavi rok od osam dana da se izjasni na navode iz upozorenja o postojanju razloga za otkaz, kao i na obavezu poslodavca da razmotri mišljenje sindikata, ukoliko ga zaposleni dostavi.[10] Stoga, otkazni postupak možemo da kvalifikujemo kao „specifičan disciplinski postupak", jer da bi poslodavac mogao da upozori zaposlenog na postojanje razloga za otkaz ugovora o radu, on mora da utvrdi opravdanost činjenica u pogledu razloga za otkaz, odnosno da utvrdi da li zaista postoji disciplinski kažnjivo delo – da je učinjena povreda radne obaveze, narušavanje radne discipline, krivica zaposlenog, da ne postoje oslobađajuće okolnosti i sl. Shodno Konvenciji MOR-a br. 158 o prestanku radnog odnosa na inicijativu poslodavca, činjenice o otkaznom razlogu moraju biti valjanje (član 4), opravdane, a da bi se došlo do takvog kvaliteta činjenica poslodavac je morao primeniti neki postupak za utvrđivanje njihove istinitosti" (Jovanović, 1998: 64). U tom slučaju otkazni postupak svodi se na: (1) radnju utvrđivanja navedenih činjenica; i (2) radnju upozorenja. Evidentno je da je zakonodavac normama o dostavljanju pisanog upozorenja, i obaveznom razmatranju mišljenja sindikata (ako ga zaposleni dostavi, a koje ne obavezuje poslodavca), zadovoljio (minorno) „donji prag" standarda iz člana 4 Konvencije br. 158/1982, i u dva pravna koraka simplifikovao ceo jedan zaokruženi sistem disciplinskog postupka, klasičnog postupka kakav je do 2000-ih poznavalo naše radnopravno zakonodavstvo. Takav postupak ni danas nije stran mnogim komparativnim regulativama, naprotiv, „radikalno" je zadržan i kod nas u posebnom režimu radnih odnosa – za utvrđivanje disciplinske odgovornosti državnih službenika. Odredbama o otkaznom postupku izvršena je „pravna sublimacija" disciplinskog procesnog prava. Time se dovodi u pitanje postojanje disciplinske odgovornosti. Disciplinska odgovornost postoji, premda posredno, jer disciplinska odgovornost kao vrsta pravne odgovornosti tradicionalno se vezuje za povrede radne discipline, odnosno povrede obaveza na radu i u vezi sa radom. U skladu sa prethodno rečenim, ma kako da je normativno koncipirana, disciplinska odgovornost je uvek odgovornost za povrede radnih obaveza i sankcionisanje nepoštovanja radne discipline. Regulisanje

9 Vidi: Član 180 ZR.

10 Član 181 ZR.

disciplinske odgovornosti, norme o uslovima, osnovu odgovornosti, disciplinskom postupku, disciplinskim organima i drugo, imaju cilj, generalno posmatrano, isti kao i zakonske odredbe o prestanku radnog odnosa, da položaj zaposlenih postave što stabilnije i čvršće, da im obezbede postojanost u radnim odnosima, kako bi se eliminisala svaka arbitrernost u odlučivanju o njihovim ne samo pravima, već i obavezama i odgovornostima, a sa druge strane zaštita radnog odnosa i potreba stabilnosti zaposlenja ne sme urušiti legitimne interese poslodavca koji izviru iz odnosa subordinacije. Subordinacija je vezana "uz status subordiniranog radnika" (Tintić, 1969: 360), i u njenom središtu nalazi se poslodavčevo ovlašćenje da izdaje naloge i uputstva zaposlenom, drugim rečima, „da donosi odluke, da uređuje odnose (propisuje ponašanje) i da izriče disciplinske sankcije" (Šunderić, 1990: 26). To poslodavcu daje ovlašćenja gospodara posla; pravo da bdije i nadzire aktivnost radnika u pogledu načina izvršenja posla; pravo da primenjuje disciplinska ovlaštenja; pravo da izdaje pravila u pogledu organizovanja posla itd. (Tintić, 1969: 359–360).[11] Izmenama i dopunama Zakona o radu 2014. godine naše radnopravno zakonodavstvo krenulo je u drugom smeru – ka tendencijama koje destabilizuju položaj zaposlenih u radnom odnosu i daju veću „slobodu" poslodavcu u otkazivanju ugovora o radu od strane poslodavca, što se u najvećoj meri odrazilo na odlučivanje o disciplinskoj odgovornosti. Normotvorna rešenja kojima se ukidaju pravila postupka za utvrđivanje odgovornosti nemaju uporišta ni u međunarodnoj regulativi ni u uporednom pravu u zemljama koje imaju razvijene industrijske odnose. Posmatrano iz ugla uporednog prava, generalno postoje dva tipa procedure: proceduralna korektnost i poštenje prema radniku na kojem je primenjena disciplinska mera i procedure koje uključuju predstavnike radnika. Zakoni, sudske odluke i kolektivni ugovori koji predviđaju procedure prvog tipa mogu se naći u većini zemalja. U te procedure obično spadaju: 1) provera činjenica;

2) pravo radnika na saslušanje na kojem bi izneo argumente u svoju korist, u pratnji drugog radnika ili sindikalnog zvaničnika; 3) pravo žalbe rukovodstvu na višem nivou. Za realizaciju ovih standarda postoje odgovarajući instrumenti MOR-a (Blanpain, Engels, 1998: 300). Tako u nemačkom pravu pravni režim disciplinske odgovornosti zaposlenih uređuje se autonomnim aktima – pre svega pravilnikom o radu poslodavca, u skladu sa načelima sudskog porekla (stavovi Saveznog radnog suda). Pruža se značajna zaštita zaposlenih od arbitrernosti

11 Iz navedenog se uočavaju tri osnovne vrste ovlašćenja, tj. funkcije koje proističu iz vlasti poslodavca: upravljačka vlast, normativna vlast i disciplinska vlast. U tom smislu i: (Kyovsky, 1978: 180); (Kovačević, 2013: 31).

postupanja poslodavca – predviđanjem saglasnosti saveta zaposlenih na pravilnik o radu, kao i na disciplinsku sankciju koju poslodavac namerava da izrekne protiv zaposlenog. Štaviše, ako savet zaposlenih uskrati svoju saglasnost na disciplinsku sankciju, poslodavac gubi svoju disciplinsku vlast, koja tada pripada nezavisnom arbitražnom vođi (Weiss, Schmidt, 2008: 92–93). To ukazuje da su zakonodavstvom o radu (heteronomnim i autonomnim izvorima) predviđeni *slučajevi*, *osnovi* i *postupak* otkaza, kao i *zaštita* zaposlenog u vezi sa otkazom. U uporednom pravu se u načelu zakonom u opštem režimu radnih odnosa uređuje manji broj elemenata materije disciplinske odgovornosti, bilo da se radi o zakonu o radu ili radnim odnosima (Velika Britanija, Srbija, Crna Gora, Makedonija, Hrvatska, Slovenija), zakoniku o radu (Francuska, Ruska Federacija) ili pak posebnom zakonu o disciplinskoj odgovornosti (Estonija) (Lubarda, 2012: 616). Materija disciplinske odgovornostise u uporednom pravu redovno uređuje pravilnikom o radu, ali se javlja takođe i kolektivni ugovor o radu, kojim se uglavnom uređuje pitanje samog disciplinskog postupka (Lubarda, 2012: 617). U zakonu se ne uređuje katalog mogućih povreda radnih i obaveza ponašanja, jer povrede obaveze mogu biti krajnje različite, tako da u disciplinskom radnom pravu (prevashodno u opštem režimu radnih odnosa) nije moguće decidirano primeniti načelo legaliteta.

3. Osobenosti disciplinske odgovornosti u posebnom režimu radnih odnosa – Zakon o državnim službenicima

Zakonodavac napušta koncept disciplinskog postupka za utvrđivanje disciplinske odgovornosti (samo) u opštem režimu radnih odnosa. Nasuprot, za razliku od Zakona o radu, Zakon o državnim službenicima (ZDS)[12] (zakon *lex specialis*) reguliše eksplicitno disciplinsku odgovornost državnih službenika,[13] i sa materijalnog i procesnog aspekta, u meri u kojoj se može govoriti o klasičnom disciplinskom suđenju za utvrđivanje disciplinske odgovornosti – reguliše institut disciplinske odgovornosti, reguliše disciplinski postupak kao

12 Zakon o državnim službenicima – ZDS, *Službeni glasnik RS,* Br. 79 (2005), 81(2005) - ispravka, 83(2005) - ispravka, 64(2007), 67(2007) - ispravka, 116(2008), 104(2009), 99(2014), 94(2017), 95(2018).

13 U članu 107 Zakona o državnim službenicima, u Glavi devet, pod rubrumom „Odgovornost državnih službenika", posebno naslovljala deo I. Disciplinska odgovornost (1. Pojam. Vrste povreda dužnosti iz radnog odnosa) i eksplicitnopropisuje: „Državni službenik je disciplinski odgovoran za povrede dužnosti iz radnog odnosa.

klasičnu procesnu formu koja se odvija pred disciplinskim organom, kroz faze: pokretanje postupka, vođenje postupka, usmenu raspravu, zapisnik, dvostepenost odlučivanja, pravo na žalbu, udaljenje sa rada, izricanje sankcije, potom i evidenciju izrečenih sankcija, brisanje istih i sl. Ovakav normativni antagonizam između opšteg i posebnog režima radnih odnosa pravda se svojinskom osnovom radnog odnosa, za šta nema utemeljenja (mišljenja smo) u konceptu vladavine prava, ni u načelu jedinstvenosti sistema radnih odnosa. Naime, vladavina prava podrazumeva, između ostalog, i odgovarajući pravni postupak *(due process of law)*, odnosno postojanje pravila o nepristrasnom i pravičnom postupku koji omogućava rešenje nastalog spora, uz istovremena jemstva pravne sigurnosti i individualne slobode (Kovačević Perić, 2016: 641−650).U smislu odredaba ZDS, državni službenik je disciplinski odgovoran za povredu dužnosti iz radnog odnosa. Do povrede može doći činjenjem ili nečinjenjem. Njegova odgovornost za krivično delo ili prekršaj ne isključuje njegovu disciplinsku odgovornost.[14] Sve zavisi od toga da li se u njegovim protivpravnim radnjama i aktivnostima, osim krivične i prekršajne odgovornosti, stiču uslovi i za disciplinsku odgovornost, u skladu sa zakonom. Povrede dužnosti iz radnog odnosa, u smislu člana 107, st. 3 ZDS, mogu biti lakše[15] i teže prirode.[16] Disciplinski postupak vodi se radi utvrđivanja odgovornosti državnog službenika za koga se veruje da je učinio povredu radne dužnosti, kao i radi njegovog kažnjavanja u slučaju da se dokaže da je odgovoran za povredu dužnosti koja mu se stavlja na teret. Vodi se pred nadležnim disciplinskim organima.

Disciplinski postupak se može voditi ako je prethodno na zakonit način pokrenut. Pokreće ga rukovodilac organa u kome radi državni službenik za koga se osnovano veruje da je počinio povredu radne dužnosti. Pokreće ga na svoju inicijativu ili na predlog lica koje je pretpostavljeno državnom službeniku. Inicijativu za pokretanje disciplinskog postupka može pokrenuti svaki državni službenik koji sazna za učinjenu povredu dužnosti iz radnog odnosa. Inicijativa se podnosi rukovodiocu organa. Disciplinski postupak pokreće se pisanim zaključkom, koji se dostavlja državnom službeniku i na koji žalba nije dopuštena.[17] Iako Zakonom o državnim službenicima nije propisano da je može pokrenuti i nameštenik, čini se da takva mogućnost ne bi bila u suprotnosti sa pravilima i principima na kojima se sistem disciplinske odgovornosti

14 Član 107 ZDS.

15 U članu 108 ZDS, taksativno su navedene lakše povrede radne obaveze.

16 U članu 109 ZDS, taksativno su navedene lakše povrede radne obaveze.

17 Vidi: član 112 ZDS.

државних службеника заснива. Наротив, такva могућност би могла бити корисна за успостављање жељене дисциплине у државним органима и службама (Кулић, Перић, 2016: 279).

Дисциплински поступак се води ради утврђивања чињеница значајних за одмеравање дисциплинске одговорности државног службеника. Законом о државним службеницима прописано је да дисциплински поступак води и о дисциплинској одговорности одлучује руководилац државног органа (Члан 113 ZDS).[18] Према томе, дисциплински поступак покреће и води исти дисциплински орган. Колико су такva решења добра, друго је питање.У свакомслучају, стоји чињеница да је боље ако један орган покреће, а други води поступак и одлучује о одговорности одређеног субјекта (Кулић, Перић, 2016: 279). Да би се ублажило овакво правно решење којим се у једном органу спаја право на покретање и вођење дисциплинског поступка, Законом о државним службеницима руководиоцу државног органа омогућено је да оснује дисциплинску комисију од три члана, са задатком да уместо њега покреће и води дисциплински поступак и одлучује о дисциплинској одговорности државних службеника.[19] Међутим, надлежност за покретање и вођење поступка, као и надлежност за одлучивање о дисциплинској одговорности државног службеника, и у такvом случају, прописана је у корист једног органа. Очигледно је да би било боље да је комисија овлашћена да покреће, а руководилац државног органа да води поступак и одлучује о одговорности државног службеника или обрнуто (Кулић, Перић, 2016: 279–280). Према одредбама члана 113, st. 1 ZDS, дисциплински поступак подразумева одржавање усмене расправе, с циљем да се државном службенику омогући да изнесе своју одбрану, а органу пред којим се води поступак – да утврди све релевантне чињенице. Државни службеник самостално одлучује да ли ће се на расправи бранитисам или преко заступника. Штавише, омогућено му је да за јавну расправуобезбеди одбрану у писаној форми. Усмена расправа може да се одржи и без присуства државног службеника, ако за то постоје важни разлози и ако је државни службеник на расправу уредно позван. Законом о државним службеницима није прописано које разлоге треба сматрати „важним“, што значи да би такva питања требало ценити од случаја до случаја. По свему судећи, такvим разлозима могу се сматрати: неодазивање државног службеника на усмену расправу, могућност наступања застарелости

18 Члан 113 ZDS.

19 Члан 113, st. 2 ZDS. У смислу члана 113, st. 3 ZDS, руководилац државног органа који се определи за оснивање наведене комисије, треба да води рачуна о томе да чланови комисије морају имати завршен факултет и најмање пет година радног искуства у струци. С тим што најмање један члан дисциплинске комисије мора да буде дипломирани правник.

вођења disciplinskog postupka, opasnost od prikrivanja povrede radne dužnosti, opasnost od novih povreda radne dužnosti od strane državnog službenika i slično (Kulić, Perić, 2016: 280). Na pitanja koja u vezi sa vođenjem disciplinskog postupka nisu uređena Zakonom o državnim službenicima, primenjuju se odredbe zakona kojim se uređuje opšti upravni postupak.[20] Zakon ovim upućuje na supsidijarnu primenu odredaba u pogledu usmene rasprave, dokaznog postupka, zapisnika, dostavljanja i dr.). Time dalje produbljuje sistematičnost i postupnost vođenja disciplinskog postupka.

Ako su se za to stekli zakonom propisani uslovi, državnom službeniku koji je kriv za učinjenu povredu dužnosti iz radnog odnosa izriče se odgovarajuća disciplinska mera, odnosno kazna. Pri izboru i odmeravanju disciplinske kazne vodi se računa o stepenu odgovornosti državnog službenika, težini posledica povrede dužnosti i subjektivnim i objektivnim okolnostima pod kojima je povreda dužnosti izvršena.[21] U smislu navedene odredbe, pri opredeljivanju vrste disciplinske kazne vodi se računa o tome da bude srazmerna težini i značaju učinjene povrede radne dužnosti, kao i stepenu disciplinske odgovornosti državnog službenika – individualizacija kazne. Osim toga, pri njenom odmeravanju uzimaju se u obzir i druge relevantne činjenice i okolnosti, kao što su: ranije ponašanje i eventualno ranije kažnjavanje državnog službenika, okolnosti pod kojima je povreda radne dužnosti učinjena, držanje državnog službenika nakon učinjene povrede dužnosti iz radnog odnosa, spremnost državnog službenika da se suoči sa svojom odgovornošću i slično. Međutim, disciplinske kazne koje su izbrisane iz kadrovskeevidencije ne mogu se uzimati u obzir pri opredeljivanju vrste i visine nove disciplinske kazne.[22] Samim tim, ne mogu se smatrati otežavajućom okolnošću za državnog službenika. Za lakše povrede dužnosti iz radnog odnosa državnom službeniku može se izreći isključivo novčana kazna, najviše do 20% plate za puno radno vreme, isplaćene za mesec u kome je kazna izrečena. Minimalni iznos novčane kazne nije propisan. Znači da može biti manji i od 1 odsto plate. Sve zavisi od organa koji je izriče i procene iznosa kojim se može postići svrha kažnjavanja. Za teže povrede dužnosti iz radnog odnosa može se izreći: (1) novčana kazna od 20% do 30% plate za puno radno vreme, isplaćene za mesec u kome je novčana kazna izrečena, u trajanju do šest meseci; (2) određivanje neposredno nižeg platnog razreda; (3) zabrana napredovanja od četiri godine; (4) premeštaj

20 Član 113, st. 4 ZDS.

21 Član 115, st. 1 ZDS.

22 Vidi smisao člana 115, st. 2 ZDS.

na radno mesto u neposredno niže zvanje uz zadržavanje platnog razreda čiji je redni broj istovetan rednom broju platnog razreda u kome se nalazi radno mesto s koga je premešten; (5) prestanak radnog odnosa. Koja će se od navedenih kazni izreći, zavisi od napred navedenih činjenica, odnosno okolnosti. U svakom slučaju, izrečena kazna mora biti srazmerna težini i značaju učinjene povrede dužnosti iz radnog odnosa. Po svemu sudeći, novčana kazna, ma kakva bila, može se smatrati najblažom disciplinskom merom. Njeno izvršenje vrši se administrativnim putem, u skladusa zakonom. Nasuprot njoj, stoji prestanak radnog odnosa, kao najteža disciplineska kazna (Kulić, Perić, 2016: 278). Državnom službeniku kome je takva kazna izrečena prestaje radni odnos danom konačnosti rešenja kojim je izrečena.[23]

Razlozi pravne sigurnosti nalažu da pokretanje i vođenje disciplinskog postupka podrazumeva preduzimanje neophodnih radnji i aktivnosti u određenim rokovima. Prekoračenje utvrđenih rokova, po pravilu, dovodi do nastupanja zastarelosti pokretanja ili vođenja određenog postupka. Pokretanje disciplinskog postupka za lakše povrede dužnosti iz radnog odnosa zastareva protekom jedne godine od izvršene povrede, a za teže povrede – protekom dve godine od izvršene povrede. Na drugoj strani, vođenje disciplinskog postupka za lakše povrede dužnosti iz radnog odnosa zastareva protekom jedne godine od pokretanja disciplinskog postupka, a za teže povrede – protekom dve godine od pokretanja takvog postupka.[24] Međutim, zastarelost ne teče ako se disciplinski postupak ne može pokrenuti, niti voditi zbog odsustva državnog službenika ili iz drugih opravdanih razloga.

Disciplinska kazna izrečena konačnim rešenjem nadležnog disciplinskog organa upisuje se u kadrovsku evidenciju.[25] Kadrovska evidencija služi za potrebe upravljanja kadrovima, kao i za zadovoljavanje drugih potreba u oblasti radnih odnosa. Centralnu kadrovsku evidenciju o državnim službenicima i nameštenicima u organima državne upravei službama Vlade Srbije vodi Služba za upravljanje kadrovima. Vodi se kao informatička baza podataka, u skladu sa zakonom. U centralnu kadrovsku evidenciju upisuju se podaci o državnim službenicima, njihovim kvalifikacijama i sposobnostima, radnom stažu i radnom iskustvu, godinama života, eventualnom disciplinskom kažnjavanju itd. Disciplinska kazna briše se iz kadrovske evidencije ako državnom

23 Član 111 ZDS.

24 Član 118 ZDS.

25 Član 119, st. 1 ZDS.

службенику не буде изречена нова дисциплинска казна у наредне две године од изречене дисциплинске казне за лакшу повреду дужности из радног односа, односно у наредне четири године од изречене дисциплинске казне за тежу повреду дужности из радног односа.[26] Утврђени рокови се не могу продужавати, нити скраћивати, због чега се по њима мора поступати.

4. Закључне напомене

Наспрам законске регулативе у општем режиму радних односа којом су дисциплинска одговорност и дисциплински поступак симплификовани, супституисани тзв. отказним поступком – поступком отказа уговора о раду због постојања оправданих разлога који се односе на понашање запосленог (повреда радне обавезе и радне дисциплине), сходно цитираним одредбама Закона о државним службеницима, евидентно је да се поступак утврђивања одговорности у државном органу одвија спровођењем процесних правила дисциплинског поступка. Он се одвија од фазе покретања дисциплинског поступка писаним захтевом, преко расправе и вођења поступка, до изрицања дисциплинске мере, односно завршава се правовременим извршењем изречене дисциплинске мере од стране законом надлежних органа. У дисциплинском поступку, према ЗДС, примењују се правила која се односе на покретање и вођење поступка, усмену расправу и одмеравање дисциплинске казне. Дакле, то је класичан поступак уз учешће свих овлашћених субјеката поступка од расправе до изрицања санкције. Важна особеност овог поступка је начело расправности, које долази до изражаја у одржавању расправе, као израз остваривања права на одбрану. Управо је из тог разлога расправа најважнији део поступка. На њој се разјашњавају све релевантне околности за утврђивање одговорности, што подразумева саслушање сведока, изођење доказа, увиђај, вештачења, исправе и друге радње, а пред органом надлежним за вођење поступкаи одлучивање о постојању кривице. Насупрот томе, право на одбрану запослених у општем режиму радних односа, у смислу члан 180 Закона о раду, своди се на изјашњене на наводе из упозорења да су се стекли услови за отказ уговора о раду. Одредбе о дисциплинској одговорности државних службеника указују на правно заокружен систем норми дисциплинског права, и у материјалном и процесном домену. Сам поступак утврђивања дисциплинске одговорности у државним органима је систематичниј од „отказног поступка“ који је предвиђен у општем режиму радних односа.У питању је, несporно, поступак „дисциплинског суђења за утврђивање дисциплинског дела“, какав је постојао и у општем режиму радних односа

26 Члан 119, ст. 2 ЗДС.

do 2001. godine. Time je izvršen svojevrstan *in favor laborem* odgovornosti zaposlenih u državnim organima u odnosu na zaposlene kod poslodavca u preduzećima a u domenu ostvarivanja pojedinih fundamentalnih prava (pravo na odbranu, pravo na prigovor/žalbu i sl.). Takođe, time se odstupa i od osnovnog radnopravnog načela jedinstvenosti sistema radnih odnosa. U skladu sa načelom jedinstvenosti sistema radnih odnosa, tj. jedinstva sistema osnovnih prava, obaveza i odgovornosti subjekata radnog odnosa, naše pozitivno radnopravno zakonodavstvo neposredno se odnosi na sve vrste i oblike radnog odnosa. Kod pojedinih pojavnih oblika radnog odnosa, npr. u državnim organima, stranih državljana i sl., određene specifičnosti su regulisane posebnim propisima. To ne znači da samim tim predstavljaju i posebne sisteme radnih odnosa. Naprotiv, specifičnosti i posebne karakteristike su samo izuzeci od principa jedinstvenosti sistema radnih odnosa, pa se stoga u odnosu na pojavne oblike radnih odnosa primarno primenjuju konkretni posebni propisi u svojstvu lex specialis-a, a supsidijarno jedinstvene odredbe Zakona o radu, po principu "*lex specialis derogat legi generali*". Zakonodavacje ove specifičnosti definisao (mišljenja smo nelegitimno) i u oblasti disciplinskog procesnog prava, odnosno postupka utvrđivanja disciplinske odgovornosti. Takvo normativno rešenje nema uporišta u teoriji prava. Svojinskom osnovom radnog odnosa ne mogu se pravdati razlike ni u uslovima i postupku utvrđivanja disciplinske odgovornosti, ni u opsegu (obimu) zaštite prava. Na to upućuje ideja i civilizacijski postulati vladavine prava, u smislu koji podrazumeva, pored ostalog, i pravila o nepristrasnom, pravičnom pravnom postupku *(due process of law).*

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RESPONSIBILITY IN THE EMPLOYMENT RELATIONSHIP: DISTINCTIVE FEATURES OF DISCIPLINARY LIABILITY IN THE GENERAL AND SPECIAL EMPLOYMENT RELATIONS REGIME

Summary

Establishing an employment relationship involves acquiring or assuming certain rights, duties and responsibilities for both parties in the employment relationship, in accordance with the law, the collective agreement, the employer's general administrative acts, and the employment contract. An employment relationship involves not only the parties' rights and duties but also their responsibility. Responsibility can be of legal and non-legal nature. Legal responsibility (liability) is of greater importance for the employees. On the whole, legal responsibility may be disciplinary, material, administrative (for misdemeanors), economic (for economic offenses) and criminal in nature. The subject matter of labour law includes only disciplinary and material liability of the employee, while other types of legal responsibility are the subject matter of other legal disciplines.

Although the former labour legislation of the Republic of Serbia regulated the disciplinary liability of the employees in detail, such practice has been completely abandoned in the new Labour Act, which only regulates the summary dismissal procedure. Unlike the Labour Act, the Civil Servants Act contains numerous provisions on the disciplinary and material liability of civil servants. This Act also regulates procedural issues regarding the rules for initiating and conducting a disciplinary proceeding, entering disciplinary sanctions in or removing them from the personnel files, etc. In this paper, the author analyzes disciplinary liability by examining the specifics of substantive and procedural norms for establishing this form of liability in the general and special employment relations regime. From the aspect of the rule of law, the author provides a critical analysis of such legislative solutions and considers their legal justification.

Keywords**:** *legal responsibility, disciplinary liability, disciplinary procedure, disciplinary sanctions, rule of law.*

pregledni naučni rad
10.5937/zrpfn0-28305

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UDK: 341.24
342.738:004.378.5
Rad primljen: 09.08.2020.
Rad prihvaćen: 26.11.2020.

PRAVO NA PRIVATNOST IZ ČLANA 8 EVROPSKE KONVENCIJE O LjUDSKIM PRAVIMA I LEGALNOST MERA EPIDEMIOLOŠKOG PRAĆENjA RADI SUZBIJANjA PANDEMIJE VIRUSA KOVID 19

***Apstrakt**: Autor u radu razmatra pitanje zaštite prava na privatni život prema članu 8 Evropske konvencije o ljudskim pravima u doba pandemije virusa Kovid 19.*

Na početku pandemije evropske države su se suočavale sa velikim brojem zaraženih i kolapsom zdravstvenih sistema u pojedinim zemljama. Pitanje koje se postavlja jeste da li je do takvog stanja koje se otelo kontroli dovelo nesprovođenje mera epidemiološkog praćenja građana u meri i na način na koji su se te mere sprovodile u zemljama Dalekog istoka, odnosno da li je demokratski sistem ostao nezaštićen upravo zbog poštovanja demokratskih standarda zaštite ljudskih prava, konkretno prava na privatnost.

Da bi se ispunili demokratski standardi, neophodno je i da sprovođenje mera epidemiološkog praćenja, kojima se vrši mešanje u privatnost građana, bude legalno.

Do odgovora na pitanje definicije pojma prava na privatni život, kao i da li mere epidemiološkog praćenja ulaze u ovaj korpus, došli smo detaljnom analizom prakse Evropskog suda za ljudska prava, pred kojim se štite prava garantovana Evropskom konvencijom o ljudskim pravima, inter alia, pravo na privatni život.

Analizom prakse Evropskog suda za ljudska prava utvrdili smo uslove koji moraju biti ispunjeni da bi se mere epidemiološkog praćenja mogle smatrati legalnim.

***Ključne reči**: pravo na privatnost, legalnost mera epidemiološkog praćenja, Kovid 19, Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda, Evropski sud za ljudska prava.*

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1. Uvod

Zaštita pojedinaca od arbitrarnog postupanja javnih vlasti u međunarod- nom i nacionalnom pravu postiže se kroz obezbeđivanje ostvarivanja različitih dimenzija njegove ličnosti. Jedna od važnih dimenzija ličnosti pojedinca jeste njegova privatnost. Problematika zaštite javne bezbednosti i zdravlja ljudi pokazuje se kao izuzetno značajna kada je u pitanju preduzimanje najefikasnijih mera u borbi protiv novog virusa Kovid 19, čije su razmere u ovom trenutku pandemijske. U pitanju su mere epidemiološkog praćenja, kojima se država meša u privatnost građana.

S obzirom na višemesečnu borbu protiv ovog virusa s kojom je svet do sada suočen, mogu se uočiti efikasne ili manje efikasne mere. Zemlje poput Kine i njenog specijalnog administrativnog regiona Hong Konga, Južne Koreje, prve su se izborile sa epidemijom koja ih je zadesila. Najefikasnije mere koje su preduzimali odnosile su se i na nužno epidemiološko praćenje. Ono podrazumeva: praćenje lokacija i kretanja putem GPS signala na mobilnim telefonima; praćenje kretanja lica na javnim mestima; unapređene modele primene biometrija/termalne kamere i slično; nadzor kroz praćenje primene platnih kartica; digitalni uvid u zdravstveni karton građana u medicinskim ustanovama i apotekama.S druge strane, evropske zemlje su se na početku pandemije suočavale sa velikim brojem zaraženih građana ovim virusom, velikim brojem smrtnih slučajeva, kao i sa posledičnim kolapsom zdravstvenog sistema u pojedinim zemljama. Postavlja se pitanje da li je u Evropi do takvog stanja koje se otelo kontroli dovelo nesprovođenje mera epidemiološkog praćenja građana u meri i na način kako je to činjeno u zemljama Dalekog istoka, odnosno da li je demokratski sistem ostao zdravstveno nezaštićen upravo zbog poštovanja demokratskih standarda zaštite ljudskih prava, konkretno prava na privatni život.

U literaturi postoji stav da je ključna razlika između demokratskih i autoritarnih društava u načinu na koji se posmatraju građani. U autoritarnim državama svako se posmatra kao pretnja za društvo, pa se primena mera prikupljanja podataka ili nadzora smatraju logičnim. Za razliku od toga, u demokratskim sistemima pretnje za društvo posmatraju se kao anomalije. Najznačajnija karakteristika demokratskih društava jeste u tome što se od građana ne očekuje, samo po sebi, da veruju vlastima, već su institucije formirane na taj način da postoje značajna ograničenja u njihovim ovlašćenjima, dok građani imaju transparentan uvid u njihov rad i imaju mogućnost kontrole nad radom institucija (Bernal, 2016: 259i 260).

Savet Evrope je 7. aprila 2020. godine u informativnom dokumentu, kao priručniku za svoje članice u borbi protiv Kovid 19, konstatovao da je veliki izazov pred državama da zaštite svoje stanovništvo od pretnje Kovid 19. U dokumentu je naglašeno da je u borbi protiv širenja novog virusa neizbežno da preduzete mere, pored ostalih ljudskih prava, posebno naruše pravo na privatnost, iako ono predstavlja ključnu vrednost demokratskog društva i vladavine prava. U vezi s tim se konstatuje da virus odnosi mnoge živote, ali se ne sme dozvoliti da odnese i evropske korenite demokratske vrednosti, slobodno društvo, vladavinu prava i ljudska prava.[1] U Zajedničkoj izjavi država članica Saveta Evrope o pravu na zaštitu podataka u kontekstu pandemije Kovid 19 ističe se da su države bile prinuđene da posegnu za izuzetnim merama, ali da, bez obzira na alarmantnu situaciju sa javnim zdravljem, ljudska prava, načelno garantovana Međunarodnim paktom o ljudskim pravima, a konkretnije Evropskom konvencijom za zaštitu ljudskih prava i osnovnih sloboda (u daljem tekstu: Evropska konvencija) i ne mogu biti suspendovana, već samo ograničena zakonom, i to isključivo u meri u kojoj to situacija zahteva. Konstatuje se "da se ne može tvrditi da pravo na zaštitu podataka nije kompatibilno sa epidemiološkim monitoringom", kao i da se garancijom zaštite ličnih podataka može sprečiti zloupotreba grupnih informacija o lokacijama za signaliziranje skupova ljudi koji krše uslove karantina. Mere koje se uvode moraju biti proporcionalne pretnji širenja virusa i moraju biti vremenski ograničene, a vladavina prava, kroz poštovanje zakona, mora prevladati.[2] Dakle, iako različite države Saveta Evrope na različit način regulišu ovo pitanje u svojim nacionalnim pravnim sistemima, obavezne su da poštuju standarde koje su prihvatile potpisivanjem međunarodnih pravnih akata, uključujući i Evropsku konvenciju.

1 Council of Europe. 07 April 2020. *Information Documents SG/inf(2020)11, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, A toolkit for member states*. Preuzeto 28. 04. 2020.https://www.coe.int/en/web/congress/covid-19-toolkits.

2 Council of Europe. *Joint Statement on the rights to data protection in the context of the COVID-19 pandemic*. 30 March 2020. Preuzeto 06. 03. 2020. https://www.coe.int/en/web/kyiv/-/joint-statement-on-the-right-to-data-protection-in-the-context-of-the-covid-19-pandemic.

2. Pravo na privatni život i informaciona privatnost

2.1. Pojam prava na privatni život

Nakon što je fašizam u Evropi tokom 1930-ih i 1940-ih godina na zastrašujući način povređivao svaki aspekt ličnosti, među kojima je i privatna sfera pojedinaca, posebno kroz rasizam i šovinizam, javila se potreba za međunarodnom zaštitom ljudskih prava i prava na privatni život. Prema članu 8 Evropske konvencije, svako uživa pravo na poštovanje privatnog života. Države potpisnice Konvencije imaju pozitivnu obavezu da osiguraju poštovanje ovog prava, pri čemu uživaju široku diskreciju u izboru mera koje će usvojiti radi ostvarivanja tog cilja (Krstić, 2006: 7–17). S obzirom na to da je pravo na privatni život u članu 8 Evropske konvencije regulisano načelno, od ključne važnosti je njegovo tumačenje od strane Evropskog suda za ljudska prava (u daljem tekstu: Evropski sud), kao organa pred kojim se štite ljudska prava garantovana ovim regionalnim ugovorom.

U praksi Evropskog suda pojam "privatni život" postavljen je veoma široko. Uključuje praktično sve što se odnosi na ličnost, lični razvoj i interesovanja pojedinca. Iako se navedeni pojam ne može definisati iscrpno, osim toga što nesporno uključuje unutrašnju sferu svakog čoveka, u kojoj se on slobodno razvija kao ličnost, podjednako značajan deo privatne ličnosti predstavljaju i spoljašnji kontakti. Stoga, "poštovanje privatnog života, takođe, obuhvata u određenom stepenu i pravo na uspostavljanje i razvijanje odnosa sa drugim ljudskim bićima".[3] Ljudi se kreću i međusobno komuniciraju i na javnim mestima, iako postoji mogućnost da će ih drugi ljudi videti u javnosti ili da će biti snimljeni, recimo, putem sigurnosne kamere preko kablovske mreže. S obzirom na to, i javne informacije mogu se smatrati privatnim (Ignjatović, 2015: 12).

Prema članu 8 Evropske konvencije, pravo na poštovanje privatnog života nije apsolutno pravo. Postoje situacije u kojima države mogu napraviti izuzetak u njegovom poštovanju, i to kada štite, pored ostalih ciljeva, javnu bezbednost i zdravlje ljudi.[4] Zapravo, ukoliko je potrebno zaštititi ove ciljeve, država se građanima može mešati u vršenje ovog prava sprovođenjem mera koje su opravdane i neophodne u demokratskom društvu. S obzirom na to da se Evropska konvencija smatra "živim

3 *Niemietz v. Germany* (1992), stav 29.

4 Član 8, stav 2 Evropske konvencija za zaštitu ljudskih prava i osnovnih sloboda. *Službeni list SCG – Međunarodni ugovori*. Br. 9/03, 5/05 i 7/05 – ispr. *Službeni glasnik RS – Međunarodni ugovori*. Broj 12/10.

instrumentom" (što predstavlja princip kojim se Evropski sud vodi prilikom tumačenja standarda ljudskih prava u skladu sa društvenim promenama), pred Evropskim sudom se mogu naći i mere koje država preduzima radi prilagođavanja novim društvenim izazovima, poput borbe za javnu bezbednost i zdravlje građana usled pandemije virusa Kovid 19. Po tom pitanju države moraju preduzeti mere da zaštite kako javnu bezbednost i zdravlje, tako i ljudska prava svojih građana. Međutim, dešava se da je nužno da jedno isključuje drugo, odnosno da se merama kojima se štiti javna bezbednost moraju ograničiti pojedina ljudska prava. U toj situaciji nužno je uspostaviti balans radi očuvanja demokratskog poretka.

Pravo na privatni život predstavlja, dakle, i kvalifikovano pravo, s obzirom na to da se mora balansirati u odnosu na javni interes i može biti ograničeno u situacijama hitne državne potrebe. Države imaju pozitivnu obavezu da zakonom regulišu ili preduzimaju određene mere, kako bi građanima obezbedile uživanje ovog prava. S druge strane, postoji i negativna obaveza države da se suzdrži od mešanja u pravo na privatnost. Međutim, u određenim situacijama države uživaju polje slobodne procene da balansiraju između javnog interesa i interesa pojedinaca, te im je omogućeno da opravdano ograniče uživanje ovog prava.

2.2. Informaciona privatnost kao segment prava na privatni život

U pravnoj teoriji je izvršena kategorizacija situacija koje predstavljaju mešanje u privatni život građana. Podela se vrši na osnovu grupisanja različitih slučajeva, koji se mogu povezati po zajedničkom osnovu, i to po osnovu: fizičkog i moralnog integriteta ličnosti; privatnosti uspostavljanja odnosa; informacione privatnosti; lokacijske privatno- sti i ekonomske privatnosti. Slučajevi zaštite podataka o ličnosti, masovnog nadzora i tajnosti komunikacije spadaju u kategoriju informa- cione privatnosti. Poslednjih godina je informaciona privatnost postala veoma značajna, s obzirom na tehnološki razvoj mera koje se u te svrhe mogu primeniti (Sloot, 2017: 340 i 342). U pravnoj teoriji postoji preovlađujuća definicija pojma informacione privatnosti, a to je pravo da se kontrolišu lični podaci pojedinca, s važnim naglaskom na to da se pojedinac o tome obavesti i pruži svoj pristanak (Henry, 2015: 110).

Da bi se na najbolji način regulisalo i zaštitilo pravo na informacionu privatnost, neophodno je doneti brojna pravila o načinu na koji se prikupljaju privatni podaci, kako se koriste, dele i obrađuju, a sve to

kroz omogućavanje slobode pojedinca da o tome odluči (Henry, 2015: 115). Razvoj informacionih tehnologija i njihovo korišćenje kako u javnom, tako i u privatnom sektoru, učinilo je da se privatni podaci skladište, analiziraju i dele na veoma složene načine, posebno kada se ima u vidu to da su, u tom smislu, granice između javnog i privatnog sektora sve manje jasne. Kako se deljenje prikupljenih privatnih podataka širi, raste i opasnost da se te informacije zloupotrebe ili izgube. Posebno kada se ti podaci izvuku iz konteksta i ukombinuju sa drugim ličnim podacima, može se oformiti slika o pojedincu na koju on nije pristao. Iako se poslednjih godina intenzivnije nastojalo da se na globalnom i evropskom nivou pravno ojačaju garancije informacione privatnosti, ipak zakonodavstvo ne uspeva da prati korak s razvojem i upotrebom novih tehnologija i da na najefikasniji način zaštiti privatnost, posebno što je nadzor postao svakodnevna stvar. Time je ostavljena mogućnost za ozbiljne greške i upotrebu nesmotrenih nelegalnih tehnika nadzora, kao i za neovlašćeni nadzor (Equality and Human Rights Commission, 2011: 5–11).

Kako pandemija Kovid 19 predstavlja neočekivan izazov, posebno na polju privatnosti i neophodnog mešanja u ovo pravo putem sprovođenja mera epidemiološkog praćenja za njeno suzbijanje, tako je neophodno i dodatno unaprediti zaštitu prava na informacionu privatnost. Kada su u pitanju evropske države, tačnije države članice Saveta Evrope, najznačajniju ulogu ima praksa Evropskog suda za ljudska prava, sa kojom države treba da usklade svoje zakonodavstvo i praksu. S obzirom na to da se pitanje zaštite prava na privatnost u situaciji ovakve pandemije nije do sada moglo naći pred Evropskim sudom, potrebno je posredno utvrditi da li su se pred ovim sudom nalazile situacije koje se mogu podvesti pod pomenutu teorijsku kategorizaciju informacione privatnosti. Analizom prakse Suda, može se primetiti da je odgovor na ovo pitanje pozitivan. Pritom je lista situacija, odnosno mera, koje se mogu smatrati mešanjem države u privatnost, otvorena.

Naime, situacije koje je Evropski sud smatrao mešanjem u pravo na privatni život su vršenje fizičke prismotre lica; prismotra prisluškivanjem, odnosno presretanjem komunikacije i snimanjem podataka o telefonskom saobraćaju; prikupljanje ličnih podataka; stavljanje pod tajni nadzor kretanja, elektronske komunikacije, i-mejlova, mobilnih telefona i interneta i prenosa podataka preko kompjutera; kao i vođenje evidencija o podacima dobijenim na navedene načine (Ditertr, 2006: 241–246).

Zaštita ličnih podataka je od ključne važnosti za poštovanje privatnog života, posebno ako se radi o medicinskoj dokumentaciji. Jedno od najvažnijih načela svih demokratskih pravnih sistema je upravo tajnost zdravstvenih podataka, prvenstveno zbog poštovanja privatnosti pacijenata, potom i zbog očuvanja poverenja građana u medicinsku profesiju i ustanove. Evropski sud je utvrdio da će se mešanje u pravo na privatnost desiti ako država sprovodi mere pružanja ili odavanja takvih podataka bez pristanka pacijenta.[5]

Kada je u pitanju telefonska komunikacija, nema značaja da li je tema razgovora nad kojim se sprovodi mera prisluškivanja privatna ili se odnosi na posao (osim ukoliko je komunikacija vršena preko nekog javnog kanala komunikacije), odnosno ne predstavlja okolnost koja će razgovoru oduzeti karakter privatnog (Rid, 2007: 451). Snimanje podataka o telefonskom saobraćaju, koje podrazumeva registrovanje telefonskih poziva, vreme i trajanje poziva, a koje ne uključuje prisluškivanje, zanimljivo je izdvojiti jer se može činiti kontroverznim, s obzirom na to da do tih podataka svaki servis telefonskih usluga zakonito dolazi. Pošto su te informacije ipak deo privatne komunikacije, ukoliko ih servis ustupi državnom organu bez pristanka korisnika telefonske usluge, smatraće se da jeste došlo do mešanja u pravo na privatnost tog lica. Ipak, ukoliko postoji legitiman interes, dok se poštuju standardi vladavine prava i demokratskog društva, takav postupak mešanja u privatnost se može opravdati (Ditertr, 2006: 245–246).

Mera nadzora putem GPS-a, odnosno sistema satelitske navigacije, jeste mera koju je Evropski sud smatrao opravdanom iako se povređivala privatnost građana, jer je konstatovao da je praćenje kretanja građana na javnim mestima manje mešanje u privatnost (Ignjatović, 2015: 12).

3. Uslovi za legalnost mešanja evropskih država u pravo na privatnost usled primene mera epidemiološkog praćenja

Imajući u vidu navedenu praksu Evropskog suda, mere koje državne vlasti preduzimaju radi zaštite od pandemije virusa Kovid 19 jasno predstavljaju mešanje u pravo na privatnost. Zato što je cilj mera epidemiološkog praćenja zaštita javne bezbednosti i zdravlja ljudi, ne može se reći da presretanje komunikacije među ljudima, praćenje njihovog kretanja, prikupljanje i korišćenje podataka o njihovom zdravstvenom

5 *Z. v. Finland* (1997), stav 95.

stanju gube karakter privatnog. Naprotiv, utvrdili smo da je ovakve mere i sam Evropski sud okarakterisao kao mešanje u pravo na privatni život.[6]

Da bi se, prema Evropskoj konvenciji, mere kojima se vrši mešanje u pravo na privatnost, konkretno informacionu privatnost, mogle opravdati, neophodno je da budu ispunjeni određeni kriterijumi kumulativno, i to: da su preduzete mere u skladu sa domaćim zakonom, odnosno da su mere legalne, potom da se njima ostvaruju neki od legitimnih ciljeva navedenih u članu 8 Evropske konvencije, u konkretnom slučaju zaštita javne bezbednosti i zdravlja građana, kao i da su te mere neophodne u demokratskom društvu radi postizanja ovog cilja.[7]

Vladavina prava i princip podele vlasti predstavljaju vrednosti koje se štite prvim kriterijumom putem koga se utvrđuje postojanje mešanja države u pravo na privatni život pojedinaca. Ovim kriterijumom se ispituje da li su mere koje država sprovodi, a kojima se povređuje pravo na privatni život, u skladu za zakonom. Navedeni standard podrazumeva tri podstandarda, i to: da za mešanje postoji pravni osnov u domaćem sistemu, da taj zakon ispunjava određene kvalitete, tačnije da je zakonska odredba pristupačna i da je mešanje predvidivo, kao i da su ustanovljeni odgovarajući mehanizmi koji štite od zloupotrebe (Starmer, 2001: 4;Roagna, 2013: 52).

Da bi se ustanovilo da li je mera čijom se primenom država meša u privatnost u skladu sa zakonom, neophodno je utvrditi šta se sve podrazumeva pod zakonom. U evropske države ne spadaju samo one koje imaju kontinentalni pravni sistem, već ima i onih sa anglosaksonskim pravom, te se, radi jednakog postupanja, pod standardom "zakon" podrazumevaju kako pisani, tako i nepisani propisi.[8] S druge strane, praktično svaka vrsta domaćeg propisa, bilo ustava, zakona, podzakonskog akta, ulazi u koncept zakonitosti (Gomien, 2005: 82).

Nije dovoljno samo po sebi da preduzeta mera bude propisana zakonom. Zakon mora imati određene karakteristike, odnosno kvalitete. Ova garancija je posebno važna kada se ima u vidu to da postoji zakonodavstvo evropskih zemalja kojim je regulisano pitanje nadzora nad građanima, ali da su zakonske odredbe često nejasne, ili sadrže pravne praznine koje ostavljaju mogućnost za zloupotrebu i arbitrarnost, dok, sa druge strane, nacionalni organi nemaju dovoljno kapaciteta da efikasno obavljaju kontrolu nad zakonitošću mera koje ulaze u informacionu

6 *Klass and Others v. Germany* (1978), stav 41.

7 *Roman Zakharov v. Russia* (2015), stav 227.

8 *Sunday Times v. The United Kingdom* (1979), stav 47.

privatnost. U takvoj situaciji obično stupaju na scenu nedemokratska sredstva, kojima se popunjavaju pravne praznine u zakonu (The Geneva Centre for the Democratic Control of Armed Forces, 2017: 2 i 4). Stoga, da bi se navedeni zakonski nedostaci rešili, odredbe zakona moraju biti jasne i precizne, zakon mora biti dostupan i poznat javnosti, a okolnosti i uslovi pod kojima država može primenjivati konkretne mere moraju biti predvidivi za građane, poput broja i statusa onih na koje se mere odnose.[9] Suština postojanja određenih kvaliteta zakonskih odredaba leži u tome da svaki pojedinac, čitajući zakonske odredbe, može jasno spoznati u kojim okolnostima i pod kojim uslovima, u kom obimu i na koji način se neka mera može primeniti i u odnosu na njega. Ovo je posebno važno kada je u pitanju mera tajnog nadzora, jer je rizik od arbitrarnosti u tom slučaju veliki, što se jedino uvođenjem pomenutih dodatnih garancija može onemogućiti.[10] Dakle, stepen preciznosti koji se zahteva od zakona, zavisi od predmeta mera. Načelno je potrebno da zakon koji uređuje diskreciono pravo državnog organa da preduzme mere mešanja u privatnost građana mora propisati opseg tog diskrecionog prava, ali "detaljni postupci i uslovi kojih se moraju pridržavati ne moraju biti ugrađeni u odredbe materijalnog prava".[11] Ako je pak predmet mere takav da zbog svoje prirode, poput tajnosti, mera ne može biti otvorena za kontrolu od strane pojedinaca ili šire javnosti, "zakon mora da ukaže na opseg takvog diskrecionog ovlašćenja nadležnog državnog organa i na način sprovođenja tog ovlašćenja, sa dovoljno jasnoće, da bi se pojedincu pružila odgovarajuća zaštita od proizvoljnog uplitanja".[12] Povodom mera tajnog nadzora ili presretanja komunikacije neophodno je da postoje jasne i detaljne odredbe, s obzirom na brzi napredak tehnologija koje se tom prilikom koriste. S druge strane, ne može se očekivati od ustavne odredbe da ima isti nivo preciznosti kao što se to može očekivati od pravnih akata nižih na hijerarhijskoj lestvici, s obzirom na opštu prirodu ustavnih odredaba (Starmer, 2001: 5).

Pojedinci čak ne moraju ni da pruže konkretne dokaze da je nad njima sprovedena neka tajna mera. Samim tim što postoji zakon koji dozvoljava primenu takve mere, odnosno praksa koja dozvoljava uvođenje tajnog nadzora, kao i razumna verovatnoća da bezbednosne službe prikupljaju i zadržavaju privatne informacije, smatraće se da postoji pretnja od

9 *Khan v. the UK* (2000), stav 26.

10 *Leander v. Sweden* (1987), stav 51; *Rotaru v. Romania* (2000), stav 55; *Roman Zakharov v. Russia* (2015), stav 229.

11 *Doerga v. The Netherlands* (2004), stav 50.

12 *Ibidem*.

мешања у право на приватност, самим тим и мешање.[13] Појединци морају знати за мере које се спроводе, а кључно је питање да ли и када морају бити обавештени о томе. С тим у вези, наглашавамо да постоје три фазе поступка спровођења мера, и то: фаза када се одређује мера, фаза спровођења и фаза након окончања мере. Логично је да у првој и другој фази појединци не могу бити обавештени да се над њима спроводи нека мера тајног надзора,јер би на тај начин појединци могли прилагодити своје понашање. Стога, у тим фазама поступка појединци свакако неће бити у могућности да траже заштиту својих права пред судом, већ се законитост и демократичност мере мора обезбедити на други начин, путем контролних механизама. Закључак је да се у првој и другој фази појединац, као предмет надзора, не мора обавестити о примени конкретне мере, што имплицира да се може обавестити уколико се то сматра примерењим. Тек се у трећој фази поступка, односно након укидања мере, појединац који је био предмет надзора може обавестити да је над њим спроведена конкретна мера, јер је то основа за омогућавање делотворне правне заштите од злоупотребе примене мере. Тада појединац може пред надлежним органом покренути питање законитог спровођења конкретне мере. Важно је наглазити да ни накнадно обаветавање није обавезно, посебно код тајних мера. Оно ће се ценити према околности случаја, тачније зависи од тога у ком степену постоји заштита од злоупотребе.[14] Како заштита права не би зависила од дискреције државног органа хоће ли или неће обавестити појединца о спровођењу мере, тако се алтернативно свако може обратити суду уколико посумња да му је, рецимо, пресретнута комуникација.[15]

Државе уживају слободу да законом уреде питање увођења мера надзора над грађанима и прикупљања приватних података, јер домаће јавне власти најбоље могу да процене која је најбоља политика коју би требало да спроведу ради заштите јавног интереса, здравља људи или остварења другог циља. Међутим, то не значи да држава ужива неограничену слободу да примени коју год меру хоће, јер би то подрило, чак и уништило демократију под окриљем њене заштите. Зато је неопходно да постоје одговарајуће и делотворне гаранције против злоупотребе.[16] Дакле, пука контрола од злоупотреба није довољна, неопходно је да она буде и делотворна, а то значи да је адекватна, да не постоји пропуст приликом обављања контроле, као и да не постоје очигледне правне празнине које регулишу контролу. На пример, контрола над спровођењем мера које

13 *Klass and Others v. Germany* (1978), stav 34; *Roman Zakharov v. Russia* (2015), stav 167.

14 *Centrum För Rättvisa v. Sweden* (2018), st. 105 i 106.

15 *Kennedy v. The UK* (2010), stav 167.

16 *Klass and Others v. Germany* (1978), st. 49 i 50.

se tiču telekomunikacija može postojati, ali neće biti delotvorna ukoliko postoji propust u nacionalnom zakonodavstvu da reguliše pitanje privatnog sistema telekomunikacije (Rid, 2007: 455).

Mehanizam kontrole nad sprovođenjem konkretne mere pazi da se mera sprovodi u skladu sa zakonom i sprečava da dođe do zloupotrebe. Zato je ključno da kontrolno telo bude nezavisno od organa koji sprovodi meru mešanja u privatni život (o garanciji nezavisnosti postupajućeg organa više u Milenković, 2019: 73–82), a kontrola neposredna i redovna (Ignjatović, 2015: 9 i 11). Preporučljivije je da telo koje vrši kontrolu nad sprovođenjem mere bude osnovano od strane zakonodavne, a ne izvršne vlasti (The Geneva Centre for the Democratic Control of Armed Forces, 2017: 4). Optimalno je da postoji sudska kontrola nad sprovođenjem konkretne mere. Ukoliko izostaje sudska kontrola, može biti prihvatljiva i kontrola od strane nesudskog tela, poput skupštinskog odbora i komisije, ako je nadzorno telo nezavisno od organa koji izvršava konkretnu meru i ako je kontrola koju vrši delotvorna i stalna (Roagna, 2013: 52). Zaključuje se da vrste mehanizama kontrole mogu biti interne, zatim dolaziti od strane izvršne i sudske vlasti ili ih može sprovoditi posebno nezavisno telo. Smatra se da se odobrenjem mera od strane sudova najjače štite ljudska prava, kao i garancije nezavisnosti, nepristrasnosti i pravilnosti postupka (o garanciji nezavisnosti i nepristrasnosti postupka više u Milenković, 2019: 71–101), a što bi moglo imati najmanje štetne posledice za demokratsko društvo u celini (The Geneva Centre for the Democratic Control of Armed Forces, 2017: 5).[17]

Načelno govoreći, praktično se može reći da je teško pronaći nacionalni sistem u kome ne postoji zloupotreba. Zato, ukoliko ne postoje dokazi, smatraće se da državni organi propisno obavljaju svoj posao ukoliko se "mere smanje na najmanju potrebnu meru i kada je obezbeđena njihova usklađenost s relevantnim zakonskim odredbama" (Rid, 2007: 455).

Predmet nadzora, prikupljanja i skladištenja mogu biti kako podaci koji se tiču privatnih aktivnosti pojedinaca, tako i javne informacije. Prikupljanje i korišćenje iako javnih podataka može povređivati privatnost, ukoliko se takvi podaci prikupljaju sistematski i stalno o nekom licu i o tome se formiraju dosijei. Pritom, nije od značaja da li se do tih podataka došlo zakonitim putem ili na tajni način, kao ni to što informacije koje su prikupljene nisu osetljive, niti bile tražene (Ditertr, 2006: 232). Razlog za to je što se samim formiranjem ovih dosijea stvara mogućnost da se ti podaci koriste na način kojim se može

17 *Roman Zakharov v. Russia* (2015), stav 233.

povrediti pravo na privatni život (Roagna, 2013: 20; Ignjatović, 2015: 12).[18] Od suštinske važnosti je da u slučaju sistematskog prikupljanja i skladištenja podataka postoje sredstva obezbeđenja prava na privatnost, kako bi lice moglo efikasno zaštititi svoja prava. Posebno je važno ispuniti ovu garanciju u slučaju da se ovi podaci koriste za policijske svrhe.

Dakle, opasnost od zloupotrebe posebno preti u slučaju automatskog prikupljanja ličnih podataka, kao i kod mera masovnog nadzora, s obzirom na to da je čest slučaj da nacionalni propisi daju odrešene ruke bezbednosnim službama u sprovođenju navedene mere ili ne daju mogućnost organima javne vlasti da kontrolišu sprovođenje takve mere, odnosno pojedincima da se obrate sudovima radi zaštite privatnosti (Ignjatović, 2015: 13; Sloot, 2017: 346). Kriterijumi koji bi u slučaju tajnog nadzora trebalo da budu ispunjeni su: određivanje kategorija ljudi nad kojima se vrši nadzor; vremensko trajanje nadzora; procedura koja se mora poštovati prilikom ispitivanja, korišćenja i skladištenja dobijenih podataka; mere predostrožnosti koje se moraju preduzeti prilikom dostavljanja ovih podataka nekoj drugoj strani; kao i okolnosti u kojima se podaci moraju obrisati ili uništiti.[19]

Prikupljanje i skladištenje informacija ne predstavlja obavezno zadiranje u privatnost.[20] Da bi se moglo opravdati skladištenje ličnih podataka, potrebno je da se ta mera koristi radi identifikovanja osoba koje su predmet primene mere i da se potvrdi da te osobe učestvuju u konkretnim aktivnostima. Zadržavanje ovih informacija opravdano je sve dok postoji društvena pretnja javnom interesu zbog čije zaštite se mera uvodi.[21]

Prikupljanje podataka koji su privatnog karaktera odnosi se i na medicinsku dokumentaciju, posebno kada sadrži visoko lične i osetljive podatke o pojedincima. Podaci u medicinskim kartonima su poverljivi. Međutim, ukoliko ih klinika koja prikuplja te podatke objavi drugom državnom organu, a samim tim i širem krugu javnih službenika, i to u svrhe drugačije od one zbog kojih ih je klinika inicijalno prikupljala, smatraće se da su se državni organi umešali u privatnost lica. Naime, samim tim što je lice pristalo na lečenje na klinici, nije prihvatilo

18 *Rotaru v. Romania* (2000), stav 46.

19 *Szabo and Vissy v. Hungary* (2016), stav 56.

20 *Leander v. Sweden* (1987), st. 48 i 68.

21 *McVeigh, O'Neill and Evans v. The United Kingdom* (1981), st. 224 i 230.

da se ti podaci otkriju van klinike, makar to bio i drugi državni organ, jer je u pitanju svrha za koju lice nije pristalo.[22]

Posebno bi trebalo imati u vidu to da epidemiološko praćenje, prikupljanje podataka i masovni nadzor ne uključuju samo državne organe, već i komercijalne organizacije, poput komercijalnih operatera *Microsoft, Google, Yahoo, Facebook, Youtube, Viber, Skype* i slično, posebno što su upravo te komercijalne organizacije razvile metode za prikupljanje podataka i nadzor, a da vlade koriste njihove prikupljene podatke. Način i mera u kojoj se sprovodi ova saradnja, kao i sva saznanja koja su dostupna komercijalnim operaterima nisu u potpunosti poznata (Bernal, 2016:246–261). I ovaj faktor je ključno uzeti u razmatranje prilikom usvajanja mera epidemiološkog praćenja i utvrđivanja opravdanosti i legalnosti njihove primene.

4. Zaključak

Kada je u pitanju efikasna borba u suzbijanju pandemije virusa Kovid 19, može se primetiti da su neke države bile uspešnije od drugih. U nekim evropskim državama je, usled prebrzog i masovnog širenja virusa, na samom početku pandemije došlo i do kolapsa zdravstvenog sistema, za razliku od nekih zemalja Dalekog istoka, poput Kine, njenog specijalnog administrativnog regiona Hong Konga i Južne Koreje. Ono što jeste poznato je i da su se u tim zemljama Dalekog istoka na samom početku pandemije primenjivale mere epidemiološkog praćenja, poput praćenja lokacija i kretanja putem GPS signala na mobilnim telefonima; praćenja kretanja lica na javnim mestima; primene termalnih kamera; nadzora kroz praćenje primene platnih kartica; digitalnog uvida u zdravstveni karton građana u medicinskim ustanovama i apotekama. Pitanje na koje smo nastojali da odgovorimo jeste da li je u Evropi do takvog stanja koje se otelo kontroli na početku pandemije dovelo nesprovođenje mera epidemiološkog praćenja građana u meri i na način na koji su se te mere sprovodile u zemljama Dalekog istoka, odnosno da li je demokratski sistem ostao nezaštićen upravo zbog poštovanja demokratskih standarda zaštite ljudskih prava, konkretno prava na privatnost. Jedan od tih ključnih demokratskih standarda, kada je u pitanju opravdanost mešanja države u privatnost svojih građana, jeste i legalnost mera koje se sprovode.

Utvrdili smo da je standard poštovanja prava na privatni život, kao zajednički u evropskim državama, odnosno državama članicama

22 *M. S. v. Sweden* (1997), stav 35.

Saveta Evrope, prvenstveno garantovan članom 8 Evropske konvencije o ljudskim pravima. Utvrdili smo da je država ovlašćena da se umeša u ovo pravo ukoliko je neophodno zaštititi određene interese, poput javne bezbednosti i zdravlja ljudi, te se novonastala potreba za suzbijanjem širenja virusa Kovid 19 može svrstati u opravdane razloge za mešanjeu privatnost građana.

Kroz analizu prakse Evropskog suda takođe smo uvideli da se navedene mere epidemiološkog praćenja, kojim se uspešno vrši suzbijanje širenja ovog virusa, mogu svrstati u situacije kojima se država ranije mešala u ostvarivanje prava na privatnost. S obzirom na to, primenljivi su uslovi koje je Evropski sud utvrdio da bi se navedene mere uvele i sprovele na legalan način.

Ono što se može primetiti jeste da su ti uslovi za legalnost mera mešanja u privatnost prilično zahtevni i u direktnoj su vezi sa poštovanjem vladavine prava i demokratskih standarda, kao i sa principom podele vlasti. Naime, standard legalnosti obuhvata nekoliko podstandarda. Prvi je da za mešanje postoji pravni osnov u domaćem sistemu, bilo da je to pisana ili nepisana pravna norma, u zavisnosti od vrste pravnog sistema. Drugi podstandard je da taj zakon ispunjava određene kvalitete, tačnije da je zakonska odredba jasna i precizna, da zakon mora biti dostupan i poznat javnosti, a okolnosti i uslovi pod kojima država može primenjivati konkretne mere moraju biti predvidivi za građane, poput broja i statusa onih na koje se mere odnose, dakle potrebno je da je mešanje u privatnost i predvidivo. Ispunjavanje trećeg podstandarda legalnosti mera mešanja u privatnost podrazumeva da su ustanovljeni odgovarajući mehanizmi koji štite od zloupotrebe primene konkretne mere. Pritom, puka zaštita od zloupotreba mera nije dovoljna. Neophodno je da ona bude i delotvorna, a to znači da je adekvatna, da ne postoji propust prilikom obavljanja kontrole, kao i da ne postoje očigledne pravne praznine koje regulišu kontrolu.

Stoga, s jedne strane je potrebno sve navedene kriterijume ispuniti i to kumulativno, da bi mere epidemiološkog praćenja u evropskim državama ispunjavale zahtev legalnosti. S druge strane, u evropskim zemljama postoji zakonodavstvo kojim je regulisano pitanje nadzora nad građanima, ali su zakonske odredbe često nejasne ili sadrže pravne praznine koje ostavljaju mogućnost za zloupotrebu i arbitrarnost, dok nacionalni organi nemaju dovoljno kapaciteta da efikasno obavljaju kontrolu nad zakonitošću mera koje ulaze u informacionu privatnost. Na osnovu toga, moglo bi se zaključiti da je u osnovi problema sa neefikasnim suzbijanjem

virusa Kovid 19 na početku pandemije u Evropi zapravo stajala nedovoljna ispunjenost zahteva legalnosti mera epidemiološkog praćenja, jer je u pitanju potpuno nova situacija koja se ranije nije mogla predvideti, samim tim ni odgovarajuće regulisati, pošto je za njeno odgovarajuće regulisanje i sprovođenje bilo neophodno unapred ili bar simultano s razvojem pandemije ispuniti brojne uslove.

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THE RIGHT TO PRIVACY UNDER ARTICLE 8 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND LEGALITY OF EPIDEMIOLOGICAL MONITORING MEASURES TO COMBAT THE COVID-19 VIRUS PANDEMIC

Summary

In this paper, the author analyzes the protection of the right to privacy under Article 8 of the European Convention on Human Rights (ECHR) at the time of the Covid-19 virus pandemic. At the beginning of the pandemic, European countries had a large number of infected people and some countries encountered a collapse of their health systems. As the situation was beyond control, it raises the question whether such a situation was caused by the non-implementation of epidemiological monitoring measures, which is comparable to the extent and manner of implementing these measures in the Far East; namely, the question is whether the democratic system remained unprotected due to the EU countries' observance of democratic human rights standards, specifically the right to privacy.

Given that epidemiological monitoring measures are currently the most important instrument for combating the Covid-19 virus pandemic, European countries have to fulfill the condition of legality in implementing these measures, which interfere with the citizens' right to privacy. In that context, the author explores the case law of the European Court of Human Rights (ECtHR), which ensures judicial protection of the rights guaranteed by the Convention (including the right to private life), focuses on the definition of the concept of the right to privacy, and examines whether epidemiological monitoring measures fall into the corpus of privacy rights. Relying on a detailed analysis of the ECtHR case law, the author points to the specific requirements that must be met in order for the epidemiological monitoring measures to be considered legal.

Keywords*: right to privacy, legality of epidemiological monitoring measures, Covid-19, European Convention on Human Rights, European Court of Human Rights.*

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pregledni naučni rad
10.5937/zrpfn0-28635

UDK: 347.778:602.9
602.9:172
Rad primljen: 30.09.2020.
Rad prihvaćen: 08.12.2020.

PROS AND CONS OF PATENTING STEM CELLS

Abstract: *The evolution and transformation of research in the field of biotechnology are clearly reflected in patent rules. In view of further development of biotechnology and the pressure from multinational biotechnical companies, gene patenting was first granted in some legal systems in order to initiate the regulation of patent protection of stem cells. Further research should provide a better understanding of the differentiation and development of stem cells, including their potential effects in curing previously incurable diseases. It should also engender new ways of exploring fundamental issues in biology, such as the mechanism of cell growth. Therefore, researchers and primarily biotech companies advocate in favor of ensuring the monopoly on the results of their research. Such a monopoly is secured by patent law. Although remarkable progress has been made in the research of stem cells, many aspects of their use, especially of embryonic cells, have not been fully clarified and made comprehensible. Successful applications of products that use a stem cell derivative (on the one hand) and moral dilemmas primarily relating to embryonic stem cells (on the other hand) have resulted in a debate that has affected many legal areas, such as patent law. Such morally challenging products have caused great concern in the USA and the EU. However, these two entities have tried to solve the problem in different ways. Different views on law, ethics and embryos have also affected different views regarding patent protection of stem cells.*

Keywords*: biotechnology, inventions, patents, genes, stem cells.*

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1. Introduction

In the area of patent law, not many questions are as complex as the question of biotechnological invention protection in general, and the question of stem cell protection in particular. No biotechnological invention has spurred so much discussion and different legal views as the issue of stem cell legal protection. In terms of biotechnological inventions, most difficulties have been encountered by patent offices and courts due to the need to react promptly to frequent changes, to empower expertise within institutions, to evaluate the state of technology, and to determine the correct standard for broadness of granted patents.

Stem or pluripotent cells were first isolated from a human embryo in the blastocyst stadium by the researchers at the University of Wisconsin in the USA (in 1998). The human embryo was cloned for the first time in November 1998, at the ACT (Advanced Cell Technology) Institution. An embryo was disrupted in its growth in the blastocyst stage in order to obtain stem cells from it and to develop cell threads such as nerve cells, bone marrow cells, muscle, or blood cells could be developed. In the scientific view, the most important notion is that stem cells could grow and differentiate in any type of cell in the human body. These characteristics provide massive potential in studying and treating serious illnesses like Alzheimer's or Parkinson's Disease, as well as diabetes. The potentials of stem cells are practically unlimited because they can induce organ regeneration or regeneration of the damaged immune system. It should be emphasized though that stem cell research is still in its infancy and that scientists seek a better understanding of the role of stem cells in normal human development and disease development.

Further research should provide a better understanding of differentiation and stem cell development along with their potential effects in curing incurable diseases. It should also engender new research methods for exploring fundamental questions in biology, such as the cell growth mechanism. Therapeutic potentials of both embryonic and "mature" stem cells are huge, but so are resources invested in their research. For this reason, all researchers, primarily big biotechnological companies, advocate for acquiring a monopoly over their research results. Such a monopoly is secured by patent law.

2. The notion of stem cells

2.1. Stem cell development and types of stem cells

Scientists in the field of medicine claim that stem cells are the foundation of the development of the entire human organism. Millions of cells of more than two hundred types are involved in the creation of the human organism, and every

one of them has its specific function; stem cells are specialized and, as such, they hold the potential to develop in one or multiple types of cells.

If we look at the creation of the human organism from the perspective of biology, we learn that the organism evolves through a certain number of successive phases. At the moment of fertilization, there is only one cell – a zygote (fertilized egg), and that cell divides very rapidly in the first couple of days. In that phase, the zygote consists of totipotent stem cells. The cell's ability to proliferate and to create daughter cells, which can then be of any cell type, is called cell potency. The totipotent cells hold the greatest development potential: they can transform into any cell type in the human organism, and they can develop into a separate embryo as well. Therefore, every totipotent cell represents an independent entity that can evolve into an entire organism (Mitalipov, Wolf, 2009:199). However, within five to seven days, the organism turns into a blastocyst, a ball of few hundred stem cells that are no longer totipotent, but pluripotent. Those cells can develop into any out of two hundred cell types within the organism, but they are no longer able to develop into an embryo (Radonjanin, 2007: 4).

Pluripotency means having more than one potential outcome. Pluripotent cells can reach the fetus or a certain cell stage, but an individual or the conglomerate of pluripotent cells cannot develop into a fetus because they lack the potential to grow into an embryo. As the development of the embryo continues, its cells become differentiated and take over a certain role in the human organism. From that moment on, the embryo is called a fetus while stem cells become multipotent (Laurie, 2004: 3). Multipotent cells are those that can transform into a smaller number of different cell types. Multipotent stem cells are a few non-differentiated cells in the tissue of developed organisms that can differentiate into closely related cells. For example, they can develop into different types of blood cells, but never into a muscle or some other cells. Finally, stem cells can be unipotent when only one type of cells can grow out of them, and they differ from non-stem cells by the ability to self-regenerate. Unipotent or oligopotent stem cells can only differentiate into one type of cell, such as cardio-vascular or skin cells, deserving of tissue regeneration (Zhu, 2011: 13). This ability to regenerate the damaged tissue makes those cells unique in medicine. They serve as a kind of internal repair system in numerous tissue types.

Stem cell research will enable scientists to learn more about basic cell characteristics and what makes them different from specialized cell types. Considering that they have unique regenerative abilities, stem cells offer new possibilities for treating diseases like diabetes and different heart diseases. One of the main characteristics of stem cells is self-regeneration, which implies a cell's ability to go through multiple division cycles while remaining undifferentiated into

specialized cell types.[1] Under certain physiological or experimental conditions, stem cells may be prompted to become tissue or specialized cells with specific functions. In certain organs, like the intestine or bone marrow, stem cells divide regularly by substituting old cells or damaged tissue, while in organs such as the pancreas and heart the division is possible under certain conditions. Thanks to these characteristics, they substitute dying cells and regenerate damaged tissue. The possibility of tissue substitution based on stem cell treatment is successfully promoted world-wide. The diseases treated in this manner are leukemia, lymphoma, and some other. At this point, some treatments are clinically tested; generally, clinical test results show that stem cell treatment is effective but still not accepted as a standard. Doctors believe that many diseases, like diabetes or nervous system illnesses, will be treated with stem cells only in a few years' time. Besides being characterized by the ability to reproduce without a time limit, stem cells are also reversible. Reversibility is the ability of certain stem cells to return to their previous state, which practically means that embryonic stem cells can regress to the embryonal phase and become embryos.

There are four types of stem cells: 1) embryonic stem cells from the blastocyst stadium of embryo development; 2) mature stem cells which all organs are made of; 3) stem cells in the umbilical cord; and, 4) induced pluripotent cells - mature cells, genetically reprogrammed into stem cells (like embryonic stem cells).[2]

2.2. Stem cells as an invention of a product and a method

Careful research of different invention patent applications shows that patent protection has been approved for inventions and applications in the entire sector of human stem cell research. Patents are so issued for inventions in the areas of pluripotent embryonic stem cells, multipotent mature stem cells, as well as multipotent mature stem cells of the fetus. Before establishing a moratorium on stem cell patents in Europe (Case 112/11 *Oliver Brustle v Greenpeace e V*

1 For more on types of stem cells, see: https://www.seracell.rs/maticne-celije/tipovi-maticnih-celija, 25.08.2020.

2 Embryonic stem cells and induced pluripotent cells are very similar; in controlled environments, both of them can grow into any kind of cell. They can self-regenerate, they can divide and produce their copies indefinitely. Unlike embryonic stem cells, induced pluripotent cells do not cause the destruction of an embryo. Yet, the results of recent research show that certain genes in induced pluripotent stem cells behave a bit differently than the genes of embryonic stem cells; that means that it is too risky to substitute embryonic stem cells with induced pluripotent stem cells in basic research at this point. See: DW (2015): Regenerativna medicina – nada za mnoge, by G. Hajze, 22.10.2015, https://www.dw.com/sr/regenerativna-medicina-nada-za-mnoge/a-18799514, accessed 24.06.2020.

language Europa EU (2011)[3], based on the analysis of reported and approved patents related to all types of stem cells both in Europe and in the USA, it can be concluded that patenting biological material taken from the human body became usual practice on both continents. Numerous patents related to mature stem cells have been approved. Of course, the situation is very different in terms of embryonic stem cells.

Stem cell patents can be approved both as a product and a method. The first patent related to human embryonic stem cells (approved by the United States Patent and TradeMark Office/ USPTO) referred to the composition of matter in these cells; subsequently, patents for methods used in isolation and purification of stem cells were approved as well. When a method is the subject matter of patent protection, patent protection extends to products directly obtained from this method. In case of inventions involving stem cells, the general provisions of relevant regulations apply, including those referring to patent protection of medicaments (Bouvet, 2002: 40).

3. Conditions for stem cell patent protection

In principle, to be patentable, every biotechnological invention must meet the same criteria as do inventions from any other technology area. Laws and legal documents, such as: the European Patent Convention (EPC), the Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS), and the national Patents Act (PA), prescribe conditions of patentability of an invention but do not define the term ”patent” .

Unlike the Patents Act of 1995, which defines a patent as a new solution for a technical problem, the current Patents Act (2019) of the Republic of Serbia defines a patent as a right which is recognized for invention in any new technological area, provided that the patent is original, inventive (ingenious) and industrially applicable (Article 7 PA)[4].

The European Patent Convention (EPC) includes a similar solution, according to which European patents are approved for inventions that are new, represent the result of creative work and that can be applied in the industry (Article 52 (1) EPC).[5]

In the USA, in order to get patent protection, an invention has to fulfill conditions prescribed by law, such as: novelty, non-obviousness, and utility. Although

3 Case 112/11, *Oliver Brustle v Greenpeace e V language Europa EU ,* Court of Justice of the EU (2011).

4 Article 7. Zakona o patentima (Patents Act) , *Sl. glasnik RS*, 2019/66.

5 Article 52 (1), European Patent Convention , *Official Journal* EPO,1973/10.

biotechnological inventions are considered morally controversial, there are no legally moral limitations in the patent law in the USA, unlike European patent rules (Thorstenson, 2007: 50).

Stem cells meet the condition of novelty if they are modified or isolated from the natural environment. Then, a question arises whether the isolation method is by itself sufficient in meeting the condition of novelty. If the isolation method is not sufficient, non-modified stem cells would not meet the novelty criterion but would be qualified as products of nature that cannot be patented. The prevailing understanding is that the main question of defining stem cell's patentability is whether they are technically new or they derive from the existing state of technology (Zhu, 2011: 67).

Novelty is examined by comparing submitted patent to concrete, defined, technical solutions that are explicitly chosen from the overall state of technology, which means that the novelty is "overthrown" by the existence of one document or one product from the overall state of technology that has the same characteristics as the submitted invention (Marković, 2016: 43).

In determining the current state of technology, we can conclude from all of the above that the patent offices mostly limit the volume and content of previous technology state to the subset of technology states that are defined in relation to the field of the invention (Xiang, Lingli, Shiwen, Ning, 2003: 541). A patent can be acknowledged as an invention only in cases where the details of it were not previously published. Since institutional and personal work of researchers was until recently valued solely based on scientific work, publishing was considered more important than the attempt to provide patent protection. However, after submitting a patent, researchers can publish an invention without violating its patent protection. The research of the European Commission for Internal Market and Research shows that in most cases there is no postponement of publishing that could relate to the previous admission of the patent application; so, the practice of combining patents with publishing papers is increasingly applied [6].

In cases where technical information relates to alive biological material, as a condition of such material entering the technical state, patent law prescribes deposition of the material in a competent depository institution where experts, under defined conditions, can take a sample of biological material and multiply it (Marković, 1997: 102).

In most relevant European Union regulations, technical intervention is also a criterion for deciding whether the element isolated from the human body will

6 Zavod za intelektualnu svojinu (2017): „Bavite se istraživanjima, razmišljajte o patentima", www.zis.gov.rs/upload/Publikacije/Lifleti/Bavite%20se%20istraživawem.pdf, accessed 8. 3. 2017

be considered a discovery or an invention (within the meaning of Art. 52 (1) EPC). "Isolation" and "purification" are arguments that differentiate isolated and purified materials from the natural ones. However, there are remarks on whether the concepts of "isolation" and "purification" are legal terms, i.e. that they are an artificial construction designed to draw the line between what is and what is not possible to patent. The concept of isolation was adopted by the European Patent Office (EPO) and the USPTO in European Union, by adopting the Biotechnological Directive (Article 5) while in the USA it was incorporated into legal practice.

The Biotechnological Directive[7] stipulates: "1) T*he human body, at different stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene*, *cannot constitute patentable invention.* 2) *An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element*." (Article 5 (1, 2) Directive).

The stated solution creates a legal area for approving patents for "elements" such as genes or stem cells, but by differentiating *in vivo* items and isolated components of the human body obtained by the technical intervention (Bahadur, Morrison, 2010: 68). Artificial intervention, like isolation from *in vivo* environment or purification from the original biological environment, is sufficient to satisfy the condition of novelty (Zhu, 2011: 68).

By isolating embryonic cell lines from an embryo in separate vessels, the condition of novelty is actually fulfilled because cultivating cells in an artificial environment can change molecular or even chromosome structure so that they could differ from the embryo out of which they were isolated (Jamil, 2016: 80).

In examining the patentability of an invention, the requirement of novelty is examined first, and then the level of innovation. In case of establishing novelty (any difference between the invention and the current state of technology), the examination of innovation level is conducted. Two very important factors are important in interpreting the innovation level: 1) an expert from the appropriate technology sector, and 2) obviousness in terms of the state of technology.

The term "expert" implies a college-educated person with a certain level of experience, a person who regularly practices some area of technology and is familiar with general knowledge in appropriate areas and of a certain date. It is assumed that such a person has access to everything related to the state of technology, especially documents from patent documentation listed in the internal report,

7 Article 5. (1)(2), Directive on the legal protection of biotechnological inventions /*EC*/98/44.

that he/she has the ability to perform routine work and experiments, and that he/she has access to standard instruments to do so (Čabarkapa, Petrović, Dunjić, 2013: 156). The term "obviousness" implies the invention which does not exceed the boundaries of standard technological progress but, in a simple and logical manner, arises from the previous state of technology (Čabarkapa, *et al.,* 2013: 157).

In the USA, the condition of "non-obviousness" was first prescribed in the U.S. Patent Act of 1952. Article 103 of the current USA patent law (U.S. Code, Title 35-Patents)[8] prescribes that the patent for the submitted invention cannot be approved, regardless of whether the invention is not identical to published patents, if the differences between the submitted invention and the current state of technology are such that the invention examined would be obvious to the expert with ordinary experience in the field at the time when the item is invented and by using methods to which the submitted invention relates. (Article 103, U.S. Code, Title 35-Patents). During the examination of the innovation level of an invention, the basic question is whether the result is "reasonably" predictable, based on the current state of technology, that is, whether a person with ordinary experience in the area of technology can expect success. If the state of technology leads to the manufacturing of the present invention and there is a realistic expectation that the invention will occur, then the condition of innovation, i.e. non-obviousness, has not been met. When examining whether the condition of innovation related to embryonic stem cells is met, it is necessary to determine whether the method of deriving cell lines is obvious for an expert in that area. Therefore, the examination of technology must be conducted by a specialized expert who will understand all technical particularities and details of chemistry, biology, and genetics (Marković, 2016: 51). Non-obviousness actually distinguishes an expert from an inventor. For the invention to be non-obvious to the expert, it is necessary for the inventor to manifest creativity in shaping and subjugating nature (Fišer, 2006: 62).

In European patent law, the current definition of the requirement concerning industry applicability is stated in Article 57 of the EPC, which emphasizes that an invention is industrially applicable "if it can be made or used in any kind of industry, including agriculture." The Serbian Patents Act (2019) defines the requirement of industrial applicability in the same manner.[9]

The term "industry" is interpreted in a broader sense, that is, as a term encompassing physical activity of a "technical" nature, i.e. the activity that belongs to

8 U.S. Code, Title 35-Patents, Art. 103 (Conditions for patentability: non-obvious subject matter),

9 Article 13, Zakon o patentima (Patent Act), *Sl. glasnik RS*, 66/19.

the group of practical or useful creations, unlike aesthetic creations. The term "industry" does not imply only the mandatory use of machines or a manufacture of a certain item, but it can also encompass a certain method (e.g. the process of converting energy from one form to another) (Čabarkapa, *et al*. 2013: 158). Industry applicability implies the possibility of the invention application in the provision of services (Marković, Popović, 2015: 110).

The requirement of industry applicability in the European-continental legal system is a counterpart of the utility requirement acknowledged in the Anglo-Saxon legal system. In the USA law, besides the requirements of novelty and non-obviousness, the invention has to meet the requirement of utility. In addition, the invention has to meet the utility requirements stipulated in the United States Patent and Trademark Office (USPTO) Guidelines (2001).[10] According to the USPTO Guidelines, in order to meet the utility requirement, the patent has to possess at least one specific, important, and credible practical usage (Spasić, 2006: 84).

The moral status of an embryo is the focal point of the conversation on stem cell research and stem cell patents. By providing a certain level of protection to an invention or patent, we face a classic moral dilemma: is it right to cause some evil in order to achieve a higher good? In the context of embryo stem cells, is it allowed to manufacture or use the existing embryos to create embryonic cell threads? The central problem is the moral status of the embryo as a source of embryonic stem cells. At the international level, the accepted opinion is that the research on embryos is ethically right if a human stands to gain out of them, without any significant risk of damage. Within this perspective, destroying embryos and extracting embryonic stem cells would be ethically unacceptable. But, if an embryo is considered only as a pile of cells that would become a complete human being only after a certain time period, then the research on embryos is allowed without any moral limitations. In-between these two complete opposite views on the embryo status, there is an array of "mixed views". There are views that early embryos should not be treated as human beings; therefore, they do not enjoy the same protection level (as humans), even though the status of an embryo changes in line with its development. For this reason, early embryos can be used for research purposes (Jochemsen, Garcia, Meir, Harris, 2005: 59).

The first moral dilemma in terms of stem cell research is the issue of the status of different types of stem cells, as well as the sources of their origin. The question is: at which moment in human development do human beings acquire the right to dignity and protection? Considering that embryonic stem cells are derived

10 US PTO Guidelines: Utility Examination Guidelines, Federal Register, Vol. 66, No. 4, 5. January, 2001, p. 1092.

from an embryo in the blastocyst phase, the status of the blastocyst is the focal point of the conversation about embryonic stem cells.

From the scientific standpoint, the supporters of embryonic stem cell research have different reasons for distinguishing embryonic stem cells from living beings. Firstly, it is not exactly obvious when the new genes take control over the embryo; so, the zygote cannot be identified with a newborn. Embryonic stem cells have a modified status of DNA methylation that is a complete opposite of mature stem cells. For example, in female embryonic stem cells, both X chromosomes are active. During embryonic development, one X chromosome is inactive. Even later, when a new genetic complement is created, the zygote does not have enough information to create a human being; so, the formation of an embryo relies on factors that are not genetic information. Because of that, a zygote should not have the same moral status as a human being. In support of the claim that human life does not start with fertilization, the proponents of this stance point out that the nervous and brain systems, the heart and blood vessels are not formed in any other stage before the blastocyst (Zhu, 2011: 30).

The biological process begins with the fertilization of the cell, which then starts to divide. During the first few divisions, cells identical to each other are being created. It is the blastocyst stage, during which 100 identical cells can be created; these cells are totipotent, meaning that they have the capacity to form a new embryo, placenta, or umbilical cord. The period of totipotency is limited to 3-4 days after conception, after which they begin to differ; so, some of them make up the umbilical cord and placenta, and others make up the body of the fetus in the internal cell mass of the blastocyst. Then, cells become pluripotent, but still have an unlimited capacity for regeneration in laboratory environments (Dakić, 2016: 234).

Considering that they are not derived from an embryo in the totipotency phase, stem cell and embryonic cell threads are morally acceptable because there is no possibility of them converting into an embryo and later into a human being. In discussing the potential utility in stem cell research, the European Group on Ethics in Science and New Technologies (EGE) also pointed out that the research of pluripotent embryonic stem cells should be allowed while taking every necessary precaution. Thus, the EGE (2002) suggested prescribing strict rules so that research could be conducted mainly on "overabundant" embryos from artificial insemination clinics[11].

11 The European Group on Ethics in Science and New Technologies (EGE), Opinion No. 16 on the ethical aspects of patenting inventions involving human stem cells, 7 May 2002, EGE, European Commission, 2002.

4. Conclusion

Unlike the Anglo-American legal system which approved stem cell legal protection from the beginning, the European-continental legal system excluded stem cells from patent protection. The essential difference between the two legal systems is reflected in the fact that most European patent laws include a "moral clause" which enables competent authorities to refuse a patent on a moral basis. On the other hand, in the Anglo-American legal system, moral evaluation is not formalized but researchers mainly focus on the questions of novelty, non-obviousness, and utility (industrial applicability).

The opponents of stem cell patents point out that, in order to derive cell threads from embryonic stem cells, the embryo has to be destroyed, which constitutes a violation of human dignity. The legal theory does not define human dignity, nor the moral status of an embryo. In terms of stem cell patent protection, there is no moral consensus in Europe. The moral status of embryos and stem cells is a very complex question, primarily because an embryo (in spite of not having all characteristics of a person) eventually becomes a human being. It raises an issue of whether it is justified to destroy an embryo and derive stem cells from it. It should be pointed out that research is mainly conducted on "overabundant" embryos, created by the *in vitro* fertilization method in the artificial insemination clinics. It raises another issue: is it more moral to dispose of such an embryo,or to use it for research purposes? The observance of moral standards can be achieved within the limits of patent law and ethical evaluation conducted by the competent authority, both of which speak in favor of stem cell patents.

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ZA I PROTIV PATENTIRANjA MATIČNIH ĆELIJA

Rezime

Evolucija i transformacija istraživanja u oblasti biotehnologije odražava se i na patentna pravila. Najpre je odobreno patentiranje gena, da bi dalji razvoj biotehnologije, ali i pritisak multinacionalnih biotehnoloških kompanija inicirao propisivanje patentne zaštite matičnih ćelija u pojedinim pravnim sistemima. Istraživanja bi trebalo da obezbede bolje razumevanje diferencijacije i razvoja matičnih ćelija, sa mogućim posledicama za izlečenje do sada neizlečivih bolesti, ali i da omoguće nove načine za istraživanja fundamentalnih pitanja u biologiji, kao što je mehanizam za rast ćelija. Istraživači, ali najviše biotehnološke kompanije, zalažu se zbog toga za obezbeđivanje monopola nad rezultatima svojih istraživanja. Takav monopol obezbeđuje patent.Pored toga što je postignut izuzetan napredak u istraživanju matičnih ćelija, mnogi aspekti korišćenja, posebno embrionalnih ćelija nisu bili u potpunosti razumljivi i jasni. Uspešna primena proizvoda koji koriste nekiderivat matičnih ćelija sa jedne strane i moralne dileme, koje se odnose prvenstveno na embrionalne matične ćelije sa druge strane, rezultirale su u raspravi koja je uticala na mnoga pravna područja, poput patentnog prava.Takvi moralno izazovni proizvodi su prouzrokovali veliku zabrinutost uSAD i EU. Međutim, ova dva entiteta su na različite načine pokušala da reše problem. Različiti pogledi na pravo, etiku i embrione, uticali su i na različita stanovišta u pogledu patentne zaštite matičnih ćelija.

Ključne reči*: biotehnologija, pronalasci, patenti, geni, matične ćelije.*

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pregledni naučni rad
10.5937/zrpfn0-28570

UDK: 179.3
351.765
343.58
Rad primljen: 27.09.2020.
Rad prihvaćen: 16.12.2020.

(PRAVNI) STATUS KUĆNIH LJUBIMACA I POSEBNA AFEKCIJA PREMA NJIMA

Apstrakt: *U domaćoj teoriji prava, kao i sudskoj praksi, preovlađuje stav da su životinje stvari – žive pokretne stvari u kontekstu stvarnog prava, odnosno opasne stvari u kontekstu obligacionog prava. Oba shvatanja, međutim, ozbiljno su dovedena u pitanje donošenjem Zakona o dobrobiti životinja, te izmenama koje su usledile u kaznenom pravu. Štaviše, stvoren je sasvim solidan osnov da se u važećem pravu o životinjama diskutuje kao, istina vrlo osobenim, subjektima prava.*

Pravni status životinja, pa i kućnih ljubimaca kao posebne kategorije koja je u fokusu rada, jeste sporan. No, već i sam nagoveštaj mogućnosti prevazilaženja tradicionalnog koncepta „životinja = stvar" obavezuje da u tom kontekstu preispitamo i druge postavke građanskog prava de lege lata, a naročito de lege ferenda.

Konkretno, s osloncem na prednosti analitičkog metoda, te generalizaciju i apstrakciju kao sastavne delove normativnog metoda, autor pretenduje da preispita mogućnosti naknade tzv. afekcione vrednosti za slučaj smrti ili telesne povrede kućnog ljubimca, naročito u kontekstu opredeljene sistematike važećeg Zakona o obligacionim odnosima, te Prednacrta Građanskog zakonika Republike Srbije.

Ključne reči: *šteta, afekciona vrednost, kućni ljubimci, živo- tinje, prava životinja.*

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1. Uvod

Paradigmatski okvir, pretežno omeđen ekocentričnim i biocentričnim stavovovima, a unutar kojeg se odvijaju praktično sve socijalne relacije, prirodno predstavlja osnovu pravno-etičkog modela po kojem funkcionišu istraživanja u okviru pravne nauke, sudska praksa, kao i zakonodavne aktivnosti. Takav pristup teško je osporiti danas. Ipak, skloni smo da se zapitamo da li je antropocentrizam u svojim umerenijim varijantama ipak moguće inkorporirati u postojeći set ideja. Da li je to možda nužno učiniti, ne radi sužavanja postojećeg paradigmatskog okvira, već upravo radi povećanja efikasnosti mera koje su na njemu zasnovane? Da li je moguće neposredno štiteći čovekove interese, uprkos egoizmu koje se sluti iz takvog pristupa (Visković, 1992: 288), unaprediti upravo čovekov odnos prema prirodi čiji je on neodvojivi deo?

Na ova i druga složena pitanja skloni smo da ponudimo pozitivan odgovor[1]. Smatramo da je na ovom nivou razvoja prava, pa i ljudskih ideja uopšte, ne samo moguće, već i uputno prepoznati i uvažiti neke najsubjektivnije čovekove pobude. Sve to, s jedne strane, radi uvažavanja tendencije širenja postojećeg okvira ljudskih prava, ali i (mada zvuči kontradiktorno) radi korekcije previše antropocentričnog odnosa čoveka prema prirodi.

S tim u vezi, u radu prezentujemo rezultate istraživanja usmerenog na preispitivanje rešenja koja nudi važeće odštetno pravo Republike Srbije u pogledu mogućnosti usvajanja tužbenih zahteva koji su usmereni na naknadu štete koja se nadovezuje na posebnu naklonost oštećenog prema određenoj stvari onda kada je ista oštećena ili uništena. Postojeća rešenja analiziramo naročito iz ugla novijih pravnoteorijskih promišljanja, kao i iz ugla relevantne sudske prakse, sve u kontekstu štete koja proizlazi iz povrede ili smrti životinje kao osobite kategorije „stvari“. Autor, međutim, napominje da je rad usmeren na naknadu afekcione vrednosti za slučaj povrede ili smrti, ne svih, čak ne ni samo „vlasničkih“ životinja, već isključivo kategorije kućnih ljubimaca. Kakva je pravnopolitička situacija u tom kontekstu kada su ostale kategorije životinja u pitanju biće predmet proučavanja u narednim radovima.

1 Unekoliko sličan pristup praktikuju autori koji su analizirali potrebu za unapređenjem prava deteta kroz unapređenje prava životinja. (Vučković-Šahović, Burazerović, 2019: 185-203).

2. О накнади „афекционе вредности“

У теорији права сматра се да се „коначно“ концепцијско и легислативно раздвајање грађанскоправне од кривичноправне одговорности догодило доношењем првих великих грађанских кодификација[2]. Процес диференцијације, међутим, започет је далеко раније – доношењем *Lex Aquilia de damno iniuria dato*[3]. Управо овим актом, мада су њиме фрагментарно регулисани хетерогени случајеви који су се чешће појављивали у пракси, отворено је питање сврхе санкције и створена могућност за инсистирање на разлици у односу на кривично право у изнетом контексту[4].

До доношења *Lex Aquilia*, правни поретци на штету су реаговали кроз скуп мера који је био изразито пунитивног карактера. Те мере, осим можда индиректно, нису ни биле усмерене на репарацију штете (Радуловић, 2016: 73), већ на сатисфакцију у циљу спречавање одмазде, наročito крвне освете (Cigoj, 1978: 400). Такав закључак јасно проистиче из система компензације у којем се штета надокнађивала у вишеструком износу.

Доношењем поменутог акта, истина само за један деликт, предвиђена је обавеза на страни штетника да исплати *износ који одговара једнострукој вредности ствари фиксираној за одређени временски тренутак* [наглашио аутор]. Римски правници, а затим и теорија права, препознали су капацитет овакvог приступа, па се оно што је био изузетак предвиђен за деликт *damnum iniuria datum* претворило у основни принцип читавог грађанског права. Тако се данас за многе аргументе може браниti став да је поправљање штетних последица нечијег деловања основни циљ установљења грађанскоправне одговорности.

То, на први поглед, проистиче као сасвим јасно, чак и несporно. Међутим, једна ствар је рећи, мада и то је упитно, да је поправљање штетних последица основни циљ. Нешто сасвим друго било би рећи да је то једини циљ грађанскоправне одговорности. То није нешто са чиме се можемо сложити, наročito уколико питање циља накнаде штете конкретизујемо и

2 Раздвајање се, сматра се, догодило на нивоу метода, затим и сврхе инкриминације, у погледу услова и основа одговорности, најзад и према врстама санкција (Salma, 2008: 79-97).

3 О овом акту, околностима под којима је донет, тачном времену његовог доношења, као и његовој садржини данас, нажалост, сазнајемо само посредно и то претежно на основу фрагмената који су сачувани у Јустинијановим Дигестама и Гајевим Институцијама (Богуновић, 2012: 425-426).

4 Мада би се до одређене мере могло браниti и становиште да је, макар једним делом, *Lex Aquilia* допринео приближавању грађанске кривичној одговорности кроз увођење појма противправности на терен грађанског права.

u traženje odgovora se upustimo iz perspektive važećeg prava Republike Srbije.

Kada postavimo pitanje šta je svrha odgovornosti u građanskom pravu, pogotovo ukoliko posmatramo odredbe važećeg Zakona o obligacionim odnosima, stojimo na stanovištu da je, ne reparacija, već prevencija osnovni cilj. Čini nam se da to sasvim jasno proizlazi iz odabrane formulacije jednog od osnovnih načela pomenutog zakona, a kojim je izričito naloženo da je svako dužan da se *uzdrži postupaka kojim je drugome moguće prouzrokovati štetu* [naglasio autor][5].

I zaista, adresirajući poimenično neodređen broj lica, zakonodavac sugeriše da je neprihvatljivo, ne samo nanošenje štete, već i preduzimanje radnji kojima se uopšte može stvoriti i najmanji stepen opasnosti nastanka štete, te da se istih treba uzdržavati. Naravno, mada nije pogrešna ukoliko poštujemo pravila jezičkog tumačenja, poslednja interpretacija mora u praksi biti unekoliko ublažena kroz logičko i teleološko tumačenje, a razlog je jednostavan – iz svake ljudske radnje potencijalno može nastati šteta. No, smatramo da očigledna potreba za „ublažavanjem oštrice" ovog pravila ne menja ništa u pogledu primarnog opredeljenja zakonodavca na ostvarivanje efekata generalne prevencije, a tek supsidijerno (dakle, za slučaj da primarni cilj ne bude ostvaren) i reparacije.

Ovakvo stanovište može se uspešno braniti na više različitih nivoa. Međutim, daleko od toga da je ovim pitanje supsidijernih ciljeva pozitivnog odštetnog prava u potpunosti razrešeno. Tako, sasvim je opravdano postaviti pitanje da li je, onda kada je postojanje štete nedvosmisleno utvrđeno, reparacija jedini cilj naknade. Konkretnije, pitanje se svodi na to da li je kroz naknadu štete moguće projektovati i punitivne efekte, a kroz punitivne i efekte specijalne prevencije.

Naime, Zakonom o obligacionim odnosima propisano je da se šteta javlja u više različitih oblika. Najpre, štetom se smatra stvarna, to jest obična šteta koja se manifestuje kao umanjenje imovine jednog lica[6]. Pod pojam štete se, zatim, podvodi se i izostanak osnovano očekivanog povećanja imovine, to jest izmakla dobit[7]. Najzad, štetom se prema slovu zakona smatra i nanošenje fizičkog ili psihičkog bola, odnosno straha drugom licu, a ovaj oblik štete označava se nematerijalnom[8].

5 Čl. 16. Zakona o obligacionim odnosima, *Sl. list SFRJ*, 29/78, 39/85, 45/89 - odluka USJ i 57/89. *Sl. list SRJ*. 31/93. *Sl. list SCG*. 1/03 - Ustavna povelja

6 Čl. 155. Zakona o obligacionim odnosima.

7 Čl. 155. u vezi sa čl. 189, st. 1 i 3. Zakona o obligacionim odnosima.

8 Čl. 155. u vezi sa čl. 200. Zakona o obligacionim odnosima.

Kada je u pitanju materijalna šteta (kao zbirni pojam za stvarnu štetu i izmaklu dobit) zakonodavac pretenduje najpre na to da se izvrši reparacija iste kroz naturalnu restituciju. Za slučaj da ona nije moguća ili sud smatra da nije nužno insistirati na njoj[9], od sudije se očekuje da dosudi naknadu u iznosu koji je potreban da se materijalna situacija oštećenog lica upodobi sa situacijom u kojoj bi se nalazilo u momentu dosuđenja da nije bilo štetne radnje ili propuštanja (Karanikić-Mirić, 2011: 69-70)[10].

Kada je u pitanju nematerijalna šteta zakonodavac, takođe, prednost daje svojevrsnom obliku restitucije[11]. Za slučaj da restitucija nije moguća, zakonodavac kroz odabranu formulaciju odbacuje „negativne teorije" o novčanoj naknadi nematerijalne štete (Nikolić, 1994: 167-170) i dozvoljava mogućnost dosuđivanja pravične novčane naknade onda kada postoje fizički bolovi, strah ili duševni bolovi koji su dugotrajni i/ ili naročito izraženog intenziteta[12].

Naturalna restitucija kao oblik reparacije favorizuje se u odnosu na kompenzaciju kroz novčanu naknadu kod materijalne, odnosno satisfakciju kod nematerijale štete. Međutim, koji god oblik naknade bio dostupan u zavisnosti od okolnosti slučaja i vrste štete, zakonodavac ne dozvoljava da se institut naknade štete pretvori u sredstvo za eksploataciju, komercijalizaciju, zloupotrebu prava, ostvarivanje lukrativnih ciljeva, a naročito za bogaćenje bez pravnog osnova (Medić, Dedić, Zivlak-Radulović, 2017: 81 i dalje; Manić, 2012: 439)[13]. Drugim rečima, zakonodavac insistira na tome da oštećeni ne sme nakon naknade biti niti siromašniji niti bogatiji nego što bi bio da je šteta izostala.

Ukoliko postavimo pitanje da li sud može da usvoji tužbeni zahtev lica koje traži naknadu štete koja proizlazi iz njegove posebne naklonosti prema uništenoj ili oštećenoj stvari, prvi utisak je da je odgovor iz perspektive pozitivnog prava izričito negativan. Takav odgovor proizlazi iz jezičkog tumačenja jer zakonodavac ni u jednom delu Zakona o obligacionim odnosima, barem ne izričito, ne pominje mogućnost uspešnog isticanja i takvih zahteva. Isti odgovor proizlazi i iz sistematskog tumačenja, to jest analize višestruko osiguranog principa

9 Čl. 185, st. 3. Zakona o obligacionim odnosima.

10 Čl. 189, st. 2. i čl. 190. Zakona o obligacionim odnosima.

11 Čl. 199. Zakona o obligacionim odnosima.

12 Čl. 200, st. 1. Zakona o obligacionim odnosima.

13 To se naročito vidi u: Čl. 190, 191, 192, 197, 198, st. 2, 200, st. 2. Zakona o obligacionim odnosima.

ekvivalentnosti naknade nastaloj šteti o kojem smo upravo govorili. Najzad, do istog zaključka može se doći i kroz istorijsku interpretaciju[14].

Međutim, u iznetom kontekstu osobito je interesantna odredba kojom je sudu dopušteno da visinu naknade odredi prema vrednosti koju je stvar imala za oštećenog onda kada je ista oštećena ili uništena krivičnim delom s umišljajem[15]. Ova norma može se tumačiti na više različitih načina: kao norma kojom se (re)definišu uslovi odgovornosti za štetu (Karanikić-Mirić, 2011: 68), kao norma kojom se prilikom naknade materijalne štete dozvoljava utvrđivanje visine štete prema subjektivnom merilu (*pretium singulare*) (Karanikić-Mirić, 2011: 69 i dalje) ili kao materijalnopravni osnov za isticanje zahteva za naknadu afekcione vrednosti.

Teorija prava pretežnim delom prihvata treće tumačenje. Iako se može učiniti da sistematika za koju je optirao zakonodavac upućuje na drugo tumačenje, mišljenju pravne teorije priklonila se i sudska praksa[16]. Pristalica ovog stanovišta je i autor, a razloga za to je više.

Prvo, odredba čl. 189 st. 4 predstavlja deo rubruma koji se odnosi na naknadu materijalne štete: afekciona vrednost po svojoj prirodi to nije. To može da znači ili da sudovi čine logičku grešku kada ovu normu posmatraju kao *premissa maior* prilikom usvajanja zahteva za naknadu afekcione vrednosti ili da je zakonodavac pogrešno sistematizovao ovo pravilo među odredbe o naknadi materijalne štete. Mi smatramo da je drugi odgovor ispravan, jer princip integralne naknade materijalne štete omogućava formiranje sudske odluke u pogledu visine naknade na

14 U odnosu na Skicu za zakonik o obligacijama i ugovorima u ovom delu učinjeno je nekoliko izmena. Ove izmene zasebno, a naročito ukoliko ih posmatramo u međusobnoj povezanosti, sugerišu da se zakonodavac prilikom izrade Zakona o obligacionim odnosima svesno odlučio da izostavi mogućnost naknade tzv. afekcione vrednosti, te da nije reč o pravnoj praznini (Konstantinović, 1996: 86).

15 Čl. 189, st. 4. Zakona o obligacionim odnosima.

16 Presuda Apelacionog suda u Beogradu Gž-2285/2018; Presuda okružnog suda u Valjevu Gž-1119/2005; Presuda Apelacionog suda u Kragujevcu Gž-3174/2010. Preuzeto 17. 04. 2020. https://www.lexonline.paragraf.rs/WebParagraf/
Upor. Odgovori na pitanja trgovinskih sudova koji su utvrđeni na sednicama Odeljenja za privredne sporove, održanim dana 5.10, 25.10, 7.11. i 14.11.2006. godine i na Sednici Odeljenja za privredne prestupe i upravno-računske sporove, održanoj dana 20.9.2006. godine - Sudska praksa trgovinskih sudova - Bilten br. 3/2006 - str. 18; Zaključak usvojen na Savetovanju Saveznog suda, Vrhovnog vojnog suda, Vrhovnog suda Srbije, Vrhovnog suda Crna Gore i Višeg privrednog suda u Beogradu, *Sudska praksa privrednih sudova, Bilten br 2/97*, 14. Preuzeto 18. 04. 2020. https://www.lexonline. paragraf.rs/WebParagraf/

osnovu objektivnih, pretežno tržišnih kriterijuma, dakle bez uzimanja u obzir stepena krivice štetnika. Stepen krivice je pre relevantan kod odmeravanja visine naknade nematerijalne štete. Ovo iz razloga što ne bi ispravno bilo tretirati isto štetnika koji je počinio štetu namerno i onog koji je istu prouzrokovao običnom nepažnjom, budući da se osnovano može pretpostaviti da će oštećeni trpeti duševne bolove daleko manjeg intenziteta ukoliko zna štetnik nije želeo nastupanje određene štetne posledice, tim pre jer se i izvesno saosećanje štetnika koji je štetu prouzrokovao, recimo nehatno, može pretpostaviti (Medić, 2017: 652; Medić, Dedić, Zivlak-Radulović, 2017: 83-84).

Dalje, smatramo da je pomenuto tumačenje u duhu našeg građanskog prava. Ideju o tome nalazimo u odredbama koje regulišu stvarnopravnu materiju, a kojima se uvažava kao pravno relevantna kategorija koja, mada nije nazvana tim imenom, definitivno podseća po postavci na afekcionu vrednost. Naime, odredbama kojima je regulisana materija sticanja prava svojine od nevlasnika predviđeno je da savesno lice može postati vlasnik stvari, iako istu nije pribavilo od lica koje ima pravo svojine na toj stvari[17]. Apsolutno pravo svojine sticaoca biva relativizovano pravom ranijeg vlasnika da traži povraćaj stvari po prometnoj vrednosti (bez diranja u pravo sticaoca da zahteva naknadu štete od prenosioca) onda kada se nepobitno utvrdi da konkretna stvar za ranijeg vlasnika *ima poseban značaj* [naglasio autor][18]. Dakle, uvažavanje posebne naklonosti prema stvari, odnosno posebnog značaja iste, nije potpuno inokosna pojava u građanskom pravu.

Najzad, potreba prevazilaženja koncepcije koja počiva na potpunoj razdvojenosti punitivne sfere krivičnopravne i reparacione sfere građanskopravne zaštite danas je izraženija nego ranije (Nikolić, 1994: 212-213). Ona proizlazi primarno iz opšte i sasvim lako uočljive tendencije humanizacije kaznenog prava u kojem bi restitucija mogla, smatramo i trebala, imati sve veći značaj, ali pri čemu ne bi trebalo zanemariti i takvu mogućnost da će i iz građanskog prava biti izdvojene sankcije punitivnog karaktera, sve u kontekstu složenog procesa koji autor naziva konvergencijom građanskopravnih i kaznenih sankcija (Nikolić, 1994: 212-213). U red sankcija koje bi iz građanskog prava mogle biti izdvojene po svojoj punitivnoj funkciji bila bi upravo naknada afekcione vrednosti. Ona, stojimo na stanovištu, omogućava uspostavljanje savršenog balansa između potrebe da se, u slučaju

17 Čl. 31, st. 1. Zakona o osnovama svojinskopravnih odnosa *Sl. list SFRJ*, 6/80 i 36/90, *Sl. list SRJ*, 29/96 i *Sl. glasnik RS*, 115/2005.

18 Čl. 31, st. 2. Zakona o osnovama svojinskopravnih odnosa.

pričinjenja krivičnog dela, naročito umišljajnog, moraju uvažiti I „instinktivne potrebe" žrtve krivičnog dela (a ne samo društva koje je u fokusu krivično-pravne zaštite u sistemu novčane kazne), a sa druge strane i potrebe društva da se kroz punitivne građanskopravne sankcije ne formira tzv. privatna kazna (barem ne kao pravilo) (Nikolić, 1994: 212-213).

3. Posebna naklonost prema kućnim ljubimcima kao kriterijum za procenu visine naknade štete

Mada borba za prava životinja nije produkt 21. veka (Stojanović, 2016: 76), sintagma „prava životinja", ne sasvim etički precizno (Waldau, 2010: 1-2) i definitivno ne na oduševljenje država i njihovih zakonodavnih organa (Stojanović, 2016: 77), sve češće se koristi u teoriji prava. Njen odjek inicirao je čitav niz promena, pa i onih pravnih, u odnosu prema životinjama.

3.1. Pojam i pravni status životinja u pravu Republike Srbije

Pojam životinje u pravnom smislu, shodno odredbama važećeg Zakona o dobrobiti životinja[19], uži je u odnosu na biološki pojam životinje, iako je ovaj akt daleko sveobuhvatniji u odnosu na druge akte važeće akte u Republici Srbiji koji za predmet imaju zaštitu životinjskog sveta (Stojanović, 2019: 442). Ne sasvim spretno sledeći učenje Jeremy Benthama (Bentham, 1823: 144) pravni pojam životinje, izostavljajući bezmalo 95% ukupne populacije životinja[20], sveden je na one kičmenjake (*verte- brata*) koji su u stanju da osete bol, patnju, strah i stres[21]. Unutar zakonske kategorije „životinja", uvodi se posebna grupa – životinje čiji opstanak zavisi neposredno od čoveka[22]. U ovu grupu, pored onih životinja koje se drže i reproudkuju u proizvodne svrhe, oglednih životinja i divljih životinja koje se drže u zatočeništvu, spadaju i kućni ljubimci[23]. Najzad,

19 Zakon o dobrobiti životinja, *Sl. glasnik RS*, 41/2009.

20 Pre bezmalo tri decenije upućena je ozbiljna kritika takvoj tendenciji (Visković, 1992: 287).

21 Uporediti u odnosu na rešenje u § 1. nemačkog Zakona o dobrobiti životinja koji se odnosi na sve životinje (Tierschutzgesetz, (BGBl. I S. 1328). Preuzeto 22.05.2020. https://www.gesetze-im-internet.de/tierschg/TierSchG.pdf) ili čl. 2 švajcarskog Zakona o dobrobiti životinja koji uslovno obuhvata i beskičmenjake (Tierschutzgesetz, Preuzeto 22.05.2020. https://www.admin.ch/opc/de/classified-compilation/20022103/201705010000/455.pdf).

22 Čl. 5, st. 1, t. 14. Zakona o dobrobiti životinja.

23 Čl. 2, st. 1, t. 5. Zakona o dobrobiti životinja.

прилично шturom formulacijom, uz neznatno odstupanje u odnosu na rešenje u Evropskoj kovenciji o zaštiti kućnih ljubimaca donetoj u okviru Saveta Evrope[24], određeno je i to da se kućnim ljubimcima smatraju sve životinje koje se drže radi druženja[25].

Definisanjem pojma životinje, donošenjem zakonskog akta kojim se promoviše njihova dobrobit, čak ni uz postojanje opšteg konsenzusa o potrebi zaštite životinja kao vrednosti *per se*, međutim, nije razrešen glavni sukob među teoretičarima prava koji su se ovom problematikom bavili. Reč je o razmimoilaženju u pristupu za koji se, s jedne strane, zalažu pozitivisti koji promovišu ideju o zaštiti životinja kao posebno vrednog objekta prava i, na drugoj strani, jusnaturalista koji smatraju da je, ne samo biološki, već i pravno opravdano normativno izdizanje životinja na nivo subjekta prava (Visković, 1992: 288). Zapravo, sukob ne samo da nije razrešen, već se može učiniti da je uopštenim zakonskim odredbama ostavljen preveliki prostor za različite interpretacije pomenutog akta, a koji pogoduje produbljivanju postojećeg jaza.

Naime, u pravnim poretcima današnjice, a izuzetak nije ni naše pravo, može se relativno lako uočiti tendencija napuštanja koncepta „životinja = objekt prava". No, zaključak da po automatizmu kao tačna važi relacija „životinja = subjekt prava" bio bi preuranjen. Upravo u ovoj oblasti tradicionalni koncept prava koji počiva na dualitetu subjekt/objekt prava doživljava svojevrsnu metamorfozu jer pravo danas uspeva da prepozna i kategorije koje jesu i subjekti i objekti prava, ali istovremeno nisu niti jedno niti drugo u potpunosti.

I zaista, na osnovu važećeg Zakona o dobrobiti životinja, ali i odredbi Krivičnog zakonika[26], može se donekle izvesti zaključak da životinje jesu subjekti, mada u pravno ogoljenom obliku. Ovo iz razloga, najpre, što je ovaj akt, kao i niz međunarodnih izvora, donet primarno radi ustanovljenja makar i rudimentarnog subjektiviteta životinja (Ristivojević, Bugarski, 2014: 3). Zatim, zato što iz ovih odredbi proizlazi da životinje jesu titulari, mada vrlo ograničenog broja, subjektivnih prava (nezavisno od čoveka kao eventualnog vlasnika), ali ne i pravnih dužnosti budući da se

24 Art. 1. European Convention for the Protection of Pet Animals. *Strasbourg, 13. 11. 1987*. Čl. 1. st. 1. Zakona o potvrđivanju Evropske konvencije o zaštiti kućnih ljubimaca, *Sl. glasnik RS – međunarodni ugovori*, 1/2010.

25 Čl. 5, st. 1, t. 26. Zakona o dobrobiti životinja.

26 Čl. 269, 271, 272, 273, 277. Krivičnog zakonika Republike Srbije, *Sl. glasnik RS*, 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 i 35/19.

ostvarivanju istih ne mogu samostalno starati. Isti zaključak proizlazi i posredno iz niza situacija u kojima je isključena mogućnost da se životinja, ili barem određene vrste životinja, tretiraju kao objekat u punom pravnom smislu te reči (Vodinelić, 2012: 416-417; Jotanović, 2014: 117).

Međutim, iako je ovakvim odredbama data mogućnost da se „interesi životinja" ostvaruju bez diskriminacije od strane čoveka u bilo kom smislu (Jotanović, 2014: 113), stanovište da životinja predstavlja i objekat prava, to jest stvar *sui generis*, nije prevaziđeno iako je naše pravo, smatramo, uveliko na prelazu iz „druge u treću generaciju prava" (Visković, 1989: 816; Vodinelić, 2012: 411-413). Posmatrano iz perspektive obligacionog prava, recimo, onda kada životinja prouzrokuje štetu, imalac iste odgovara prema pravilima o objektivnoj odgovornosti. To znači da životinja, mada zakon ne vrši numeraciju u tom smislu, prema stanovištu sudske prakse predstavlja stvar od koje preti povećana opasnost nastanka štete[27]. Isti zaključak, mada opet posredno, proizlazi iz analize položaja životinje u okviru stvarnog prava budući da ista može biti predmet prava svojine. Konačno, takav zaključak proizlazi iz opravdane kritike važeće normative (Stojanović, 2019: 449) koja ne zabranjuje i ne omogućava kažnjavanje napuštanja životinja, kao ni bilo koje druge stvari načelno, pa čak ni onih životinja čiji opstanak, prema stavu zakonodavca, zavisi neposredno od čoveka.

3.2. Afekciona vrednost životinje i njena naknada

Zaključak da životinje i dalje figuriraju i kao objekt prava proizlazi i iz analize situacija u kojima je životinja povređena ili usmrćena. U takvim slučajevima vlasnik životinje ima pravo da zahteva naknadu štete kao da je reč o uništenju ili oštećenju bilo koje druge (pokretne) stvari. Preciznije, vlasniku kao nesporno, u skladu s objektivnim merilom (*pretium commune*), pripada pravo na naknadu stvarne štete, zatim i izmakle dobiti ukoliko je reč o životinji koja je zaista korišćena radi uvećanja

27 Ukoliko pogledamo radni tekst budućeg Građanskog zakonika Republike Srbije u okviru odeljka posvećenom odgovornosti za štetu izazvanu upotrebom opasne stvari ili obavljanjem opasne delatnosti poseban odsek posvećen je odgovornosti za štetu koju uzrokuje životinja. Iako se odsek odnosi samo na štetu koju uzrokuju domaće životinje, u članovima 323-326 jasno je iskazan stav da se životinje u smislu pravila odštetnog prava poimaju kao stvari (opasne). Proizlazi zaključak da je tendencija da životinje zadrže, makar delimično, status stvari. Preuzeto 20.05.2020. https://www.mpravde.gov.rs/files/NACRT.pdf,
Isti zaključak proizlazi i iz odredbi koje regulišu pojam stvari, konkretno pokretnih, u smislu pravila stvarnog prava (Stojanović, 2018: 328).

imovine. Štaviše, nije sporno ni to da vlasniku životinje, ukoliko uspe takav zahtev da opravda posebnim prilikama, pripada pravo na naknadu štete prama tzv. subjektivnom kriterijumu (*pretium singulare*) (Radišić, 2004: 272).

Sporno, međutim, u zavisnosti od interpretacije čl. 189 st. 4 Zakona o obligacionim odnosima Republike Srbije, može biti da li vlasnik životinje može uspešno isticati i zahtev za naknadu štete koji prevazilazi čak i zahtev opredeljen prema subjektivnom kriterijumu. Drugim rečima, sporno je da li, pored stvarne štete i izmakle dobiti, vlasnik životinje može uspešno da zahteva i naknadu tzv. afekcione vrednosti.

Osnovanost ovakvog zahteva, zapravo, sporna je na barem dva nivoa – na materijalnopravnom i na činjeničnom nivou. Na materijalnopravnom nivou može biti sporno to da li postoji pravni osnov za isticanje zahteva za naknadu afekcione vrednosti, to jest da li čl. 189. st. 4 Zakona o obligacionim odnosima Republike Srbije igra tu ulogu. No, kako smo se ovim pitanjem bavili u prethodnom delu rada i na njega dali pozitivan odgovor, naredne redove posvetićemo drugom pitanju koje se razrešava na nivou činjenica, to jest ispunjenosti uslova za isticanje ovakvog zahteva.

Naime, da bi oštećeni uspeo sa isticanjem odštetnog zahteva usmerenog na naknadu stvarne štete i izmakle dobiti neophodno je da dokaže postojanje štete, a po pravilu, dakle onda kada se ona ne pretpostavlja, i postojanje uzročne veze između radnje i štete[28]. Budući da se u našem pravu prihvata sistem integralne naknade štete[29], zatim i relativna pretpostavka krivice[30], psihički odnos počinioca štete nije neophodno dokazivati.

Međutim, kada oštećeni pretenduje na naknadu i tzv. afekcione vrednosti, njegova situacija se unekoliko menja. Da bi sud u konkretnom slučaju udovoljio tako formulisanom zahtevu oštećenog, postojanje svih ovih uslova nije dovoljno. Neophodno je, pored ostalog, da šteta bude prouzrokovana krivičnim delom učinjenim sa umišljajem[31]. U krivičnom postupku, dakle, budući da važi prezumpcija nevinosti, neophodno je

28 Dokazivanje uzročno-posledične veze nije neophodno u slučajevima kada je ista prouzrokovana upotrebom opasne stvari ili vršenjem opasne delatnosti. Ona se tada relativno pretpostavlja.
Čl. 173. Zakona o obligacionim odnosima.

29 Čl. 189, st. 1 i čl. 190. Zakona o obligacionim odnosima.

30 Čl. 154. Zakona o obligacionim odnosima.

31 Čl. 189, st. 4. Zakona o obligacionim odnosima.

dokazati da je štetnik znao ili morao znati koje su štetne posledice njegovog ponašanja, da je njima mogao da upravlja i da je baš te posledice želeo.

Najzad, da bi sa uspeo sa zahtevom za naknadu afekcione vrednosti, oštećeni bi morao da dokaže i drugi subjektivni element, to jest postojanje posebne naklonosti prema oštećenoj stvari. Budući da je stvar o čijem uništenju ili oštećenju govorimo zapravo životinja i to kućni ljubimac, ovo pitanje prema mišljenju autora postaje osobito problematično posmatrano *de lege lata*.

Naime, o posebnoj naklonosti drugim stvarima može se diskutovati. Međutim, životinje u biološkom definitivno, a kako smo videli ni u pravnom smislu, nisu puki objekti, to jest stvari. Prema definicijama koje smo preuzeli u prvom delu iz unutrašnjih i međunarodnih akata, proizlazi da su to isključivo one kategorije kičmenjaka *koje su u stanju da osete strah, bol, patnju, sledstveno i afekciju, sve to u smislu koji je vrlo blizak čovekovom doživljaju istih emocija* [naglasio autor]. S obzirom na bliskost emotivnog rasuđivanja, te sposobnost iskazivanja emocija, danas se za notornu uzima činjenica da ljudi sa srodnicima iz grupe kičmenjaka koji se u pravnom poretku smatraju životinjama vrlo lako razviju emotivnu vezu. Ova emotivna veza nipošto nije jednostrana. Naprotiv. Ipak, ako na trenutak ostavimo po strani emotivnu inteligenciju životinja, ono što je izvesno je da je čovek u stanju da razvije set osećanja prema životinji koji se, prema rečima samih vlasnika životinja, poredi čak i sa emocijama koje osećaju prema najbližim srodnicima. Dakle, sve i da zanemarimo (kvazi)subjektivitet životinja u pravnom poretku Republike Srbije, jedno je izvesno – ako je prema nekoj stvari čovek u stanju da razvije posebnu naklonost, onda je to najpre životinja.

Svakako, u potpunosti smo spremni da prihvatimo argumentaciju da sve životinje nemaju isti značaj za čoveka, te da čovek ne razvija naklonost prema njima nužno. Takav primer bile bi, recimo, radne životinje, stoka, živina, ogledne životinje i slično. No, ukoliko posmatramo kućne ljubimce, situacija je dijametralno drugačija. Kućni ljubimci se prvenstveno uzimaju i drže zbog emotivne vezanosti za njih ili potrebe za njihovim prisustvom. Naravno, ima i drugačijih situacija, na primer kada se kućni ljubimac nabavlja i drži kao „simbol statusa“ ili radi zadovoljenja nekih devijantnih potreba, no to nije pravilo, već izuzetak od suverenog pravila da se kućni ljubimci drže iz emotivnih razloga.

Uostalom, i zakonodavac ide u korak s ovim mišljenjem. Naime, kućni ljubimci su životinje koje se prema zakonskoj definiciji drže *radi*

druženja [naglasio autor]. Stoga proizlazi da i sam zakonodavac prezumpira postojanje osobitog prijateljskog odnosa, tek neznatno drugačijeg u odnosu na prijateljski odnos s drugim čovekom, a koji nije ništa drugo do složeni skup emocija. Drugim rečima, zakonodavac kao da definicijom kućnog ljubimca i odabranom formulacijom uvodi relativnu pretpostavku kvalitativne veze između dva bića.

Jezičko tumačenje ovog pravila upućuje na takav zaključak. Prihvatanje takve interpretacije dalje implicira da je oštećeni koji pretenduje na ostvarivanje prava na naknadu afekcione vrednosti zbog smrti ili telesne povrede kućnog ljubimca, za razliku od imaoca bilo koje druge stvari koja je oštećena ili uništena, oslobođen dela dokaznih tegoba u smislu nepostojanja potrebe da dokazuje svoju naklonost i njen stepen prema kućnom ljubimcu. I zaista, „druženje" o kojem zakonodavac govori, iako nipošto ne može biti interpret-tirano kao jednostrana relacija, definitivno implicira uvažavanje čovekove privrženosti životinji.

Ipak, ne treba žuriti sa zaključkom. Dozu umerenosti je neophodno pokazati i pristupiti teleološkom tumačenju. Takvim tumačenjem zasigurno doći ćemo do drugačijeg zaključka, to jest da intencija zakonodavca nije bila obrtanje pretpostavke postojanja posebne naklonosti radi ostvarivanja prava na naknadu afekcione vrednosti onda kada je kućni ljubimac povređen ili usmrćen. Mada takav zaključak ne odstupa u odnosu na opšte ciljeve, konkretni razlozi za donošenje ovakvog rešenja su potpuno drugačiji. Ipak, jezičko tumačenje, a u kontekstu sistematskog i istorijskog tumačenja, postaje vrlo interesantno kao meta poređenja *de lege ferenda*.

4. Zaključna razmatranja

Biocentrična, zatim i ekocentrična postavka sveta koje za „vrednost *per se*" uzimaju život, sledstveno i sva živa bića, odnosno prirodu, kao osnovni politički i etički principi višestruko su ugrađeni u sve socijalne relacije. Promena čovekovog odnosa prema prirodi i živom svetu za neposredni rezultat imala je sazrevanje ideje o integralnoj zaštiti ovih vrednosti, dakle kroz povezivanje znanja iz čitavog niza različitih disciplina (Nikolić, 2019: 62 i dalje).

Radi sinhronizovanog sprovođenja akcija i mera koje je ovakav oblik povezivanja iznedrio, po prirodi stvari, iste su morale biti pravno uređene. Posredni rezultat promene čovekovog odnosa prema prirodi, stoga, prepoznaje se u složenom konglomeratu normi međunarodnog i unutrašnjeg karaktera među kojima se u značajem ipak izdvajaju one kojima

se regulišu prava i obaveze čoveka, to jest društva, prema životinjama, kao i status i pravna zaštita ove kategorije dobara. Upravo ova kategorija, tačnije posebna podkategorija, njen status i zaštita građanskopravnog karaktera, neposredni su predmet interesovanja u ovom radu.

Konkretno, izdizanje životinja na nivo (kvazi)subjekata prava, posma- trano iz ugla kućnih ljubimaca kao posebne kategorije životinja, otvorilo je mogućnost za vrlo široku interpretaciju pojma „druženje" koji zakonodavac po ugledu na čitav set međunarodnih akata upotrebljava. Ovaj pojam moguće je, s jezičkog i sistematskog stanovišta, interpretirati kao pretpostavku posebne naklonosti imaoca životinje prema životinji u cilju rasterećenja dokaznih tegoba imaoca životinje onda kada je ista povređena ili usmrćena na nejbezobzirniji način – umišljajnim krivičnim delom.

Ovo tumačenje, smatramo, bi trebalo ozvaničiti u budućim zakonskim rešenjima. Više je načina da se to uradi. Jedan od načina je da se ova pretpostavka uvede u Zakon o dobrobiti životinja kao *lex specialis* u odnosu na opšta zakonska pravila o naknadi štete. Drugi način je da se ova pretpostavka uvede u Zakon o obligacionim odnosima kao deo člana kojim bi naknada afekcione vrednosti bila izričito regulisana. Najzad, treća opcija, inače opcija za koju pledira autor, je da se pomenuta pretpostavka uvede u opšta pravila o prouzrokovanju i naknadi štete uz eliminisanje potrebe vlasnika životinje da dokazuje da je šteta prouzrokovana krivičnim delom s umišljajem. Ovo iz razloga što autor iskreno veruje u to da ubistvo ili povreda kućnog ljubimca stvara osnov za naknadu afekcione vrednosti po sebi, a da je stepen krivice koji bi dokazivao štetnik eventualno osnov za odmeravanje visine naknade. Činjenica je, naime, da patnja oštećenog može biti veća ukoliko je štetnik postupao naročito bezobzirno, ali nije tačno da takav oblik patnje i nematerijalne štete ne postoji ukoliko je šteta prouzrokovana, recimo, nehatno.

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LEGAL STATUS OF PETS AND PRETIUM AFFECTIONIS

Summary

In domestic legal theory, as well as in judicial practice of the Republic of Serbia, there is a widely accepted standpoint that animals are property items, i.e. living movable assets in property law, and property items which increase the risk of damage in tort law. However, both views have been seriously challenged by the adoption of the Animal Welfare Act, and the subsequent amendments introduced into the Serbian criminal legislation. These norms have ultimately contributed to creating a solid base for reconsidering the legal status of animals and treating them as highly distinctive subjects of law.

The current legal status of animals, including pets as a special legal category of animals which is the focal point of this paper, is debatable. Yet, the mere hint that there is a possibility to finally overcome the traditional "animal = object" concept creates an obligation to review all other civil law provisions and principles de lege lata, and especially de lege ferenda. In particular, using both analytical and normative method, the author analyzes the relevant provision of the Civil Obligations Act and the Draft Civil Code of Republic of Serbia, and examines the likelihood of awarding compensation (damages) for pretium affectionis (special affection and attachment) in case of death or injury caused to a pet.

Keywords: *damage, pretium affectionis, pets, animals, animal rights.*

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pregledni naučni rad
10.5937/zrpfn0-29235

UDK: 347.124(497.11)
Rad primljen: 03.11.2020.
Rad prihvaćen: 04.01.2021.

ZABRANA ZLOUPOTREBE PRAVA U NACRTU GRAĐANSKOG ZAKONIKA REPUBLIKE SRBIJE

Apstrakt: *U ovom radu se opisuje, objašnjava i kritički ocenjuje predloženo rešenje ustanove zabrane zloupotrebe prava iz člana 20 Nacrta Građanskog zakonika Republike Srbije. Najpre se iznose naznake pravnodogmatskog razvoja i analiziraju savremene teorijske dileme o prirodi ove ustanove, a zatim se upoređuju relevantne domaće i uporednopravne pozitivne i predložene odredbe. Na kraju se kritički ocenjuje predloženo rešenje, polazeći od kriterijuma utemeljenosti u tradiciji građanskopravne nauke i prakse, primerenosti rešenja savremenom razvoju građanskopravne teorije, pravnodogmatske sadržajnosti, informativnosti, te pravnosistemske i logičke doslednosti.*

Istraživanje rezultira saznanjima o opredeljenju priređivača da novo rešenje utemelji na pozitivnopravnoj odredbi, uz poboljšanja u vidu isticanja pojma škođenja i subjektivnih manifestacija pojma. Ovakvo se rešenje kritikuje zbog propuštanja prilika da se pravnodogmatski izraze sve one manifestacije pojma zloupotrebe koje je prepoznala sudska praksa i koje je prihvatila nauka građanskog prava, i da se ova ustanova izrazi u skladu sa modernom teorijom unutrašnjih ograničenja subjektivnih prava.

Polazeći od nalaza savremene građanskopravne dogmatike i teorije, predlaže se drukčije rešenje koje jasnije izražava prirodu ove ustanove, te pouzdanije vodi sudsku praksu u stvaralačkoj primeni prava i artikulisanju posledica zloupotrebe prava.

Ključne reči: *zloupotreba prava, zabrana, subjektivno i objektivno shvatanje, unutrašnja i spoljna teorija.*

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1. Uvod

U predstojećem velikom spremanju u građanskom pravu Srbije, koje je zasnovano na predlogu kodifikacije građanskog prava, nalaze se određene novine u definisanju pojma i pravnih posledica zloupotrebe prava. Preciznije, u članu 20 Nacrta Građanskog zakonika Republike Srbije: „Zabranjeno je vršenje prava u nameri da se drugome škodi, kao i svako drugo njegovo vršenje koje je protivno svrsi radi koje je ustanovljeno ili priznato“ (Vlada RS, 2015: 78).

Kako se radi o materiji uvodnog dela građanskog prava, jasno je da navedena odredba, upotrebom širokih i nedovoljno određenih pojmova, omogućava široku sudijsku slobodu u tumačenju i primeni građanskopravnih normi. Ona to čini na način koji nije uobičajen u materiji građanskog prava, jer sadrži eksplicitno određenje o zabrani u pravnom području čija se tehnika regulisanja ne zasniva na naredbama i zabranama, nego na priznavanju i dodeli subjektivnih prava (Vodinelić, 2012: 192–193).Na prvi pogled, radi se o paradoksu: zakonodavac istovremeno priznaje vršenje subjektivnih prava i to isto zabranjuje, ako se na taj način škodi drugima. U svakom slučaju, sudija je taj koji je ovlašćen da manifestacije škodljivog vršenja prava prepozna i kvalifikuje ih nedopuštenim.

U ovom radu se analizira pravnodogmatski, teorijski i pozitivnopravni pojam zloupotrebe prava i njene zabrane, kako bi se objasnila i kritički ocenila teorijska savremenost i sveobuhvatnost, pravnosistemska usklađenost i praktična primerenost predloženog rešenja. Sastavljen je iz četiri dela. Najpre je ukratko iznesen put pravnodogmatskog razvoja ustanove, a zatim su objašnjene savremene teorijske dileme o njenoj prirodi. Zatim su objašnjena i kritički ocenjena postojeća i predložena rešenja. Na kraju je predloženo i poboljšanje predloga pozitivnopravne definicije zloupotrebe prava u skladu sa nalazima savremene građanskopravne teorije.

2. Razvoj ustanove zloupotrebe prava u građanskopravnoj dogmatici

Pojava zloupotrebe prava je starija od njenog uvođenja u svet građansko-pravne dogmatike i pozitivnog prava, jer se preteče ove građanskopravne ustanove nalaze već u kazuistici rimskog prava i njegovoj srednjovekovnoj recepciji. U Digestama se navodi da ne treba biti popustljiv na pakost koja se sastoji u tome da držalac prilikom vraćanja ostruže ukrase sa stvari; da vlasnik ne sme kopati na svom zemljištu samo da bi drugoga lišio vode; da poverilac ne treba da zahteva od legatara nešto što bi po osnovu legata morao da mu vrati; da vlasnik suždrebne kobile koja

je pasla na tuđem zemljištu može da traži naknadu štete od vlasnika zemljišta koji je kobilu oterao grubo je udarajući, tako da je izgubila plod; da zakupodavac ne duguje ugovornu kaznu zakupoprimcu usled raskida ugovora do koga je došlo zbog neplaćanja zakupa; da imalac službenosti može da bude obavezan da naknadi štetu ako se nije obazirao na posledice koje vlasniku poslužnog dobra uzrokuje način vršenja prava službenosti; da otac ne može osporavati testament ćerke pozivajući se da nije bila pravno emancipovana ako je nije tako tretirao za života; itd. U srednjem veku se elementi ove ustanove raspoznaju u susedskom pravu, i u sledećim zabranama: preganjanja sa drugim, pozivanja na sopstveno nemoralno ponašanje, kontradiktornog ponašanja i beskorisnog vršenja prava (Vodinelić, 1997: 48–55).

U literaturi se počeci teorije o zloupotrebi prava nalaze u praksi francuskih sudova krajem XIX veka da vršenje subjektivnih građanskih prava dovode u vezu sa ciljem i duhom prava, te u nemačkom zakonodavstvu inspirisanom prihvatanjem prigovora prevare (*exceptio doli generalis*). Zloupotreba prava se uobličuje kao pozitivnopravna ustanova u prvim građanskim kodifikacijama. U pruskom *Landrecht*-u (1794) određuje se da "niko ne sme zloupotrebiti svojinu radi povrede ili oštećenja drugoga" i "vršenja svojine koje po svojoj prirodi može imati za cilj samo povredu drugoga." Nemački Građanski zakonik (1895) uvodi načelo savesnosti i poštenja i s tim u vezi određuje u članu 226 da je "nedopušteno vršenje prava koje može imati jedino za cilj da se drugome nanese šteta." Novela austrijskog Građanskog zakonika (1916) takođe zabranjuje šikanozno vršenje prava, tj. "protivno dobrim običajima i u očiglednoj nameri da se drugom nanese šteta." Švajcarski građanski zakonik (1907) određuje da "očigledna zloupotreba prava ne uživa pravnu zaštitu." Srpski Građanski zakonik (1848) u članovima 32 i 806 određuje odgovornost imaoca prava koji je vršenjem tog prava prekoračio njegove granice, kao i pravilo o međusobnom ograničavanju vršenja suprotstavljenih prava, a kada to nije izvodivo, da manje vredno pravo ne sme da se vrši na štetu vrednijeg. Uzorne odredbe u tom smislu se nalaze u članu 1000 Opšteg imovinskog zakonika za Knjaževinu Crnu Goru (1888) Valtazara Bogišića: "Ni svojim se pravom služiti nemoš`tek drugom na štetu il dosadu." I u članu 1014: "Ni u pravu svome ne tjeraj mak na konac" (Vodinelić, 1997: 163–164; Rašović, 2006: 145–148; Perović, Stojanović, 1980: 132–134).

U navedenim citatima prvih pozitivnopravnih uobličavanja ove ustanove je očigledan uticaj tada dominantnih škola ciljne i interesne jurisprudencije, kojima se pozitivistički rigidne odredbe građanskih kodifikacija ublažavaju shodno uočenoj potrebi da se u

вршењу субјективних права води рачуна о правима других, чак и онда када то законодавац није препознао. Контрадикторност ове установе је можда најбоље изразио велики српске правне мисли из прве половине XX века Живојин Перић, када је 1939. године окарактерисао теорију злоупотребе права нерешивим правним проблемом. "Уношење у један систем (индивидуалистичко-буржоаски) идеја из једног другог, сасвим, антиподно, супротног, друштвеног уређења (уређења колективистичкога), у а свршу да се ублаже штетне последице првога уређења… једна врста замке које би једно такво објективно приватно право наметало власницима приватних права, чије вршење би, на тај начин, представљало један ризик и било скопчано за, њих штетним изненађењима" (Перић, 2008: 48). За овај проблем он предлаже синтетички начин нормирања, чиме се судији даје дискрециона моћ за примену законодавчеве волје: „Законодавац, дакле, хоће да, овде, судија има, у извесној мери, једну власт сличну његовој, законодавчевој, власти, он га ту, прави делимично законодавцем... судија је ту један пуномоћник законодавчев са извесном слободом кретања" (Перић, 1921: 20–21). Другим речима, „судија није аутомат за супсумцију под појмове, али није ни потпуно слободан: мисаоном операцијом треба да реконструише избор интереса који је начинио законодавац и да у примени спроведе тај избор (мислећа послушност)" (Водинелић, 1991: 139).

Савремена интерпретација процеса позитивизације установе злоупотребе права је виђена као продор метаправних и јусналистичких појмова у позитивно грађанско право, које је наročито дошло до изражаја у другој половини XX века. Установе грађанског права све више прожимају социјални и етички садржаји, а теорије забране злоупотребе права и теорије субјективних права као социјалних функција су две доминантне теорије о вршењу субјективних права (Станковић, 1996: 221–224). Она представља непisано опште правно начело, довољно изражено као опште правило за конкретизацију од стране законодавца, судске праксе и науке о праву (Водинелић, 1997: 107–110).

Из наведеног је видљиво да правнодогматски развој злоупотребе права није резултирао униформним приступом овој установи. У наставку ће бити показано да ове разлике нису превладане ни у савременој грађанскоправној науци.

3. Priroda zloupotrebe subjektivnih građanskih prava: teorijske dileme

У prethodnom delu je pojašnjeno kako je zloupotreba prava u svom pohodu od rimskog prava do danas evoluirala od kazuističke reakcije na socijalno

i етички неоправдане, а naizgled dopuštene načine vršenja subjektivnih prava, preko etabliranja u opšte pravno načelo pa sve do pravne ustanove uobličene u tradiciji ciljne i interesne jurisprudencije. Dakle, teorija zloupotrebe prava nije donela samo jednu novu građanskopravnu ustanovu, nego je kao opšte načelo unela mnoge novine u druge građanskopravne ustanove i osnažila diskreciona ovlašćenja građanskih sudija.

Razvojem građanskopravne dogmatike, nedovoljno određeni pojam zloupotrebe prava se širi definisanjem njegovih novih manifestacija koje je prepoznala sudska praksa. Pored toga, otvaraju se dva teorijska raskršća, dve dileme o prirodi ove ustanove. Prva je ona o značaju subjektivnog odnosa prema ponašanju koje se može okvalifikovati kao zloupotreba prava, a druga o pravnoj prirodi tog ponašanja. Prva se dilema izražava kroz razlikovanje subjektivnog i objektivnog pristupa ovoj ustanovi. Starije, subjektivno i uže poimanje zloupotrebe prava podrazumeva vršenje prava u nameri da se drugome naškodi (tzv. šikana), dok su savremenija shvatanja objektivne i šire prirode. Prema savremenim shvatanjima, namera škođenja nije ključno obeležje ove ustanove, nego je to svako vršenje prava protivno njegovom cilju. Drugim rečima, subjektivno shvatanje zloupotrebe prava insistira na postojanju namere da se škodi drugome, dok objektivno ne počiva na krivici i zadovoljava se utvrđenjem da određeno ponašanje nije u skladu sa ciljem građanske norme na koju se to ponašanje poziva, odnosno sa načelom savesnosti i poštenja. Druga dilema je ona o samoj prirodi ustanove i nastaje razlikovanjem teorija unutrašnjih i spoljnih ograničenja subjektivnih prava. Prema spoljnoj teoriji, subjektivna prava se ograničavaju spolja, pa ograničenja ne vrše nikakav uticaj na samu sadržinu subjektivnog prava: radnja zloupotrebe prava se kreće u granicama vršenja prava a zabranjena je zato što su njome povređene druge norme. Prema unutrašnjoj teoriji, ograničenja subjektivnih prava su sastavni deo subjektivnih prava: sadržina svakog prava je ograničena smislom prava, normom ili opštim pravnim načelima kao što su dobri običaji, savesnost i poštenje, javni poredak, i dr. (Pe- rović, Stojanović, 1980: 134–136 – komentar Stojanovića; Vodinelić, 1997: 195–201). U nastavku će biti izloženi različiti, često i suprotstavljeni stavovi po ovim pitanjima vodećih domaćih i regionalnih autora.

Rašović smatra zloupotrebu prava opštim načelom pravnog poretka i ”nedopuštenim vršenjem subjektivnog prava, najčešće škodljivo drugome,” a kao njene oblike on navodi protivciljno vršenje prava, vršenje prava sa namerom da se drugome nanese šteta, (šikana), vršenje prava bez opravdanog interesa (beskorisno vršenje prava), nesrazmerno vršenje prava (radi ostvarenja nesrazmerno manje vrednog interesa u

odnosu na interes trećeg koji se vršenjem prava vređa), neprimereno vršenje prava, protivrečno ponašanje imaoca prava i vršenje prava protivno moralu ili pravičnosti. Prema njemu, subjektivno pravo može zloupotrebiti samo imalac subjektivnog prava (Rašović, 2006: 145–148). Time se on opredeljuje za objektivni pristup, definisanje ove ustanove egzemplifikativnom enumeracijom njenih manifestacija i za teoriju spoljnih ograničenja subjektivnih prava.

I Vizner smatra da se radi o zabrani vršenja nekog građanskog prava, odnosno o "sukobu subjektivnih prava… do kojeg je došlo zbog toga što je jedno subjektivno pravo, doduše, realizirano unutar odgovarajućih pravnih granica, ali u suprotnosti svog glavnog cilja… čime se onemogućilo ostvarenje drugog postojećeg subjektivnog prava…" (Vizner, 1978: 80–81).

Slično njemu, Loza vidi koren ustanove u pravilu rimskog prava da se vršenjem prava ne sme nanositi šteta (*qui suo iure utitur neminem ledit*) i opredeljuje se za objektivni pristup, ističući da nije jednostavno utvrditi vršenje prava protivno njegovom cilju (Loza, 2000, 12).

Stojanović smatra da se kod ovog instituta radi o "institucionalno pogrešnom vršenju… prava koje ne uživa pravnu zaštitu." Pogrešnost se sastoji u vršenju prava "suprotno duhu institucije, njenom cilju, finalitetu", kao i grubom zanemarivanju interesa drugih šikanoznim, egoističnim, protivurečnim ponašanjem, kao i nasrazmernim precenjivanjem svojih interesa. Prema njemu, zloupotreba prava je "flagrantna povreda načela savesnosti i poštenja, koja je formulisanau formi jedne zabrane." Time se on očigledno opredeljuje za objektivni pristup ovoj ustanovi, jer ne insistira na krivici za ponašanje kojim se zloupotreba vrši. Sa druge strane, on se ne opredeljuje jasno ni za spoljnu ni za unutrašnju teoriju, navodeći da obe imaju određene prednosti koje se ne moraju isključiti, tako da je stvar zakonodavca da oceni hoće li "odmah u sadržini prava da odredi elemente ograničenja, ili će, vodeći računa o relativnosti sadržaja prava, to učiniti kasnije" (Perović, Stojanović, 1980: 134–136, 146 – komentar Stojanovića).

Vodinelić daje najširu i najubedljiviju teorijsku eksplikaciju ove ustanove. Prema njemu, dilema između subjektivnih i objektivnih shvatanja zloupotrebe prava predstavlja pogrešno postavljen problemski okvir, jer se jednom definicijom koja je neutralna (ne ističe ni subjektivne ni objektivne elemente) i sveobuhvatna (sadrži sve identifikovane vidove zloupotrebe) najjasnije izražava priroda ove ustanove. Za razliku od autora koji smatraju da jedino imalac subjektivnog prava

може злопотребити право, Vodinelić смatra da ovaj institut upravo isključuje imanje subjektivnog građanskog prava. On zloupotrebu prava naziva prividom, a sam izraz pogrešnim, takozvanim, jer izraz „dopušteno vršenje prava“ predstavlja pleonazam, a „nedopušteno vršenje prava“ *contradictio in adjecto* (Vodinelić, 1997: 215–225). On predlaže enumerativnu egzemplifikativnu definiciju: “Zloupotreba prava je ono ponašanje nalik vršenju prava a škodljivo drugom, koje je između ostalog, šikanozno, beskorisno, nesrazmerno, protivciljno, neprimereno, protivrečno, nemoralno ili nepravično.” Za razliku od ostalih autora, on se rezolutno opredeljuje za teoriju unutrašnjih ograničenja subjektivnih prava. Spoljnu teoriju smatra neodrživom, polazeći od opšteprihvaćenog teorijskog pojma subjektivnog građanskog prava kao pravno priznate ili date mogućnosti radi ostvarenja nekog interesa. „Ako neka mogućnost nije priznata, tada nema ni subjektivnog prava; ako na nešto nismo ovlašćeni, nego nam je to zabranjeno, tad nema ni subjektivnog prava, ni njegovog vršenja, pa ni zabrane zloupotrebe subjektivnog prava... Pošto pravni poredak nikad u isto vreme ne ovlašćuje na određeno ponašanje i zabranjuje to isto ponašanje, ne radi se o zabrani vršenja prava negoo zabrani vršenja radnje, zabrani određenog ponašanja... Ne zabranjuje se vršenje prava, nego vršenje radnje. Norme o zabrani zloupotrebe prava baš i imaju zadatak ... da obaveste o tome kad neko ponašanje, koje je u pravilu dopušteno, ipak nije dopušteno“ (Vodinelić, 2012: 298–310).

Na tragu Vodinelićevog shvatanja o zloupotrebi kao prividu prava je Krneta. Proučavajući pojam gubljenja prava (*Verwirkung*) kao posebnog slučaja nedopuštenog vršenja prava u nemačkoj teoriji, ona zaključuje da ponašanje u protivnosti sa ranijim ponašanjem imaoca određenog subjektivnog prava (*venire contra factum proprium*) koje škodi savesnom licu dovodi do prestanka tog prava zbog kršenja načela savesnosti i poštenja (Krneta, 2007: 14).

Kada se sumiraju različita teorijska opredeljenja o prirodi ove ustanove, jasno se ukazuje ishodište njene evolucije u vidu sredstva ograničavanja subjektivnih građanskih prava, prepoznavanja i definisanja njenih novih manifestacija. To je ishodište umnogome proširilo i do neprepoznatljivosti izmenilo prvobitno jezgro pojma koje se sastojalo od namernog ili pak protivciljnog škođenja drugome. U nastavku će biti govora o tome kako je navedena ustanova formulisana u *lege lata* i *lege ferenda.*

4. Zabrana zloupotrebe prava u pozitivnom građanskom pravu

Najvažnije odredbe u kojima je pozitivisana ustanova zabrane zloupotrebe prava u srpskom građanskom pravu su član 13 Zakona o obligacionim odnosima (*Sl. list SFRJ,* 29/78, 39/85, 45/89, 57/89, *Sl. list SRJ*, 31/93 i *Sl. list SCG*, 1/03): "Zabranjeno je vršenje prava iz obligacionih odnosa protivno cilju zbog koga je ono zakonom ustanovljeno ili priznato."; i član 4, stav 2 Zakona o osnovama svojinsko-pravnih odnosa (*Sl. list SFRJ*,6/80, 36/90, *Sl. list SRJ*, 29/96 i *Sl. glasnik RS*, 115/2005): "Zabranjeno je vršenje prava svojine protivno cilju zbog koga je zakonom ustanovljeno ili priznato."

Ova su pozitivnopravna rešenja očigledno na tragu objektivnog pristupa ovoj ustanovi, jer zabranjuju svako protivciljno, a ne samo namerno vršenje sopstvenog prava kojim se škodi drugome. Drugo, izrazi "zabranjeno je vršenje prava…" ukazuju na davanje prednosti teoriji spoljašnjeg ograničenja subjektivnih prava. Treće, odredbe su lapidarnog karaktera, jer ističu samo jednu manifestaciju zloupotrebe u vidu protivciljnog vršenja prava. Ovakvo sadržinsko siromaštvo, objektivni i spoljašnji pristup nisu izuzetak uporednopravno, jer se to može zaključiti i za analogne odredbe mađarskog Građanskog zakonika (1959), kao i novelu japanskog (1947) (Vodinelić, 1997: 163–164). Sa druge strane, postoje i drugačiji pristupi, a kao dobar primer može poslužiti član 7 španskog Građanskog zakonika (1889, novela iz 1974. godine): "Prava se moraju vršiti u skladu sa zahtevima dobre vere. Pravo ne podržava zloupotrebu prava ili njegovo antisocijalno vršenje. Bilo koje činjenje ili nečinjenje koje, kao rezultat namere počinioca, ima svrhu ili okolnosti u kojima je preduzeto očigledno prevazilaze normalna ograničenja za vršenje prava, sa štetom trećoj strani, vodiće do odgovarajuće kompenzacije ili do pravosudnih ili upravnih mera koje sprečavaju nastavak zloupotrebe" (Spanish Civil Code, 2009: 3).

Međutim, primeri iz sudske prakse Srbije i bližeg okruženja ukazuju da su sudovi pozivanjem na šture odredbe člana 13 Zakona o obligacionim odnosima i člana 4 Zakona o osnovama svojinsko-pravnih odnosa proširili pojam zloupotrebe i na druge manifestacije i novija shvatanja ustanove o kojima je bilo govora u prethodnom delu. Tako npr. "Stanar je obvezan omogućiti davatelju stana da u stan dovodi potencijalne kupce stana radi razgledavanja, pri čemu je davalac stana ograničen jedino zabranom šikanoznog postupanja"[1] (Crnić, 2001: 8); Vlasnik zemljišta zasađenog drvećem koje pravi hlad usevu na susednom poljoprivrednom

1 Vrhovni sud Hrvatske, Rev. 2357/88

zemljištu može da odgovara za manji prinos usled nedostatka sunčeve svetlosti jedino „ako je sađenje imalo za cilj da susedu nanese štetu“[2]; Vlasnik obradivog zemljišta na kome se gaje vinogradi i druge ratarske kulture njegovim pretvaranjem u šumsko zemljište koje ugrožava susedno zemljište i kulture na njime čini zloupotrebu prava[3]; suvlasnici zgrade ne mogu tražiti uspostavu ranijeg građevinskog stanja od kupca idealnog dela zgrade koji je izvršio adaptacije kojima je povećao njenu vrednost „ako za to ne postoji njihov opravdani interes“[4]; postoji zloupotreba prava kada vlasnik usmerava oticanje vode sa svog zemljišta tako da se ona sleva na zemljište suseda i nanosi štetu, jer se ono vrši u suprotnosti sa ciljem „makar i ne postojala namera da se time drugome nanese šteta.“[5] (Vuković, 1999: 14, 15).

Dakle, sudska praksa se stvaralačkim tumačenjem i primenom prava uspešno nosila sa sadržinskim siromaštvom i teorijskom anahronošću pozitivnopravnih odredbi. Kako se očekuje veliko spremanje u srpskom građanskom pravu, u nastavku će biti analizirano predloženo pozitivno- pravno rešenje i ocenjena njegova teorijska i praktična opravdanost.

5. Zabrana zloupotrebe prava *de lege ferenda*

Da ponovimo, u Nacrtu Građanskog zakonika Republike Srbije, odredba o zloupotrebi prava našla je svoje mesto u Opštem delu, Uvodnim odredbama, u članu 20 (rubrum Zloupotreba prava): „Zabranjeno je vršenje prava u nameri da se drugome škodi, kao i svako drugo njegovo vršenje koje je protivno svrsi radi koje je ustanovljeno ili priznato.“. Pozivanje na zabranu zloupotrebe prava se ponavlja u još nekim odredbama, a posebno u članu 1699 (rubrum Zloupotreba prava svojine), 2219 (rubrum Roditeljsko pravo).

Priređivač se, ograničavanjem na prve uočene manifestacije zloupotrebe u vidu „namere škođenja“ i „svrhe“, očigledno opredelio da obuhvati subjektivna i objektivna shvatanja ove ustanove, dok je upotrebom izraza „zabranjeno je...“ ostao na tragu tradicionalnih pozitivnopravnih rešenja inspirisanih spoljašnjim teorijama ograničavanja subjektivnih prava. U prilog primerenosti ovog rešenja sadašnjem trenutku razvoja građanskopravne nauke moglo bi se reći da se ono u priličnoj meri podudara

2 Vrhovni sud BiH, Gzz. 87/68

3 Okružni sud u Leskovcu, Gž.1182/78

4 Vrhovni sud Jugoslavije, Rev. 128/68

5 Vrhovni sud Hrvatske, Rev. 149/66

sa sadašnjim pozitivnopravnom odredbom i da upotpunjuje definiciju ustanove navođenjem škođenja, kao njenog nespornog konstitutivnog elementa. Ovo je važno poboljšanje definicije, iako se povezivanjemškođenja sa pojmom namere ograničava samo na šikanozne manifestacije zloupotrebe prava. Naime, škođenje, kao širi pojam od prouzrokovanja štete, obuhvata svaku nastalu ili pak samo moguću nepovoljnu posledicu koja se vršenjem radnje zloupotrebe prouzrokuje drugom licu (Vodinelić, 1997: 11). Takođe, nedostatak pozitivisanja već solidno teorijski elaboriranih manifestacija zloupotrebe ni do sada nije bio prepreka širokoj sudijskoj diskreciji, pogotovo što predloženi tekst obiluje socijalnim i etičkim pojmovima koji tu diskreciju podržavaju snažnije nego ikada pre: u članu 2. je kao težnja Zakonika istaknuto ostvarenje vrline pravde, u članu 6 moral je postavljen kao granica uređenja subjektivnih građanskih prava.

Sa druge strane, gore izneseni Vodinelićevi argumenti ukazuju da predloženo pozitivnopravno rešenje treba da bude poboljšano. Pre svega, pojam zloupotrebe bi trebalo da bude preciznije definisan, jer od toga ne može da bude štete, nego samo koristi. Pojam škođenja drugome, kojije u predloženoj definiciji ostao povezan sa namerom, treba da bude istaknut kao konstitutivni element celokupnog pojma i svih njegovih manifestacija, zato što ne može biti govora o nedopuštenom vršenju subjektivnih ovlašćenja kojim se ne uzrokuju nepovoljne posledice po druge. Dalje, jusnaturalistička pozivanja na pravdu i moral su korisna, ali je nužno da se pozitivnopravno konkretizuju u interesu pravne sigurnosti: „Brojne jusnaturalističke vrednosti i maksime su formalna pravila, ispražnjena od sadržine, te je neophodno postaviti kriterijume, kriterijume, i opet kriterijume, ne bi li se u pravničkom poslu moglo nositi sa opasnim metodološkim insuficijentnostima jusnaturalizma, s njegovim neodređenostima u pogledu nevezanosti ne-pravom, i s rizicima instrumentalizovanja u političke svrhe. Jusnaturalistička opcija valja da se opremi odgovarajućim učenjima o svemu tome da bi uopšte bila funkcionalno sposobna“ (Vodinelić, 1996: 82). Zato i manifestacije zloupotrebe prava koje je prepoznala sudska praksa i etablirala građanskopravna nauka zaslužuju da budu pozitivisane.[6] Na taj način bi odredba o zloupotrebi ne samo ukazivala na tradicionalna značenja ustanove, nego bi takođe pouzdano vodila građanske sudije u prepoznavanju

6 Tako je npr. u predlogu kodifikacije privatnog prava Evropske unije u načelu 25 eksplicitno zabranjena manifestacija zloupotrebe prava u vidu nedoslednog (kontradiktornog) ponašanja (*venire contra factum proprium*). Kao razlog se navodi potreba zaštite razumnog pouzdanja i očekivanja strana u građanskopravnim odnosima. (Principles, Definitions and Model Rules of European Private Law, 2009: 77)

novih pravno nedopuštenih načina vršenja subjektivnih ovlašćenja. Pri tome je nužno da ovaj pojam bude definisan kao otvoren, čime bi se jasno ostavila mogućnost sudskoj praksi i pravnoj nauci da stvaralačkom primenom prava identifikuje nove, sasvim izvesne, manifestacije ovog višeznačnog, širokog i nepotpuno određenog pojma.

Pored toga, prednosti unutrašnje teorije ograničavanja subjektivnih prava potvrđuju svoju vrednost. Za razliku od *lege lata*, Nacrt Građanskog zakonika u članu 81 definiše pojam subjektivnog građanskog prava. On je definisan u skladu sa nalazima građanskoprave nauke kao „ovlašćenje ili skup ovlašćenja koja pravni poredak priznaje određenom licu da od drugog ili drugih lica u pravnom odnosu zahteva određeno ponašanje sudskim putem" (alternativno, kao: "ovlašćenje ili skup ovlašćenja koja pravni poredak priznaje određenom licu da od drugih lica zahteva određeno ponašanje, uz mogućnost prinudnog ostvarenja"). Sistemskim tumačenjem ove odredbe sa odredbom člana 20 o zloupotrebi prava dolazi do izražaja njena logička nedoslednost: *contradictio in adjecto* je da pravni poredak istovremeno daje ovlašćenje i zabranjuje njegovo vršenje, a pleonazam je dopuštanje nečega za šta se ionako daje ovlašćenje. Zato je logički ispravnije pozitivisati stav da pravni poredak ne priznaje ovlašćenje na određenu radnju nego da to ovlašćenje zabranjuje.U tom smislu, pravnom kvalifikacijom zloupotrebe prava „oduzima se pravnost pojedinom ovlašćenju koje izgleda *in abstracto* podesno da bude sadržina subjektivnog prava u nekom pravnom odnosu, čineći ga *in concreto* zabranjenim ili nedopuštenim (neopravdanim)" (Rašević, 2014: 77).

U tom smislu, rešenje koje je predloženo u članu 14 (rubrum Zabrana zloupotrebe) radnog teksta Zakonika o svojini i drugim stvarnim pravima je modernije, informativnije i logički korektnije, pa je stoga ovde preporučeno u celosti:

„(1) Imalac stvarnog prava ne vrši pravo već zloupotrebu, ako škodi drugome:

1. samo ili prvenstveno da bi mu naškodio,
2. bez opravdanog interesa, radi beznačajnog interesa ilibeskorisno,
3. nesrazmerno više nego što sebi koristi,
4. ili mu škodi više nego što bi da postupa na drugi način kojimtakođe ostvaruje interes,
5. izigravši njegovo opravdano poverenje, koje je stvorio, da nećevršiti svoje ... pravo,

6. postupajući protivno cilju tog ... prava,
7. postupajući protivno društvenom moralu,
8. postupajući protivno pravičnosti, i
9. i u drugim slučajevima zloupotrebe.

(2) Ko čini zloupotrebu u smislu odredbi stava 1 ovog člana, ne uživa zaštitu, odnosno odgovara za posledice takvog postupanja." (Zakonik o svojini i drugim stvarnim pravima, 2012: 4).

Praktična prednost ovakve odredbe se čini očiglednom u budućim građanskim sporovima. Smisao pravnozaštitnog zahteva, kao i parnične odbrane, nije u utvrđivanju da li određeni građanskopravni subjekt svoje pravo vrši na način koji mu dopušta pravni poredak ili ne. Smisao je u utvrđivanju da li u određenoj parničnoj stvari takvo subjektivno pravo uopšte postoji, kao i u određivanju konkretnih posledica (ne)postojanja tog subjektivnog prava, bilo da se radi o preventivnoj, bilo reaktivnoj zaštiti.

Na kraju, još jedan pravno-politički argument ide u prilog pozitivisanja rešenja koje bi bilo na tragu unutrašnje teorije ograničenja subjektivnih prava. Taj argument polazi od javnopravnog okvira važenja i tumačenja građanskog prava. Naime, u teoriji i praksi ljudskih prava, koja se neposredno primenjuju na osnovu člana 18, stav 3 Ustava Srbije (*Sl. glasnik RS,* 98/06) uobičajeno je gledište o zloupotrebi ljudskih prava kao unutrašnjem ograničenju ljudskih prava zarad javnog interesa ili pak ostvarivanja prava drugih. Tako npr. član 17 (rubrum Zabrana zloupotrebe prava) Evropske konvencije o ljudskim pravima i osnovnim slobodama (*Službeni list SCG-Međunarodni ugovori,* 9/03, 5/05, 7/05 *i Sl. glasnik RS-Međunarodni ugovori,* 12/10, 10/15) određuje da: "Ništa u ovoj konvenciji ne može se tumačiti tako da podrazumijeva pravo bilo koje države, grupe ili lica da se upuste u neku djelatnost ili izvrše neki čin koji je usmjeren na poništavanje bilo kog od navedenih prava i sloboda ili na njihovo ograničavanje u većoj meri od one koja je predviđena Konvencijom." Ova odredba ukazuje da subjektivna ljudska prava imaju svoj opseg definisan njihovim ograničenjima iz te konvencije (Vodinelić, 2006: 359), tako da se može zaključiti da se ovde radi o unutrašnjim ograničenjima. Pošto Građanski zakonik u članu 3 „proklamuje i na odgovarajući način predviđa istu zakonsku zaštitu celovitosti ljudskih prava u svim oblastima koje čine predmet njegovog regulisanja," on treba da obezbedi koherentnost, potpunost i doslednost normi koje uređuju granice ostvarivanja ljudskih i građanskih prava. To se najbolje može postići pozitivisanjem analognih

javnopravnih i privatnopravnih pozitivnopravnih rešenja u kojima je primenjena unutrašnja teorija ograničavanja subjektivnih prava.

6. Zaključak

Ustanova zloupotrebe prava u Nacrtu Građanskog zakonika Republike Srbije zaslužuje pažnju naučne i stručne javnosti, zato što treba da zadovolji različite, pa i suprotstavljene zahteve. Predloženo rešenje treba da bude utemeljeno na tradiciji socijalizacije i moralizacije građanskog prava, primereno sadašnjem trenutku razvoja građanskopravne nauke i građanskopravnih odnosa (da izražava nalaze savremene građanskopravne teorije), dovoljno sveobuhvatno (da obuhvati sve manifestacije zloupotrebe koje je uočila sudska praksa i naučno elaborirala građanskopravna dogmatika), dovoljno informativno, pravnosistemski i logički dosledno (da obezbedi pouzdano vođenje u tumačenju i primeni prava).

Analiza i poređenje ustanove *de lege ferenda* sa teorijskim nalazima o njenoj prirodi i sa pozitivnopravnim i uporednopravnim rešenjima ukazuju da je ona u velikoj meri podudarna sa odredbama sada važećih Zakona o obligacionim odnosima i Zakona o osnovama svojinsko-pravnih odnosa, s time da je nešto preciznija: navodi se i namera kao jedna od njenih subjektivnih manifestacija i ističe pojam škođenja drugome, koji je važan konstitutivni element teorijskog pojma zloupotrebe. Sa druge strane, propuštena je prilika da se ova pozitivnopravna ustanova definiše u skladu sa modernom teorijom unutrašnjih ograničenja subjektivnih prava, i da se izraze nove manifestacije zloupotrebe koje je prepoznala sudska praksa i građanskopravna nauka.

Zato se predlaže teorijski modernije, sveobuhvatnije, informativnije i doslednije pozitivnopravno rešenje, za koje kao uzor može da posluži analogna odredba u radnom tekstu Zakonika o svojini i drugim stvarnim pravima. Ono bi obezbedilo pravu meru sudijske slobode u primeni ove ustanove, ograničavanjem domašaja neodređenih jusnaturalističkih pojmova putem pozitivnopravnih kriterijuma. Ti kriterijumi nisu dizajnirani da ograničavaju sudijsku slobodu, nego da pouzdano vode građanske sudove u spoznaji granica opravdanosti vršenja subjektivnih građanskih prava.

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THE PROHIBITION OF ABUSE OF RIGHTS IN THE DRAFT CIVIL CODE OF THE REPUBLIC OF SERBIAN

Summary

This paper explores, explains and critically evaluates the legal provision on abuse of rights proposed in Article 20 of the Draft Civil Code of the Republic of Serbia. The author first briefly presents the institutional development and analyzes the contemporary theoretical dilemmas about the nature of this legal institute. Then, the author compares relevant Serbian and comparative law provisions de lege lata and de lege ferenda. Finally, the proposed legal solution is critically evaluated against the following criteria: its justification in the tradition of civil law doctrine and practice (case-law), adequacy in the development of modern civil law theory, envisaged content and information, and systemic and logical consistency.

The research results expose the legislator's choice to formulate a new provision on the provision de lege lata, which is improved by introducing the concept of harm to others and subjective manifestations of abuse. This solution is criticised here for ommission to enumerate all abuse manifestations that have been recognized in civil law literature and case-law, as well as for the ommission to regulate this institute in compliance with modern approach based on the theory of internal limitations of subjective rights. Relying on the premises in the contemporary civil law literature, the author proposes a different provision de lege ferenda, which may more clearly express the nature of this institute and guide civil courts in the judicial interpretation and assessment of the consequences of the abuse of rights.

Keywords*: civil law, abuse of rights, prohibition, subjective and objective approach, inner and outer theory.*

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stručni članak
10.5937/zrpfn0-29937

UDK: 371.3::811.111]:378.096
Rad primljen: 09.12.2020.
Rad prihvaćen: 24.12.2020.

INTEGRATED COMMUNICATIVE LEARNING APPROACH IN ELP PRACTICE: Practical application in the context of intra/multi/inter/transdisciplinary integration

Abstract: *English for Legal Purposes (ELP) or Legal English (LE) is a prominent area of English for Specific Purposes (ESP), catering for the specific discourse community needs and purposes. This article presents the Integrated Communicative Learning (ICL) approach to instructional design within the curricular framework of ELP/LE courses for academic and professional purposes (LEAP/LEPP) in tertiary education. This holistic approach includes ample intradisciplinary, multidisciplinary, interdisciplinary and transdisciplinary dimensions. The first part of this article presents the conceptual, structural and theoretical framework of this approach, and its many pedagogical and methodological functions. The second part outlines the structural framework of the three ELP/LE courses, the teaching/learning context,, and the rationale for selecting this approach. The third part focus the practical application of the ICL in these courses, with reference to examples of intra/multi/inter/transdisciplinary integration. Finally, the author discusses the benefits, challenges and considerations in implementing this approach, particularly in view of promoting authentic learning and inter/transdisciplinary legal education.*

Keywords: *ESP, ELP/Legal English, integrated communicative learning, authentic learning, global competence, transferable skills.*

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1. Introduction

Integrative Learning has been part of general, legal and language education since the early 20th century[1]. English Language Teaching (ELT) pedagogy has engendered a range of integrative approaches.[2] In the 21st century, the corpus has been supplemented by Digital Learning varieties.[3]

English for Specific Purposes (ESP) pedagogy, methodology and practice integrate all these approaches in an effort to put them to good use. While some approaches have gained prominence in the 21st century (PBL, CLL, CLIL, ComBL), ESP instruction is hardly ever confined to a single approach. Given the complex and dynamic nature of ESP, as well as distinctive target learner needs, practitioners prefer to keep the gates open for alternative learning solutions. Thus, they resort to integrating different approaches. As an interdisciplinary area aimed at bridging the gap between education and real-world applications, ESP integrates different intradisciplinary, multidisciplinary, interdisciplinary and transdisciplinary perspectives, taking into account the views of relevant stakeholders (institutions, subject-teachers, practitioners, employers, learners). The integration of diverse approaches and perspectives inevitably entails a quest for "situationally relevant pedagogy" (Larsen-Freeman, Anderson, 2011: xii). In ESP, it often results in the development of ESP-specific pedagogy and methodology.

The 21st century global trends have prompted the expansion of English for Legal Purposes (ELP) or Legal English (LE), aimed at facilitating an effective law-and-language instruction for academic, professional and occupational/vocational purposes. The Integrative Learning provides a broad conceptual, theoretical, pedagogical, methodological, and structural framework that may most comprehensively depict the various dimensions of ELP/LE instruction.

This article provides an insight into the *Integrated Communicative Learning* (ICL) approach applied in ELP/LE instructional design for academic and professional purposes (LEAP/LEPP) at the Faculty of Law, University of Niš. The article first presents the ICL conceptual and structural framework, and its many theoretical, methodological, pedagogical, psychological, developmental, functional and

1 For more on the theoretical framework of Integrative Learning, see: Ignjatović, 2020:179-198

2 The extensive list includes: Experiential Learning/EL, Task-based Learning/TBL, Community Learning/CL, Communicative Language Teaching/CLT, Multiple Intelligences Theory/MI; Project-based Learning/PBL, Content-based Learning/CBL; Cooperative Language Learning/CLL, Content & Language Integrated Learning/CLIL, Competency-based Learning/ ComBL; for more, see: Larsen-Freeman & Anderson, 2011:*v.*

3 *E.g.* Computer-Assisted Learning/CAL, Flipped Learning, Blended Learning, Distance Learning, Mobile Learning, E-Learning: Virtual Learning Environments (VLE), Learning Management Systems (LMS), and "Gamification".

pragmatic functions. The second part outlines the structure of these courses, the teaching context,, and the rationale for selecting this approach. The third part focuses on the practical application of the ICL in three ELP/LE courses, including examples of intra/multi/inter/transdisciplinary integration. In the last part, the author discusses the challenges and benefits of implementing the ICL, particularly in view of promoting authentic learning for real-life discourse community purposes and inter/transdisciplinary legal education.

2. The Integrated Communicative Learning Approach in ELT and ESP

The concept of *Integrated Communicative Learning* (ICL) is a theoretical-methodological construct indicative of a holistic approach encompassing multiple approaches, dimensions and perspectives. This "label" does not depict distinctive features of many approaches which are intrinsically embedded in the ICL: Experiential Learning/EL, Multiple Intelligences/MI, Task-based Learning/TBL, Project-based Learning/PBL, Communicative Language Teaching/CLT, Content-based Learning/CBL, Cooperative Language Learning/CLL, Content and Language Integrated Learning/CLIL, Competency-based Learning/ComBL, Digital Learning/DL; nor does it depict the multidimensional integration of other intra/multi/inter/transdisciplinary perspectives.[4] Yet, its broad framework offers sufficient latitude for examining the underlying features and presenting its implementation in the specific ELP/LE tertiary education setting.

The structural framework of the ICL approach entails correlation and integration of at least three distinctive approaches: *communicative language learning, integrative learning,* and *authentic learning,* which are the cornerstones of ESP instruction. As each of these concepts entails a set of correlated approaches and contemporary concepts, they are briefly reviewed here.

2.1. Communicative Language Teaching (CLT) in ELT and ESP

The CLT is an integrated approach which emerged in the 1970s, in an effort to integrate the key elements of communication (purpose, context, content knowledge, competences, values) and address learner needs by focusing on diverse socio-linguistic issues (integrated language skills; language functions in social/intercultural contexts; discourse and rhetorical skills; contextualized practice on form/meaning/use, coherence/cohesion in production, accuracy/fluency in performance) and pedagogical, methodological, psychological issues (cognitive, behavioral, developmental factors; topic/task-based, project-based,

4 For more on the intra/multi/inter/transdisciplinary integration approaches, see: Ignjatović, 2020:184-186.

experiential learning[5], multiple intelligences;[6] authentic sources, hands-on activities: role-play, games, projects; learning skills, learner autonomy; varied assessment; etc.) (Richards, Rogers, 1986:67-68; Richards, 2006:14-21). Thus, it incorporates features of other interactive approaches (EL, MI, TBL, PBL, CBL, CLL) or their distinctive features (principles, methods, techniques, strategies, instruments, activities).

For all these tenets, the CLT has had a huge impact on subsequent ELT and ESP developments to date. First, the CLT pedagogy and methodology engendered the concept of *communicative syllabus*, which includes several syllabus types: structural, functional, notional, topic/theme-based, task/content-based, and integrated skills-based syllabus (Richards, 2006:10-11). Second, the CLT generated the concept of *communicative competence*,[7] which includes a set of correlated competences: a) *linguistic competence* (vocabulary, grammar, structures, functions); b) *socio-linguistic competences* (socio-cultural, functional, pragmatic rules, spoken/written communication, formal/informal range/register); c) *discursive competence* (texts/genres, professional skills, interaction rules,); and d) *strategic competence* (learner/learning skills, interpersonal skills) (Richards, Rogers, 1986:70-71). Third, as this eclectic approach proved to be adaptable to various contexts, the communicative syllabus and communicative competence have become the bedrock of ESP. Accordingly, the CLT is the fundamental approach in ESP.

2.2. Integrative Learning in ELT and ESP

Integrative Learning is a holistic learner/learning-centered approach, aimed at correlating a range of intra/multi/inter/transdisciplinary perspectives, transferring knowledge and competences across contexts, cultivating inter/transdisciplinary mindsets, and generating an integrated system of knowledge, competences and values applicable in real-world contexts (Klein, 2008:406-407). Its pedagogical framework rests on multiple approaches (EL, TBL, MI, PBL, CBL, CLL, CLIL, ComBL, DL). The structural framework for integrative processes is the integrated curriculum.

5 Postulated by J. Dewey (1938) and developed by D. Kolb (1984), *Experiential Learning Theory* entails learning by doing and discovery, reflection, learning from experience, and application in new contexts (Leicester Uni., 2020).

6 For more on H. Gardner's *Multiple Intelligences Theory* (1983), see: Ignjatović, 2017a: 569-570.

7 For more on the *communicative competence,* and each integral competence, see: Ignjatović, 2017a: 581-582.

The integrated curriculum entails various aspects of integration: a) integrative content, courses, programs, projects (multi/inter/transdisciplinary); b) integrative pedagogy, methodology (authentic, holistic, humanistic, experiential learning); c) integrated syllabus (learner/learning-centered, standards/outcomes-based, knowledge/competence/value-based) d) integrative goals, objectives (knowledge/competences/values, processes/practices); e) integrative processes (correlation, reconstruction, transformation); f) integrative activities (research-based, problem/project-based, competency/performance-based; process/product-based); g) integrative competences (critical thinking, problem-solving, decision-making); h) integrative strategies (learning skills, learner autonomy, collaboration); i) integrative assessment (formal/informal, summative/formative); j) integrative experiences (collaborative projects, learning/professional communities); and k) integrative outcomes (communicative competence, global competence, transferable skills) (Klein, 1999:16-23; Newell, 2010:8-11). The elaborate structure of the integrated curriculum points to multiple ICL functions: theoretical, pedagogical, methodological, socio-linguistic, functional, strategic, psychological, developmental and affective.

2.3. Authentic Learning in ELT and ESP

In ELT, authentic learning is a holistic approach aimed at correlating institutional study with real-life (GSP, 2013) and ensuring meaningful, practical and effective learning in real-life contexts or for real-life purposes. In ESP, the concept of authenticity is all-inclusive.

Authentic learning is the pivotal and inherent feature of ESP instructional design. It may be defined as the acquisition of authentic competences required in authentic contexts, for authentic purposes of the specific discourse community. Authenticity is an integral part of all stages of ESP instruction: a) authentic approach (learner/learning-centered, ESP-specific pedagogy) to authentic design (content/competences/practices); b) authentic needs for authentic purposes in authentic contexts (expertise for professional performance in discourse events); c) authentic knowledge, competences, values (lawyer expertise, skills, integrity); d) authentic sources, materials, activities (texts, audio-visuals; problem-solving) (Breen, 1985); e) authentic interaction, communication, collaboration (speaker-audience, debates, projects); f) authentic culture, conduct (negotiation; legal reasoning); g) authentic goals, outcomes and assessment (persuasive legal argumentation; peer-assessment); h) authentic environments (legal clinics, conferences); i) authentic experiences (mock trials, moot courts) (Gilmore, 2007); (Pinner, 2012: 28-32). As these facets are inherently correlated and complementary, they facilitate holistic learning. The use of authentic contents often generates ESP-specific pedagogy and methodology. For example, legal

case method differs in purpose, structure, content and requisite competences from case studies in other social sciences. Thus, it has to be explored from the discourse community perspective. Yet, besides the discursive competences, the ICL includes two generic competences.

2.4. Global Competence and Transferable Skills

Under the OECD Learning Framework 2030, *the global competence* entails four assets of quality learning: a) Knowledge (disciplinary, interdisciplinary, epistemic, procedural); b) Competences (cognitive, social, discursive, affective); c) Attitudes (conduct, beliefs, judgment); and d) Values (personal, professional, local, global) (OECD,2018:4-5). It implies four capacities: 1) to examine issues of local/global relevance; 2) to understand, appreciate and evaluate different perspectives; 3) to establish positive interactions with people of different backgrounds; and 4) to take constructive action for sustainable development and well-being (OECD PISA, 2018:7-8).

Proposed at the outset of the 21st century and developed within the UNESCO's *Integrated Learning for Sustainable Development*,[8] the concept of *transferable skills* has recently been updated within the UNICEF's *Global Framework on Transferable Skills* (2019), which identifies five learning dimensions (cognitive, instrumental, individual, social, action capacities)[9] and four essential skills needed for efficient learning, productive employment and constructive participation in society: a) *foundation skills* (literacy, communication, cooperation); b) *digital skills* (literacy, ethics, data management); c) *transferable skills* ("soft" skills: socio-cultural, emotional, generic life/career skills), and d) *job-specific skills* ("hard skills") (UNICEF, 2019:1). In particular, the concept of *transferable skills* comprises three categories of competences, each entailing a set of skills: 1) *cognitive skills* (critical/analytical thinking, problem-solving, decision-making, data management, life-long learning); 2) *socio-cultural skills* (interpersonal/intercultural communication, collaboration, conflict resolution); and 3) *emotional skills* (self-awareness, self-regulation, responsibility, integrity, empathy) (UNICEF: 2019:10). Each skill comprises a set of sub-skills and micro-skills; for example, life-long learning includes: a) critical thinking (active listening, cognition/metacognition, questioning, analysis, synthesis, interpretation, reflection); b) problem-solving

8 Within the UN Sustainable Development Agenda (2002), the UNESCO's 21st Century Learning Framework envisaged 3 essential skills: 1) *Learning skill*; 2) *Literacy skills*; and 3) *Transferable life skills* (UNESCO, 2012:11).

9 Based on the UNESCO's Education for Sustainable Development Initiative Report (2012), the UNICEF identified five learning dimensions: 1) *cognitive dimension* (knowledge); 2) *instrumental dimension* (competences); 3) *individual dimension* (values); 4) *social dimension* (interpersonal/intercultural cooperation); and 5) *action dimension* (active citizenship, constructive action, innovation) (UNICEF, 2019: 12).

(analytical thinking, social responsibility, constructive solutions, negotiation, conflict resolutions); c) creativity (divergent thinking, innovation, effective articulation, performance) (UNICEF: 2019:19); and d) *learning skills* (learning strategies, learner autonomy; self-management, motivation, confidence) (UNESCO-IBE, 2013:25). The examples show that transferable skills are not viewed as a fixed set of competencies and attributes; they are fluid, changeable and adaptable to the specific learner needs and learning contexts.

The integration of all these approaches, perspectives and competences may be facilitated by devising an integrated competency-based and outcomes-based curriculum (OECD, 2018: 5).

3. Integrated Communicative Learning Approach in ELP/LE instruction

The presented conceptual, structural, pedagogical and methodological framework of the ICL approach has been the foundation of the integrated ELP/LE curriculum design at the Law Faculty in Niš. The part of the paper provides an overview of the structure of the ELP/LE courses, the learning context, and the rationale for selecting the ICL approach.

3.1. A brief overview of ELP/LE courses at the Law Faculty, University of Niš

The current LF curriculum comprises three ELP/LE courses: a compulsory first-year ELP course (3h/w, 45h; B1/B1+CEFR)[10] and two elective LE courses (3+1h/w, 60h each): the third-year LE1 course (B1+/B2) and the fourth-year LE2 course (B2+/C1). The current distribution of courses across three semesters in three years was instituted in the last two accreditation cycles (2013-2018, 2018-2023), but the core framework was developed in the period 2002-2009. The course syllabi, materials and methods have been revised, updated and adapted ever since. The instructional design has evolved, in line with the ongoing intra/multi/interdisciplinary research, professional development, cooperation with law-and-language experts, learner evaluation, etc.

3.2. Target Learners and Learning Context in ELP/LE Courses

The target learners in the first-year ELP course (B1/B1+) are undergraduate law students (aged 19-20), who attend classes as a single mixed-ability group (60-70 learners per year). The *Present Situation Analysis* (PSA), including the

10 *The Common European Framework of Reference* (CEFR) is an international standard for assessing language competences on a six-level scale (2001): beginner (A1), elementary (A2), pre-intermediate (B1), intermediate (B1+), upper-intermediate (B2), advanced (C1), and proficiency (C2); for more, *see*: CoE (2020).

language needs analysis at intake, shows that most learners have been exposed to General English (GE); they have different proficiency levels (B1 to B2+/C1), different habits and attitudes to learning, and different perceptions of linguistic, academic and professional needs for real-world purposes. The *Context Analysis* (CA) shows that classes take place in a traditional classroom setting (fixed-desks, low-tech environment), including the use of technology in class (CAL) and elements of Blended Learning (online sources). The *Target Situation Analysis* (TSA) shows that law professionals need generic and specific competences for performance in different real-world contexts. As learners' professional needs remain indefinite (rather than specific), the ELP/LE course aims to raise awareness about LE applications, facilitate the acquisition of both generic and discursive competences, and promote authentic and holistic learning for academic and professional purposes.

The target learners in the 3rd and 4th elective LE courses are law students (aged 22-25+) who have already taken the first-year ELP course; they are intrinsically motivated to explore new LE horizons. These groups are smaller (10-15 students per year) and learners' proficiency levels are more homogenous (B1+/B2 and B2+/C1, respectively). The LE courses focus on subject-specific content knowledge and discourse culture, facilitate the acquisition of related discursive and generic competences, and promote life-long learning for personal and professional purposes.

3.3. The rationale for applying the Integrated Communicative Learning Approach

At the outset of the 21st century, there was a need to reconsider and reconstruct ELP instruction in line with the contemporary developments in ESP pedagogy. To this effect, the ELP/LE course design was rooted in the *Integrated Communicative Learning* (ICL) approach, which offers ample opportunities for integration and devising meaningful learning opportunities. Based on the Experiential learning theory, MI theory, learner/learning-centered pedagogy, and content-based, tasks-based and competence-based methodology, this approach is aimed at fostering the *communicative competence* through inter/multi/intra/transdisciplinary integration, fostering learner/learning skills, learner autonomy and life-long learning (Ignjatović, 2009: iii), and promoting *authentic learning* for real-world purposes, *transferable skills* for employability and constructive social engagement, and the *global competence* for sustainable development.

Moreover, as integrative learning approach gained ground in legal education[11], there was a growing focus on essential legal skills: a) *cognitive competences* (legal

11 For more on integrative learning in legal education, see: Ignjatović, 2020: 182-183

literacy; doctrines, rules, procedures); b) *professional competences* (legal research, case analysis, critical thinking, argumentation, interpretation, evaluation, problem-solving, public speaking, advocacy skills); c) *professional identity and responsibility* (values, ethics, conduct, judgment); and d) *personal qualities and interpersonal communication competences* (time/data management, collaboration, conflict management; responsibility) (Munro, 1991:7; Wegner, 2011:14-19). Professionalism and employability at the global labour market were reinforced by fostering *global legal skills* (2005): a) professional competences; b) language competences (Legal English); and c) socio-linguistic, strategic, intercultural competences (GLS, 2010). The recognition of Legal English as a *lingua franca* at the global level has been an incentive for further development of ELP/LE instruction.

4. Multidimensional alignments in ELP/LE integrated curriculum design

Given that integrative learning calls for "the new quadrangulation of disciplinary depth, multidisciplinary breath, interdisciplinary integration and transdisciplinary competences" (Klein, 2008:406), this part focuses on the "quadrangulation" of these dimensions in ELP/LE practice,[12] and illustrates the implementation of the ICL approach in ELP/LE courses offered at the LF Niš.

4.1. Intradisciplinary integration

This intradisciplinary integration is reflected in the core dimensions of law-and-language instruction: knowledge/competences/values and pedagogical/methodological approaches.

In terms of *language*, intradisciplinary integration includes a body of distinctive features associated with linguistics and applied linguistics. The *linguistic integration* is embodied in the integrated skills: language systems (phonology, morphology, syntax, semantics, functional grammar), and receptive/productive skills (reading, listening, speaking, writing). The common tool are integrated content/task-based activities (word-building, matching/ordering, paraphrasing, summarizing, comparing, interpreting), coherently structured to ensure integrated input, practice and performance. The synergy of language systems and skills may be illustrated by reading/listening tasks, which include a lead-in task for eliciting prior knowledge and pre-teaching vocabulary, note-taking while reading/listening, post-reading/listening focus on linguistic features and skills, followed by contextualized practice and a culminating (oral/written) performance activity. *The applied linguistics* integration entails pedagogical, methodological, psychological, strategic and affective considerations as vital

12 For theoretical framework of intra/multi/inter/transdisciplinary integration in ELP, see: Ignjatović 2020:188-192

elements in devising practical and enjoyable learning experiences. It includes pedagogical approaches (methods, techniques, strategies), learning goals/outcomes, classroom management (conduct/communication rules, grouping, instructions), organization tools (guidelines, mind maps, tables, charts), needs analysis and summative/formative assessment tools (questionnaires; tests, quizzes, rubrics, checklists), and learner/learning support (strategies, autonomy). For example, learner support includes: grammar and language reference charts, audio-scripts, key to exercises, progress tests, websites for practice/research, etc.[13] This approach has been consistently applied in all ELP/LE courses.

In terms of ***law***, intradisciplinary integration involves law-related content knowledge, competences, values and practices from different areas of law. In particular, the *first-year ELP course* (B1/B1+)[14] provides an introduction into the basic legal terminology, concepts, principles, legal culture, practice and values, which serve as a foundation for exploring issues related to legal education, professional ethics, legal systems, courts, judicial practice, constitution, human rights, government and elections. The materials are compiled from authentic sources (law textbooks, casebooks, legal documents, institutional websites, newspaper articles, videos, popular culture: movies, songs, cartoons), selected (for relevance), abridged (into manageable chunks), and adapted to the learners' proficiency level. The integrated law-and-language activities focus on legal terminology, contextualized practice, and culminating production activities. The exposure to law-and-language contents is imbued with professional competences (client interview, persuasive argumentation, public speaking), legal ethics (in advocacy, judiciary), discourse/genre analysis (provisions, cases, judgments), and comparative (Anglo-Saxon/American and Serbian/European-Continental) legal culture. Area-specific topics (constitutional law) are clustered into correlated units (government, elections, human rights) and explored in individual class hours. Learner support includes content-related videos, games, and resources for further research/practice.[15]

Building upon these core insights, *the third-year elective LE 1 course* (B1+/B2)[16] addresses the subject-specific areas of criminal law and civil law (torts, family and succession). The authentic source included court databases, casebooks,

13 See: Ignjatović (2009). *LE Files 1* (Appendices: 154-211); Ignjatović (2011). *LE Files 2* (Appendices: 159-213).

14 *See:* Pravni fakultet Nis (2020a): ELP Course Syllabus (I year), Law Faculty Niš website (accessed 28.2.2020).

15 For example, see the list of *iCivic* educational games, available at https://www.icivics.org/games (28.2.2020).

16 See*:* Pravni fakultet Nis (2020b): LE1 Course Syllabus (III year), Law Faculty Niš (accessed 28.2.2020).

documents, videos, popular culture, etc. The exposure to legal terminology is contextualized in genre analysis (law reports, case law, judgments) and discourse analysis (opening statements, closing arguments), exploring legal theories (punishment), documents (indictment, complaint), provisions (homicide), institutes (plea bargaining), standards (liability), procedures (appeal), and comparative legal culture (advocacy). The integrated activities focus on professional competences, performance and practices (legal research, case analysis, reasoning, argumentation, advocacy, case presentation, mock trial). For example, after examining tort-related concepts, learners explore legal provisions, analyze a case, discuss liability and legal remedies, or watch a court video, examine proceedings and language of advocacy, prepare structured oral arguments, and participate in a mock trial in class.

The fourth-year LE 2 course (B2+/C1)[17] further advances the learners' discursive knowledge, competences and values in complex areas of civil law (property, intellectual property, contracts), labour/employment law, business law (company, commercial, trade law), and international (public/private) law. The integration of authentic contents is ensured through contextualized exposure to legal terminology, discourse/genre analysis (law reports, documents, contracts, transactional letters, judgments), competences (legal research, case analysis, reasoning, persuasive argumentation) and practices (problem-solving, decision-making, negotiation, project management). For example, after exploring contract terminology, learners read sample contracts, focus on contract language (legal "shall", "here/there" compounds, "negative inversion"), discuss remedies and discuss outcomes (litigation vs. alternative dispute resolution). In the follow-up, they research "smart" contracts and share findings in class, or perform criteria-based case analysis, prepare oral arguments for moot court, and decision-making processes (judgment).

4.2. Multidisciplinary integration

Multidisciplinary integration rests on a careful selection of contents/competences/values cutting across multiple disciplines: law and language, ethics, society, government, politics, economics, business, culture, environment, medicine, technology, etc. The ELP/LE course syllabi are thus imbued with contents and practices from correlated disciplines that may be encountered in discourse community contexts. The integration tool are content/topic/task-based and problem-project-based activities: a) discourse/genre analysis (reports, documents,

All ELP/LE syllabi include learning goals, outcomes, exam material, assessment and grading criteria.

17 See: Pravni fakultet Nis (2020c): LE2 Course Syllabus (IV year), Law Faculty Niš (accessed 28.2.2020).

graphs, cases) involving insights from other disciplines (economics, science, technology, language); b) debates on controversial local/regional/global issues (human rights, surrogacy, migration) addressed from diverse perspectives (historical, social, cultural, ethical, environmental, medical, political, etc.); c) local community problem-solving scenarios involving multiple stakeholders' perspectives (citizens, NGOs, public/local authorities, interest groups); d) group projects on local/global issues (violence, juvenile delinquency) requiring insights from natural, social and technical sciences; e) use of digital technology for research, analysis, presentation; etc. This form of integration has a huge potential in designing cross-disciplinary learning solutions.

4.3. Interdisciplinary integration

Based on disciplinary and multidisciplinary tenets, interdisciplinary integration takes the instructional design to the next level. It entails multidimensional alignment and integration of contents/competences/values, pedagogy/methodology, and intra/multi/inter/transdisciplinary dimensions into a holistic learning experience within each and across the three ELP/LE courses. Huge consideration is given to *authentic* learning (contents, contexts, competences, practices, outcomes, assessment) and ongoing use of technology. The ultimate goal is to strike the right balance between the integrated communication competences, global competences and generic transferable skills by facilitating exploration, practice, productive performance, evaluation and reflection on learning. It is achieved by designing integrated learning material and activities that systematically, progressively, concurrently and conjointly address several goals and outcomes.

Interdisciplinary integration is embodied in contextualized learning activities: a) integrated law-and-language tasks (terminology, collocations, word-building, functional grammar); b) genre/discourse analysis (legal documents, cases, judgments, contracts, transactional letters); c) discussion panels, public presentation, persuasive argumentation; d) legal research, analysis, reasoning, assessment; e) comparative approach to legal systems, culture, institutes, provisions; e) collaborative community-related projects (legislative proposals); f) simulation of discursive processes (problem-solving, decision-making, elections, mock trials, moot courts, project management, business meetings, alternative dispute resolution). In designing integrated law-and-language material/activities, special attention is given to integrated pedagogy and methodology (experiential, authentic, holistic learning; multiple intelligences); classroom management (organization, interactions, delivery); learner/learning skill/strategies (data/media/digital literacy; assessment, exam practice; learner autonomy, life-long learning); communicative and global competences (personal/professional integrity; social/cultural literacy; interpersonal/intercultural, discursive/strategic

skills), and transferable skills (critical thinking, constructive problem-solving; self-direction, initiative, responsibility, productivity, flexibility). These assets have been integrated within each and across the three ELP/LE courses provided at the Law Faculty in Niš.

The correlation between different areas of law (e.g. criminal, property, international law) and the application of integrated communicative, global and transferable competences in authentic contexts may be best illustrated by referring to the culminating performance activities in the three ELP/LE courses. For example, the highlights of *the first-year ELP course* include content/process/problem/product-based activities: debates on local/global issues, case analysis, problem-solving, persuasive argumentation, paragraph writing, and individual public speaking projects (presentation on a law-related topic of students' choice). In the *third-year LE 1 course*, the culminating activities are process/product/problem/project-based activities: discourse/genre analysis (cases, reports, judgments, indictment, complaint), case presentations (a criminal/civil case of learner's choice) and simulated mock trials (featuring legal research, analysis, reasoning, persuasive arguments, decision-making). In the *fourth-year LE2 course*, the culminating process/product-based and problem/project-based activities are: simulation of ADR processes (negotiation, mediation), a case presentation (a civil/labour/business/international law case of learner's choice), and a moot court (persuasive argumentation in appellate/international courts). These multifaceted tasks are aimed at: promoting communication, critical thinking, collaboration and creativity, demonstrating learners' effective performance in authentic contexts, and fostering learner autonomy and development of generic transferable skills.

Authentic assessment of learner performance includes various summative and formative assessment instruments (tests, quizzes, rubrics, teacher/peer evaluation, feedback). For example, summative assessment (tests) cover law-and-language contents (terminology, structures, reading, summary/paragraph writing). Preparation for performance is supported by self-assessment tools: reference charts, checklists, rubrics, quizzes, games, sample videos and reference websites. Case presentations are both peer and teacher-assessed (on genre-specific assessment criteria), and followed by group feedback on essential learning. Besides the initial needs survey, learners are urged to provide ongoing feedback on the course contents, materials, methods; at the end, they may evaluate the course contents, classes, tests and teacher performance.

4.4. Transdisciplinary integration

Considering that transdisciplinarity is perceived as "the unity of knowledge", encompassing a body of theoretical, methodological, technical, professional,

practical and ethical knowledge, competences, values and practices (Hirsch Hadorn, 2009:1-2) applicable in resolving "complex, multidimensional, interdependent, non-linear problems" (Klein, 2009:47), transdisciplinary integration aims to develop transdisciplinary mindsets and competences. It inevitably includes: a) the global competence (cognitive, social, discursive and affective capacity to examine local/global issues, correlate perspectives, communicate in intercultural contexts, and take constructive action), and b) transferable life/career skills (data/media/digital literacy; social/cultural literacy; professional/ethical and interpersonal/strategic skills; life-long learning).

In ELP/LE courses, the integration of transdisciplinary competences may be illustrated by performance activities which involve an array of integrated transdisciplinary tenets: 1) research on the assigned/student-selected issue, freedom of choosing sources/methods; 2) teamwork in collaborative projects (project organization, data/time management, interpersonal skills, conflict resolution); 3) developing digital competences (use of technology in research, presentations); 4) problem-solving and decision-making (in simulated jury/judicial panels, community meetings); 5) drafting legal solutions (considering local/global circumstances); 6) presenting arguments in mock trials, moot courts, negotiation/mediation processes; 7) self-assessment and peer evaluation of presentations, relevance and implications of proposed solutions; 8) transactional writing (email, CV, legal correspondence, conference abstract); 9) micro-project management (law firm company profile, business plan, business meetings, describing products/performance), etc.

Given that LE courses commonly include a smaller number of similar-ability learners, they offer more opportunity for a *negotiated syllabus design,* where students participate in shaping the program by suggesting contents and contributing materials. There is also more latitude for *differentiated learning,* focusing on personal interests and production of student-generated material, which contributes to developing inter/transdisciplinary mindset and competences. The practical relevance of integrated (intra/multi/inter/transdisciplinary) law-and-language instruction may be also illustrated by referring to the LF students' successful participation in a number of regional and international moot court competitions since 2011.[18]

18 LF student teams have participated in moot court competitions (in English) in human rights, media law, humanitarian law, international trade arbitration, international criminal law. See: Pravni fakultet u Nišu (2020d).

5. Concluding remarks: Challenges and Benefits of the ICL approach

Relying on the presented structural framework and application of the ICL approach we may consider the challenges and benefits of its implementing in ELP/LE courses at the LF Niš.

The process of designing an authentic, rigorous, methodologically sound, practical and enjoyable ESP/ELP instruction is a highly complex and challenging task. *First,* the elaborate structure and multiple functions of the ICL approach require multidimensional integration of cognitive, pedagogical, methodological, psychological, developmental and affective aspects within each course, pluri-dimensional integration across the three courses, and hyper-dimensional integration of intra/multi/inter/transdisciplinary perspectives. It calls for constant alertness, interdisciplinary research, reconsideration, realignment, reconstruction, reevaluation, and commitment to fluid and transformative pedagogy including various integrated, negotiated and differentiated learning solutions. *Second,* the past practice has shown that the major challenge of ELP/LE design has been to ensure a sound *balance* of the requisite communicative competence, discursive competences, global competence, and transferable skills. To that effect, additional considerations include relevant pedagogical and methodological support, gradual learner training to overcome the challenges and embrace the benefits of this approach. *Third,* as contemporary legal education aims to equip learners with requisite professional competences and global legal skills, it is vital to change the traditional paradigm and provide a sustainable integrated learning for discourse community purposes. Given that Legal English has been globally recognized as one of the key assets of legal education, it is vital to ensure an authentic and holistic learning experience, which will be a valuable asset in different real-world discourse community contexts.

The application of the dynamic ICL approach in the ELP/LE courses demonstrates multiple benefits*. First,* the ICL is an eclectic, flexible and adaptable approach which provides viable solutions for authentic, holistic and humanistic integrated learning in different learning contexts. It is based on the multidimensional integration of intra/multi/inter/transdisciplinary perspectives (knowledge/competences/values; pedagogical, methodological, psychological, developmental, affective tenets; communicative, professional, global competences and generic transferable skills). The insight into the ELP/LE integrated curriculum shows that these diverse approaches and perspectives are intrinsically correlated and complimentary; they have many common or compatible features which facilitate the integration processes. They offer ample integration opportunities, which may be used both interchangeably or concurrently. They provide a great latitude for creativity, experimentation, modification and constructive integration, which

often results in developing ESP-specific pedagogy and methodology. *Second*, the examples from ELP/LE practice show that the integration occur within each and across the three courses. The common integration tools are the integrated communicative learning activities, which concurrently and conjointly address several learning goals and outcomes. The culminating performance activities most comprehensively reflect the holistic nature of authentic integrated learning, aimed at promoting learner autonomy, developing inter/transdisciplinary mindsets, demonstrating effective performance and application of the acquired knowledge and competences in new situations, or generating viable solutions for contemporary local/global issues. *Third,* the ICL is a dynamic and constantly evolving approach which has proven to be highly meaningful in ELP/LE contexts. Building on prior learning, it raises awareness of multiple perspectives, options, solutions and implications, enables learners to experience authentic processes in a safe learning environment, and thus prepares them for effective performance in real-world contexts. It aims to systematically expose learners to authentic contents, gradually reinforce and expand their generic and discursive competences, activate their potentials and resources, and holistically demonstrate the acquisition of integrated competences and productive performance. The inclusion of negotiated and differentiated learning solutions offers a great latitude for developing an inter/transdisciplinary mindset, demonstrating creativity and personal/professional growth, and fostering learner autonomy and life-long learning.

On the whole, given the complexity of non-linear integration processes and ever-changing learner/learning needs, this paper may offer a valuable insight into the implementation of the *Integrated Communicative Learning* (ICL) approach in tertiary ELP/LE instruction at the LF Niš. As there is always room for improvement, the prospective practice may rest on some important insights: 1) the multiple roles of enthusiastic ESP/ELP practitioners (acting as researchers, course designers, managers, facilitators, technicians, counselors, therapists); 2) the need for a genuine commitment of all stakeholders to standards/outcomes-based, competence-based and value-driven learning, aimed at promoting inter/transdisciplinary legal education and authentic, holistic and humanistic quality learning; 3) the need to ensure a systematic exposure to ELP/LE instruction over a number of courses rather than perceiving it as one-time (term) event; 4) a genuine endeavour to ensure highly meaningful, rigorous, coherent and enjoyable integrated learning opportunities, as an incentive for attaining integrated competences for current and prospective needs; and 5) a constant awareness of versatile, dynamic and transformative processes, based on negotiated and differentiated learning solution, and pro-active approach to implementing change for sustainable personal/professional growth and well-being.

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INTEGRISAN KOMUNIKATIVNI PRISTUP UČENJU ENGLESKOG JEZIKA PRAVNE STRUKE (ELP/LE): Praktična primena u kontekstu intra/multi/inter/transdisciplinarnih integrativnih procesa

Sažetak

Ovaj rad predstavlja analizu Integrisanog komunikativnog pristupa učenju engleskog jezika pravne struke (ELP), tj. pravnog engleskog jezika (LE) za akademske i profesionalne potrebe, u okviru nastavnog plana i programa Pravnog fakulteta u Nišu. Prvi deo rada predstavlja konceptualno-teorijski, pedagoško-metodološki i strukturalni okvir ovog pristupa u učenju engleskog jezika struke (ESP) koji nudi održiva rešenja za kreiranje integrisanih programa. U drugom delu rada se prikazuje struktura ponuđenih (ELP/LE) kurseva, daje kratka analiza nastavnog konteksta, i obrazlaže izbor ovog pristupa učenju. Treći deo rada nudi prikaz multidimenzionalnih integrativnih procesa u okviru (ELP/LE) kurseva, sa osvrtom na intradistciplinarne, multidisciplinarene, interdisciplinarne i transdisciplinarne aspekte integracije. Analiza složene strukture, brojnih funkcija i primene ovog pristupa potkrepljena je primerima iz prakse. U finalnom delu rada, autor razmatra ključne izazove u primeni ovog pristupa, kao i brojne prednosti koje omogućavaju kreiranje komunikativne nastave zasnovane na principima initegrisanog kurikuluma, globalnih kompetencija, transferabilnih veština, i autentičnog holističkog pristupa učenju. Dugogodišnja iskustava u razvoju i primeni integrisanog pristupa mogu biti od koristi ne samo u pogledu unapredjenja nastave pravnog engleskog jezika (koji je globalno prepoznat kao jedna od važnih pravničkih veština) već i cilju obezbeđivanja kvalitetnog, interdisciplinarnog i holističkog pravničkog obrazovanja.

Ključne reči: *Engleski jezik pravne struke (ELP/LE), integrisani komunikativni pristup učenju, autentični holistički pristup, globalne kompetencije, transferabilne veštine.*

II PRIKAZI

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prikaz
10.5937/zrpfn0-28346

Rad primljen: 10.09.2020.
Rad prihvaćen: 09.11.2020.

IOM-UNHCR Okvirni dokument o razvoju standardnih operativnih procedura za olakšavanjeidentifikacije i zaštite žrtava trgovine ljudima

U junu 2020. godine, Međunarodna organizacija za migracije (*International Organization for Migration*/IOM) i Visoki komesar Ujedinjenih nacija za izbeglice (*United Nations High Commissioner for Refugees*/UNHCR) objavili su zajednički dokument kojim se razvijaju standardne operativne procedure (*standard operating procedures*) u cilju otkrivanja i zaštite žrtava trgovine ljudima. Reč je o Okvirnom dokumentu o razvoju standardnih operativnih procedura za olakšavanje identifikacije i zaštite žrtava trgovine ljudima (Okvirni dokument)[1]. Ovaj dokument predstavlja noveliranu i unapređenu verziju istovetnog dokumenta objavljenog decembra 2009. godine.

Okvirni dokument je zamišljen kao vodič za pojedince, domaće institucije i organizacije koje sarađuju sa IOM-om i UNHCR-om u kontekstu pružanja pomoći ranjivim osobama.[2] Opšti cilj Okvirnog dokumenta je osnaživanje saradnje između IOM-a i UNHCR-a u pogledu otkrivanja, upućivanja, zaštite i pomoći žrtvama trgovine ljudima. Posebni cilj ovog dokumenta je namera da se osnaži razvoj standarda operativnih procedura između IOM-a i UNHCR-a na terenu. Okvirnim dokumentom se predlaže postupak za saradnju kako bi se osiguralo da raspoloživa stručnost, kapaciteti i potencijal svake organizacije budu efikasno iskorišćeni i koordinisani kako bi se pružila najbolja moguća zaštita i pomoć žrtvama trgovine ljudima.[3]

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1 UN High Commissioner for Refugees (UNHCR), *IOM-UNHCR Framework document on developing standard operating procedures to facilitate the identification and protection of victims of trafficking*, June 2020, available at: https://www.refworld.org/docid/5ee22b4f4.html [accessed 3 August 2020].

2 Framework document, p. 4.

3 *Ibidem*, p. 4.

Okvirni dokument predstavlja takozvano meko pravo (*soft law*). Dakle, nije reč o obavezujućem pravnom aktu, već o modelu po kom bi trebalo da se ponašaju svi oni koji dolaze u kontakt sa (potencijalnim) žrtvama trgovine ljudima. U slučajevima u kojima su postojeći mehanizmi i okviri neadekvatni ili ne udovoljavaju zahtevima međunarodnog i domaćeg prava, dokument treba posmatrati samo kao smernicu za poboljšanje postojeće prakse i ni u kom slučaju ne treba da bude zamena za nju.[4] Međutim, ne treba gubiti iz vida da: „upotreba takvih dokumenata, bez obzira na naziv, na primer, preporuke, smernice, kodeksi ponašanja ili standardi značajni su u signaliziranju razvoja i uspostavljanja smernica koje se u krajnjoj liniji mogu pretvoriti u pravno obavezujuća pravila."[5]

Okvirni dokument ima 24 strane, podeljen je u tri dela i sadrži jedan aneks. U uvodnom delu Okvirni dokument sadrži ciljeve, definicije,[6] ciljnu grupu, ulogu IOM-a i UNHCR-a, principe saradnje, principe zaštite i pomoći, kao i obavezu država da zaštite žrtve trgovine ljudima i osobe koje su u riziku da postanu žrtve trgovine ljudima. Fokus osoblja IOM-a i UNHCR-a, koje inače dolazi u neposredan kontakt sa žrtvama trgovine ljudima,[7] ogleda se u tome da se principima sadržanim u ovom dokumentu osigura „najprikladnija zaštita, pomoć i rešenja".[8] Okvirni dokument je usmeren na tri oblasti: identifikacija žrtava trgovine ljudima, obezbeđivanje zaštite i uslužnih servisa i pronalaženje rešenja. Okvirni dokument, dalje, sadrži sedam principa saradnje i 12 principa zaštite i pomoći žrtvama trgovine ljudima.[9]

U drugom delu Okvirnog dokumenta postavljen je okvir za saradnju, identifikaciju, upućivanje i vođenje slučajeva. Podela uloga između IOM-a i UNHCR-a je izvršena na sledeći način: u situaciji gde osobe

4 Vidi Framework document, p. 4.

5 Vidi Shaw Malcolm N. (2017). *Intenrnational Law*. 8th edition. Cambridge: Cambridge University Press, p. 88.

6 Za definicije ključni međunarodni ugovor predstavlja Konvencija UN o transnacionalnom organizovanom kriminalu, *United Nations Convention on Transnational Organized Crime* UN GA Resolution 55/25 of 15 November 2000, Annex I i prateći protokol – Protokol za sprečavanje, suzbijanje i kažnjavanje trgovine ljudima, posebno ženama i decom, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* UN GA Resolution 55/25 of 15 November 2000, Annex II.

7 Okvirni dokument je prepoznao kao osobe u riziku od trgovine ljudima sledeće kategorije: migrante, tražioce azila, izbeglice, apatride i interno raseljena lica, uključujući tu nepraćenu i razdvojenu decu.

8 Framework document, p. 7.

9 Vidi Framework document, p. 9–11.

potpadaju pod mandat UNHCR-a, ali UNHCR nema kapacitet da okvalifikuje osobu kao žrtvu trgovine ljudima, UNHCR će konsultovati IOM, i tamo gde je neophodno i prikladno uključiti IOM u obavljanje dubinskog intervjua i *vice versa*.[10] U državama gde samo jedna od dve organizacije deluje (IOM/ UNHCR) ili samo jedna organizacija ima pristup potencijalnoj žrtvi, organizacija koja je prisutna ili koja ima pristup može pružiti početnu pomoć i po potrebi koordinisati drugom organizacijom, putem nacionalne, regionalne ili centralne kancelarije.[11] Rad po Okvirnom dokumentu predviđen je u dva koraka: inicijalni skrining i potvrđivanje dubinskim intervjuom.

U trećem delu predstavljen je okvir za saradnju u pogledu neposrednih odgovora zaštite i rešenja za žrtve trgovine ljudima. Okvirni dokument prepoznaje da žrtvama trgovine ljudima može biti potrebna specijalizovana ili dodatna podrška u sledećim slučajevima: prihvatilište i smeštaj; voda, sanitarni uslovi, higijena; hrana i ishrana; lična bezbednost; zdravlje i blagostanje; obrazovanje i obuke; sredstva za život, zaposlenje i sticanje prihoda; potraga za članovima porodice i spajanje porodice; pristup pravdi, uključujući tu i adekvatna pravna sredstva.[12] Takođe, Okvirni dokument u trećem delu sadrži i sledeća ponuđena rešenja: dobrovoljnu repatrijaciju i reintegraciju žrtava trgovine ljudima koje su tražioci azila ili izbeglice; asistirani dobrovoljni povratak tih ljudi; lokalnu integraciju žrtava trgovine ljudima koje se nalaze pod mandatom UNHCR-a i onih koji nisu pod njegovim mandatom; preseljenje u treću zemlju. Okvirni dokument nudi i komplementarne vidove zaštite i rešenja, kao i rešenja za apatride.[13]

Na kraju dokumenta nalazi se aneks koji sadrži listu odabranih referenci (međunarodne ugovore, regionalne instrumente, odluke, preporuke, i druge značajne reference iz oblasti trgovine ljudima). Ove reference su od izuzetnog praktičnog značaja jer olakšavaju primenu Okvirnog dokumenta i osiguravaju da se u postupanju sa žrtvama trgovine ljudima postupa bez propusta i sa što manje poteškoća. Sve to se čini u skladu sa međunarodnim pravom, ljudskim pravima, izbegličkim pravom i transnacionalnim krivičnim pravom.

Verzija dokumenta od 2009. godine sadržala je i aneks sa formularom „Zajednički obrazac za skrining" (*Joint Screening Form*), koji se sastoji od 29

10 Vidi Framework document, p. 12.

11 *Ibidem*, p. 15.

12 *Ibidem*, p. 16.

13 Vidi Framework document, p. 19.

pitanja i koji služi prilikom prvog susreta sa žrtvom trgovine ljudima. Dok je drugi aneks takođe sadržao listu relevantnih referenci, koja je u novoj verziji izmenjena i dopunjena prateći razvoj međunarodnog prava i prakse. Pored novela u samom tekstu dokumenta, i okolnosti u trenutku objavljivanja dokumenta su znatno izmenjene od onih koje su vladale pre nešto više od jedne decenije. Masovne i mešovite (izbegličko-migrantske) krize intenzivirale su se u toku proteklih deset godina; usled tih kriza je i usvojena Njujorška deklaracija o izbeglicama i migracijama i dva propratna kompakta uz nju koji su, između ostalog, doveli i do znatnog približavanja IOM-a i UNHCR-a.[14] Do približavanja je došlo 2016. godine, kada je odlukom Generalne skupštine UN[15] i na osnovu Sporazuma o odnosu između Ujedinjenih nacija i Međunarodne organizacije za migracije[16], IOM postao povezana organizacija (*re- lated organisation*) sa UN i na taj način dobio novu ulogu.[17] Krajem 2019. godine došlo je do pojave i brzog širenja virusa korona. To je izazvalo pandemiju sa nesagledivim posledicama, a što se odrazilo i na migracije intenzivirajući iregularne migracije i pogoršanje statusa stranaca u mnogim državama širom sveta itd.

Predviđeno je da će implementacija Okvirnog dokumenta biti vršena tako da podržava i dopunjava postojeće institucionalne okvire i koordinacione mehanizme razvijene na nacionalnim i regionalnim nivoima u cilju otkrivanja i zaštite žrtava trgovine ljudima, kada ti mehanizmi ili okviri deluju efikasno i u skladu sa zahtevima važećeg međunarodnog i domaćeg prava.[18]

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14 O usvajanju Njujorške deklaracije vidi internet stranicu azil.rs. Dostupno na: http://azil.rs/usvajanje-njujorske-deklaracije-o-izbeglicama-i-migrantima-na-istorijskom-samitu-un/. Prevod Globalnog kompakta o sigurnim, uređenim i regularnim migracijama vidi Krasić Bogdan (ur.) (2019). Globalni kompakt o sigurnim, uređenim i regularnim migracijama. Beograd: Beogradski centar za ljudska prava.

15 UN GA Resolution 70/263, 27 April 2016.

16 UN GA Agreement concerning the Relationship between the United Nations and the International Organization for Migration, Note by the Secretary-General, A/70/976, 8 July 2016; Annex I - Draft Agreement concerning the Relationship between the United Nations and the International Organization for Migration; Annex II - Draft resolution Cooperation between the United Nations and the International Organization for Migration.

17 Vidi Cullen Miriam, "The IOM's New Status and its Role under the Global Compact for Safe, Orderly and Regular Migration: Pause for Thought", *EJIL: Talk!*, 29 March 2019. Dostupno na: https://www.ejiltalk.org/the-ioms-new-status-and-its-role-under-the-global-compact- for-safe-orderly-and-regular-migration-pause-for-thought/.

18 Framework document, p. 4.

Značaj Okvirnog dokumenta se ogleda u tome što će poslužiti ranoj i pravovremenoj identifikaciji žrtava trgovine ljudima i njihovom adekvatnom zbrinjavanju. Takođe, imajući u vidu da će se njime moći da služe državni službenici, zaposleni u međunarodnim organizacijama i njihovi izvršni partneri na terenu i ostali koji dolaze u dodir sa žrtvama trgovine ljudima, ova unapređena verzija dokumenta biće korisna alatka u radu i slamka spasa za same žrtve trgovine ljudima. Novelirani Okvirni dokument dolazi u periodu kada je IOM postao povezana organizacija UN, te je došlo do približavanja u radu sa UN, a posebno sa UNHCR-om. Dalje, Okvirni dokument je prepoznao da humanitarne krize, oružani sukobi i prirodne katastrofe imaju tendenciju da pogoršaju izloženost od rizika, pretnji, zlostavljanja i eksploatacije, uključujućii trgovinu ljudima.[19]

U situaciji kada su milioni ljudi u dodatnom riziku da postanu žrtve trgovine ljudima usled promenjenih okolnosti i novonastalom krizom usled pandemije virusa korona, novelirani Okvirni dokument dolazi u pravi čas. U narednom periodu ostaje da se sagleda praktični značaj Okvirnog dokumenta i spremnost onih koji se susreću sa žrtvama trgovine ljudima da se služe ovim dokumentom. Svakako, može se pozitivnim oceniti objavljivanje jednog ovakvog dokumenta, uz napomenu da je neophodno raditi na tome da se on prevodi, širi, te da se vrše potrebne obuke u cilju efikasnog služenja ovim dokumentom.

19 Vidi Framework document, p. 6.

III RADOVI STUDENATA DOKTORSKIH STUDIJA

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originalni naučni rad
10.5937/zrpfn0-29303

UDK: 347.77.43:061.1EU
347.4
Rad primljen: 09.11.2020.
Rad prihvaćen: 11.01.2021.

PRAVNI TRETMAN KLAUZULE O ISKORIŠĆAVANjUNAKNADNIH USAVRŠAVANjA PREDMETA LICENCE U UGOVORU O LICENCI SA ASPEKTA PRAVA KONKURENCIJE EVROPSKE UNIJE[**]

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Ključne reči*: naknadna usavršavanja, ugovor o licenci, transfer tehnologije, pravo konkurencije.*

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U tom smislu ugovor o licenci može predstavljati restriktivni sporazum sa aspekta prava konkurencije.[3] Kao takav može dovesti do ograničavanja

1 Domaći zakonodavac je predvideo da *know-how* (znanje i iskustvo) može biti predmet ustupanja putem ugovora o licenci. S druge strane, domaća prava teorija je na stanovištu da *know-how* ne može biti predmet ugovora o licenci, s obzirom na to da ne predstavlja isključivo pravo industrijske svojine. (Marković, Popović, 2013: 218).

2 Čl. 686 Zakona o obligacionim odnosima, ("Sl. list SFRJ", br. 29/78, 39/85, 45/89 -odluka USJ i 57/89, "Sl. list SRJ", br. 31/93 i "Sl. list SCG", br. 1/2003 - Ustavna povelja).

3 Ugovor o licenci ne predstavlja restriktivan sporazum *per se.* Šta više, veliki broj ugovora o licenci ima pozitivan uticaj na konkurenciju na tržištu. Na primer,

ili narušavanja slobodne konkurencije na tržištu.[4] Pravo konkurencije toleriše one vrste ograničenja u ugovorima o licenci koje davalac licence stavlja sticaocu, ukoliko ta ograničenja proizilaze iz samog izvornog prava davaoca (Marković, 1997: 323).[5] U tom smislu, zabrana restriktivnih sporazuma ne sprečava titulara prava intelektualne svojine da ovlašćenja koja čine sadržinu njegovog subjektivnog prava vrši na uobičajeni način. S druge strane, pravo konkurencije toleriše i neke oblike ograničenja u ugovorima o licenci koja izlaze van pomenutog okvira. Naime, pravo konkurencije u određenim slučajevima dopušta izuzeća ugovora o licenci od zabrane restriktivnih sporazuma.

Autor u daljem tekstu rada analizira dopuštenst ugovaranja klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence (eng. *grant-back clause)* u ugovorima o licenci sa aspekta prava konkurencije. S obzirom na to da pozitivno pravo konkurencije Republike Srbije ne reguliše pomenuti institut, u radu je analizirana zakonitost ugovaranja klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence sa aspekta komunitarnog prava konkurencije.

2. Pravni okvir za regulisanje klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence u pravu Evropske unije

Politika zaštite konkurencije na unutrašnjem tržištu regulisana je Ugovorom o funkcionisanju Evropske unije (u daljem tekstu UFEU).[6] S obzirom na temu rada, za našu analizu će od posebnog značaja biti uredbe Evropske komisije o kolektivnom izuzeću sporazuma o prenosu tehnologije.[7] Kolektivno izuzeće od zabrane sporazuma o prenosu tehnologije regulisano je Uredbom Komisije br. 316/2014 od 21. marta 2014.

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ugovori o licenci u praksi mogu doprineti širenju novih tehnologija. Vid. tač. 9 Smernica o sporazumima o prenosu tehnologije.

4 Autor se opredilo da za potrebe ovog rada koristi termin restriktivni sporazumi koji je prihvaćen u pozitivnom pravu Republike Srbije. Naime, u komunitarnom pravu su sporazumi kojima se ograničava, narušava ili sprečava konkurencija označeni kao zabranjeni sporazumi koji su nespojivi sa unutrašnjim tržištem (vid. čl. 101 st. 1 Ugovora o funkcionisanju Evropske unije).

5 To se odnosi na ograničenja u pogledu načina, obima, količine, teritorije i vremena korišćenja predmeta licence.

6 Politika zaštite konkurencije na unutrašnjem tržištu regulisana je čl. 101 do 106 UFEU.

7 Uredbom Saveta br. 19/65/EEZ je Komisiji dato ovlašćenje za primenu čl. 101 st. 3 UFEU (nekadašnji čl. 85 Rimskog ugovora) te je Komisija ovlašćena da bliže uredi uslove pod kojima se čl. 101 UFEU ne primenjuje na određene kategorije sporazuma.

godine o primeni čl. 101, st. 3 UFEU na kategorije sporazuma o prenosu tehnologije (u daljem tekstu Uredba TTBER).[8] Evropska komisija je usvojila i prateće Smernice o primeni čl. 101 st. 3 UFEU na kategorije sporazuma o prenosu tehnologije (u daljem tekstu Smernice o sporazumima o prenosu tehnologije).[9]

U komunitarnom pravu konkurenicije nalazimo da je pitanje kolektivnog izuzeća ugovora o licenci od zabrane restriktivnih sporazuma vrlo detaljno regulisano. U tom smislu, Uredbom TTBER propisani su strogi uslovi koje ugovor o licenci mora ispunjavati kako bi bio izuzet od zabrane restriktivnih sporazuma.

S druge strane, Uredbom TTBER propisane su dve vrste ograničenja na koje se ne primenjuje kolektivno izuzeće i koje, stoga, zahtevaju pojedinačnu ocenu njihovih učinaka na konkurenciju na tržištu. Naime, reč se o ugovornim klauzulama sadržanim u ugovorima o licenci koje zahtevaju pojedinačnu ocenu u smislu da li doprinose ili štete konkurenciji na tržištu.[10]

Prvo, TTBER propisuje ograničenje koje se odnosi na klauzulu o isključivom ustupanju ili prenosu prava na iskorišćavanje naknadnih usavršavanja predmeta licence.[11]

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8 *Službeni list EU,* 2014, br. L 93/17. Skraćeno od *Technology Transfer Block Exemption Regulation*.

9 Smernice o primeni čl. 101 st. 3 Ugovora o funkcionisanju Evropske unije na sporazume o prenosu tehnologije, *Službeni list EU*, 2014, br. C 89. Sporazum o prenosu tehnologije je u komunitarnom pravu konkurencije definisan tako da se sastoji iz dva pojma, i to: ugovora o licenci i ugovora o cesiji. Vid. čl. 1 Uredbe TTBER. Autor u radu analizira ugovor o licenci kao sastavni deo pojma sporazuma o prenosu tehnologije. U domaćoj pravnoj teoriji nalazimo da pojedini autori izjednačavaju ova dva instituta (Popović, 2013: 56).

10 Uredba TTBER, čl. 5. Domaće pravo konkurencije, za razliku od prava EU, dopušta pojedinačna izuzeća restriktivnih sporazuma od zabrane. Naime, pojedinačno izuzeće podrazumeva sistem obavezne prethodne notifikacije restriktivnog sporazuma. U pravu EU je sistem pojedinačnih izuzeća postojao od 1962. do 2004. godine, kada je, nakon značajne reforme pravnog okvira za primenu čl. 101 UFEU, uveden sistem samoprocene. Samoprocena podrazumeva da učesnici na tržištu neposredno i direktno primenjuju čl. 101 UFEU i sami ocenjuju ispunjenost uslova iz čl. 101 st. 3 UFEU. Vid. više Sandra Fišer Šobot, Da li je vreme za uvođenje samoprocene restriktivnih sporazuma u pravo konkurencije Republike Srbije?, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3/2019, str. 955-972.

11 Uredba TTBER, čl. 5 st. 1 tč. 1.

Drugo, kolektivno izuzeće od zabrane restriktivnih sporazuma nije moguće primeniti na klauzule o neosporavanju valjanosti prava intelektualne svojine davaoca licence.[12]

3. Pojam i vrste klauzula o iskorišćavanju naknadnih usavršavanja predmeta licence

Klauzula o iskorišćavanju naknadnih usavršavanja predmeta licence se može definisati kao klauzula u koja se ugovara prilikom zaključivanja ugovora o licenci kojom se bar jedna od ugovornih strana obavezuje da drugoj strani omogući pristup budućim inovacijama koje se odnose na predmet ugovora (Chevigny, 1966: 569). U tom smislu, klauzula o iskorišćavanju naknadnih usavršavanja predmeta licence odnosi se na intelektualnu svojinu koja još uvek ne postoji.[13] U praksi se, po pravilu, ugovaranjem klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence nameće obaveza sticaocu licence da davaocu ustupi ili prenese poboljšanja predmeta licence do kojih je došao u toku korišćenja predmeta licence.

U domaćem pravu ne nalazimo definiciju naknadnih usavršavanja predmeta licence. ZOO propisuje da, u slučaju da ugovorom o licenci nije predviđeno drugačije, sticalac licence nema pravo na korišćenje naknadnih usavršavanja predmeta licence.[14] Ovakvim zakonskim rešenjem se pruža zaštita legitimnom interesu davaoca licence da ne dozvoli da sticalac licence postane njegov tehnološki konkurent.[15]

Praksa ugovaranja klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence je sa tehnološkim napretkom sve više dobija na značaju. Naime, čak oko 43% zaključenih ugovora o licenciranju sadrži pomenutu klauzulu.[16]

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12 Uredba TTBER, čl. 5 st. 1 tč. 2. O pravnom režimu klauzule bez osporavanja u ugovorima o licenci sa aspekta prava konkurencije vid. više Aleksandra Vasić, Pravni tretman klauzule bez osporavanja u ugovoru o licenci sa aspekta prava konkurencije, *Zbornik radova Pravnog fakulteta Univerziteta u Nišu*, br. 85, 2019, str. 371-385.

13 Vid. više Assessment of potential anticompetitive conduct in the field of intellectual property rights and assessment of the interplay between competition policy and IPR protection, Competition Reports, European Commission, 2011, str. 38.

14 Vid. čl. 697 ZOO.

15 Podrazumeva se da ugovorne strane mogu ugovoriti drugačije.

16 Vid. više *supra* fusnota 14, str. 39.

Ugovaranje klauzule o iskorišćavanju naknadnih usavršavanja je najčešće u interesu davaoca licence. Naime, cilj ugovaranja ove klauzule je sprečavanje mogućnosti da davalac licence, ukoliko sticalac licence u toku trajanja ugovora dođe do značajnih poboljšanja licencirane tehnologije, bude istisnut sa tržišta budući da bi tehnologija koju je licencirao bila prevaziđena.[17]

U praksi nalazimo različite modele pomenute klauzule. Naime, sticalac licence može biti u obavezi da ustupi (licencira) davaocu licence naknadna usavršavanja do kojih je došao u toku korišćenja licenciranetehnologije, ili pak može biti u obavezi da davaocu licence prenese prava, u celosti ili delimično, koja se odnose na njegova naknadna usavršavanja predmeta licence ili na njegove nove primene licencirane tehnologije. Dakle, sticalac licence se obavezuje da će sa davaocem licence zaključiti ugovor o licenci ili ugovor o cesiji prava na iskorišćavanje naknadnih usavršavanja predmeta licence do kojih je došao tokom korišćenja predmeta licence. U slučaju licenciranja prava na naknadna usavršavanja, u praksi je moguće ugovoriti isključivu ili neisključivu licencu za naknadna usavršavanja do kojih je došao sticalac licence (Cross, 2016: 2). Ugovaranjem isključive licence za naknadna usavršavanja predmeta licence, sticalac licence ne bi bio u mogućnosti da se koristi poboljšanjima, niti da poboljšanja do kojih je došao ustupa ili prenosi trećim licima. Kada je reč o neisključivom ustupanju prava na naknadna usavršavanja, tada bi pristup poboljšanjima, pored davaocai sticaoca licence, imali i svi ostali sticaoci licence sa kojima je davalac zaključio ugovore o licenci (Stedman, 196: 209). Takođe, naknadna usavršavanja predmeta licence mogu biti predmet ustupanja ili prenosa sa ili bez naknade. Pravni tretman pomenute klauzule sa aspekta prava konkurencije, između ostalog, zavisi i od toga da li se radi o isključivom ili neisključivom ustupanju ili prenosu i da li je ugovorena naknada.[18]

U pravnoj teoriji nailazimo na različita mišljenja o efektima ugovaranja ove klauzule sa aspekta prava konkurencije. S jedne strane, pojedini teoretičari zastupaju stanovište da ugovaranje pomenute klauzule podstiče širenje tehnologija i ima pozitivan efekat na konkurenciju na tržištu. U tom smislu zastupaju stav da davaocu licence mora biti omogućeno njeno ugovaranje, budući da bi u suprotnom bio demotivisan za

17 Na primer, sticalac licence za patent može u toku korišćenja licencirane tehnologije doći do značajnih poboljšanja patenta, takva poboljšanja (ukoliko se radi o odvojivim poboljšanjima) može patentirati i na taj način istisnuti sa tržišta davaoca licence.

18 Vid. više *supra* fusnota 14, str. 39.

licenciranje. Na primer, ukoliko titular prava intelektualne svojine ne bi mogao da ugovori klauzulu o iskorišćavanju naknadnih usavršavanja predmeta licence, vrlo je verovatno da bi odbio da licencira svojutehnologiju zbog straha da bi mogao biti istisnut sa tržišta ukoliko bi sticalac licence mogao da samostalno iskorišćava naknadna usavršavanja predmeta licence do kojih dođe u toku iskorišćavanja licencirane tehnologije. Takva odluka bi se negativno odrazila na konkurenciju na tržištu. Naime, titular bi bio primoran da samostalno ostvari komercijalnu eksploataciju svoje zaštićene tehnologije. Na taj način bi stekao monopol na tržištu i usporile bi se inovacije, budućida ne bi došlo do širenja tehnologije, a potencijalnim konkurentima bi bio onemogućen ulazak na tržište (Murray, 2012: 307).

S druge strane, u pravnoj teoriji je rasprostranjen stav da ugovaranje pomenute klauzule može usporiti inovacije i imati negativan uticaj na konkurenciju na tržištu tako što će davaocu licence omogućiti da zadrži monopol nad određenom tehnologijom ili da svoj monopol proširi i na naknadna usavršavanja predmeta licence do kojih dođe sticalac licence. Pojedini teoretičari smatraju da se u velikom broju slučajeva pomenuta klauzula ugovara sa ciljem zaštite monopola titulara prava intelektualne svojine (DeLisio, 1962: 256). Šta više, ugovaranje ove klauzule omogućava titularu prava intelektualne svojine da na taj način proširi opseg svog monopolskog prava koje mu je priznato na osnovu objektivnih normi prava intelektualne svojine (Schmalbeck, 1975: 733)

4. Pravni režim klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence u pravu konkurencije Evropske unije

Posmatrano sa aspekta prava konkurencije, pravni režim klauzule o iskorišćavanju naknadnih usavršavanja zavisi od toga da li pomenuta klauzula ima isključiv ili neisključiv karakter. Ugovaranje klauzule o isključivom iskorišćavanju naknadnih usavršavanja predmeta licence može se negativno odraziti na konkurenciju između učesnika na tržištu na više načina. Naime, u slučaju ugovaranja klauzule na isključivo ustupanje prava na naknadna usavršavanja, postavlja se pitanje da li bi sticalac licence uopšte bio zainteresovan za ulaganje sopstvenih sredstava u istraživanje i razvoj licencirane tehnologije. U tom slučaju bi sticalac licence bio u obavezi da sva poboljšanja do kojihje došao za vreme trajanja ugovornog odnosa, prenese ili ustupi davaocu

licence. Jasno je da sticalac licence ne bi bio motivisan za istraživanje i razvoj, što bi nesumnjivo uticalo na smanjeni obim inovacija, što u krajnjem dovodi do manjeg blagostanja potrošača. Takođe, ugovaranje pomenute klauzule može dovesti i do zatvaranja tržišta za potencijalne konkurente, budući da sticalac licence ne bi bio u prilici da trećim licima licencira naknadna usavršavanja predmeta licence do kojih je došao (Murray, 2012: 308).

S druge strane, kada je reč o ugovaranju klauzule na neisključivo iskorišćavanje naknadnih usavršavanja, u pravu Evropske unije prihvaćen je blaži stav po pitanju pravnog režima pomenute klauzule, te je njeno ugovaranje načelno dozvoljeno.

Pravni režim pomenute klauzule uređen je Uredbom TTBER i pratećim Smernicama o sporazumima o prenosu tehnologije.

Čl. 5 st. 1 tač. (a) Uredbe TTBER kao izričito zabranjeno ograničenje navodi „svaku neposrednu ili posrednu obavezu sticaoca licence da davaocu licence ili trećem licu koje je imenovao davalac licence izda isključivu licencu ili dodeli prava, u celini ili delimično, za vlastita poboljšanja ili vlastite nove primene licencirane tehnologije.[19] U Smernicama o sporazumima o prenosu tehnologije nalazimo da se čl. 5 st. 1 tač. 1 TTBER odnosi na isključivo ustupanje prava na naknadna usavršavanja ili na prenos naknadnih usavršavanja licencirane tehnologije davaocu licence.[20] Isključivo ustupanje prava na naknadna usavršavanja predmeta licence je u Smernicama o sporazumima o prenosu tehnologije definisano kao ustupanje prava na naknadna usavršavanja koje sticaoca licence (koji je inovator i davalac licence za poboljšanja u ovom slučaju) sprečava da iskorišćava poboljšanja, bilo za vlastitu proizvodnju ili za licenciranje trećim licima.[21]

U odnosu na rešenje koje je propisivala prethodna Uredba TTBER 772/04, važećom Uredbom TTBER je uklonjena razlika između odvojivih i neodvojivih naknadnih usavršavanja predmeta licence. Naime, važeća Uredba TTBER tretira sva poboljšanja, bilo da su odvojiva ili neodvojiva u odnosu na licenciranu tehnologiju ili postupak primene licencirane tehnologije, na jedinstven način. U tom smislu, sve klauzule o isključivom

19 Čl. 5 st. 1 tč. (a) TTBER. Autor će daljem tekstu rada, radi doslednosti u terminologiji, koristiti termin ustupanje prava na naknadna usavršavanja, bez obzira što se čl. 5 st. 1 tač. (a) Uredbe TTBER odnosi i na prenos, odnosno cesiju, naknadnih usavršavanja.

20 Vid. tač. 129 Smernica o sporazumima o prenosu tehnologije.

21 *Ibid*.

ustupanju prava na naknadna usavršavanja smatraju se ograničenjima konkurencije na tržištu u smislu čl. 101 st. 1 UFEU, bilo da se radi o odvojivim ili neodvojivim poboljšanjima.[22]

22 Uredba TTBER propisuje da se sve klauzule o isključivom ustupanju prava na naknadna usavršavanja tretira kao ograničenja konkurencije na tržištu u smislu čl. 101 st. 1 UFEU, bilo da se radi o odvojivim ili neodvojivim naknadnim usavršavanjima licencirane tehnologije. Za razliku od važeće Uredbe TTBER, prethodna Uredba 772/04 je na ovakav način tretirala samo klauzule o isključivom ustupanju prava na odvojiva naknadna usavršavanja predmeta licence. Međutim, budući da u praksi nije uvek bilo lako napraviti razliku između odvojivih i neodvojivih naknadnih usavršavanja predmeta licence, Komisija je bila na stanovištu da je neophodno da se sve klauzule o isključivom ustupanju prava na poboljšanja tretiraju na jedinstven način i da budu podvrgnute pojedinačnoj proceni, a u cilju da se obezbedi podsticaj sticaocima licence za dalja ulaganja u istraživanje i razvoj licencirane tehnologije (Rab, 2014:440). Odvojiva naknadna usavršavanja predmeta licence su ona poboljšanja koja se mogu iskorišćavati bez upotrebe licencirane tehnologije. S druge strane, neodvojivo naknadno usavršavanje je ono poboljšanje koje se ne može koristiti bez licencirane tehnologije, odnosno, bez povrede prava titulara intelektualne svojine, tj. davaoca licence. U tom smislu, sticalac licence ne može koristiti neodvojivo poboljšanje bez dozvole davaoca licence. Uredbom 772/2004 je bilo propisano da kolektivno izuzeće nije moguće primeniti na klauzule o isključivom ustupanju odvojivih naknadnih usavršavanja licencirane tehnologije, dok su klauzule o isključivom ustupanju neodvojivih naknadnih usavršavanja bile dopuštene sa aspekta prava konkurencije. Mišljenja smo da je rešenje koje nalazimo u važećoj Uredbi TTBER umnogome bolje i pravičnije posmatrano iz vizure sticaoca licence. Naime, budući da se klauzula o isključivom ustupanju prava na neodvojiva poboljšanja smatra ograničenjem konkurencije na tržištu u smislu čl. 101 st. 1 UFEU, te takvu klauzule davalac licence ne može nametnuti sticaocu licence, ugovornim stranama preostaje mogućnost da na neki drugi način urede svoja prava i obaveze u vezi neodvojivih naknadnih usavršavanja licencirane tehnologije. S obzirom da sticalac licence ne može koristiti neodvojivo naknadno usavršavanje licencirane tehnologije bez dozvole davaoca licence, a da davalac licence ima za cilj da se koristi poboljšanjima do kojih je došao sticalac licence, može se očekivati da ugovorne strane postignu sporazum o zajedničkom ekonomskom iskorišćavanju neodvojivih naknadnih usavršavanja. Vid. Assessment of potential anticompetitive conduct in thefield of intellectual property rights and assessment of the interplay between competition policy and IPR protection, Competition Reports, European Commission, 2011, str. 50. U tom smislu, sticalac licence bi bio u mnogo boljem položaju u odnosu na situaciju da je ugovorena klauzula isključivog ustupanja prava na neodvojiva poboljšanja. Takođe, ovakvo rešenje ne umanjuje podsticaj sticaoca licence da ulaže u istraživanje i razvoj licencirane tehnologije. Stoga smo mišljenja da rešenje u važećoj Uredbi TTBER kojim je izjednačen pravni tretman klauzula na isključivo ustupanje odvojivih i neodvojivih naknadnih usavršavanja pravično i ima prokonkurentno dejstvo. O pravnom tretmanu klauzule na isključivo ustupanje neodvojivih poboljšanja vid. više Jesper Markvar, The Treatment of Exclusive Grant Backs in EU Competition Law, *Journal of European Competition Law & Practice*, 6/2018, 368.

Primena čl. 5 st. 1 tač. (a) Uredbe TTBER ne zavisi ni od činjenice da li davalac licence plaća naknadu sticaocu licence za isključivo ustupanje ili prenos prava na vlastita poboljšanja.[23] Međutim, budući da ugovori o licenci koji sadrže napred pomenute klauzule, mogu biti predmet pojedinačne procene u skladu sa čl. 101 UFEU, ugovaranje naknade kojubi davalac licence plaćao sticaocu bi moglo biti od značaja u ovom postupku. Naime, kada sticalac licence prenosi ili licencira pravo na vlastita poboljšanja uz naknadu, manja je verovatnoća da će ova obaveza sticaoca licence odvratiti od ulaganja u inovacije licencirane tehnologije. Takođe, u Smernicama o sporazumima o prenosu tehnologije nalazimo da je prilikom pojedinačne procene pomenute klauzule važno imati u vidu i položaj davaoca licence i sticaoca licence na tržištu tehnologije.[24] Što je superiorniji položaj davaoca licence, izglednije je da će obaveza sticaoca licence na isključivo ustupanje prava na naknadna usavršavanja imati ograničavajuće dejstvo na konkurencijuna tržištu, budući da sticalac licence neće biti motivisan za ulaganje u istraživanje i razvoj licencirane tehnologije. Što je jača pozicija davaoca licence na tržištu tehnologije, to je važnije da sticalac licence može postati značajan izvor inovacija i buduće konkurencije na pomenutom tržištu (Gilbert, Shapiro, 1997: 325). Takođe, važan faktorprilikom pojedinačne procene dopuštenosti klauzule o isključivom ustupanju prava na naknadna usavršavanja je i broj učesnika na tržištu određene tehnologije. Naime, kada dostupnu tehnologiju kontroliše ograničen broj davaoca licenci koji sticaocima licenci nameću obavezu isključivog ustupanja prava na naknadna usavršavanja, veći je rizik od negativnih učinaka po konkurenciju na tržištu.[25] Nasuprot tome, u slučaju kada veliki broj učesnika na tržištu ima dostupnu tehnologiju, a samo ograničen broj primenjuje klauzule o isključivom ustupanju prava na naknadna usavršavanja, rizik od negativnih učinaka po konkurenciju na tržištu je znatno manji, budući da su oni sticaoci licenci koji nemaju obavezu isključivog ustupanja prava na naknadna usavršavanja motivisani za istraživanje i razvoj licencirane tehnologije i takmičenje sa drugim učesnicima na tržištu. Komisija bi sve napred navedeno trebalo da ima u vidu prilikom pojedinačne ocene svakog konkretnog ugovora o licenci. Takođe, mišljenja smo da je bitno da se prilikom pojedinačne procene posebna pažnja obrati i na to da li bi eventualno nedopuštanje ugovaranja klauzule na isključivo ustupanje

23 Vid. tač. 130 Smernica o sporazumima o prenosu tehnologije.

24 Tač. 130 Smernica o sporazumima o prenosu tehnologije.

25 Tač. 130 Smernica o sporazumima o prenosu tehnologije.

права на наknадна усавршавања умањило подстицај даваоца licence да иницијално улаже у иновације и licенцирање технологије, будући да не би био у прилици да контролише даљи развој технологије коју је licенцирао и економску експлоатацију побољшања до којих је дошаосticалац licence.[26]

С друге стране, обавезе које се односе на неискључиво уступање права на наknадна усавршавања предмета licence нису обухваћене ограничењем прописаним у чл. 5. ст. 1 Уредбе TTBER 2014. Наиме, Смернице прописују да су клаузуле неискључивог уступања права на наknадна усавршавања предмета licence изузета од примене чл. 101. ст. 1 UFEU.[27] На исти начин регулисана је и ситуација у случају када је обавеза повратног уступања (повратна licenca) неузајамна, односно наметнута само sticaocu licence, и када према уговору давалац licence има право да наknадна усавршавања преноси другим sticaocima licence (клаузула даљег уступања).[28] Овакво решење је прихваћено будући да подстиче ширење технологије и на тај начин позитивно утиче на конкуренцију између учесника на тржишту. Сваки sticalac licence у тренутку закључивања уговора о licenci са даваоцем licence зна да ће бити у једнаком положају као и сви други sticaoci licence, те да ће моћи да користи побољшања до којих дођу други sticaoci licence (Curley, 2004: 132). На тај начинsu sticaoci licence stimulisani da ulažu u istraživanje i razvoj licencirane tehnologije, budući da među njima postoji konstantan konkurentski pritisak. Такође, мишљења смо да овакво решење иде на руку и потенцијалним конкурентима и да не постоји ризик од затварања тржишта.

Међутим, у правној теорији налазимо на став да неискључива уступања права на наknадна усавршавања предмета licencemogu имати негативан утицај на конкуренцију на тржишту. Наиме, у случају уговарања неискључивог уступања права на наknадна усавршавања, sticalac licence би био у обавези да побољшања до којих је дошао уступи даваоцу licence. Такође, могао би да побољшања до којих је дошао licencira и трећим лицима. Међутим, очигледно је да би се у овакvој ситуацији давалац licence појавио као конкурент sticaocu licence, будући да би и давалац licence могао да licencira иста побољшања трећим лицима. Постављa се питање да ли би sticalac licence, који је свестан могућих последица

26 Сличан став налазимо и код Jacques-Philippe Gunther, Introductory remarks and concerns, The new EU Technology Transfer Regulation and Guideline, *Law & Economics workshop organized by Concurrences*, jul 2014.

27 Тач. 131 Смернице о споразумима о преносу технологије.

28 Тач. 131 Смернице о споразумима о преносу технологије.

usled ugovaranja neisključivog ustupanja prava na naknadna usavršavanja predmeta licence, bio zainteresovan da ulaže u istraživanje i razvoj licencirane tehnologije, budući da ne bi mogao da samostalno ekonomski iskorišćava svoje unapređenje (Curley, 1981: 358). Mišljenja smo da bi ovaj problem u praksi mogao da se prevaziđe ugovaranjem određene naknade koju bi davalac licence bio dužan da plaća sticaocu licence na ime naknadnih usavršavanja predmeta licence.

5. Zaključak

U komunitarnom pravu konkurencije je pravni tretman klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence uređen dvojako. Naime, sve klauzule o isključivom iskorišćavanju naknadnih usavršavanja predmeta licence smatraju se ograničenjima konkurencije na tržištu u smislu čl. 101 st. 1 UFEU, bilo da se radi o odvojivim ili neodvojivim poboljšanjima. U tom smislu, predstavljaju ograničenja na koja se ne može primeniti kolektivno izuzeće.

Naime, u slučaju ugovaranja klauzule o isključivom iskorišćavanju naknadnih usavršavanja predmeta licence sticalac licence bi bio u obavezi da sva poboljšanja do kojih bude došao u toku korišćenja licencirane tehnologije ustupi ili prenese na davaoca licence. To bi, bez sumnje, u velikoj meri umanjilo podsticaj sticaoca licence da investira u istraživanje i razvoj licencirane tehnologije, što bi se u krajnjem negativno odrazilo na konkurenciju na relevantnom tržištu, budući da davalac licence ne bi imao konkurenta.

S druge strane, klauzule o neisključivom iskorišćavanju naknadnih usavršavanja predmeta licence nisu obuhvaćene ograničenjem propisanim u čl. 5. st. 1 Uredbe TTBER. Naime, Smernice o sporazumima o prenosu tehnologije propisuju da su pomenute klauzule izuzete od primene čl. 101. st. 1 UFEU budući da mogu imati pozitivan uticaj na konkurenciju na tržištu. Klauzula o neisključivom iskorišćavanju naknadnih usavršavanja predmeta licence omogućava sticaocu licence da i samostalno koristi poboljšanja licencirane tehnologije, kao i da poboljšanja ustupi trećim licima. Na taj način se stvara podsticaj da sticalac licence ulaže sopstvena sredstva u poboljšanje licencirane tehnologije.

U pravu konkurencije Republike Srbije još uvek ne postoji pravni okvir za izuzimanje ugovora o licenci od zabrane restriktivnih sporazuma. Naučnoj i stručnoj javnosti je dostupan Nacrt Uredbe o sporazumima o transferu tehnologije koji se izuzimaju od zabrane. Između ostalog, čl. 7

Nacrta uredbe o sporazumima o transferu tehnologije koji se izuzimaju od zabrane predviđa izričito zabranjena ugovorna ograničenja u ugovorima o licenci. Upravo u pomenutom članu nalazimo odredbu koja bi trebalo da reguliše pravni tretman klauzule o iskorišćavanju naknadnih usavršavanja predmeta licence u domaćem pravu konkurencije.

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Smernice o primeni čl. 101 st. 3 UFEU na kategorije sporazuma o prenosu tehnologije.

Ugovor o funkcionisanju Evropske unije.

Uredba Komisije br. 316/2014 od 21. marta 2014. godine o primeni čl. 101,st. 3 UFEU na kategorije sporazuma o prenosu tehnologije.

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LEGAL TREATMENT OF GRANT-BACK CLAUSES IN LICENCE AGREEMENTS FROM THE ASPECT OF EU COMPETITION LAW

Summary

In this paper, the author explores the legal treatment of no-challenge clauses in license agreements. A grant-back clause obligates the licensee to grant the rights on future advances or improvements in the licensed technology to the licensor. The author analyzes the legality of contracting the aforementioned clause in license agreements from the aspect of European Union Competition Law, considering that the positive law of the Republic of Serbia still does not include legal norms regulating this institute.

Keywords*: grant-back clause, license agreements, technology transfer, competition law.*

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pregledni naučni rad
10.5937/zrpfn0-28646

UDK: 347.65/.67(497.11)
342.7:179.3
Rad primljen: 01.10.2020.
Rad prihvaćen: 30.12.2020.

EUTANAZIJA KAO RAZLOG NEDOSTOJNOSTI ZA NASLEĐIVANJE[**]

Apstrakt: *Nedostojnost za nasleđivanje, kao građanskopravna kazna, primenjuje se samo u zakonom predviđenim slučajevima. Srpski zakonodavac taksativno navodi razloge nedostojnosti, pa se činida nema dilema u pogledu primene ovog instituta. Međutim, kod umišljajnog ubistva ili pokušaja ubistva ostavioca, kao razloga za nedostojnost, nailazimo na nedoumicu. Da li eutanazija, ili ubistvo iz milosrđa ulazi u okvir pomenute odredbe? U većini savremenih pravnih sistema lišenje života određenog lica na njegovo traženje ili pristanak, kvalifikovano je kao privilegovano ubistvo za koje je predviđena odgovarajuća sankcija. S druge strane, pojedini pravni sistemi dozvoljavaju pasivnu eutanaziju, koja se ogleda u nepružanju ili uskraćivanju dalje medicinske brige ili lečenja određenom licu. U svetlu predloženih rešenja u Prednacrtu Građanskog zakonika Republike Srbije, povodom priznavanja prava na dostojanstvenu smrt, potrebno je odrediti mesto eutanazije među razlozima nedostojnosti za nasleđivanje. Autor u radu nastoji da utvrdi da li i eutanazija, u oba svoja vida, predstavlja razlog za nedostojnost naslednika, i da kroz uporednopravni prikaz predloži određena rešenja.*

Ključne reči: *eutanazija, lišenje života iz samilosti, naslednik, nedostojnost za nasleđivanje, umišljajno ubistvo.*

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[**] Rad je izložen na Međunarodnoj naučnoj konferenciji „Odgovornost u pravnom i društvenom kontekstu“, održanoj 18. 09. 2020. u online formatu, na Pravnom fakultetu u Nišu.

1. Uvod

Nedostojnost za nasleđivanje (indignitet) predstavlja građanskopravnu (civilnu) kaznu za nedozvoljeno ponašanje naslednika prema ostaviocu (Đurđević, 2010: 66). Naslednopravna ustanova „nedostojnost za nasleđivanje" je predviđena u svim pravima, razlike postoje jedino u pogledu razloga za nedostojnost. Razlike proizilaze iz kulturoloških, moralnih shvatanja određenog društva. Razlog za nedostojnost koji je u različitim pravnim sistemima univerzalno prihvaćen je umišljajno ubistvo ili pokušaj ubistva ostavioca (Antić, 1994: 49). Ovaj razlog nedostojnosti je predviđen članom 727 Francuskog *Code civil*-a[1], članom 2339 Nemačkog građanskog zakonika[2], članom 540 Švajcarskog građanskog zakonika[3], članom 4:3 Holandskog građanskog zakonika[4], članom 727 Belgijskog građanskog zakonika[5], ali i članom 4 srpskog Zakona o nasleđivanju[6]. Na prvi pogled jasno određen, ovaj razlog nedostojnosti otvara niz nedoumica. Predviđanje umišljajnog ubistva ili pokušaja ubistva, kao razloga nedostojnosti za nasleđivanje, u većini zakonskih tekstova nije jasno određeno. Naime, često se postavlja pitanje: Da li razlog za nedostojnost predstavlja samo osnovni oblik ubistva ili se pod ovim razlogom nedostojnosti tretiraju i ostala krivična dela protiv života, npr. teško ubistvo kao kvalifikovani oblik, ubistvo na mah, krivično delo ubistva deteta pri porođaju, lišenje života iz samilosti (eutanazija), navođenje na samoubistvo i pomaganje u samoubistvu?[7] U

1 Civil code. Preuzeto 25. 4. 2020. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006165513/#LEGIARTI000006430775

2 German Civil Code in the version promulgated on 2 January (Federal Law Gazette Bundesgesetzblatt) I page 42, 2909; 2003 I page 738, last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719). Preuzeto 26. 4. 2020. https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p6923

3 Swiss Civil Code of 10 December 1907. Preuzeto 1. 5. 2020. https://www.admin.ch/opc/en/classified-compilation/19070042/index.html

4 Dutch Civil Code, Book 4, 1 January 2003. Preuzeto 1.5.2020. http://www.dutchcivillaw.com/civilcodebook044.htm

5 Belgian Civil Code. Preuzeto 1. 5. 2020. http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1804032132%2FF&caller=list&row_id=1&numero=5&rech=14&cn=1804032132&table_name=LOI&nm=1804032152&la=F&dt=CODE+CIVIL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27CIVIL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=16&imgcn.y=9#LNK0005

6 Čl. 4, st. 1 Zakona o nasleđivanju, *Sl. glasnik RS*, 46/95, 101/2003 – *odluka USRS i* 6/2015.

7 Čl. 113, čl. 114, čl. 115, čl. 116, čl. 117 i čl. 119 Krivičnog zakonika, *Sl. glasnik RS*, 85/2005, 88/2005-*ispr.,* 107/2005-*ispr.,* 72/2009, 111/2009, 121/2012, 104/2013,

uporednom zakonodavstvu se najčešće pod ovim razlogom podrazumevaju i ostali pojavni oblici ubistva (Kovačević, 2016: 69). Jedno od osnovnih pitanja, bez namere da se umanji značaj ostalih je: Da li eutanazija ili pravo na dostojanstvenu smrt ulazi u okvir umišljajnog ubistva kao razloga nedostojnosti? Odgovor na ovo pitanje zavisi od preciznog pojmovnog određenja eutanazije i adekvatnog zakonskog regulisanja.

2. Pojmovno određenje eutanazije

Eutanazija, ubistvo iz milosrđa ili pravo na dostojanstvenu smrt, tema je koja gotovo od početka ljudske civilizacije predstavlja predmet brojnih, ne samo pravnih, već i etičkih, filozofskih, medicinskih i religijskih rasprava. Reč eutanazija je nastala u XVII veku u grčkom jeziku od reči*eu* – što znači dobro i *thanatos* – što znači smrt (Živković, 2015: 55). Doslovno, eutanazija predstavlja pravo na dobru smrt.

Pojmovno određenje eutanazije predstavlja prvi korak u njenom pravilnom regulisanju, bilo njenom sankcionisanju ili dozvoljavanju. Najčešće se pod eutanazijom podrazumeva postupak planiranog prekida života drugog lica, s ciljem da ga oslobodi nepodnošljivih patnji uzrokovanih njegovim teškim zdravstvenim stanjem (Turković, Roksandić Vidlička, Maršavelski, 2010: 225). Kod izučavanja eutanazije moramo, pored njenog pojma, odrediti i njene pojavne oblike. Prva podela eutanazije vrši se s obzirom na postojanje ostaviočeve volje, odnosno pristanka lica nad kojim se eutanazija sprovodi, na njeno preduzimanje. Tako razlikujemo dobrovoljnu eutanaziju, nedobrovoljnu eutanaziju i eutanaziju protiv volje. Dobrovoljna eutanazija se odnosi na slučajeve prekida života uz pristanak osobe nad kojom se eutanazija vrši. Nedobrovoljna eutanazija pak postoji kada se ovaj postupak odvija bez izričitog pristanka lica čiji se život prekida. Eutanazija protiv volje jeste ona koja se sprovodi uz primenu sile, prevare ili druge radnje kojom se negira volja osobe nad kojom se eutanazija sprovodi (Turković, 2010: 226). U uporednom zakonodavstvu se pod eutanazijom najčešće podrazumeva samo dobrovoljna eutanazija, odnosno usmrćenje lica na njegov izričit pristanak. Nažalost, kroz istoriju su postojali slučajevi sprovođenja eutanazije protiv volje. Ubijanje pod „velom" milosrđa sprovođeno je u nacističkoj Nemačkoj. Naime, 1939. godine zakonodavno telo Trećeg rajha je donelo zakon o eutanaziji, „čiji je idejni i duhovni tvorac bio Hitler". Ovaj zakon je predviđao mogućnost „oslobađanja od patnji" neizlečivo bolesnih lica. Međutim, ovaj zakon je služio samo za opravdanje ubistava više

108/2014, 94/2016 *i* 35/2019.

od 275.000 ljudi, koji su „kvarili" rasnu superiornost nemačkog naroda. Slična situacija je bila i s masovnim ubijanjima u gasnim komorama koncentracionih logora (Živković, 2015: 57).

S obzirom na metod sprovođenja, eutanazija se deli na aktivnu i pasivnu. Aktivna eutanazija podrazumeva primenu medicinske terapije od strane lekara, sa isključivim ciljem okončanja života neizlečivo bolesnog pacijenta. Najčešće se aktivna eutanazija sprovodi davanjem visoke doze hipnotičkih sredstava pacijentu, opojnih droga, ili otrovnih materija kao što je kalijum-hlorid. Pasivna eutanazija podrazumeva nepreduzimanje ili obustavljanje daljeg lečenja pacijenta, koje će neminovno posle određenog vremena dovesti do smrtnog ishoda. Ova vrsta eutanazije se najčešće sprovodi obustavljanjem veštačkog davanja pacijentu vode, hrane, kiseonika, veštačkog disanja, veštačkog davanja lekova, transfuzije krvi ili dijalize (Živković, 2015: 56).

Na kraju, eutanaziju možemo razlikovati s obzirom na to da li je preduzeta s namerom neposrednog izazivanja smrti – direktna eutanazija, ili je preduzeta s namerom ublažavanja bolova, koja je dovela do skraćenja života pacijenta – indirektna eutanazija. Indirektna eutanazija je dozvoljena Deklaracijom svetskog medicinskog udruženja u kom se navodi da: „Eutanazija, odnosno namjerno skraćivanje života pacijenta, čak i na njegov zahtjev, odnosno zahtjev bliskih rođaka je neetično. No, to ne sprečava liječnika da poštuje želju pacijenta da dopusti prirodnom procesu smrti da slijedi svoj put u terminalnoj fazi bolesti" (Turko- vić, 2010: 228). Indirektna eutanazija ne predstavlja ništa drugo do sprovođenja osnovnih postulata palijativne medicine.[8]

Pored prethodno navedenih pojavnih oblika eutanazije, pod njom se u uporednom zakonodavstvu često podrazumeva i navođenje i pomaganje u samoubistvu osobi koja se nalazi u teškom zdravstvenom stanju. Pomaganje se najčešće odnosi na nabavljanje određenih sredstava za samoubistvo ili pak učestvovanje davanjem konkretnih uputstava za izvršenje samoubistva.

3. Eutanazija u uporednom zakonodavstvu

Lišenje života iz samilosti je postojalo još u najstarijim ljudskim društvima. Spartanci su imali običaj ubijanja fizički i mentalno slabe

8 Palijativna medicina je nova grana medicine koja proučava i primenjuje postupak s bolesnicima obolelim od aktivne, progresivne, uznapredovale bolesti s nepovoljnom prognozom. Težište je na kvalitetu života i bolesnika i njegove porodice, do smrti bolesnika (Kostić, 2009: 193).

dece. U starom Rimu je ovaj običaj kodifikovan zakonom XII tablica, koji je u četvrtoj tablici predviđao da „nakazno dete treba odmah ubiti".[9] Nomadi su imali običaj napuštanja starih koji nisu bili sposobni za privređivanje i kretanje. Američki Indijanci su svoje stare roditelje ostavljali da umru od gladi ili su ih odvodili u šumu gde su ih zveri rastrzale (Živković, 2015: 55).[10] Kod naših predaka je postojao običaj ubijanja starih a najbližih članova porodice, poznat pod nazivom
„lapot".[11]

Prva moderna država u Evropi koja je ozakonila eutanaziju je Holandija, Zakonom o okončanju života na zahtev i potpomognutom samoubistvu[12],od 12. aprila 2001. godine. U Holandiji se pod eutanazijom podrazumeva prekid života od strane lekara na zahtev pacijenta".[13] Pod eutanazijom se pak ne podrazumeva prestanak daljeg lečenja umirućeg pacijenta, kao ni davanje lekova za ublažavanje bolova koji kao sporedan efekat imaju ubrzanje smrti pacijenta. Do 2002. godine i donošenja Zakona o okončanju života na zahtev i potpomognutog samoubistva, eutanazija je predstavljala krivično delo. Naime, član 293 Holandskog krivičnog zakonika[14] predviđao je da će se kazniti zatvorom do 12 godina ili novčanom kaznom svaka osoba koja okonča život druge osobe na njegov izričit i ozbiljan zahtev. Donošenjem Zakona o okončanju života na zahtev i asistiranom samoubistvu, u član 293 Krivičnog zakonika, u okviru

9 Zakon XII tablica (Leges duodecim tabularum). Preuzeto 15. 5. 2020. https://www.harmonius.org/sr/pravni-izvori/pravo-eu/privatno-pravo/Zakon_12_tablica%20.pdf

10 Prema jednoj legendi „sin je ubio svog oca i kukom ga vukao do groblja. Sa sobom je poveo i svog sina. Kada su stigli do groblja, on htede da baci kuku, ali mu detereče: „Ne bacaj kuku! Biće mi potrebna kad ti ostariš". (Mitrović, Ćirić, Miletić, Bogoslović, Mladenović, Đorđević, 2015: 112)

11 Reč „lapot" se odnosi na običaj ubijanja starih članova porodice, kada oni više ne mogu da rade i svojim radom doprinesu materijalnim potrebama domaćinstva. Koren i značenje reči „lapot" je „lap", koja je reč staroslovenskog porekla, a znači gubljenje, iščezavanje, nestajanje. U našoj zemlji je ovaj običaj postojao u Risnici kod Pirota, i u Svrljigu. Ovaj ritualni čin je predstavljao akt dobročinstva, olakšanja, nikako kaznu. (Mitrović et al. 2015: 112)

12 Termination of Life on Request and Assisted Suicide (Review)Act, 1 April 2002. Preuzeto 20. 5. 2020. https://www.worldrtd.net/dutch-law-termination-life-request-and-assisted-suicide-complete-text

13 The Termination of Life on Request and Assisted Suicide (Review Procedures)Act in practice, Netherlands Ministry of Foreign Affairs. Preuzeto 20.5.2020. http://www.patientsrightscouncil.org/site/wp-content/uploads/2012/03/Netherlands_Ministry_of_Justice_FAQ_Euthanasia_2010.pdf

14 Netherlands Civil Code, 3 March 1881. Preuzeto 20. 5. 2020. https://www.legislationline. org/download/id/6415/file/Netherlands_CC_am2012_en.pdf

stava 2[15], uključen je poseban osnov za izuzeće od krivične odgovornosti lekara koji prekinu život pacijenta ili mu pomažu u samoubistvu, pod uslovom da ispunjavaju zahteve dužne pažnje, predviđene članom 2 Zakona o okončanju života na zahtev i asistiranom samoubistvu.[16] Ista odredba se primenjuje i u slučaju samoubistva ili pomaganju u istom, predviđenog članom 294 Holandskog krivičnog zakonika.[17] Lišenje života drugog lica radi prekida fizičkih bolova i psihičkih patnji izazvanih teškim zdravstvenim stanjem u kojim se to lice nalazi, i dalje predstavlja poseban oblik krivičnog dela ubistva. Ovakvom odredbom su od krivične odgovornosti izuzeti lekari koji postupak eutanazije sprovode uz ispunjenje svih zakonom predviđenih kriterijuma i obavezu prijavljivanja ovog postupka posebnom odboru za reviziju imenovanog od strane ministra pravde i državnog sekretara za zdravstvo, socijalnu zaštitu i sport. Ukoliko je lekar prilikom sprovođenja eutanazije ispunio sve kriterijume potrebne nege, takav slučaj se neće prijavljivati javnom tužilaštvu, niti će se lekar procesuirati. Rešenje holandskog zakonodavca zaslužuje pohvalu. Naime, na ovaj način se štiti pravo na život kao jedno od osnovnih ljudskih prava, a sa druge strane ostvaruje se i pravo na prekid života pacijenta čija je patnja trajna i nepodnošljiva. Tako se lišenje života drugog lica, čak i ako je vođeno samilošću, saosećanjem sa pacijentom, svodi na izuzetak, koji se primenjuje u tačno određenim opravdanim slučajevima.

15 Vid., čl. 293, st. 2: „Delo iz stava (1) neće biti kažnjivo ako ga počini lekar koji ispunjava zahteve dužne nege iz stava 2 Zakona o okončanju života na zahtev i potpomognutom samoubistvu... ili ko obavesti opštinskog forenzičkog patologa u skladu sa stavom 7(2) Zakona o sahrani i kremiranju...".

16 „Zahtevi dužne brige navedeni u članu 293 Krivičnog zakonika znače da lekar: drži uverenje da je pacijentov zahtev bio dobrovoljan i dobro razmotren; drži uverenje da je pacijentova patnja bila trajna i nepodnošljiva; da je pacijenta obavestio o njegovoj situaciji i mogućim alternativama; da je pacijent bio uveren da nije bilo drugog razumnog rešenja za situaciju u kojoj se nalazio; da je konsultovao još najmanje jednog nezavisnog lekara koji je posetio pacijenta i koji je dao svoje pismeno mišljenje o ispunjenosti navedenih zahteva dužne nege i da je s dužnom pažnjom okončao život ili pomogao u samoubistvu", čl. 2 Termination of Life on Request and Assisted Suicide Act. Preuzeto 15. 5. 2020. https://www.worldrtd.net/dutch-law-termination-life-request- and-assisted-suicide-complete-text

17 „1. Svaka osoba koja namerno podstiče drugu osobu na samoubistvo, kazniće se zatvorom do tri godine ili novčanom kaznom četvrte kategorije. 2. Svako lice koje namerno pomaže u samoubistvu neke osobe ili mu pruža sredstva za samoubistvo, kazniće se zatvorom do tri godine ili novčanom kaznom četvrte kategorije", čl. 294. Netherlands Civil Code, 3 March 1881. Preuzeto 20. 5. 2020. https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf

Belgija je Zakonom o eutanaziji[18] od 28. maja 2002. godine legalizovala eutanaziju. Ovaj zakon u članu 2 eutanaziju definiše „kao namerno prekidanje života od strane nekoga ko nije osoba u pitanju, na njen zahtev". Zakonom o eutanaziji su od krivične odgovornosti izuzeti lekari koji postupak eutanazije sprovode uz ispunjenje kriterijuma predviđenih ovih zakonom. Lekar koji vrši eutanaziju ne čini krivično delo kada obezbedi sledeće: da je pacijent nad kojim se eutanazija sprovodi punoletan ili emancipovan maloletnik, da je u trenutku podnošenja zahteva podnosilac istog imao odgovarajuću zakonsku sposobnost i svest o podnetom zahtevu,da je zahtev dobrovoljan, dobro razmotren i da nije bio rezultat bilo kakvog spoljnog pritiska, da je pacijent u medicinski uzaludnom stanjuu kome trpi stalne i nepodnošljive fizičke ili mentalne patnje koje se ne mogu ublažiti usled ozbiljnog i neizlečivog poremećaja izazvanog bolešću ili nesrećom, i kada je ispoštovao uslove i postupke predviđene ovim zakonom[19]. Sprovođenje aktivne eutanazije u belgijskom pravu nalazi se u rukama lekara, po posebno predviđenom postupku, uz strogo poštovanje navedenih uslova.

Treća evropska država koja je legalizovala eutanaziju je Luksemburg,Zakonom o eutanaziji i potpomognutom samoubistvu, iz 2009. godine. Ovim zakonom predviđeno je dopuštanje aktivne eutanazije i potpomognutog samoubistva izvršenog od strane lekara prema pacijentu koji se nalazi u ozbiljnom i neizlečivom zdravstvenom stanju, koji usled toga trpi nepodnošljive fizičke ili psihičke bolove, bez mogućnosti poboljšanja (Turković, 2010: 236).

Švajcarski krivični zakonik u članu 114[20] inkriminalizuje ubistvo na zahtev žrtve iz pohvalnih motiva, a posebno iz saosećanja sa žrtvom, i predviđa zatvorsku kaznu do tri godine ili novčanu kaznu. Slična situacija je i sa podsticanjem i pomaganjem samoubistva. Naime, „svako lice koje iz koristoljubivih razloga podstiče ili pomaže drugom da izvrši ili pokuša samoubistvo, ako to drugo lice nakon toga izvrši ili pokuša da izvrši samoubistvo, kazniće se zatvorskom kaznom koja ne prelazi pet godina, ili novčanom kaznom".[21] U Švajcarskoj je podsticanje i

18 The Belgian Act on Euthanasia of May, 28th 2002. Preuzeto 18. 5. 2020. https://apmonline. org/wp-content/uploads/2019/01/belgium-act-on-euthanasia.pdf

19 Section 3. The Belgian Act on Euthanasia of May 28th 2002. Preuzeto 18. 5. 2020. https:// apmonline.org/wp-content/uploads/2019/01/belgium-act-on-euthanasia.pdf

20 Swiss Criminal Code of 21 December 1937. Preuzeto 20. 5. 2020. https://www.admin.ch/opc/en/classified-compilation/19370083/index.html

21 Art. 115. Swiss Criminal Code of 21 December 1937. Preuzeto 25. 5. 2020. https://www. admin.ch/opc/en/classified-compilation/19370083/index.html

pomaganje u samoubistvu kažnjivo samo ako se temelji na sebičnom motivu. Ovakvim pravnim regulisanjem ubistva na zahtev i potpomognutog samoubistva, zakonodavac izostavlja slučajeve njihovog izvršenja zbog nesebičnih razloga. Svako ko pomogne nekome da izvrši samoubistvo, pod uslovom da ne deluje iz sebičnih motiva, ne može biti kažnjen.
„Sebični motivi bi bili, na primer, ako bi pomaganjem u samoubistvu neko mogao ranije naslediti imovinu ili bi se rešio finansijske obaveze izdržavanja." Ipak, činjenica da neko prima normalnu novčanu naknadu za pomoć u samoubistvu, ne znači da se time ispunjava element krivičnog dela „sebični motiv".[22] Na ovaj način, u Švajcarskoj je dozvoljeno samoubistvo uz podsticanje ili pomoć lekara. Svakako, ono je moguće samo uz ispunjenje određenih uslova. Međutim, Švajcarska nije donela poseban zakon kojim bi regulisala ovaj postupak. Stoga, u izvršenju samoubistva na teritoriji Švajcarske zainteresovanim licima pomažu udruženja poput *Exit*-a, *Dignitas*-a (pruža usluge samoubistva uz pomoć i strancima). Švajcarska dozvoljava strancima da na njenoj teritoriji izvrše eutanaziju. Ovaj fenomen je poznat pod nazivom „samoubilački turizam". Okosnica „samoubilačkog turizma" je mogućnost lišavanja života određenog lica, bez postojanja opravdanih razloga za to. U praksi se ova mogućnost često ostvaruje od strane lica za čiji prekid života nema opravdanih zdravstvenih razloga, već su, na primer, u pitanju lica koja smatraju da su dovoljno živela, ili pak ona koja ne žele da dožive duboku starost i tada budu „na teretu" članovima porodice. Međutim, ovakvom pravnom regulativom povređuje se pravo na život kao jedno od osnovnih ljudskih prava. Ukoliko je i dozvoljeno lišavanje života drugog lica, ono mora biti svedeno na izuzetak koji se primenjuje onda kada postoje opravdani razlozi za to. Eutanazija se od običnog ubistva upravo razlikuje po motivu za njeno sprovođenje. Kod eutanazije se lišenje života sprovodi iz saosećanja prema licu koje se nalazi u teškom zdravstvenom stanju, koje trpi nepodnošljive bolove i za koje nema nade za izlečenje.

Nemačko krivično zakonodavstvo sankcioniše ubistvo na zahtev predviđajući da onaj ko „podstakne na ubistvo na izričiti i ozbiljan zahtev ubijenog kazniće se zatvorom od šest meseci do pet godina".[23] S druge strane, asistirano samoubistvo sankcioniše se nešto drugačije:
„Ko, s namerom da pomogne drugom licu da izvrši samoubistvo, pruži, nabavi ili uredi mogućnost da to lice učini i čiji su akti upereni na

22 Dignitas, To live with dignity, To die with dignity, Legal Basis. Preuzeto 25. 5. 2020. http://
www.dignitas.ch/index.php?option=com_content&view=article&id=12&Itemid=53&lang=en

23 Section 216, German Criminal Code (Strafgesetzbuch- StGB). Preuzeto 30. 5. 2020. https://www.gesetze-im-internet.de/englisch_stgb/

ispunjenje datog zahteva, kažnjava se zatvorom od tri godine ili novčanom kaznom. Učesnik čije radnje ne spadaju u domen profesionalne usluge i koji je ili rođak ili je blizak osobi iz prethodnog stava, izuzet je od kazne".[24] Intencija nemačkog zakonodavca bila je da se sankcioniše sprovođenje asistiranog samoubistva i ubistva, kao profesionalne službe. Ovakvo rešenje je opravdano, ukoliko nema medicinskih razloga za lišenje života određenog lica. Međutim, ukoliko postoje opravdani razlozi, asistirano samoubistvo se treba sprovoditi od strane stručnjaka, koji mogu da procene zdravstveno stanje i mogućnost za dalji život osobe u pitanju.

U Francuskoj je kroz Zakonik o javnom zdravstvu 2005[25]. godine predviđeno da se neće goniti lekari koji ne preduzmu lečenje ili pak suspenduju lečenje koje se prema okolnostima slučaja čini nepotrebnim, ili nema drugi efekat osim veštačkog održavanja života. Ovakvim postupanjem lekar štiti dostojanstvo osobe koja umire i osigurava kvalitet njenog života. Naime, ukoliko lekar utvrdi da ne može da ublaži patnju osobe u poodmakloj ili terminalnoj fazi ozbiljne i neizlečive bolesti, bez obzira na uzrok, primeniće tretman koji za neželjeni efekat može imati skraćivanje života. Pored toga, ukoliko osoba u uznapredovaloj ili terminalnoj fazi ozbiljne i neizlečive bolesti, bez obzira na uzrok, odluči da ograniči ili zaustavi bilo koji tretman, lekar će poštovati njegove želje nakon što ga je obavestio o posledicama svog izbora.[26] Na ovaj način je u francuskom pravu, opravdano, dozvoljeno sprovođenje pasivne eutanazije kroz ograničavanje ili zaustavljanje daljeg lečenja, ili pak davanjem lekova za ublažavanje bolova koji dovode do bržeg smrtnog ishoda.

Kroz uporedni prikaz pravnog regulisanja eutanazije možemo uočiti da u evropskom pravnom području postoje pravni sistemi u kojima je aktivna eutanazija dozvoljena (Holandija, Belgija i Luksemburg), ali i oni gdese kroz zakone o zdravstvenoj zaštiti, o pravima pacijenata, legalizuje pasivna eutanazija (Francuska).

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24 Section 217. German Criminal Code (Strafgesetzbuch-StGB). Preuzeto 30. 5. 2020. https:// www.gesetze-im-internet.de/englisch_stgb/

25 Law No. 2005-370 of April 22, 2005 on the rights patients and the end of life (1). Preuzeto
2. 6. 2020. https:// www.legifrance.gouv.fr/jorf/id/JORFTEXT000000446240?r=VQU98RM6Vx

26 Vid., article 1, article 2 and article 6, Law No. 2005-370 of April 22, 2005 on the rights patients and the end of life (1). Preuzeto 2. 6. 2020. https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000446240?r=VQU98RM6Vx

4. Eutanazija u srpskom pravu

U pozitivnom srpskom pravu, eutanazija predstavlja krivično delo. Shodno krivičnom zakonodavstvu, eutanazija se tretira kao lišenje života punoletnog lica iz samilosti zbog teškog zdravstvenog stanja u kojem se to lice nalazi, a na njegov ozbiljan i izričit zahtev.[27] Ovakva zakonska odredba je predmet ponovnog interesovanja usled predloga za uvođenje prava na dostojanstvenu smrt, unutar Građanskog zakonika.

Prednacrtom Građanskog zakonika predviđeno je pravo na dostojanstvenu smrt (eutanaziju): „kao pravo fizičkog lica na saglasni, dobrovoljni i dostojanstveni prekid života, koje se može izuzetno ostvariti ako se ispune propisani humani, psiho-socijalni i medicinski uslovi".[28] Pravo na dostojanstvenu smrt je regulisano u okviru odeljka koji se odnosi na prava ličnosti, pre svega prava na dostojanstvo iz kog proizilaze sva druga prava ličnosti.[29] Naime, kako svako fizičko lice ima pravo na život dostojan čoveka, tako bi trebalo predvideti i pravo na dostojanstvenu smrt, ali samo pod jasno utvrđenim uslovima. Bliži uslovi i postupak za ostvarivanje prava na eutanaziju, shodno rešenju u Prednacrtu, biće regulisani posebnim zakonom.

Predlogom posebnog Zakona o pravu na dostojanstvenu smrt je predviđeno da se „u izuzetno teškoj i dugotrajnoj medicinskoj, psihološkoj i socijalnoj situaciji umirućeg može, na osnovu jasno, nesumnjivo i slobodno izražene volje, uvažiti zahtev o prevremenom prekidu života u vidu dostojanstvenog umiranja".[30] Ovaj zakon dalje predviđa da ovo pravo može biti ostvareno uz ispunjenje tri vrste uslova, medicinskih, humanih i socijalnih.[31]

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27 Čl. 117 Krivičnog zakonika, *Sl. glasnik RS*, 85/2005, 88/2005 – *ispr*., 107/2005 – *ispr*., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 *i* 35/2019.

28 Čl. 86 Prednacrta Građanskog zakonika, 2019.

29 Čl. 78 Prednacrta Građanskog zakonika, 2019.

30 U pripremi Nacrt Zakona o pravu na dostojanstvenu smrt. Preuzeto 2. 6. 2020. https://www.paragraf.rs/dnevne-vesti/050619/050619-vest6.html

31 „Medicinski uslov je ispunjen onda kada konzilijum lekara odgovarajuće specijalnosti, na osnovu medicinske dokumentacije i neposrednog uvida, utvrdi da u konkretnom slučaju u bliskoj budućnosti ne postoji nada da se, i pored korišćenja naučnog, stručnog i praktičnog iskustva i saznanja savremene medicinske nauke, može postići izlečenje pacijenta ili poboljšanje njegovog zdravstvenog stanja. Humani uslovi su ispunjeni ako je umirući u takvom psihofizičkom stanju koje je zbog fizičkih bolova i psihičkih patnji postalo neizdrživo u dužem periodu. Socijalni uslovi su ispunjeni ako su zbog dugotrajnijeg zdravstvenog i psihofizičkog stanja umirućeg nastupile za užu porodicu, ili osobu koja se stara o njemu, tako

Shodno navedenom rešenju u nacrtu zakona, ispunjenost navedenih uslova ceniće sud u vanparničnom postupku. Ovaj postupak bi bio hitan i postupalo bi tročlano sudsko veće sastavljeno od jednog sudije profesionalca i dvoje sudija porotnika. Po okončanju postupka, sud može doneti rešenje o odbijanju zahteva ili o njegovom prihvatanju uz određenje roka i načina ostvarivanja ovog prava. Posebnom odredbom ovog zakona je predviđeno da eutanaziju „sprovodi određeni tim licenciranih javnih izvršitelja medicinsko-tehničke struke, od kojih jedan neposredno realizuje prekid života kao profesionalnu tajnu".[32] Ukoliko bi predloženo rešenje bilo usvojeno, u našem pravu bi bila dozvoljena aktivna eutanazija koja bi se sprovodila od strane stručnjaka medicinske struke, na osnovu odgovarajuće sudske odluke. U svim ostalim slučajevima bi i dalje postojalo krivično delo ubistva iz milosrđa, predviđeno Krivičnim zakonikom. Dok je legalizacija ovog tipa aktivne eutanazije u našem pravu i dalje na nivou predloga, po shvatanjima mnogih, pasivna eutanazija je već dozvoljena. Naime, prema shvatanjima određenih autora (Vučinić, 2019: 25), s kojima se slažemo, pasivna eutanazija je u našem pravu dozvoljena, i to Zakonom o pravima pacijenata[33]. Odredbama ovog zakona predviđeno je da: „pacijent ima pravo da slobodno odlučuje o svemu što se tiče njegovog života i zdravlja, osim u slučajevima kada to direktno ugrožava život i zdravlje drugih lica. Bez pristanka pacijenta ne sme se, po pravilu, nad njim preduzimati nikakva medicinska mera".[34] Međutim, ovaj zakon dalje previđa da pacijent koji je sposoban za rasuđivanje ima pravo da predloženu medicinsku meru odbije, čak i u slučaju kada se njome spasava ili održava njegov život.[35]

5. Eutanazija kao razlog nedostojnosti za nasleđivanje

Umišljajno ubistvo ili pokušaj ubistva predstavlja univerzalno prihvaćen razlog nedostojnosti u uporednom zakonodavstvu. Tako član 727 *Code civil*-a predviđa da će biti nedostojan onaj ko je osuđen zbog

teške materijalno-socijalne posledice koje znatno ugrožavaju njihovu materijalnu egzistenciju ili budući socijalni položaj". Pristupljeno 5. 6. 2020. https://www.paragraf.rs/dnevne-vesti/050619/050619-vest6.html

32 Isto.

33 Zakon o pravima pacijenata, *Sl. glasnik RS,* 45/2013 *i* 25/2019-*dr. zakon*, u daljem tekstu: ZOPP

34 Čl. 15 ZOPP-a

35 Čl. 17 ZOPP-a

ubistva ili pokušaja ubistva ostavioca[36], član 2339 Nemačkog građanskog zakonika predviđa da je lice nedostojno za nasleđivanje „ako je namerno i protivpravno ubio ili pokušao da ubije ostavioca...”[37], član 540 Švajcarskog građanskog zakonika predviđa da će biti nedostojan: „on ili ona ako je namerno i nezakonito izazvao ili pokušao da izazove smrt osobe koja je sada ostavilac”[38], član 4:3 Holandskog građanskog zakonika predviđa da je nedostojno: „lice koje je pravnosnažno osuđeno za oduzimanje života preminulog, za pokušaj ubistva ili pripremu ili učešće u takvom krivičnom delu”[39], član 727 Belgijskog građanskog zakonika predviđa da je nedostojan: „onaj koji je proglašen krivim zato što je kao izvršilac, saizvršilac ili saučesnik, prema ostaviocu izvršio delo koje je dovelo do njegove smrti kako se navodi u članovima 376, 393–397, 401, 404 i 409, st. 4 Krivičnog zakonika, kao i lice koje je oglašeno krivim za pokušaj izvršenja takvog dela”[40]. Kroz uporedni prikaz vidljivo je da u gotovo svim zakonodavstvima, izuzev Belgije, nema pojašnjenja šta sve potpada pod ovaj razlog nedostojnosti. Pre svega, da li ubistvo iz milosrđa ulazi u okvir umišljajnog ubistva ili pokušaja ubistva kao razloga nedostojnosti za nasleđivanje?

U državama u kojima je aktivna eutanazija dozvoljena, a to su Holandija, Belgija i Luksemburg, ona se sprovodi samo od strane lekara, uz poštovanje strogih uslova. U svim ostalim slučajevima, lišavanje života drugog lica je kažnjivo. Tako bi krivično sankcionisanje naslednika, predstavljalo osnov njegove nedostojnosti. Belgijski građanski zakonik, čak, prilikom taksativnog navođenja razloga nedostojnosti, u okviru svakog navodi i odgovarajuće članove Krivičnog zakonika na koje se ovaj razlog odnosi.[41]

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36 Code civil. Preuzeto 15. 6. 2020. https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/2020-09-30/

37 German Civil Code. Preuzeto 15. 6. 2020. https://www.gesetze-im-internet.de/englisch_bgb/

38 Swiss Civil Code. Preuzeto 15. 6. 2020. https://www.admin.ch/opc/en/classified-compilation/19070042/index.html

39 Dutch Civil Code. Preuzeto 15. 6. 2020. http://www.dutchcivillaw.com/civilcodebook044. htm

40 Belgian Civil Code. Preuzeto 15. 6. 2020. http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1804032132%2FF&caller=list&row_id=1&numero=5&rech=14&cn=1804032132&table_name=LOI&nm=1804032152&la=F&dt=CODE+CIVIL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27CIVIL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=16&imgcn.y=9#LNK0005

41 Art. 727. Belgian Civil Code. Preuzeto 20. 6. 2020. http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1804032132%2FF&caller=list&row_id=1&numero=5&rech=14

Ovakvo rešenje predstavlja pozitivan primer koji bi trebalo da sledei ostala zakonodavstva, uključujući i srpsko. Taksativnim navođenjem članova zakona na koje se pojedini razlog nedostojnosti odnosi, otklanjaju se brojne navedene nedoumice i doprinosi ostvarenju pravne sigurnosti. S druge strane su one države, poput Švajcarske, koje ne sankcionišu potpomognuto samoubistvo iz nesebičnih razloga.[42] Ukoliko ovu odredbu prenesemo na teren nedostojnosti, naslednik bi iz ovog razloga bio nedostojan za nasleđivanje. Naime, njegova odgovornost bi izostala samo u slučaju nepostojanja „sebičnih motiva". Međutim, ubistvom ostavioca, naslednik stiče zaostavštinu ranije u odnosu na prirodni tok stvari, što se najčešće ima smatrati sebičnim motivom.

U zemljama poput Francuske i Nemačke koje dozvoljavaju pasivnu eutanaziju, u pogledu nedostojnosti situacija je drugačija. Francuska dozvoljava prekid daljeg lečenja ili uzdržavanje od istog, te tako dozvoljava eutanaziju sprovedenu samo od strane lekara.[43] U svim ostalim slučajevima radilo bi se o krivičnom delu, te bi tako naslednik koji usmrti ostavioca, bilo svojom pasivnom ili aktivnom radnjom, bio nedostojan za nasleđivanje. Nemačka pak nudi rešenje koje nismo uočili u ostalim zakonodavstvima. Naime, lice koje drugom potpomogne izvršenje samoubistva, ali ta radnja ne spada u domen profesionalne usluge, i koji je ili rođak ili je blizak osobi koja samoubistvo izvršava, neće biti kažnjeno.[44] U praksi ovo znači da muž koji pomogne svojoj terminalno bolesnoj supruzi da umre neće biti procesuiran. Na terenu nedostojnosti, navedeno znači da naslednik koji pomogne ostaviocu da izvrši samoubistvo i tako prekine fizičke i duševne patnje izazvane teškim zdravstvenim stanjem biva dostojan da ga nasledi.

U domaćoj pravnoj teoriji, brojni autori (Babić, Stojanović)[45] eutanaziju tretiraju kao razlog nedostojnosti za nasleđivanje. Budući da, shodno pozitivnom krivičnom zakonodavstvu, eutanazija predstavlja krivično

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&cn=1804032132&table_name=LOI&nm=1804032152&la=F&dt=CODE+CIVIL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27CIVIL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=16&imgcn.y=9#LNK0005

42 Art. 540. Swiss Civil Code. Preuzeto 15. 6. 2020. https://www.admin.ch/opc/en/classified-compilation/19070042/index.html

43 Art. 724. Code civil. Preuzeto 15. 6. 2020. https://www.legifrance.gouv.fr/codes/texte_lc/ LEGITEXT000006070721/2020-09-30/

44 Section 2339, German Civil Code. Preuzeto 15. 6. 2020. https://www.gesetze-im-internet. de/englisch_bgb/

45 Vid. (Babić, 1996: 11; Stojanović, 2011: 57).

delo za koje je propisana odgovarajuća krivična sankcija, ne čudi ovakvo shvatanje. Naime, ukoliko naslednik iz samilosti liši života ostavioca, biće nedostojan za nasleđivanje iz razloga predviđenog u članu 4 stav 1 Zakona o nasleđivanju.[46] Međutim, ukoliko eutanaziju posmatramo kroz rešenje dato u Prednacrtu Građanskog zakonika, možemo doći do nešto izmenjenih zaključaka. Aktivna eutanazija predviđena ovakvim rešenjem može se sprovoditi samo od strane licenciranih javnih izvršitelja medicinsko-tehničke struke. Ovakvom zakonskom odredbom naslednici bivaju u potpunosti isključeni kao lica koja bi bila uključena u proces izvršenja eutanazije, pa se pitanje nedostojnosti naslednika u ovakvom slučaju ne bi moglo ni postavljati (Stanković, 2009: 917). Međutim, kako intencija tvoraca ovog rešenja nije bila dekriminalizacija eutanazije iz Krivičnog zakonika, rešenje da je naslednik koji iz samilosti liši života ostavioca nedostojan za nasleđivanje i dalje je opravdano. Ipak, s obzirom da je reč o privilegovanom obliku ubistva, koje se izvršava iz posebnih motiva saosećanja, kao društveno prihvatljivih motiva, ne možemo zanemariti ove okolnosti. Naime, u zakonodavstvu Poljske, iako predviđeno kao krivično delo, „ubistvo iz sažaljenja" ne vodi nužno do izricanja krivične sankcije. U izuzetnim okolnostima sud može učiniocu ovog krivičnog dela da ublaži propisanu kaznu ili da ga čak u potpunosti oslobodi od kazne. Postojanje izuzetnih okolnosti se ceni u svakom konkretnom slučaju (Jovašević, 2020: 121). Ukoliko bi se ovakva mogućnost uvela u naše pravo, kao alternativa kažnjavanju, sud bi s obzirom na okolnosti konkretnog slučaja odlučivao o izricanju krivične sankcije, odnosno njenom izostanku. Ukoliko bi sud učinioca oglasio krivim i izrekao odgovarajuću krivičnu sankciju, pravnosnažna krivična presuda vezivala bi ostavinski sud prilikom utvrđivanja postojanja razloga nedostojnosti.[47] Međutim, shodno navedenom rešenju, učinjeno ubistvo iz samilosti ne bi istovremeno značilo i postojanje pravnosnažne osuđujuće presude. Tako bi sud na osnovu okolnosti konkretnog slučaja procenjivao postojanje ovog razloga nedostojnosti. Prvenstveno kroz utvrđivanje odsustva sebičnih motiva na strani naslednika, odnosno postojanje motiva saosećanja kao odlučujuće pobude za lišavanje života lica koje se nalazi u teškom zdravstvenom stanju.

46 „Ne može nasledити na osnovu zakona ili zaveštanja, niti steći kakvu korist iz zaveštanja (nedostojan je): 1) onaj ko je umišljajno usmrtio ostavioca, ili je to pokušao...". Čl. 4, st. 1 Zakona o nasleđivanju, *Sl. glasnik RS,* 46/95, 101/2003 – *odluka USRS i* 6/2015.

47 Isto je predviđeno i prilikom određivanja razloga za iskučenje iz nasleđa. Vid. Stojanović, 1996: 180.

6. Zaključak

Nedostojnost kao građanskopravna kazna se primenjuje samo ukoliko postoje zakonom predviđeni razlozi. Uporednopravni prikaz predviđenih razloga nedostojnosti ukazuje na njihovu nejasnoću i nepreciznost. Prvenstveno u pogledu umišljajnog ubistva ili pokušaja ubistva ostavioca, koji je univerzalno prihvaćen. Za nastupanje nedostojnosti iz ovog razloga potrebno je da budu ispunjeni određeni uslovi, prvenstveno da je reč o ubistvu ili pokušaju ubistva, ubistvo mora biti izvršenosa umišljajem, lice koje je ubijeno mora biti ostavilac, dok lice koje je ubilo ili pokušalo da ubije ostavioca mora biti naslednik (Stanković, 2009: 895). Na ovaj način bi bio nedostojan da nasledi i onaj naslednik koji bi izvršio, na primer, teško ubistvo, ubistvo deteta pri porođaju. Međutim, da li se pod ovaj razlog može podvesti lišenje života iz samilosti? Krivični zakonik Republike Srbije predviđa da onaj ko liši života drugo lice iz samilosti zbog teškog zdravstvenog stanja u kom se to lice nalazi, a na njegov izričit i ozbiljan zahtev, izvršava krivično delo ubistva. Pravnosnažna osuđujuća krivična presuda zbog izvršenja ovog krivičnog dela predstavlja osnov za utvrđenje nedostojnostinaslednika. Naime, naslednik koji iz samilosti liši života ostavioca, prema pozitivnom srpskom pravu biva nedostojan za nasleđivanje iz razloga umišljajnog ubistva ili pokušaja ubistva. Ovakva odredba predmet je ponovnog preispitivanja u svetlu predloga predviđanja prava na dostojanstvenu smrt unutar Prednacrta Građanskog zakonika. Prednacrtom se pravo na dostojanstvenu smrt reguliše u okviru prava ličnosti. Jasna je intencija zakonodavca da pored prava na dostojanstven život predvidi i pravo na dostojanstvenu smrt. Nacrtom se dozvoljava aktivna eutanazija, koja bi se sprovodila uz ispunjenje strogih uslova od strane posebno licenciranih javnih izvršitelja medicinsko-tehničke struke. Pasivna eutanazija ostaje izvan okvira ovakve zakonske odredbe, iako je Zakonom o pravima pacijenata ona dozvoljena kroz pravo pacijenta da odbije primenu određene medicinske mere ili medicinske terapije čak i kada se time ugrožava njegov život. Ukoliko bi aktivna eutanazija iz Prednacrta bila prihvaćena, pitanje nedostojnosti naslednika se ne bi moglo ni postavljati, jer bi se sprovođenje eutanazije nalazilo „samo u rukama“ stručnjaka medicinsko-tehničke struke. Međutim, intencija zakonodavca nije bila dekriminalizacija ubistva iz milosrđa. Shodno navedenom, naslednik bi i u slučaju postojanja prava na dostojanstvenu smrt predviđenog u Prednacrtu i dalje bio nedostojan za nasleđivanje.

Razjašnjenje eutanazije kao razloga nedostojnosti možemo potražiti u pozitivnim primerima iz uporednog zakonodavstva. Prvenstveno je

potrebno adekvatno definisanje eutanazije i njenih pojavnih oblika, što je učinjeno na primer u holandskom pravu. Holandski zakon o eutanaziji pod njom podrazumeva samo aktivnu eutanaziju izvršenu od strane lekara, u svim ostalim slučajevima lišenje života drugog lica bez obzira na motive i postojanje pristanka ubijenog predstavlja krivično delo ubistva. Shodno navedenom rešenju, naslednici bi bili nedostojni za nasleđivanje bez obzira na motive za lišenje života ostavioca. Na sličnim postulatima je bazirano i predloženo rešenje u Prednacrtu Građanskog zakonika Republike Srbije. Naime, pomenutim predlogom se ne vrši dekriminalizacija eutanazije, već se samo stručnjaci medicinske struke oslobađaju odgovornosti. Predloženo rešenje ne donosi promene u pogledu shvatanja eutanazije kao razloga za nedostojnost naslednika. Naslednik koji iz samilosti liši života ostavioca, i prema Prednacrtu, biva nedostojan za nasleđivanje. Međutim, ukoliko bismo razmotrili mogućnost uvođenja oslobađanja od odgovornosti učinioca, u određenim okolnostima, kako je to učinjeno u poljskom pravu, izvršenje ovog krivičnog dela ne bi nužno vodilo nedostojnosti naslednika. Nepostojanje pravnosnažne osuđujuće krivične presude omogućava ostavinskom sudu drugačije odlučivanje. Sud bi posebno cenio postojanje sebičnih motiva, potom motiva saosećanja kao društveno prihvatljivog motiva, zdravstveno stanje i pristanak oštećenog.

Uvođenje mogućnosti za oslobađanje od odgovornosti učinioca ovog krivičnog dela predstavlja korak napred ka dozvoljavanju eutanazije, kojem se naše društvo već tradicionalno opire. Pomenuta alterantiva bi izazvala promene i na terenu nedostojnosti. Lišenje života iz samilosti ne bi nužno vodilo nedostojnosti za nasleđivanje, već bi sud s obzirom na okolnosti konkretnog slučaja utvrđivao postojanje ovog razloga. Na ovaj način bi se otvorila mogućnost za ostvarivanje prava na dostojanstvenu smrt, bez negativnih naslednopravnih posledica po lice koje je udovoljilo zahtevu oštećenog.

Rešenje koje bi takođe trebalo razmotriti je ono o preciziranju razloga nedostojnosti predviđeno u belgijskom pravu. Naime, u belgijskom građanskom zakoniku se prilikom predviđanja umišljajnog ubistva ili pokušaja ubistva navode članovi Krivičnog zakonika na koje se ovaj razlog odnosi. Prihvatanjem ovakvog rešenja otklonile bi se nedoumice i u pogledu eutanazije kao razloga nedostojnosti za nasleđivanje.

Pod eutanazijom se u uporednom zakonodavstvu podrazumeva i asistirano samoubistvo. Usled toga se moramo osvrnuti na rešenje nemačkog zakonodavca. Naime, lice koje drugom potpomogne izvršenje

samoubistva, ali ta radnja ne spada u domen profesionalne usluge, ikoji je ili rođak ili je blizak osobi koja samoubistvo izvršava, neće biti kažnjeno. Na terenu nedostojnosti, navedeno znači da naslednik koji pomogne ostaviocu da izvrši samoubistvo i tako prekine fizičke i duševne patnje izazvane teškim zdravstvenim stanjem, biva dostojan da ga nasledi. Intencija nemačkog zakonodavca bila je da se spreči sprovođenje eutanazije kao profesionalne delatnosti, jer njemu često nedostaje element samilosti koji predstavlja osnovni motiv za njeno izvršenje. Međutim, ovako radikalno rešenje teško da bi moglo da pronađe primenu u našem zakonodavstvu. Tako, predložena alternativa može predstavljati prelazno rešenje ka dekriminalizaciji eutanazije, jednom kada naše društvo na to bude spremno.

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EUTHANASIA AS A REASON FOR UNWORTHINESS TO INHERIT

Summary

The provision on the right to a dignified death proposed in the Preliminary Draft Civil Code of the Republic of Serbia has again actualized the discussions on the legalization of euthanasia. Within the framework of inheritance legislation, there are discussions regarding the place of euthanasia among the reasons for unworthiness to inherit. In most legislations, euthanasia is still a criminal offense and, on that basis, the reason for unworthiness to inherit. In the legal systems where euthanasia is allowed, this procedure is completely performed by a doctor. Heirs are not involved in the procedure. Accordingly, euthanasia is not mentioned as a reason for unworthiness of the heir to inherit. The legal solution proposed in the Preliminary Draft of the Civil Code of the Republic of Serbia was discussed in general terms and left for further debate. By the time the proposed solution is adopted in this or a slightly modified form, active euthanasia will be the reason for unworthiness to inherit, while passive euthanasia could be discussed within some other legally prescribed reasons for unworthiness.

Keywords*: euthanasia, mercy killing, heir, unworthiness to inherit, premeditated murder.*

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Institucija kao autor	Republički zavod za statistiku. (2011). *Mesečni statistički bilten*. Br. 11.	(Republički zavod za statistiku, 2011)
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Enciklopedija	Pittau, J. (1983). Meiji constitution. In *Kodansha encyclopedia of Japan* (Vol. 2, pp. 1-3). Tokyo: Kodansha	(Pittau, 1983: 3)
Institucija kao autor	Republički zavod za statistiku. *Mesečni statistički bilten*. Br. 11 (2011)	(Republički zavod za statistiku, 2011)
Propisi	Zakon o osnovama sistema vaspitanja i obrazovanja. *Službeni glasnik RS*. Br. 62 (2004)	**Fus nota:** Čl. 12. Zakona o osnovama sistema vaspitanja i obrazovanja, *Sl. glasnik RS*, 62/04
Sudske odluke	Case T-344/99 *Arne Mathisen AS v Council* [2002] ECR II-2905 *ili* *Omojudi v UK* (2010) 51 EHRR 10 *ili* Odluka Ustavnog suda IU-197/2002, *Službeni glasnik RS*. Br. 57 (2003)	**Fus nota:** Case T-344/99 *Arne Mathisen AS v Council* [2002] *ili* Odluka Ustavnog suda IU-197/2002
Elektronski izvori	Wallace, A. R. (2001). *The Malay archipelago* (vol. 1). [Electronic version]. Retrieved 15, November 2005, from http://www.gutenberg.org/etext/2530 *ili* European Commission for Democracy through Law, *Opinion on the Constitution of Serbia*, Retrieved 24, May 2007, from http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp	**Navođenje u tekstu**: (Wallace, 2001) **Fus nota**: European Commission for Democracy through Law, *Opinion on the Constitution of Serbia*, Retrieved 24, May 2007, from http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp

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Type of work	References	In-text citation
Book (a single author)	Jones, C. P. (1994). Investments: Analysis and Management. New York: John Wiley& Sons. Ltd.	(Jones, 1994: 123)
Book (a number of authors)	Osterrieder, H., Bahloul, H., Wright, G., Shafner, K., Mozur, M. (2006). Joining Forces and Resaurces for Sustainable Development Cooperation among Municipalities – A Guide for Pracititioners. Bratislava: UNDP	**First in-text citation:** (Osterrieder, Bahloul, Wright, Shafner, Mozur, 2006: 31) **A subsequent in-text citation:** (Osterrieder et all., 2006: 45)
Joint authorship (a group of authors)	*Oxford Essential World Atlas* (3rd ed.). (1996). Oxford, UK: Oxford University Press	(Oxford, 1996: 245)
An article or a chapter in a book with an editor	Scot, C., del Busto, E. (2009). Chemical and Surgical Castration. In Wright, R. G. (ed.), Sex Offender Laws, Failed Policies and New Directions (pr. 291-338). New York: Springer	(Scot, del Busto, 2009: 295)
Journal article	Sandler, J. C., Freeman, N. J. (2007). Tipology of Female Sex Offenders: A Test of Vandiver and Kercher. Sex Abuse. 19 (2). 73-89	(Sandler, Freeman, 2007: 79)
Encyclopedia	Pittau, J. (1983). Meiji constitution. In *Kodansha Encyclopedia of Japan* (Vol. 2, pp. 1-3). Tokyo: Kodansha	(Pittau, 1983: 3)
Institution (as an author)	Statistical Office of the Republic of Serbia, *Monthly statistical bulletin*, No. 11 (2011)	(Statistical Office RS, 2011)
Legal documents and regulations	Education Act, Official Gazette RS, No. 62 (2004)	**Footnote: Article** 12. Education Act, Official Gazette RS, 62/04
Court decisions	Case T-344/99 *Arne Mathisen AS v Council* [2002] ECR II-2905; or *Omojudi v UK* (2010) 51 EHRR 10; or Constitutional Court decision IU-197/2002, *Official Gazette RS*, No. 57 (2003)	**Footnote:** Case T-344/99 *Arne Mathisen AS v Council* [2002] ECR II-2905 or Constitutional Court decision IU-197/2002
Online sources	Wallace, A. R. (2001). *The Malay archipelago* (vol. 1). [Electronic version]. Retrieved 15 November 2005, from http://www.gutenberg.org/etext/2530 ; or European Commission for Democracy through Law, *Opinion on the Constitution of Serbia*, Retrieved 24 May 2007, from http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp	**In-text citation:** (Wallace, 2001) **Footnote:** European Commission for Democracy through Law, *Opinion on the Constitution of Serbia*, Retrieved 24 May 2007, from http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp