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TABLE OF CONTENTS

/ЧЛАНЦИ

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Dušica G. KOVAČEVIĆ, LL.M.*

EUTHANASIA IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The paper aims to shed light on the interpretation of mercy killing, i.e., euthanasia, in European Court of Human Rights cases. This controversial phenomenon has a specific legal status. More specifically, due to the complexity of euthanasia, it is impossible to create universally accepted international standards. On the other hand, modern society creates a need to expand the legal boundaries regarding bioethical issues related to the compassionate end-of-life care. The European Court of Human Rights is a unique international organization that interprets universal legal documents, especially the European Convention on Human Rights, in the context of euthanasia. Bearing this in mind, it is important to collect and analyze the information resulting from the specific decision-making process of the European Court of Human Rights. The Court's past and future similar cases will certainly affect the future legal status of euthanasia both internationally and at the level of member states.

Key words: *European Court of Human Rights. – Right to life. – Right to private life. – Active euthanasia. – Passive euthanasia*.

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1. INTRODUCTION

In any consideration of basic human rights, the right to life is at the top of the list. The main reason for this is the fact that the existence of any other human right or freedom would be unthinkable without the right to life. Contrary to its fundamental importance, we encounter difficulties in precisely defining this main human right. Based on legal acts (national constitutions and international instruments) and practice, the right to life is explained by the norms of customary international law.[1] The general norm indicates that it is the most valued human right and any deprivation of this right is impermissible.[2] So, the logical assumption would be that the right to life is among the most protected rights.[3] Nevertheless, it is not an absolutely protected right due to the limitations reflected in the standardized exceptions,[4] which must be interpreted restrictively (McKinney 2022, 5).

Today, we challenge the various conditions in which the right to life is threatened. Many different specific situations usurp the general legitimate paradigm of respect for the right to human life and cast a shadow on the possibility that human life can and should be protected, so it is expected that we will face more accepted limitations of the right to life. First, nothing can ensure the protection of life under the constant threat of the use of nuclear weapons, which are widespread and ready for use at any time. Second, people are constantly at risk from various forms of natural disasters that can

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[1] The main sources of all law on the right to life are the Universal Declaration of Human Rights (Article 3), the International Covenant on Civil and Political Rights (Article 6), the European Convention on Human Rights (Article 2), the American Convention on Human Rights (Article 2) and the African Charter on Human and Peoples' Rights (Article 4). These legal instruments contain specific norms related to respecting and protecting human life as the supreme legal good. The statement of the right is usually framed as *the right to life* (in the Universal Declaration, the International Covenant, and the European Convention), but it could refer to *the right to respect for life* (in the American Convention), or to *respect for life* (in the African Charter). Each of the above indicates that any arbitrary or intentional deprivation of the right to life is prohibited.

Additionally, guarantees of the right to life are also prescribed by the Geneva Convention and Protocols on humanitarian law, and also by the Genocide Convention. See more in Tomuschat, Lagrange, Oeter 2010.

[2] There are also a few exceptions in which deprivation of the right to life may be permitted, such as the potential death penalty.

[3] Such as the prohibition of torture and prohibition of slavery.

[4] Boyle lists the following exceptions in for which the taking of life is permitted: death penalty, self-defense, murder during lawful arrest or to prevent escape, i.e. to prevent execution of a criminal act in the course of riot prevention. See more in Boyle 1985.

cause loss of life. Third, there are many systemic and structural problems within countries that result in poor living conditions for millions of human beings, leading to loss of life.[5] Fourth, there are issues related to social policy such as euthanasia,[6] abortion, and other, predominantly bioethical issues (Tönnies 2002).

Bioethical interpretations of different phenomena point to the increasing societal need to expand the objects of human rights protection to the values highlighted by bioethics research. A long-standing document supporting this is the Council of Europe (CoE) Convention on Human Rights and Biomedicine (the Biomedicine Convention, or Oviedo Convention), a legally binding instrument that entered into force in 1999 (CoE 1997). However, this document does not pay special attention to the ways of purposely ending someone's life. This is an explicit sign that the need for a legal formulation of the method of merciful termination of human life (i.e., euthanasia) was not recognized at the time of the adoption of the Convention. In addition, the fact that it is a controversial phenomenon with numerous moral dilemmas has led to the absence of international documents on this issue at the present. The absence of international documents, and therefore of standards, along with the recently emphasized societal need to regulate this issue, led to states being given wide space to regulate this area according to special *margins of appreciation*,[7] aligned with national interests and characteristics (Alves 2022).

In parallel with the numerous parliamentary activities related to euthanasia around the world in the past two decades, many cases of ending human life by euthanasia have been brought before the European Court of Human Rights (ECtHR). A detailed analysis of the court cases can determine the specific course of the wider acceptance of euthanasia and the increasingly

5 There are even more problems within the internal organization of the state that could lead to loss of human life and it is difficult to name them all.

6 The position of many vulnerable groups, such as patients in the terminal stage of disease, often give rise to threats to life. Terminally ill patients who would have an interest in artificially ending their lives are in a position that is usually dominated by those who would prefer to maintain the *status quo*.

7 The extent to which the state's field of assessment is respected in matters of euthanasia was shown in the *Gard and Others v. the United Kingdom* case. On 27 June 2017, the ECHR ruled on the appeal of the parents of a baby suffering from a rare and fatal genetic disease against the decision of the domestic authorities to stop the baby's artificial ventilation. The Court, by majority vote, declared the appeal unfounded, considering "the room for maneuver or wide margin of appreciation" in the sphere that concerns the terminally ill and that involves particularly sensitive moral and ethical issues. See more in ECtHR, App. No. 39793/17, 3 July 2017.

flexible interpretation of legal provisions. This contribution will provide an overview of several ECtHR cases involving euthanasia requests, in which the right to life has been interpreted.

2. EUTHANASIA AND RIGHT TO LIFE BEFORE THE ECtHR

The meaning of euthanasia implies a medical context; it refers to a terminally ill patient who suffers from constant and unbearable pain, with no hope of improvement. An important element of euthanasia is voluntary with regard to the expression of the patient's wish to end their life. Also, euthanasia includes situations where patients are unable to express their will, but it is unequivocally assumed. In response to a patient's voluntary and well-considered request for euthanasia (or to such a request given by their legal representative), some doctors are prepared to take the action of ending a patient's life (for example: injecting the patient with a lethal dose of a drug), i.e., active euthanasia, or to withdraw life-sustaining treatment knowing that it leads to death, i.e., passive euthanasia, or to help them take their own life by prescribing a lethal dose of medicament, i.e., assisted suicide (Center for Health Ethics).

Both active and passive euthanasia are complex issues that have not yet been offered a single legal answer at the international level. Many complex contradictions, such as the conflict between paternalistic protection of the patient's life and respect for private life and autonomy in the decision-making process, appear specifically in the issue of requested euthanasia. Accordingly, it is highly difficult to constitute universal standards on euthanasia and that is why the margin of appreciation about this topic is given to the states. Considering the lack of unequivocal international legal rules on euthanasia, it is important to bear in mind the interpretation of the European Convention on Human Rights (ECHR, or Convention) within specific ECtHR cases (especially Article 2, which refers to the protection of human life, and Article 8, which refers to the private life) (CoE 2003).

2.1. Article 2 of the ECHR – Right to life

The European Convention on Human Rights has a universal corpus of rights that protects human life. This norm prescribes two of the state's central obligations related to the right to life: the general positive obligation to protect life by law and to take measures for the physical protection of potentially endangered lives, and the negative obligation of the state, which

is reflected in the prohibition of arbitrary deprivation of life. The provisions of the right to life must be strictly interpreted because they relate to one of the fundamental values of the democratic societies that make up the Council of Europe.[8]

Article 2 of the Convention reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken the purpose of quelling a riot or insurrection (ECtHR 2018, 6).

From the general point of view of Article 2 of the European Convention on Human Rights, everyone's right to life must be protected by law (ECtHR 2018, 6). Also, there are exceptions to this general norm, meaning that there are only very limited circumstances in which it is acceptable for a state to use force against a person resulting in their death.[9] The main focus of the interpretation of Article 2 by the European Court must be determined by the need to make its protective measures practical and effective, which is also the main purpose of the Convention as an instrument for the protection of individual human beings. For CoE Member States, this right implies a prohibition (negative obligation) to intentionally take the lives of individuals and a positive obligation for national authorities to take appropriate steps to protect the lives of those under their jurisdiction (ECtHR 2022a, 18–19). At the same time, a dilemma arises between the positive obligation of the state to protect human life and the positive obligation of the state to respect the aspect of the right to private life – the individual's decision on how and when to end their life – provided that they are in a position to form their own free will and to act accordingly. Such a dilemma was considered in the *Haas v. Switzerland* case.

[8] Interpreting Article 2 of the Convention in this way implies considering it together with Article 3 – Prohibition of Torture. Article 3 implies that no one may be subjected to torture or to inhuman or degrading treatment or punishment, which further means that everyone has the absolute right not to be tortured or subjected to treatment or punishment that is inhuman or degrading. See more in Fontalis, Prousali, Kulkarni 2018.

[9] Such as giving the ability to police officers to use reasonable force to defend themselves or other people.

2.2. *Haas v. Switzerland*[10]

A Swiss[11] citizen, Ernst G. Haas, suffered from bipolar affective disorder for decades. During this long period, he made several suicide attempts aimed at overcoming the painful symptoms of the disorder. The attempts were futile because he needed a prescription for a lethal dose of medication, which none of the psychiatrists he consulted for that purpose would prescribe.[12] Because of these circumstances, he decided to obtain permission from the judicial authorities to get a lethal dose of the drug without an official medical prescription. After several rejected requests by lower state authorities,[13] Haas filed an appeal with the Federal Court, which was rejected. The judgment of the Federal Court, from 6 November 2006, focused on the explanation that it is necessary to distinguish between the right of a person to decide on his death and the right of a person to commit suicide with the help of the state or a third party. Based on complaints against Switzerland[14] that the positive obligation to create conditions for the execution of suicide without the risk of potential failure and in a painless manner (which derives from Article 8 of the Convention – the right to respect for private and family life), was not fulfilled, Haas appealed to the ECtHR. Therefore, the crucial matter in the *Haas v. Switzerland* case was the consideration of whether Article 8 imposes a "positive obligation" on the State to enable its citizens to obtain a medicament that would enable them to end their life.

The Court's judgment on the non-existence of such an obligation of the state in this particular case is based on several points. One point is that although assisted suicide has been decriminalized (at least partially) in certain CoE Member States, the vast majority of States seem to place more weight on protecting an individual's life than on their right to end it. Also, the Court found that Swiss law's requirement for a prescription for sodium pentobarbital had a legitimate aim – to protect people from making

[10] ECtHR, App. No. 31322/07, 20 January 2011.

[11] Since 1942, Switzerland has allowed assisted suicide as long as the motives are not selfish. See more in Bosshard, Fischer, Bär 2002.

[12] According to the applicant's statement, he wrote to more than 150 psychiatrists, with an explanation of the problem and a request for help in procuring the necessary medication.

[13] The state bodies were: the Federal Department of Justice and the Department of Health of the Canton of Zurich, the Federal Department of the Interior, and the Zurich Administrative Court.

[14] According to the Criminal Code of Switzerland, incitement to commit or assist in suicide is only punishable when such acts are committed for selfish reasons.

hasty decisions and preventing abuse, the risks of which must not be underestimated in a system that has allowed for assisted suicide. The Court pointed out that the right to life requires states to establish a procedure that can ensure that a person's decision to end their life actually reflects their free will, which is in accordance with the requirement of a detailed psychiatric assessment that would precede the issuance of a prescription. Additionally, a key point of the trial was to emphasize that the applicant had effective access to a medical assessment that could enable him to receive pentobarbital sodium (if not, his right to choose when and how to die would be theoretical and illusory) (ECtHR 2011). Based on all of the above and the discretion enjoyed by national authorities in this sphere, the Court considered that the Swiss authorities did not breach the positive obligation to take measures to enable a dignified suicide in the case of the applicant.[15]

3. PRIVATE LIFE AND PERSONAL AUTONOMY

A very specific characteristic of euthanasia cases is that they mostly involve consideration of the protection of the right to life versus the protection of private life and personal autonomy. Private life is a broad term that cannot be clearly defined as a term that covers a person's physical and psychological integrity and may include aspects of a person's identity. Article 8 of the ECHR – the right to private and family life includes the protection of personal development in terms of personality and personal autonomy which is an important principle, but it doesn't mean exclusion from the outside world and living a personal life in any chosen way.

Article 8 (1) of the ECHR begins by asserting that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

Then Article 8 (2) prescribes:

[15] Although the position of the ECHR in the *Haas* case was that the abuse and widespread use of the right to assisted suicide should be prevented, the *Gross v. Switzerland* case points to the fact that the Swiss law is not sufficiently clear and precise. In 2013, the ECtHR ruled that Article 8 and the right to personal autonomy of women who did not suffer from a clinical illness and who were denied a request for assisted suicide in Switzerland were violated. See more in ECtHR, 67810/10, 30 September 2014. (Although the judgment subsequently became legally invalid, due to additional circumstances not established in time, it is significant for the analysis of the ECtHR's position.)

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (ECtHR 2018, 11).

The primary purpose of Article 8 is protection against arbitrary interference by public authorities in private and family life. In addition to this negative obligation, which compels the Member States to refrain from such interference, they also have positive obligations in the form of measures to ensure that the rights in Article 8 are respected even between private parties. Inter alia, it includes matters concerning consent to treatment,[16] autonomy, and dignity (Griffith 2021). This further means that among other values (such as wellbeing and dignity, physical and psychological integrity, relationships with other human beings, aspects of social identity, etc.) this right includes self-determination, which can be related to deciding on end-of-life issues. The applicant on euthanasia matters before the European Court often indicates a violation of Article 8 of the Convention. Generally, if the decisions of the courts were made solely by looking at the provisions that the petitioners refer to, then most likely the outcome of the judgments would be much different than what is most common. Specifically, the position of the ECtHR is that the Convention, regardless of the potentially violated article, must be viewed as a whole. Given such a position, the necessity to respect Article 2 on the right to life is most often cited as a "counterweight" to the violation of Article 8 in the interpretation of the Convention as a group of indivisible elements.

Article 8 is most often cited before the ECtHR in the context of the prohibition of assisted suicide. Many countries prohibit assisted suicide in order to protect vulnerable people from being pressured by unscrupulous family members or friends to end their lives. On the other hand, the same provisions prevent people who cannot take their own lives, because of a debilitating condition, from being helped to do so. One such case is the *Pretty v. the United Kingdom* case.

[16] With the absence of validly given consent of the patient to euthanasia or life support by means of artificial devices, the issue of potential violation of Article 3 of the Convention (freedom from torture and inhuman or degrading treatment) can be additionally raised.

3.1. *Pretty v. the United Kingdom*[17]

Diane Pretty was a patient who suffered from motor neural disease, a paralyzing, degenerative, and incurable illness. The neurodegenerative disease had progressively weakened her muscles to the point where death occurs from the inability to breathe or swallow. She was paralyzed from the neck down, unable to speak, and was tube fed. Given the overall condition, caused by the disease that would lead her to death in a distressing manner, Mrs. Pretty wanted to end her life and die with dignity. She was not able to commit suicide, nor to administer the lethal dose of medicine that, hypothetically, a doctor could have prescribed to her. The only option available to the patient for avoiding suffering was to undergo passive euthanasia.[18] Applying passive euthanasia would mean that she would not automatically end her life by stopping medical treatment, instead, she would have to go through a painful period of starvation after the tube was removed. The only dignified solution from the patient's point of view was to allow the implementation of active euthanasia by judicial authorities.[19] Thus, 43-year-old patient Diane Pretty asked the Director of Public Prosecution for permission for her husband to administer a lethal dose of a drug with the intent to end her life, without his subsequent criminal responsibility for the crime committed. After such a request was refused, she sought justice before the ECtHR on the grounds that an earlier decision by a UK court against allowing her husband to assist her in ending her own life contravened certain articles[20] of the European Convention on Human Rights (ECtHR 2002).

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17 ECtHR, App. No. 2346/02, 29 April 2002.

18 Passive euthanasia refers to the interruption or refusal of medical treatment. More specifically, it refers to intentionally allowing a patient to die by withholding artificial life support, such as a ventilator or feeding tube. Unlike active direct euthanasia, the patient's death in the case of passive euthanasia does not necessarily occur immediately. A delayed effect of the undertaken activities is possible. See more in Rachels 1975.

19 In addition, for patients who are in such a situation, there is the possibility of going to a country that allows assisted suicide for foreigners, such as Switzerland. Considering the frequency of such services being rendered to foreigners, they are increasingly being referred to as a specific type of tourism. In 2015, such a solution was implemented by a patient who was a quadriplegic, after he could not get approval from the local authorities in Germany to carry out assisted suicide. The *Koch v. Germany* case ended up in the European Court, filed by the husband, after the patient committed assisted suicide in Switzerland, claiming violation of Article 8 by the German state. See more in ECtHR, App. No. 497/09, 19 July 2012.

20 More precisely, it concerns Article 2 – Right to life; Article 3 – Prohibition of torture; Article 8 – Right to respect for private and family life; Article 9 – Freedom of thought, conscience, and religion; Article 14 – Prohibition of discrimination. See

The ECtHR rejected this application, emphasizing that in all previous similar cases it was the state's obligation to protect life (Singer 2002, 234–235). Even though the case highlighted the importance of personal autonomy, it also emphasized the impossibility of the right to life to be interpreted as a framework for the derivation of a new right such as the right to die, or as a basis for self-determination in the context of choosing the way of ending one's life. Consequently, no right to death – whether at the hands of a third person or with the aid of a public authority – can be derived from Article 2. While considering paragraph 1 of Article 8, the Court emphasized several aspects of interpretation. The Court pointed out that personal autonomy can include the ability to lead a life according to one's own choice, which can also include the ability to perform activities that are considered to be physically or morally harmful or dangerous to the individual. The extent to which the state can use coercive powers or criminal law to protect people from the consequences of their chosen lifestyle can therefore turn into an infringement of private and personal life. In the sphere of medical treatment, the refusal to accept a certain life-sustaining treatment could inevitably lead to a fatal outcome, but the imposition of medical treatment would interfere with the physical integrity of the patient (ECtHR 2002).

Interference with the state's exercise of rights from Article 8 must be in accordance with the law. In this case, the state's paternalistic encroachment on the right to private life is reflected in the limitation of the patient's options. It must be proportionate to the higher legitimate goal pursued, which is the prevention of wider potential abuse that could occur in the legalization of euthanasia. However, on an individual level, such inflexibility of the law means that the patient is forced to suffer the consequences of their incurable and excruciating illness, at a very high personal cost. Regardless of the above argumentation, the Court concluded that states have the right to specifically regulate general actions that are harmful to human life and, consequently, to limit autonomy in making decisions about the intentional and merciful termination of life. Respecting such freedom of regulation of internal state legislation, the Court unanimously concluded that there was no violation of the abovementioned article or any other article of the Convention.[21]

more in ECtHR 2018.

[21] There was no violation of Article 3– prohibition of torture, because it is beyond dispute that the respondent country has not inflicted any ill-treatment on the applicant, nor is there any complaint that the applicant is not receiving adequate care from the state medical authorities.

The *Pretty* case was the first case before the ECtHR to consider personal autonomy in the context of healthcare. At the same time, it can be said that due to the nature of the elements included in the case, this was the first case related to euthanasia and similar institutes (ECtHR 2002). Therefore, it is not surprising that the European Court did not make significant exceptions in the interpretation of the case.

4. ACTIVE EUTHANASIA AND THE ECtHR

The ECtHR does not have an instrument whose provisions would be consulted when making decisions on cases concerning the artificial termination of human life by a third party or authority, either at the express or presumed request of the person in question. The two most interesting documents are the Convention on Human Rights and Biomedicine[22] (ETS No. 164, 1997) and the *Guide on the decision-making process regarding medical treatment in end-of-life situations*[23], which was drawn up by the Council of Europe Committee on Bioethics (DH-BIO) in the course of its work on patient's rights, with the intention of facilitating the implementation of the principles enshrined in the Convention on Human Rights and Biomedicine. Both documents are fundamentally related to the issue of euthanasia, but they do not directly touch on its foundations.

Therefore, the judgements in such cases before the ECtHR has so far depended on the Court's interpretation of Article 2 of the European Convention. The position of the ECtHR so far has been that there is no right to die, nor is there any reason to derive such a right from the Convention. Contrary to this interpretation of Article 2 of the Convention, the European Court respects the discretionary right of the state to decide on the regulation of euthanasia in national law. For example, the Netherlands, Belgium,

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There was no violation of Article 9 – freedom of thought, belief, and religion– considering the fact that the views of the petitioner that reflected a commitment to the principle of personal autonomy cannot be an opinion or belief in the sense of this provision.

There was no violation of Article 14 – the prohibition of discrimination, due to the complexity of the issue and the possibility of seriously endangering the protection of life proclaimed by law there are no compelling reasons not to demand a distinction between persons who are physically capable of committing suicide and those who are not. See more in ECtHR 2002.

[22] The ECtHR does not refer to the provisions of this Convention in any case of euthanasia. To see more on the Convention CoE 1997.

[23] See more in CoE 2014.

Luxembourg and, more recently, Spain allow active euthanasia. Considering that the CoE Member States have the freedom to regulate this issue through their internal legislation, it is clear that the cases that appear before the ECtHR and which originate from the such countries can in principle refer to the conformity of the activity and the legislation with the Convention (ECtHR 2022a). One such case of active euthanasia that was recently recorded before the ECtHR is the *Mortier v. Belgium* case.

4.1. *Mortier v. Belgium*[24]

The applicant in the *Mortier* case was the son of a patient who complained that he and his sister were not aware that their mother had initiated euthanasia proceedings. The complaint also referred to the assumption that the Belgian state did not protect their mother's life because the necessary procedure was not properly implemented and a detailed and effective investigation was lacking. Considering the specificity of the case, the ECtHR was able to assess the compatibility of the planned activities with Articles 2 and 8 of the Convention. Due to the fact that Belgium had legalized active euthanasia, this case did not concern the question of whether there was a right to euthanasia, but rather the conformity of the act of euthanasia carried out in the given case with the Convention. The ECtHR found that there was no violation of Article 2 of the Convention when it comes to ensuring respect for the right to life within the framework of compliance with the Belgian legislative framework that regulates acts and procedures prior to euthanasia. Also, it was established that the conditions under which the act in question was performed were in accordance with the law. Article 2 was violated only in respect of the non-observed procedural positive obligation of the state on account of the post-euthanasia review procedure, specifically the lack of independence of the Federal Board for the Review and Assessment of Euthanasia and the length of the criminal investigation in the case (ADF International 2022).

The Court established that there was no violation of Article 8, given that the doctor in charge had acted in accordance with the law (taking into account the confidentiality of data and professional secrecy while respecting all ethical guidelines). The Belgian Act on Euthanasia requires doctors to discuss a patient's request for euthanasia with their relatives only if that was the patient's wish. In the given case, the patient did not want to have

[24] ECtHR, App. No. 78017/17, 4 October 2022.

contact with her children, even though the doctors involved had suggested to the patient to maintain contact with her children. The Court ruled that the doctors had done everything within reason, in accordance with the law, and reiterated that respect for the confidential nature of medical information was an essential principle of the legal systems of all the contracting parties to the Convention. In order to achieve a fair balance between the various interests involved in the case, the Court finally concluded that there had been no violation of Article 8 of the Convention. The right of an individual to decide under what conditions their life should end is one aspect of the right to respect for private life. The decriminalization of euthanasia gave individuals a free choice to avoid ending a life that might be undignified in their opinion. Perhaps it was not possible to derive a right to die from the right to life, but the right to life could not be interpreted as *per se* prohibiting the conditional decriminalization of euthanasia (ECtHR 2022a).

5. PASSIVE EUTHANASIA AND THE ECtHR

In the official document of the ECtHR, *Guide on Article 2 of the Convention on Human Rights – Right to life,* euthanasia is a separate issue from the issue of termination of artificial maintenance (ECtHR 2022a). It can be concluded that according to the view of the ECtHR, the termination of artificial life support is not considered a way of euthanasia in a passive form.

Given the discretionary right of the Council of Europe member states to regulate passive euthanasia through their internal legislation, the Court based its decisions on the specific case and the country of origin. Activities involving passive euthanasia are most often approved in the CoE member countries, but predominantly under the auspices of the patient's rights. Regardless, it would be most accurate to say that a large number of CoE member states allow the patient the right to refuse medical treatment (including the right of refusal of life-sustaining treatment). Even though there are no universally accepted views on the issue of terminating human life in this way, it is typically sufficiently addressed at the level of national legislation. The field becomes more complex with the introduction of consideration of the patient's will. There are almost no legal rules that would adequately regulate the field of termination of human life in this way with guidelines concerning the presence or absence of a clearly expressed will of the patient. Therefore, in each specific case where the issue of the patient's will is disputed, the right to autonomy is interpreted separately, as are the right to private life and the right to life (ECtHR 2022a).

Respecting the wishes of the patient in this area has its limitations. The limiting effects of respecting the patients will directly affect the respect for the personal autonomy, which they are part of. Therefore, it is the task of the ECtHR to define the relationship between respect for the patient's autonomy and how the state's obligations, arising from Article 2 of the Convention, are to be fulfilled in court cases dealing with the issue of the termination of artificial maintenance of human life. To make valid decisions in the field of interruption of medical treatment maintaining human life at the international level, it is necessary to consider several aspects:

1. the state of legal regulation of this issue in the case's country of origin;
2. the presence of a validly expressed will of the patient or their legal representative;
3. the analysis of the patient's comprehensive medical condition, which is reflected in the opinion of the competent medical staff (ECtHR 2022).

Based on this, it is possible to establish what further activities can be undertaken in the patient's best interest.

5.1. *Lambert and Others v. France*[25]

Vincent Lambert, the 42-year-old former nurse, had sustained severe brain damage in a car accident in 2008. The consequence of the resulting head injury was tetraplegia and complete dependence on other people's care and help. He had been living in an irreversible vegetative state and had been on artificial nutrition and hydration through a gastric tube for many years. Considering the patient's condition, the decision to stop the medical treatment was made by the doctor in charge. This decision, which initiated the collective procedure provided by the Leonetti Act (the law on patients' rights and end-of-life issues, dated 22 April 2005), came into effect in April 2013. A month after, the applicants turned to the emergency judge of the Administrative Court to protect fundamental freedom and sought an injunction against the hospital. The urgent-application judge granted their requests (this decision was based on the fact that there were no advance directives by Vincent Lambert and that his parents had not been informed about the decision). After that, the doctor in charge consulted doctors

[25] ECtHR, App. No. 46043/14, 5 June 2015.

of various specialties on several occasions about the case and met with family members several times. In late 2013, he called a meeting of all the doctors and the care team members. Almost everyone present, including the patient's wife and six of his eight siblings, was in favor of withdrawing treatment. In early 2014, the doctor explained his repeated decision to the Administrative Court. It was pointed out that the decision was made based on the established futility of the treatment and on the assumption that the patient would have agreed with such a decision had he been able to express it. The patient's parents and some family members appealed to the same Court to prevent the implementation of the doctor's decision. The Administrative Court suspended the decision primarily because of the lack of the formal expression of the patient's wish and because of the fact that as long as the treatment did not cause any stress or suffering, it could not be characterized as futile or disproportionate. In three applications Rachel Lambert, François Lambert, and the Reims University Hospital appealed that ruling to the judge for emergency applications of the Conseil d'État. The Conseil d'État overturned the judgment of the Administrative Court and dismissed the applicants' claims primarily based on medical reports.

The patient's parents, half-brother, and sister submitted a request to the European Court against the verdict of the local authorities, pronounced on 24 June 2014. The essence of the appeal was based on the assumption that the verdict declaring the doctor's decision to be legal violated Article 2 of the European Convention. On 5 June 2015, the ECtHR (Grand Chamber judgment) found that there was no violation of Article 2 in the given case. The Court's position was that the judgment of the national authorities was adequately made, based on several conclusions. One of them was the possibility previously given to Member States to regulate such issues concerning the end-of-life at their discretion. In addition, the ECtHR found that the legal framework of the state (specifically, the 2005 law based on which the decision was made) was clear and precisely regulated, which created an adequate basis for the local authorities to determine whether the decision was made in accordance with the law. The ECtHR also pointed out the fact that the legally stipulated process of making medical and judicial decisions predicted was compatible with the articles of the European Convention. Consequently, there was no violation of Article 2 of the Convention (ECtHR 2015).[26]

[26] A similar case before the ECtHR was *Afiri and Biddarri v. France*. The case related to the doctor's decision to end the futile life support, assisted by medical devices, of a fourteen-year-old patient, with which the parents did not agree. In the appeal, it was stated that the parents should be involved in the decision-making process, in line with the concept of parental responsibility. The ECtHR dismissed the appeal on

6. CONCLUSIONS

Since 2002, the European Court of Human Rights has issued a large number of judgments and decisions in cases involving the intentional termination of human life. Conclusions about a certain shift in the direction of consideration of euthanasia cases before the ECtHR, concerning the right to life, could be reached by comparing the presented Court cases. In the *Pretty* case, the ECtHR did not conclude that preventing the patient from carrying out the activities that she considered a way to avoid suffering related to an inhumane and undignified life constituted an interference with the patient's right to respect for private and personal life, as prescribed by Article 8 of the European Convention on Human Rights. Subsequently, the ECtHR allowed for certain exceptions to be made in these cases. The conclusions presented in the *Haas v. Switzerland* case focused on the need for a holistic approach to the Convention. The potential threat to Article 8 was therefore inevitably linked to the items from Article 2. However, in the *Lambert and Others v. France* case, the position of the ECtHR shows that the reverse situation is possible and desirable. This further means that a potential violation of Article 2 would lead to the consideration of Article 8 and the right to personal autonomy that accompanies it.

Today, the focus of medical ethics and patient rights is directed towards individualism in which the patient's will is of primary importance. The logical consequence of this point of view is visible in only a few countries where all forms of euthanasia and similar legal institutions exist, including assisted suicide. Passive euthanasia is more widely present, under the umbrella of other permissible human rights. Paradoxically, this situation is the result of limiting personal autonomy regarding euthanasia. The Council of Europe Member States are allowed wide discretion to decide on the manner of internal regulation on the issue of euthanasia and similar legal institutes. The consequence of the abovementioned is the diversity of legal solutions to these issues.[27] It cannot be expected that the European Court will radically change its position and prohibit legal solutions and practices that allow such measures. The current situation reflects the sovereign position of national legislation on euthanasia, which the opinion of the ECtHR is subject to. With

the grounds of the violation of Article 2 of the Convention, finding that, despite the parents' disagreement with the decision, all conditions were met in the process of its adoption. See more in ECtHR, 1828/18, 25 January 2018.

[27] Some European states have legalized euthanasia and physician-assisted dying (e.g., the Netherlands, Belgium, Luxembourg) and many of them allow individuals to refuse medical treatment, or to order a lethal drug and to shorten their life (Germany, France, Switzerland). See more in *Euronews* (Hurst, Bello 2022).

the increasing occurrences of Court cases and the development of legal rules on euthanasia, this area will produce a certain body of standards. The future legal formulation of euthanasia will certainly require less freedom of the states in this domain, which will create a suitable ground for wider decriminalization or legalization of certain forms of action related to the artificial termination of human life.

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SURROGACY – A BIOMEDICAL MECHANISM IN THE FIGHT AGAINST INFERTILITY

This paper reviews the issue of surrogacy. The author analyzes surrogacy and continues by conducting a comparative overview of two legal systems with different approaches to surrogacy. The analysis first looks at the legal system of Russia, as it represents a country that allows all forms of surrogacy, and then that of Germany, as a country with norms prohibiting all forms of surrogacy. In turn, the author reviews Serbian legal provisions, which also forbid all forms of surrogacy. The paper further explores whether there is justification for such legal provisions, i.e., it pinpoints potential problems that could arise if the legal provisions were to be changed. It is concluded that the Serbian legislator has decided to remain silent on this issue, most probably due to the fact that any amendments could raise questions that, at least for the time being, have no clear answers.

Key words: *Medically assisted reproduction. – Right to respect for private and family life. – Right to freely decide on birth. – Surrogate motherhood. – Health protection.*

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1. THE CONCEPT OF SURROGACY

Medically assisted reproduction can be defined as a segment of human reproductive medicine aimed at alleviating infertility in cases where the cause of infertility cannot be eliminated, hence creating space for considering various reproductive technologies (Mršević 2020, 3). Artificial insemination implies various techniques of intracorporeal (*in vivo*) and extracorporeal (*in vitro*) fertilization (Draškić 2022, 342). However, it seems that the classification under which the *mater semper certa est* rule can be tested (Jović Prlainović 2015, 43; Draškić 2022, 342) is of more relevance for the topic of this paper. To this end, a distinction is made between three types of procedures, i.e., between egg donation, embryo donation, and surrogacy. Although the importance of egg and embryo donation for the exercise of reproductive rights of an individual is unquestionable, the author will focus her attention on the surrogacy process, i.e., on surrogate motherhood.

The Warnock Report stipulates that surrogacy is the practice whereby a woman (surrogate mother) carries a child for another (intended mother) woman with the intention to give the child away after birth (Warnock Report 1984, ch. 8.1).[1] A surrogate mother is defined as a woman who agrees to carry a child (children) to term for the intended parents and who waives her parental right following the child's birth. On the other hand, a couple that wishes to fulfil their role as parents is most often referred to as "intended parents", "commissioning parents" (Draškić 2022, 346 fn. 9) or as "clients" (Bordaš 2012, 98). Typically, the intended parents conclude an agreement with the surrogate mother which stipulates that she will carry the pregnancy for them and give birth to the child. The agreement further provides that they will become the bearers of parental rights following the birth of the child and that they will raise the child as their own. They can, but do not necessarily have to be, genetically related to the child that is born following this agreement.[2] Medically speaking surrogacy consists of in vitro fertilization (most often using the eggs and/or sperm of the intended parents who are assisted) and of transferring a certain number of zygotes to the uterus of the chosen recipient woman, with her consent (Bila, Tulić, Radunović 1994, 128 as cited in Draškić 2022, 343). The first case of a child born through a surrogate mother was documented in the 1980s in the United

[1] See *The Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report)*, HMSO, 1984.

[2] See *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, Preliminary Document No. 10 of March 2012*, drawn up by the Hague Conference on Private International Law (Hague Conference on Private International Law 2012, ii).

States of America (Kovaček Stanić 2013, 2; Jović Prlainović 2015, 42 fn. 3). Bordaš (2012, 98 fn. 3) stresses that it was precisely this case that marked the beginning "of the regular practice of human reproduction by engaging a woman that will give birth for another woman".[3]

It is important to highlight some specifics that are significant for a more precise defining of the concept of surrogacy. First of all, there are two types of surrogacy, depending on whose genetic material is used in the fertilization. Better said, a distinction is made between partial (genetic) and full (gestational) surrogacy. Partial surrogacy can be defined as a procedure in which a woman (surrogate mother) carries the pregnancy and gives birth to a child that is genetically hers (the surrogate mother's egg is fertilized using the genetic material of the man who will be the parent). In this case, the surrogate mother has the role of both a genetic and a gestational mother (Kovaček Stanić 2013, 3; Vidić Trninić 2015, 1162; Draškić 2022, 346 fn. 9). Full (gestational) surrogacy is a procedure in which a woman (surrogate mother) carries the pregnancy and gives birth to a child conceived using either the genetic material of the couple that wishes to have a child, or using donated genetic material (Bordaš 2012, 98 fn. 4 and 6; Kovaček Stanić 2013, 3; Draškić 2022, 346 fn. 9). In such situations, the surrogate mother is only the gestational mother. Kovaček Stanić (2013, 3) points out that gestational surrogacy is more appropriate for defining the term surrogacy because the surrogate mother replaces the genetic mother in carrying the pregnancy and giving birth to the child.

The surrogacy process, therefore, implies a specific contractual relationship between the surrogate mother and intended parents. This is why a distinction is made between altruistic and commercial surrogacy, depending on whether a gratuitous contract or an onerous contract has been concluded. Altruistic surrogacy agreements imply a contractual relationship in which the surrogate mother is recognized only the right to reimbursement of expenses incurred in connection with the pregnancy, but not the right to a reward.[4] Still, it should be noted that this requirement is not necessarily

[3] Translated by author. It should be noted that certain authors claim that surrogacy dates back to ancient times. According to the Old Testament, Sarah convinced her husband Abraham to take up a concubine, Hagar, who then bore him a son, Ishmael. Although conception occurred naturally, this case is seen as the earliest example of the practice of surrogacy. See Vlašković 2011, 1 fn. 1; Kovaček Stanić 2013, 2 fn. 3.

[4] Reasonable expenses may include medical costs, pregnancy costs and lost earnings. See Kovaček Stanić 2013, 5.

met in legal systems that only allow altruistic surrogacy agreements.[5] On the other hand, commercial surrogacy agreements present a contractual relationship in which the surrogate mother is recognized both the right to reimbursement of expenses and the right to a reward.

The final criteria that can be used for the classification of surrogacy is related to the role that the surrogate mother has with the intended parents. More precisely, the surrogacy may stem from family or friendly relations of the surrogate mother with the intended parents, or, on the contrary, the surrogate mother may have no previous relationship with the intended parents. Based on the practices of countries that allow this method of assisted reproduction, each of the three mentioned types of surrogacy has proven to be a mechanism with both positive and negative aspects (Kovaček Sanić 2013, 3).[6]

2. SURROGACY IN COMPARATIVE LAW

Although the issue of surrogacy is not uniformly regulated in comparative law, the generally accepted position is that surrogacy is prohibited in any form, i.e., "except for when it is carried out with the help of agencies that mediate, for money, in concluding these agreements" (Draškić 2022, 344, translated by author). However, despite the fact that a certain number of countries have opted for legal solutions that prohibit surrogacy, there are also those that have chosen a less conservative path. This is precisely why two legal systems with completely different approaches towards regulating

[5] Draškić (2022, 354) asserts that, for example, in English law the no-reimbursement condition is "largely ignored or circumvented, seeing as the sum of money that is paid to a surrogate mother presents a direct payment for the services she provides, rather than reimbursement of real and justified costs that she had to cover in relation to pregnancy and delivery of the baby" (translated by author).

[6] As a result, some scholars argue that if a surrogate mother is in a family relationship with one of the intended parents, the process of transferring the baby is easier and the contractual relationship is altruistic rather than commercial. On the other hand, this type of surrogacy can cause confusion in familial relations. Surrogacy stemming from friendly relations is, to some extent, similar to surrogacy based on family relations because there is a previous relationship between the surrogate mother and the intended mother, but it is also stressed that this form of "cooperation" can disrupt the friendship. Nevertheless, surrogacy in which there is no previous relationship between the surrogate mother and the intended mother has a specific negative side to it, which is nonexistent in the previous two cases – the inclusion of the commercial element. See Kovaček Stanić 2013, 4.

surrogacy have been selected for the discussion below. The author will firstly analyze the legal system of the Russian Federation, as it is a country with liberal solutions which allows for surrogacy to be carried out without any obstacles. The second system to be analyzed in this paper is the legal system of Germany; an example of a country that expressly prohibits surrogacy. It is interesting, however, to point out that, in recent years there has been a notably more flexible approach by the German courts in addressing the issue of surrogacy carried out abroad (international surrogacy).

2.1. Surrogacy in Russian law

As previously said, the discussion will primarily address the legislation of a country that allows every form of surrogacy. An example of one such legislation is that of the Russian Federation. The first surrogacy case in Russia was recorded in 1995 when the first twin girls were born using assisted reproduction.[7] Immediately after that, the Family Code of the Russian Federation[8] came into effect, which, albeit scantily, laid down the first rules on surrogacy (Svitnev 2016, 232–233). It stipulated that married persons who have given their consent, in written form, for the implantation of an embryo in another woman for carrying and bearing it, may be recorded as the child's parents only with the consent of the woman who has given birth to the child (surrogate mother).[9] The same law prohibited any subsequent dispute of the child's origin, following such registration of motherhood/parenthood.[10] Nevertheless, the Family Code failed to answer some of the main surrogacy-related questions. This is precisely why the Russian legislator enacted the Basic Law on Health Protection of Citizens,[11] in order to regulate surrogacy in greater detail. One of the dilemmas finally

[7] This surrogacy case led to certain problems because the surrogate mother found it difficult to accept the fact that she needed to part ways with the children that she had carried and gave birth to. It was precisely this case, as well as some other issues, that led to the adoption of the Family Code of the Russian Federation that contains norms related to the issue of surrogacy. See Weis 2017, 124–125.

[8] See Family Code of the Russian Federation (*Семейный кодекс Российской Федерации*) No. 223-FZ, dated 29 December 1995, amended 4 August 2022, entered into force 1 September 2022.

[9] Family Code, Article 51 para. 4 item 2.

[10] Family Code, Article 52 para. 3 item 2.

[11] Basic Law on Health Protection of Citizens (Федеральный Закон Российской Федерации Об основах охраны здоровья граждан в Российской Федерации) No. 323-FZ, dated 21 November 2011.

resolved with the enactment of this law was whether the Russian legislation allows both partial and full surrogacy.[12] More precisely, the provisions of the Basic Law on Health Protection of Citizens outline that the same woman cannot be a surrogate mother and an egg donor, hence indicating that only full (gestational) surrogacy is permitted in Russia.[13] The said law defines full (gestational) surrogacy as the process of carrying and delivering a child (including premature birth) based on a contract concluded between the surrogate mother (the woman carrying the fetus following the transfer of a donated embryo) and the intended parents, whose genetic material was used in the fertilization process.[14] In addition and unlike the Family Code, the Basic Law on Health Protection of Citizens recognizes the right to surrogacy to a wider scope of legal subjects. In other words, the right to surrogacy is granted not only to persons who are married, but also to heterosexual partners, as well as to single women. It is important to emphasize that a single woman has this right solely under the condition that there are medical indications preventing her from carrying and delivering a child (Weis 2017, 125).[15] In connection with this, Draškić (2022, 347) points out to two issues arising from such provisions. Firstly, only married couples are required to use their own genetic material in surrogacy procedures, i.e., the legislator does not stipulate this condition for heterosexual partners or for single women. Khazova (2016, 300) stresses that it remains unclear as to why the legislator opted for this approach and highlights that it is indisputable that, at least normatively, the law limits married couples' right to access to this method of assisted reproduction (see Svitnev 2016, 234). The second issue relates to the discrimination against single men. Better said, the previously mentioned legal provisions testify to the fact that single men are not granted the right to access to this method of assisted reproduction. This is why the constitutional provision on gender equality in health protection and provision of medical assistance is directly violated (Draškić 2022, 347 fn. 11).[16]

[12] Khazova (2016) underlines that, by using the term "implementation" in the Family Code, the legislator wanted to point only to the possibility of full surrogacy, and not partial surrogacy. However, she correctly concludes that this ignores a potential situation in which the egg of the surrogate mother was used for in vitro fertilization. See Khazova 2016, 285.

[13] Basic Law on Health Protection, Article 55 item 10. See Khazova 2016, 285.

[14] Basic Law on Health Protection, Article 55 item 9.

[15] Basic Law on Health Protection, Article 55 item 3.

[16] However, some authors note that on a practical level this right is also recognized for single men. Moreover, when ruling on whether a single man can be granted the legal status of a parent of a child born through surrogacy, the District Court in Moscow emphasized that there are no norms in Russian law that prohibit or limit the right of women or men to use mechanisms of medically assisted reproduction.

It seems, however, that one of the greatest inconveniences of Russia's legislation regarding the issue of surrogacy is related to the execution of surrogacy contracts: the intended parents can be registered as the child's parents only if the surrogate mother consents to it after the birth of the child (Khazova 2016, 285). Consequently, a surrogacy contract does not produce any legal effects if, following the child's birth, the surrogacy mother refuses to give away the child and consent to the registration of the intended parents as the child's legal parents. The intended parents (who can, at the same time, be the biological parents) therefore remain unprotected because "the surrogate mother always retains the right to decide whether she wants to execute the previously concluded surrogacy agreement, without having to bear any consequence" Draškić (2022, 348, translated by author). This solution was met with much criticism by legal scholars. That is because the will of the surrogate mother was placed above the child's interest to live with his/her biological parents (Draškić 2022, 347). It hence comes as no surprise that the general opinion of the Plenary Session of the Supreme Court of Russia concluded that the fact that a surrogate mother refuses to consent to the registration of intended parents as the child's legal parents cannot be used as an unconditional basis for resolving the issue of parental rights. Instead and in order to assess the case correctly, courts should take into account the circumstances of each case, primarily whether the parties concluded a surrogacy agreement and, if so, consider its provisions to determine whether the intended parents are also the child's genetic parents, why the surrogate mother failed to consent to the intended parents being registered as the child's legal parents, and, after taking into account all the circumstances of the case, as well as the principle of the best interest of the child,[17] to decide in the best interest of the child (Khazova 2016, 288). The Constitutional Court of Russia accepted the said general opinion already in 2018 when deciding on a case that involved precisely this matter. When deciding on a case in which a surrogate mother refused to give her consent to the registering of the intended parents as legal parents, the Constitutional Court of Russia rejected a constitutional appeal filed by the surrogate mother. The rationale of the court was that "the surrogate mother abused her rights, not only by acting contrary to the provisions of the surrogate contract,

The District Court in Moscow therefore passed down a decision under which a single man can be designated as the father, while the field for the name of the child's legal mother is crossed out. See Torkunova, Shcherbakova 2022, 29 fn. 51.

[17] Convention on the Rights of the Child, Article 3 para. 1: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

but also counter to the interests of the children born in the execution of this contract and whose genetic parents were a contractual party in the conclusion of the contract, as well as contrary to the interests of children from a previous marriage" (Draškić 2022, 349 fn. 16, translated by author).[18]

It was previously noted that surrogacy can be altruistic or commercial. The countries that allow surrogacy usually prohibit any form of its commercialization. Russian law, however, neither prohibits nor allows commercial surrogacy (Khazova 2016, 290). This is precisely why some authors note that a surrogate mother is entitled to reimbursement of expenses (medical costs, travel expenses, childbirth expenses, etc.) and to a reward for providing the service of carrying and delivering a child (Svitnev 2016, 236). Moreover, it is estimated that a surrogate mother may receive a sum of EUR 15,000 to EUR 30,000, on the basis of her right to a reward.[19]

However, another, more important issue related to surrogacy has been raised in Russia in the past two years. As Russian legislation is quite liberal in the field of medically assisted reproduction, it is of no surprise that "reproductive tourism", i.e., international surrogacy, has been a common occurrence. In this particular case international surrogacy refers to intended parents who are foreign nationals and who travel to Russia in order to conclude a surrogacy agreement with a surrogate mother in Russia whose duty will be to carry and deliver a child that she will then transfer to them.[20] Russia is especially interesting for foreign nationals, primarily because the costs of the process are considerably lower than in the European Union member countries that allow surrogacy (Svitnev 2016, 239). Moreover, foreign nationals enjoy the same rights as Russian citizens when it comes to the medically assisted reproduction services. Better said, in surrogacy cases that result in delivery of the child on Russian territory, foreign nationals are allowed to obtain a birth certificate for the child designating them as the child's legal parents. However, it is uncertain whether and to what extent such international surrogacy practices will continue. That is because the recent activities of the Russian legislator indicate a possible adoption of a law that would prohibit foreign nationals from using the services of surrogacy in Russia. The draft law lays down a number of rules of significance for international surrogacy. First of all, it stipulates that only a Russian national can be a surrogate mother. In addition to this, only

[18] Also see Khazova 2016, 286–289.

[19] These figures can go up to EUR 100,000 and in some cases surrogate mothers even acquire ownership of real estates which are worth even twice as much (Svitnev 2016, 236).

[20] For more on international surrogacy see Bordaš 2012.

Russian citizens as intended parents would have the right to surrogacy. This ban would not apply to cases in which one of the intended parents is a Russian citizen who is married to a foreign national or a stateless person (Federal Assembly of the Russian Federation 2022).[21] As reported by Reuters (Reuters 2022), a member of the working group who took part in the drafting of these provisions pointed out that the ban on foreign citizens and stateless persons using surrogacy services was a response to the recorded cases of death and trafficking of children born as a result of surrogacy arrangements concluded with foreign nationals or stateless persons marked as the intended parents. It should, however, be noted that for now, this presents a draft law and the question remains whether it will be adopted. However, it appears that potential legal norms restricting the right of foreign nationals to use surrogacy in Russia could cause significant difficulties, as Russia is one of the countries that is often the choice of foreign nationals for carrying out the surrogacy procedure. This problem becomes even more noticeable when taking into account the fact that, in addition to Russia, a large number of foreigners choose Ukraine as the country in which they want to carry out the surrogacy procedure. As we know, Ukraine and Russia are in an armed conflict at the time of the writing of this paper. As a result, conducting the surrogacy procedure in Ukraine is significantly more difficult and what is more, it opens up many unresolved issues that have not had to be raised in the past.[22] Seeing as the question remains when the conflict will end, it is clear that many foreigners are essentially denied the possibility of opting for a surrogacy procedure in Ukraine. If, in addition to this, the aforementioned draft law was to be adopted in Russia, additional difficulties for foreign nationals will appear because they would be denied the right to carry out the surrogacy procedure in Russia. This would in turn deprive foreign citizens of the right to carry out the surrogacy procedure in two European countries where the implementation of the international surrogacy procedure is otherwise very common.

[21] See Federal Assembly of the Russian Federation (2022).

[22] Due to the armed conflict, it has come to light that the interests of intended parents, surrogate mothers and agencies that provide mediation in the surrogacy process are actually opposed. A particular problem that has arisen is also related to the legal status and citizenship of the children born in surrogacy processes in conflict areas who, therefore, cannot leave the country. Consequently, many intended parents are in a desperate situation because they are not certain whether they will ever meet with the child and establish a parental relationship. For more details see Marinelli *et al*. 2022, 5647.

All previously said leads to the conclusion that Russia is an example of a legal system that recognizes the need to exercise and protect the reproductive rights of individuals, as well as the need to protect the interests of the child by using this specific mechanism of medically assisted reproduction. However, it can be claimed with equal certainty that there is also room for changes to the existing legal norms in order to resolve certain potentially disputed issues. Hence, the Russian legislator should lay down adequate amendments that would introduce changes to the existing provision under which a single man is not permitted to use surrogacy services. Moreover, having in mind that commercial surrogacy is also present in Russia, the author believes that the Russian legislator should present certain amendments that would regulate the contractual relationship between the surrogate mother and the intended parents in a more detailed manner, i.e., their rights and obligations, primarily the surrogate mother's right to a reward. Finally, although for the time being only a draft law is being discussed, it appears that potential legal norms restricting the rights of foreigners to opt for surrogacy in Russia could also cause considerable difficulties because the Russian Federation is one of the countries in which surrogacy is very popular. As already stated, this problem is even more noticeable taking into account the fact that, for many couples, the alternative is a surrogacy procedure in Ukraine, which is currently in an armed conflict with Russia. If this draft law was to be adopted, third persons, foreign nationals, could subsequently truly suffer significant consequences regarding the exercising of their reproductive rights.

2.2. Surrogacy in German law

In complete contrast to Russia are the legal systems that explicitly prohibit surrogacy, such as is the case with the German legal system. The German legislator addressed the issue of surrogacy in several different laws. First of all, it should be said that the Article 134 of the German Civil Code[23] stipulates that any legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion,[24] as well as that any legal transaction that offends public policy is void.[25] Additionally, the first section of The Embryo Protection Act,[26] titled Improper Use of Reproductive

[23] German Civil Code (Bürgerliches Gesetzbuch – BGB).

[24] German Civil Code, §138.

[25] German Civil Code, § 138 (1).

[26] Embryo Protection Act – Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG).

Technology, stipulates that anyone who attempts to carry out the artificial (*in vitro*) fertilization of a woman who is prepared to permanently give up her child to a third person after birth (surrogate mother) or to transfer a human embryo to a surrogate mother can be fined and sentenced to up to three years imprisonment.[27] It is noteworthy to underline that the said attempt is punishable by law only if it is perpetrated by healthcare workers because the legislator emphasizes that the intended parents and the surrogate mother cannot be criminally prosecuted (Klinkhammer 2016, 51).[28] The Act on Adoption Placement and on the Prohibition of Surrogacy Placement [29] stipulates that a surrogate mother is defined as a woman who is willing, on the basis of an agreement, to undergo artificial or natural insemination or to undergo implantation of an embryo that is not her own and who will, after giving birth, hand the child over to intended parents for adoption or other placement in permanent care.[30] Surrogacy placement relates to the matching of persons wishing to adopt or otherwise permanently care for a child born to a surrogate mother with a woman who is willing to act as surrogate.[31] Such surrogacy placement procedure is prohibited and punishable with a fine or with up to one year in prison. Moreover, any form of offering of surrogacy services or advertising of such services by adoption agencies is also forbidden (Dutta 2016, 37). Although it can be concluded that the German legislator has a negative attitude on surrogacy, regulating the issue of the legal status of intended parents could not be completely ignored because of the cases when surrogacy does occur.[32] However, this issue is addressed in a way that completely ignores the specificities of surrogacy as a process of medically assisted reproduction. The German Civil Code stipulates that the mother of a child is the woman who gave birth to it.[33] Such wording unequivocally gives precedence to the implementation of the *mater semper certa est* principle even if there is no genetic connection between the surrogate mother and the child. By laying down this norm, the legislator

27 Embryo Protection Act, § 1 (1) No. 1 and No. 7.

28 Embryo Protection Act, § 1 (3) and § 11 (2).

29 Act on Adoption Placement and on the Prohibition of Surrogacy Placement (Adoptionsvermittlungsgesetz – AdVermiG).

30 Act on Adoption Placement, §13a.

31 Act on Adoption Placement, §13b.

32 There are situations when the intended parents, surrogate mother and medical professionals decide to act contrary to the legal regulations and carry out the surrogacy process, i.e., situations when surrogacy is not banned (for example, it is possible to talk about the surrogate mother's natural insemination) or there are cases that refer to international surrogacy. See Dutta 2016, 39.

33 German Civil Code, § 1591.

intended to prevent the implementation of medically assisted reproduction procedures that lead to "split" motherhood (Gössl 2015, 451; Dutta 2016, 39). Consequently, an intended mother can be designated as the mother of the child only if that is preceded by the adoption of the child born through surrogacy (Gössl 2015, 451). The rules that apply to the establishment of fatherhood are to some degree more flexible than those for establishing motherhood. More precisely, there is a rebuttable legal presumption that the mother's husband is to be considered the child's father.[34] Therefore, in the case of surrogacy, the surrogate mother's husband would be considered the child's father. If the child's mother is single, the person who gave a declaration of recognition of paternity, and to whose declaration the mother consented, is to be considered the child's father.[35] Paternity can also be established by a court decision in two cases. The first case refers to all situations in which paternity has not been determined. In this scenario, the man who considers himself to be the father of the child can turn to the court asking it to pass a decision determining his out-of-wedlock paternity of the child.[36] The second case is somewhat more complicated because it involves a situation in which the paternity of the child has already been determined. The man who believes to be the father of the child has the right to contest the determined paternity only if he declares in lieu of an oath that he had sexual intercourse with the mother of the child during the period of conception and if there is no familial relationship between the child and the father whose paternity had previously been determined.[37] If the man who considers himself to be the father of the child succeeds in contesting the paternity of the man designated as the father of the child, when contesting the paternity the court will at the same time also pass a decision determining the paternity of the man who considers himself to be the child's father (Dutta 2016, 43). Such a norm raises the question of how the existence of sexual relations will be interpreted in practice and whether this condition truly has to be met. Some authors point out that the German Federal Court[38] took a liberal position on the issue of the existence of sexual relations between the man who considers himself to be the father and the child's mother (Dutta 2016, 42 fn. 23). It was hence said that the cases in which the fertilization of the woman happened using the genetic material of a donor who consented to such fertilization

[34] German Civil Code § 1592 No. 1.

[35] The man who considers himself to be the father (intended father) can give a declaration of paternity recognition even before the child's birth, even if his genetic material was not used for the conception of the child. See Dutta 2016, 41.

[36] See the German Civil Code § 1600d (1).

[37] See the German Civil Code § 1600 (1) No. 2 and § 1600 (2).

[38] The Federal Court of Justice (Bundesgerichtshof – BGH).

can be classified as the existence of sexual relations, unless the donor is anonymous.[39] Regarding the establishment of paternity of a man who considers himself to be the father of a child conceived through surrogacy, there are scholarly opinions that in case of the assessing of whether there was a sexual relationship between the man who considers himself to be the father of the child and the child's mother, the Federal Court of Justice would probably take the position that this condition is met if the genetic material of the man who considers himself the father was used and if he and the child's mother were acquainted (Dutta 2016, 43 fn. 24).

It is undeniable that, under the norms contained in the German legislation, acquiring the status of legal parents in the surrogacy procedure is made difficult for the intended parents. It is precisely for this reason that intended parents most often opt for adoption through which they can become the legal parents of a child born through surrogacy. If the intended parents are spouses, they can jointly adopt a child born by a surrogate mother.[40] In order for the adoption to take place, several requirements need to be met. The intended parents can be adoptive parents only if the child's biological parents consent to the adoption, i.e., the surrogate mother in the case of surrogacy (and also the surrogate mother's husband, if she is married). As the child's biological parent, the surrogate mother cannot give her consent before the child is eight weeks old.[41] Additionally, a decision on adoption is passed only if it is in the best interest of the child and if it can be expected that a parent-child relationship will be established between the adoptive parents and the child (Dutta 2016, 45). It should be noted that the assessment of the standard of the best interest of the child is raised to an even higher level when the intended parents are the adoptive parents. The German Civil Code emphasizes that a person who, for the purpose of adoption, has taken part in a procurement of a child that is unlawful or contrary to public policy or who has commissioned a third party for this or rewarded them for this, should adopt a child only if that is necessary for the best interest of the child and if can be expected that the child and the intended parents will create a family-like relationship.[42] Therefore, in this case, it is not enough for the court to

[39] See BGH 15 May 2013, *FamRZ* 2013, 1209, 2010.

[40] One of the intended parents who is married can also adopt a child alone if the intended parent's spouse is already designated at the child's father. See German Civil Code § 1741.

[41] German Civil Code, § 1747.

[42] German Civil Code, § 1741 No. 1.

assess that the establishment of adoption is suitable for achieving the best interest of the child, but that the establishment of adoption is necessary to protect the best interest of the child (Dutta 2016, 45).

Although the adoption procedure is a more favorable solution for recognizing the legal status of intended parents, compared to the application of the rules on establishing maternity and paternity, it seems that the simplest solution for the intended parents is to go abroad so that the surrogacy procedure can be carried out smoothly and in accordance with the law. However, German nationals encounter certain difficulties even in such cases. Better said, seeing that German law prohibits surrogacy, a particular problem arises when there is a need to recognize the legal status of intended parents in cases where the surrogacy procedure is carried out outside of Germany (international surrogacy). It is often the case that German citizens leave the country and carry out the surrogacy procedure in another country, only to then return to Germany and petition to be recognized as the legal parents of a child born through surrogacy in a foreign country. The German courts' initial position was that any form of recognition of the intended parents' legal status is contrary to public policy, even when the surrogacy procedure is allowed in the country in which it was carried out (Gösll 2015, 449 fn. 4). However, the views of the German courts changed after 2014. A same-sex couple, German citizens residing in Berlin, who were in a civil partnership, decided to travel to California to carry out the surrogacy procedure. The intended parents entered into a surrogacy agreement in accordance with Californian law. The surrogacy procedure was carried out using the genetic material of parent No. 1 and that of an unidentified woman. Before the child was born, parent No. 1 signed an acknowledgement of paternity of that child at the German consulate, which the surrogate mother consented to. In accordance with the decision of the Superior Court of the State of California, both intended parents were designated as the child's legal parents. The intended parents then returned to Germany and turned to the relevant municipal administration requesting it to establish their status as the child's legal parents. The relevant municipal administration refused the request to register their legal status, pointing out that that would be contrary to public policy. They were told that the intended parent who had donated the genetic material could be registered as the child's father, but that the decision of the Superior Court of the State of California cannot be recognized in its entirety (Gösll 2015, 450). Once the intended parents exhausted all previous legal remedies, they decided to turn to the German Federal Court of Justice, requesting it to answer whether two men can be designated as

the legal parents of a child born through surrogacy in a foreign country.[43] The Federal Court of Justice took the position that recognition of a foreign court's decision cannot be refused on the grounds that it runs counter to public policy, and instead ordered the relevant municipal administration to register the child's birth and the plaintiffs as the child's legal parents. The court pointed out that, in the case of surrogacy, a foreign court's decision recognizing intended parents the legal status of parents is not a violation of public policy if one of the intended parents is genetically related to the child (Klinkhammer 2016, 53). The Federal Court of Justice also stressed that the surrogacy procedure in the foreign country was carried out legally, that the child had no influence whatsoever on its creation, and that it thus cannot be responsible for the consequences arising from it (Klinkhammer 2016, 54). The court additionally pointed out that when assessing whether a foreign court decision is contrary to German public policy, the rights protected by the European Convention on Human Rights (ECHR)[44] must be considered. Citing the decisions of the European Court of Human Rights,[45] it emphasized

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43 Bundersgerichtshof Beschluss XII ZB 463/13, 10 December 2014.

44 *Ibid*.

45 The first case that the German Federal Court of Justice cited was *Mennesson v. France*. The applicants were the parents of girls born through surrogacy in the United States of America. They turned to the European Court of Human Rights claiming that the right to respect for their private and family life (Article 8 of ECHR), and that the children's best interests had been violated as they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad. The European Court of Human Rights ruled that there had been a violation of the right to respect for private and family life of the girls born through surrogacy. The violation was primarily reflected in the fact that the French state authorities refused to identify the girls as the children of the indented parents (the applicants), even though they were identified as their children in the state in which the surrogacy process had been carried out. The European Court of Human Rights pointed out that this position undermined the children's identity within French society. In addition, it stipulated that the norms of French law, which refused to establish a legal relationship between the intended parents and the children conceived through such processes of medically assisted reproduction negatively affected not only the parents who chose a certain medically assisted reproduction treatment but also the children, thus affecting their right to respect for private life as well. Moreover, having in mind that one of the intended parents was the children's biological parent, and that biological parenthood is an important component of one's identity, it cannot be said that it is in the interest of the child to deprive them of a legal relationship of this nature where the biological reality of that relationship has been established and both the child and the intended parent demand full recognition thereof. In view of all this, the European Court of Human Rights held that the consequences of this serious restriction of the identity and right to respect for private life of the children, by preventing both the recognition and establishment of their legal relationship with their biological father, point to the fact

that a child's right to respect for private and family life, protected by Article 8 of the European Convention on Human Rights, must always be taken into account when deciding on the legal status of parents.[46] The Federal Court of Justice has, to a large extent, based its decision precisely on the rights and the wellbeing of the child born through surrogacy (Klinkhammer 2016, 54–55).[47] The Federal Court of Justice hence clearly pointed out that when deciding on the recognition of the legal status of parents, precedence should be given to the best interest of the child, and not to the protection of the German public policy. Nevertheless, it remains uncertain whether the Federal Court of Justice would have ruled the same way if the child born through surrogacy had been conceived without using the genetic material of one of the intended parents. That is because in the aforementioned case the court's decision was, among other things, based on the fact that there was a genetic link between one of the intended parents and the child.

Yet and considering the change of views of the Federal Court of Justice, it can undoubtedly be concluded that the German judicial authorities opted for a more flexible approach and in favor of recognizing surrogacy procedures carried out abroad, which is a shift compared to the previous understandings of the German courts. However, it remains to be seen whether that will open a small window of opportunity for the possibility of recognizing the right to carry out the surrogacy procedure in Germany, i.e., for relevant amendments to the legislation. For the time being, this seems unlikely because international surrogacy and surrogacy carried out in the territory of Germany cannot be equated. What is more, it is pointed out that this approach to the surrogacy process by the German legislator is a result of the intention to fully prevent the practice of carrying out the surrogacy procedure in the territory of Germany (Klinkhammer 2016, 54).

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that France had overstepped the permissible limits of its margin of appreciation. It is precisely for this reason, and taking into account the significance of the child's interests in weighing the competing interests at stake, that the European Court concluded that the right of the girls to respect for their private life was infringed. See *Mennesson v. France*, No. 65192/11, 26 June 2014, § 96–101. For more details on the facts in this case and the court ruling see Draškić 2022, 356–360.

46 Bundersgerichtshof Beschluss XII ZB 463/13, 10 December 2014.

47 The Federal Court of Justice primarily took into account the child's right to be cared for and to be brought up by its parents rather than anyone else. See Grundgesetz, Article 2 para. 1, in connection with Article 6 para. 2.

3. SURROGACY IN SERBIAN LAW

When speaking of medically assisted reproduction in Serbia, it should first be noted that the Constitution of the Republic of Serbia,[48] being the highest legal act, stipulates that every person has the freedom to decide whether they will procreate.[49] The legal content of the principle of deciding freely on whether to have children was most comprehensively defined by Stevanov (1977, 49) who believes that this principle encompasses several rights, one of which is precisely the right to conceive (naturally or artificially, the right to treatment of sterility, and the right to transplantation of gonads in order to birth a child) (Draškić 1992, 246).[50] Therefore, the right to access to medically assisted reproduction is one of the rights encompassed in the constitutional right to freely decide on procreation. Along with the Constitution of the Republic of Serbia, the same right is also protected by Article 8 of the European Convention on Human Rights,[51] which the European Court of Human Rights itself emphasized on a number of occasions.[52] However, the Serbian Family Act[53] envisages that only a woman has the right to freely decide on giving birth.[54] Nevertheless, since the constitutional norm entails that it is everyone's right to freely decide to procreate, and as this right entails the right to conceive, it is undisputed that every person, regardless of their sex, has the right to access to medically assisted reproduction.

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48 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 98/2006 and 115/2021.

49 Constitution of the Republic of Serbia, Article 63 para 1.

50 See also Mladenović 1989, 58.

51 Article 8 of the ECHR, which was ratified by the state union of Serbia and Montenegro in 2003, stipulates that everyone has the right to respect for their private and family life, home, and correspondence.

52 The European Court of Human Rights pointed out that "the right of a couple to conceive a child and to make use of medically assisted procreation for that end comes within the ambit of Article 8, as such a choice is clearly an expression of private and family life." See *S. H. and others v. Austria*, 57813/00, para. 82; Barać 2021, 176–177. For more details on medically assisted reproduction before the European Court of Human Right see Bordaš 2011, 313–333.

53 Family Act of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 18/2005, 72/2011 – state law and 6/2015.

54 As can be noted, the Family Act grants this right only to women, hence undeniably violating the constitutional norm proclaiming that everyone is entitled to this right. Such provision became an integral part of the text of the law because, in the process of passing the Family Act, an amendment was adopted that changed Article 5 para. 1 of the Draft Family Act, which had been drafted by a committee of experts (Draškić 2020, 51).

The Law on Medically Assisted Reproduction[55] is of special importance to the subject matter. To that end this law defines that medically assisted reproduction is a procedure that is carried out in line with the modern standards of biomedicine, in the event of infertility and if there are medical indications for fertility preservation, enabling the joining of male and female reproductive cells to achieve pregnancy in a manner different from sexual intercourse.[56] Medically assisted reproduction implies the procedure of intracorporeal fertilization, which involves the introduction of sperm cells into the female reproductive tract or the introduction of eggs and sperm cells together into the female reproductive organs (*in vivo* fertilization), as well as the procedure of extracorporeal fertilization, which involves the joining of an egg and a sperm cell outside of the woman's body in order to create an embryo and transfer it to the woman's reproductive organs (*in vitro* fertilization).[57] The right to medically assisted reproduction is recognized to spouses of legal age and with legal capacity, to extramarital partners and to single women of legal age and with legal capacity.[58] This right is also recognized to women/men with legal capacity who have postponed the use of their reproductive cells due to the possibility of a decrease or loss of reproductive function.[59] It should be noted that medically assisted reproduction can be carried out using either the genetic material of the persons entitled to this right or the genetic material of donor(s).[60]

Serbian legislation envisages the possibility of conception solely through egg donation or embryo donation, while explicitly prohibiting surrogacy. The provisions of the Law on Medically Assisted Reproduction (LMAR) stipulate that a woman who intends to give a child away to a third-party following delivery, with or without payment of any kind, i.e. obtaining any other material or immaterial gain, is prohibited from taking part in medically assisted reproduction, nor is it permitted for a woman or any other person to offer surrogate services with or without payment of any kind, i.e., obtaining any other material or immaterial gain.[61] In addition, the same law establishes criminal sanctions for persons who include a woman intending

[55] Law on Medically Assisted Reproduction – LMAR, *Official Gazette of the Republic of Serbia* 40/2017 and 113/2017.

[56] LMAR, Article 3 para. 1 item 1.

[57] LMAR, Article 13 para. 2.

[58] LMAR, Article 25 paras. 1 and 2

[59] LMAR, Article 25 para. 3. For more on exercising this right and meeting the conditions for the exercise of this right, see Barać 2021, 178–187.

[60] LMAR, Article 29.

[61] LMAR, Article 49 para. 1 item 18.

to give a child, once it is born, to a third party with or without payment of any kind, i.e., obtaining any material or immaterial gains, or a person offering surrogate services of a woman or any other person, with or without payment of any kind, i.e., obtaining any material or immaterial gains, in a medically assisted reproduction procedure.[62] On the other hand, the Family Act contains a norm stipulating that the woman who gave birth to a child is considered to be the mother of the child.[63] The Family Act also stipulates that if a child was conceived using a donor egg in a medically assisted procedure, the maternity of the woman who donated the egg cannot be established.[64] Based on these legal solutions and in light of the fact that, as previously said, there is also a possibility of conception using donor genetic material, Kovaček Stanić (2013, 12) concludes that the legislator opted for a legal solution that gives legal parenthood precedence over genetic parenthood.

Some legal scholars have criticized this legal solution, presenting a number of arguments justifying the position that surrogacy should be allowed. Cvejić Jančić (2010, 11), being one of them, emphasizes that the ban on surrogacy violates the constitutional norms related to the right to procreate because the Constitution of the Republic of Serbia does not envisage the possibility of restricting this right by law or in any other way. Moreover, the said author points out that the ban on surrogacy violates the constitutional norm on gender equality[65] and the ban on discrimination based on gender.[66] She draws this conclusion from the fact that, when it comes to treating male infertility, all known and available medically assisted fertilization procedures can be carried out, while this is not the case when treating female infertility. Although the legislator allows for the treatment of infertility using egg or embryo donation, a woman who is able to produce her own eggs, but is unable to carry a pregnancy and bear a child, is denied the possibility of becoming the mother of a child that carries her genetic characteristics (Vidić Trninić 2015, 1165). The same authors also refer to

62 LMAR, Article 66 para. 1.

63 Family Act, Article 42.

64 Family Act, Article 57 para. 2. The same rule is also established in cases when a child is conceived with medical assisted reproduction using donor sperm. Therefore, there can be no establishing of paternity of the man who donated the sperm. See Family Act, Article 58 para. 5.

65 "The State shall guarantee the equality of women and men and develop equal opportunities policy." Constitution of the Republic of Serbia, Article 15.

66 "All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited." Constitution of the Republic of Serbia, Article 21 para. 3.

the issue of the national birth rate. The provisions prohibiting surrogacy are "particularly unacceptable" in cases where a woman who can bear children opts to limit herself by having one or two children while, on the other hand, a woman, wanting to have more children is prevented from starting a family with the help of another woman who is willing and able to do so (Cvejić Jančić 2010, 12–13; Vidić Trninić 2015, 1165).[67]

The author is of the opinion that there is room for a different interpretation of the aforementioned norms of the Constitution of the Republic of Serbia. In other words, it is questionable whether the prohibition of surrogacy can at all be said to restrict one's right to freely decide to procreate. The purpose of the constitutional norms is to prohibit the interference of the state in the rights of spouses and extramarital partners to have children that are naturally conceived. This, however, does not mean that the legislator must stipulate provisions which would allow for this right to be exercised through all medically available methods. It should be noted that some scholars are of the opinion that the holder of the right to freely decide on bearing children "does not at all times have to have the actual possibility for procreation of offspring" (Draškić 1992, 249 fn. 54, translated by author). Hence, it is evident that the Republic of Serbia has no duty to offer the users of this right a range of possibilities for exercising it. As a result, it can be stressed that the argument that the current legal norms restrict this right are improper. This opinion is based on the fact that the Constitution of the Republic of Serbia clearly stipulates that the provisions on human rights are interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practices of international institutions that oversee their implementation.[68] With this in mind, it should be pointed out that it is questionable whether the provisions on human rights should actually be interpreted in a way that permits surrogacy. It is hence important to consider the case law of the European Court of Human Rights, as it is an international body set up to ensure the full implementation of the ECHR (Draškić 2019, 41), and particularly because the exercise of the right to freely decide on bearing children is protected by Article 8 of the ECHR (the right to respect for private and family life, home and correspondence).[69] Consequently, in

[67] See also Vlašković 2011, 331–332.

[68] Constitution of the Republic of Serbia, Article 18 para. 3.

[69] ECHR, Article 8: "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

interpreting the norms on human and minority right, the provisions of the ECHR and the practice of the European Court of Human Rights should be taken into account. With this in mind, it should first be pointed out that, in the judgment recently handed down in *Pejřilova v. the Czech Republic*,[70] the European Court of Human Rights stressed that, in a sensitive domain such as artificial procreation, concerns based on moral considerations or on social acceptability must be taken seriously.[71] For this reason and when examining the compatibility of a prohibition of a specific artificial procreation technique with the requirements of the Convention, the legislative framework to which it belongs to must be taken into consideration, and the prohibition must be

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." When ensuring protection of the rights provided by Article 8 of the ECHR, the European Commission of Human Rights and the European Court of Human Rights often also ensured the protection of the reproductive rights of individuals. For more details see Barać 2020, 189.

70 This case involved a man and a woman who got married in 2012. As they were unable to conceive a child naturally, and the applicant's husband had a serious illness, they decided to undergo medically assisted reproduction. In June 2014 the applicant's husband had his sperm cryopreserved, signing a consent form agreeing to such preservation solely for the purpose of infertility treatment. However, he died before any further steps were taken. The applicant thus turned to the center where the sperm cells had been deposited with a request to have her eggs fertilized with her late husband's cryopreserved sperm. The center refused and instead suggested that the applicant petition the court in order to reach a settlement. The position of the domestic courts was that the center was under no obligation to carry out the requested procedure. The applicant appealed to the European Court, emphasizing that the state should allow her to continue the process of assisted reproduction using the cryopreserved sperm of her deceased husband. When stating her request, she cited the right to respect for private and family life, home and correspondence. In this specific case, the Court assessed whether the Czech Republic's interference with the applicant's rights protected by Article 8 of the ECHR had been in accordance with the law, whether its aim was legitimate, and whether it was necessary in a democratic society. The Court gave a positive answer to the first question, because this type of ban on posthumous fertilization was envisaged by law. The Court further found that the Czech legislature's decision to enact such provisions, and their interpretation by the domestic courts, indicated the intention to respect human dignity and free will, and that such action achieved a legitimate aim, namely the protection of morals and the rights and freedoms of others. Regarding the question of whether such interference was necessary in a democratic society, the Court emphasized that it did not find that the applicant's legitimate right to respect for the decision to have a child genetically related to her late husband should be accorded greater weight than the legitimate general interests protected by the impugned legislation. In view of all this, the Court concluded that there was no violation of the applicant's right to respect for private life. For more details see *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022.

71 *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022, § 58. See also *S. H. and Others v. Austria*, No. 57813/00, of 3 November 2011, § 112.

perceived in this wider context.[72] The European Court of Human Rights noted that states should enjoy a wide margin of appreciation in determining the most appropriate policy for regulating matters of artificial procreation, especially since the use of IVF treatment continues to give rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments.[73] Moreover, the Court answered the question regarding the permissibility of carrying out the surrogacy procedure in the legal systems of European countries. To that end, in the aforementioned *Case of Mennesson v. France*,[74] it was stressed that European states should be afforded a wide margin of appreciation in deciding on surrogacy because there is still no consensus on the issue of surrogacy among them as surrogacy raises sensitive ethical questions.[75]

Even if one were to accept the position that women in Serbia are denied access to all known and available medically assisted methods for the treatment of female infertility, this still does not mean that such a restriction is unjustified and that there is discrimination. In other words, the procedure of egg donation and embryo donation, where a woman who carries and gives birth to a child becomes its mother, differs significantly from surrogacy, where the surrogate mother has a contractual obligation to carry and give birth to a child, and then give the child away to the intended parents. (Kovaček Stanić 2006, 159). Restricting, i.e., denying the right to carry out the surrogacy procedure is closely linked with the specific nature of the contractual relationship between a surrogate mother and the intended parents. For example, an inevitable question that can be raised in the case of a surrogacy contract is whether the subject matter of the surrogate mother's obligation is permitted at all, taking into account the provisions of Law of Contracts and Torts (LCT).[76] Under the provisions of the LCT, the subject of obligation shall not be permitted if it is contrary to compulsory legislation,

72 *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022, § 58. See also with *S. H. and Others v. Austria*, No. 57813/00, of 3 November 2011, § 112.

73 See *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022, § 43. See also *Evans v. United Kingdom*, No. 6339/05, of 7 March 2006, §81; *S. H. and Others v. Austria*, No. 57813/00, of 3 November 2011, § 97.

74 *Mennesson v. France*, No. 65192/11, 26 June 2014.

75 *Mennesson v. France*, No. 65192/11, 26 June 2014, §§ 78, 79. See also Draškić 2022, 358.

76 Law on Contracts and Torts – LCT, *Official Gazette of the Socialist Federal Republic of Yugoslavia* 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of the Federal Republic of Yugoslavia* 31/93, *Official Gazette of Serbia and Montenegro* 1/2003 – Constitutional Charter; and *Official Gazette of the Republic of Serbia* 18/2020.

public policy or fair usage.[77] If the subject of an obligation is unlawful, the contract would be considered void.[78] Cigoj (1983, 169) argues that parts of the human body cannot be the subject of a legal transactions, unless this involves the disposal of body parts that does not pose a threat to life and health, i.e., if it involves altruistic aims (the health of another person). Seeing that in the present case the body of a surrogate mother, i.e., her uterus, is used to fulfill a contractual obligation toward the intended parents, and as it is conceivable that, through pregnancy, the surrogate mother exposes herself to a threat to her life or health, it could potentially be claimed that the subject matter of the surrogate mother's obligation is impermissible because it affects her personal sphere.[79] Such rationale can also be found when inspecting other legal systems in which surrogacy contracts are prohibited. For example, in French law, it is emphasized that surrogacy contracts are contrary to public policy and are therefore void (Pintens 2016, 18). Moreover, in a case reiterating that surrogacy contracts are prohibited, the French Court of Cassation also underlined that the human body and the status of a person are inviolable and thus cannot be viewed as goods.[80] Ethical reasons also speak against surrogacy contracts in order to avoid situations in which a child becomes the object of exchange between an infertile couple and a surrogate mother (Pintens 2016, 18). Moreover, while such a contractual relationship could negatively affect the psychological status of a child born in this manner, the prohibition of it could prevent the exploitation of women from lower social status (Draškić 2022, 355).[81] Since carrying out the surrogacy procedure implies a process that raises many important questions and intrudes on the surrogate mother's private life (unlike the processes of egg donation and embryo donation), it appears that the position of the authors who claim that prohibiting the surrogacy process violates constitutional norms must be relativized.

Finally, it is necessary to reflect on the views that the provisions prohibiting surrogacy are "particularly unacceptable" when women who are able to carry a pregnancy and give birth limit themselves and have only up to two children while, on the other hand, there are legal obstacles

77 LCT, Article 49.

78 LCT, Article 47.

79 For more details on types of inadmissibility see Cigoj 1983, 168.

80 Cass. (Ass. plén) 31 May 1991, D. 1991, note D. Thouvenin, JCP 1991 II, 21 752, note J. Bernard. Cited according to Draškić 2022, 355 fn. 29. For more details see Draškić 2022, 355.

81 She, however, underlines that there are also opposite examples, the best proof of which is *Mennesson v. France*. See Draškić 2022, 355.

for women who, although they want to, are prevented from having a child with the help of a surrogate mother. It appears that the position of such scholars is that the right to procreate encompasses the right to choose the manner in which the childbirth will occur. The right to freely decide on having children primarily relates to every person's right to make a choice on whether they want offspring or not (Kovaček Stanić 2013, 2; Draškić 2020, 51–53). Once a person has made this choice, their right to conceive, both naturally and artificially, is protected. Due to its biological aspect, the right to conceive naturally is far easier to realize. On the other hand, the right to conceive artificially implies infertility treatment by carrying out procedures that include various reproduction technologies of intracorporeal or extracorporeal conception, which is a more complex method. Consequently, it can be concluded that the surrogacy procedure, as a method of conceiving a child artificially, cannot be treated the same as other methods of conception. Thus, it is necessary to keep in mind that in carrying out the surrogacy procedure, there is a very specific obligation of the surrogate mother, as was previously explained. In addition to this, "pregnancy and childbirth actually lead to the creation of emotional bonds between a mother and a child the breaking of which is unnatural, even inhumane" (Kovaček Stanić 2013, 16, translated by author). Moreover, the protection of the right to found a family does not necessarily mean that this right will in fact be realized. Let's say a woman wants to terminate a pregnancy and her husband is against it. In such case the woman's husband, although granted the constitutional right to freely decide on having children, cannot in fact exercise his right and become a parent.[82] Even if the courts were to accept the position of legal scholars that the surrogacy procedure should be allowed it should not be overlooked that some questions of both biological and legal nature would definitely be raised, questions to which Serbia's legal system has no answers – at least not at the moment. Having all this in mind, the author is of the opinion that there is no place for the interpretation that the right to conceive artificially includes the right to surrogacy. Consequently, she does not see a correlation between a woman's right to choose to "limit" her own reproduction by wanting one or two children and denying the right to surrogacy.

It should be mentioned that a discussion of legislative changes allowing surrogacy procedures in Serbia was recently opened. The proposed Preliminary Draft of the Civil Code of the Republic of Serbia (Preliminary Draft) included a legal provision that allows for the conclusion of surrogacy contracts provided that certain conditions are met. The proposed norms have been defined in a way which offers alternative solutions for every provision,

[82] See Draškić 1992, 248 fn. 53.

therefore leaving the actual intent of the working group of the Preliminary Draft rather unclear. The Preliminary Draft defines surrogacy contract as a contract on child bearing for another, which can be concluded between a woman who would carry and give birth to a child (surrogate mother) and the intended parents, whereby the intended parents may be both spouses and extramarital partners, as well as single persons (man or woman).[83] The Preliminary Draft remains ambiguous regarding the form of surrogacy since alternative solutions are proposed, e.g. it provides for the possibility of surrogacy based on family relations, but bans surrogacy between individuals who are not related, and then proposes, as an alternative solution, to ban surrogacy based on family relations, while only allowing surrogacy between individuals who are not related.[84] Furthermore, it envisages the possibility of both partial and full surrogacy, with a criterion for determining the type of surrogacy different from the one accepted in comparative law.[85] Hence, it can be underlined that many dilemmas remain unresolved. Anyhow, the provisions contained in the Preliminary Draft should not be given much weight, bearing in mind that the said draft has been put *ad acta* and that it remains unclear whether and how surrogacy procedure will be regulated in Serbian law. Nevertheless, considering the specific legal nature of surrogacy contracts, there are several preliminary questions that need to be answered in order to adequately address the issue of carrying out the surrogacy procedure. In other words, the first question that needs to be answered is whether the surrogacy agreement is contrary to public policy, bearing in mind that it foresees carrying and giving birth to a child for another and handing the child over to the intended parents. Furthermore, the issue of the form of this contract would also have to be resolved, i.e., whether a surrogacy contract should be concluded with prior/subsequent consent of an administrative body, whether the agreement should be concluded in the form of a notary public record, or whether it should be envisaged that a surrogacy contract does not produce any legal effects pending the decision of the competent

83 Preliminary Draft, Article 2273.

84 Preliminary Draft, Article 2275.

85 In the Preliminary Draft, partial surrogacy refers to surrogacy carried out using the reproductive material of at least one of the individuals who wants a child (contrary to this, in comparative law, the distinguishing criterion is whether the egg of the surrogate mother was used in the surrogacy process). According to the solution proposed in the Preliminary Draft, full surrogacy refers to cases in which the reproductive material of both intended parents is used in the surrogacy process – while, in comparative law, full surrogacy includes the cases where the genetic material of one or both intended parents is used. For more details on the solutions proposed by the Preliminary Draft, see in Kovaček Stanić 2013, 14–15. See Vidić Trninić 2015, 1166 ff.

court, after which a parental legal relationship can be established between the intended parents and the child born through surrogacy.[86] Finally, the question whether both partial and full surrogacy should be allowed would also need to be answered. Kovaček Stanić (2013) asserts that Serbia's legal system should start off with more restrictive legal solutions, which is why it should only allow full surrogacy.[87] In addition to these, many other legal questions can be raised regarding the surrogacy procedure (issues related to the right to reimbursement of costs, right to termination of contract due to non-performance, impossibility of performance, right to termination of contract or amendment of contract due to changed circumstances, etc.). It is precisely for this reason that it can be unequivocally concluded that, at the present time, Serbia's legislation has not considered the issue of carrying out the surrogacy procedure to a sufficient extent and with adequate attention. As a result, it would be necessary to first resolve the numerous dilemmas that may arise in connection with medically assisted fertilization, and only then proceed with its implementation.

4. CONCLUSION

Surrogacy has been known as a mechanism of medically assisted reproduction for almost forty years now. Nonetheless, it is still not regarded as an appropriate infertility treatment, albeit the fact that it offers infertile couples a chance to become parents of a child that is genetically related to one or even both of them. On the contrary, the research and analysis presented by the author leads to the conclusion that the legal systems in Europe and around the world still do not have a uniform approach. However, the examples of different legal systems showcase that the division of legal systems into those that prohibit surrogacy, those that allow only altruistic surrogacy and those that allow every form of surrogacy is not necessarily nor should it be very strict. This paper presents a comparative review of two legal systems that can testify to that. On the one hand there is Russia, a legal system that features extremely liberal norms regarding surrogacy. This approach, however, raises certain issues, the most important being the justification of a surrogate mother's right to refuse, following the birth of a child, to consent to the registering of the intended parents as the child's

[86] For more details on form of surrogacy contracts, see Vlašković 2011, 333–335.

[87] If partial surrogacy were to be allowed, there would be risk of the surrogate mother refusing to hand over the child because of the genetic link between her and the child. See Kovaček Stanić 2013, 15.

legal parents. Nevertheless, the general opinion of the Plenary Session of the Supreme Court of Russia clearly stated that, when assessing whether a surrogate mother has the right to refuse to hand over the child and to consent to the intended parents being designated as the child's legal parents, the courts must assess the circumstances of the case (whether the parties concluded a contract and, if so, what do the provisions of the contract stipulate, and what is the reason for the surrogate mother's refusal to give consent), and to observe the principle of the best interest of the child. Moreover, it is emphasized that when passing its decision, the courts must resolve the case in the best interest of the child. In addition, and as previously stipulated, commercial surrogacy presents a controversial issue in Russia. That is why the author believes it is necessary to regulate the norms that refer to the right to a reward in greater detail, primarily in the context of potential abuse of women from lower social status who opt to offer their surrogacy services for financial reasons. Additionally, certain legal norms in Russian law are set in a way that raises the question of their constitutionality. In other words, in Russia, at least according to the law, the right to a surrogacy procedure is not recognized for men, which is a direct violation of the constitutional provision on the equality of men and women in health protection and provision of medical assistance.

Germany, on the other hand, is an example of a legal system that has opted for a more conservative approach, at least at first glance. Thus, several legal acts contain norms explicitly prohibiting surrogacy. However, according to legal scholars, this ban focuses on preventing surrogacy solely on the territory of Germany. The 2014 ruling of the German Federal Court of Justice, which stipulates that a ruling by a foreign court recognizing the legal status of intended parents does not constitute a violation of public policy if one of the intended parents is genetically related to the child, proves that this is in fact the case. In connection with this, the ruling of the Federal Court was primarily based on the need to recognize and honor the rights of a child born through surrogacy, i.e., the child's right to be cared for, before anyone else, by its parents as well as its right to upbringing. This ruling reflects the positions expressed in the rulings of the European Court of Human Rights.

It is notable that both legal systems, with two completely opposite approaches to regulating the issue of surrogacy, recognize the need to acknowledge the legal effects of surrogacy contracts so as to protect a child's interests. It should, however, be borne in mind that this position of the German courts, at least at this point, refers only to international surrogacy.

Serbia, similar to Germany, prohibits surrogacy. The norms of the Serbian Law on Medically Assisted Reproduction ban surrogacy. However, such position of the legislator is criticized by legal scholars. They point out that

this prohibition constitutes a violation of constitutional norms that proclaim the right of every person to freely decide on having children, and that a ban on surrogacy limits this right. Additionally, it is underlined that such prohibition discriminates against women because, unlike men, they are not recognized the right to use all available and known methods of medically assisted reproduction. However, the author offered a different interpretation of these norms and pointed out that the right to freely decide on having children should not necessarily be interpreted as an absolute right, which is best evidenced by the fact that some other rights that are part of the right to freely decide on having children are somewhat regulated (for example, the right to termination of pregnancy). It is also necessary to take into consideration the fact that the European Court of Human Rights clearly pointed out that member states enjoy a wide margin of appreciation in deciding on the matter of surrogacy, as there is still no general consensus regarding surrogacy because this question raises delicate ethical dilemmas. Along with the ethical quandaries, surrogacy contracts also raise dilemmas of legal nature, such as whether the surrogacy contract would be contrary to public policy, what form should it take, whether it could also be concluded as a commercial contract or take the form of an altruistic contract. This is why it is necessary to first resolve these dilemmas and only then embark on standardizing legal norms that recognize the right to the surrogacy procedure. Even if surrogacy is permitted, it would be important to start off with more restrictive solutions and only later assess whether there are also possibilities for accepting more liberal norms.

Finally, it should be kept in mind that, for some people, surrogacy is the only mechanism that would allow them to be genetically related to their child. It is precisely for this reasons that it appears questionable whether and to what extent it is possible to talk about prohibiting surrogacy in the long term, especially in light of the fact that infertility causes great stress for people, i.e., for (un)married couples, and that the birth of a child creates "the greatest feeling of fulfillment and purpose in life, also enabling them to respect their own identity and dignity" (Draškić 2013, 219, translated by author). Based on all that has been said, an inevitable conclusion is that it is necessary to define certain standards that would, at least to some extent, help states in standardizing rules on the surrogacy process.[88]

[88] The Hague Convention on International Private Law has taken on the initiative in an attempt to formulate a suitable international convention that would regulate various aspects of international surrogacy contracts, however there has been no progress so far. Even if it were not so, this would not resolve the problems in Serbian domestic law. See Draškić 2022, 369.

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ЕВЕНТУАЛНИ УМИШЉАЈ И РАЗГРАНИЧЕЊЕ СА СВЕСНИМ НЕХАТОМ

Централна тема рада је садржај евентуалног умишљаја, пре свега у светлу његовог разграничења са свесним нехатом, од којег се разликује по елементу воље, док је елемент свести исти. То питање је важно због тога што последице те демаркације, догматски и криминалнополитички, непосредно и посредно, вишеструко утичу на правну квалификацију дела, висину изречене казне и, уопште, на (не)кажњивост одређеног понашања.

Након уводног објашњења тог значаја, анализиране су најпре бројне теорије и схватања о могућим начинима разграничења (интелектуалне и волунтативне теорије, теорије ризика) и посебно је указано на њихове предности и недостатке. У другом делу је потом проверено да ли би нека од тих теорија, самостално или у комбинацији са сегментима других теорија, могла да се примени на решење у српском законодавству које, за разлику од других, законски дефинише евентуални умишљај и свесни нехат, али и даље нема сасвим адекватан и заокружен критеријум њиховог разграничења.

Кључне речи: *Евентуални умишљај. – Свесни нехат. – Пристанак. – Теорије. – Кривични законик Србије.*

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1. УВОДНЕ НАПОМЕНЕ

Кривични законик Србије[1] садржи дефиниције сва четири облика кривице.[2] Тако евентуални умишљај (*dolus eventualis*)[3] постоји када је учинилац био свестан да може да учини дело, па је на то пристао (чл. 25). Слабије изражена оба елемента, и интелектуални (*свест о могућности*) и вољни (*пристанак*), не чине компликованим његово разликовање од директног умишљаја, где је учинилац био *свестан свог дела* и *хтео* његово извршење (чл. 25). Штавише, постојање намере у законском опису бића указује на то да је реч о директном умишљају.[4]

Исто тако је међусобно разликовање блиских облика кривице с друге стране спектрума, свесног и несвесног нехата, релативно јасно. Код несвесног нехата се непостојање психолошке везе (*учинилац није био свестан да својом радњом може учинити дело*) надомешћује појачаном нормативном копчом (*иако је, према околностима под којима је оно учињено и према својим личним својствима, био дужан и могао бити свестан те могућности*, чл. 26).[5] Свесни нехат, с друге стране, садржи и елемент свести (*учинилац је свестан да својом радњом може учинити дело*) и елемент воље (*али је олако држао да до тога неће доћи или да ће то моћи да спречи*, чл. 26).

Видимо да ободи кривице нису спорни. Проблем настаје у средишту, на линији разликовања евентуалног умишљаја и свесног нехата, с обзиром на то да је елемент свести код оба облика кривице истоветан (*свест о могућности*). Управо је то разграничење, које је још Велцл (*Welzel*) означио као „једно од најтежих и најспорнијих питања

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[1] Кривични законик – КЗ, *Службени гласник РС* 85/2005, 88/2005 – испр., 107/2005 – испр., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

[2] Умишљај и нехат су не само облици већ и елементи кривице, и то од посебне важности. Први разлог је то што дају суштински печат кривици, а други то што се остали елементи (урачунљивост и противправност) претпостављају, па је у највећем броју случајева утврђивањем умишљаја и нехата потврђено и постојање кривице (Делић 2009, 64).

[3] Израз „евентуални умишљај" се заправо нигде у КЗ експлицитно не помиње, као ни називи остала три облика кривице. Помињу се само речи „умишљај" и „нехат", без ближих одредница.

[4] Немачко право у комбинацији умишљај + намера препознаје највиши, засебни степен кривице – *dolus directus* првог степена.

[5] Код несвесног нехата ће се пре поставити питање разграничења са случајем, али је оно свакако мање спорно од разграничења евентуални умишљај – свесни нехат.

кривичног права“ ([1969] 2010, 69) изузетно битно, и то из неколико разлога. Најпре, умишљај је тежи облик кривице и као такав повлачи са собом по правилу и строжу казну.[6] Постоје кривична дела која се могу вршити само умишљајно, од којих нека само са директним умишљајем (попут кривичног дела принуде, чл. 135 КЗ), а нека изузетно само са евентуалним умишљајем (нпр. несавесно пружање лекарске помоћи, чл. 251 ст. 1). Но, правило је да је код већине умишљајних кривичних дела довољан евентуални умишљај (Вуковић 2022, 211). Умишљај је иначе уобичајен облик кривице у законском опису већине кривичних дела сходно чл. 22 ст. 1, док се нехат изричито предвиђа у законском опису кривичних дела (чл. 22 ст. 2) и самим тим се ређе и сређе.[7] Можемо рећи да је умишљај правило, а нехат (изричито прописан) изузетак. Зато је важно тачно утврдити облик кривице. Од тог одређења ће неретко зависити да ли постоји кривично дело или не.

Осим тих директних последица, значај разликовања (евентуалног) умишљаја и (свесног) нехата може бити и посредан. То се везује за поједине институте кривичног права, попут могућности ублажавања казне за нехатно изазвану опасност у ситуацији крајње нужде (чл. 20 ст. 3); условну осуду, где је један од услова за изрицање те код нас најчешће изрицане кривичне санкције протек више од пет година од правноснажности осуде којом је учиниоцу изречена казна затвора или условна осуда за умишљајно кривично дело (чл. 66 ст. 3). Још значајнији је за повратак (чл. 55), вишеструки повратак (чл. 55а), посебан основ за ослобођење од казне (чл. 58 ст. 2) и продужено кривично дело (јединствени умишљај као варијабилни елемент, чл. 6. ст. 1 и 5), а помиње се и код места извршења (покушаног) кривичног дела (чл. 17 ст. 2). На крају, осим код једне варијанте саизвршилаштва, код свих осталих облика саучесништва меродавна кривица је само она умишљајна (чл. 33–35),[8] док је кривичноправно релевантан само онај

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6 Кривично право артикулише одговарајућа социјално-етичка вредновања тако што се умишљајном и нехатном учиниоцу упућује прекор различите тежине (Делић 2008, 172). Примера ради, док је за умишљајни, основни облик кривичног дела промене породичног стања из члана 192 КЗ предвиђена казна затвора у трајању од шест месеци до пет година (ст. 1) или од једне до десет година за тежи, умишљајни облик (ст. 3), дотле је за нехатни облик (ст. 4) тог истог дела запрећена казна затвора до три месеца.

7 Свега 14% кривичних дела из српског КЗ поседује (и) нехатни облик.

8 Наравно, не морају да постоје исти облици умишљаја у истом делу, то јест могуће је да један учинилац поступа са евентуалним, а други са директним умишљајем. Пресуда Вишег суда у Чачку, К. 45/2010 (2) од 18. априла 2011, *Paragraf Lex*.

покушај који је такође умишљајан (чл. 30 ст. 1). Другим речима, базични институти кривичног права почивају на умишљају и посредно такође могу да зависе од овог разграничења.

Наравно, не постоји такав однос на основу којег би се због недоказаности једног облика кривице могло аутоматски закључити да постоји онај други облик кривице.[9] Само непостојање евентуалног умишљаја не значи да постоји свесни нехат, и обрнуто.[10] Сваки елемент кривичног дела мора да се докаже, па тако и кривица као његов субјективни део.[11] При томе, постојање облика кривице треба утврдити као извесно, а не као вероватно.[12]

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[9] У том смислу и Рисимовић 2008, 99; Стојановић 2020а, 142; Ђокић 2005, 369.

[10] Тако се у једној одлуци Врховног суда Србије истиче да „изрека пресуде (...) мора да садржи описно облик виности у виду евентуалног умишљаја, а не истовремено и опис свесног нехата за исте радње окривљеног." Пресуда Врховног суда Србије, Кж. 281/01 од 12. јуна 2001, *Ing-Pro*.

У другој одлуци је истакнуто да је учињена битна повреда одредаба кривичног поступка јер је изрека пресуде неразумљива и нејасна, а и противречна сама себи, јер „првостепени суд истовремено у изреци утврђује да је окривљени основни облик кривичног дела учинио и са евентуалним умишљајем, а такође и свесним нехатом 'олако држећи да до угрожавања саобраћаја и смрти неког лица неће доћи'." Решење Врховног суда Србије Кж. 2186/07, од 24. децембра 2007, *Ing-Pro*.

[11] То потврђује и наша судска пракса: „Изрека пресуде мора садржати јасан опис облика виности за који се окривљени оглашава кривим, као и опис околности од којих зависи оцена тог облика виности, те уколико је оптужени оглашен кривим да је на забрањену последицу пристао (евентуални умишљај), чињенични опис мора садржати и опис околности из којих се може оценити да ли постоји наведени облик виности." Пресуда Апелационог суда у Нишу, Кж. 231/2014 од 29. априла 2015, *Paragraf Lex*.

„Неразумљивост изреке пресуде се огледа у томе што у истој недостаје опис умишљаја окривљеног, без кога имајући у виду одредбе чл. 14 ст. 1 и чл. 22 ст. 1 и чл. 25 КЗ-а нема кривичног дела. Изреком пресуде окривљени је оглашен кривим да је предметно кривично дело извршио са евентуалним умишљајем, али изрека не садржи као битно обележје кривичног дела облик виности који се изражава кроз опис субјективног односа учиниоца према последици кривичног дела." Пресуда Основног суда у Чачку, К 445/19 од 6. марта 2020. и решење Вишег суда у Чачку, Кж 91/20 од 5. августа 2020, *Ing-Pro*.

„Првостепени суд је учинио битну повреду одредаба кривичног поступка јер није дао јасне разлоге на основу којих закључује да је окривљени у односу на основно дело угрожавања јавног саобраћаја поступао са евентуалним умишљајем, па ће првостепени суд у поновном поступку у погледу виности окривљеног утврдити да ли је окривљени у датој саобраћајној ситуацији поступао неопрезно и недовољно пажљиво (свесни нехат), или је пак свесно, очигледно и грубо прекршио наведене законске прописе и услед тога довео

2. ТЕОРИЈСКА СХВАТАЊА

Питање разграничења евентуалног умишљаја и свесног нехата једна је од основних кривичноправних дилема, тако да се развио велики број схватања у кривичноправној доктрини.[13] Она су се до сада грубо делила на когнитивне и волунтативне теорије, а као трећа група се могу издвојити и теорије ризика.

2.1. Когнитивне теорије

Теорије које су се историјски прве развиле јесу когнитивне теорије. Њима је заједничко то што кривицу заснивају искључиво на елементу свести. Следствено томе, лакомислено незнање, односно непостојање свести и потискивање опасности по живот не доводе до евентуалног умишљаја (Ruppenthal 2017, 227). Тим теоријама је заједничко и што признају постојање вољног елемента, али он нема значаја за утврђивање кривице (Sinn 2018, 875).

2.1.1. Теорија могућности/теорија представе

Најмање захтевна је теорија могућности (*Möglichkeitstheorie*). Према њој, за постојање евентуалног умишљаја неопходно је (само) да учинилац препозна конкретну могућност наступања последице и да

у опасност живот и тело људи (евентуални умишљај)." Решење Апелационог суда у Београду, Кж1 бр. 873/17 од 9. октобра 2017, *Ing-Pro*. У тој одлуци није ни истакнут вољни елемент евентуалног умишљаја.

12 Пресуда Окружног суда у Ваљеву, К. бр. 62/98 од 16. новембра 1998, *Ing-Pro*.

13 Она су посебно развијена у немачкој науци, услед незаокруженог појма кривице из њиховог Кривичног законика (StGB), у којем се тек уопштено говори о томе да је кажњиво само умишљајно поступање, уколико законом није изричито предвиђена казна и за нехатно поступање (§ 15 StGB). Издвајање знања (*Wissen*) и хтења (*Wollen*) дошло је касније и изводи се посредно из одредбе о стварној заблуди (§ 16 StGB). Због непостојања законске дефиниције евентуалног умишљаја, немачка догматика је имала много простора за развијање когнитивних теорија (Papageorgiou-Gonatas 2006, 265). О питању разграничења евентуалног умишљаја и свесног нехата тамо се расправља на нивоу предвиђености у закону, што међутим не утиче на општи карактер дискусије и на могућност сагледавања из угла других кривичних законодавстава, доктринā и праксе.

остане при предузимању радње. Шредер (*Schröder*), који је ту теорију развио после Другог светског рата, нешто детаљније је описује као ситуацију у којој учинилац предвиђа могућу последицу свог делања и када алтернативу која проистиче из тога – а то је да једноставно не дела више, одбија као опцију и ипак предузима радњу (1949, 232). Реч је, дакле, о предузимању радње са представом да би правно добро могло да буде повређено или уништено (Schröder 1949, 243). Отуда се она, ређе додуше, назива још и теорија представе (*Vorstellungstheorie*). Некакав волунтативни елемент се не захтева; интелектуална компонента је довољна.

Стављање у шири контекст теорије могућности, међутим, доводи и до првих критика. Из те теорије избија схватање, може се рећи и очекивање, да пука представа о могућности наступања последице треба да одврати учиниоца од даљег предузимања радње и да уверење да последица неће наступити уједно негира могућност наступања последице (Roxin 2006, 455). Учинилац који је уверен да последица неће наступити, то јест који се узда у њено ненаступање или могућност њеног наступања сматра минималном, иако то објективно не одговара стварним околностима, нема праву представу као такву те неће одговарати за умишљај већ за нехат (Ruppenthal 2017, 228). Управо то уздање у ненаступање последице је заправо формулација која би била блиска поимању свесног нехата, али се овде приписује евентуалном умишљају, и то преко когнитивне, а не волунтативне линије. Тиме граница умишљаја толико клизи у поље нехата да заправо брише постојање свесног нехата (Jescheck, Weigend 1996, 302) или, како је Шредер концизно закључио: „Сваки нехат је несвесни нехат“ (1949, 245).

Шмитхојзер (*Schmidhäuser*) такође одбацује вољни елемент, те умишљај повезује са актуелном свешћу о могућности наступања последице. Уколико је та свест несигурна, постојаће евентуални умишљај (Schmidhäuser 1980, 249). Ако је испрва постојећу свест потом потиснуо, постојаће „наизглед свесни нехат“ (Schmidhäuser 1980, 250). То значи да је он најпре помислио на (апстрактну) могућност наступања последице, али је у кључном моменту (мисли се на тренутак извршења кривичног дела) у својој свести одбацио конкретну могућност, ма колико то деловало неразумно. Насупрот томе стоји несвесни нехат, код ког учинилац ни у једном моменту није помислио на могућност. Пошто код „наизглед свесног нехата“ он на крају ипак не мисли на (конкретну) могућност наступања последице, док она апстрактна није меродавна, третираће се суштински као несвесни нехат, чиме и овде долазимо до негације свесног нехата као код Шре-

дера. Тој варијанти теорије могућности се додатно приговара због увођења фикције механизма потискивања (Küpper 1988, 761), која итекако има примесе воље, односно која може да се схвати и као више од тога – као њен сурогат (Ruppenthal 2017, 230, 231).[14] Потискивање би можда могло да се прихвати ако се угрожавају сопствена добра јер учинилац ту често бриге о последицама оставља по страни и уздаје се у добар исход.[15] Узмимо као пример опасно претицање у саобраћају, где ће пре постојати прецењивање сопствених способности (уздање у сопствене способности избегавања удеса) и/или потцењивање спољних околности (потискивање да би удес могао да се догоди) него што ће постојати пристанак на последицу. Но, ако су очигледно угрожена туђа добра, онда је ту већ донета одлука против тог туђег правног добра (Ruppenthal 2017, 230) и учинилац не може да „побегне" у потискивање и самим тим у нехат. Ако ловац са велике удаљености пуца, при чему је свестан да постоји петопроцентна вероватноћа да погоди лице Г., одговараће као умишљајни учинилац уколико је био наклоњен томе да то лице лиши живота. Ако је, пак, хтео да погоди дивљач, а лакомислено није озбиљно схватио да може да погоди и лице Г., уздајући се у то да је шанса од пет посто сувише ниска, постојао би нехат. Роксин (*Roxin*) овде критикује недоследност, јер код истог степена свести, који је чак изражен у процентима, а без узимања у обзир волунтаристичког елемента, у једном случају имамо евентуални умишљај, а у другом случају свесни нехат (2006, 456).

2.1.2. Теорија вероватноће

Код теорије вероватноће (*Wahrscheinlichkeitstheorie*) ради се о препознавању вероватноће наступања последице, при чему је већински (дакле, не и једини) став да „вероватно" значи „више од пуке могућности и мање од претежне вероватноће" (Mayer 1953, 250). Роксин у томе види варијанту теорије представе (2006, 457) јер се заснива на представи учиниоца о вероватноћи.

Природа ове процене вероватноће, câма срж теорије дакле, уједно је и оно што је спорно. Уколико се та процена вероватноће схвати као квантитативни појам, онда она као таква може стално да се мења, са све бољим увидом ситуације, односно она би са све вишим

[14] Пупе (*Puppe*) говори о сурогату воље који је начелно независтан од садржаја спознаје учиниоца о врсти и опсегу опасности (Puppe 2006, 65).

[15] Овде видимо сличности са дефиницијом свесног нехата у нашем праву.

нивоом свести ишла нагоре, тиме у правцу умишљаја или обратно, када се вероватноћа смањује, тако да не може да се повуче стриктна линија разграничења између умишљаја и нехата само на основу овог критеријума (Puppe 1991, 32).

Пупе (*Puppe*), додуше, признаје да су заговорници те теорије одабрали заправо компаративни, а не квантитативни појам („учинилац наступање последице сматра вероватнијим од ненаступања последице“), али она и од компаративног израза очекује да се прецизира, а то може да се учини само конкретним бројкама. Тиме се враћамо на приговор који се тиче суштински квантитативног карактера те његове већ описане неупотребљивости (Ruppenthal 2017, 231). Осим тога, критеријум остаје неодређен јер „препознавање“ вероватноће може да се креће у широком дијапазону од обичне вероватноће или претежне вероватноће до високе вероватноће и извесности, па тако тешко да може да буде правно верификован (Вуковић 2022, 212).[16] Обична могућност („више од пуке могућности“) не долази у обзир; тада би се радило о минималистичкој теорији могућности.

2.2. Волунтативне теорије

Насупрот когнитивним учењима, волунтативне теорије у фокус разграничења умишљаја и нехата стављају вољу. Постоји велики број схватања која спадају у ту групу, с тим што један део њих не достиже задовољавајући ниво кохерентности, преклапа се са другим схватањима или полази од сувише специфичних поставки чији се исходи као такви не могу нужно генерализовати.[17] На овом месту ћемо стога представити схватања која се догматски и практично сматрају најважнијим.

[16] Вуковић такође примећује да се такво поимање евентуалног умишљаја коси са схватањем директног умишљаја, за који је у случају намерног поступања довољна и најмања вероватноћа остварења циља (Вуковић 2022, 213, 214).

[17] Тако, рецимо, Кауфманова (*Kaufmann*) теорија о избегавајућој вољи (*Theorie des Vermeidewillens*), која полази од финалног појма радње. Kaufmann 1958, 64. Треба поменути још теорију инхибицијског граничника – теорију психолошке баријере (*Hemmschwellentheorie*), која се односи само на крвне деликте (Puppe 2014, 67).

2.2.1. Теорија одобравања

Према теорији одобравања (*Billigungstheorie*),[18] која је уједно владајуће схватање[19] у немачкој судској пракси, *dolus eventualis* постоји када је учинилац наступање последице препознао као могуће и као не толико далеко и када је то уз одобравање узео у обзир (*billigend in Kauf nehmen*) (Fischer 2015, 122; Hefendehl 2021, 203). Појам одобравања (*billigen*) као такав има позитиван призвук; он упућује на то да је учиниоцу наступање последице пријатно, да му се радује (Müller 1980, 2392). Пупе у томе чује нешто мање позитивну конотацију, сматрајући да се овде не ради о неком слабијем хтењу или жељењу, већ да је то израз гесла да последица „сме да наступи овде и сада" (Puppe 2018, 394).

Евентуални умишљај и свесни нехат разграничавају се на основу Франкове формуле: „Како би се понашао учинилац да је оно што му је деловало као могуће замислио као извесно? Ако би се закључило да би и код одређеног знања делао, онда треба потврдити умишљај; у супротном ће се радити само о нехату." Другим речима, облик кривице на тој међи зависиће од одговора на питање да ли би учинилац наставио са својом радњом да је знао да ће наступити последица. Ако је одговор потврдан, говоримо о (евентуалном) умишљају. Учинилац себи каже: „Шта год да се деси, у сваком случају ћу делати." („Како год!") Ако је одговор одричан, ако би се уздржао од своје радње, то ће бити (свесни) нехат. Ту учинилац себи каже: „Да сам то знао, не бих делао." („Ма биће све у реду! Ма неће ваљда!") Иако је та формула, постављена још 1890. године, распрострањена, није успела да оповргне главну критику која јој је упућена: да је то хипотетичко питање, на које није увек могуће са сигурношћу одговорити.[20] При томе ће прагматични окривљени у својој одбрани (где није дужан да говори истину) редовно тврдити да не би наставио/предузео радњу да је знао да ће наступити последица.[21]

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[18] Ређе се још може срести назив *Einwilligungstheorie*, што би значило теорија пристанка. Међутим, пристанак (саглашавање) и одобравање нису идентични појмови да би се овде употребили алтернативно, тим пре што немачка судска пракса користи израз *billigen* (одобрити).

[19] Говорећи о томе да та теорија представља класично и владајуће схватање, Филипс (Philipps) додаје да је она то изгледа упркос томе што је још од њеног настанка почетком прошлог века била „изложена непрестаној корозији кроз судску праксу и науку" (Philipps 1973, 28).

[20] Срзентић, Стајић и Лазаревић (2000, 216) сматрају да се то скоро уопште не може утврдити.

[21] Стојановић овде говори о двоструко хипотетичком питању: у погледу тога шта би учинилац урадио да је знао да ће последица сигурно наступити и да ће у неким случајевима (чак и *post factum*) бити у дилеми шта би учинио

Према новијим схватањима, међутим, „одобравати“ не значи „поздрављати“ или „сматрати прикладним“, већ га треба схватити у правном смислу. Ту би се убрајала и једна сама по себи нежељена последица – ако се учинилац ради одређеног циља са тиме помирио (*sich abfinden*) или је принуђен да то прихвати (*hinnehmen*).[22] На то се односе и два често цитирана примера из судске праксе: случај вашарске стрељање (*Lacmann´scher Schießbudenfall*)[23] и случај кожног каиша (*Lederriemenfall*).[24] Њима се придружује најсвежији и због учесталости те врсте илегалног надметања вишеструко значајан случај берлинске ауто-трке (*Berliner Raserfall*).[25]

(Стојановић 2020а, 150). Чини нам се да би одговарајући правни савет браниоца и уопште изгледи успешне одбране навели учиниоца да одговори одрично на питање које поставља Франк (дакле, тврдио би да не би предузео радњу да је био сигуран у наступање последице). Даље, иако неодлучност није исто што и равнодушност, у овом случају би се могла тумачити на тај начин. Резултат би напослетку био исти.

[22] BGH *Neue Juristische Wochenschrift* 2020, 2902.

[23] Учинилац се кладио да ће погодити стаклену куглу која се налазила у руци девојке у вашарској стрељани, а да је притом не повреди. Ако би је погодио, планирао је да баци пушку и да се изгуби у маси људи. Пуцао је и метак је погодио девојчину руку (Lacmann 1911, 159). То је свакако нежељена последица за учиниоца (тиме губи опкладу), али ју је ипак у правном смислу одобрио. Он је, наиме, урачунао могућност неуспеха (сâм је рекао да би тада побегао у гужви), али је вера у успех опкладе у њему просто превагнула над ризиком од неуспеха (Hefendehl 2021, 210).

[24] Лица К. и Ј. су хтела да опљачкају лице М. Да би га спречили да им пружи отпор, планирали су да га даве кожним каишем док се не онесвести, да би га везали и одузели му ствари. Испрва су одустали од плана када су увидели да би лице М. тако могло да изгуби живот, што је за њих било изразито непожељно. Решили су да га уместо тога ударе у главу џаком пуњеним песком и да га тако онесвесте. То су и учинили, али је том приликом џак пукао. Уследило је гуркање, а онда су К. и Ј. ипак узела кожни каиш који су за сваки случај понели са собом, обавила га око врата М. и повукла све док се М. више није померао. Након неког времена, К. и Ј. су се забринули да би М. могао да буде мртав. Покушали су да га реанимирају, али у томе нису успели. Савезни суд Немачке је најпре потврдио дотадашњу судску праксу да су познавање (свест) о могућим последицама неког поступања и одобравање тих последица две самосталне претпоставке евентуалног умишљаја. Није довољно да учинилац само предвиди остварење дела као могуће; томе мора да се придружи волунтативни елемент. Одобравање последице, међутим, не треба схватити у буквалном, већ у правном смислу. Осећања учиниоца у том погледу нису битна; наступање последице не мора да буде нешто што је учинилац желео.

[25] Једна од најпознатијих берлинских улица *Kurfürstendamm* (отуда алтернативни назив за овај случај – *Kudamm-Raserfall*, LG Berlin, Urteil vom 27.02.2017, 251 Js 52/16 (8/16)) место је учесталих, нелегалних ауто-трка, што због њене дужине и праве путање, што због централне локације и тиме ефектности надметања пред (случајном) публиком. Двојица учесника једне такве

Уз синтагму „одобравајуће узимање у обзир“, судови повремено користе израз „саглашавање“ (*einverstanden sein*).[26] Увид у новију судску праксу показује да тај појам заслужује предност у односу на појам одобравање, који са своје стране садржи истакнутији (позитивнији) вредносни суд (Hefendehl 2021, 203).[27] Пошто се такав позитиван однос према новијем схватању не захтева, тим пре би евентуални умишљај постојао у случају равнодушности.[28] Постојаће „само“ свесни нехат уколико учинилац не одобрава могуће остварење законског описа кривичног дела и ако се озбиљно и не само неодређено узда у то да последица неће наступити.[29] Вера у такав исход не сме да се заснива само на пукој нади него мора да има и чињеничну основицу.[30]

2.2.2. Теорија равнодушности

Енгиш (*Engisch*) је први који је појам равнодушности концепцијски прикључио евентуалном умишљају (1964, 186). Тај облик кривице ће постојати када учинилац поздравља могуће лоше пропратне последице радње или их равнодушно прихвата, али не и када те последице сматра непожељним и сходно томе се нада да ће оне изостати (Engisch 1955, 1689). При томе, сâм Енгиш очигледно разликује „равнодушност“ (у смислу одсуства значаја) и „потпуну индиферентност“, односно „релативну“ и „апсолутну“ равнодушност (Papageorgiou-Gonatas 2006, 269).

Према модернијим верзијама теорије равнодушности (*Gleichgültigkeitstheorie*), евентуални умишљај настаје када учинилац сматра да је остварење дела могуће и када то узима у обзир из свесне равнодушности према заштићеном правном добру (Sternberg-Lieben, Schuster 2010, § 15, Rn. 84). Иако он није начисто са тиме да ће доћи до тога, могућност да ће остварити законски опис, то јест да ће проузроковати забрањену последицу, не утиче на њега да одустане већ он упркос томе (наставља да) дела, чиме доказује да се определио против правног добра

илегалне трке осуђена су 2017. године за тешко убиство у саизвршилаштву на доживотне казне затвора, пошто су изазвали удес и смрт трећег возача. Случај је постао познат пре свега због утврђивања *dolus eventualis*-а.

[26] BGH *Goldtammer´s Archiv* 1979, 106.

[27] Слично и Хасемер (*Hassemer*), који истиче да вољни елемент евентуалног умишљаја „није једна позитивна морална одлука о сопственој радњи; дакле, није одобравање (*billigen*)“ (Hassemer 1989, 297).

[28] У том смислу и Jakobs 2010, 306; Wessels, Beulke, Satzger 2016, 103.

[29] BGH *Neue Juristische Wochenschrift* 2020, 2902.

[30] BGH *BeckRS* 2021, 5149.

(Sternberg-Lieben, Schuster 2010, § 15, Rn. 84). Тиме долазимо до нечега што је Енгиш још раније описао: равнодушност као душевно стање одређено је у негативном смислу као непостојање отпора према могућој повреди правног добра (Engisch 1964, 191).

То схватање је утолико корисно зато што у равнодушности види сигурну индицију за то да се учинилац помирио са последицом, па самим тим и да поступа умишљајно (Roxin 2006, 454). Међутим, супротно се не може закључити, то јест да би искорак из равнодушности у правцу пуке нежељености последице морало да искључи умишљај (Ruppenthal 2017, 216). Разлог је управо то што учиниоцу више није свеједно за нежељену последицу; она је сада добила јасан негативни предзнак – последица није жељена.

Недостатак тог учења је ослањање на поверење, односно на наду да ће последица изостати. Овде се одмах могу препознати обриси свесног нехата, тако да би се прихватањем те теорије поље свесног нехата проширило на уштрб евентуалног умишљаја. Међутим, учинилац се не може само на основу наде ослободити последица свог поступања, а које је претходно свесно укалкулисао (Roxin 2006, 454). На овом примеру се види колико је појам наде кривичноправно „неухватљив", тим пре што се не би могао на задовољавајући, правно прецизан начин подвести под вољу као сегмент кривице.[31] У том смислу је Роксин у праву када примећује да је „одлучујуће за шта или против чега се неко одлучује када треба да се определи, а не са којом жељом и надом се то чини" (Roxin 2006, 454).

Ни сврставање теорије равнодушности у волунтативне теорије није сасвим неспорно. Наводи се да заиста постоји волунтативни елемент, али да се равнодушност учиниоца поистовећује са безобзирношћу те се на тај начин заправо утврђује невредност мисли, односно унутрашњег држања учиниоца (*Gesinnungsunwert*) (Esskandari, Schmitt 1998, 3).

[31] Ренгијер (*Rengier*) истиче да је нада осећање, а не манифестација воље која би се захтевала за умишљај те тиме индиректно критикује зависност утврђивања умишљаја од емоција. Rengier 2022, 108. Посматрајући поједине трендове данашњице, међу којима се издваја (пре)наглашавање емоција, па тако и у сфери кривичног права и криминалне политике, може се замислити да би та теорија могла да наиђе на добар одјек. Тим пре што се сфера права и сфера емоција дотичу и прожимају (Марковић, Здравковић 2020, 176).

2.2.3. Теорија схватања озбиљно

Специфичан назив те теорије – „схватање озбиљно“ (*Ernstnahmetheorie*) развио се у склопу терминолошких парова из расправе о облицима кривице. Тако имамо комбинацију „помирити се са нечим“ (*Sich-Abfinden mit*) и „уздати се у нешто, надати се нечему“ (*Vertrauen auf*), као и познатији и препознатљивији пар „лакомисленост“ (*Leichtsinnigkeit*) и „схватање озбиљно“ (*Ernstnehmen*).[32] Користе се још и изрази „рачунати са нечим“ (*Rechnen mit*) и „узети у обзир“ (*Inkaufnahme von*).[33] Суштина теорије схватања озбиљно је у томе што учинилац који поступа са евентуалним умишљајем озбиљно држи да је могуће остварити законски опис кривичног дела (Stratenwerth 1959, 55). Наводи се конкретан пример: лице А баци у шуми цигарету која још гори, уздајући се у то да цигарета неће пасти на лако запаљиво лишће. Он тиме опасност од шумског пожара не схвата озбиљно већ поступа у вредносно неутралном смислу лакомислено. Та лакомисленост, међутим, претпоставља свест о опасности. Ко ту свест нема може се назвати неопрезним или неозбиљним, али лакомислен није, па се за поменути пример не може рећи да лице није имало свест о (конкретној) могућности наступања последице. Не схватити неку опасност озбиљно не значи немати свест о њој (Stratenwerth 1959, 56).

Схватање озбиљно редовно на првом месту захтева одређење према могућој, негативно вреднованој последици. Од учиниоца се очекује да заузме став о томе и да одлучи да ли ће, зарад вреднијих циљева ван законског описа, узети у обзир ту последицу или ће се суздржати од планиране радње (Stratenwerth 1959, 55).

Са свесним нехатом поступа лакомислени учинилац јер он препознату опасност не уноси у своју вољу и не узима их у обзир, јер опасне елементе у тој рачуници фигуративно „ставља у заграду“, оставља их по страни и узда се у то да последица неће наступити (Stratenwerth 1959,

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[32] Топаловић, с друге стране, облике кривице дели (и) према моралним мотивима, тако да појму лакомислености (тада нехат) супротставља егоизам (тада умишљај), (Топаловић 2010b, 298).

[33] Малтене исти изрази се помињу и у италијанској доктрини: „прихватање“ или „схватање озбиљно ризика“ (*accettazione del rischio*), „поступање на рачун“ (*agire al costo di*) или „узимање у обзир последице као цену коју треба платити“ *(in considerazione dell`evento qualle prezzo da pagare*). Ти изрази се уједно критикују као „разочаравајући“ за коначно одређење вољног елемента евентуалног умишљаја и за разграничење са свесним нехатом (Canestrari 2004, 219–220).

55). Речима српског КЗ, олако држи да до тога неће доћи. У примеру са бацањем цигарете постоји, дакле, свест о могућим последицама, али оне нису укључене у формирање воље учиниоца.

Ту долазимо, међутим, до главног приговора тој теорији, а то је проблем оптимизма који се не заснива на чињеницама, то јест просто неоснованог оптимизма (*Problem des tatsachengelösten Optimismus*). О чему је реч? Штратенверт, зачетник тог учења, признаје да „лакомисленост у погледу опасности има изразито ирационалне разлоге" (Stratenwerth 1959, 57). Па ипак, управо од те ирационалности сâмог учиниоца зависиће његова одговорност за свесни нехат, а не за евентуални умишљај јер ирационално није схватио озбиљно могућност наступања последице. Тиме се он неоправдано привилегује (Ruppenthal 2017, 211) тако што се утврђује свесни нехат, а не евентуални умишљај. У случају кривичних дела која уопште не познају нехатну одговорност то би било посебно згодно за учиниоца. Стога се још пре скоро 50 година могло чути да се „може само поздравити проширење евентуалног умишљаја на рачун свесног нехата" (Schünemann 1975, 788), управо због тог привилеговања.

2.2.4. Теорија опредељивања/одлуке

Роксин (*Roxin*) сматра да евентуални умишљај треба схватити као опредељивање/одлуку (*Entscheidung*) за могућу повреду правног добра, што је по њему уједно одлучујућа разлика у невредности између (евентуалног) умишљаја и (свесног) нехата (2010, 8–9). Разграничавајући критеријум је давање предности спровођењу радње ради остварења неких циљева ван бића у односу на одустанак од ње, иако ризик од остварења описа дела није психички потиснуо већ га је изнутра прихватио („укалкулисао") и тиме се определио за могућност повреде правног добра (Roxin 1964, 53).[34] Он то мерило суштински препознаје и у пракси Савезног суда Немачке (Roxin 2006, 449–450; Roxin 2010, 10; Ruppenthal 2017, 212), с тим што указује на потребу даље конкретизације јер опредељивање за могућу повреду правног добра није један поступак који би споља био видљив већ се може препознати само на основу додатних критеријума (Roxin 2010, 10).

[34] Лакнер и Кил (*Lackner*, *Kühl*) надовезују одржавање воље за остварењем дела спрам тежине у потпуности спознатог ризика од остварења тог законског описа (Lackner, Kühl 2007, 107).

Као најважнија три индикатора наводи препознату опасност сопственог понашања; урачунавање вероватноће да ће се жртва сопственим снагама извући из опасности и непостојање мотива за узимање у обзир последице (Roxin 2010, 11–12). Уколико се ни помоћу тих индикатора не могу разграничити облици кривице према критеријуму опредељивања/одлуке за могућу повреду правног добра, рецимо када поједини индикатори упућују у супротне смерове,[35] онда се узимају у обзир све околности конкретног случаја (Roxin 2010, 13). Или, како је немачки Савезни суд почео да процењује, на основу „свеукупног сагледавања свих објективних и субјективних чињеничних околности".[36]

Критеријум опредељивања је, је кроз судску праксу, дакле, све више прецизиран. Евентуални умишљај би, уз сагледавање поменутих индикатора, постојао када би учинилац схватио озбиљно могућност наступања последице, али би, упркос томе, наставио да предузима радњу или када би наступање последице узео у обзир или се са тим помирио, док тога нема код свесног нехата (Roxin 2010, 10–11).

Најкасније на овом месту постаје јасно да се овде ради о теорији схватања озбиљно која је допуњена нормативним компонентама. Како сâм Роксин констатује, појам одлуке/опредељивања, „као сви правни појмови, није гола психичка констатација, него се мора оценити према нормативним мерилима" (Roxin 2006, 449), те овде говоримо о „волитивном (вољном) нормативизму" (*volitiver Normativismus*) (Roxin 2004, 248). Опредељивање за једну могућу повреду правног добра најчешће није емпиријски утврдиво већ га судија нормативно приписује. Или, Роксиновим речима илустровано, умишљај се не ствара у глави учиниоца већ у глави судије (Roxin 2010, 15).

2.3. Теорије ризика

Дискусија о разграничењу евентуалног умишљаја и свесног нехата до сада је текла углавном у оквирима две групе теорија, когнитивне и волунтативне, зависно од тога који елемент кривице је био наглашен. Међутим, има простора и разлога да се њима дода и трећа група – група

[35] Пример за то би била препозната опасност да би ауто-бомба могла да повреди и случајне пролазнике, али да је учинилац рачунао на то да ће они на време моћи да побегну са лица места, пошто је аутомобил са постављеном бомбом био паркиран даље од улице.

[36] BGH *Neue Zeitschrift für Strafrecht* 1988, 175.

теорија ризика. Теорије из прве две групе нису, наиме, сва питања решиле на задовољавајући начин. Иако теорије ризика наглашавају махом когнитивни елемент и самим тим би се могле сврстати у прву групу учења, као врста модерних когнитивних теорија (Ruppenthal 2017, 233), ипак је њихов акценат пре свега на ризику, па тек онда на интелектуалном елементу, те уз све специфичности које носе са собом, оправдано је издвојити их у засебну групу.

Оно што је заједничко теоријама ризика је да евентуални умишљај постоји онда када се учинилац (свесно) одлучио за једно понашање које је неспојиво са начелима ризика који важе у једном правном поретку (Philipps 1985, 38; Herzberg 1986, 258; Frisch 1983, 27).

2.3.1. (Фришова) Теорија ризика

Према Фришовој (*Frisch*) теорији ризика (*Risikotheorie*), за умишљај се захтева тзв. квалификовано знање о конкретној опасности повреде правног добра (1983, 207). Ко, знајући за недозвољени ризик који потиче од његовог понашања, упркос томе (настави да) дела, определио се против правног добра и тиме поступио умишљајно (Frisch 1983, 248).

Две одреднице из ове дефиниције захтевају додатно разјашњење. Најпре, знање је квалификовано када је учинилац препознати ризик који је прешао праг толеранције (и тиме постао недозвољени) схватио озбиљно; није довољно да га је само „регистровао" у својој свести (Frisch 1983, 341). Даље, недозвољени ризик је онај ризик који је барем минимално прешао праг који би се могао толерисати.

И ту долазимо до приговора. Наиме, помињање ризика одређене висине (која је прешла поменути праг) чини умишљај зависним од познавања вероватноће наступања повреде правног добра. Тиме се ова теорија поистовећује са теоријом вероватноће и напослетку такође прави само квантитативно, не и квалитативно, разликовање између умишљаја и нехата (Schünemann 1999, 370). Толерисани ризик се одређује на основу вагања интереса: интереса предузимања радње, с једне стране, и интереса неугрожавања односног добра, с друге стране (Ruppenthal 2017, 241), и може варирати с обзиром на то о којем добру је реч. Имајући на уму, рецимо, апсолутну заштиту живота, у погледу тог добра неће ни бити много простора за вагање. Фриш се брани тиме да теорија вероватноће на место знања (свести), пак, поставља једну круту и садржински још мање прецизну представу о вероватноћи наступања последице (Frisch 1983, 483), то јест да се његова теорија ризика и теорија вероватноће не могу изједначити.

2.3.2. Нормативизирана теорија вероватноће

Јакобс (*Jakobs*) полази од теорије вероватноће и допуњује је нормативним елементима (*normativierte Wahrscheinlichkeitstheorie*). Према његовом схватању, умишљај ће постојати када учинилац процењује да остварење дела као последица његове радње није мало вероватно (Jakobs 1991, 271). Доња граница вероватноће је одређена на основу критеријума „значаја за одлучивање спознатог ризика" (*Entscheidungserheblichkeit des erkannten Risikos*), при чему тај значај опет зависи од вредности односног добра и од густине ризика. О нормативизираној теорији вероватноће говоримо зато што овде неће бити меродавна субјективна процена учиниоца већ правно вредновање. То значи да је квантитативна мерила теорије вероватноће Јакобс заменио квалитативним критеријумима (Ruppenthal 2017, 237).

Код нехата, ризик такође мора да буде од значаја за одлучивање, али учиниоцу недостаје знање (свест) о остварењу дела (Ruppenthal 2017, 237). Неће сви ризици бити значајни. Он из тог домена одваја такозване свакодневне остатке ризика, односно минимална прекорачења издваја из сфере умишљајних (и нехатних) кривичних дела (Ruppenthal 2017, 237). Да поједине области живота не би морале потпуно да се избегавају, он признаје извесно „навикавање на ризик" (*Risikogewöhnung*) у тим сферама. Као пример наводи случај возача који уместо дозвољених 50 километара на час, вози 5% брже, па би у сваком тренутку (али управо са врло малом вероватноћом) могло „нешто да се деси", што би при регуларној брзини могло да се контролише. Да ли већ ту постоји покушај оштећења туђе ствари, телесне повреде или чак убиства (Jakobs 2010, 291)? Овде би се радило о недозвољеним ризицима који статистички постоје, али из којих врло ретко заиста и проистекне удес (Roxin 2006, 464).

Критика Јакобсове теорије односи се на крутост поменутих индикатора (Küpper 1988, 763). Спорна је маргина ризика коју он толерише и изузима из кривичноправно релевантне зоне. Није јасно зашто 5% бржа вожња не би потпала под умишљај, док би мало већи постотак био обухваћен умишљајем. Правно вредновање 5% или 10% брже вожње од дозвољене не разликује се – она у оба случаја остаје недозвољена и самим тим нешто што би требало да потпадне под интелектуални елемент кривице.

Исто тако се не види због чега би тежина односног добра различито утицала на умишљај учиниоца. То би значило да ће евентуални умишљај пре постојати код вреднијих добара него оних мање вредних, односно тешких, да останемо при употребљеним изразима. Приликом

исте процене вероватноће наступања последице, то би значило потврду умишљаја у случају убиства (због живота као вреднијег/тежег добра) и негирање умишљаја код уништења туђе ствари (имовина као мање вредно/тешко добро). То би довело не само до неразумних већ и до погрешних одлука (Roxin 2006, 465).

2.3.3. Теорија непокривене опасности

Теорију непокривене опасности (*Theorie der unabgeschirmten Gefahr*) развио је Херцберг (*Herzberg*) и она већ у сâмом називу садржи објашњење. За постојање умишљаја захтева се, наиме, (објективно) „квалификованије ризично понашање", то јест стварање непокривене опасности (Herzberg 1987, 780). Она је непокривена када приликом или након предузимања радње учиниоца, срећа или случајност, у целини или у великом делу, морају да се умешају да се законски опис не би испунио (Herzberg 1988, 639). Опасност је покривена када сâм нехатни учинилац, угрожено лице или треће лице обазривошћу може евентуално да спречи наступање последице (тзв. фактичка резервна заштита) (Herzberg 1988, 642). Ако учитељ, упркос ознаци за опасност, дозволи својим ученицима да се купају у набујалој реци (Herzberg 1986, 249), независно од његове субјективне процене као учиниоца, исход смрти ученика би, према овој теорији, била само учитељева одговорност за нехатно лишење живота – ознака за опасност била је добро видљива и ученици су, да су били пажљивији, могли да избегну губитак живота. Умишљаја неће бити ни тамо где је учинилац створио само „удаљену непокривену опасност" (Herzberg 1986, 256). Пример за то би било бацање тешког предмета ноћу са прозора, са свешћу да би тај предмет могао да погоди, па и убије пролазника (Roxin 2006, 466). С друге стране, играње руског рулета (два пријатеља један другом ставе пиштољ на чело са по једним метком у добошу оружја и истовремено окину обарач) довешће до одговорности за евентуални умишљај,[37] чак и ако се учинилац уздао у то да последица неће наступити (Roxin 2006, 465).

Херцберг је намеравао да објективизује и конкретизује теорију схватања озбиљно тако што би избацио вољни елемент и свео је на мерило (не)покривености (Roxin 2006, 466). Тај критеријум, међутим, не делује убедљиво. Зашто не би могао да постоји евентуални умишљај

[37] Такав је и закључак српске судске праксе, где је у случају „играња" руског рулета потврђен евентуални умишљај. ВСС, Кж. 1647/02 од 22. априла 2003. (Симић, Трешњев 2004, 19).

и у случају покривене опасности, ако је учиниоцу јасно да остаје знатан ризик, док би непрокривен ризик истог обима друге стране увек потврђивао евентуални умишљај (Jakobs 2010, 295; Roxin 2006, 466)? Ако се очекује да само представа о једној незнатној опасности може да искључи умишљај, онда се тиме враћамо (превазиђеној) теорији вероватноће и критеријум (не)покривености постаје сувишан (Roxin 2006, 467).

Такође, делује неубедљиво или у најмању руку напрегнуто ослањање на увиђајност и вичност жртве или трећег лица да отклони опасност, као и несигурност начина на који учинилац то треба да схвати. То се коси са Херцберговим очекивањима „врло ефикасног резервног обезбеђења" опасности или „солидне искуствене основице" на основу којег учинилац то обезбеђење треба да процени (Herzberg 1986, 254). Напослетку, чини се да има мало простора за ту теорију мимо констелација лишења живота и телесних повреда у чијим је оквирима (случајеви преношења ХИВ-а) она првобитно и развијена (Küpper 1988, 784).[38]

Та теорија, премда „најфинија верзија теорије ризика" (Canestrari 2004, 216), са доста практичним критеријумом (не)покривености (Weigend 2008, 1001), ипак није успела да испуни Херцбергова очекивања (Herzberg 1986, 261), а то је да уместо ирационалног очекивања/наде (на основу сведене теорије схватања озбиљно), постави јасне, недвосмислене и објективне границе умишљаја (Roxin 2006, 465).

3. ПРИМЕЊИВОСТ АНАЛИЗИРАНИХ ТЕОРИЈА НА СРПСКО ПРАВО

Пре него што се осврнемо на могућност примене поставки из поменутих теорија на српско кривично право, треба истаћи да наш КЗ својим дефиницијама облика кривице пружа одређени вид правне сигурности. То је свакако од помоћи у поступку утврђивања законског описа кривичног дела, што укључује и правилно одређивање облика кривице. Наши судови то, међутим, не чине увек на задовољавајућ и заокружен начин.

[38] Тешко се може замислити стварање ризика који, рецимо, лопов приликом одузимања ствари не може да контролише (осим можда свеприсутног ризика да буде откривен), (Ruppenthal 2017, 250).

3.1. Примери тумачења из српске судске праксе

Тако се рецимо код кривичног дела угрожавања јавног саобраћаја из чл. 289 ст. 1 КЗ и тамо захтеваног умишљаја, услед неупотребљивости Франкове формуле, још од саветовања Савезног врховног суда 1961. године, прибегава појму безобзирности. Ту се подводи понашање у саобраћају којим се не води рачуна о интересима и добрима других учесника у саобраћају (Стојановић 2020b, 915–916). Међутим, пошто безобзирност може да постоји и код нехата, за умишљај се захтева висок степен[39] безобзирности.[40] Но, и тај критеријум сâм за себе није задовољавајућ јер допушта различита схватања, тј. границе остају нејасне. Тако се приговара да би груба непажња требало да спада у свесни нехат, али да је остало отворено како је објективно разграничити од безобзирности (Лазин 1977, 394).

[39] Помиње се и критеријум грубе безобзирности, са укљученим вредносним аспектом (колика је јачина прекора која се учиниоцу може упутити због његове безобзирности). Стојановић 2020b, 916. У свом ставу Савезни врховни суд говори о „обесном, грубом вређању саобраћајних прописа и правила, очигледно угрожавајући туђе животе и имовину и сл." (према Лазин 1977, 393). Како истиче Делић, грубу безобзирност је „у садржинском смислу неопходно посматрати као сложену психолошко-нормативну категорију у оквиру које би квалификатив 'грубо' имао значај 'обухватног' критеријума чија испуњеност, осим фактичке присутности одређених околности конкретног случаја, претпоставља и њихову нормативну оцену, вредновање (евалуацију). Овако утврђена груба безобзирност би са једне стране указивала на евентуални умишљај као психолошку категорију, односно на пристајање на наступање опасности, а са друге стране би указивала на евентуалном умишљају иманентан интензитет социјално-етичког орекора који је у конкретном случају оправдано упутити учиниоцу кривичног дела угрожавања јавног саобаћаја" (Делић 2020, 239–240).

[40] „Међутим, за квалификацију наведену у жалби неопходно је да се на поуздан начин из свих околности може утврдити да је окривљени био свестан да забрањена последица може наступити и да је на њено наступање пристао (евентуални умишљај). Свест о томе да забрањена последица може наступити и да је возач на ово пристао произилази из изузетно високог степена безобзирности коју возач у одређеним ситуацијама показује при управљању моторним возилом. То су по правилу ситуације најгрубљих облика непрописне вожње од стране возача као што су случајеви управљања моторним возилом под утицајем алкохола, управљање од стране возача који није обучен за то, управљање технички неисправним возилом нарочито у погледу механизма за управљање и коришћење, а да је тих недостатака возач свестан или у другим приликама када се вожња из одређених разлога због брзине, непоштовања првенства пролаза и сл. може окарактерисати као нарочито безобзирна." Пресуда Апелационог суда у Крагујевцу, Кж1 1127/2014 од 18. јула 2014. године, *Paragraf Lex*.

Влададајуће је и учестало тумачење судова којим се алкохолисаност поистовећује са умишљајем; негде као конкретизација безобзирности (Лазин 1977, 394). Свест о томе да се моторним возилом управља у алкохолисаном стању аутоматски доводи до закључка да је учинилац и пристао на наступање последице,[41] чак и када је концентрација алкохола у крви у дозвољеним границама[42] (Стојановић 2020b, 916). Такво виђење се, између осталог, коси са поимањем самоугрожавања које упућује на свесни нехат. Наиме, лице које вози у алкохолисаном стању и свесно је тога такође је, по правилу, свесно и да тиме и себе угрожава, али олако држи да до тога неће доћи или да ће то моћи да спречи. Да би се могло говорити о пристанку на остварење законског описа дела, неопходно је да постоје додатни критеријуми који ће указати на поменути висок степен безобзирности (недозвољено претицање, пребрза вожња, уопште кршење и других саобраћајних прописа).[43] Кршење прописа се овде, дакле, појављује као додатни критеријум,[44] уз поменуту алкохолисаност.[45] Ти примери указују на једну заправо ширу одлику домаће

[41] „Чињеница да је у време извршења кривичног дела тешко дело против безбедности јавног саобраћаја, у крви оптуженог установљена количина алкохола која је већа од законом дозвољене указује да је облик кривице евентуални умишљај. Другим речима, суд неће прихватити одбрану оптуженог да је у конкретној саобраћајној ситуацији упркос пијанству олако држао да конкретна опасност неће наступити или да ће је моћи отклонити." Пресуда Окружног суда у Краљеву, К. 66/2003(2) од 10. маја 2004. године, *Paragraf Lex*.

[42] Пресуда Апелационог суда у Крагујевцу, Кж1 891/2014 од 19. јуна 2014. (према Стојановић 2020b, 916).

[43] У том смислу и Стојановић 2020b, 916.

[44] Насупрот томе, постоје одлуке које се не само ограничавају на грубо кршење прописа већ у објашњењу погрешног поступања првостепеног суда и не наводе вољни елемент евентуалног умишљаја: „Првостепени суд је учинио битну повреду одредаба кривичног поступка јер није дао јасне разлоге на основу којих закључује да је окривљени у односу на основно дело угрожавања јавног саобраћаја поступао са евентуалним умишљајем, па ће првостепени суд у поновном поступку у погледу виности окривљеног утврдити да ли је окривљени у датој саобраћајној ситуацији поступао неопрезно и недовољно пажљиво (свесни нехат), или је пак свесно, очигледно и грубо прекршио наведене законске прописе и услед тога довео у опасност живот и тело људи (евентуални умишљај)." Решење Апелационог суда у Београду, Кж1 бр. 873/17 од 9. октобра 2017, *Ing-Pro*.

[45] „Алкохолисаност оптуженог од 1,43% алкохола у крви у узрочној је вези са угрожавањем јавног саобраћаја пошто је налазом вештака утврђено да код оптуженог услед наведене концентрације алкохола његова способност да безбедно управља возилом је била компромитована, па да није био способан да безбедно управља возилом, што се у крајњем случају манифестовало и у начину управљања возилом, када без икаквог разлога прелази на другу страну пута и губи контролу над возилом, те удара пешаке.

судске праксе, а то је да на основу ситуација које би требало оцењивати у светлу битно смањене урачунљивости или неурачунљивости[46] (попут умора након непроспаване ноћи)[47] доноси закључке о облицима кривице.

У другим примерима, грубо кршење саобраћајних прописа неће бити довољно за конституисање умишљајне одговорности, односно неће се моћи подвести под пристајање на последицу. Пример за то би био пешак који не мари за прописе у саобраћају, прелази улицу на недозвољеном месту и тиме изазове судар са камионом (Ристимовић 2008, 100). Управо то је ситуација самоугрожавања,[48] која указује на (свесни) нехат. Психолошки се то објашњава тиме да учинилац опасност по себе и/или друге спознаје, али у одлучном моменту, потискује из своје свести и ипак предузима радњу (Vuković 2010, 78). Додуше, управо због тога ни тај критеријум сâм за себе не би био довољан за разграничење облика кривице јер је неадекватан у констелацијама када учинилац поступа супротно од очекиваног, пре свега када изразиту опасност несхватљиво потискује. Тада је, наиме, тешко објаснити зашто би он заслужио мањи прекор од онога ко ваљано процењује ситуацију (Vuković 2010, 78, fn. 57).

Из овако утврђеног понашања оптуженог сасвим је јасно да је оптужени управљајући путничким возилом у алкохолисаном стању и неприлагођеном брзином у саобраћајним условима био свестан да тиме може да угрози јавни саобраћај и доведе у опасност живот и тело људи, па је на то пристао, олако држећи да до теже последице, смрти пешака неће доћи и да ће је моћи отклонити.“ Пресуда Врховног суда Србије, Кж. 1042/04 од 13. априла 2005. и Пресуда Окружног суда у Београду, К. 773/03 од 5. априла 2004, *Ing-Pro*.

[46] Стојановић примећује да се у судској пракси ретко постављало питање да ли алкохолисаност води битно смањеној урачунљивости вероватно и због бојазни да би се отворила могућност ублажавања казне (чл. 23. ст. 3 КЗ), (Стојановић 2020b, 916–917).

[47] Оптужени је, у односу на основну последицу, угрожавање јавног саобраћаја, поступао са свесним нехатом, а не са евентуалним умишљајем, када је, као возач путничког возила и учесник у саобраћају, управљао возилом после непроспаване ноћи, иако због умора није био способан за безбедно управљање возилом, па је због тога у току вожње за тренутак заспао, изгубио контролу над возилом које је прешло на леву половину коловоза, и тако проузроковао саобраћајну незгоду са тешким телесним повредама.“ Решење Окружног суда у Ваљеву Кж. 215/03, од 24. априла 2003, *Ing-Pro*.

[48] О самоугрожаваању у контексту (објективног) урачунавања вид. Вуковић 2018, 382–421.

Дакле, иако наш КЗ познаје поделу и дефиниције евентуалног умишљаја и свесног нехата, постоји потреба за даљим, „чистијим“ тумачењем кључних појмова и ситуација. Ту се доктрини отвара простор да анализом и провером примене поменутих теорија понуди решења.[49]

3.2. Примењивост когнитивних теорија

Когнитивне теорије (теорија могућности – теорија представе и теорија вероватноће) у свом чистом облику нису примењиве на српско право већ због тога што слово чл. 25 КЗ изричито говори о елементу свести и о елементу воље, које сходно томе треба и утврдити у сваком конкретном случају.[50] Обе теорије, иначе, превиђају значај (иначе неспорно постојећег) вољног елемента, који је кључан посебно на линији евентуални умишљај – свесни нехат јер се управо ту утврђује њихово разликовање, с обзиром на то да је когнитивни сегмент та два облика кривице идентичан. Осим тога, теорија могућности проширује *dolus eventualis* на рачун свесног нехата у тој мери да је фактички сваки нехат – несвесни. То такође није у складу ни са законском одредбом (чл. 26 КЗ). Теорији вероватноће се додатно приговара да није јасно ни лако утврдиво када је нешто (овде је то вероватноћа наступања последице, односно остварење законског описа кривичног дела) „више од пуке могућности и мање од претежне вероватноће“. Вуковић напомиње да „фино разликовање евентуалног умишљаја и свесног нехата и није могуће извести математички строго“ (2022, 213) или, Лазиновим речима, „тоталну прецизност, ни у ове, ни у других правних установа није могуће постићи“ (1977, 398).

[49] Топаловић је пре више од 110 година приметио да су поделу умишљаја на разне облике ретко кад вршили позитивни законици (наш КЗ је у том смислу изузетак) те да је она „вазда остављана кривичноправној науци“ (Топаловић 2010а, 100).

[50] Вуковић наводи пример кривичног дела преношења инфекције ХИВ вирусом из чл. 250. КЗ (на страну законодавчево дуплирање речи вирус у називу), у којем препознаје теорију могућности. Наиме, у законском опису дела говори се само о свести, односно о знању учиниоца да је заражен вирусом; дакле, само о интелектуалном елементу. Он у наставку констатује да се тиме, као и проширењем умишљаја на рачун нехата, „вешто избегавају проблеми разграничења које (...) теорија не може лако да реши“ (Vuković 2010, 81).

3.3. Примењивост волунтативних теорија

Примењивост теорије одобравања најзначајније је питање за наше право и праксу због блискости те теорије са теоријом пристанка, владајућег схватања код нас.[51] Појмови одобравања и пристајања, додуше, не могу се поистоветити. Иако у свакодневном говору, у лаичкој сфери, фигурирају као синоними,[52] у нормативном смислу они то нису. Одобравање указује на позитиван однос према остварењу законског описа дела, на његово поздрављање, док се пристајање, у складу са психолошко-нормативном концепцијом кривице, схвата као нормативно саглашавање, у којем изражена позитивна компонента, као код одобравања, може, али не мора да постоји. Ово тим пре ако узмемо у обзир да и равнодушност, како примећује Вуковић, у психолошко-нормативном (не и у психолошко-дескриптивном) смислу може да се подведе под пристанак (2022, 213–214). Српско решење из чл. 25 КЗ прихватљивије је од, рецимо, поменутог немачког[53] јер је израз пристанак законски постављен (премда не и дефинисан),[54] али и мање вредносно обојен у односу на решење из немачког права, где се равнодушност такође подводи под појам евентуалног умишљаја. „Разводнавање" значења термина „одобравања" (*billigen*) до кога се временом дошло у њиховој судској пракси, говори у прилог томе

[51] Сагласно о теорији пристанка као владајућој Стојановић 2020а, 149; Вуковић 2022, 212; Ђокић 2005, 367.

[52] Синоними за пристанак су многобројни: сагласност, одобрење, допуштење, прихватање, одобравање, слагање, акцепт, договор, склад, споразум, слога, конгруенција, разумевање, погодба, хармоничност, сарадња, нагодба, сложност, складност. Ћосић и сарадници 2008, 505.

[53] Прихватљивије је и од других решења, попут турског. Наиме, у Кривичном законику (*Türk Ceza Kanunu – TCK*) умишљај се одређује слично немачком решењу као „спознато и вољно остварење одлика законског описа кривичног дела" (Art. 21 (1)), док је евентуални умишљај ближе, али очигледно недовољно дефинисан као предвиђање учиниоца да би могао да оствари законски опис кривичног дела (Art. 21 (2)). законска дефиниција „не садржи додату вредност" у погледу разграничења облика кривице у поређењу са немачким решењем (Özbek, Oğlakcıoğlu 2019, 343).

[54] Појам пристанка нигде у КЗ није дефинисан, иако се непосредно или посредно јавља код три од четири елемента општег појма кривичног дела: код предвиђености у закону, као основ искључења противправности и сада код евентуалног умишљаја. Терминолошка диференцијација тог појма би стога добро дошла (Марковић 2011, 284).

(саглашавање уместо одобравања).[55] Напослетку, пристати се може и без одобравања; довољно је помирити се са остварењем дела, односно наступањем последице.

Даље, Франкова формула, која се примењује и код нас (Vuković 2010, 76),[56] из перспективе евентуалног умишљаја даје одговор који гласи „Како год", а који много више нагиње ка равнодушности (и пристанку, у крајњу руку) него ка одобравању. Но, приговор хипотетичности који прати ту формулу остаје да важи (Рисимовић 2008, 92);[57] она се заснива на једном фингираном психичком стању и самим тим је непоуздана (Ђокић 2005, 368), недовољно сигурна и корисна (Лазин 1977, 391).

Оно што је предност свих волунтативних теорија и што говори у прилог њиховој примени, па тако и овде, јесте да преко вољног елемента чини видљивим квалитативно виши степен неправа који постоји код умишљаја у поређењу са нехатом, посебно уколико је елемент свести идентичан. Само се из једног психолошког односа воље, који иде даље од спознаје (свести), може правдати разлика у санкционисању једног и другог облика кривице (Ruppenthal 2017, 208). Другим речима, ако је свест иста, само другачији квалитет воље (субјективног елемента) може (објективно) да оправда строжу казну за евентуални умишљај него за свесни нехат. С друге стране, остаје стари проблем доказивања унутрашњих чинилаца (Лазин 1977, 387), посебно у светлу претпоставке невиности (чл. 3 Законика о кривичном поступку),[58] терета доказивања (чл. 15 ст. 2 ЗКП) и начела *in dubio pro reo* (чл. 16 ст. 5 ЗКП).[59] Последње поменуто начело значи да ће се сумња у погледу чињеница од којих зависи вођење кривичног поступка, постојање

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[55] Вид. тачку 2.2.1.

[56] Решење Апелационог суда у Новом Саду, Кж1 763/2014 од 2. септембра 2014, *Paragraf Lex*.

[57] Притом формула нарочито код кривичног дела угрожавања јавног саобраћаја, показује малу или никакву употребну вредност (Стојановић 2020b, 915).

[58] Законик о кривичном поступку – ЗКП, *Службени гласник РС* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – одлука УС и 62/2021 – одлука УС.

[59] „Ако он [судија] не би био у стању да на фактима заснује своје уверење да нада, да последица неће наступити није била главни мотив радње, онда ваља применити правило *in dubio pro reo*" (Топаловић 2010b, 297). То потврђује и наша судска пракса: „Како евентуални умишљај представља тежи облик виности у односу на свесни нехат, неопходно је, у сваком конкретном случају, постојање евентуалног умишљаја утврдити као извесно, а не као вероватно. Када постоји гранични случај, мора се узети оно што је повољније за оптуженог, односно да се ради о свесном нехату" (Пресуда Окружног суда у Ваљеву, К. бр. 62/98 од 16. новембра 1998). Овде треба нагласити да није

обележја кривичног дела или примена неке друге одредбе кривичног закона решити у корист окривљеног. Широк круг предмета на које се то правило односи обухвата, између осталог, и кривицу као обележје кривичног дела (Илић и др. 2022, 165).

Што се конкретних приговора на рачун теорије равнодушности тиче, у нади, уздању у изостанак последице препознаје се олако држање („погрешна нада“) да до последице неће доћи или да ће она моћи да се спречи, то јест препознаје се свесни нехат, тако да би ова теорија тај облик нехата проширила на рачун евентуалног умишљаја. Наравно, уколико се равнодушност, како сматра Енгиш, схвати као непостојање отпора према могућој повреди правног добра (1964, 191), тај приговор би отпао. Отпор потиче од обавезе уздржавања од вршења кривичних дела. Предност таквог поимања равнодушности видела би се у препознавању да се учинилац помирио са наступањем последице, што би се тумачило као умишљај. Олако држање да ће остварење кривичног дела моћи да се спречи указује управо на неравнодушност. У нашој доктрини би се као неко ко нагиње ка тој теорији могао препознати Јовановић, који пристајање представља као „неку врсту вољне неодређености, једну нејасну тежњу која је осећајно обележена“ (1971, 85), где у односу на последицу кривичног дела „као да влада индиферентност, нека вољна неодређеност“ (1971, 85).

Речено је већ да је сржтеорије схватања озбиљно у томе што учинилац који поступа са евентуалним умишљајем озбиљно држи да је остварење законског описа кривичног дела могуће (Stratenwerth 1959, 55). У нашем праву се може поставити питање да ли је „схватање озбиљно“ исто што и „пристајање“. Иако та два појма нису лингвистички идентична, „схватање озбиљно“ нормативно можемо да припишемо евентуалном умишљају, из два разлога. Најпре због тога што је то антипод лакомислености свесног нехата,[60] а потом и зато што је „схватање озбиљно“ корак који по правилу претходи пристајању. Чак и ако се тај редослед може учинити упитним, не може се рећи да схватање озбиљно на било који начин задире у вољну страну олаког држања свесног неха-

реч о аутоматском закључивању већ о томе да постоје докази који подједнако говоре у прилог постојања оба облика кривице, а како може постојати само један од та два, узима се онај облик који је повољнији за учиниоца.

[60] То се може посредно закључити из примера судске праксе, где је „окривљени свој пиштољ уперио у правцу оштећеног из шале (...) желећи да направи неумесну шалу, извршио опаљење из пиштоља, те да је окривљени и раније правио такве шале“, што је суд тумачио као нехатно лишење живота, а не као убиство извршено са евентуалним умишљајем. Решење Апелационог суда у Новом Саду, Кж1 763/2014 од 2. септембра 2014, *Paragraf Lex*.

та. Ваља такође и овде подсетити на приговор „претераног оптимизма“, односно на опасност од привилеговања лакомисленог (стога нехатног) учиниоца спрам озбиљнијег (стога умишљајног) учиниоца. Испада да ће савеснији, промишљенији грађани бити третирани строже него они безбрижни, необазриви и незаинтересовани (Вуковић 2022, 212).

Пошто представља нормативизирану варијанту теорије схватања озбиљно, оно што је речено о њеној примењивости важи и за теорију опредељивања, с тим што се додатно поставља питање целисходности постављених индикатора: препознате опасности сопственог понашања; урачунавање вероватноће да ће се жртва сопственим снагама извући из опасности и непостојање мотива да се у обзир узму последице (Roxin 2010, 11–12). Урачунавање жртвиног доприноса решава се на нивоу предвиђености у закону (каузални ток), док се мотиви вреднују приликом одмеравања казне, осим ако претходно не представљају обележје кривичног дела.

Напослетку, треба приметити да су волунтативне теорије међусобно врло блиске, да се преклапају, да се нека схватања појављују само као допуна или варијанте претходних, тако да и њихову примењивост треба посматрати као целину свих учења која у фокус стављају елемент воље.

3.4. Примењивост теорија ризика

Предност и уједно аргумент у корист примењивости Фришове теорије ризика јесте то што се њоме уводи појам нормативно релевантног ризика – нечега што је већ познато из теорије објективног урачунавања и што, самим тим, није сасвим ново и потпуна непознаница за тумача. Тиме је уједно начињен и корак ка некој врсти објективизације субјективног елемента какав кривица јесте, и самим тим њеног потенцијално лакшег доказивања. Против њене примењивости говори то што се у нашем праву (не)дозвољени ризик суштински види (иако није изричито као такав предвиђен)[61] као основ искључења противправности, а не касније, на нивоу кривице. Даље се и овде појављује хипотетички елемент – могући умишљајни учинилац. При томе би се непостојање кривице утврђивало само преко заблуде, што доста су-

[61] То, додуше, и не би био контрааргумент као такав, имајући у виду и неке друге основе оправдања које се у КЗ не наводе изричито, али које препознају доктрина и пракса; пре свега пристанак повређеног, предузимање медицинских захвата итд. Вид. Марковић 2015, 285–300.

жава сâм њен појам. Напослетку, сви приговори који важе за теорију вероватноће, ма колико Фриш покушавао да их релативизује, важе и за његову теорију.

Што се Јакобсове нормативизиране теорије вероватноће тиче, и овде важе аргументи везани за теорију вероватноће као основице његовог учења. Оно се такође коси са одредбом члана 28 КЗ (стварна заблуда) јер би се учиниоцима нормативно приписало (не)постојање одређене свести о ризику. Даље, критеријум густине ризика је сувише неодређен – под тиме се може схватити како величина, тако и близина ризика, а сасвим је могуће да се појави и треће тумачење. Проблем се додатно усложава ако се повеже са другим предложеним критеријумом – вредношћу правног добра. На асиметричности и нелогичности једног таквог тумачења, што важи и за српско право, већ је указано. Напослетку, Јакобсово поимање да очигледна, лако препознатљива опасност доводи до умишљајне одговорности и када је учинилац није препознао јер „чињенично слепило" свакако заслужује казну за умишљај означено је као „радикализовано" (Frister 2019, 385–386). Ако учинилац нема свест о опасном чињеничном стању, онда он и не доноси одлуку против избегавања остварења законског описа, то јест не може бити кажњив за умишљајни деликт (Frister 2019, 386). То би било још једно кршење одредбе о стварној заблуди.

Херцбергова теорија непокривене опасности, осим већ изнетих приговора и начелног поздрављања покушаја објективизације критеријума и тиме њиховог лакшег доказивања, остаје спорна због тога што је махом усмерена на крвне деликте[62] као и због тога што би и онај учини-

[62] Тај приговор вреди поновити и за наше право, тим пре што постоји пример из судске праксе који личи на поменути пример са бацањем тешког предмета са терасе, када се ствара удаљена, непокривена опасност. У нашем примеру, чињенично стање утврђено у изреци пресуде је следеће: „Оптужена је поступала с евентуалним умишљајем приликом извршења кривичног дела тешка телесна повреда из члана 121 став 2 Кривичног законика када је са терасе на којој је стајала бацила метални чекић у правцу главе оштећеног који је стајао у дворишту испод терасе, с обзиром на то да је била свесна да метални чекић средње величине представља средство подобно да другом нанесе тешку телесну повреду опасну по живот и да ће га погодити по глави на којој се налазе највиталнији делови тела човека: мозак и кости лобање, па је пристала на наступање забрањене последице." Након овог анатомског описа, следи образложење, у којем се наводи: „Што се тиче одговорности окривљене за тежу последицу, односно смрт оштећеног, окривљена је у смислу члана 27 КЗ поступала с нехатом. Наиме, окривљена је према налазу суда била свесна да оштећеном може нанети повреду услед које као тежа последица може наступити смрт оштећеног, с обзиром да је метални чекић средње величине бацила у правцу његове главе и да је знала да исти може

лац који није ни покушао да избегне последицу, а веровао је у добар исход, могао да профитира од те теорије. Уосталом, применом те теорије би се релативизовала одговорност гаранта по основу ингеренције јер би се пре закључила нехатна одговорност ако је био обазрив него евентуални умишљај.

Ниједна од анализираних теорија ризика не би била у свом чистом облику и сама за себе примењива на српско право већ због тога што су оне лоциране у пољу когнитивних теорија (где им је природно и место јер је спознаја ризика интелектуална радња; воља се надовезује на ту спознају). Међутим, оне би се, као уосталом и сегменти још неких теорија, могле узети у обзир индиректно, и то у склопу једне прецизиране теорије пристанка.

3.5. Прецизирана теорија пристанка

Поставља се питање која од анализираних теорија би била најприкладнија за наше право, пошто разграничење евентуалног умишљаја и свесног нехата до данас није решено на задовољавајућ и заокружен начин. Мимо различитости које поједине теорије носе са собом, неспорно је да постојећа схватања о начину разликовања та два облика кривице (преко Франкове формуле, безобзирности, става према заштићеном добру)[63] свакако треба осавременити. То смо могли да закључимо већ на основу примера из судске праксе који су се махом површно бавили вољним елементом или су на основу интелектуалног елемента аутоматски доносили закључак и о његовом волунтативном пару.[64]

повредити лобању и мозак оштећеног чије повређивање може изазвати и наступање забрањене последице. Она наступање смрти оштећеног као свог супруга у конкретном случају није желела и олако је држала да до наступања такве теже последице неће доћи, о чему говори околност да је она оштећеном задала само један ударац а не више, јер да је она желела да га лиши живота она би након његовог пада наставила да га удара чекићем." Пресуда Окружног суда у Нишу, К. 200/2007(1) од 21. јануар 2008, *Paragraf Lex*.

63 Стојановић 2020а, 149–151.

64 Иако је утврђивање интелектуалног елемента по правилу неспорно, вреди се подсетити неких ранијих тумачења. Тако Радовановић негира свест о смртној последици у примеру из судске праксе, у којем је оптужени ударио жртву „снажно три пута по глави храстовим коцем дебљине човечије руке", да би потом био осуђен због кривичног дела убиства са евентуалним умишљајем. Пресуда Врховног суда НР Хрватске, Кж. 8/52 од 19. јануара 1952 (према Радовановић 1954, 336). Радовановићева специфична аргументација зашто учинилац у примеру није морао очигледно да предвиди наступање

Полазна основа би била класична теорија пристанка, с обзиром на то да представља најмање критиковано учење, односно учење са најмање слабих тачака, а да је уједно познато и признато код нас.[65] Истовремено се не би пробио постојећи чл. 25 КЗ, у којем се изричито говори о пристанку на чињење дела. Међутим, већ овде се намеће прва корекција: „пристанак" садржински не треба поистоветити са емотивним одобравањем већ га треба приближити теорији схватања озбиљно. Осим тога што би „схватање озбиљно" (евентуалног умишљаја) и „схватање олако" (свесног нехата) били заправо тачни супротстављени појмовни парови,[66] синтагма „схватање озбиљно" пружа више простора за коришћење (објективних) индикатора.

Иако равнодушност није исто што и пристанак, чули смо већ аргументе о томе како је она ипак ближа евентуалном умишљају но свесном нехату, тако да је том тежем облику кривице и треба прикључити.[67] Већ на овом примеру тумачења равнодушности видимо уплив вредносног схватања кривице. Развој кривице је и иначе текао ка нормативном (Roxin 2010, 15; Делић 2009, 56). Тако Вуковић констатује да постојање воље према учињеном треба тумачити психолошки-нормативно – као опредељивање за последицу у околностима високог ризика радње (Vuković 2010, 79). У опредељивању је поново потцртан материјални појам кривице[68] („могао је и другачије да одлучи"), а поменут је и важан индикатор – ризик. Стварање високог степена ризика указује, наиме, на постојање пристајања у нормативном смислу (Стојановић 2020a, 151–152). И Делић сматра да се код евентуалног умишљаја учинилац саглашава са могућношћу остварења кривичног дела; он је свестан високог ризика који прати његову делатност и акцептира наступање кривичног дела (2016, 96). При томе се утврђивање евентуалног

смрти повређеног гласи да је „позната особина наших људи на селу да се обрачунавају међусобно ударима неког коца (проштаца) приличне дебљине и то обично по глави и леђима, а нису ретки случајеви туче чак и гвозденим вилама, будацима и мотикама". Он наводи да је сврха таквог поступања да се противник само „добро истуче и премлати, не би ли га тиме 'опаметили и уразумили'" (Радовановић 1954, 336).

65 Већ је поменуто да се код нас говори о пристанку, док је у Немачкој реч о одобравању, тако да сходно одговарајућим терминима треба и разумети (прилагодити) ову теорију.

66 „Пристајање" и „непристајање", пак, не би се могли згодно уклопити јер би се тиме избрисала граница између свесног и несвесног нехата (оба би тада представљали „непристајање").

67 У том смислу и: Топаловић 2010b, 298.

68 Више о материјалном појму кривице: Вуковић 2017, 501–516.

умишљаја не може увек заснивати само на психичком односу учиниоца већ се његов пристанак мора утврђивати и као нормативна, вредносна чињеница (2016, 96–97).

Пристанак би се утврђивао у границама законске дефиниције, али би то била само почетна тачка јер би се нормативно прецизирао преко индикатора. Слично као код продуженог кривичног дела (чл. 61 КЗ), судска пракса би могла да развије каталог варијабилних елемената који би индиковали да ли постоји пристанак. Дакле, оно што је „целина" код продуженог кривичног дела, овде би био „пристанак" – унутрашња учиниочева вољна страна која се манифестовала у спољном свету. Наравно, и овде би важило да што је више варијабилних критеријума испуњено, пре би се могло рећи да постоји пристанак у психолошко-нормативном смислу. За критеријуме би дошли у обзир већ позната мерила (безобзирност, став према добру, Франкова формула), али и нека нова, која би надоместила недостатке постојећих – врста опасности, близина ризика, величина ризика, евентуално психичка баријера[69] (која је заправо партикуларно решење за поједина кривична дела). У спецификуме спада и самоугрожавање, које се у нашој судској пракси већ искристалисало као знак који указује на свесни нехат, и то пре свега код саобраћајних деликата.[70] Код ових кривичних дела се као контра-индикатор за евентуални умишљај код нас врло често препознаје безобзирност.

Већина индикатора иначе има везе или би се могла подвести под ризик, који као такав постаје све важнији и актуелнији критеријум, те се у том домену може очекивати даљи развој судске праксе (или би то барем било пожељно). У сваком случају, потребно је једно довољно еластично решење које ће моћи „да покрије сву разноликост живота" (Лазин 1977, 398), пошто је и сâм прелаз између евентуалног умишљаја

[69] Тај критеријум се односи пре свега на крвне деликте, али је тешко примењив на кривична дела пропуштања.

[70] „Оптужени је, у односу на основну последицу, угрожавање јавног саобраћаја, поступао са свесним нехатом, а не са евентуалним умишљајем, када је као возач путничког возила и учесник у саобраћају, управљао возилом после непроспаване ноћи, иако због умора није био способан за безбедно управљање возилом, па је због тога у току вожње за тренутак заспао, изгубио контролу над возилом које је прешло на леву половину коловоза, и тако проузроковао саобраћајну незгоду са тешким телесним повредама." Решење Окружног суда у Ваљеву Кж. 215/03, од 24. априла 2003, *Ing-Pro*. Дамашка је још раније тврдио да „конструкција евентуалног умишљаја никако не одговара за потребе саобраћајних деликата, као уосталом и свих осталих деликата угрожавања." Тај аутор истиче да се у пракси пристанак не утврђује него се грубе повреде правила пажње приписују умишљају (Damaška 1964, 92).

и свесног нехата „постепен и еластичан, па и критеријум за њихово разграничење мора у основи бити такав“ (Лазин 1977, 388), а да притом не напусти поље одређености, прецизности и поткрепљености доказима, па самим тим и правне сигурности.

4. ЗАКЉУЧНЕ НАПОМЕНЕ

Спорно питање разграничења евентуалног умишљаја и свесног нехата изнедрило је мноштво теорија и схватања, доктринарно развијених и у одређеној мери судски потпкрепљених или оповргнутих, указујући на слојевитост проблема и његов практични значај. Полазећи од законских обличја кривице (тамо где су уопште легислативно уобличена), делује корисно да се при тумачењу комбинују поједини неспорни елементи тих учења. Како би то могло да изгледа, приказано је на српском примеру.

Шире посматрано и мимо везе са одређеним националним правом, могу се издвојити два запажања која изоштравају нејасну догматску и криминалнополитичку слику о разграничењу (евентуалног) умишљаја и (свесног) нехата.

Најпре се, посебно код теорије схватања озбиљно, искристалисао проблем неоснованог оптимизма, односно привилеговања лакомислености.[71] Поштовање начела *in dubio pro reo* у спорним ситуацијама може се косити са осећајем праведности, тако да не чуди то што се поздравља ширење евентуалног умишљаја на рачун свесног нехата. То би уједно био догматски начин прикључења криминалнополитичким кретањима која су код нас усмерена ка пооштравању кривичноправне реакције, односно начин на који би судска пракса и доктрина могле криминалнополитички да интервенишу.[72]

Такође се показало да је појам ризика потенцијално користан, да омогућава нијансирање у спорним ситуацијама. Свим теоријама које се њиме баве је заједничко да се у први план ставља и на основу објективних критеријума вреднује квалитет опасности коју је учинилац створио (Ruppenthal 2017, 233). Ти критеријуми допуштају објективизацију процене. Много тога што се доживљава само као психолошка категорија има и своју нормативну садржину. То тим пре

[71] Лазин (1977, 392) говори о „повлашћивању криваца“.

[72] Овде се оставља по страни питање да ли су актуелна криминалнополитичка кретања добра или лоша.

не сме да се пренебрегне у правима која су, попут нашег, прихватила управо психолошко-нормативни појам кривице. Да не треба избегавати нормативно вредновање, показало се код теорије објективног урачунавања, која се са својим смерницама показала као прецизнија од дотадашњих приступа (објективном) урачунавању. То искуство би могло да се прилагоди и пренесе и у сферу субјективног урачунавања.

До преклапања ће неминовно доћи. Већ сада можемо да констатујемо да ће кривичноправно вредновање опасности постати значајније како се повећава број потенцијално ризичних, комплексних области које су повезане са девијантним понашањима, па самим тим и са разграничењем облика кривице. Ту спадају, само примера ради, индустријска производња, истраживања у сфери здравства, спортске активности, привредни криминалитет итд. (Canestrari 2004, 211). Када говоримо о њима, ми увек говоримо и о ризику који им је иманентан.

Чини се да то већ јесу, односно да ће тек бити неки од главних праваца будућег развоја у изналажењу „суптилних и корисних решења у сивој зони између умишљаја и нехата“ (Canestrari 2004, 210), која се потом преламају и на важној међи кажњивости и некажњивости.

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DOLUS EVENTUALIS AND ITS DEMARCATION FROM CONSCIOUS NEGLIGENCE

Summary

The aim of the paper is to determine the content of *dolus eventualis* in order to demarcate it from conscious negligence as the less serious form of guilt. The main challenge in Serbian law for their differentiation is their identical element of consciousness (awareness of the possibility to commit the act), while the element of will is different ("consent" to *dolus eventualis* and reckless assumption that the consequence of the act would not occur or that the perpetrator would be able to hinder it for conscious negligence).

Firstly, various doctrines (cognitive theories, voluntative theories, and theories of risk) are analyzed. After that, the most important, typical interpretations from the Serbian jurisprudence are presented and commented on, after which it is assessed whether any of the analyzed theories could apply to Serbian Law. Finally, a more precise interpretation of the term „consent" and related questions is proposed.

Key words: *Dolus eventualis*. – *Conscious negligence*. – *Consent*. – *Theories*. – *Criminal Code of Serbia*.

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REMARKS ON EARLY MEDIEVAL ALEMANNIC CODES

The paper deals with the age and the origin of the early medieval Alemannic common law, the fragments of the Pactus Alamannorum and the text of the Lex Alamannorum, which has an exceptionally rich manuscript tradition. After examining the common roots of the regulations and the prologues of the Lex Alamannorum and the Lex Baiuvariorum, and the influence of Frankish capitularia on the Alemannic leges, a possible answer to the question regarding the date and the legislator will be presented.

Key words: *Lex Alamannorum. – Pactus Alamannorum. – Early medieval legal history. – Volksrecht.*

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1. INTRODUCTION

The Alemanni are first mentioned by Roman sources in 213 AD, when Caracalla ordered the repel of the Alemannic invasions in the upper Main region (Brunner 1906, 42). Around 260 AD, the Alemanni broke through the limes and reached Gaul; later Mamertinus's *panegyricus* mentions them in 289 AD in connection with the victories of Maximianus Augustus (Mamertinus, *Panegyricus* 5, 1). Nevertheless, soon after the Romans were repeatedly defeated by the Alemanni, leading to them becoming permanent inhabitants of the Roman Empire, which, however, was advantageous to the Romans in that, as *cohors Alamannorum*, they decided to take part in the protection of the Danube and Rhine limes (Brunner 1906, 42). This area is henceforth referred to in the sources as Alamannia (Steuer 1998, 276). In the 5th century, a part of Alsace was under the rule of the Alemanni, the territory of present-day Switzerland extending to the Alps, Vorarlberg as well as the lands to the east, to the river Lech (Geuenich 1994, 168). After 496 AD (the battle of Zülprich), Chlodwig brought the northern part of the area previously inhabited by the Alemanni under Frankish rule, while the other areas remained under the Eastern Gothic Protectorate, until the death of Theodoric the Great (Zöllner 1970, 56; Schröder 1907, 95). After the death of Charles Martel (714–741 AD), a dispute over the throne erupted between his sons, Pepin and Carloman. Taking advantage of the situation, Theudbald, the son of the Alemannic Prince Lantfrid (709–730 AD), forced into subjection by Charles Martel, tried to regain the independence of the duchy. Carloman broke the tough resistance of the Alemanni, and in 746 AD at Cannstatt he slaughtered part of the Alemannic nobility (*Blutgericht von Cannstatt*), and divided Alemannia into two counties under Warin and Ruthard, thus finally making it part of the Frankish Empire (Riché 1992, 75).

Alemanni popular law survived in two versions: the older version is titled *Pactus Alamannorum*, while the newer version is the *Lex Alamannorum.*

The *Pactus Alamannorum* has survived in a single manuscript, in fragments, and in the fragments scattered throughout the manuscript. It has been preserved due to the inattention of a 9th century scribe who inserted fragments of texts mixed up in the material to be copied into the text of the *Lex Alamannorum* (Schott 2014b, 167). This is how four longer fragments survived, and another *fragmentum* was preserved as the appendix to a manuscript of the *Lex Alamannorum,* and was later identified as being part of the *Pactus* (Schott 1974, 136; Schott 2014a, 862–869). Accordingly, Karl Lehmann's edition divided the *Pactus* into five fragments, regardless in its

editio, while Karl August Eckhardt favoured classification based on content (Lehmann, Eckhardt 1966, 21–32; Eckhardt 1958, 98–148). Later research qualified the latter as foreign to the source despite its clarity.

The *Lex Alamannorum* was preserved in fifty manuscripts that originate from between the 8th and the 12th century, while the existence of another dozen lost manuscripts can be inferred. This means that in addition to the *Lex Salica,* it is one of the *Volksrecht* with the most abundant textual tradition (Schott 2014b, 174). The manuscript tradition does not show any significant variation in content, the differences are predominantly linguistic in nature, except for the introductory part of the law.

2. THE ISSUES OF DATING AND THE LEGISLATOR IN SCHOLARLY LITERATURE

The first sentence of the *Pactus Alamannorum* is the fragmentary '*Ubi fuerunt XXXIII duces et XXXIII episcopi et XLV comites*', which refers to the circumstances and the actors involved in legislation, but does not name the legislator, i.e. the ruler themselves.

Most of the manuscripts of the *Lex Alamannorum* begin with the phrase '*Incipit lex Alamannorum, qui temporibus Chlothario rege una cum proceribus suis, id sunt XXXIII episcopi et XXXIIII duces et LXV comites, vel cetero populo adunatu (constituta est)*', while two (previous) manuscripts start with the phrase '*In Christi nomine incipit textus lex Allamannorum, qui temporibus Lanfrido filio Godofrido renovata est. Incipit textus eiusdem. Convenit enim maioribus nato populo Allamannorum una cum duci eorum Lanfrido vel citerorum populo adunato, ut si quis...'.* The main difference between the two variants is that while the first states that the law was created during the reign of King Clothar at a Frankish imperial diet (held in the presence of thirty-three bishops, thirty-four princes and forty-five counts), according to the second it was created at an Alemannic provincial assembly during the reign of Lantfrid, and was revised under his son, Gotofrid (Schott 2014b, 169).

It should be noted that since several manuscripts of the *Lex Alamannorum* mention *rex Chlotharius* as legislator in the sentence identical or similar to the *Pactus*: '*Incipit lex Alamannorum, qui temporibus Chlothario rege una cum proceribus suis, id sunt XXXIII episcopi et XXXIIII duces et LXV comites, vel cetero populo adunatu (constituta est)*', it may be presumed that the relevant part of the *Pactus* contained the name of this ruler (Schott 2014b,

168). However, there is no consensus in the literature whether this ruler should be identified as Chlothar I (511–561 AD), Chlothar II (584–629 AD), or Chlothar IV (717–719 AD).

August Friedrich Gfrörer considered the *Lex Alemannorum* to be the result of Charles Martel's legislative work, which sought to bring the independent Alemannic principality back under Frankish influence. Gfrörer dated the *Pactus* to the 7th century, and considered the *Lex* its revision, stating that it was not a result of Prince Lantfrid's activity but rather was only created during his reign sometime between 724 AD and 730 AD, and furthermore, it was contrary to his aspirations.

According to Heinrich Brunner, parts of the *Lex Alamannorum* and the first and second titles of the *Lex Baiuvariorum* can both be traced back to a lost Merovingian royal law, however, he did not believe that the original text of the law could be reconstructed (Brunner 1931, 619). He dated the common prototype to the time of Dagobert I's united rule (629–634 AD), and its promulgation to the imperial diet mentioned in the *Pactus.* He places the *Lex Alamannorum* as a later edition, between 717 AD and 719 AD (the *Lex Baiuvariorum* between 744 AD and 748 AD), while the fragmentary *Pactus*, because it mentions Chlothar (IV), was somewhat later, but prior to the king's death in 739 AD. Accordingly, he considers the surviving Alemannic legislation to be a princely law, the re-formulators of which adhered less to the common prototype as the compilers of the *Lex Baiuvariorum* (Brunner 1931, 613; Beyerle 1929, 380).

Bruno Krusch considered Charles Martel to be the creator of the *Lex*, during the figurehead rule of Chlothar IV, around 718 AD; in his opinion Chlothar IV is only mentioned in the introductory part of the law because the *maior domus* did not have and could not have the royal (sacral) legitimacy necessary for legislation (Krusch 1924, 307). In his view, in a later rebellion against the *maior domus*, Prince Lantfrid redrafted the text of the law at an Alemannic provincial assembly in 726 AD (or 727 AD), vindicating the status of the legislator for himself.

Konrad Beyerle's position is that Charles Martel could hardly have needed to include the name of one of the last Merovingian rulers, deprived of his actual influence, for the purpose of legitimacy (Beyerle 1926, LXIV). It is well-known that about a century before the actual Carolingian takeover, the Merovingian rulers were present in the political life only as puppet kings, as the actual control was concentrated in the hands of the *maior domus*, who, from Theuderich IV's death in 737 AD until the death of Charles Martel, i.e. until 741 AD, decided to ignore appearances as well, did not replace the king and ruled the Frankish empire in the absence of a *de iure* ruler (Ewig 1988,

202). Charles Martel's sons, Carloman and Pepin, acclaimed a puppet king from the Merovingian dynasty in 743 AD in the person of Childebert III, but after his death in 751 AD, Pepin crowned himself king.

Sharing Brunner's views, i.e. starting from the history of the origin of the *Prologus* of the *Lex Baiuvariorum*, Franz Beyerle further developed the theory in an attempt to unravel the stratifications of the text (Beyerle 1956, 84). He dated the catalogue of sanctions to the time of Theuderic I (511–532 AD) (for the northern part of Alemannia, as the southern part was under Eastern Gothic rule), the provisions on the church and the prince – to the rule of Theudebert I (532–548 AD), the novellas introduced at the initiative of the church – to the rule of Chlothar II (596–629 AD), mentioned *expressis verbis* in the text, the editing by the four jurists mentioned in the *Prologus* of the *Lex Baiuvariorum* – to the rule of Dagobert I (623–639 AD), the re-editing by the princes between 655 AD and 725 AD, i.e. the time of independence of Alemannia, and the provisions strengthening the prominent position of the church – to the rule of Lantfrid (709–730 AD).

Karl August Eckhardt connected the reference to Chlothar (originally in the *Pactus*, later incorporated in the *Lex*) to Chlothar II (584–629 AD) and, based on historical facts, he dated the creation of the *Pactus* at the earliest to between 613 AD (the conquest of Austrasia) and 623 AD (the independence of Austrasia under Chlothar I's son, Dagobert I) and set its legislative goal to be the integration of Alemannia into the Frankish Empire. On the other hand, he considered the *Lex* to be Lantfrid's work and dated its creation to between 712 AD and 725 AD, the period of loyalty to Frankish authority. In his view, the introductory phrase was changed after Lantfrid's death but before 743 AD, and Chlothar IV's name was introduced at the same time (Lehmann, Eckhardt 1966, 90). Nevertheless, in his opinion, Chlothar IV can be ruled out as legislator as he did not wield sufficient political power to carry out and adopt legislative work (Eckhardt 1934, VII).

Clausdieter Schott considered the author of the *Pactus* to be Chlothar II, emphasising that the language of the law is comparable to that of the *Lex Ribuaria*, as well as the later versions of the *Lex Salica.* On the other hand, he dated the *Lex Alamannorum* to Lantfrid's rule, however he stressed the close connection of the *Lex Alamannorum* to the Monastery of Reichenau, which, according to tradition, was founded by Charles Martel in 724 AD, despite Lantfrid's resistance (Schott 1993, 16). At the same time, the fact that the *Liber confraternitatis* (*Verbrüderungsbuch*) of Reichenau mentions Lantfrid as the founder of the monastery seems to refute the controversy surrounding the founding of the monastery between the *maior domus* and the Alemannic prince. Based on this, the years 724 AD and 725 AD cannot be ruled out as the dates of creation of the *Lex Alamannorum*; however, the text

of the law does not name the prince as legislator, it only identifies Lantfrid as the ruler at the time of the creation of the law. In his view, the ecclesiastic origin of the *Lex* is also supported by the fact that compared to other *Volksrechte*, the Alemannic law conferred the most significant privileges on the church, which does not rule out the theory that the creation of the law was not based on the legislating intention of the ruler/prince, but it is merely the product of the monastery at Reichenau, coming into being during the turbulent times after the death of Lantfrid, between 735 AD and 740 AD (Schott 2014a, 862). If the *Lex* is to be regarded as a forgery worded at the monastery at Reichenau, it is clear that the provincial assembly held by Lantfrid, with the participation of the counts, bishops and of the people, is no more than mere fiction for the purpose of legitimation.

3. POSSIBLE COMMON ROOTS OF ALEMANNIC AND BAVARIAN LAW

The *Prologus* of the *Lex Baiuvariorum* contains a very specific description of the alleged historical process of the drafting of Bavarian and Alemannic laws, based on which this legislative or codifying act was carried out as follows (Nótári 2014, 15). During his stay in Chalons, and after Chlodwig's death in 511 AD, the Frankish king, Theuderich, set up a committee of men versed in the law to record the rights of Franks, Alemanni and Bavarians under his authority, in accordance with the common laws of each nation, and in doing so, to replace the pagan elements with Christian ones. This was followed by the legislative amendments by Childebert and Chlothar at the turn of the 6th and 7th centuries, as well as by the reform carried out by four advisors, Claudius, Chadoind, Magnus, and Agilulf (at Dagobert's request), and the written promulgation of the legislation in force.

In connection with the dating of the Alemannic laws, the literature frequently raises the question of the evaluation of the historicity of the *Prologus* included in the *Lex Baiuvariorum*, as well as the content elements of the first two *titulus* (regulation regarding the church and the prince) in the text of the law. In this respect, two opposing views have emerged, namely the theory of unity *(Einheitstheorie)* and the theory of creation in several steps *(Schichtentheorie)*. The proponents of the latter theory suggest that the surviving versions of the Alemannic (and Bavarian) law presuppose the existence of several layers of text that clearly differ in time. Proponents of the theory of unity trace the creation of the law back to a unified, royal legislative will and to the approval by the people at the Frankish imperial diet (Hohenlohe 1932, 5; Siems 1978, 1887–1901).

Approximately two-thirds of the *Prologus* of the *Lex Baiuvariorum* comes from Isidore's work titled *Origenes seu Etymologiae*, more exactly from its fifth book, which discusses the history of codification of the antiquity and certain mythical elements; at the same time, as an exercise in legal theoretical analysis, it defines the relationships between justice, law and common law (*Lex Baiuvariorum* 5, 1, 1–7; 5, 3, 1–4). In addition, the *Prologus* contains a short account of the legislative activities of the Frankish king, Theuderich, i.e. of the creation of the laws recorded for the Franks, Alemanni and Bavarians, on the king's orders for purposes of legitimacy.

The authenticity of the *Prologus* first became subject of scientific debate in the 17th century: In his work published in 1643, Hermann Conring did not question the veracity of the descriptions contained in it. Mederer was the first to point out in 1793 that the text of the *Lex Baiuvariorum* and the narrative of the history of codification in the *Prologus* contradicted each other in many respects. If the content of the *Prologus* were to be completely valid, the text of the law known to us would have been created in the 7th century, which however is contradicted by the provisions of the Bavarian law, which presuppose the existence of a stable and complex Bavarian church system. Yet, this was established only in the first third of the 8th century. The credibility of the narrative in the *Prologus* has since been questioned by many, e.g. by Gfrörer, who also examined the *Prologus* of the Alemannic law (Gfrörer 1865, 168). Of course, there were also attempts to 'rehabilitate' the *Prologus*, an example of which is Brunner's conception of the narrative on the history of codification as the presentation of the activities of redrafting a Merovingian imperial law. According to this theory, this imperial law was issued by King Dagobert I between 629 AD and 634 AD, with the effect extending over several principalities (Brunner 1906, 453). According to Gengler, based on its genre, the *Prologus* is not a legal code, i.e. it is not a piece of legislation, but a historical narrative, and as such it belongs to the sphere of historiography (he hypothesises that the narration included in the *Prologus* is an extract from a lost, more comprehensive historical work, and accordingly, he dates the final drafting of the Bavarian law to the reign of King Dagobert I, i.e. the period between 623 AD and 639 AD). Roth does not rule out the involvement of King Dagobert and his legal scholars in the drafting of Alemannic and Bavarian laws, but notes that this intervention may have affected only a few *titulus*, and that the surviving text of the other norms reflects the legal perceptions of later editors (Roth 1848, 6; Mederer 1793, 32).

Regarding the time of creation of the *Lex Baiuvariorum*, the first *terminus ante quem* to be considered is the earliest accurately dated Bavarian Council, the Council of Ascheim, during which there was reference to two passages (2, 1; 7, 5) in the *Lex Baiuvariorum*: '*De reliquo promiscuo volgo,*

ut in lege Baiuvariorum consistere debet, ut de eorum hereditate, exceptis capitalibus criminibus, non alienentur'. The Council also mentions Tassilo III's predecessor, which makes it likely that the *Lex Baiuvariorum* was created before the rule of Tassilo, the last independent duke of Bavaria, i.e. before 748 AD: '*De legibus ecclesiarum paterna reverentia conperiemini et nos maxime admoneri oportit, quod tot diffusus orbs oriens occidensque conservat et precessorum vestrorum depicta pactus insinuate*'. On the issue of dating, research has always relied on the introductory *Prologus* which provides general – and in some ways 'legal theoretical' – explanations of the function of the legislator and the legislation, as well as of the concept of *lex* and *consuetudo*, as Isidorus Hispalensis does (Landau 2004, 30). This is followed in the *Prologus* by the presentation of the codification process carried out by Theuderich, Childebert, Chlothar, and Dagobert, aided by the four advisors, Claudius, Chadoind, Magnus, and Agilulf.

Researchers still have not reached a consensus regarding the veracity of the events portrayed in the *Prologus.* For Bruno Krusch, the *Prologus* was nothing more than a tendentious falsification trying to legitimise the legislative power of the Frankish ruler over Alemannia and Bavaria tracing it back until Chlodwig's death (Krusch 1924, 259). Franz Beyerle assumes that the *Prologus* originated before 656 AD, i.e. during King Dagobert I's lifetime, since he was the only one among the listed rulers to receive the epithet *gloriosissimus* (Beyerle 1929, 373). Mayer also believes that the *Prologus* originates from the 7th century and that the narrative passage on Frankish legislation was only later complemented with the ideas from Isidorus on the nature of *lex* and *consuetudo* (Mayer 1886, 133). It should be noted, however, that certain parts of the *Prologus* most likely refer to historical facts, since we know about legislative action that took place both during the reign of Childebert II and Chlothar II: the former can be linked to the *directio* created around 596 AD, and the latter to the *praeceptio* from 584 AD/628 AD and the *edictum* from 614 AD. The *Lex Ribuaria*, based on the Salian Frankish law code, was also created during the reign of Dagobert I, around 633 AD. Two of the royal advisors mentioned in the *Prologus* are historically identifiable: Fredegar writes with utmost appreciation about the wisdom and proficiency in the sciences of Claudius, who held the position of *maior domus* in 605 AD, and also mentions Chadoind as Dagobert I's *referendarius* and military leader (Fredegarius, *Chronicae* 4, 28, 78). In the case of Agilulf, there is a bishop mentioned by Fredegar in connection with the events of the year 642 AD, while in regard to Magnus, there is a bishop of Avignon by that name (Landau 2004, 33). At the same time, we cannot ignore the fact that other sources do not mention Dagobert I's legislative activity expanding over the Bavarian territories, while Theuderic I's Alemannic and Bavarian legislative

role can hardly be more than mere legend, all the more so because the appearance of the Bavarians is first reported by sources only a decade and a half after Theuderich's death in 533 AD.

Regarding the dating of the *Lex Baiuvariorum*, Peter Landau paid particular attention to the introductory *rubricatio* found in most of the manuscripts of the law: '*Hoc decretum est apud regem et principes eius et apud cunctum populum christianum qui infra regnum Mervungorum consistent*'. The Frankish ruler, from whom the legislative initiative originated, is not mentioned here as *regnum Francorum*, but as *regnum Mervungorum*, the emphasis being not on belonging to the Frankish people but on the dynasty. And this emphasis only makes sense if the author of the text wants to support the royal claim of the Merovingians, perhaps precisely because it was threatened (Landau 2004, 34).

It is well known that about a century before the actual takeover by the Carolingians, the rulers from the Merovingian dynasty were present in politics only as puppet kings, as actual control was in the hands of the *maior domus*, and that from the death of Theuderich IV in 737 AD until Charles Martel's death in 741 AD, he did not appoint a king, not even for the sake of appearances, and in the absence of a *de iure* ruler, he ruled the Frankish Empire (Ewig 1988, 202). Charles Martel's sons, Carloman and Pepin, acclaimed a puppet king from the Merovingian dynasty in 743 AD in the person of Childebert III, but after his death in 751 AD, Pepin crowned himself king, having eradicated both the Alemannic and the Bavarian claims of independence (Affeldt 1980, 96).

The date of origin of the Bavarian law, assumed by Heinz Löwe and Peter Landau to be between 737 AD and 743 AD, is supported by the ecclesiastical influence in the *Lex Baiuvariorum*, which goes far beyond Germanic popular law. It is clear from the text of the law that its compiler started with knowledge of canonical rules and a clearly defined ecclesiastical organisation (*Lex Baiuvariorum* 1, 12). It is possible that around 740 AD, by the time the first Bavarian monasteries were established, the compiler of the *Lex Baiuvariorum* was familiar with Isidor's work and could have based the 'legal philosophical' explanations of the *Prologus* on it (Jahn 1991, 192; Bischoff 1966, 171–194). In addition, the fact that the compiler of the *Lex Baiuvariorum* also used the *Lex Alamannorum* in his work also supports the dating between 734 AD and 743 AD. Given the likely very close kinship between Lantfrid, duke of Alemannia, and Odilo, duke of Bavaria, there is a high likelihood that Odilo's ducal program also included the collection of legislative works (Jahn 1991, 123; Landau 2004, 38; Nótári 2014, 29).

Landau raised the issue of whether Odilo's commissioners had been able to use in their work any pre-existing written legislation regarding Bavaria, possibly originating from the Merovingian era, which they could rewrite or complement in order to facilitate their task. Regarding Alemannia, it is certain that the compilation initiated by Lantfrid was indeed a kind of *renovatio*, as they had the *Pactus Alamannorum* at their disposal.

It seems doubtful, however, that the narrative history of the codification contained in the *Prologus* is historically entirely authentic (Landau 2004, 40). The question arises as to what 'prototypes' and sources the editor of the *Lex Baiuvariorum* may have consulted for the part of the *Prologus* that is not based on Isidore's *Origines seu Etymologiae.* Childebert and Chlothart are mentioned as legislators in the manuscript of the *Lex Salica* from Wolfenbüttel (Krammer 1910, 466). Two versions of the *Prologus* of the *Lex Salica*, drafted in the first half of the 8th century, i.e. before the creation of the *Lex Baiuvariorum*, mention four men (*electi de pluribus viris quattuor*) who finalised the text of the Frankish common law in three sessions (Schmidt-Wiegand 1978b, 1951). The narrative of the four-member committee was therefore likely to have been included in the *Lex Baiuvariorum*, under the influence of the *Lex Salica*. The names of Claudius and Chadoind are presumably taken by the author from Fredegar's *Chronica*, Agilulf's name here probably does not mean a historical but a fictitious person referring to the Bavarian ducal family, while there is no consensus regarding the name of the fourth man, Magnus (Beyerle 1926, LXIII; Landau 2004, 41). Konrad Beyerle considers it to be a well-sounding but colourless and unidentifiable name, while Peter Landau associates it with Magnus from Narbonne, a *praefectus praetorio* present around 460 AD at the court of Theuderich II, king of the Visigoths, a legal scholar praised by Sidonius Apollinaris in his *panegyricus* for his outstanding erudition. It cannot be ruled out, therefore, that the mention of the name Magnus is nothing more than a prototype of a legal advisor to Germanic rulers (Beyerle 1926, LXIV; Landau 2004, 41).

Taking all this in consideration, in agreement with Landau, we can conclude that the history of origin suggested by the *Prologus* as the source of Alemannic and Bavarian *lex*es is not entirely correct, nevertheless, it provides much information on the views, education and identity of the compilers of the law in the 8th century.

4. A POSSIBLE RESPONSE TO THE ISSUE OF DATING AND THE LEGISLATOR

As we have seen, there is relative consensus in the literature that the *Pactus Alamannorum* is Chlothar II's work. His identity seems to be supported by the fact that in September 626 AD or 627 AD, forty bishops, an abbot and a deacon (the latter as an emissary) were present at the Council of Clichy, and this number is similar in magnitude to the description found in the *Pactus* (Fastrich-Sutty 2001, 85). The list in the introductory sentence of the *Pactus* obviously refers to a Frankish imperial assembly. The named ruler is most likely Chlothar II (581–629/630 AD), as his position of power among the ones bearing that name allowed only him to hold this significant imperial assembly with such a high number of participants (Schmidt-Wiegand 2001, 201–205). This means that the time of creation of the *Pactus* was most likely between 613 AD and 623 AD. In addition to the introductory sentence, the provisions themselves make it clear that the *Pactus* was drafted specifically for Alemannia, as, for example, the text uses *Alemannus* and *Alemanna* as the names of victims in describing the different forms of battery. As such, the *Pactus* can be understood as both Frankish and Alemannic law, since the creator of the source of the law was a Frankish ruler, and its subjects were the Alemanni (Schott 2014b, 169).

Regarding the *Lex Alamannorum*, due to the manuscripts mentioning *Chlotharius rex*, the possibility has also been formulated in the literature that the law could be traced back to the provisions of Charles Martel, the *maior domus* wielding actual power during the reign of Chlothar IV. Nevertheless, the Alemannic tradition wanted to attribute its creation to Duke Lantfrid in order to legitimise Alemannic independence. There is, however, an opposite approach that focuses on a similar period in terms of dating, according to which the law actually owes its existence to Lantfrid's provisions, and the name of Chlothar IV, the last Merovingian ruler, was inserted into the text only to support Frankish claims to the throne, aiming to compensate the political power of the Carolingian *maior domus* (Schott 1974, 137). The wording referring to Chlothar is the result of subsequent contamination of the *Lex*, thus the version naming Duke Lantfrid as legislator is to be regarded as the original. According to this, Latfrid renewed and completed the text of the *Pactus* during his balanced relationship with the Frankish ruler, i.e. between 712 AD and 724 AD, and Chlothar's name was introduced for political reasons only after Lantfrid's failed rebellion against the *maior domus*, Charles Martel, striking Lantfrid with a form of *damnatio memoriae* (Schott 2014b, 168; Schwab 2017, 26). Nevertheless, it seems to be certain that the Frankish rewriting of the text was carried out before Lantfrid's death, i.e. between 730 AD and 743 AD, since by the time the *Lex Baiuvariorum* was finally drafted (743 AD at the latest), the text of the Alemannic law as we know it had to

be finalised, given the high degree of overlap in their system of *composition* (Schott 1993, 12–17; Fastrich-Sutty 2001, 83). The introduction mentioning the Alemannic duke, Lantfrid, can be considered an earlier version of the *Lex Alamannorum*, while the one mentioning Chlothar is most likely a later reformulation of the law, both clearly indicating the objective – the renewal of *Pactus Alamannorum* (Schott 2014b, 175). The *Lex Alamannorum* was most likely created at the initiative of Duke Lantfrid, sometime between 712 AD and 730 AD (Schott 1974, 135). The ecclesiastical influence originating from Reichenau does not necessarily suggest a monastic forgery behind the text in the law, as Schott assumes. In this respect, Baesecke's position that there may have been closer cooperation between the Reichenau monastery founded by Pirmin in 724 AD and the ducal emissaries, seems more convincing in this respect (Baesecke 1935, 28).

5. THE STRUCTURE AND THE REGULATORY SYSTEM OF THE *PACTUS* AND OF THE *LEX ALAMANNORUM*

In terms of content, the remarks by Byzantine historian Agathias Scholastikos (530–582 AD) can also refer to the period when the *Pactus Alamannorum* was created. In his description, the Alemanni lived according to the laws and customs inherited from their fathers (*nomima kai patria*), but from the point of view of public law (*politeia*) they were subject to Frankish rule. They are predominantly still pagans, but Christianity is spreading among them due to the Frankish influence (Schmidt-Wiegand 2003, 113–124). Agathias's work was written around 580 AD, but in terms of content it reflects the conditions in the mid-6th century. According to this, the Alemanni did have an independent legal system, but their state law was under Frankish influence (Schott 2014b, 170). Regarding its content, the *Pactus*, as indicated by the Latin language of its wording showing strong Frankish influences, is nothing more than a law containing a catalogue of penalties, issued to the Alemanni as a product of Frankish legislation, its primary function being to replace blood feud with the system of *compositio.* According to Schott, the issue of the appearance of *ex asse* Alemannic, i.e. more ancient elements, cannot be clarified in the *Pactus* (Schott 2014b, 167).

From the linguistic point of view, the *Pactus* does not contain Alemannic phrases, the terms of Germanic origin are mostly Latinised Frankish legal terms, such as *wirigildium* ('man money', 'bounty'), *mundum* ('guardianship'), *litus/leta* ('semi-free'), *minofledis* ('small wealth person'), *wegalaugen* ('highway robbery'), and *wadium* ('bond'). This fact suggests that the wording of the *Pactus* took place in a Frankish legal context (Schmidt-Wiegand 1978a, 9–37; Schott 2014b, 171).

The Frankish effect can also be clearly identified in the wording of the facts: the wording and the elements of fact patterns overlap with the *Lex Salica* as well as the *Lex Ribuaria* in more than one case, but they are by no means literal reproductions. For example, mill iron theft is expressed in the *Lex Salica* (22, 2) using the Vulgar Latin word *furare*, while the *Pactus Alamannorum* uses the word *involare.* The legislative phrase *mallobergo antedio* does not appear in the *Pactus*, and is replaced by the Frankish term *taxega*, meaning theft. As regards legal consequence, the *Pactus* orders the payment of a *duplum* and six *solidus*, while the *Lex Salica* includes a limited amount of compensation, forty-five *solidus.* Regarding ear damage, there are also substantial differences between the two Frankish laws and the Alemannic *Pactus*: the *Lex Salica* only mentions the provision regarding ear-cutting, while the *Lex Ribuaria* differentiates between its consequences (injuries resulting in total loss of hearing or not resulting in loss of hearing). The *Pactus* only includes provisions regarding one type of injury, but highlights the occurrence of loss of hearing as a factual element (*Lex Salica* 29, 14; *Lex Ribuaria* 5). In the case of injuries to the skull, the *Lex Salica* only takes the severity of the injury into consideration for sanctioning purposes, while the *Lex Ribuaria* also determines the method of proof (when thrown from twelve feet, the broken bone must make a sound while hitting a shield). The latter can also be found in the *Pactus* with a different wording (*Lex Salica* 17, 4. 5; *Lex Ribuaria* 71, 1). While the two Frankish laws show a fairly close relationship (although the regulations of the *Lex Ribuaria* are more detailed), the wording of the *Pactus* differs significantly from the two. It cannot be ruled out that the Alemannic text could be traced back not to a direct Frankish model, but to a common custom appearing frequently in Germanic common law, which is also contained in the *Edictus Rothari* (46) of 643 AD. It is worth mentioning that the *compositio* in the *Pactus* is lower than the ones found in Frankish laws, which is due on the one hand to the lower level of economic development of the area, and on the other, to the higher level of plasticity of the Alemannic social structure. However, the *Pactus* does not contain any facts or wordings showing *ex asse* independent Alemannic features that do not overlap or relate to Frankish regulations. This is also due to the gaps in the textual tradition (Schott 2014b, 174).

In terms of content, the *Lex Alamannorum* can be divided into three main parts: ecclesiastical affairs (1, 1–23), provisions regarding the duke (1, 24–44), and provisions/legal issues arising among the people (1, 44–3, 104). This division follows the regulatory order of the provincial councils of the era (Schott 1974, 141–143; Schwab 2017, 28). In terms of its structure, it bears a kinship with the *Lex Baiuvariorum* and thus with the *Leges Visigothorum.* At the same time, a double parallelism can be detected in the division (*causae ecclesiasticae – causae saeculares; causae ad principem pertinentes – causae*

ad populum pertinentes); the sharp distinction between the ecclesiastical and the secular is already reflected in the provisions and *capitualre* of the Frankish councils, and there are cases for the triple division features in the *Lex Alamannorum* in the 6th century, for example in the text of the 614 Council of Paris (this system is sometimes broken in the *Lex Alamannorum* which can be attributed to later *Articuli novellaris*).

The provisions regarding the church confer it a privileged position compared to other common laws. They guarantee unlimited donation possibilities to the donors: the *compositio/*blood money of ecclesiastics was set higher than that of free Alemanni, three times higher in the case of *presbyter parochianus* (1, 12) and one and a half times higher for the bishop's deacon and monks (1, 13), the bishop's being set at the same rate as that of the duke (1, 11). The blood money for the ecclesiastical *colonus* was identical to the free ones, although in principle their social status was lower than the latter (1, 8), which may have facilitated the decision in cases when a free man wanted to establish a relationship of dependence with the church (Schott 1974, 145). The abolition of a state of slavery could take place by emancipation, either *in ecclesia* or *per cartam.* The two forms of *manumissio* were included in 321 AD in Constantine the Great's decree, which was transferred to the *Volksrechte* from *Codex Theodosianus* (4, 7, 1) with the mediation of the *Lex Romana Burgundionum* (3, 1). The widespread use of ecclesiastical provisions over freedmen, as well as of the expansion of the *patrocinium*, is demonstrated by the fact that in the case of killing a freedman without an heir, the *compositio* was to be paid to the church (Schott 1974, 146).

The special protection of the church, as well as the provision by which the order of collective property is broken and the right to dispose of property in the case of death is created, i.e. that any free Alemanni could leave their property to the church unrestricted, and in this case neither the family, which otherwise had (exclusive) right of inheritance, nor the duke had a right to veto (1, 2), is unique to the *Volksrechte* (Schott 2014b, 176). The rule had severe consequences and resulted in the displeasure of the family/kinship, and these consequences can be seen also in the fact that those opposing the donation were subject to additional sanctions under contemporary canon law (Schott 1974, 143). The relevant section of the *Lex Baiuvariorum* (1, 1) contains a clearer provision, meaning that a *donatio* covering the entire property may be made to the church only after the obligatory part has been released. By placing the document (*charta*) on the altar, the church has irrefutable presumptive evidence in a possible lawsuit that may be initiated by the heirs, meaning that the heirs would not be in a position to prove their lack of intent to donate with an oath. If the document is destroyed, the burden of proof also falls on them in this case, i.e., their litigation position is

less favourable. In the event of theft, church property must be reimbursed at three times the standard *niungeldo* (i.e. nine times the value), which in Bavarian law applies only to church property (*Lex Alamannorum* 1, 6– *Lex Baiuvariorum* 1,3). The law also provides for a threefold *compositio* for the killing of church servants, who were considered part of church property (*Lex Alamannorum* 1, 7– *Lex Alamannorum* 1, 19). The *Lex* prohibits the sale of ecclesiastical property to members of the clergy, however, exchange is possible. This is in accordance with the provisions of the 7th century Frankish council, but the principle itself was already worded at the (Visigoth) Council of Agde in 506 AD, its origin going back to the Council of Carthage in 401 AD.

The institution of ecclesiastical asylum (*asylum*) appeared at the Council of Orléans in 511 AD (with reference to *Codex Theodosianus* 9, 45, 4) which was adopted in the 6th century *Pactus pro tenore pacis.* Accordingly, the *Lex Alamannorum* also protects ecclesiastical asylum: for the killing of a free man in a church, both the church and the *fiscus* had to be paid in addition to the usual *composition* (1, 4), and the slave who sought refuge in a church could be returned to the owner by the priest only if the lord promised that he would not punish the slave for his deed (1, 3).

The *Lex* also protects the duke, as the embodiment of statehood (the duchy itself appears as *regnum* in the text) with special sanctions and *composition* (1, 35). At the same time, the king is mentioned in the text of the law in several places: for example, in connection with the fact that the blood money of a murdered bishop belongs to the king or the duke (1, 11); in connection with theft in the royal army (1, 26), theft at the royal court (1, 30), the rebellion of the duke's son (1, 35); in connection with the fact that in cases of capital offences, prosecution had to be carried out in front of the king or the duke (1, 43). His 'presence', however, in the text is not very pregnant, the duke is described as the one exercising actual power (Schott 1974, 148). Interestingly, the punishment for killing the duke is not *expressis verbis* mentioned in the *Lex* (1, 11. 34). In the case of attempted murder, however, the duke (or the *principes populi*) could choose between the assassin paying with his life or only paying the *composition* (1, 23). The *Lex* also describes facts of treason punishable with death or exile, as well as instigation to violence in the ducal army (1, 24. 25. 26). The rebellion of the duke's son may refer to a specific but unknown historical event, as the duke, if he manages to put down the rebellion, can exile his son or hand him over to the king; the son loses his inheritance, unless he wins back the grace of the duke in the absence of siblings (1, 35).

Based on ancient common law (*secundum consuetudinem antiquam*), the *Lex* determines the jurisdiction of the *comes* in the name of the duke, as well as that of the *centenarius*, and emphasises that only the people appointed

by the duke are entitled to jurisprudence (1, 41). The legal service was presumably, as a general rule, performed by the *centenarius*, or by the *comes* or his delegate (*missus*) only if they were in the given area of jurisdiction (Schott 1974, 156). The law uses the term *iudex* several times (1, 22. 36. 29. 41. 42. 84), nevertheless, as the context suggests, it is not a *terminus technicus* meaning an independent legal body/person, but it denotes the current provider of legal services.

The impediments of marriage as well as the ban on work on Sunday are not regulated in the part on the church but rather in the part on the duke, as it is the ruler's task to enforce them, and thus it is no coincidence that they resulted in secular sanctions as early as in the case of Guntram's *decretum* of 585 AD and Childebert's *decretum* of 596 AD. Violation of the prohibition is an act against the state, possibly signalling an adherence to paganism (Schott 1974, 147). A servant violating the prohibition must be caned; if a freeman violates the prohibition, he must be warned three times, after which he loses a third of his inheritance, and finally he is enslaved, by order of the duke.

These provisions show a number of overlaps with the *Edictus Rothari* created in the mid-7th century (Schwab 2017, 29). Therefore, it cannot be ruled out that the compilers of the *Lex* used this resource or the joint Merovingian royal law discussed by Franz Beyerle (Schott 2014b, 177; Schott 1974, 149; Beyerle 1956, 122). Regarding the provisions on the church and the duke, it cannot be ruled out that these are in fact based on the provisions issued between 629 AD and 634 AD under Dagobert I, and this can be traced back to the *Codex Euricianus.*

In the third part (*De causis, qui saepe solent contingere in populo*), which refers to the common people and is the most extensive one, expanding the blood money catalogue of the *Pactus Alamannorum*, the *Lex* clearly leans towards the system of *compositio*, clearly trying to repel blood feuds (Schwab 2017, 29). In doing so, it reflects on the church's position that not only murder, but any form of bloodshed, such as the death penalty or blood feud, is not compatible with Christian teaching (Brunner 1928, 789). It should be noted, however, that blood feud as immediate reaction (for example, in cases when the armed relatives of a person murdered in a dispute pursue the perpetrator without delay and execute him) is considered legitimate by law. However, if blood feud is planned, meaning that they ask the neighbours for help and reinforcement, the *compositio* for this deed is identical to that for premeditated murder (Schott 1974, 149).

The *Lex Alamannorum* provides several pieces of information on the stratification of the Alemannic society. It divides the freemen (in the *Pactus*: *ingenui*, in the *Lex*: *liberi*) into nobles (*primi/meliorissimi*), the middle class

(*mediani*), and the inferior common people (*minofleti*), their *compositio* being two hundred and forty, two hundred, and one hundred and sixty *solidus* (Köbler 1978, 38; Schott 1974, 153).

The group of the semi-free (*litus*) and of the servants (*servi, ancillae*) is ranked below the nobles in the *Pactus*. In contrast, the *Lex Alamannorum* mentions only the noble freemen, belonging to the middle class (*medii Alamanni*), and the simple freemen (*liberi*). The blood money for women is in all cases twice as that for men, the semi-free are grouped into one by the law, while the *compositio* of the craftsmen and servants performing responsible work is a quarter of the *compositio* of freemen (Schott 1978, 51–72; Schwab 2017, 29).

The provisions concerning the common people most clearly show the nature of the Alemannic law, for example by the vernacular description of facts.

6. CONCLUSIONS

The following main conclusions can be drawn from the examination of the age and circumstances of the establishment of the two most important sources of Alemannic common law, the fragmentary *Pactus Alamannorum* and the *Lex Alamannorum*, which has an exceptionally rich manuscript tradition, and their relationship to each other. The *Pactus Alamannorum* is clearly the result of the ruling legislative politics of King Chlothar II of the Franks, and was approved at a Frankish imperial diet between 613 AD and 623 AD. As a piece of legislation, it can be understood as both Frankish and Alemannic law, since the creator of the source of the law was a Frankish ruler, and its subjects were the Alemanni. The *Lex Alamannorum* was most likely created at the initiative of Duke Lantfrid, sometime between 712 AD and 730 AD. The fact that the *Prologus* of most manuscripts mentions Chlothar as the legislator is most likely the result of later contamination. Chlothar IV's name was inserted in the text only for political reasons and following Duke Lantfrid's unsuccessful rebellion against Charles Martel. Thus, the introduction mentioning the Alemannic duke, Lantfrid, can be considered an earlier version of the *Lex Alamannorum*, while the one mentioning Chlothar is mostly likely a later reformulation of the law, both clearly showing the objective – the renewal of the *Pactus Alamannorum.* The creation of the *Lex* shows a strong ecclesiastical influence, namely the spiritual influence of the Monastery of Reichenau, which also explains the church's privileges, which are protected by the law and are unique to the *Volksrechte*. The *Pactus Alamannorum* is nothing more than a catalogue of fines, whereas the clear

structure of the *Lex Alamannorum* (ecclesiastical matters, facts concerning the duke, legal issues among the people) shows the influence of the Frankish *capitularia* and represents a uniquely valuable source in terms of both the judiciary system and the contemporary structure of Alemannic society.

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УНУТРАШЊА И СПОЉНОПОЛИТИЧКА ТЕРМИНОЛОГИЈА АНТИЧКОГ РИМА – ДВЕ СТРАНЕ ИСТЕ МЕДАЉЕ

У раду су упоређивани савети које је Квинт давао своме брату Марку Цицерону о томе како треба да води предизборну кампању, са упутствима које је Улпијан давао управницима провинција о томе како треба да се опходе према провинцијалцима. Идентификовани су исти или слични термини.

Може се рећи да су се кандидати на изборима служили сличним методама манипулације у кампањи каквим се служила римска политика и у провицијама. На крају крајева, то су само две стране исте медаље.

Кључне речи: *Familiaritas. – Amicitia. – Libertas. – Spes. – Континуитет.*

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1. ШИРИ И УЖИ КОНТЕКСТ

Насупрот војном, групном идентитету, идентитету војног колектива (о групном идентитетувидети Фукујама 2007, 77), у провинцијама, међу покореним становништвом, Римљани су фаворизовали идентитети интересе појединца.

Управник провинције, осим политичке каријере, има и војну. У провинцији има и војну и цивилну команду. Политика римских федерата и осталих политичких ентитета у Римском царству могла је да постоји само у таквом римском империјалном миљеу. Њихова и слобода појединаца могла је да постоји само у римском схватању слободе (видети Vujović 2018, 178). Зато је требало разбити ширу слику, шири контекст и ставити пред очи провинцијалаца самог појединца и његове захтеве. То је циљ који се може видети из упутстава које је Улпијан давао управницима провинција. Реч је о упутствима, садржаним у Дигестама, о томе како да током обављања своје функције поступају са провинцијалцима (видети Vujović 2018, 178–185).

С друге стране, када Квинт Цицерон саветује свога брата Марка Цицерона како да манипулише на изборима, он га такође, у суштини, саветује да ствари истрже из ширег контекста. Он то чини у писму (*Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem*) које је упутио брату који ће постати много чувенији од њега.[1] У писму су садржани савети како да води изборну кампању. То су савети које је Цицерон несумњиво примењивао у току целе своје политичке каријере. Такви назори се могу видети и у бројним говорима које је одржао, а чије су речи допрле до нас. Зато се чини оправданим да савети које Квинт даје, као прави пример начина вођења римске унутрашње политичке пропаганде, послуже за одговарајуће терминолошко поређење са поменутим Улпијановим упутствима.

2. ПРИВИД УМЕСТО СТВАРНОСТИ

Пријатељство и континуитет су појмови на којима је инсистирано у империјалном језику римског права (видети Vujović 2018, 180–182).

[1] Треба поменути да је у скорије време то Квинтово писмо издато у: Ciceron 2018.

Када Улпијан саветује управнике провинција како да одржавају континуитет, он их у ствари поучава да истржу ствари из контекста. Битнији је привид континуитета од стварног континуитета. Стварни континуитет би био када би провинцијалци имали своје стварно независне државе, а не оне које су део римског империјалног мозаика. Овде се то питање занемарује, потискује се истицањем у први план онога што је видљиво, а то је, на пример, где ће и како управник ући у провинцију.

Тако Улпијан даје упутства да је исправно и да је ред да (нови управник) своме претходнику пошаље едикт у коме ће назначити ког дана треба да пређе границе (провинције) будући да провинцијалце узнемирава било која неизвесност и неочекиваност и то омета њихове послове.

Recte autem et ordine faciet, si edictum decessori suo miserit significetque, qua die fines sit ingressurus: plerumque enim ***incerta haec et inopinata turbant provinciales*** *et actus impediunt* (D. 1. 16. 4. 4.).

Улпијан понавља да се мора водити рачуна о устаљеним очекивањима становника провинција,[2] чак и када је у питању место на које се улази у једну провинцију и место које се прво посећује. Тако је приликом уласка у провинцију Азију проконзул морао да дође морем и прво уђе у метрополу Ефес.

Ingressum etiam hoc eum observare oportet, ut per eam partem provinciam ingrediatur, per quam ingredi moris est, et quas Graeci epidymias *appellant sive* kataploun *observare, in quam primum civitatem veniat vel applicet: magni enim facient provinciales servari sibi consuetudinem istam et huiusmodi praerogativas. Quaedam provinciae etiam hoc habent, ut per mare in eam provinciam proconsul veniat, ut Asia, scilicet usque adeo, ut imperator noster Antoninus Augustus ad desideria asianorum rescripsit proconsuli necessitatem impositam* ***per mare Asiam applicare*** **kai twn mytropolewn Efeson** ***primam attingere*** (D. 1. 16. 4. 5.).

То су све симболични акти са јасном политичком поруком.Та порука не угрожава римску доминацију ни интересе јер ти акти не производе суштинске политичке и друштвене последице. Тиме се указује поштовање најминималнијим политичким обзирима и обичајима које захтевају аутохтона, неримска политичка елита и становништво

[2] Рим је директно утицао на живот у провинцији, али су понекад и неки провинцијски обичаји из области приватног права посредно умели да утичу на неке аспекте приватног права самог Рима. Видети, на пример, Катанчевић 2013.

провинције. То је и порука континуитета у односима између Рима и њих, за коју су преплашени провинцијалци заинтересовани. Сем таквог једног континуитета, као некакве сламке спаса, они и немају много преосталог политичког достојанства. Такав континуитет пружа неку, какву-такву сигурност на којој се могу градити односи. Становници Ефеса не доводе у питање политичко и правно вођство Рима ни његово војно присутуво.

Тај површни континуитет добија на значају, а провинцијалци из страха прихватају такав мозаик. Ужи контекст се, као лепо упакована лаж, прихвата како би се лакше живело са страхом. Како би се оправдао један такав живот.

Основа тог тргања ствари из контекста налази се у крајње себичном циљу да се што је могуће више остваре искључиво сопствени интереси. То су интереси Империје у провинцијама или, с друге стране, интереси кандидата на изборима. Компромис настаје само када је препреку тој себичној тежњи немогуће прећи. Свему томе служи и одговарајућа терминологија.

3. ТЕРМИНОЛОГИЈА

У писму које је Квинт Цицерон послао своме брату Марку Цицерону, који се кандидовао за конзула, даје му практична упутства за вођење предизборне капамање у доба римске Републике. С друге стране, постоје упутства која је Уплијан (у доба Империје) давао управницима провинција. Мада су те две појаве и ти извори временски раздвојени више од два века, ипак је реч о сличним терминима иза којих, по природи ствари, стоје слични разлози. То су заправо два лица истог новчића.

Римске институције су у провинцијама биле нешто ново, па су правила изграђивана постепено. Полазило се од онога што је познато из унутрашњег искуства, од постојећих институција, па им је продужен облик. Тако је конзул ван Рима,у провинцији, постао проконзул, а претор је постао пропретор (Vujović 2018, 176–177). Тако и данас, САД као суперсила пројектује глобалну моћ тако да она осликава њено унутрашње искуство (Bžežinski 2001). Слично је и у односу власти према становницима провинција пројектовано унутрашње друштвено-политичко искуство Рима.

3.1. Термини који означавају механизме власти

Управник провинције је требало да има сталан и непосредан уплив у све аспекте јавног и приватног живота провинцијалаца. Како другачије протумачити следеће параграфе:

Nec quicquam est in provincia, quod non per ipsum expediatur. Sane si fiscalis pecuniaria causa sit, quae ad procuratorem principis respicit, melius fecerit, si abstineat (D. 1. 16. 9. pr.).

Превод: Нема било чега у провинцији што преко њега (проконзула и управника уопште) не треба да буде решено. Изузев ако се ради о пореском новцу, што је додељено императоровом прокуратору, па треба да се уздржи.

Ubi decretum necessarium est, ***per libellum id expedire proconsul non poterit****: omnia enim, quaecumque causae cognitionem desiderant,* ***per libellum non possunt expediri*** (D. 1. 16. 9. 1).

Превод: Тамо где је декрет неопходан, проконзул не може разрешити случај преко писма (*libellus*). Све у свему, уколико се жели да се у такав случај оствари увид, то путем писма није могуће учинити.

Како би се омогућио увид у право стање ствари и како самим тим управник не би изгубио контролу над спорним случајем, Улпијан је захтевао да управник води рачуна о томе да свако добије адекватног заступника на суду јер није добро да се сви плаше да заступају некога (*ut omnes metuant adversus eum advocationem suscipere*). Адвокати су обично одређивани немоћним особама (нејач), женама, пупилама, неразумнима (*feminis vel pupillis vel alias debilibus vel his, qui suae mentis non sunt*).

Advocatos quoque petentibus debebit indulgere plerumque: feminis vel pupillis vel alias debilibus vel his, qui suae mentis non sunt, si quis eis petat: vel si nemo sit qui petat, ultro eis dare debebit. Sed si qui per potentiam adversarii non invenire se advocatum dicat, aeque oportebit ei advocatum dare. Ceterum oprimi aliquem per adversarii sui potentiam non oportet: hoc enim etiam ad invidiam eius qui provinciae praeest spectat, si quis tam impotenter se gerat, ut omnes ***metuant*** *adversus eum advocationem suscipere* (D. 1. 16. 9. 5).

Овде је употребљен појам страх (*metus*). Дакле, у провинцији страх може да заводи само Рим посредством управника и осталих својих органа.

Власт, иако се труди да јавно носи плашт права, пре свега има фактичку енергију и фактичке ефекте. Она се првенствено огледа у вршењу низа фактичких аката. Зато је, зна то Улпијан врло добро, било

врло битно имати потпун увид у сваки могући фактички однос. Власт се константно бави контролом многих конкретних односа (колико год се неупућенима они чинили ситним) и то и омогућава генералну контролу над провинцијом. Конторле нема без страха (*metus*).

Улпијан инсистира да проконзул треба да буде стрпљив (*patiens*) са адвокатима. Треба да поступа пажљиво, да не изгледа да то ради незаинтересовано (*contemptibilis*), да не показује небригу (*dissimulare*), да дозвољава парнице само у случајевима који су предвиђени едиктом.

Circa advocatos ***patientem*** *esse proconsulem oportet, sed cum ingenio, ne* ***contemptibilis*** *videatur, nec adeo* ***dissimulare****, si quos causarum concinnatores vel redemptores deprehendat, eosque solos pati postulare, quibus per edictum eius postulare permittitur* (D. 1. 16. 9. 2).

Улпијан упућује да власт проконзула треба да се протегне и ван онога што пружа сама форма судског поступка, да треба да пређе и у приватне, породичне односе провинцијалаца.

Тако каже да постоје ствари које проконзул може решавати и ван судског поступка: да нареди да се покаже послушност родитељима и патронима и деци патрона; да запрети и да застраши сина кога је отац одао да се не понаша како доликује; слично, и ослобођеника може да кажњава шибањем или батином.

De plano autem proconsul potest expedire haec: ut obsequium parentibus et patronis liberisque patronum exhiberi iubeat: comminari etiam et terrere filium a patre oblatum, qui non ut oportet conversari dicatur, poterit de plano: similiter et libertum non obsequentem emendare aut verbis aut fustium castigatione (D. 1. 16. 9. 3).

Проконзул је требало да се стара о томе да саслуша све захтеве, свих слојева друштва:

Observare itaque eum oportet, ***ut sit ordo aliquis postulationum****,* ***scilicet ut omnium desideria audiantur****, ne forte dum honori postulantium datur vel improbitati ceditur, mediocres desideria sua non proferant, qui aut omnino non adhibuerunt, aut minus frequentes neque in aliqua dignitate positos advocatos sibi prospexerunt* (D. 1. 16. 9. 4)

Римска власт је све то радила како би имала што шире упориште у провинцијама. Пошто се власт врши путем бројних правних и фактичких аката, она не треба да буде лења него треба да се труди да буде свеприсутна. Да буде присутна у сваком могућем тренутку, правном или фактичком, и у сваком могућем друштвеном односу и проблему. Власт треба да буде интензивна, не само екстензивна.У том смислу она има више посла на терену факата, него на терену правних норми. Логично

је да управник треба да прима припаднике свих друштвених слојева и да има стрпљења да саслуша све њихове проблеме и захтеве јер се само тако може обезбедити приступ свим битним информацијама. Само на тај начин је могуће формирати праву слику о проблемима и животу становништва.

Наша историја нуди добар пример колико је битно имати информације из што разуђенијих извора. Наиме, Османско царство је изгубло контролу над Србијом великим делом и због тога што се у значајној мери ослањало на Милоша Обреновића. Зато је Русија увек инсистирала да вршилац владалачке власти поред себе има и војводе, које је окупљала у форми некаквог саветодавног органа власти.

Слично као Улпијан, Квинт саветује Марка да кућа треба да му буде пуна чак и ноћу (*domus ut multa nocte compleatur*), да буде фреквенције људи свих врста (*omnium generum frequentia adsit*). Посебно саветује да око себе треба често да има гомилу младих људи (*adulescentulorum frequentia*).

Sequitur enim, ut de rumore dicendum sit, cui maxime serviendum est. Sed quae dicta sunt omni superiore oratione, eadem ad rumorem concelebrandum valent, dicendi laus, studia publicanorum et equestris ordinis, hominum nobilium voluntas, ***adolescentulorum frequentia****, eorum qui abs te defensi sunt adsiduitas, ex municipiis multitudo eorum quos tua causa venisse appareat, bene te ut homines nosse, comiter appellare, adsidue ac diligenter petere, benignum ac liberalem esse loquantur et existiment,* ***domus ut multa nocte compleatur****,* ***omnium generum frequentia adsit****, satisfiat oratione omnibus, re operaque multis, perficiatur id, quod fieri potest labore et arte ac diligentia, non ut ad populum ab his omnibus fama perveniat sed ut in iis studiis populus ipse versetur* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem,XIII, 50).

Млади људи су они који, по природи ствари, најлакше поверују у пропаганду. Они због тога могу да буду и најоданији. Врло су корисни у прикупљању и достављању информација. Врло су корисни и у ширењу пропаганде, из чистог уверења. Осим тога, за кандидата је ефектније да буде окружен младима јер тиме шаље поруку да са њим има будућности.

Млади су утицајни јер попуњавају коњичке центурије (*equitum centuriae*), подсећа Квинт. Доба младости је много приљежније у пријатељству (*multo enim facilius illa adulescentulorum ad amicitiam aetas adiungitur*). Велика је њихова приљежност у гласању, када је реч о њиховој послушности, када је у питању ширење гласина, следбеништво (*Nam studia adulescentulorum in suffragando, in obeundo, in nuntiando, in adsectando mirifice et magna et honesta sunt*).

Nam equitum centuriae multo facilius mihi diligentia posse teneri videntur. Primum cognosci equites; pauci enim sunt; deinde appeti; multo enim facilius illa adolescentulorum ad ***amicitiam*** *aetas adiungitur,deinde habes tecum ex iuventute optimum quemque et studiosissimum humanitatis; tum autem, quod equester ordo tuus est, sequentur illi auctoritatem ordinis, si abs te adhibebitur ea diligentia ut non ordinis solum voluntate sed etiam singulorum amicitiis eas centurias confirmatas habeas. Nam studia adulescentulorum in suffragando, in obeundo, in nuntiando, in assectando mirifice et magna et honesta sunt* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VIII, 33).

У току кампање треба максимално гледати да постоји нада у добробит јавне ствари (Републике). Овде се појављује реч *spes*, *spei* (нада).

Atque etiam in hac petitione maxime videndum est ut ***spes rei publicae*** *bona de te sit et honesta opinio; nec tamen in petendo res publica capessenda est neque in senatu neque in contione. Sed haec tibi sunt retinenda: ut senatus te existimet ex eo quod ita vixeris defensorem auctoritatis suae fore, equites Romani et viri boni ac locupletes ex vita acta te studiosum oti ac rerum tranquillarum, multitudo ex eo quod dumtaxat oratione in contionibus ac iudicio popularis fuisti te a suis commodis non alienum futurum* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, XIII, 53).

Нада је преко потребна за механизам власти. Људима се влада управо помоћу наде. Нарочито масом. Уколико онај којим се влада нема наде у побољшање свог положаја, онда, најблаже речено, почиње да показује равнодушност према ономе ко му је не нуди. Отићи ће тамо где има наде. Осим тога, нада је појам који је, руку под руку са младошћу, најснажније везан за будућност.

Они који следе некога због наде још су пажљивији и послушнији, наглашава Квинт (*quod genus hominum multo etiam est diligentius atque officiosius*).

Qui autem ***spe*** *tenentur, quod genus hominum multo etiam est diligentius atque officiosius, iis fac ut propositum ac paratum auxilium tuum esse videatur, denique ut spectatorem te suorum officiorum esse intellegant diligentem, ut videre te plane atque animadvertere quantum a quoque proficiscatur, appareat* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VI, 22).

Тако, уколико управник провинције не покаже разумевања за потребе различитих слојева становништва, ризикује да они изгубе наду и да се побуне. Јер, ако покорени не осећају да има наде, они су спремни на радикалне методе деловања.

Дакле, долазимо до још једног кључног појма манипулације, нада (*spes*, *spei*) у добробит јавне ствари (Републике).

3.1.1. Spes (нада) et terror (страх)

Рим је, иначе, у свом унутрашњем животу, од самог свог оснивања, имао искуства са владањем различитим етничким скупинама. Тако Квинт подсећа Цицирона да треба стално да има на уму да је Рим град састављен од скупа народа (*Roma est, civitas ex nationum conventu constituta*). Каже да је потребно много планирања и вештине (*Video esse magni consilii atque artis*) да би се један човек прилагодио таквој разноврсности обичаја, говора и жеља (*esse unum hominem accommodatum ad tantam morum ac sermonum ac voluntatum varietatem*).

Haec veniebant mihi in mentem de duabus illis commentationibus matutinis, quod tibi cottidie ad forum descendenti meditandum esse dixeram: „Novus sum; consulatum peto". Tertium restat: „Roma est", civitas ex nationum conventu constituta, in qua multae insidiae, multa fallacia, multa in omni genere vitia versantur, multorum arrogantia, multorum contumacia,multorum malevolentia, multorum superbia, multorum odium ac molestia perferenda est. Video esse magni consilii atque artis in tot hominum cuiusque modi vitiis tantisque versantem vitare offensionem, vitare fabulam, vitare insidias, ***esse unum hominem accommodatum ad tantam morum ac sermonum ac voluntatum varietatem*** (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, XIV, 54).

У том смислу, Рим је упознао кризни менаџмент који је онда пренео на провинције и прилагођавао га је у ходу. Слично унутрашње искуство имају и за владање светом користе и данашње Сједињене Америчке Државе.

Та прилагођавања су могућа једино уз помоћ бројних фактичких и правних одлука које доносе магистрати на лицу места и низа поступака. Слично су радили у самом Риму, па су због тога претори у правосуђу имали велика овлашћења и оригинална решења, дотле да је, како се то популарно каже, *actio* стварала *obligatio*.

Основа власти је страх (*terror*, *terroris*), осим поменуте наде. Страхом се лакше добија оно чему се тежи (*sed ut hoc* ***terrore*** *facilius hoc ipsum quod agis consequare*), каже Квинт.

Atque haec ita volo te illis proponere ut videare accusationem iam meditari, sed ut hoc ***terrore*** *facilius hoc ipsum quod agis consequare. Et plane sic contende omnibus nervis ac facultatibus ut adipiscamur quod petimus. Video nulla esse comitia tam inquinata largitione quibus non gratis aliquae centuriae renuntient suos magno opere necessarios* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, XIV, 56).

Квинт употребљава термин *terror*, *terroris*, који означава страх, као што Улпијан од управника захтева да води рачуна о томе да провинцијлцима нико сем њега не сме заводити *metus*, страх.

Страх и нада, руку под руку.

3.2. Две стране исте медаље

Оправдано се може претпоставити да су се тим предизборним речником у свом односу према бирачима политичари служили и након одржаних избора, у редовној комуникацији са грађанима. То је био уобичајен језик њихове професије, а и римски политичари су били константно у кампањи за неку од магистратура.

Овде су издвојени они термини који наглашавају природу односа између кандидата за магистратуре и њиховог бирачког тела (и оног које им је одано и потенцијалног бирачког тела ка којем су усмерена очекивања кандидата).

Тако наилазимо на термин *gratiam* (захвалност). Тај појам је део природе политичког мандата и очекивања која имају кандидати у односу на бираче и, обрнуто, бирачи у односу на кандидате.

Praeterea magnam affert laudem et summam dignitatem, si ii tecum erunt qui a te defensi et qui per te servati ac iudiciis liberati sunt; haec tu plane ab his postulato ut, quoniam nulla impensa per te alii rem, alii honestatem, alii salutem ac fortunas omnis obtinuerint, nec aliud ullum tempus futurum sit, ubi tibi referre ***gratiam*** *possint, hoc te officio remunerentur* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, IX, 38).

Превод: Штавише, много доприноси добром гласу и највишем достојанству ако ће са тобом бити они које си бранио и које си спасао и пред судом ослободио. Ти јасно захтевај од њих, будући да су без икакве штете једни стекли ствари, други част, други здравље и богатство, да неће бити будуће прилике у којој би могли да ти узврате захвалност (*gratiam*).

Затим се јавља термин *certis* (извесност):

Iam deductorum officium quo maius est quam salutatorum, hoc gratius tibi esse significato atque ostendito, et, quod eius fieri poterit, ***certis*** *temporibus descendito; magnam affert opinionem, magnam dignitatem cottidiana in deducendo frequentia* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, IX, 36).

Трајност (*perpetuam*) и пријатељство (*amicitiam*):

Ego autem tibi hoc confirmo, esse neminem, nisi aliqua necessitudine competitorum alicui tuorum sit adiunctus, a quo non facile si contenderis impetrare possis ut suo beneficio promereatur se ut ames et sibi ut debeas, modo ut intellegat te magni se aestimare, ex animo agere, bene se ponere, fore ex eo non brevem et suffragatoriam sed firmam et ***perpetuamamicitiam*** (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VII, 26).

Од управника повинције је, с друге стране, захтевано да буде у пријатељству (*familiaritas*) са провинцијалцима (Vujović 2018, 180–181). Квинт употребљава синоним (*amicitia*), али ојачан атрибутом трајности (*perpetuus*). Тај захтев за *трајним пријатељством* аналоган је захтеву за истицањем пријатељстава (*familiaritas*) између управника провинције и провинцијалаца. Управник је, нема препреке претпоставци, пријатељима требало да ослобађава и становнике провинција. Вероватно је у обичај ушло и обрнуто. Треба приметити да је он ипак надређен провинцијалцима, тако да пријатељима у ствари назива оне који су му подређени.

Из цитираног дела Квинтовог писма у којем се појављује фраза *perpetuam amicitiam* видљиво је да се она тиче оних којима је потребна Цицеронова наклоност након добијених избора. Каже се да су то лица која се труде да заслуже његову наклоност услугама које му чине (*ut suo beneficio promereatur se ut ames et sibi ut debeas*). Да они управо због тога треба да разумеју да их кандидат за магистрата много цени (*modo ut intellegat te magni se aestimare*). Да су се добро понели (*bene se ponere*) и да из тога неће настати неко пролазно изборно пријатељство него управо трајно пријатељство (*fore ex eo non brevem et suffragatoriam sed firmam et perpetuam amicitiam*). Дакле, из свега тога се види да се Цицерон налази у политички јачем положају од оних који се помињу у овом делу писма. Вероватно је зато и употребљен израз који указује на пријатељство, као и у случају односа управника провинције и њених становника.

Данас се у односима између државника моћнијих и мање моћних земаља користи термин *пријатељи*, а у односима између равноправних *партнери*.

Када у нешто улажу, људи воле да улажу у чврсте и трајне односе. Зато је, уз све што је наведено, Цицеронов захтев за трајним пријатељством комплементаран са захтевом који Улпијан поставља управницима да воде рачуна о постојећим обичајима у провинцији и континуитету у том смислу.

Квинт саветује да се проналазе људи из свих региона (*ex omni regione*). Желеће да ти буду пријатељи ако виде да и ти очекујеш њихово пријатељство (*Volent te **amicum**, si suam a te **amicitiam** expeti videbunt*)

*Perquiras et investiges homines ex omni regione, eos cognoscas, appetas, confirmes, cures ut in suis vicinitatibus tibi petant et tua causa quasi candidati sint. Volent te **amicum**, si tuam a te **amicitiam** expeti videbunt; id ut intellegant, oratione ea quae ad eam rationem pertinet habenda consequere. Homines municipales ac rusticani, si nomine nobis noti sunt, **in amicitia** esse se arbitrantur, si vero etiam praesidi se aliquid sibi constituere putant, non amittunt occasionem promerendi. Hos ceteri et maxime tui competitores ne norunt quidem, tu et nosti et facile cognosces, sine quo amicitia esse non potest* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VIII, 31).

Треба што више раширити базу своје подршке и у колективним органима власти. Треба настојати да се све центурије придобију бројним и разноврсним пријатељствима (*multis et variis **amicitiis***).

*Quam ob rem omnes centurias multis et variis **amicitiis** cura ut confirmatas habeas. Et primum, id quod ante oculos est, senatores equitesque Romanos, ceterorum ordinum omnium navos homines et gratiosos complectere. Multi homines urbani industrii, multi libertini in foro gratiosi navique versantur; quos per te, quos per communes amicos poteris, summa cura ut cupidi tui sint elaborato, appetito, adlegato, summo beneficio te affici ostendito* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VIII, 29).

Пријатељства се граде пажљиво, *diligenter*.

*Et quamquam partis ac fundatis **amicitiis** fretum ac munitum esse oportet, tamen in ipsa petitione amicitiae permultae ac perutiles comparantur; nam in ceteris molestiis habet hoc tamen petitio commodi: potes honeste, quod in cetera vita non queas, quoscumque velis adiungere ad **amicitiam**, quibuscum si alio tempore agas ut te utantur, absurde facere videare, in petitione autem nisi id agas et cum multis et **diligenter**, nullus petitor esse videare* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VII, 25).

Превод: Премда се треба ослонити на добро утемељена пријатељства која треба учвршћивати, ипак се и у самој капмањи стичу многа и корисна пријатељства. Јер, и поред свих невоља, кампања има и предности: можеш часно, што у редовним животним околностима не би могао, да постанеш пријатељ са било киме. Чак и са онима с којима би у неко друго време изгледало апсурдно то чинити. У току изборне кампање, ако то не би радио са многима и пажљиво, не би ни изгледао као кандидат.

Термин *diligenter* (пажљиво) аналоган је термину *patiens* (стрпљив) који, видели смо, Улпијан користи када каже да управник провинције тако треба да поступа према адвокатима у обављању њиховог посла. Заступање које врше адвокати врло је битан, редован и често једини механизам којим захтеви провинцијалаца могу да дођу пред управника. Јер, обични људи пред њега не могу да износе захтеве ако нису узели адвокате одговарајућег достојанства (*neque in aliqua dignitate positos advocatos sibi prospexerunt*), каже Улпијан.

Observare itaque eum oportet, ut sit ordo aliquis postulationum, scilicet ut omnium desideria audiantur, ne forte dum honori postulantium datur vel improbitati ceditur, mediocres desideria sua non proferant, qui aut omnino non adhibuerunt, aut minus frequentes neque in aliqua dignitate positos advocatos sibi prospexerunt (D. 1. 16. 9. 4).

Без адекватних адвоката захтеви обичних људи (који увек чине већину становништва) фактички не би ни дошли на ред зато што је управник, по природи ствари, био претрпан послом. Зато овај параграф има круцијални значај за нашу тему. Потреба за пажљивим и стрпљивим радом иначе се провлачи кроз сва Улпијанова упутства иако се понегде сами ти термини и не користе.

Понављамо, могли смо видети да је слично саветовано и управницима провинција да им врата увек буду отворена за сваковрсне контакте са провинцијалцима и за њихове сваковрсне захтеве. Још једна врло битна ствар је иста у оба случаја. Ти контакти морају бити *непосредни*.

3.2.1. Пријатељство, услуге, помоћ и слобода

Пријатељство је повезано са пажљивим поступањем, али и са услугама и помоћи (*auxilium*):

*Qui autem spe tenentur, quod genus hominum multo etiam est **diligentius** atque officiosius, iis fac ut propositum ac paratum **auxilium** tuum esse videatur, denique ut spectatorem te suorum officiorum esse **intellegant diligentem**, ut videre te plane atque animadvertere quantum a quoque proficiscatur appareat* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VI, 22).

Битно је да се бирачима ставља до знања да се пажљиво води рачуна (*intelligant diligentem*) о томе како се ко поставио током кампање. Управо специфичност изборне кампање и специфичност односа између бирача и кандидата налаже употребу оваквог израза.

У сваком случају, и управник провинције је био дужан да има стрпљења за све захтеве провинцијалаца и да буде пажљив у њиховом разматрању.

Бирачима треба ставити до знања да знаш шта од кога очекујеш (*intellegant te videre quid a quoque exspectes*) и да памтиш оно што си од њих добио (*meminisse quid acceperis*).

Sunt enim quidam homines in suis vicinitatibus et municipiis gratiosi, sunt ***diligentes*** *et copiosi, qui etiam si antea non studuerunt huic gratiae, tamen ex tempore elaborare eius causa cui debent aut volunt facile possunt; his hominum generibus sic inserviendum est ut ipsi* ***intellegant te viderequid a quoque exspectes****, sentire quid accipias,* ***meminisse quid acceperis****. Sunt autem alii qui aut nihil possunt aut etiam odio sunt tribulibus suis nec habent tantum animi ac facultatis ut enitantur ex tempore; hos ut internoscas videto, ne spe in aliquo maiore posita praesidi parum comparetur* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VI, 24).

Квинт истиче како три ствари чине да људи покажу максималну посвећеност на изборима. Реч је о услугама, нади и удружењу душе и воље (*beneficio, spe, adiunctione animi ac voluntate*).

Sed quoniam tribus rebus homines maxime ad benevolentiam atque haec suffragandi studia ducuntur, ***beneficio, spe, adiunctione animi ac voluntate****, animadvertendum est quem ad modum cuique horum generi sit inserviendum. Minimis beneficiis hominess adducuntur ut satis causae putent esse ad studium suffragationis, nedum ii quibus saluti fuisti, quos tu habes plurimos, non intellegant, si hoc tuo tempore tibi non satis fecerint, se probatos nemini umquam fore; quod cum ita sit, tamen rogandi sunt atque etiam in hanc opinionem adducendi ut, qui adhuc nobis obligati fuerint, iis vicissim nos obligari posse videamur* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, VI, 21).

Пријатељство захтева поверење. Оно је засновано на искрености, а супротан појам је неискрен (*simulator*) пријатељ. Поверење је основ сваког подухвата, а посебно изборне победе.

Et quoniam in ***amicorum*** *studiis haec omnis oratio versatur, qui locus in hoc genere cavendus sit praetermittendum non videtur. Fraudis atque insidiarum et perfidiae plena sunt omnia. Non est huius temporis perpetua illa de hoc genere disputatio, quibus rebus benevolus et* ***simulator*** *diiudicari possint; tantum est huius temporis admonere. Summa tua virtus eosdem homines et simulare tibi se esse amicos et invidere coegit. Quam ob rem Epicharmeion illud teneto, nervos atque artus esse sapientiae non temere credere, et, cum tuorum*

amicorum studia constitueris, tum etiam obtrectatorum atque adversariorum rationes et genera cognoscito (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, X, 39).

Слично, Прокул каже да је слободан народ онај који се није подредио власти било каквог другог народа: као што је федерат, који је или једнак федерат у пријатељству (***amicitiam***) или се подразумева да је неко као федерат, тако да један другом здушно чувају углед и достојанство (*maiestatem*). Ако је очигледно да је један народ супериорнији, то не треба разумети тако да други није слободан. Као што се разуме да су наши клијенти слободни, иако нам не претпостављају ни власт, ни достојанство, нити су нам вође. Исто тако, разуме се, слободни су и они који су дужни да наше достојанство (*maiestatem*) пажљиво чувају.

Liber autem populus est is, qui nullius alterius populi potestati est subiectus: sive is foederatus est item, sive aequo foedere in ***amicitiam*** *venit sive foedere comprehensum est, ut is populus alterius populi maiestatem comiter conservaret. Hoc enim adicitur, ut intellegatur alterum populum superiorem esse, non ut intellegatur alterum non esse liberum: et quemadmodum clientes nostros intellegimus liberos esse, etiamsi neque auctoritate neque dignitate neque viri boni nobis praesunt, sic eos, qui maiestatem nostram comiter conservare debent, liberos esse intellegendum est* (D. 49. 15. 7. 1).

У том дакле пасусу који се прирписује правнику Прокулу појављује се појам пријатељство (*amicitia*).

Значи, роб нам, по природи ствари, не може чувати достојанство. Ту дужност може имати само формално једнак, формално слободан човек, клијент. Зато управо та дужност формално слободног народа који је подређен Риму тај народ чини слободним. Јер је узајамне природе. Мора се признати да је та манипулација колико вешта исто толико и лицемерна.

Усваком случају, слобода римских савезника (федерата) не постоји ван контекста верности римској политичкој породици (Vujović 2018, 178). Слично као што су клијенти незаобилазан део политичке моћи активних учесника римског политичког живота, посебно сенатора. Што више клијената, то више бирача, више економске моћи и више друштвеног утицаја (видети Вујовић 2017).

У тим односима са другим народима термини пријатељство (*amicitia*) и слобода (*libertas*) нераздвојни су. Подразумевају један други. Један без другог не могу.

Квинт, с друге стране, саветује и да се обилазе макар и најнезнатнији појединци међу бирачима. Да им се указује пажња памћењем имена. То је врло слично Улпијановом савету управнику провинције да прима све становнике без разлике у њиховом имовном стању и утицају.

3.2.2. Пријатељство и нада

Иако је Цицерон себе представљао као оптимата, што би се данас рекло конзервативца и десничара, он је ипак током кампање поступао и као популар. Требало је обезбедити подршку што ширег круга људи. Зато је кампању прилагођавао и једнима и другима. Требало је причати оно што различите групе воле да чују.

На тој линији је и савет да чак и онима чије је интересе оштетио залажући се за своје актуелне пријатеље треба да понуди пријатељство (*amicitia*). Том приликом треба да им укаже и да им дâ наду (*spes*) да ће и према њима убудуће показати подједанку пријежност (*si se in **amicitiam** contulerint, pari studio atque officio futurum*) ако му постану пријатељи.

*Haec tria sunt: unum quos laesisti; alterum, qui sine causa non amant; tertium qui competitorum valde amici sunt. Quos laesisti, cum contra eos pro amico diceres, iis te plane purgato, necessitudines commemorato, **in spem** adducito, te in eorum rebus, si se in **amicitiam** tuam contulerint, pari studio atque officio futurum. Qui sine causa non amant, eos aut beneficio aut spe aut significando tuo erga illos studio dato operam ut de illa animi pravitate deducas. Quorum voluntas erit abs te propter competitorum amicitias alienior, iis quoque eadem inservito ratione qua superioribus et, si probare poteris, te in eos ipsos competitores tuos benevolo esse animo ostendito* (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, X, 40).

Дакле, пријатељство би требало да се исплати.

Даје се савет, сличан оном који Улпијан даје управницима провинција, да кандидат треба увек да држи отворена врата за друге.

Овде пак Квинт каже данонoћно (*diurni nocturnique*), и то не само кућна, него да држи отворена и врата душе.

*Benignitas autem late patet: et est in re familiari, quae quamquam ad multitudinem pervenire non potest, tamen ab amicis si laudatur, multitudini grata est; est in conviviis, quae fac ut et abs te et ab amicis tuis concelebrentur et passim et tributim; est etiam in opera, quam pervulga et communica, **curaque ut aditus ad te diurni nocturnique pateant, neque solum foribus aedium tuarum, sed etiam vultu ac fronte, quae est animi ianua**, quae si*

significat voluntatem abditam esse ac retrusam, parvi refert patere ostium. Homines enim non modopromitti sibi, praesertim quod a candidato petant, sed etiam large atque honorifice promitti volunt (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, XI, 44).

Квинт препоручује да кандидат има увек пуну кућу оних који траже услуге од њега. Пуну кућу потенцијалних бирача. Не може имати пуну кућу онај ко обећава само онолико колико може испунити (*neque posse eius domum compleri qui tantum modo reciperet quantum videret se obire posse*). Том приликом даје пример Гаја Коте, бившег конзула, кога назива мајстором изборне капмање. Он је своју помоћ обично обећавао свима (*polliceri solere omnibus*).

C. Cotta, in ambitione artifex, dicere solebat se operam suam, quod non contra officium rogaretur, polliceri solere omnibus, impertire iis apud quos optime poni arbitraretur; ideo se nemini negare, quod saepe accideret causa cur is cui pollicitus esset non uteretur, saepe ut ipse magis esset vacuus quam putasset; neque posse eius domum compleri qui tantum modo reciperet quantum videret se obire posse; casu fieri ut agantur ea quae non putaris, illa quae credideris in manibus esse ut aliqua de causa non agantur; deinde esse extremum ut irascatur is cui mendacium dixeris (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, XII, 47).

Видели смо да, слично томе, Улпијан саветује управника провинције да његова врата буду отворена свима и у свако доба.

Квинт говори о изборној кампањи, а Улпијан о поступцима управника провинције. Међутим, суштинске разлике нема. И један и други треба да придобију што више људи за своје деловање. И један и други су популисти, у суштини. То су кључеви Империје. Цицерон се декларисао као републиканац, али је, уствари, био део реке која се претварала у Империју.

Дом треба и ноћу да буде пун (*ut de nocte domus compleatur*). Многи треба да буду везани надом (*ut multi spe tui praesidi teneantur*).

Ac ne videar aberrasse a distributione mea, qui haec in hac populari parte petitionis disputem, hoc sequor, haec omnia non tam ad amicorum studia quam ad popularem famam pertinere: etsi inest aliquid ex illo genere, benigne respondere, studiose inservire negotiis ac periculis amicorum, tamen hoc loco ea dico quibus multitudinem capere possis, ut de nocte domus compleatur, ut multi spe tui praesidii teneantur, ut amiciores abs te discedant quam accesserint, ut quam plurimorum aures optimo sermone compleantur (Epistula Q. Ciceronis De Petitione Consulatus Ad M. Fratrem, XII, 49).

Суштина утицаја на масу је нада да ће им утицајни кандидат или управник провинције помоћи. Људи се окупљају око онога ко им пружа наду (*spes*).

4. ЗАКЉУЧАК

Манипулација почиње истрзањем ствари из правог, ширег контекста и инсистирањем на њиховом ужем контексту. Том приликом се инсистира на привиду као нечем битнијем од реалности. Да би привид заменио истину, лажни континуитет треба да заузме простор ужег контекста ствари. Тиме се губи из вида прави континуитет. Да ли има правог континуитета, може рећи само шири контекст ствари. Манипулација је насиље и зато је агресивна. Користе се термини који сами по себи нису агресивни, али су врло опште природе и зато погодни за пропагандну употребу. Сами по себи су врло привлачни.

Термин који се употребљава и у управљању провинцијама и у предизборној пропаганди је, пре свега, *пријатељство*. У предизборној кампањи то је трајно (*perpetuam*) пријатељство (*amicitiam*), што је аналогно захтеву за истицањем пријатељстава (*familiaritas*) између управника провинције и провинцијалаца и показивању стрпљења (*patiens*) том приликом. Са пријатељством су повезани *spes* (нада), *gratiam* (захвалност) и *certis* (извесност). Извесност је, по природи ствари, део континуитета, и обрнуто. Пријатељства се у унутрашњем политичком животу граде пажљиво, *diligenter*, и пажљиво се води рачуна (*intelligant diligentem*) о томе како се ко поставио током кампање. Тај термин је аналоган термину *patiens* (стрпљив) који, видели смо,Улпијан користи када каже да управник провинције треба стрпљиво да поступа према адвокатима у обављању њиховог посла.

Као круна свега, у свим тим односима са другим народима (као и у односима патрона и клијената у унутрашњем политичком животу) термини пријатељство (*familiaritas, amicitia*) и слобода (*libertas*) нераздвојни су. Подразумевају један други. Један без другог не могу.

Цицерон је бранио Републику као конзервативни политичар. Међутим, у предизборној кампањи, а и у практичном бављењу политиком служио се популарским методама. Те методе су оно што је породило Империју. То је својеврстан апсурд његове каријере, због кога је у суштини и страдао. Начелно је био конзерватиВац и бранилац Републике. Практично се служио популизмом јер није желео, а није ни могао, да се одупре реци Империји која је већ текла својим коритом. Рекло би се

да тога није ни био свестан. У сваком случају, служио се сличним методама манипулације у кампањи каквим се служила римска политика и у провинцијама. На крају крајева, то су само две стране исте медаље.

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DOMESTIC AND FOREIGN POLICY TERMINOLOGY OF ANCIENT ROME – TWO SIDES OF THE SAME COIN

Summary

The paper compares the advice that Quintus gave to his brother Marcus Cicero, on how to conduct an election campaign, with the instructions that Ulpian gave to the governors of the provinces on how to treat the provincials. On that occasion, the same or similar terms were identified.

It can be said that the candidates in the elections used similar methods of manipulation in the campaign as were used in Roman politics in the provinces. After all, they are just two sides of the same coin.

Key words: *Familiaritas. – Amicitia. – Libertas. – Spes. – Continuity.*

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/ПРИКАЗИ

Zara SAEIDZADEH, PhD*

Vujadinović, Dragica, Antonio Álvarez del Cuvillo, Susanne Strand. 2022. *Feminist Approaches to Law: Theoretical and Historical Insights.* **Springer International Publishing AG, 150.**

> "Education is dangerous, because schools and colleges do not just reproduce culture, they shape the new society that is coming into existence all around us."
>
> Raewyn Connell (2012a)

This book is the first in the Gender Perspective in Law series, part of the project titled: New Quality in Education for Gender Equality – Strategic Partnership for the Development of Master's Study Program on Law and Gender.[1] The aim of the book is to lay the theoretical foundation for advancing legal education through a gender equality approach. What is convenient about this book is that it is written in a way that is not only suitable for students, but also is beneficial for practitioners, researchers, and activists within a variety of multidisciplinary fields of humanities and social sciences.

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1 LAWGEM. For more about the project visit *http://lawgem.ius.bg.ac.rs/*.

The editors of the book are well-situated scholars of political and legal sciences, with special expertise in the area of political and legal philosophy, gender equality, and feminist methodologies. The editor's choice of collaborators clearly indicates their intention to raise awareness about gender inequalities in law. It also emphasizes their contribution to the development of legal and structural gender equality as the editors themselves claim (p. *v*) this book is an investment for the future goals of "gender justice, more social justice and human rights." Hence, the authors of each chapter address different forms of gender inequalities within various laws and legal systems, providing strategies to overcome institutionalization of gender inequalities in different contemporary societies.

The book achieves its aims by offering the reader, in each chapter, thorough reflections on different theories, perspectives, and practices of feminists' trajectories in their struggles against various forms of gender-based inequalities within law and legal system. However, this structure is not fully reflected in the title of the book *Feminist Approaches to Law: Theoretical and Historical Insights*. The content of the book evolves around the question of how feminist struggles for legal transformation have taken shape historically to achieve gender equality in law. Without *gender* and *gender equality*, the title does do justice to the overall aim of the book, which is to highlight the gender equality approach. Moreover, it implies that all feminist approaches to law are based on gender equality, which is not entirely correct as we have witnessed the rise of gender critical feminists, especially in the past several decades in Europe.

Problematizing traditional legal scholarship, its limits, and the dominance of white male objectives in knowledge production, feminist have taken variety of theoretical approaches to criticize and reform laws and legal systems that are being created based on unequal power relations. The main feminist approaches to laws have been informed by liberal, radical, postmodern, and intersectional feminist theories, at least in the West. In this book, being heavily devoted to Critical Legal Studies, the authors introduce some of the most important feminist epistemological and methodological approaches to legal studies, including Critical Race Feminism, Queer Legal Theory, and Feminist Intersectionality. Each chapter carefully addresses several important and globally identified gendered legal policies and practices around the concept of gender, structural racism, queer lives, the institution of family, and women's sexuality.

The authors splendidly discuss and problematize two crosscutting themes in their studies of laws and legal systems across different contexts. The first element is the dominance of patriarchies, which they show not only is present in the legal sciences but also is built into the legal systems,

and the second element is the perpetuate status subordination of people on the basis of their gender, sexuality, class, race and ethnicity within law. It is evident in almost every chapter of the book that the epistemological and methodological suggestions for the legal reforms are developed by postmodern approaches to gender and gender relations, which emphasize the social construction of gender in law and invite lawmakers to 1) break through the heteronormative male and female binary in defining gender, 2) include multiple factors (e.g., gender, sexuality, class) in prohibiting racism, 3) recognize diverse sexual orientations and gender expressions in regulating marriage, and 4) acknowledge the autonomy and sexual rights of women.

It could not have been timelier to see the publication of this book in the current climate of anti-gender campaigns across the world, especially in Europe. The anti-gender campaigns (now referred to as anti-gender movements, under the influence of right-wing populism) work to resist gender equality and sexual rights policies focusing on fundamental issues, such as marriage, reproductive rights, gender mainstreaming and the very notion of gender, by using the formulation of "gender theory" and/or "gender ideology" (Kuhar, Zobec 2017; Paternotte, Kuhar 2018). The anti-gender movements, namely in Europe and Americas have actively and systemically targeted the process of knowledge production for the past decade. To them the education system is the place where feminist ideologies of gender are used to sexualize and brainwash students. As a result, gender studies are constantly criticized for being ideological and non-scientific which has led to gender studies departments being closed down in some countries, as well as the banning of textbooks that have gender perspectives or draw on gender equality in schools (Kuhar, Zobec 2017; Paternotte, Kuhar 2018; Sosa 2021). As I am writing this review, the state of Florida in the USA is approving the ban of instruction about sexual orientation and gender identity in all grades, at the request of Governor Ron DeSantis (Izaguirre 2023). Moreover, anti-gender campaigns are moving towards demolishing postmodern and poststructuralist research in social sciences and humanities, because postmodern researchers do not produce knowledge based on essentialist understanding of male and female nor do they build on natural theory of masculinity and femininity. Instead, they problematize unequal power relations and see reality as socially and discursively constructed. I consider this book to be a well-structured scientific response to all the abovementioned strategies and mobilizations of anti-gender movements against women's rights, LGBTQI+ rights, as well as the rights of non-Western and non-white people. Thus, I dare to say that this book is an example of

a good fight against the anti-gender movements' fundamentalism, racism, nationalism, and the attack on the legitimacy of gender knowledge, research and education.

The book starts with a critical analysis of two prominent political thinkers Aristotle and Rawls by Dragica Vujadinović, who discusses mainstream political theories that have for long developed from the privileged perspectives of males. Men who were and continue to be oblivious to their patriarchal values and constantly fail to address gender equality. Their theories exclude the views and experiences of women and other genders, something that she calls a "gender incompetent history of political philosophy" (p. 1). Thus, she argues that modern and contemporary theories, developed by scholars like Rousseau, Schopenhauer and Nietzsche, can promote patriarchal values, misogyny and unequal power relations such as those embedded in far-right populist and neoconservative and sometimes neoliberal values, which do not recognize women as autonomous political and legal subjects but rather as subjects of traditional gendered roles. Therefore, she proposes that political theories should be reconstructed with the perspectives of postmodern feminist scholars and activists, which include gender equality and an intersectional approach, through this chapter, Vujadinović prepares the reader for what the book embarks to offer in the next five chapters.

In the second chapter, Amalia Verdu Sanmartin provides a critical stance towards the use of the concept of gender in law, addressing the law's heteronormative binary understanding of gender while showing different feminist epistemological and methodological approaches to gender, all of which are stimulating. However, the author does not draw on the fact that the Anglophone understanding of the concept of "gender" is problematically universalized by Western scholars and scholarships. Moreover, the author's historical account of the use of gender in legal feminism is bound to Anglophone Euro-North American feminism – which is usually referred to as the waves of Western feminist movements, dismissing the understanding of gender in different languages, cultures and social settings. The author takes the reader thorough the process of the conceptualization of gender in the Anglo-American world but does not refer to the concept of sexuality in the Western scholarship. It is true that sexuality and gender are different, but I believe that they are not separable and as such cannot be studied separately, especially in defining gender. Gender is a matter of social relations. Gender is not just about identity, power or sexuality, it is about all of these at once (Connell, Pearse, 2009). Sanmartin concludes that there is a need for retaining gender categories, in order to allow for recognition of political subjects, while she argues for a genderless and sexless law that would prevents people from being limited to legal categories and thus could

provide them with more opportunities (p. 47). Unlike Sanmartin, scholars like Raewyn Connell (2012b) argue that de-gendering people would make it impossible to problematize structural inequalities and patriarchies that are based on gender. What I find quite rudimentary is that Sanmartin describes "genderqueer people" as an example of being genderless, as opposed to "transgender people" whom she explains (p. 47) are those "who transition only once and end up fitting into one of the established categories." Trans studies scholars and activists would disagree with such a definition, since the dominant theoretical perception in the West is that trans disrupts notions of gender and sexuality and allows for deconstruction and reconstruction of sex and gender, i.e., the problematization of binary, fixed and universal understanding of gender.

After reading Sanmartin's interesting reflection on the complexity of the concept of gender, I am perplexed by the author's own understanding of sex and gender which she explains that "[b]oth sex and gender imply a binary related to the reproductive functions and genitals of the body." Thus, she continues to propose the use of alternative language, which not only blurs the categories but also avoids new exclusions: "we should [...] probably consider concepts such as the human and the person" (p. 50). However, these terms, such as "mankind", have been long questioned by feminists pointing out to the danger of its universal application and exclusion of women (Vujadinović, p. 5 in this book).

In the third chapter Adrien K. Wing and Caroline Pappalardo explain the emergence and importance of Critical Race Feminism among the US scholars of law, emphasizing its intersectional approach and its expansion to Global Critical Race Feminism. The authors discuss how the exclusion of the experiences and struggles of women of color by the US feminists amounted to the emergence of a legal theory that could problematize the power structure affecting the lives of women of color specifically rather than just men of color. Their eloquent description illustrates the struggle of people of color who have criticized Critical Legal Studies for its lack of attention to the role of race and ethnicity in their critical stance towards law. But then later, it was women of color in the US who criticized Critical Race Theory for not including the experiences women of color in law, which led to the formulation of Critical Race Feminism. This theory adds the underlying factor of gender into legal analyses and sees gender and race-based inequalities as a structural problem of white male supremacy. They emphasize that the nature of Critical Race Feminism is anti-essentialist, intersectional and experience-based.

Despite decades of struggles against racial discrimination in the USA, the authors rightly point out the fact that many states in the USA have banned Critical Race Theory in public schools, aiming to force schools to teach only white patriarchy (p. 68). I would also add that several states in the US have already prohibited teachers from instructing students about gender and sexuality, because it is considered "developmentally inappropriate" (USA Facts 2022). It is apparent that right-wing populist campaigns around the world fuel anti-gender movements (Paternotte, Kuhar 2018) and one of the strategies they use is to lobby policy makers (Sosa 2021).

In the next chapter, Damir Banović works on providing a definition of Queer Legal Theory, which he perceives as a notion, concept and amethod. He addresses Queer Legal Theory not only as a theory or methodology but as a movement by tracing back its roots to feminism and Critical Legal Studies. Again, Banović focuses on the Anglo-American understanding of queer and queer theory and provides a precise historical overview of the development of the term sexuality and gay movement, specifically in the US, but does not really touch on the historical emergence of the term "queer" itself.

The term "queer" is an American creation, thus it means and is used differently in different parts of the world who don't speak English. For example, "queer" in Romance language does not have the same signification as in English, therefore activists have instead used "transfeminismo" (Saeidzadeh 2016). The term "queer" was historically used to insult lesbian, gay men, bisexual and transgender people in homophobic societies, but then the non-heterosexual working class in North America gave it a positive meaning in 1950s (Namaste 1999). In the 1990s, the term was used in a form of reaction by the marginalized, against dominant heterosexuality, in the context of the US, in New York in the ACTUP movement against the AIDS crisis (Namaste 1999). So, historically, queer was developed by gay and lesbians within the Anglo-American political discourses of the time.

Queer theory has a deconstructionist approach that disrupts and denaturalizes the sexual and gender binary categories. It also brings out fluidity of gender and its plurality (Richardson 2006). Although queer theory has been important for the development of anti-essentialization and anti-identarian views, it has largely invested in conflating sex, gender, and sexuality altogether rather than distinguishing them. As Vivianne Namaste (2009) argues, Anglophone feminist queer theory have missed out on including the constitution of gender. Queer theory does not really engage with the material experiences of people who identify as trans because it does not take into account the importance of gender embodiment (Prosser 1998; Monro 2005; Richardson 2006; Connell 2012b).

I like the sentence where Banović sites Romero (2009) and writes: "it seems that the concept of queer legal theory is a paradox, having in mind the tension between the 'queer' and the 'legal'" (p. 85), as I think it says everything about Queer Legal Theory. I also appreciate that Banović explains that queer theory is approached in variety of ways, depending on which epistemologies and methodologies are applied. It seems that he sides with the postmodern framework of understanding and applying Queer Legal Theory. As he draws our attention to the complexities of queer theory, Banović elaborates that Queer Legal Theory's focus is on sexual orientation at the intersection with class, race, ethnicity, gender, or immigration status (p. 84).

Queer and feminist theories have contradicted each other since the mid-1990s. As Banović briefly mentions, some feminists reject queer theory, but he does not explain the contestations. Here again, I would like to point out the anti-gender ideas that have also poisoned the views of some feminists, who identify as gender critical feminists. "Anti-gender movements and gender critical feminists feed into right-wing, white male supremacy and vice versa" (Thurlow 2022, 13). Rejecting trans people, gender critical feminists argue that trans is a product of postmodern anti-intellectualism, which is "post-truth of the left" (Thurlow 2022, 10). Moreover, gender critical feminists reject the post-structural and queer approach and even oppose intersectionality (Thurlow 2022, 10). For example, Sheila Jeffreys (2014) denounces queer theory, arguing that it weakens feminist theory.

Banović further claims that Queer Legal Theory has emerged from feminist critical legal studies but does not specifically explain how feminist is Queer Legal Theory other than drawing on its anti-essentialist and intersectional perspectives, so it is unclear whether the author thinks Feminist Queer Legal Theory is possible.

Chapter five is a socio-historical account of family law development in various legal systems in Europe, where Marion Röwenkamp illustrates comprehensively how women were excluded from being legal and political subjects due to the domination of male patriarchies and inferiority of the women's social legal status. Moreover, Röwenkamp reviews women's struggles for equality in family in Europe since the beginning of 19th century (1848) and the subsequent legal reforms in various European contexts. It is fascinating to see, as the author shows, how similar the patterns of control have been and how alike women's resistance in various European countries has been.

The author illustrates how the institution of family has been a crucial terrain of struggle for women as it has also been an important sphere of control for the state. Hence, the patriarchal family has been the seed of the patriarchal state. Röwenkamp justifiably writes: "The family was constructed to form the smallest cell of the state, the idea that only a stable family with the men as head of the household and the family's sole legal person and citizen could form a stable nucleus of society. The women and children in turn being his legal inferior, mirrored the idea of the head of the nation and its citizens in the family" (p. 98). This did not change until women started to stand up for their rights within family law, demanding equality of rights to marriage, divorce and child custody.

As Röwenkamp discusses, family law reforms were the start of women's movement in Europe, with legal clinics being set up as a way of helping women to fight discriminatory laws as well as raising awareness of the unequal laws. The institution of family is still one of the main areas where conservatives and anti-gender movements focus their oppressive ideas of confining women to the home. The author's historical account of legal changes reminds us that women in Europe, including Britain, France, Germany, Austria, Greece, the Nordic countries, as well as Russia, have a long history of fighting for equality and justice – something that was not achieved overnight.

In the final chapter of the book, Nina Kršljanin takes the reader through different historical periods examining the process of legal and social changes around the notion of adultery, from being a crime against men to not being a crime at all. Kršljanin's analysis of legal history shows how unequal power relations, subjugation of women as the property of men, and the lack of sexual rights in various legal systems have played a role in meting out heavy punishments to women and affording impunity to men in cases of adultery.

It is fascinating to learn from this chapter that in some contexts, during Antiquity, men (the husband) were given the right to kill the adulterous wife and/or the adulterer. Later, by the turn of the 21st century, many countries underwent legal reforms. However, there are still countries, such as Iran, where the contemporary legal system is still patriarchal and gives the husband the right to kill both his wife and her lover if he catches them *in flagrante* (Iran's Islamic Penal Code, Art. 630). If the husband does not kill them, the state will. According to the law, the punishment for married perpetrators of adultery is stoning to death if proven by eyewitnesses, otherwise it is 100 lashes for each party (Iran's Islamic Penal Code, Art. 225).

It is also interesting how the author shows that the majority of the countries that criminalize adultery are Muslim states. What I feel is missing in Kršljanin's historical analysis is the account for women's struggles against criminalization of adultery and consensual sex in these Islamic countries, as she gives a historical overview of Muslim legal criminalization of adultery, or *Zina* in Arabic, but she does not draw on women's resistance. I appreciate that the author focuses on the Western (or as she puts it "Eurocentric") societies' mobilization against criminalization of adultery and thus continues to mention all the reasons why contemporary Western societies do not accept criminalization of adultery, including the individual rights to privacy, growing forms and varieties of open relationships – which do not threaten the institution of marriage. Therefore, adultery is seen as a private issue in such societies, to be dealt with without the involvement of the state. Very interestingly, the issue of gender is not addressed in these reasonings, by which I mean that none of the reasons outlined by the author against criminalization of adultery reflect the ways women have been subject to aggravated forms of structural violence. On the other hand, Islamic feminist scholars emphasize the issue of gender and violence and argue that criminalization of adultery by Islamic states legitimatizes violence against women through the regulation of women's sexuality (Mirhosseini 2011). Nonetheless, Kršljanin writes about "the double standard in the application of adultery laws" (p. 145) by which she means "discrimination and subjugation of women" (p. 145), instead of emphasizing the issue of gender inequality and gender-based violence with regards to adultery laws.

With its capacity to enhance legal education, this book is a great contribution to the process of knowledge production, criticizing the malestream objective "truth", and adding to the gender knowledge of activists, scholars, practitioners, and professionals at the structural, institutional, and individual levels, on their path to achieving social justice. Finally, this book is an excellent example of a good fight against the ongoing attacks on gender, race, and sexuality around the world – attacks that we are witnessing every day because of the global backlash against gender equality, sexual rights, and the lives of people of color.

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Guriev, Sergei, Daniel Treisman. 2022. *Spin Dictators: The Changing Face of Tyranny in the 21st Century*. Princeton & Oxford: Princeton University Press, 340.

> 'Because it is not easy to recognise the enemy, the goal is achieved even if only five per cent of those killed are truly enemies.'
>
> Joseph Vissarionovich Stalin, 1938

After a long history of psychopathic, kleptocratic, sadistic, cruel, bloodthirsty, destructive, sometimes somewhat enlightened, and even benevolent dictators (fear not, the last exist only in economic theory, not in the real world), the reader now encounters innovative subspecies – the spin dictators. Do they actually exist? Who are they? What kind of dictators are these novels? What is their *modus operandi*? Why have they not existed in the past? This is just the beginning of the list of questions the authors of the book place on their agenda – not exactly a research agenda, since the book, as they point out, collates the insights that are based on the results of the theoretical and empirical research that they have already published in economics and political science academic journals.

The book is an attempt by Sergei Guriev (an economist, former head of Moscow's New Economic School, and former chief economist of the European Bank for Reconstruction and Development, currently provost of the Paris Institute of Political Studies) and Daniel Treisman (a political scientist, professor at the University of California, Los Angeles) to explain the nature of the majority of current autocracies that the authors refer to as spin dictatorships. The role model for spin dictator for the authors is

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Vladimir Vladimirovich Putin,[1] followed by a lengthy line of leaders and countries from Hugo Chávez's Venezuela and Viktor Orbán's Hungary to Mahathir Mohamad's Malaysia and Nursultan Nazarbayev's Kazakhstan. 'We see all these rulers [i.e. spin dictators – remark of the reviewer] as converging on a novel – though not unprecedented – approach that can preserve autocracy for a while in even modern, globalized settings. The key to this is deception: most dictators today conceal their true nature. So the first step is to understand how they operate. In the chapters that follow, we explore why these regimes emerged, how they work, what threats they pose, and how the West can best resist them' (p. x). Well, quite a vow!

In the introductory chapter of the book, the authors set the benchmark for distinction between the new breed and the old-style dictators, traditional tyrants of the previous century. In the 20th century, 'most dictators maintained power by repressing any opposition, controlling all communications, punishing critics, (often) imposing an ideology, attacking the ideal of pluralist democracy, and blocking most cross-border flows of people and information. The key principle behind all these practices was simple: intimidation. The typical twentieth-century autocrat was a dictator of fear' (pp. 10–11). As examples of those dictators, the authors encourage the reader to think about the classic tyrants of the twentieth century – Adolf Hitler, Joseph Stalin, Mao Zedong – who were larger-than-life figures responsible for the deaths of millions. They controlled not only people's public behaviour but also their private lives, basically fulfilling a necessary condition for totalitarianism (Linz 2000). To do that, each created a disciplined party and brutal secret police. The authors point out that not every old-school dictator was a genocidal killer or the prophet of some utopian creed, but even the less bloodthirsty ones were experts in projecting fear. Terror was their all-purpose tool. That is the reason the authors designate old-style autocrats as fear dictators.

Contrary to them, spin dictators do not use fear but – spin. According to the authors, there are five basic rules for spin dictators. The first one is – be popular. Unlike classic despots, who could not care less about their popularity, spin dictators must care about their approval ratings. For twenty years, the authors point out, Putin's approval never dipped below 60 per

[1] Since the book was released on 5 April 2022, it is obvious that the manuscript was submitted well before the beginning of the war in Ukraine. With all developments in Russia since then, it is rather doubtful that Vladimir Putin has acted as a spin dictator since the beginning of the war. Massive repression against the media, political opponents and all the people who do not share his views on the war in Ukraine made him an old-style, traditional fear dictator. With his KGB background and Russian people from the political and business elite recurringly falling out of windows, one would say – a sinister dictator.

cent. The second rule is – use personal popularity to consolidate power. Popularity is a fluid asset that can fall as well as rise. So it makes sense for an autocrat, according to the authors, to invest that popularity into other levers of control. 'To cash in his high ratings, a spin dictator calls elections and referenda and, winning huge victories, claims a mandate to adjust political and legal institutions' (p. 17). The third rule is – pretend to be democratic. Nowadays public opinion globally favours democracy, hence a spin dictator pays lip service to democracy and pretends to embrace the vogue of freedom. The fewer people that see through their hypocrisy, the better for their popularity – a desirable outcome, according to rule number one.

Spin dictators open up to the world – that is the fourth rule. 'Occasionally, they restrict foreign media. But mostly they welcome flows of people, capital, and data and find ways to profit from them. They join international institutions and disrupt any missions that might be turned against them' (p. 17). They are members of international clubs, whatever the club may be and regardless of where the sessions take place – Davos, Switzerland, for example. Finally, the fifth and, according to the authors, the most important rule is – avoid violent repression, or at least conceal or camouflage it when used. In modern societies, brutal acts tend to discredit the leader. For a spin dictator, the authors point out, visible violence against the public is a mark of failure. In short, 'spin dictators manipulate information to boost their popularity with the general public and use that popularity to consolidate political control, all while pretending to be democratic, avoiding or at least camouflaging violent repression, and integrating their countries with the outside world' (p. 18). A handy table is provided in the book as a kind of the reader's guide to distinguishing between fear and spin dictators. For the record, the authors classify a leader as a spin dictator 'if under his rule all the following are true: (a) the country is a nondemocracy, *and* (b) national elections are held in which at least one opposition party is allowed to run, *and* (c) at least a few media outlets criticize the government each year, *and* (d) fewer than 10 state political killings occur each year on average, *and* (e) fewer than 1,000 political prisoners are held in any year' (p. 20, italic in original).

Now that the reader knows how to distinguish between the two types of autocracy and how to recognize a spin dictator, with some evidence about surging spin dictatorships around the world in the last few decades, with the decline of fear dictatorships provided, in Part I ('How It's Done') the book turns to the analysis of how spin dictatorship is achieved. Chapter 2 ('Discipline, But Don't Punish') starts with a story about the pioneer of the new breed of dictators – Singapore's Lee Kuan Yew, who saw the authorities' futile repression of the student movement back in September 1956 and

realized that the operation was not effective. Lee believed the real battle was for the hearts and minds of the governed. Throughout his political career, his goal was to sustain public support and marginalize the opposition, without open repression. Nonetheless, harassment is a part of the game, and it should be presented to the public as if absolutely not on political grounds. Hence, the first thing to do is to arrest dissidents for non-political crimes, whichever the crime is fabricated. 'Find him something' is a standing order. The officials in spin dictatorships provide a long-doctored list of non-political crimes. 'Inventiveness and creativity' is the motto of the actions of the spin dictators, as they find crimes that are not just non-political but disreputable. Sex offences have worked well, the authors point out, especially when primed by rumours. Who cares about evidence and truth, the only important feature is that there is no visible political connotation on the surface. Revolving door detention is another principle. The person who is detained on fabricated indictments for non-political crimes should not be incarcerated for a long time, as martyrs should not be fabricated. Nonetheless, as soon as a political detainee is released, a new indictment is fabricated. Following sex offences, perhaps tax fraud will do. Bankrupting the opposition with fines is another tool. No criminal proceedings, God forbid on political grounds, just civil and administrative procedures with recurring fines, decreasing the budgets of free media and opposition parties. No banning of opposition activities, just regulations and restrictions, to decrease the political impact of opposition efforts. It is always good to accuse the opposition of violence, especially against helpless special police forces armed only to the teeth. Then, dirty jobs are privatised, and subcontracted to private operators, so no blame can be allocated to a spin dictator. Finally, the Internet offers unprecedented opportunities for slandering activists and sowing distrust within the opposition networks. Anonymous posts can accuse them of being state agents. The entire repertoire of spin dictators aims to discipline rather than to punish the opposition, those with ideas to run for office instead the incumbent dictator. Punishing was the old style, i.e. fear dictators' course of action. Fear is not fashionable anymore.[2]

[2] This is not to say that old-style dictators, unscrupulous tyrants do not operate any more. With the hanging spree of the Iranian Islamic government, journalist killings by Mohamad Bin Salman (MBS) of Saudi Arabia, perhaps the worst tyrant in the world these days, and, so far, business-friendly but liberty ultimately unfriendly, Xi Jinping, starting his third mandate as the head of the Chinese Communist Party, fear dictators demonstrate their viability, although there are not as widespread as in the heydays of Hitler, Stalin and Mao Zedong, and their repression accomplishments are much more modest. As to the giants of repression, not all of them behave irrationally (Gregory, Schröder, Sonin 2011), with some of them with exceptional risk aversion, recognisable from the quote at the beginning of this review.

Chapter 3 ('Postmodern Propaganda') starts with a review of traits of propaganda in a fear dictatorship. It is open, direct, and leaves no room for second thoughts. As the authors point out: 'The main message propaganda sent was simple: "Be obedient, or else!" The subtext: "We are tough!" The style was usually literal and direct. There was little of the humor, irony, and double meanings that pervade much modern political advertising' (pp. 66–67). Propaganda helped make repression more effective. For fear dictators, propaganda was not an alternative to violence: the two worked together.

Contrary to that, spin dictators have a set of rules for propaganda. First of all, instead of fear, project an image of a competent leader. The essential goal is to replace the rhetoric of violence with one of performance. Rather than terrify citizens, the authors point out, spin dictators bid for their support with a show of leadership skill and dedication. The new line seems to be: 'Look what a great job we're doing!' Forget uniforms, however fancy they may have been, and tunics. Well-pressed business suits suggest professionalism and modernity. 'Spin dictators evoke peace and prosperity. Instead of demanding blood and sacrifice, they offer comfort and respect' (pp. 74–75), especially if the price of oil on the world market soared, something that Vladimir Putin welcomed to no end in his first decade in power. The second feature of the spin dictators' propaganda, the authors point out, is that they do not have an ideology but 'a kaleidoscope of appeals' – a mix of images and themes to target multiple audiences at once. Vladimir Putin, for example, according to a Kremlin insider, 'hates the word ideology' (Taylor 2018, 9). The authors emphasise that the incumbent Russian leader blends imperial history, communist tropes, and conservative traditionalism in what was rather early in Putin's leadership career described in the literature as 'a Molotov cocktail of French postmodernism and KGB instrumentalism' (Krastev 2006, 58). The third standing propaganda order for spin dictators is cultivate celebrity – instead of cult of personality. The authors specify that celebrity, by contrast to the personality cult, is mostly decentralized, often spontaneously constructed, and exploited by private actors for profit. 'With this in mind, consider Putin. Many have marveled at the flood of themed paraphernalia – from matryoshkas, T-shirts, vodka, and cologne to iPhone cases, chocolates, and calendars – that appeared early in his first presidency' (p. 77). The sarcastic conclusion is '[i]f Stalin was a god, Putin has become a trademark' (p. 78).[3]

[3] Actually, it is not so different from former US President Barack Obama, the authors emphasise, as he too inspired a catalogue of themed merchandise – from wooden eggs to bobble-head dolls, refrigerator magnets, jigsaw puzzles, travel mugs, cocktail glasses, cat collars, nail polish, and even spatulas.

The fourth wisdom of spin dictators' is – borrow credibility. They allow some nominally independent press and sometimes even television. They tolerate limited criticism. This allows them, when needed, to exploit the reputation of non-state outlets for their purposes. By channelling messages through such media, they borrow credibility. According to the authors, a second way to borrow credibility is to conceal the source of propaganda. The Internet made this much easier. Propagandists could hire 'trolls' or 'keyboard warriors' to pass as ordinary citizens and infiltrate online conversations.

Weaponizing entertainment is another avenue of propaganda, but much more important is the framing and interpreting information. Interpreting facts – not straightforward lying – is particularly important, as some realities are difficult to conceal or deny, and a news source that attempts to do so may just lose its audience. Explaining them away is another matter. Empirical research (Rozenas, Stukal 2019) found that both 'good' and 'bad' economic facts were reported accurately on the Russian main TV station (Chanel One). What made the difference was the assignment of credit or blame. 'Good' news was attributed to the Kremlin's expert management, and 'bad' news to external forces such as global financial markets or foreign governments. Besides redirecting blame for inferior performance, the authors claim that spin dictators who cannot conceal bad news try to convince the public that any alternative leader would have done worse.

Chapter 4 ('Sensible Censorship') provides another distinction between fear and spin dictators. 'For most of the twentieth century, the censor's pencil – typically a blue one – was almost as important to dictators as the AK47 [Soviet mass produced and a widespread automatic assault rifle – remark by the reviewer]' (p. 88). Censorship was comprehensive – in ambition, if not always in results.[4] All public communication had to be sanitised.[5] In addition to being comprehensive, under old-school dictators the process was quite public. Censorship was not just a way to block messages: it was itself a message, according to the authors. And the message itself was often violent and openly so – the censorship of fear dictators aimed to demoralize and deter.

[4] Stupidity and ignorance can be counterproductive. According to the authors, Pinochet closed down Chile's left-wing media and posted censors in all newspapers, magazines, radio stations, and television channels. His soldiers raided bookstores. In one case, they impounded artworks on Cubism for fear they might be promoting Fidel Castro's revolution.

[5] The authors point out that not only was the manuscript of Vasily Grossman's epic novel *Life and Fate* seized, but the KGB even confiscated the carbon paper and typewriter ribbons he had used to write it. *Sicher ist sicher*!

Alberto Fujimori of Peru, who was described by the author as a trailblazer of the novel approach to censorship, aimed at controlling the media, as one controls the ratings. And by controlling the ratings, one controlled politics. The techniques invented by spin dictators like Fujimori turned the old censorship of fear on its head. 'Where fear dictators sought comprehensive power, the new approach was deliberately partial. In the modern global economy, a complete information monopoly meant settling for backwardness' (p. 93). In fact, the authors conclude, a token opposition media could be useful. It showed that the regime was confident in its appeal. It could be held up to the West – and domestic critics – as proof that the authorities respected the freedom of the press.

Furthermore, overt censorship would suggest that the government had something to hide and might send people searching for the missing information. Concealing something can, perversely, increase awareness of it. The authors refer to that phenomenon as the Streisand effect: when the American singer tried to stop a little-known website from posting pictures of her Malibu home, the scandal itself attracted thousands of viewers. 'The book that is suppressed today gets twice as much attention tomorrow, wrote South African novelist and Nobel prize winner J. M. Coetzee. There is no evidence that spin dictators are avid readers of Coetzee's novels (although it is reasonable to assume that some of them would adore Colonel Joll, a character from *Waiting for Barbarians*), but definitely their political instinct concurs with his insights about censorship.[6] Just as public violence creates martyrs, public censorship creates the interest of the people – something that should be avoided in the mind of spin dictators.

One of their powerful weapons, instead of censorship, is to sue journalists for libel or defamation. This ties the victims up in court proceedings and burdens them with crippling fines – or even short jail spells where criminal penalties apply. No doubt it has a substantial deterrent effect, something that goes well for spin dictators.[7] Short of such suits, spin dictators harass critical

[6] Perhaps this is an explanation why books that openly mock Putin himself (*iPhuck 10* by Victor Pelevin), or his regime (*The Sugar Kremlin* by Vladimir Sorokin) have not been censored in Russia. On the contrary, they have received literary accolades and have been translated into other languages. Both writers have been celebrated as leading contemporary Russian literary authors. All these insights refer to the time before the war in Ukraine.

[7] For example, Ecuador's Rafael Correa, according to the authors, charged four journalists from the daily *El Universo* with criminal defamation for referring to him as a 'dictator'. After a trial that lasted less than twenty-four hours, the judge sentenced each journalist to three years in prison and fined the newspaper 40 million USD.

media with enforcement actions and regulatory fines, usually for ostensibly not paying taxes. Another even subtler tactic is to camouflage interventions as the operation of free markets, for example, a free decision by private companies in the market to halt business cooperation, like when Russian private cable providers suddenly cancelled contracts with the program producer who had angered the Kremlin. There is always payback time for these companies. In addition to all that, the way to neutralize hostile media messages is to discredit the source; tabloids with perhaps little help from the friends of the spin dictator, usually those in charge of defamation, are eager, due to substantial compensation, to publish fake information about the sources.

The title of Chapter 5 ('Democracy for Dictators') could be *prima facie* puzzling. Dictatorship rejects democracy, so why on Earth do dictators need democracy? Well, old-style dictators have had a quite peculiar way of considering democracy's basic notion: the rule of the people. According to the authors, the attitude of the old-style despots was that democracy required a dictator to discern the people's 'true' will – and impose it on them. How about the new breed – spin dictators? In short, they use polls and ballots to entrench themselves in power, hence the institutional framework they operate in should be labelled as competitive authoritarianism (Linz, Way 2010).

Spin dictators claim to be committed to democracy. This is not only lip service. Their power depends on their popularity. So they monitor it closely. 'Unlike old-school autocrats, who at most dabbled in sociology, the new one's pore over polling data. Each week, for instance, Putin's Kremlin commissions broad-ranging, national surveys from two firms. It periodically adds regionally representative surveys and secret polls on particular topics. At the same time, the Kremlin's security agency, the FSO (*Federalnaya Sluzhba Okhrany* – Federal Guards Service), conducts its own heterodox soundings of public opinion – roughly five hundred a year, some with as many as fifty thousand respondents' (p. 125). With monitoring popularity and heavily investing in its increase or just maintaining, it is not surprising that elections recurrently take place in competitive authoritarianism. What is surprising, nonetheless, is that they are fixed. After all, with soaring popularity, primarily due to well-organised propaganda, the outcome of the elections should not be a problem. 'With their high ratings, these leaders could have won elections honestly. And yet, they almost always chose to do so with an element of fraud, sometimes barely hidden. This has puzzled observers. It seems perverse' (p. 128).

After dismissing several hypotheses (some of them rather convincing to the reader, such as the one that dictators commit fraud – and do so blatantly – to demoralize potential challengers), the authors offer several explanations,

none of them compelling. They suggest that inflated margins due to election fraud help incumbents monopolise power, as they may provide the supermajority needed for constitutional amendments. But that contradicts the insight of the authors that spin dictators, for PR purposes, do not desire vast majorities in the parliament, as they purport to be democrats. 'A second reason is more paradoxical: even if believed to be partly fraudulent, large victories can still increase the incumbent's legitimacy' (p. 130). The reader fully agrees that the reason is paradoxical, but the authors do not provide a convincing explanation of the paradox. The authors' insight that signs of cheating may not undermine the incumbents' claims to be democratic because many citizens in autocracies believe that fraud is common in democracies too, although plausible, is hardly a convincing explanation of the massive and open election fraud in spin dictatorships.

Chapter 6 ('Global Pillage') deals with the relations of the spin dictators with the world, and it starts with a story about the global reach of one fear dictator that could be labelled as a forerunner of the spin dictators – Yugoslavia's Josip Broz, known to many as Tito. Although by a substantial number of traits a fear dictator, with political repression against any political opposition,[8] he was a half-breed: an international celebrity, letting people freely leave the country and travel abroad, letting international press come in, everything save political pluralism and undermining of his cult of personality. And he was enormously popular. The reader finds some seeds for the spin dictators in Tito's political manners.[9]

The classical fear dictators were afraid of anything that was not within their realms and their control, hence isolation was key. The new breed of dictators is quite distinctive in this respect: they embrace international travel, in and out of their countries. They do not block international media. 'Spin dictators treat foreign media much as they do domestic publications.

[8] Although the repression in the first years of his rule, even after breaking with Stalin, was substantial, with Gulags on the seaside, after some time the repression in Tito's Yugoslavia become a bit softer. After expelling one of his arch-rivals within the Yugoslav Communist Party and the political head of the secret police, Aleksandar Ranković in 1966, Tito just retired Ranković and left him alone with all pensioner's remunerations and People Hero's honours in his villa located in a posh area of Belgrade. As pointed out by Kershaw (2022), that would not have been possible in the case of Stalin and his party cleansing, especially considering that the main (political) culprit was the head of the secret police.

[9] These manners have nothing to do with the catastrophic failure of his political projects – federal Yugoslavia and the 'brotherhood and unity' of Yugoslav ethnic groups. Both collapsed with massive violence and long causality list just ten years after Tito's death, because there were ill-founded, and political liberalisation just disclosed how shallow the foundations of these projects were.

They usually tolerate those that appeal only to the intellectual fringe' (p. 146). Furthermore, they have foreign assistants, most of them from democratic countries. According to the authors, spin dictators collect foreign endorsements for their political accomplishments (whatever they may be) and display them proudly to their citizens. Another way to show the world's respect is by hosting summits. Vladimir Putin 'spent almost $400 million chairing the 2006 G8 meeting in St. Petersburg' (p. 148). It is also helpful for spin dictators to get public endorsement from internationally recognised experts, for example, Nobel Prize winners in economics, like Finn Kydland and Robert Mundell, acknowledging in 2010 the wisdom of the economic policy of Kazakhstan's Nursultan Nazarbayev. Endorsement from celebrities is also relevant, so spin dictators skilfully cultivate and harvest such relationships. It was Marilyn Monroe that attended the birthday party of JFK, then US President, on 19 May 1962, but it was Hilary Swank who attended a ceremony to mark the 35th birthday of Vladimir Putin's Chechen henchman Ramzan Kadyrov in Grozny, on 5 October 2011 – 'Happy Birthday to you, Mr. Henchmen!'.

Foreign election observers are obligatory for spin dictators, but they may be misled by sophisticated deception. Even more sophisticated is the creation of international groups of observers, usually with some official-sounding names and international membership, but effectively PR activist groups for spin dictators. And dissidents are arrested abroad for 'non-political' offences, naturally on trump-up charges. The obvious abuse of Interpol 'Red Notice' has been recurrent in the past several decades. According to the authors, spin dictators participate in Western institutions in order to extract benefits, exploiting the design flaws and weaknesses of these bodies. They trade with Western countries while denouncing them. 'They recruit networks of corrupt partners in the West, simultaneously pursuing concrete goals and eroding Western cohesion' (p. 152).

Spin dictators shape not only domestic but also global opinion. Most of them are aware that Western political elites would like to remove them. But leaders in democracies are dependent on their citizens and their opinions, so it is prudent to invest resources in shaping that opinion. 'A second option, almost as effective, is to turn Western publics against their own governing elites – in particular, those tempted by foreign military action. That means supporting anti-elite movements. Russia's Putin has become the guardian angel of right-wing populists across Europe, providing moral and sometimes financial support' (p. 157). Own global TV channels sending a global message and competing with the likes of the BBC and CNN, and modelled after them, such as RT (formerly Russia Today) cannot harm this endeavour. Consultants also come from the West: for example, Kazakhstan's president Nazarbayev

hired former British Prime Minister Tony Blair to advise him on handling the press. Spin dictators are not isolated at all, and democratic countries – or rather individuals from political and not only political elites from them – are to be credited for that lack of isolation. Job very well done!

Part II of the book ('Why It's Happening and What to Do About It') compresses into only two chapters the answers to two crucial issues: the origin of the spin dictators' phenomenon and the policies towards them that should be applied. This is a strange disbalance between the phenomenology of spin dictatorships in the (much bigger) first part of the book, on the one side, and its understanding (its origins) and recommended actions, on the other. It is as if the authors' priority is to demonstrate that spin dictators really exist and that should be no second thoughts about their advent. After they did that job, the reader expects at the least the same effort in the explanation of the origin and recommendation of policies. Alas, the effort is reduced to two chapters only.

Chapter 7 ('The Modernization Cocktail') deals with the question of the origin of spin dictators: what triggered the shift in the forms of autocracy? According to the authors, the answer lies in a cocktail of interconnected forces related to economic and social modernisation, combined with globalization. They call this the 'modernization cocktail'. It makes life harder for violent dictatorships and nudges some of them into democracy. But others find ways to adapt and survive, substituting deception and manipulation for terror. 'The modernization cocktail has three ingredients: the shift from industrial to postindustrial society, the globalization of economies and information, and the rise of a liberal international order. The end of the Cold War – itself partly a result of these forces – catalyzed the process' (p. 170).

The cocktail, according to the authors, works both within countries and at the international level. The first segment of the cocktail is a shift to post-industrial society. This shift to service industries is indisputable, but its pace and the achieved level differ greatly from nation to nation – there is a general shift, but countries are affected in vastly different ways. Furthermore, the authors' claim that the growing service sector demanded ever more creativity is a bit puzzling, because many service industries are based on low-skill labour with repetitive tasks, and it is manufacturing industries that record more technological progress and innovation than services. The authors claim that once progress required imagination, Stalin-style coercion no longer worked. 'You could not order people to have ideas' (p. 173). Be that as it may, there was much more innovation in Stalin's Russia than in Putin's. After all, in the time of Stalin's somewhat softer (but still first-rate fear dictators) successors, Russia (Soviet Union) led in the Space Race, hence achieving unprecedented success in aerospace, a rather innovative industry.

Furthermore, the authors claim that the shift towards services creates a need for a highly educated workforce, which is not suitable for fear dictatorship. They suggest that a college-educated, politically savvy segment of society sees through the dictator's lies and opposes him. But the authors emphasise that a skilled spin dictator's manipulations secure him support among the general, not-so-well-educated public.

Nonetheless, throughout the book the authors also point out the exceptionally large share of college-educated people in the population of the Soviet Union – neither a service industry country, nor a spin, but rather a fear dictatorship. Furthermore, a high share of educated people in Russia goes well with one of the most remarkable and dangerous spin dictatorships (although it is only spin one these days) in the world. Yes, social values have changed – a point well taken by the author – as they have been changing throughout the history of human civilisation, but again it is difficult to see the link between the social values change and service industries. New information technologies indeed make it more likely for opponents of the regime to establish links among themself and more difficult for dictators to isolate them, but it is difficult for the reader to associate this change with the advent of post-industrial society. In short, the first component of the modernisation cocktail as the explanation for the advent of spin dictatorships is not convincing.

The second element in the modernisation cocktail, according to the authors, is the economic and informational globalisation. This reasoning is rather intuitive, and it is hard to deny both globalisations. Nonetheless, the authors did not provide the basic theory, i.e. the theoretical hypothesis on the causality link from globalisation to spin dictatorships; rather they deliver only a single case as anecdotal evidence – the transformation of the regime of the former Mexican president 'Salinas's regime, already halfway from fear to spin dictatorship, was pushed into a low-violence strategy. What made the difference was the combination of Internet communications, global news media, and financial vulnerability produced by the country's rapid integration into global capital markets' (p. 183). Well, if single country cases are counted (obvious *par pro toto* reasoning error) it did not work in the case of China, the reader concludes. The authors do not provide insights on in which conditions and for what reasons globalisation works for spin dictatorships and in which it does not.

According to the authors, the third ingredient of the modernisation cocktail is the rise of the liberal international order. 'An important driver of this was the emergence of a global movement for human rights. From around the world, small groups of educated professionals with progressive values and often legal training linked up in the late twentieth century into a

network of liberal NGOs' (p. 183). Besides public opinion and law, according to the authors, international business has also been influenced by human rights activism. For dictators, all this has made overt repression riskier. Brutal violence might discourage investors. Violence and undemocratic behaviour tend to be costlier than before, especially when compared to the Cold War era, for dictators who were 'on the right side'. The insight is true, but it is rather trivial. What is missing is an explanation of why this cocktail ingredient, as well as the whole cocktail, works in diverse ways in different situations. In some cases, the cocktail turned fear dictatorships into democracies, in other cases into spin dictatorships, and in some other cases, there has been no change at all. The reader does not know why, because there is no information whatsoever about the preconditions for each of these outcomes. The authors provide no theory, no theoretical model, no matter how unsophisticated, that would offer information about the causalities and mechanism of change, and which could predict the change of political institutions, depending on the identified factors. The reader concludes that it is basically guesswork, more or less informed.[10] That is hardly an accomplishment for academic literature.

Chapter 8 title ('The Future of Spin') is somewhat misleading because the most important part of this chapter is about policy recommendations to the liberal West regarding spin dictators. It starts with the insight that '[t]oday's nativist populism – in both West and East – unites the economic resentment and obsolescent values of those hurt by the postindustrial transition' (p. 205). So the reader concludes that this can be the wind in the sails of spin dictators. Also, the authors identify the main weakness of spin dictators. 'Focused on personal power and self-interest, today's dictators have trouble forming solid alliances. Stalin forged a stable bloc based on shared ideology. Current autocrats can collaborate with each other on specific projects. But their loyalties realign as new opportunities emerge' (p. 206). The crucial question is, at least for the reader, how that weakness should be exploited.

[10] The theoretical contribution (Acemoglu, Robinson 2006) proved quite a developed theoretical model regarding causalities regarding the outcomes of political institutions, which predicts the conditions under which dictatorship will turn into a democracy. The authors mention this contribution only in one sentence in a footnote, not related to the origins of the spin dictatorships, but in the debate about whether an increase in income is favourable to the advent of democracy. The authors subscribe to the thesis of the favourable effect of an increase in income on democracy (Treisman 2020), contrary to the empirical findings (Acemoglu *et al.* 2008). There is empirical evidence, though, about the favourable effects of democracy on economic growth and income (Acemoglu *et al.* 2019).

Before stepping on the ground of recommendations, the authors describe Western international policy since the end of the Cold War. There has been, according to the authors, some version of George Kennan's containment policies, but the containment was not so tight as during the Cold War. Development assistance and (economic and political integration) to spur modernisation as the way out of dictatorship was praised by the authors, who just a few pages before referred to modernisation as the cause of spin dictators as an evolutionary process from fear dictators. Furthermore, the authors claim that Western leaders did not foresee how integration would affect their societies. 'Greater integration made the East more like the West. It also made the West more like the East' (p. 209). Be that as it may, the reader wonders what it has to do with spin dictators and the recommendations of policies towards them.

For the authors, integration should continue. 'But the West needs to devise a smarter version of integration. What would that look like? We suggest an approach of adversarial engagement. The West must continue to engage. But it should not expect integration to automatically disempower dictators and render them cooperative. Rather, the West should use the leverage of an interconnected world to defend its interests and nudge dictatorships toward free government. The catch is that dictatorships will be doing the same in reverse' (p. 210). The reader is hardly any wiser for such a policy recommendation.

Nonetheless, there are a few specific recommendations – principles of engagement, according to the authors. The first is to be more watchful. In the past thirty years, spin dictators have slipped under the radar by imitating democracy. The second principle is to welcome modernisation, as they point out, even in our adversaries. The reader would perhaps add – especially in them. 'So, although economic sanctions may be necessary at times, they should be targeted and narrow, aimed at individuals and firms. They should not seek to prevent modernization or isolate whole countries from world markets' (p. 211). Two short comments on these insights. First, necessary for what? For imposing democracy? Either you guys will make your country democratic, or we will impose sanctions on you.[11] Consider yourself fortunate not to be bombed! Second, targeted sanctions are completely ineffective (Demarais, 2022). It is the suffering of the people that creates incentives for the political elite to comply with a given request from the West.

[11] This is exactly the content of the 1992 US Cuban Democracy Act, which stipulates that the comprehensive sanctions will be waived only if democratic political institutions are introduced and effectively implemented in Cuba.

A third principle is to 'put our own house in order. Spin dictatorships exploit the vulnerabilities of democracies and try to create new ones' (p. 212). The first recommendation is that '[a]nti-trust has to be nimble and attentive to global political factors as well as market conditions' (p. 212). Poor antitrust: it is supposed to deal not only with Facebook and Google but also with all the other evils of the modern world. That is too much even for Lina Kahn, the over-aspiring, arrogant and too-ambitious head of the Federal Trade Commission. Senator John Sherman, whose bill became the first antitrust statute in the world in 1890, must be turning in his grave.

'Most important of all, the West needs to put its political house in order, repairing government institutions and restoring confidence in them' (p. 213). Finally, a sensible recommendation. Nonetheless, it is easier said than done, with the genie of populism released from the lamp, with Donald Trump being a serious candidate for the US 2024 presidential elections, and with excellence being forgotten as a virtue of the Western political elite. It seems that this crucial principle, establishing the West as a role model from the high moral grounds, will hardly be achievable in due course. Nonetheless, it is good to always keep this principle in mind.

The fourth orienting principle is to defend and reform the institutions of the liberal world order. An example is given: 'NATO must also change from a body focused almost entirely on military threats – although those remain – to one defending against the full spectrum of attacks today's dictators favor. Article 5 of the North Atlantic Treaty could be amended or interpreted to include collective defense against cyber-interference in the elections of any member country' (p. 215). The reader can imagine what kind of a mess the implementation of this recommendation would create. How about something simpler? Perhaps NATO should stop violating its own charter as it did with the military action against FR Yugoslavia in 1999. That would increase its credibility in the alliance's purely defensive military tasks.

The fifth and final principle recommended by the authors is rather surprising: 'support democracy democratically'. Is it really necessary to spell this out? The reader *prima facie* assumes that it goes without saying. But then, with a long history of Western nation-building and democracy-imposing programs, it is evident that this recommendation is actually desperately needed. Many decision-makers from the Western political elite disregard that democracy building is a bottom-up process, with disenfranchised groups boldly fighting for their own rights and that it is inevitably an indigenous political endeavour. No one brought democracy to the West. Acquiring it was a slow and painful process. That is the reason why democracy is so viable in the West. This is also the reason for the hasty Western retreat from Kabul in 2021, leaving the country to the Taliban. Afghanistan is simply not ripe

for democracy and universal human rights in this decade – perhaps in this century or more. One way or the other, it is for the Afghans to make their decision when actually the country is ripe for it. With deeds, not words. And there is extraordinarily little the West can do about it. Perhaps to 'support democracy democratically'.

The concluding chapter of the book is written in accordance with the modern liberal internationalism *dictum* of intervention, by any means available, in every case when democracy does not exist. Perhaps this is a reminiscence of Woodrow Wilson's old thesis in the aftermath of the Great War that democracy brings peace to the world. There are two problems with this approach – bringing democracy for the sake of peace. The first one is, as pointed out in the previous paragraph, building democracy is a bottom-up process and it depends on indigenous political players, not the Western political elite's thinking. The second problem is that, as the authors themselves point out, spin dictators do not go to war and modern wars are between democracies and old-style dictatorships. Accordingly, turning spin dictatorship into a democracy would not make the world a safer place.

The book is written in a clear and understandable style, focusing only on the main points (although with substantial references for anyone interested in more details, as the book is based on many academic contributions), with numerous examples and anecdotal evidence, making it a joyful ride. It is a very readable piece and there is no need for any prerequisite knowledge, save general education, to follow the insight and arguments of the authors. The reader does not have to be a specialist in spin dictators, whatever a specialist in that area may be.

There is a 'checking the evidence' section in every chapter, providing some empirical support for the theses disclosed in the chapter. However, checking the evidence section is strangely missing from the last two and the most important chapters, or at least should be the most important chapter: the one about the origins of spin dictatorships and the other about policies towards them. It speaks for itself. Furthermore, the book is not very well edited, so some of the insights are unnecessarily repeated throughout the book and the authors contradict themselves from time to time. In addition to contradictions already mentioned in this review, in one section of the book they refer to modern centrally controlled mass media as a crucial source of information, in the other they stress decentralised social media that cannot be controlled as such a source.

After finishing the book, the reader wonders whether 'spin dictators' is actually the most precise term. For years, the very notion of a dictator has intrinsically been linked to wholesale oppression and terror. So one could

even conclude that 'spin dictator' is an oxymoron. Of course, it is about autocrats, but not every autocrat is necessarily a dictator.[12] Nonetheless, this debate seems like splitting hairs. The authors obviously selected the term spin dictators rather than spin autocrats because the former is more colourful and captivating for the reader. Some criminal law scholars argued that the title of the perhaps most popular Dostoevsky novel is not precise and that from the standpoint of criminal law doctrine – it should be *Violation of the Penal Code and Sanction*. The entire world is grateful that Fyodor Mikhailovich did not consult these legal theorists before submitting the manuscript to the publisher, so fortunately for the readers, he selected the title *Crime and Punishment*. This is not to say that this book will accomplish similar fame, not even close to it, but the title should not be a problem for any well-meaning reader – spin dictator is an appropriate term.

A question for the end of the review: Can this book be harmful? After all, with its clear style and with a lot of substance, this is effectively a textbook, almost a manual, if not for spin dictators, then for spin dictators' candidates. Obviously, this was not the intention of the authors, but there are so many tricks of the trade explained in detail in the book, as they have immersed deep in the tradecraft of the spin dictators. It seems that this fear of producing a freedom harmful manual is not well founded, because spin dictators hardly read books, although some of them publicly, without providing evidence, for PR purposes, claim so. They read reports on the surveys of public opinion, focus group reports and, of course, detailed accounts from their secret security apparatus about the activities of the political opponents and the mood of the masses. They rely on personal contacts with their peers for a private exchange of experience. Furthermore, they innovate and adjust to new situations. In that process, they have immense support of the services of extremely well-paid (whatever the source of that remuneration is) professionals: former senior officials from Western counties, including former prime ministers, talented political consultants, imaginative public opinion experts, knowledgeable spin doctors, all the exceptional people who know what they are doing and why they are doing it. And the list of those who are ready to step in for a hefty remuneration is long. Awfully long! Spin dictators, incumbent or future, just do not need to read a book like this one. Nonetheless, the book should be a rather reasonable choice for those who would only like to acquire the skills of spotting a dictatorship when it is dressed in a democratic new suit.

[12] In their academic article about the topic, the authors use the term 'autocrat' (Guriev, Treisman 2019).

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/VARIA

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Т: Користећи Гринов метод (Greene 1997), направили смо модел који...

Л: Greene, William H. 1997. *Econometric Analysis.* 3. ed. Upper Saddle River, N.J.: Prentice Hall.

Т: (Поповић 2018, број стране), *Р:* Поповић, Дејан. 2018. *Пореско право*. 16. издање. Београд: Правни факултет Универзитета у Београду.

Навођење броја издања није обавезно.

Поновно издање – репринт

Т: (Angell, Ames [1832] 1972, 24)

Л: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Чланак

У списку литературе наводе се: презиме и име аутора, број и година објављивања свеске, назив чланка, назив часописа, година излажења часописа, странице. При навођењу иностраних часописа који не нумеришу свеске тај податак се изоставља.

Т: Тај модел користио је Левин са сарадницима (Levine *et al*. 1999, број стране)

Л: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

Т: На то је указао Васиљевић (2018, број стране)

Л: Васиљевић, Мирко. 2/2018. Арбитражни уговор и интеркомпанијскоправни спорови. *Анали Правног факултета у Београду* 66: 7–46.

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Л: Орлић, Миодраг. 10/2010. Субјективна деликтна одговорност у српском праву. *Правни живот* 59: 809–840.

Цитирање целог броја часописа

Т: Томе је посвећена једна свеска часописа *Texas Law Review* (1994).

Л: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance*, special edition 72: 1203–1702.

Т: Осигурање од грађанске одговорности подробно је анализирано у часопису *Анали Правног факултета у Београду* (1982).

Л: Анали Правног факултета у Београду. 6/1982. *Саветовање: Нека актуелна питања осигурања од грађанске одговорности*, 30: 939–1288.

Коментари

Т: Смит (Smith 1983, број стране) тврди...

Л: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

Т: Према Шмаленбаху (Schmalenbach 2018, број стране), јасно је да...

Л: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–*Л:* Томић, Јанко, Саша Павловић. 2018. Упоредноправна анализа прописа у области радног права. Радни документ бр. 7676. Институт за упоредно право, Београд.

Т: (Glaeser, Sacerdote 2000)

Л: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Лична кореспонденција/комуникација

Т: Као што тврди Дамњановић (2017),

Л: Дамњановић, Вићентије. 2017. Писмо аутору, 15. јануар.

Т: (Welch 1998)

Л: Welch, Thomas. 1998. Letter to author, 15 January.

Стабилни интернет протокол (URL)

Т: Према Заводу за интелектуалну својину Републике Србије (2018),

Л: Завод за интелектуалну својину Републике Србије. 2018. Годишњи извештај о раду за 2017. годину. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html*, последњи приступ 28. марта 2018.

Т: According to the Intellectual Property Office (2018)

Л: R.S. Intellectual Property Office. 2018. Annual Report for 2017. *http://www.zis.gov.rs/about-us/annual-report.106.html*, last visited 28 February 2019.

У штампи

Т: (Богдановић 2019, број стране)

Л: Богдановић, Лука. 2019. Економске последице уговарања клаузуле најповлашћеније нације у билатералним инвестиционим споразумима. *Номос*, том 11, у штампи.

Т: (Spier 2003, број стране)

Л: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Прихваћено за објављивање

Т: У једном истраживању (Петровић, прихваћено за објављивање) посебно се истиче значај права мањинских акционара за функционисање акционарског друштва.

Л: Петровић, Марко. Прихваћено за објављивање. Права мањинских акционара у контексту функционисања скупштине акционарског друштва. *Правни живот*.

Т: Једна студија (Joyce, прихваћено за објављивање) односи се на Колумбијски дистрикт.

Л: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Судска пракса

***Ф(усноте)**:* Врховни суд Србије, Рев. 1354/06, 6. 9. 2006, Paragraf Lex; Врховни суд Србије, Рев. 2331/96, 3. 7. 1996, *Билтен судске праксе Врховног суда Србије* 4/96, 27; CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16.

Т: За референце у тексту користити скраћенице (ВСС Рев. 1354/06; CJEU C-20/12 или Giersch and Others; Opinion of AG Mengozzi) конзистентно у целом чланку.

Л: Не треба наводити судску праксу у списку коришћене литературе.

Закони и други прописи

Ф: Законик о кривичном поступку, *Службени гласник РС* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 и 55/2014, чл. 2, ст. 1, тач. 3; Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, 60, Art 6 (3).

Т: За референце у тексту користити скраћенице (ЗКП или ЗКП РС; Regulation No. 1052/2013; Directive 2013/32) конзистентно у целом чланку.

Л: Не треба наводити прописе у списку коришћене литературе.

4. ПРИЛОЗИ, ТАБЕЛЕ И СЛИКЕ

Фусноте у прилозима нумеришу се без прекида као наставак на оне у остатку текста.

Нумерација једначина, табела и слика у прилозима почиње са 1 (једначина А1, табела А1, слика А1 итд., за прилог А; једначина Б1, табела Б1, слика Б1 итд., за прилог Б).

На страни може бити само једна табела. Табела може заузимати више од једне стране.

Табеле имају кратке наслове. Додатна објашњења се наводе у напоменама на дну табеле.

Треба идентификовати све количине, јединице мере и скраћенице за све уносе у табели.

Извори се наводе у целини на дну табеле, без унакрсних референци на фусноте или изворе на другим местима у чланку.

Слике се прилажу у фајловима одвојено од текста и треба да буду јасно обележене.

Не треба користити сенчење или боју на графичким приказима. Ако је потребно визуелно истаћи поједине разлике, молимо вас да користите шрафирање и унакрсно шрафирање или друго средство означавања.

Не треба користити оквир за текст испод или око слике.

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Слике не могу бити веће од 10 cm x 18 cm. Да би се избегло да слика буде значајно смањена, објашњења појединих делова слике треба да буду постављена у оквиру слике или испод ње.

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АНАЛИ Правног факултета у Београду : часопис за правне и друштвене науке = The Annals of the Faculty of Law in Belgrade : Belgrade law review / главни и одговорни уредник Марија Караникић Мирић. – [Српско изд.]. – Год. 1, бр. 1 (1953)–. – Београд : Правни факултет Универзитета у Београду, 1953– (Нови Сад : Сајнос). – 24 cm

Тромесечно. – Преузео је: Annals of the Faculty of Law in Belgrade. – Друго издање на другом медијуму: Анали Правног факултета у Београду (Online) = ISSN 2406-2693.

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Факултетски научни часопис *Анали Правног факултета у Београду* излази од 1953. године (ISSN: 0003-2565) као потомак часописа *Архив за правне и друштвене науке* који је излазио од 1906. године.

Главни уредници *Архива за правне и друштвене науке* били су: Коста Кумануди и Драгољуб Аранђеловић (1906–1911), Коста Кумануди (1911–1912), Чедомиљ Митровић (1920–1933), Михаило Илић (1933–1940), Ђорђе Тасић (1940–1941) и Јован Ђорђевић (1945).

Главни уредници *Анала Правног факултета у Београду* били су: Михајло Константиновић (1953–1960), Милан Бартош (1960–1966), Војислав Бакић (1966–1978), Војислав Симовић (1978–1982), Обрен Станковић (1982–1985), Дејан Поповић (1996), Миодраг Орлић (1997–2004), Данило Баста (2004–2006), Сима Аврамовић (2006–2012), Мирољуб Лабус (2013–2015) и Мирко Васиљевић (2016–2018).

У часопису се објављују научни чланци, критичке анализе, коментари судских одлука, прилози из међународног научног живота и прикази књига. Часопис излази и у електронском облику (eISSN: 2406-2693).

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