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C O N T E N T S

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PRACTICE OF EXTENDED COMPETENCE OF THE OMBUDSMAN FOR THE FINANCIAL SERVICES OF THE UNITED KINGDOM IN THE FIELD OF INSURANCE

ABSTRACT: In this paper, the authors discuss the decision-making method of the UK Financial Services Ombudsman enabling more favourable outcomes for an insured person in relation to the strict application of law. The authors delineate the manner in which the Ombudsman and the courts act and present specific examples in which the Ombudsman has recognized some rights to the insured whose exercising they themselves did not demand from the insurer. In the practice of the Ombudsman, there are numerous examples in which disputes arose due to a poor understanding of the breadth of the insurance coverage by the insured, the quality and scope of the damage repair service, a restrictive interpretation of the subject of insurance by the insurer. The circumstances on which the Ombudsman made decisions in disputes were based on the standard of a "vulnerable insured person" and a free belief of this body regarding the existence of unfulfilled expectations, which could contribute to the further improvement of the legal framework for the protection of the insured persons.

Keywords: a *vulnerable insured person, insurer, the Ombudsman, consumers protection, costs*

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1. Introduction

During the twentieth century, awareness of the need for an independent body to protect certain rights of citizens has matured for decades. Thus, in 1967, the Office of the Parliamentary Ombudsman was formed in Great Britain, after which, until the end of the 1970s, ombudsmen in the field of health care, local self-government, etc. were formed. In the field of insurance, the *British Insurance Law Association (BILA*) held a colloquium in July 1975 on "Insurance and the Consumer" to discuss the success of an independent grievance redress system, after which a representative of the insurance company *The Guardian Royal Exchange*, in September of the same year, sent a memorandum to the insurance companies of Great Britain on the need to establish the institution of the Insurance Ombudsman (Mendelowitz, 2014, p. 67). After a few years, in 1981, three insurers (Guardian Royal Exchange, General Accident i Royal Insurance) formed the *Insurance Ombudsman Bureau*, which was supposed to resolve clients "complaints about insurers" behaviour independently, and without compensation. It was a voluntary, professional and non-governmental initiative supported by the National Consumer Council of Great Britain. Since at that time there was no other body to supervise the implementation of business codes in the field of investment and insurance, most other insurers joined the organization (Penina Summer, 2009, p. 1).

With the entry into force of the Financial Services and Markets Act in 2000,[1] the *Financial Services Authority* established the *Financial Ombudsman Service* (Ombudsman) as the only body to deal with consumer complaints related to all types of financial services.

It should be borne in mind here that English insurance law developed through the creation of customary insurance law during the 18th and 19th centuries, only to be partially codified in 1906 by the *Marine Insurance Act (*hereinafter: ZPO). Courts in the early 90s of the 20th century took the view that it applies to all types of insurance because it represents insurance codification of customary law (*common law*)[2]. However, the principles precisely and understandably defined in this Law posed a problem to the courts in their application with the emergence of new modern tendencies in the development of insurance rights, i.e. new rules by which the solutions from that Law no longer met the needs of the modern consumer market (Jovanović & Slavnić, 2015, p. 154).

[1] Part XVI, Art. 225–234 /Financial Services and Markets Act 2000

[2] Lord Mustill's rationale in the Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 AC 501, p. 518; Judge Steyn's rationale in the Banque Keyser Ullmann SA v Scandinavia (UK) Insurance Co Ltd [1990] 1 QB 665, p. 701.

2. Delimitation of the manner of action of courts and ombudsmen

The analysis of the manner in which the Ombudsman acts in the exercise of his legal powers in this paper does not refer to procedural rules and principles, but to the principles on which the decisions of this body are based. For the purposes of this paper, the basic meaning of the neglected Latin term *modus operandi* that it has in the work of the police or in some other scientific disciplines will be, but the definition of the term "modus" as a possibility or way to solve something (Serbian Language Dictionary, 2007, p. 725) in this work, resolving a dispute between the insured and the insurer before the Ombudsman of the United Kingdom.

First of all, it should be borne in mind that the Rulebook of the Financial Supervision Agency stipulates that the Ombudsman resolves complaints by applying standards that, in his opinion, are fair and reasonable in all circumstances of the case (Financial Conduct Authority's Handbook of rules and guidance, 2016, 364R). A fair and reasonable decision of the Ombudsman is based on relevant laws and by-laws, rules, guidelines and standards of the supervisory body, business codes and what the Ombudsman considers to be good practice of insurance activities at the time of the complaint (Financial Conduct Authority's Handbook of rules and guidance, 2016, 364R).

There are fundamental differences in the conduct of the UK Financial Services Ombudsman and the courts with regard to lawsuits against financial service providers. The Ombudsman makes his decisions by applying what he considers fair and reasonable, taking into account all the circumstances of the case. Thus, the Ombudsman is not obliged to apply strict rules of interpretation if their application would nullify the legitimate (subjective) expectations of consumers (Mendelowitz, 2014, p. 71).

It is a well-known moral assumption that a policyholder does not enter into an insurance contract for commercial gain (Merlin, 2015, p. 2). That is, the essence of insurance is to protect policyholders from sudden and unexpected disasters that create a state of economic and personal vulnerability of policyholders.

Given a large number of disputes with similar circumstances and consequences, the Financial Services Ombudsman has built certain standards in decision-making over time.

Unlike the UK, the Ombudsman in Germany can never make a decision as an expression of goodwill (Kullanzentscheidung), "but it may informally recommend to the insurer that accepting a client's compensation claim may be a gesture of goodwill," (Gal, 2014, p. 40). The Ombudsman's

extended jurisdiction over court proceedings is reflected in the fact that the UK Ombudsman can pass judgement for damages for stress or problems even when the complainant has not claimed such compensation. On the other hand, the court can only decide on the merits of the claims in accordance with the law and cannot award those types of damages that the plaintiff did not even request in the claim. Thus, the court cannot oblige the insurer to pay damages for delaying the liquidation of the claim, because the obligation under the insurance policy arises from the occurrence of the insured event that causes the damage, and any delay in payment of damages is compensated by interest from the date of damage until payment, how ever long that period of time.[3] In addition to the above, the dispute in *The Italia Express*[4] established that there is no right to compensation for stress caused by delays in the liquidation of the claim because the peace of the insured is not a specific goal of the insurance contract. If the insurer deserves a penalty that is stricter than the interest, the competent supervisory body should decide on that.

3. Vulnerable Insured

According to the Financial Services Ombudsman, the insured is in a vulnerable position due to personal circumstances such as age, physical or mental health, liability and events that significantly change the regular life such as job loss, break up with a partner or death of a loved one, why they need additional attention, but also the support of companies and the services they use (Financial Ombudsman Service – Iss. 127, 2015, p. 3).

According to the definition of the Agency for Supervision of Behavior in the Financial Sector, a **vulnerable consumer** is someone who, due to his personal circumstances, is particularly exposed to harmful effects, especially when the service provider does not act with an adequate level of attention (Financial Conduct Authority, 2015, p. 20). Consumer protection regulations rely on the definition of the average or typical consumer and what they expect, understand or behave. Consumers in vulnerable circumstances are often unable to substantially represent their interests and are more likely to be exposed to harm than the average consumer. This is an area where service providers can take appropriate action and create good outcomes for consumers.

[3] Sprung v Royal Insurance (UK) Ltd (1997) CLC 70; Pride Valley Foods Ltd v Independent Insurance Co Ltd [1999] Lloyd's Rep I.R 120; England v Guardian Insurance Ltd, [2000] Lloyd's Rep I.R. 404; Normhurst Ltd v Dornoch Ltd [2005] Lloyd's Rep I.R. 27 i Tonkin v UK Insurance Ltd.

[4] [1992] 2 Lloyd's Rep 281.

The Ombudsman may also, by his decision, oblige the insurer to, in addition to the basic claim and the related interest (if any), pay special compensation for the greater vulnerability of the insured caused by the poor quality of the insurer's service. In dispute no. 127/1 (Financial Ombudsman Service – Iss. 127, 2015, pp. 4–5) on vacation in Spain, the insured was taken to the hospital for his psychotic condition due to, as the hospital doctor said, the recent death of his mother and his divorce. On the other hand, the insurer obtained the opinion of the general practitioner who stated that the insured had been suffering from depression for a long time and refused to pay the hospital costs for treatment due to the health condition that existed before concluding the insurance policy. When the insured learned of the insurer's decision, he voluntarily left the hospital and slept on the street until his sister came for him and took him home to the UK. The ombudsman considered that the insurer could have done more for the insured and that he could have organized his transfer to the state hospital and that he could thus have avoided being on the street. Since, in the Ombudsman's opinion, the insurer failed to prove that the cause of the specific health condition was excluded from the coverage, the Ombudsman obliged the insurer to reimburse the insured for medical expenses and interest, as well as compensation for vulnerability due to the insurer's refusal to pay compensation.

The extent to which the principle of fairness and reasonableness plays a decisive role in the protection of insured persons when deciding on the Ombudsman can be seen in the area of fulfilling contractual obligations and reporting important facts to the insurer. This especially refers to the case when, in the opinion of the insurer, there is a worsening of the risk and the right of the insurer to narrow the insurance coverage or cancel the insurance contract. In dispute no. 127/3 (Financial Ombudsman Service – Iss. 127, 2015, p. 6–7), the insured was admitted to the hospital due to an ankle fracture, and due to degenerative changes, he had to be hospitalized for two months. During his stay in the hospital, there was a burglary in his house, so the insured filed a claim with the insurer for compensation for the stolen items. The insurer rejected the claim with the explanation that the conditions of the insurance were the obligation of the insured not to leave the house empty. The term "empty house" is defined in the insurance terms in such a way that "the policyholder, members of his family or another authorized person do not sleep in it for a period longer than 30 days." The Ombudsman accepted the insured's claim for compensation, taking into account that the insured's stay in the hospital was sudden, that he did not act negligently and that his son visited the house several times while he was in the hospital. The Ombudsman considered it unfair for the insurer to refuse to pay this claim, and obliged the insurer to pay it in full.

In the next dispute no. 127/9 (Financial Ombudsman Service – Iss. 127, 2015, pp. 13–14) it was a question of whether the insured reported an important fact and whether the insurer had the right to refuse his obligation. The insured moved into a house on a new farm. His wife fell ill and could not work, which is why they leased several auxiliary buildings to other people to compensate for their income. Soon after they moved in, the fire destroyed one of the barns and most of its contents, including parts for the machines, kept there by a neighbour. The fire also damaged parts of the family home. When the insured filed a claim, the insurer rejected it, claiming that the insurance coverage did not apply to the business purposes of the insured property and that the insured did not state that the barn would be used for business purposes. On the other hand, the insured referred to the fact that he specifically mentioned to the insurer when concluding the insurance contract that he would lease the buildings. The Ombudsman requested from the insurer the procedures on the basis of which the sale of the insurance policy in question took place. From the procedures, they determined that there was a question about the purpose of the insured facilities, but that it was not set up for the insured, nor was a telephone conversation between the insured and the insured recorded. On the other hand, the insured claimed that in a telephone conversation he mentioned his wife's illness and the intention to rent facilities on the farm in order to supplement his income. Given that the insurer did not have a record of the telephone conversation, and that the insured was consistent in his claims, the Ombudsman decided to support the insured's claim for damages. The ombudsman considered that it was obviously a mistake that caused the insured a great deal of stress at an already difficult time for him, which is why his children and his sick wife lived in a damaged house. The insured also took a loan to pay the neighbour for the damaged car. Taking all the above into account, the Ombudsman obliged the insurer to pay the insured the damage in accordance with the terms and limits of the insurance policy, compensation for the problem caused by their mistake, as well as interest on the loan taken out by the insured.

In dispute no. 127/11 (Financial Ombudsman Service – Iss. 127, 2015, pp. 16–17), the vulnerability of the insured was manifested due to poor quality work on repairing the insured damage. The insured's house was flooded after a series of severe storms and heavy rainfall, with the ground floor, and especially the kitchen, severely damaged. She filed a claim for damages under the household insurance policy. The insurer went to the scene, agreed with the necessary repairs and agreed with the contractor. The insurer also provided an alternative – temporary accommodation for the insured and her six-year-old daughter during the works. After a few weeks, the insured and her daughter returned to their house, but after a few days, she noticed numerous problems. Parts of the kitchen

wall were not secured, the floor coverings were not at the same level and there was still an intense smell of moisture. Dissatisfied with the quality of the performed repair works, the insured contacted a local construction company whose services she had used before. They believed that the smell of moisture was coming from the gypsum boards damaged in the flood, which the contractor hired by the insurer had not removed. They also discovered that the pipe was leaking and suggested that the insured install air valves to try to get rid of the smell of moisture, but they refused to do any additional work in the kitchen because they thought that the previous works were poorly performed. When she approached the insurer, they refused any additional help and pointed out that the problem with the floor coverings had existed before and considered that the insured had damaged parts of the kitchen wall by installing air valves and that the pipe leak was due to regular wear. A third construction company, hired by the insured, confirmed that the wrong type of plaster was used on the wall, which also worsened the problem of pipe corrosion. The insurer considered that he had fulfilled everything that was his obligation and rejected further requests of the insured. At that time, the insured woman lived without using the kitchen for more than a year and called her doctor because of the stress she suffered.

Based on the photographs, the Ombudsman determined that the works were not performed in a satisfactory quality and that the claims of the insured were justified. The insurance company also submitted three reports from independent construction companies, which confirmed that the quality of the work performed was poor.

The Ombudsman pointed out that the insurer was responsible for the quality of the contractor's work, and concluded that the insurer had not acted fairly when he refused to accept responsibility for bringing the damage into proper condition and take care of the insured and her daughter until the kitchen was in good condition.

In addition to obliging the insurer to repair all the identified damages, the Ombudsman considered that the insured and her daughter were vulnerable for a long period of time due to poor service of the insurer, and ordered the insurer to pay the insured £750 due to continuous disturbance and stress she suffered.

4. Unfulfilled expectations of the insured

It is a common opinion that the biggest risk for every insurance policyholder, and especially for a natural person, is to have an insurance policy and to pay premiums regularly, without having any or almost no insurance coverage (Todorović Simeonidis, 2014, p. 256).

A special problem with insurance contracts is the non-transparency of general and special insurance conditions that the insured does not know at all or only superficially browses when concluding the insurance policy, without essentially knowing or understanding them. Although the conditions of insurance today are quite similar, as claimed in our legal theory, there is a danger that the insurance contract will include provisions aimed at protecting the insurer from larger obligations to the detriment of the legitimate interests of the insured (Pak, 2004, p. 192). This is especially true when it comes to the refusal or unfounded reduction of the insurer's obligations to the insured.

In the practice of the Ombudsman of the United Kingdom, there are numerous examples in which disputes arose due to a poor understanding of the breadth of insurance coverage by the insured, the quality and scope of the repair service, restrictive interpretation of the insurance subject by the insurer or other insurance conditions. In the following, we will present the details of these disputes.

In dispute no. 07/01 (Financial Ombudsman Service, Iss. July, 2001, pp. 6–7), the insurer did not explain to the insurance contractor that the insurance coverage is valid for individual trips lasting for up to 30 days and that it does not cover claims from dangerous activities, including riding motorcycles with over 125cc. It took the insurer three weeks to issue the policy and send it to the insurance contractor. Since he was on the road at the time, his sons could not check before the trip to the United States whether the insurance policy corresponded to their needs, because they wanted the insurance coverage to cover the trip to the United States. A month later, one of the sons of the insurance contractor travelled to Australia, where he suffered a fatal car accident while riding a motorcycle. The policyholder has filed a claim for repatriation and funeral expenses and compensation of £30,000 for the death with the insurer. The insurer explained that due to the said exclusion, the policyholder has no coverage. However, he accepted that he did not sell and issue the insurance policy fairly, nor did he explain the conditions of the insurance, and he accepted to reimburse the costs of repatriation and burial as a gesture of goodwill.

The insurance contractor pointed out that he decided to conclude an insurance policy for a trip to the USA due to the length of the trip, to which the insurer replied that he would not invoke the mentioned exclusion if the accident happened in the USA.

However, during the second trip, the contractor realized that the insurance policy did not cover all types of dangerous activities, which is why he had the opportunity to check whether the insurance policy meets his needs and to request an extension or supplement of the necessary coverage. In such circumstances, the Ombudsman of the United Kingdom considered that the insurer's

offer to reimburse the costs of repatriation and burial was reasonable and that he had no obligation to pay the insured benefit due to the death of his son.

In the UK legal system, a court may apply the UK Regulation on Unfair Contractual Terms of Consumer Contracts of 1999 to determine whether it is fair to exclude a certain dangerous activity from coverage. Thus, in the dispute between *Bankers Insurance Co. v South,*[5] the court decided that the exclusion of accidents of "motorized vessels" was stated in simple and understandable language and that this exclusion was the essence of the travel insurance in question, which is why it was not analysed. The court added that it was not an unfair and incorrect exclusion, because the person who planned the vacation could read it if he wanted to. These are logical views of the court, but the Ombudsman can take completely different views that are more in favour of consumers.

In the next dispute no. 18/22 (Financial Ombudsman Service, Iss. July, 2002, p. 20) oil seals on the camshaft broke and there was a leak of oil on the belt in the housing at the end of the engine, which was closed with a seal. The insured performed the necessary repairs: steam cleaning of the components and replacement of the shaft seal and oil seal, and then demanded from the insurer reimbursement of the repair costs. The insurer rejected the claim, claiming that the insurance conditions excluded from the coverage "external oil leakage." He explained that he would have covered the repair costs if they had been caused by an internal oil leak, such as a leak from a torn seal head into the cylinder, however, it does not cover any leaks outside the engine block, oil tank and cylinder head.

The Ombudsman considered that the insurer interpreted the exclusion in question as too restrictive. The Ombudsman considered that it was unreasonable to expect the policyholder to understand the narrow distinction between different types of oil leaks and disagreed with the insurer's claim that oil leaks in the housing due to a seal failure were considered "external."

In dispute no. 18/24 (Financial Ombudsman Service, Iss. July, 2002, p. 21), there was a problematic way in which the insurer addressed the loan insurance policy and the breadth of insurance coverage. In the specific case, the insured concluded the insurance for his own protection in case of impossibility to repay the loan. His lender concluded an insurance policy "for the risks of death, incapacity for work and unemployment." When the insured was fired, he filed a claim against the insurer, who rejected it, claiming that the insurance conditions covered unemployment only in the event of redundancy.

[5] [2003] EWHC 380.

In terms of insurance, the term "unemployed" was defined as "without a job directly due to redundancy or the collapse of the company." The insurer also referred to the definition of "redundancy": "employment terminated solely due to the employer's decision to stop or reduce the activities you are engaged for." The insured complained that he became redundant because he received compensation for redundancy, but the insurer did not accept his objection. The insurer pointed out the proof of the former employer of the insured according to which the insured was fired because he was incapable of performing his obligations in a satisfactory manner.

The Ombudsman found the following: Although part of the title of the insurance policy contained the words "unemployment risk" in the description of coverage, the insurance conditions did not provide this type of coverage, but limited coverage only to unemployment due to redundancies. This limitation was only noticeable after a careful reading of the insurance conditions, including the definitions section. The ombudsman also found that the insurer called and advertised this type of insurance as if it covered all causes of unemployment. Given this fact, the insurer had to specify to the lender, who sold these insurance policies, the actual scope of coverage with which he would inform the potential policyholders before concluding the insurance contract. Finally, that the insured did not lose his job through no fault of his own.

For the above reasons, the Ombudsman considered that the lender did not draw the policyholder's attention to the limitations of coverage and accepted the claim of the insured that the insurance policy was sold to him in a state of delusion. In addition, the Ombudsman considered that it was not fair to return only the premium to the insured, but also to pay him full compensation because if he had known that the insurance policy did not cover all causes of unemployment, he would have concluded wider coverage with another insurance company.

In dispute no. 133/1 (Financial Ombudsman Service, Iss. 133, 2016, pp. 3-4) the insured damaged his vehicle by pouring the wrong type of fuel and demanded from his Casco insurer reimbursement of repair costs. However, the insurer rejected the claim, claiming that the insurance policy no longer covered that type of damage. The ombudsman asked the insurer to provide him with the information he sent to the insured before the extension of the insurance policy, together with all changes and amendments to the insurance conditions. The cover letter submitted together with the other documentation contained the following notice: "You must carefully check all the details. If they are correct, you do not have to take any further action." As the disputed exclusion was not mentioned or highlighted anywhere, and was only after a few pages, as the

last of all exclusions, the Ombudsman considered that it was not reasonable to expect someone to read 40 pages to check whether the insurance coverage had changed. Therefore, the Ombudsman decided that the insurer did not do enough in the given circumstances to inform the insured that his insurance coverage was narrowed for the risk of using the wrong type of fuel and ordered the insurer to act with this claim as if the exclusion did not exist.

The Ombudsman may be more lenient in interpreting insurance conditions and in the case of luggage insurance, in which type of insurance very few insured persons are aware of the standard exclusion of lost or stolen luggage (for example, when luggage left in a motor vehicle unlocked and unattended) and to compensate performed according to the actual value, and not the newly acquired value or after deduction of the franchise (Penina Summer, 2009, p. 89). In dispute no. 63/8 (Financial Ombudsman Service, Iss. 63, 2007, pp. 10-11) of the insurance conditions stipulated that luggage must be stored "in a locked accommodation" or "in a locked or covered compartment/trunk of a motor vehicle." In this particular case, the insured travelled to New Zealand in a camper van, so the Ombudsman decided that it was more of a vehicle than accommodation and that because he did not have a luggage compartment or trunk where personal belongings would not be visible, he did not accept the claim.

In dispute no. 69/4 (Financial Ombudsman Service, Iss. 69, 2008, pp. 7–8), the insured concluded a contract for insurance of an extended product warranty for the purchased leather set in three parts. The set was covered by the manufacturer's warranty for the first twelve months and four additional years of extended warranty under the insurance contract against any accidental damage to the material caused by "separation, splitting, burns, perforation and pets", as well as "structural damage" caused by the number of its special features, including "broken zippers." Less than a year after the purchase, the insured discovered that the leather cover on the sofa was damaged, at the place where the metal part of the adjusting mechanism rubbed against the leather cover. The manufacturer has repaired this defect free of charge under its warranty. The same defect occurred after eight months when the manufacturer's warranty expired, due to which the insured filed a claim with the insurer. The insured reported that the damage occurred after previous repairs and that it is necessary to repair the sofa frame because the leather is poorly marked and the zippers on the backrests are damaged.

The insurer rejected the claim, claiming that the damage was caused by the poor quality of the manufacturer's repairs and that the extended warranty insurance contract did not cover the manufacturer's "negligent omission."

The ombudsman analysed the insurance conditions and concluded that they were very poorly worded, as there was great uncertainty as to what the insurer wanted to cover and how the various exclusions were applied. Due to the above, we can say that the Ombudsman's decision in this dispute coincides with the legally prescribed interpretation of the terms of the contract in case of unclear provisions drawn up by the insurer, and he considered that the terms of the insurance must be interpreted in the most favourable way for the policyholder and with the most sensible expectations he had at the time of concluding the insurance contract.

The unfulfilled expectations of the insured are best reflected in the poor quality of the insurance service provided during the repair and compensation of damage, due to which the insured suffers the damage again. In dispute no. 130/3 (Financial Ombudsman Service, Iss. 133, 2015, p. 6) after severe damage to the roof during the storm, the eighty-year-old insured who lived alone filed a claim for damages under her household insurance policy. During the damage assessment, the insurer recommended that she arrange a temporary repair of the roof. Later, the insurer agreed to compensate for the damage that occurred inside the house, but they rejected part of the compensation claim, claiming that the roof was in a bad – unmaintained condition before the storm. A few months later, the roof of the insured leaked again and caused additional damage to the interior of the house. She called the insurer, but he refused to help her because the damage was caused by poor temporary roof repairs and the insured's obligation was to carry out permanent repairs. However, the insurer could not provide any evidence that the insured had been warned that she needed to carry out a permanent roof repair, and given her age and the fact that she lived alone, they should have done so. The ombudsman obliged the insurer to repair the damage as if it were a claim for damages.

5. Conclusion and significance for the Republic of Serbia

Based on the analysis of the decision-making manner of the Financial Services Ombudsman of the United Kingdom, several conclusions can be drawn. It is an institution of out-of-court settlement of disputes between consumers of insurance services and insurers that are subject to mandatory supervision by the Financial Supervision Agency and fall under the mandatory competence of the Ombudsman. Second, the extended competence of the UK Ombudsman in relation to the strict application of regulations differs from the way in which the equivalent bodies of the continental legal systems decide. Third, the non-obligation to apply regulations, business practices and

business codes in relation to the free belief in a fair and balanced settlement of disputes contributes to (sometimes) unexpected outcomes for both the insured and the insurer. Fourth, deciding exclusively on the principle of *equo et bono* without strict application of regulations and precedents inevitably leads to uncertainty regarding the consistency of decisions. Fifth, the decisions of the Ombudsman can be far harsher for the interests of insurers and more favourable for the insured in relation to the outcome by strict application of insurance regulations and conditions. Sixth, we believe that such a system of the Ombudsman forces insurers to be more conscientious and careful when executing insurance contracts.

Having in mind the high specialization of this institution for the insurance business, we believe that it should be introduced in the domestic system of protection of insurance service users. The ombudsman should be a person, who should be recommended for this position by the highest positions in the work of the judiciary, and his assistants should be experts in insurance law. Membership in the Ombudsman should be mandatory for all entities whose operations, in accordance with the Law on Insurance, are subject to the supervision of the National Bank of Serbia.

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PRAKSA PROŠIRENE NADLEŽNOSTI OMBUDSMANA ZA FINANSIJSKE USLUGE VELIKE BRITANIJE U OBLASTI OSIGURANJA

REZIME: U ovom radu autori razmatraju način odlučivanja Ombudsmana za finansijske usluge Velike Britanije, koji omogućuje povoljnije ishode po osiguranika u odnosu na striktnu primenu zakona. Autori vrše razgraničenje načina postupanja ombudsmana i sudova, te izlažu konkretne primere

u kojima je Ombudsman osiguranicima priznao i neka prava čije ostvarivanje oni sami nisu zahtevali od osiguravača. U praksi Ombudsmana postoje brojni primeri u kojima su sporovi nastajali usled lošeg razumevanja širine osiguravajućeg pokrića od strane osiguranika, kvaliteta i obima usluge popravke štete, restriktivnom tumačenju predmeta osiguranja od strane osiguravača. Okolnosti u kojima je Ombudsman donosio odluke u sporovima zasnivane su na standardu „ranjivog osiguranika" i slobodnom uverenju ovog organa u vezi sa postojanjem neispunjenih očekivanja, što može doprineti daljem unapređenju pravnog okvira zaštite osiguranika.

Ključne reči: *ranjivi osiguranik, osiguravač, Ombudsman, zaštita potrošača, troškovi.*

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SPECIFIC CHARACTERISTICS OF DIGITAL VIOLENCE AND DIGITAL CRIME

ABSTRACT: Migration of many aspects of human life and work into the online sphere has become an integral part of everyday life and it is difficult to imagine the functioning of any aspect of life without the Internet and the space in which most human interactions take place. One such large and significant new form has created a large number of smaller ones, and conditioned the transformation of things and phenomena from the physical world into completely new digital forms. The same happened with violence, as a phenomenon, a pattern of behavior and a part of human nature from the very beginnings of civilization, which took its new form being called a digital violence. It does not necessarily have to be online, but it is necessarily related to digital devices. To the problem of digital crime there should be added a digital violence as a contemporary problem, especially when we talk about legal regulatory mechanisms, although these two phenomena, with frequent overlaps, do not necessarily have to be contained in each other, but they are equally important.

Online and offline digital spaces represent just a new field in which violence and crimes are committed, but the virtual characteristic of these spaces is only an additional specific feature, because their consequences are felt in the physical, real world, and in that sense, the border between virtual and real is invisible. This paper aims to explore the ontological determinants of violence and digital violence, to identify specific forms of digital violence

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and digital crime, as well as to analyze existing regulations aimed at combating digital violence and digital crime.

Keywords: *violence, digital violence, digital crime, legal regulations*

1. Introduction

The technological development of modern society has led to the multiplication of the space in which social life and social interactions take place. If we say that technological development has brought a new space for social interactions, we would significantly reduce the real situation, because it is not a new space, but an incalculable number of new spaces, which can be classified as Internet spaces, but as the Internet is only a means by which these spaces are approached, such a claim is not precise enough. It can be said that modern society is a society of countless illuminated screens. These screens are not just a two-dimensional representation of traditional media content, on the contrary – they are the means by which the greatest interconnection of people and content is achieved. Digitalization have brought unprecedented changes, and not only in the technological sense. The digital revolution has embraced all segments of society and changed the way human beings function even on a daily basis, from socialization to business, encompassing most things in between (Bjelajac & Filipović, 2021). Of course, as most of his life migrated to online digital spaces, it is understood that violence and crime, as an inseparable part of human nature and behavior, also migrated, and with that migration they acquired a new form and characteristics, while retaining most of their physical characteristics. But it is precisely these new forms and features that create a great challenge, both in the theoretical and in the practical sense. A rare thing in which there is no difference between the physical and the digital, when we talk about violence and crime, are the consequences, which are the same regardless of the space and the means by which the violence is committed. This paper starts from several hypotheses: that due to the ontological nature of violence, and thus digital violence and crime, it is not possible to completely suppress them; that the difference between violence in the real world and violence in the digital world is invisible, because the consequences and pain caused by digital violence are also felt in the real world; and that analogous to the regulation, suppression and control of violence and crime committed in the physical world, there must be regulation, suppression and control of violence and crime in the digital world, taking into account all the specifics and differences between the physical and digital. The aims of the

paper are to investigate the phenomenological and ontological determinants of violence and digital violence, the differences between violence in the digital world and violence in the real world, to identify specific forms of violence and crime in the digital world and to analyze existing regulations to control and combat digital violence and crime.

2. On the ontological nature of violence and digital violence

Digital violence has its ontological root and origin in violence in general, so that digital violence in its being differs little or not at all from general violence as a necessary essential feature of members of the human species. The presence of different types of violence makes it difficult to identify its general characteristics, but all chances are that "violence is a manifestation of the very structure of being " (Денисов, 2008). Violence is a specific form of relationship whose use is associated with "use of force", "infliction of physical, spiritual and property damage", "violation of one's interests and rights", "suppression of free will". Violence or the threat of its use forces people to behave inappropriately to their desires, hinders the "somatic and spiritual realization of human potential" (Денисов, 2008).

World Health Organization has defined violence as "the intentional use of physical force or power, threatening or actual, against oneself, another person, or against a group or community, which results in or has a high probability of injury, death, psychological injury, malformation, or poverty. This definition includes the very intention to commit the act, regardless of the outcome it creates. However, in general, anything that leads to harm or injury can be described as violence even though it was not planned as an act of violence (by or against a person) (World Health Organization n.d). In the essence of the being of violence, there are two firmly rooted phenomena – the intention to commit violence and the primary evil in man as the spiritus movens of violence, a noumenon that always means pain for the victim of violence.

In philosophical interpretations of the nature of human violence, as presented by Plato (2013) and later, among others, Hume (1896), Hobbes (2004) and Russell (1949), violence is highly ranked in the primary series of human instincts, moreover, there is a constant that indicates that human nature is ontologically intrinsic to violence, which, according to this thesis, is not only the most effective, but often the only means by which man can fulfill his desires. some can be vital to the life and survival of the individual, family, group, and even the state. These desires and the effort of man to realize them represent the primary initiator of violence, which in that context is by no means evil, is

not harmful and represents a praiseworthy activity. While we tend to declare such a view savage and erroneous, placing the habit of "doing evil for evil and violence for violence" in the wild past measured by millennia, it is not so. Haven't we, in the immediate past and the immediate environment, had armed conflicts and the ones most celebrated were precisely the people and groups that committed the greatest violence. Even today, many individuals and large parts of society worship them, and their activities are declared historically and existentially useful works.

In Leviathan (1651), Hobbes claims that the human person is ontologically destined to act according to natural law, that is, according to the freedom that is given to every human being by birth and being on Earth. This freedom that nature gives to man makes every man have the right to make his own decisions about how to use his own power to preserve his own nature and his life, and consequently man has the freedom to do whatever he thinks is the most appropriate means to do so (Hobbes, 2004, pp. 72–93). Hobbes claims that all people are equal in this and that they all believe in themselves equally, so their equal status encourages equality in their minds to realize their desires. The result is that where two or more people want what not everyone can have at the same time, they necessarily become enemies and necessarily commit violence. This point is clearly stated in the quote that "the condition of man is a condition of war of everyone against everyone, so that everyone rules with his reason and can use everything he likes that could help him save his life from the enemy" (Hobbes, 2004, p. 90). Life, according to Hobbes, is a selfish quest to saturate desires, and to that end people will seek to destroy and subjugate each other (see more: Shitta-Bey 2016).

At the international conference that was held in Russia in 2018 under the name "*Насилие в цифровую епоху*" (Violence in the digital era), an interesting paper "Ontological ultimatum and the nature of violence" was submitted, in which the author starts from the thesis that aggression and human violence, and even doing evil to others is not a matter of his choice, but it is natural impulses deeply ingrained in the ontological being of man that make aggression, violence and evil a way of life and a way of expressing natural instincts that society cannot suppress forever (Оболкина 2018). At the same time, "aggression and human violence, as well as doing harm to others" in the sense of this work, were if not the only, then the best way to succeed in life, to gain much-needed fame and to live to a decent old age.

Bertrand Russell wrote: "We have all kinds of aggressive impulses, which society forbids us to follow. I think that ordinary people cannot be happy without competition, because competition has been, since the beginning of man, the

inspiration for most serious activities. So, one should not try to abolish the competition, but one should try to practice it in forms that are not too dangerous. The primitive competition consisted of who would be the first to slaughter his rival, his wife and children; modern competition in the form of war still boils down to that. Anyone who hopes that wars will be eradicated in time should seriously consider the problem of safely satisfying the instincts we inherited from numerous generations of our wild ancestors. Many people are happier in war than in peace, provided they do not suffer much on their own. A quiet life can be boring. The monotonous existence of an exemplary citizen, preoccupied with making ends meet in a humble capacity, leaves completely unsatisfied that part of his nature which, had he lived 400,000 years ago, would have been completely filled with the search for food, beheading enemies and fleeing tigers" (Russell, 1949). This view is also articulated by Tofler when he observes that power is a reciprocal desire, and that human desires are infinitely different. Anything that can fulfill someone's desire is a source of power (Tofler, 1990).

3. Digital violence and digital crime

Like the majority of terms belonging to the sphere of the information and communications technologies, digital violence is a relatively new phenomenon which becomes a topic of serious scientific discussions in recent decades. There is a number of definitions of digital violence, and some are more general and include all forms of disturbance by using digital technologies, while the others are focused on specific forms of digital violence (Filipović & Vojnić, 2019). Nonetheless, the most important thing is mutual to violence in physical world and digital violence, that consequences are felt in physical world, and the space where the violence happens in merely a new and different challenge. A specific and particularly harmful form of both violence and crime in digital space is Internet pedophilia. Pedophiles use the Internet in various ways, whether to connect with children, make friendships, organize live meetings, or as a means to find, keep, and distribute child pornography. The Internet is also used as a means for interconnecting in pedophile networks, where they share experiences, advice, and visual content. Still, the Internet is not usable to pedophiles only because of the easy access to children, their identity, and child pornography. The internet is an ideal tool for pedophiles as it offers them complete safety and absolute anonymity (Bjelajac & Filipović, 2020). And in the case of Internet pedophilia and other migrated forms of violence and crime, the difference between digital and physical, if we look at the problem from the victimological perspective, is almost invisible.

As much as the differences between violence and digital violence were academic, the difference between general crime and digital crime is so great that countering digital crime with methods developed for general crime is almost impossible. When we consider digital crime as a group of practical actions that individuals or groups of people undertake, the first problem is the terminological definition of the term. Is it digital crime, cybercrime, high-tech crime, or something fourth. All the definitions are similar, but they are by no means the same, and when we start the meticulous scientific treatment, we very quickly notice the crucial differences.

The problems of preventing cybercrime were first discussed at the Eighth United Nations Congress in Havana in 1990. Since then, the UN has been actively considering various aspects related to the use of computers. In 1992, the OECD prepared the "Information Systems Security Directives". They were subsequently revised and adopted on 25 July 2002 as a Recommendation of the OECD Council as a "Directive on the Security of Information Systems and Networks: Building a Security Culture" (Organisation for Economic Co-operation and Development, 2003).

It seems that the crucial problem is that criminological science, followed by practice, has completely unprepared for the escalation of "new" digital crimes. The operatives who were engaged in detecting crime in the field found themselves in a territory they do not know. The courts could not conduct proceedings because many of the crimes that caused great harm to society and individuals were not codified as crimes at all. The state of criminological theory and practice, which in many countries suddenly began to understand what it was about, required a significant reorientation of activities, primarily law enforcement services, to actually ensure criminological security of individuals, society and the state in the context of digitalization. Fulfillment of this task required and still requires serious training of experts who must be able to investigate the current state of crime in the development and use of digital technologies, identify the features of the cause-and-effect complex, analyze the socio-demographic and moral-psychological characteristics of the criminal who has committed a crime in the field of digital technologies, to determine the main directions of confrontation with new types of crimes. Only criminology as a social-legal general theoretical and applied science and discipline can provide the necessary knowledge for that. It is called to investigate crime as a social phenomenon, to determine the essence and forms of its manifestation, to identify patterns of occurrence, existence and change of crime (Ищук, Я. Г., Пинкевич, Я. Г., & Смольянинов, Е. С., 2021).

Serebrennikova wrote about some interesting ideas about the correlation of digital technology and new criminological science: "The structure of digital technology is of crucial criminological importance for the detection, investigation and investigation of crimes. The first factor in the structure is large databases (Big Data) with network access. Other are computational capabilities, expert systems, and artificial intelligence, and to some extent modeling as part of the psychophysiological and mental process. Third, it is cloud technology (storage and computing) as well as distributed computing. Here we talk about a fairly wide range of modeling methods, correlation, structure of contingency tables, performing discriminant, regressive, variational, factorial and other types of analysis, application of seasonal fluctuation methods, probability limitation (including least squares method), as well as calculation methods growth using the index of average annual rates. Digital criminology is seen as a set of more advanced technological plans – methods that are developed on the basis of mathematical prediction. It is a computerized processing of quantitative and qualitative parameters of crime and mathematical identification of different types of dependence (on time, place and other variables). Mathematical processing of criminological information is rightly given great importance, which indicates new possibilities for specifying predictions. At the same time, it would be irrational to reduce digital criminology to just that, even if it is a rapidly evolving technological component, since, in essence, there is a danger of neglecting criminological theory. It is obvious that the development of technology, even the most advanced, does not in itself constitute a perfect methodological basis for criminological research. The development of technology without the support of theory does not identify enough potential directions for improving the theory of crime prevention, taking into account its current state" (Serebrennikova, 2020).

It is similar with the definition of digital crime. A significant factor that complicates the definition of digital crime is the primary legal dilemma, as this term is understood and defined differently in different countries. There is the experience of scientists in the study of cybercrime, but the postulates of that experience do not give a complete picture and definition of crimes committed in the field of digital technologies. It is known that the term "computer crime" was first used in one of the reports of the Stanford Research Institute (1999). Later, articles on cybercrime adopted the following classification according to which a computer can be: a subject of crime; may be the subject of a crime; and can be a tool. There was a fourth option, proposed in 1973 – the computer as a symbol, but that option was abandoned during the 1980s (Ищук, et al., 2021).

Over time, two primary definitions of cybercrime in a narrower and broader sense have been developed. In the first case, cyber crime is considered to be any illegal behavior in the field of electronic transactions that aims to violate the security of computer systems and the data they process. In a broader sense, crime is considered to be any illegal behavior committed through a computer network or through computer systems. As the case law proves, this should include the illegal possession, supply or dissemination of information via a computer system or network.

The definition of cybercrime was given in 2000 at the session of the Tenth UN Congress on Crime Prevention and Criminal Justice. It has been established that a computer crime refers to any criminal offense that can be committed through a computer system or network, within a computer system or network, or against a computer system or network. In principle, it covers any crime that can be committed in an electronic environment. But already in the framework of the Eleventh UN Congress on Crime Prevention and Criminal Justice, 2005, it was proposed "that this conceptual model be formulated differently, taking into account crimes related to the use of computers as prohibited by law and / or case law, which is: a) focused on the computer sphere and communication technologies; b) involves the use of digital technology in the commission of a criminal offense; c) involves the use of computers as tools in the process of committing other criminal offenses, and, accordingly, the computer acts as a source of electronic procedural evidence" (Computer Crime Research Center 2005).

We mentioned Stanford University, whose research teams have been dealing with all aspects of what we call computer crime in this paper for decades. We also recommend their thoughts on defining this type of crime and determining their elements (Stanford Research Institute, 1999).

The computer crime literature focuses on computer-related scams. "Fraud is the intentional or deliberate distortion of the truth in order to gain an unfair advantage" (Strothcamp, 1999). This is certainly a big part of computer crime, but it may be a little too narrow for our needs. Many others, when they think of computer crime, think only of those who break into computers to steal or destroy information.

We can get a slightly broader definition by studying what law enforcement agencies are actually researching. The FBI's National Computer Crime Squad (NCCS) deals with all crimes involving computers in two or more states. The following are considered important computer crimes:

- Intrusions into the public switched network (telephone company)
- Larger intrusions into the computer network

- Violation of network integrity
- Privacy breach
- Industrial espionage
- Pirated computer software
- Other crimes in which the computer is the main factor in the commission of a crime.

The Jones Telecommunications & Multimedia Encyclopedia states: "Some issues are carefully studied by everyone, from network veterans and law enforcement agencies to radical experts, including:

- Intrusion into a computer network
- Industrial espionage
- Software piracy
- Child pornography
- Email bombing
- Password finders
- Forgery
- Credit card fraud."

These lists are useful for thinking about areas of computer crime, but a reasonably concise definition comes from the end of the NCCS list: "crimes in which the computer is a major factor in the commission of a crime." This definition may be a little vague, so it might be useful to reduce it to crimes in which the computer is the primary, not just the main factor. Any real-world definition is necessarily somewhat arbitrary, but this working definition will be helpful in thinking about what we consider cybercrime" (Stanford Research Center, 1999).

4. Legal regulation of digital violence and digital crime

We live in an era of scientific and technological development, to unprecedented proportions. Along with the improvement, it has become increasingly common for technologies to be used for harassment and abuse. Digital abuse can occur in people of all ages, although it is especially common among teenagers and young people who use smartphones more often. Signs of digital abuse may include, but are not limited to: intimidation and harassment, surveillance and stalking, sexual coercion, possession and control. The specifics of digital violence are reflected in the fact that they include all cases in which someone uses electronic devices (mobile phone, computer, camera…) and

the Internet to tendentiously frighten, insult, humiliate or otherwise injure someone.

The life and activities of children in the modern age, in a significant part, take place in a digital environment, most often in spending time on the Internet. Learning, research, mutual communication with family and friends, takes place through digital devices that represent the focus of attention, wishes and desires of every child today. All this leads to an increased interest of children in exploring that boundless space of information and content, and on that path of search, they often face problems. The biggest of them is the whirlpool of digital violence, which they fall into recklessly, very easily, and the way out is difficult to find, most often by accident and after a hard fight with oneself, one's own environment and the aggressor or more of them (Mirković, 2019). Therefore, it is an incoherent and deceptive notion that digital violence takes place somewhere in the "virtual" world and is therefore less dangerous than the classic violence that takes place in the real world.

International conventions, resolutions and directives adopted at the level of the United Nations, the Council of Europe and the European Union, states and legally oblige states to establish a comprehensive legislative framework aimed at preventing abuse and violence against children in the digital environment, timely detection of such behavior, prosecution of perpetrators, as well as to take all necessary actions to provide assistance and support to child victims, to raise citizens' awareness of the unacceptability of any form of abuse and exploitation of a child, including that committed through information and communication technologies. This includes the obligation of the state to take all necessary legislative, administrative, social and educational measures, extraterritoriality or cross-border prosecution and conviction of perpetrators, as well as an adequate and concrete definition of criminal activities through information and communication technologies that harm children (child sexual abuse, recruitment, persuasion and encouraging children to do harmful activities, etc.), the best interests of children, transparent information on the risks of using such technologies and means of protection against exploitation (Ivanović, 2019). With this in mind, the protection of young people from online abuse and exploitation is guaranteed by numerous international and national documents, in order to provide support and a framework for measures to protect children from all forms of violence, exploitation and abuse in the digital environment. Despite everything, there is a huge gap between the potential of the normative and the real. For example, Serbia has ratified numerous conventions, protocols, guidelines for respecting, protecting and exercising the rights of the child in the digital environment. In addition to

the provisions of the Constitution, the Criminal Code, strategic documents, other relevant protocols and legal acts have been adopted, which form, among other things, a unique and comprehensive legal framework, including Law on the Fundamentals of the Education System, Rulebook on the protocol of actions in response to violence, abuse and neglect, Special Protocol for the Protection of Children and Students from Violence, Abuse and Neglect in Educational Institutions, and Framework action plan for the prevention of violence in educational institutions. Unfortunately, as in many social spheres, it has been shown that the volume of documents in this domain cannot cover anomalies, which are becoming more and more frequent, which indicates a serious gap between law and justice. The obvious and sightless violation of regulations related to the digital environment and the media space in general, where immorality and violence are openly promoted, confirms that the difference between normative and real is growing in this area and that what is in the regulations is not in line with reality.

As for our country, Serbia is trying to be technologically developed. In systemic activities towards high-tech crime, Serbia, according to state services, is in the upper half of the world. Data from independent screenings indicate slightly worse ratings (Beogradski centar za bezbednosnu politiku 2016).

"In the process of Serbia's accession to the European Union, cyber security and high-tech crime are subject to regulatory harmonization within Chapter 24 – Justice, Freedom and Security. The European Commission's Chapter 24 screening report points to the fact that the fight against high-tech crime in Serbia is still in its infancy. According to the index of development and use of information and communication technologies of the UN International Telecommunication Union, Serbia is a medium-developed country with a tendency to decline. Serbia also records a significantly lower rate of Internet representation in households (66.2%) than the average of the European Union countries (79.3%). From the formal legal point of view, Serbia is not in a bad position, since as a candidate for EU membership, it follows the legal guidelines from Brussels. Although the practice can be discouraging, the fact that the current laws of Serbia are largely harmonized with global, and especially European standards for the fight against cybercrime, which is a necessary condition for institutional improvement of the practice, is extremely important" (Beogradski centar za bezbednosnu politiku 2016).

For Serbia, as for a large number of European countries, it is characteristic that almost all forms of high-tech (computer) crime appear. Piracy is the most widespread, but there are also computer sabotages, frauds, misuse of payment cards, unauthorized use of data, pedophilia, etc. Computer crimes were

introduced by the Criminal Code of Serbia from 1998, when certain crimes were identified as "crimes against computer data". In a separate section, the Criminal Code defines the terms used in the law, and within that provides legal definitions relating to computer crimes. The basic terms are: computer data, computer network, computer program, computer virus, document, movable item.

The Law on the Organization and Competence of State Bodies for the Fight against High-Tech Crime entered into force on July 26, 2005, in response to high-tech crime, and "regulates the education, organization, competence and powers of special organizational units of state bodies for detection. criminal prosecution and trial for criminal offenses determined by this law". In addition to defining what high-tech crime is and the scope of this law, the District Public Prosecutor's Office in Belgrade for the territory of the Republic of Serbia has been appointed to act in criminal cases of this law, and a special department for fighting high-tech crime is being organized within it. The work of this department is managed by a special prosecutor appointed by the Republic Public Prosecutor, with priority given to public prosecutors and deputy public prosecutors who have knowledge in the field of information technology. The special prosecutor is appointed for four years with the possibility of re-election.

5. Discussion

The history of great technological discoveries has shown that the most significant technological discoveries very quickly end up in the hands of criminals and help them carry out illegal activities. Only later do technological discoveries become useful for the rest of humanity. It is the same with information and communication technologies (ICT). The development of ICT and related technologies has raised to a new and higher level the task of combating crimes committed through their use and minimizing the damage caused by these crimes. The growth in the volume of new types of crime alarmed society and the government at the moment when, with the help of ICT and computer fraud, huge amounts of money began to flow into the accounts and pockets of criminals. Criminologists are also alarmed, since the penetration of criminals into the virtual environment and their mastery of new technologies has taken on threatening dimensions, introduced a new criminal motivation, but at the same time, to some extent, encouraged the development of information and telecommunications technologies.

Some authors (Serebrennikova, 2020) believe that combating and combating digital crime requires a critical re-examination of existing criminological

methods and an attempt to go beyond the known, "generally accepted" ways of working in neoclassical criminology. The development of the concept of digital criminology cannot be reduced only to a set of technologically advanced methods that are developed on the basis of mathematical prediction, ie. computer processing of quantitative and qualitative parameters of crime, mathematical identification of different types of dependence. The modern information – analytical sphere of law enforcement activities includes the use of digital criminological tools in crime prevention programs, mathematical methods of crime analysis, profiling, etc. Their totality is mainly applicable for criminological analyzes and forecasts, but there is no necessary theoretical basis that corresponds to the tasks of fighting crime in the digital world, which is still being formed on the basis of digital criminology, criminological neoclassicism, overall scientific achievements about society and man. Forecasts for the next industrial revolutions predict a sharp acceleration of the pace of technology development, systemic transformation of production and management, which will not only push the global growth of living standards, but also increase inequality, and therefore give rise to crime. It is these aspects that must be taken into account when predicting the further scientific development of digital criminology, whose theories should be based on conceptual models of social development in the near future. The social consequences of the predicted new industrial revolutions will inevitably become common determinants of future crime, as they have always been in the past.

In that sense, digital criminology emphasizes the interdisciplinary integration of scientists who represent the complex of sciences of the so-called criminal cycle. The literature also discusses the need, and even the necessity, for the return of criminology to a holistic, traditional picture of the world, which will be quickly filled with new knowledge in accordance with the development of the information society. In this case, a special role will belong to the new, digital criminology, within the framework and means in which legal, humanitarian and natural-elementary knowledge will converge. Within traditional criminology, the problems of the criminal's identity have, at first glance, been solved and comprehensively investigated, which, however, cannot be said of a "digital" criminal operating in a virtual, seemingly invisible world. In that sense, the criminological literature on the problems of the development of the criminal personality is still mostly "analog", and does not take into account the specifics of the development of the digital society. The criminology of most countries is still dominated by a mechanical, traditional and somewhat simplified view of the personality of the criminal, who, as a rule, depersonalizes.

6. Conclusion

The digital world has led to new variability in the development of the situation, since the circumstances that can lead to digital crime can develop in both the real and virtual world. Crimes committed on the basis of and under the influence of computer games, communication on social networks, various forms of internet fraud require criminological analysis. Scientists are increasingly pointing out the discrepancy between old, traditional forms and methods of investigating information and "new" crimes with new illegal manifestations in the digital sphere or with the use of the digital sphere of life. In that sense, the imperative is to "return" the identity of criminals to the focus of criminological research. It is necessary to accept the emergence of "new" crimes that carry the specifics of the information age, the number of which will most likely only increase and worsen in the future. The forecast of the effectiveness of measures to combat such crime is generally pessimistic. The forecasts of the so-called fourth industrial revolution indicate a sharp acceleration of the pace of technology development and a systemic transformation of production and management. The social consequences of the projected new industrial revolutions will inevitably become the general determinants of the crimes of the future, as they have always been in the past.

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SPECIFIČNOSTI DIGITALNOG NASILJA I DIGITALNOG KRIMINALA

REZIME: Migracija brojnih aspekata ljudskog života i privređivanja u onlajn sfere postala je neodvojivi deo svakodnevice i teško je zamisliti funkcionisanje bilo kog aspekta života bez interneta i prostora u kome se odvija

najveći deo ljudskih interakcija a koji on omogućava. Jedna tako velika i značajna nova forma stvorila je veliki broj manjih, i uslovila transformaciju stvari i fenomena iz fizičkog sveta u sasvim nove digitalne forme. Isto se desilo i sa nasiljem, kao fenomenom, obrascem ponašanja i delom ljudske prirode od prapočetaka civilizacije, koje je dobilo svoju novu formu koju generalno zovemo digitalnim nasiljem, a koje ne mora nužno da bude onlajn, ali je nužno vezano za digitalne uređaje. Digitalnom nasilju kao savremenom problemu treba dodati i problem digitalnog kriminala, naročito kada govorimo o pravnim regulativnim mehanizmima, iako ta dva fenomena, uz česta preklapanja, ne moraju nužno da se sadrže jedan u drugom, ali su podjednako važna. Onlajn i oflajn digitalni prostori su samo novo polje u kome se vrše nasilje i krivična dela, ali virtuelnost tih prostora predstavlja samo dodatnu specifičnost, jer se njihove posledice osećaju u fizičkom, realnom svetu, i u tom smislu, granica između virtuelnog i stvarnog je nevidljiva. Ovaj rad ima za cilj da istraži ontološke odrednice nasilja i digitalnog nasilja, da identifikuje specifične oblike digitalnog nasilja i digitalnog kriminala, kao i da analizira postojeću regulativu namenjenu suzbijanju digitalnog nasilja i digitalnog kriminala.

***Ključne reči*:** *nasilje, digitalno nasilje, digitalni kriminal, pravna regulativa.*

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SPANISH SPECIAL TAXES AND THE TAX HARMONIZATION OF THE EUROPEAN UNION

ABSTRACT: If the special taxes have been imposed with a fundamental objective of promoting a consumption limitation of certain products derived from their devastating social or environmental impact, it is necessary to reflect on their high cost produced by the transposition of the EU Directive 2020/262 of the Council, from December 19th, 2019, which establishes a general regime of special taxes and their taxation. If the objective of the aforementioned Directive is to achieve a fiscal harmonization, it is necessary to consider the effects that occur when its application in the Spanish state directly collides with the economic capacities and tax justice, since these principles may be void of a content and threaten to a greater or lesser extent against another basic non-confiscatory tax collection. For this reason, this work will analyze some issues related to its high quantification and the results produced in the EU harmonization line. Taking into account that our constitutional principles may be called into question, there will be raised various questions about a double taxation of the products affected by these taxes, and, how, in its social repercussion, it does not seem to comply with its alleged extra-taxation in terms of its effectiveness.

Keywords: *special tax, extra-tax, confiscatory, harmonization*.

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1. Introduction

Taxes, in their most elementary conception, are the fundamental instruments for sustaining the public expenditures of a State since they provide the population with the services necessary for the achievement of the well-being of society, having a direct impact on maintaining it in its own right political, economic and social dimension. However, if we talk about special taxes, in addition to being collection instruments, they have a much more specific function, since they try to tax products that, due to their special nature, can have a negative impact on both the environment and society. However, these special taxes are indirect taxes that significantly tax the product, justified by the extra-fiscal function of the tax, that is, a function that tries to discourage consumption, although it will not always produce the desired effect. Consequently, here the implementation in the Spanish State is proposed as a consequence of the transposition of Directive 2008/118 of the Council of December 16, 2008, which establishes the general regime of special taxes, in terms of its regime harmonization of Member States. This community transposition, as well as those specific to energy products and electricity (Directive 2003/96/CE); alcohol and alcoholic beverages (regulated by Directives 92/83 /CEE and 92/84/CEE); and tobacco products (regulated by Directive 2011/64 / EU) can jeopardize such important fiscal principles as tax justice and economic capacity, since they are applied directly to consumption and to a high degree.

2. Methodology

In this article, a brief overview of the legal regime of excise taxes will be made, not only the basic aspects of the Spanish legal regime but also its European dimension. Subsequently, its extra-fiscal function and whether or not this occurs will be analyzed. The structure of special taxes and their scope of application will be analyzed, and the intended fiscal harmonization of the European area and its repercussion with the tax principles of the Spanish State will be questioned.

Finally, the possible consideration of the confiscatory nature of the tax will be raised and it will conclude with the hypotheses that have given rise to the study and possible future lines of research on the subject in question.

3. Special taxes: concept and legal regulation in Spain-European Union

To start talking about special taxes, it is necessary to point out what a tax system means and its objective. Our supreme rule, the Spanish Constitution (1978), establishes as an obligation of all citizens, both Spanish and foreigners, the support of social spending through taxes, included in article 31.1, where it also adds that such circumstance must be weighted based on their economic capacity through a fair tax system, supported by principles of equality and progressivity, eliminating any confiscatory feature. The meaning of this declaration means that everyone who has any professional activity in Spanish territory must contribute to the public coffers, simply due to the fact that the taxable event typified by the legislator occurs, derived from an act or legal-economic business. In this way and according to the Spanish constitutional essence, each taxpayer must contribute only what they have the economic capacity to face (Sainz de Bujanda, 1991, p. 107). As a note, the Constitutional Court has repeatedly declared that taxes[1] are an instrument of general economic policy that fulfill the essential objective of collecting income and above all, ensuring an equitable distribution of wealth (STC 46/2000, of February 17; 276 / 2000, of November 16). Consequently, the Professor of Financial and Tax Law (López, 2020a, p. 91), insists on this issue throughout his works, relating articles 1.1, 31.1 and 131.1 of our Spanish Constitution, where he determines that as a social and democratic State of Law Income and public spending are distributed towards a social dimension of the State, thus justifying a just distribution of wealth.

3.1. Special taxes: national and European legal concept and regime

According to the General Tax Law (2003), in its article 2.2.c, the tax is a tribute that is required of the citizen without any consideration when a taxable event occurs through patrimonial businesses, taking into account the economic capacity of the subject. It also adds a list of both direct and indirect taxes such as: Personal Tax, Corporation Tax, Tax on Economic Activities (VAT), Tax on Patrimonial Transmissions, etc., detailing a wide list. But within its list it also includes a section on Special Taxes, this being the subject at hand.

According to Law 38/1992, of December 28, on Special Taxes, in its article 1, the special tax is expressly defined as a tax of an indirect nature that

[1] The concept of tribute is defined as a general notion that includes taxes, fees and special contributions.

falls on certain consumptions and levies only one phase, either manufacturing, importation or territorial introduction. These products or goods subject to these taxes are hydrocarbons, coal, electricity, means of transport, tobacco products, alcohol, wine, beer and fermented beverages. In other words, it taxes products that may have a negative impact on society, as stated in the explanatory memorandum of this aforementioned Law. The scope of application that is established is of the national territory except the Canary Islands, Ceuta and Melilla. However, intermediate taxes on alcohol and derivatives will be required in the Canary Islands.

Consequently, and according to article 6 of the Special Tax Law, its own circumstances of non-subjection are determined on extraordinary occasions when the loss of products occurs due to force majeure or destruction.

The accrual of the special tax according to the Law already cited in its article 7, declares that it will occur at the time of leaving the factory, or deposit or self-consumption depending on the case. The taxpayer, according to article 8 of the Law of Special Taxes, is attributed to both natural and legal persons, likewise in article 9 it establishes a regime of tax exemptions in international organizations, armed forces, etc.

3.2. Purpose of the Special Tax: its extra-fiscal function

In order not to expand further on the characteristics of the tax, we have to focus on its purpose, as a special tax, to concur with another tax, as we already know, with the Value Added Tax. This double taxation has its justification in the objective of the tax itself. In the explanatory memorandum of the Special Tax Law, the need for this tax together with the VAT is justified in the application of certain products such as hydrocarbons, electricity, alcohol, etc., because they have high social costs, both environmental and health. Therefore, they must be taxed by consumers, thus fulfilling an extra-fiscal function as a dissuasive instrument that limits or reduces their consumption. It assumes in its scope that this tax will be applied together with another tax, Value Added Tax, increasing it, thus insisting on its justification.

If we take into account that the function of the tax in a State of Law is not simply to collect (Barquero, 2002, pp. 431–437), we thus have the concept of the extra-fiscal function of the tax, since this special tax has the apparent purpose of dissuading, encouraging or motivating certain conducts in favor of the general interest. This is where the dual functionality of the tax resides, its high collection and consequently its correction in the behavior of the consumer or user, this high tax being limited to the non-confiscatory

principle declared by the Spanish Constitution, mitigating this double taxation in certain taxable events of rational way (Ríos, 2008, p. 139). However, this extra-fiscal function should not be based exclusively on a high tax for the consumer, but according to article 43.2 of the Spanish Constitution, public bodies may establish other dissuasive measures that promote such extra-fiscal function (campaigns to promote the use of renewable energies, subsidies for the purchase of hybrid or electric vehicles, among others) and not only based on the economic increase of the product.

In certain products such as the use of electricity or hydrocarbons, due to their essential nature, their extra-fiscal function is meaningless and has exclusively a collection objective, so when raising the tax on these products, no matter how much extra-fiscal appearance that possess, the only thing that is intended is to fill the state coffers (López, 2020b).

At this point, we can verify that, on some occasions, the alleged extra-fiscal measures are supported by a double standard of the State, dissuading a behavior, but in turn collecting, since with such measures it is proven that the consumption of these products has not declined. As proof of this we can see it in the different economic studies on the behavior of users in relation to some products, where an increase in the consumption of alcohol (El Independiente, 2021), tobacco (Health web portal, 2021) (increases in Spain), hydrocarbons (Electronic economic journal, 2021), among others, is observed, demonstrating that the extra-fiscal nature of excise duties does not fulfill its mission despite its high burden.

3.3. The Confiscation of Special Taxes

Consequently, the application of special taxes may suggest that due to the lack of effectiveness in its extra-fiscal function and its double taxation in the collection with such unjustifiably high prices, it does not fulfill its mission, even being considered that it violates principles based on tax justice and economic capacity, leaving into question such essential concepts contained in the Spanish Constitution in its article 31.1 as that of non-confiscation. This term, included as inadmissible, is defined as ambiguous as the actual percentage necessary to consider it as such is not established exactly, and even jurisprudentially. Likewise, not only from the point of view due to its high taxation but where it is directed, since being an indirect tax, it absolutely dispenses with the circumstance of the economic capacity of the subject, and, therefore, it may be confiscatory or not depending on who pays it and their financial resources. As the Professor of Financial and Tax Law states (López, 2018, pp.

23–54) when one quota is included over another, that is, the application of two taxes, the Value Added Tax and the Special Tax, taxing the product doubly does not respect the principle economic capacity of the subject.

3.4. The European tax harmonization of Special Taxes

The European Union, in an attempt to harmonize taxation of its Member States, has established different rules to unify the prices of products in all its Member States or at least make the amounts as close as possible, as proposed in Article 113 of the TFEU, where it establishes the need to harmonize taxes to guarantee the establishment and proper functioning of markets, as stated by the Professor of Financial and Tax Law (Mata, 2018, pp. 41–64). To this end, different Directives have been developed with common guidelines on specific matters that unify, as far as possible, their quantification. Energy products and electricity, regulated by Directive 2003/96 / CE; Alcohol and alcoholic beverages, regulated by Directives 92/83 / CEE and 92/84 / CEE; Tobacco work, regulated by Directive 2011/64 / EU; with the essential objective of guaranteeing a good functioning in the European space.

However, this harmonization has not been exempt from consequences, especially in our legal system, the Spanish, since its application, as we have already verified, to the principles of economic capacity of the obligor and therefore does not comply with tax justice, an essential element of our constitutional regulation on tax matters. This harmonization obliges the imposition of one tax on another, which, when applying said tax on consumption tax, VAT, to another, the special one, supposes a situation of superimposition, as pointed out by the Professor of Financial and Tax Law (López, 2018, pp. 23–54). Therefore, such harmonization is detrimental to the pocket of the Spanish citizen, especially those lacking in resources, which have not been taken into account in the application of this tax, something contrary to what our constitutional rule stipulates.

4. Future research directions

In order to achieve a better analysis of the incidence of special taxes in the Spanish legal system, its European harmonization and its respect for the constitutional principles of the state, the study of the future transposition derived from the new Directive (EU) 2020 is proposed. It establishes the general regime of special taxes, since it intends to continue with the fiscal harmonization of the Member States, guaranteeing their functioning of the internal

market by applying new telematic and administrative measures, however, it will be necessary to wait for the period granted by the Union for its regulation.

5. Conclusions

To conclude, after the study carried out on Special Taxes and the incidence of the Tax Harmonization Directive in the Spanish State, it has been found that it collides with the constitutional tax principles, since it taxes certain products with double taxation in excess, totally disregarding the subjective element of the tax, its circumstances and conditions, taxing it in a linear way as it is an indirect tax, eliminating the personal consideration of the principle of economic capacity in its entirety, negatively affecting the extra-fiscal function to those lacking resources especially.

Therefore, such harmonization, although necessary in terms of guaranteeing the free circulation of markets, should consider the circumstances of the obligor more directly and make compatible both the national principles of tax justice with the proper functioning of European markets through not only economic measures, since, in a way, it reveals a marked collection character rather than fulfilling its extra-fiscal purpose as a corrective means.

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ŠPANSKI POSEBNI POREZI I PORESKO USKLAĐIVANJE EVROPSKE UNIJE

REZIME: Ako se posebni porezi rađaju sa osnovnim ciljem promovisanja ograničenja potrošnje određenih proizvoda koji proizilaze iz njihovog razornog društvenog ili ekološkog uticaja, potrebno je razmisliti o njihovoj visokoj ceni koja je nastala transpozicijom Direktive (EU) 2020. /262 Saveta, od 19. decembra 2019. godine, kojom se utvrđuje opšti režim posebnih poreza i njihovog oporezivanja. Ako je cilj pomenute Direktive postizanje fiskalne harmonizacije, potrebno je razmotriti efekte koji nastaju kada njena primena u španskoj državi direktno dođe u koliziju sa ekonomskim kapacitetima i poreskom pravdom, jer ovi principi mogu biti

bez sadržaja i ugrožavati u većoj ili manjoj meri protiv druge osnovne nekonfiskatorske naplate poreza. Iz tog razloga, u ovom radu će se analizirati neka pitanja vezana za njegovu kvantifikaciju i rezultate koji nastaju u okviru harmonizacije sa pravilima Evropske unije. Uzimajući u obzir da naši ustavni principi mogu biti dovedeni u pitanje, postaviće se različita pitanja o dvostrukom oporezivanju proizvoda na koje ti porezi svakako utiču i kakav je kontekst društvenih reperkusija u situaciji da se ovakav sistem oporezivanja ne primenjuje.

***Ključne reči*:** *poseban porez, ekstraporeski, konfiskatorski, harmonizacija.*

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PROTECTION MEASURES FOR THE CHILDREN WITHOUT A PARENTAL CARE

ABSTRACT: Foster care is the most important measure of the protection of the rights and interests of the children who have either been left without a parental care or have had certain developmental and behavioural disorders, and cannot live with their biological parents. In addition to a foster care as a measure of the protection of the children without a parental care, in a legal system of Republic of Serbia, there are some other institutes of a legal guardianship and adoption too. Foster care is most often associated with altruism and humanity of the people who have decided to be foster parents, and who had had these qualities even before that decision. Foster care in Republic of Serbia has had its ups and downs. The social crisis has also affected this institute, but the humanity that foster care carries in its nucleus and the fact of helping the helpless has always managed to ensure a foster care not to disappear from the legal regulations. By using the comparative, historical, analytical and descriptive method, the aim of this paper is to analyse a foster care as one of the measures of protecting the children without a parental care, as well as to indicate the current state of foster families in Republic of Serbia and the position of children in them.

Keywords: *foster care, children`s protection, legal guardianship, adoption, family.*

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1. Introduction

In the legislation of the Republic of Serbia, the most important measures that protect the rights and position of children without parental care are contained in two legal texts: the Family Law of the Republic of Serbia from 2005 and the Law on Social Protection from 2011. In that way, foster care, as a form of child protection, is classified in the institutes of family and social law. Family, because it contains a family law relationship in itself, through the establishment of a foster-child relationship, and in the function of education and raising the child. Social, in the sense of social law, because these are minors who are in a state of social need and who exercise their protection in the social protection system. In addition to the mentioned two legal texts, two ordinances are of special importance for the realization of foster care: the Rulebook on foster care which determines more detailed conditions and standards for child protection in a foster family, and the Rulebook on closer conditions and standards for social services regulates foster care financing.

Foster care is the most important measure of protection of a child without parental care, ie a child under parental care who has mental and physical disabilities or behavioral disorders, and who is temporarily unable to live with his parents (Rulebook on foster care, 2008. Article 2). The primary goal of foster care is to ensure the safety and well-being of vulnerable children (Chipungu & Bent-Goodley, 2004. p. 76). The purpose of foster care is reflected in the temporary protection of the child and lasts until the critical situation in the child's biological family is resolved, however, foster care is not limited by the legal deadline and it can last until the child becomes independent and reaches full maturity. The goal of placing a child in a foster family is to provide the child with an adequate family environment in which that child can be brought up, grow and develop, be educated and trained for independent living, in accordance with all its ambitions and natural potentials. In this way, the child is given the same chances of success as children who grow up in their family, together with their biological parents.

For foster care to be successful, it is not enough to give the child only home and love. Children in foster families were left without the care of their biological parents and were often neglected. That is why the role of a foster parent is crucial and crucial, in order for those children to regain their faith in adults. The belief that there are some people who are ready to provide happiness, security, love, intimacy and emotional relationship that they could not get in their family. Foster parents who accept this task must be aware and familiar with all the problems that the child had in his family, and treat

him without discrimination and prejudice. The foster parent should accept the child as he is, and in the light of the experience he had in the family in which he was born, with all the characteristics and behavior that need to be understood and, if necessary, corrected for something better.

Being a foster parent means having the necessary knowledge and skills of raising and educating children who have early experienced injuries on their body and psyche. Their sense of identity is endangered due to the major changes, rudeness and inconvenience they experienced during their short life. Deprived of the love, feeling of warmth and security that the family provides, these children usually do not even know how to get them. These children are often introverted, withdrawn and "cocooned" in the shell of their dark reality, often as little builders they build an impenetrable wall around themselves in fear of being hurt again, and these traumas are sometimes the biggest challenges of foster care (Holland & Gorey, 2004. p. 117). The task of a foster parent is all the more difficult and responsible because he needs to accept such a child with all his specifics and fears, to develop skills that will make it easier for them to recognize and understand such children's behavior. Foster parents should be in the service of correction to help children change their expectations and behavior (Dozier, 2005, p. 29). Foster parents know that the child has not contributed in any way to the current situation, nor is he guilty of his past, which will mark him for the rest of his life. Therefore, the foster parent has a mission to direct the child towards the development of the potential that the child has, but also to help the child in a subtle way so that the child accepts and understands his past. However, a child's bad life experience can create a distorted picture of the child's potential (for example, separation from parents and living in an institution can have consequences that are reflected in developmental delays). This can deceive the caregiver, as well as create a wrong picture of the child's potentials, seemingly showing the child's potentials less than they really are. In such a situation, the knowledge and skills of a skilled foster parent stand out and come to the fore, who should apply his experience and do everything to strengthen the child, restore his self-confidence and help him make up for everything he missed by staying in a dysfunctional family.

These are situations and specifics in which the challenges of foster care are hidden, tasks that biological parents do not have and do not meet with them. Belief in the child and commitment to achieving results, when everyone else gives up, is a task only for the chosen ones, because not everyone can be a foster parent. However, because of that, the satisfaction is higher when the progress in the child's development is seen. This success is important not only for the child, but also for the foster parents, but, more broadly, for the society,

which remains a young, healthy person and a successful citizen ready to join the society. Without the work of a foster parent, these children would not have been successfully built and realized as a person, they would have borne the burden of insecurity all their lives, without the will to become independent and continue their life path successfully.

In times of major social upheavals and great human suffering (epidemics, revolutions, wars, natural disasters ...), it is necessary to provide temporary shelter and protection to children who have lost their parents or parental care until those circumstances pass, ie. while there is a need for someone to take care of that child as well. Scandinavian countries are known for their rich and long history and tradition of foster care, based on the opinion that a child's stay in a foster family is a natural and desirable part of his growing up, maturing and becoming independent. "Thus, in Norway, where the tradition of foster care has been known for centuries, it was considered a special honor for a foster family to accept someone else's child for temporary upbringing, and a child given foster care was considered to have a special privilege to gain such experience. During the 19th century, members of social elites considered it a matter of their prestige to prepare their children for future life in this way as well" (Draškić, 2014. p. 140).

2. Historical overview of foster care in Serbia

The most important legal document of insurgent Serbia, the so-called "Karađorđev zakonik"[1] from 1805, contains the first written traces of regulating the placement of children in another family. Article 30 of the Code regulates the provision on an "illegitimate mother" who is obliged to feed a child, but provides for the possibility: she must not kill the child because it was punishable by death (Mirković, 2008. p. 128).

During the 19th and 20th centuries, Serbia took part in many wars, which resulted in a large number of children who were left without a family and who needed to be taken care of. The suffering of the people did not force the state

[1] Karađorđev zakonik (Karadjordjev's Code) is one of the two generally recognized laws of a general character from the period of the Serbian uprising. It was of great importance in the establishment of the legal system in the newly formed Serbian state and as such represents a great turning point, because it relied heavily on the provisions of Austrian law. Karađorđev zakonik represents a sudden turn and deviation in relation to the law that has dominated under Turkish rule for centuries. The matter of Karađorđev zakonik is a mixture of customary law on the one hand and criminal / civil law on the other, but the influence of the Orthodox Church in its standardization is also noticeable.

to seriously deal with this problem, because it was necessary to take care of a large number of orphans at once. Thus, the solidarity and humanity of relatives, but also of those families that were not related to the unfortunate children, which also helped to take care of these children, was shown in action.

The Civil Code of the Principality of Serbia (better known as: The Serbian Civil Code is the most important civil law act in Serbia during the 19th century, adopted in 1844. It contains only one article (Article 144) that could refer to foster care, however, it is not possible to state with certainty whether it is about foster care institutes, adoption or just caring for children. "However, based on the linguistic analysis of documents scattered in various archival funds and comparing the description of relations between children and their dependents with the regulations on institutes similar to foster care, it can be concluded that the mentioned relations cannot be anything other than foster care. The archives speak about the manner of establishing foster care, the categories of children who were with foster parents, the sources of funds for child support and the duration of foster care" (Drakić, Kulauzov & Stanković, 2018. p. 570). Article 144 of the Serbian Civil Code mentions foster care in the context of adoption: "it can be adopted without the declaration of the first person or the second, and then such adoptive parents are considered as foster parents, and adopted as foster child, having only the right to decent maintenance and not to the family name and other family rights" (The Serbian Civil Code, 1927).

However, we can see from the legal norm that The Serbian Civil Code did not regulate the rights and obligations of foster parents. "The decree passed on July 17, 1851, prescribed that a certain part of the child's property could be ceded to the foster parents of the child under guardianship, but only at the proposal of the guardian and with his obligations to monitor whether the foster parent fulfills his duties well and to guarantee that he ceded the property and will not ruin it" (Drakić, Kulauzov & Stanković, 2018. pp. 570–571). The formalities envisaged for the establishment of foster care under the The Serbian Civil Code did not exist, so it was created by taking the child under foster care. There is not much historical documents and preserved legal acts about the costs of foster care. One of them is the Decree from 1847, which"... says that the municipality is obliged to support orphans only if no one will accept them, which means that the foster parent could support the child with his own funds" (Kulauzov, 2014. p. 281.)

After the First World War, a large number of civic and charitable associations were founded, which, using the help of humanitarian organizations from abroad, participate in helping homes for children. The first family

accommodation, on the territory of Serbia, in this period, was recorded in the vicinity of the town of Šabac, in the village of Štitar, in 1920, which was organized by the Society for the Protection of Children and Youth. Two types of accommodation were envisaged: accommodation of children in a home and accommodation of children in families. It is estimated that one fifth of the children were cared for in foster families. "Since 1919, when the Rulebook and Rules of Procedure of the State Protection of Children and Youth were adopted, and a few years later the Law on the Protection of Children and Youth, the development of family accommodation has been encouraged. Family accommodation experienced a special momentum between 1929 and 1934, when, following the example of "Baby Farms" in Great Britain, the so-called children's colonies in Miloševac and Čortanovci, Stapar near Sombor and Čurug" (In the Labyrint of social protection – Lessons learnt from research on children in care, p.77).

During the Second World War, a large number of children were left without parents, however, due to the direct influence of the ideology taken over from the Soviet Union, in which orphanages were opened en masse to accommodate orphans, war orphans were not given to foster families in Yugoslavia. Those children were placed in such homes for orphans. However, such a practice was soon abandoned, so that from 1948, the establishment of children's colonies began again.

The long tradition of family accommodation and foster care has been present in the city of Belgrade for many decades. "As early as 1931, the Central Office for the Protection of Mothers, Children and Youth of the City of Belgrade was established, which, among other things, had the task of founding its own children's colonies and supervising children in other people's families. This office initiated the establishment of an institution for closed protection of children, "Centre for Protection of Infants, Children and Youth" in Zvečanska Street, which changed its name over time, but has survived to this day and remains recognizable by the name of the street in which it is located. Within this centre, from the very beginning of its work, the activity of family accommodation took place" (A Safe Step to Foster Care – A Guide for Foster Parents, 2009, p. 24).

The period spanning seven decades after World War I enabled foster care to record constant growth and increasing application, both from a normative point of view and in terms of practical application. The most important legal acts in this period, in the field of foster care, are the Law on Family Accommodation from 1959, which was applied until the adoption of the Law on Marriage and Family Relations in 1980. After that, the matter of family

accommodation was regulated by the provisions of two laws – the Law on Marriage and Family Relations and the Law on Social Protection. In 1955, family accommodation was established in Belgrade as a special institution under the name: "Center for Caring for Children in Families". It has been integrated into the Center in Zvečanska Street (Centre for Protection of Infants, Children and Youth) since 1962, and since 1974 the Center has worked as a special unit of the Centre in Zvečanska Street. However, the Center was closed in 1998 due to the crisis and lack of funds. In the 1990s, along with the disintegration of the Socialist Federal Republic of Yugoslavia and the decadence of all social values, the institution of foster care came under attack. As a result, the number of foster families decreased. Based on official statistics from the Bureau of Statistics, there were 546 children in 372 foster families in the city of Belgrade in 1980, and two decades later, in 2001, there were 220 children in 156 foster families, which indicates that they returned to practice after the second World War II and that children were placed less in foster families, and more in institutions intended and educated with the aim of accommodating and caring for children without parental care. That was not a good solution because it deviated from the practice that was nurtured in Serbia for almost a century. Significant progress was made in 2008 with the establishment of the Centre for Foster Care and Adoption in Belgrade, but also with the adoption of a decision establishing networks of institutions. In addition to the center in Belgrade, there are sixteen more Centers for Foster Care and Adoption in Serbia.

The general decadence and degradation of all values and state institutions, as well as the bad situation in society at the end of the 20th century in Serbia, left scars on the social protection system and its institutions. Indirectly, this led to a worsening of the position of children in need of protection due to the lack of parental care. There were fewer and fewer foster families ready to help the children, which is why the children were placed in institutions and remained in them until they came of age. 2003 was a key year in the revitalization of foster care, because then the competent ministry began the process of reforming the social protection system. The primary and priority task of this reform was the application of family forms of child protection. The Strategy for the Development of Foster Care in the Republic of Serbia was presented, in order to start with the help and support of donors with the improvement of foster care and placement of children in foster families. Priority goals were defined:

- setting professional standards,
- amendment of legislation,
- hiring professionals in the field of protection of children without parental care,

- realization of an active campaign in favor of foster care,
- creating training programs and
- major changes in the financing of family accommodation in foster families as an additional stimulus and relief.

The implementation of these measures was aimed at facilitating the position of foster parents and children placed in foster families. In order to strengthen the position of foster carers, a new approach called "Safe step to foster care" was introduced, which had the ultimate goal of acquiring crucial knowledge and skills in the field of foster care, as a preparatory phase necessary for the final realization.

3. Comparison of foster care, adoption and guardianship institutes

Guardianship, adoption and foster care are family law institutes regulated by family law, which in practice and through the eyes of those who are not educated lawyers know how to create confusion, ie they can mix and replace each other. Therefore, it is necessary to elaborate each of these institutes and mutual comparison, so that these mistakes would not occur. In the literature, foster care is most often defined as "taking someone else's child for free feeding and education" (Begović, 1957. p. 165; Bakić 1988. p. 340). In other words, when foster care is established, a relationship arises in which no kinship relationship is established between the two main subjects of that relationship: the child (foster child) and the adult who takes the child for free food and accommodation (foster parent). The child maintains his kinship with members of his biological family.

The most important feature of foster care in the past was gratuitousness, however, today in Serbian law it is one of the measures of social protection, "but for such a foster care function to be fully fulfilled, it would be necessary to have a network of eligible foster families who are ready to within the offer of social services, in the future they will completely replace accommodation in social protection institutions. Also, the child who is placed in foster care is still obliged to be supported by the parents, but since foster care contains elements of a social protection institution in parallel, the foster parent is paid a monthly allowance for supporting the child in his family" (Draškić, 2014. p. 142).

The most significant difference is foster care in relation to adoption. Foster care does not transfer the entire parental right to the foster parent, but only individual rights and obligations from the entire corpus of parental rights, such as: upbringing, education, custody, and child support. Outside

the domain of these rights and obligations, there are no mutual rights and obligations between the foster parent and the foster child (eg the foster child does not have the right to the foster parent's surname, the foster parent and the foster child do not have guaranteed mutual inheritance etc.). So, foster care is a specific relationship with the elements of the family relationship, which is not basically that, but has the primary role of compensating the child for the absence of the natural family and biological parents.

Foster care has similarities with the institute of guardianship, however, it also differs from this institute. Namely, "foster care has some similarities with the institutions of adoption and guardianship, but it also differs from them. Thus, the key difference between foster care and adoption lies in the fact that legal adoption establishes a kinship that mimics the natural relationship between parents and child, or blood relatives in general, while foster care does not change anything in the child's family status, but only temporarily placed in another family for care. On the other hand, the guardian has a general authority to take care of the protection of personal and property interests of the minor ward, but he does not support him and is not obliged to accept the child into his family. In other words, a foster child is assigned a guardian to represent him or her in legal matters and to protect his or her personal and property rights and interests (although the foster parent may, of course, be appointed as a guardian), and the foster child may to be placed in foster care for the purpose of daily care, upbringing, education and, eventually, support" (Mladenović, 1981. p. 406).

4. Establishment, effects and termination of foster care based on the provisions of the Family Law of the Republic of Serbia

The fifth part of the Family Law of the Republic of Serbia contains regulations that regulate: establishment, actions and termination of foster care (Articles 110-123 of the Family Law). The law stipulates that foster care can be established exclusively by a decision of the guardianship authority, whereby the minister responsible for family protection prescribes the conditions for establishing foster care. Article 111 emphasizes the position of the child and his interest, ie that it is possible to establish foster care only if it is in the best interests of the child, so that the next article (Article 112) highlights another condition for establishing foster care – "only if the child is a minor".[2]

[2] From this rule, in paragraph 2 of Article 112, an exception is stated that "established foster care may be extended even after the age of 18 of the foster child, if the child has a disability in psychophysical development and if he is unable to take care of himself and protect his rights."

Legal provisions as a special condition for establishing foster care state that it is necessary to have adequate consents: parent of the child (where this consent is not required when the child is without parental care), guardian (if the child is under guardianship) and child (if the child is 10 years old) and is capable of reasoning) (Articles 114-116).

The personal qualities that a the foster parent should have in order to be suitable for the role of foster parent are also specified in the law. Foster parent can only be the "person who has been determined to have personal characteristics on the basis of which it can be concluded that he will take care of the child in his best interest. The foster parent cannot be:

1. a person who is completely or partially deprived of parental rights;
2. a person who is completely or partially deprived of legal capacity;
3. a person suffering from a disease that may have a detrimental effect on the foster child;
4. a person convicted of a criminal offense from the group of criminal offenses against marriage and family, against sexual freedom and against life and body "(Article 117).

The law is also precise regarding the preparation of foster parents, stating that it is necessary for the foster parent to be prepared for foster care according to a special program prescribed by the minister in charge of family protection (Article 118).

5. Foster care effects

The Family Law of the Republic of Serbia defines the rights and duties of all foster parents who are obliged to: look after, raise, educate and educate the child, with the emphasis "to take special care to enable the child to live and work independently" (Article 119, paragraph 2) and for all this foster parent is entitled to compensation defined and in accordance with the law (Matijašević-Obradović & Stefanović, 2017. p. 21).

In addition to foster care rights and obligations, this law also regulates the rights and obligations of the parents of a child who is on foster care. They have the right and duty to: continue to represent the child; they dispose of and manage the child's property; support a child; maintain personal relationships with the child; decide on issues that significantly affect the child's life (this is decided jointly and in agreement with the foster parent, unless they are completely or partially deprived of parental rights, ie legal capacity or parents who do not care for the child or care but in an inappropriate way).

6. Cessation of foster care

Article 121 of the Family Law regulates the conditions necessary for the termination of foster care, so that foster care ceases: when the child reaches the age of 18; when the child acquires full legal capacity before coming of age; when the child is adopted; when a child or foster parent dies; through the termination of foster care" (Article 121, paragraph 1).

It is exceptionally possible to extend foster care after the age of 18, but no later than the age of 26 if the child is in school regularly. If the foster parent dies, the person who lived with the deceased foster parent in the same family community has priority in establishing new foster care.

However, although foster care was established with the intention of helping a child who should be better off in a foster family than in his or her biological family, there is a possibility that the foster care may be terminated. This seems to be the decision of the guardianship authority, which can make a decision on the termination of guardianship: at the request of the foster parents, parents, guardians or by mutual request.

In that situation, the guardianship authority has a legal obligation and is obliged to make a decision on the termination of guardianship in two situations:

a) if he finds that the need for foster care has ceased or
b) if it determines that foster care is no longer in the best interests of the child.

If the guardianship ends due to the death of the foster parent or due to the termination of the foster care, the parents will continue to take care of the child, and if the child is without parental care, the guardianship authority decides on the care of the child.

7. Centers for Family Accommodation and Adoption and Foster Care Statistics

The Government of the Republic of Serbia established the Centers for Family Accommodation and Adoption (hereinafter CFAA) as institutions in the social protection system, which arose as a result of the intention to reform this area of social life with clearly defined tasks in the field of protection of children without parental care. The work of the CFAA is regulated and regulated by the current law, namely the following legal acts: Law on Welfare (2011), Decree on the network of social protection institutions and Rules on foster care (2008.).

CFAA provides accommodation for children and young people who are without parental care in other families, inspects the work and offers adequate professional assistance to the family in which the child or young person is placed and entrusted with education and care, until the conditions are met to return to his own family or until he is old enough and independent to take care of independent living and work. "Adults and the elderly are provided with family accommodation to maintain or improve the quality of life. Family accommodation is provided as: 1) standard accommodation, 2) accommodation with intensive and additional support, 3) urgent accommodation, 4) occasional accommodation and 5) other types of accommodation in another family.

The Centers for Family Accommodation and Adoption are also entrusted with the following tasks:

1) preparation, assessment and training of future foster parents and adoptive parents,
2) providing support to foster parents, ie families who provide family accommodation services and adoptive parents,
3) reporting to the centers for social work on the work of foster parents and the functioning of families that provide family accommodation services and proposing measures to eliminate possible omissions, and
4) performing other tasks, in accordance with the Law on Social Protection, other laws and regulations based on the law" (Report on the work of the Center for Social Accommodation and Adoption in 2018 p. 4).

The Decree on the Network of Social Protection Institutions envisages eight institutions providing family accommodation services that would enable the availability of this service on the entire territory of the Republic of Serbia. By the end of 2018, six centers for family accommodation and adoption were established in the Republic of Serbia: CFAA Belgrade 2008, Ćuprija, Niš and Kragujevac in 2011, Miloševac was registered as CFAA in 2012 (it existed before the reforms, since 1931) and Novi Sad in 2014 (started providing services in 2015).

Out of the planned 145 municipalities and cities in Serbia, CFAA provides direct support to foster families and children in 47%, ie in 68 municipalities and cities. Regarding the preparation and assessment of the suitability of foster families, this entrusted work is realized in 57%, ie in 82 municipalities/cities.

Unfortunately, the last consolidated report for all established Centers was published in 2019 and refers to data from 2018. Number of active foster families that are on the records of the CFAA on December 31, 2018. was 2016, ie 45.42% of the total number of foster families in Serbia. The number of children in family accommodation in Serbia is December 31, 2018. was 5,447, of which 2,692, ie 49.42% in the jurisdiction of the CFAA. Other foster families and their beneficiaries are under the jurisdiction of the centers for social work.

The number of families recruited for the foster care training process over a five-year period (2013-2018) varies: the lowest was in 2017 (214 families) and the highest in 2014 (297 families). During 2018, 281 families were recruited. Of the 281 families that started training in 2018, only 55% received general eligibility to provide the service, while in previous years the success rate was about 80%.

For 47% of foster families, the place of residence is the city center. In 92% of foster families, the apartment in which they live is owned by a foster family member. For 90.5% of foster carers, the space intended for a child is in full compliance with the quality standards defined by the Foster Care Ordinance. When it comes to income, 65.6% of foster families have income at the level of average earnings, and 10.5% above average. Most foster parents, 63.1% have completed secondary school, 21.4% have completed primary school, 12.7% have caregivers have completed college/university, and 2.8% of caregivers have not completed primary school. Of the total number of foster families, as many as 86.7% are families with parental experience.

The age structure of foster families does not change significantly compared to previous years, so the largest share of 46.3% of foster parents is still aged 51 to 64. In the age that can be considered the most productive, from 31 to 50 years is 37.38% of foster parents. Only 1.8% of foster parents are under 30 years old. The number of foster parents over the age of 70 is 3.2%. In the past 5 years, the share of foster parents over the age of 70 has increased: in 2016, it was 2.5%.

According to the records of the CFAA, during 2018, there were 3,509 children and young people in family accommodation, and on December 31, 2018. 3,142 children and young people. At the end of 2018, for the first time in the past five years (2013-2018), a smaller number of users was recorded than in the previous year. The increase in the total number of users in the period 2016-2018 is only 0.7%, while in the period 2014-2016 the increase was 12.17%. What are the real reasons for the decline in the number of beneficiaries

will be determined by the analysis of the participants and the consequences, but the factors can be numerous: from the general economic crisis to the age structure of the foster parents. (Report on the work of the Center for Social Accommodation and Adoption in 2018, pp. 9-12.)

8. Conclusion

The analysis of statistical data shows that during the last decade, as a result of the implemented reforms in the field of foster care, the number of children placed in children's homes decreased, while the number of children placed in foster families increased. As a result of the establishment of Centers for Family Accommodation and Adoption throughout Serbia, which can boast of being one of the countries with the lowest rate of institutionalization, ie placement of children in children's homes, in Europe. This is a great result, but the situation could be even better. The Centers for Family Accommodation and Adoption were given the task and mandate to provide adequate support, but also quality control of the provision of family accommodation services in foster families.

However, in the last five years, there has been a decline in the number of foster families on the CFAA records, as well as a stagnation in the number of active foster families. The number of foster families that did not provide accommodation services is the lowest in the past five years, which indicates that the CFAA makes maximum use of available resources. It is assumed that during the Corona virus epidemic, the number of foster families was even smaller, given the high health risks of both foster parents, who are mostly elderly, and foster children whose poor family situation was more difficult to determine because most government agencies focused their attention. towards the health and security situation in the Republic of Serbia.

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MERE ZAŠTITE DECE BEZ RODITELJSKOG STARANJA

REZIME: Hraniteljstvo predstavlja najznačajniju meru kojom se štite prava i interesi dece koja su ili ostala bez roditeljskog staranja ili imaju izvesne smetnje u razvoju i ponašanju, a ne mogu da žive sa biološkim roditeljima. Pored hraniteljstva kao mere zaštite dece bez roditeljskog staranja u pravnom sistemu Republike Srbije, postoje još instituti starateljstva i usvojenja. Hraniteljstvo se najčešće vezuje za altruizam i humanost ljudi koji su odlučili da budu hranitelji, a te osobine su imali i pre te odluke. Hraniteljstvo je u Republici Srbiji imalo svoje uspone i padove. Kriza u društvu se odrazila i na ovaj institut, ali je humanost koju hraniteljstvo nosi u svom nukleusu i činjenica da se pomaže nemoćnima uvek uspevala da obezbedi da hraniteljstvo ne nestane iz pravne regulative. Cilj ovog rada je da se upotrebom komparativnog, istorijskog, analitičkog i deskriptivnog metoda obradi hraniteljstvo kao jedna od mera zaštite dece bez roditeljskog staranja, kao i da se ukaže na trenutno stanje hraniteljskih porodica u Republici Srbiji i položaj dece u njima.

Ključne reči: *hraniteljstvo, zaštita dece, starateljstvo, usvojenje, porodica.*

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APPARENT JOINDER OF CRIMINAL OFFENSES IN THE CRIMINAL LAW OF SERBIA

ABSTRACT: Apparent joinder of criminal offenses is a legal institute which deviates from the actual or real joinder. It deals with legal situations where one or more criminal acts constitute the substance of several criminal offenses but, for legal and technical reasons, only one criminal offense is considered to have been committed. Following the division of a joinder into ideal and real, where one or several acts of criminal offenses have been taken as a criterion, the apparent joinder is also divided into ideal and real. This practically means that the offender had committed one criminal offense with one criminal act (an apparent ideal joinder) or several acts (an apparent real joinder), regardless whether his/her act or acts constitute the substance of several criminal offenses. Considering the fact that a legal institution of apparent joinder includes an entire catalogue of various legal situations, our legislator stipulates several forms of the apparent ideal as well as the apparent real joinder. They contain modalities of actions constituting the substance of several various criminal offenses. In a criminal theory, the issue of the apparent ideal joinder has occupied the attention of a large number of authors. They have shown an interest in expanding the catalogue of legally defined forms of the apparent joinder of criminal offenses. As a consequence, we have a significantly higher number of forms of the apparent joinder in comparison with the

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legal framework being used to regulate this institution in our criminal legislature. Therefore, apart from a legal designation, it is necessary to indicate a theoretical designation of both the apparent ideal and apparent real joinders of criminal offenses.

Keywords: *apparent joinder, specialty, subsidiarity, consumption, criminal offense.*

1. Introduction

The original legal memorials do not recognize joinder of criminal offenses as an independent criminal and legal institution. The application of special rules used to regulate the possibility that the offender, with one or several criminal acts, commits the substance of several criminal offenses was completely foreign to the understanding of criminal law in the past. Therefore, it is redundant to discuss the existence of apparent joinder of criminal offenses in such a manner. However, in court proceedings, we can see a hint of awareness that the offender, in certain situations, had acted within the framework of joinder of criminal offenses. At most, the perpetrator was punished more severely if they had committed the substance of several criminal offenses with one or more acts.

The legal institution of joinder of criminal offenses had gradually evolved in such a way that its presence can be seen in the newest codifications. Here, it is reasonable to presuppose the application of an institution that covers situations where the perpetrator, with one or more acts, had committed the substance of several criminal offenses, which are to be arbitrated at the same time. However, apparent joinder of criminal offenses included the introduction of special legal constructions and special rules. This provides the solution for situations where the legislator considers that one and not several criminal offenses exist regardless of the fact that the perpetrator had, with one or more actions, entered the incriminating zone of several criminal offenses.

At present, there is an institution of real and apparent joinder of criminal offenses in national legislatures of a large number of countries. Certain differences can be noted in terms of individual forms of apparent ideal and apparent real joinder of criminal offenses. In international criminal law, the presence of joinder of criminal offenses can be seen in the verdicts of judicial tribunals. We can primarily see that Hague Tribunal had applied joinder of criminal offenses in its verdicts. Based on the practice of Hague Tribunal, it can be concluded that judicial assembly determined in a large number of cases that a certain individual (the defendant) had participated as a perpetrator

(indirect, direct or co–perpetrator) or as an accessory (in any form or manner of participation in collective criminal offense) in committing a large number of international criminal offenses, meaning, that they had committed multiple violations of the Statute during one event. Consequently, Hague Tribunal applied cumulative indictment, justified by the fact that prior to presentation of evidence (at the main hearing) it was not possible to determine with certainty whether all or only some of the charges would in fact be proven (Jovašević, 2012, p. 94).

2. The term and meaning of apparent joinder of criminal offenses

As a rule, the perpetration of criminal offenses by a person through one or several acts is dealt within the framework of *real joinder of criminal offenses* institution. There are situations when the perpetrator, with one or more perpetrating acts commits several criminal offenses, however, due to their connected nature, only one criminal offense is considered to have been committed. In this case, it only seems that several criminal offenses have been committed, all the while legally they are considered to be one criminal offense. The reason the institution of apparent (unreal) joinder of criminal offenses exists is that in this case, it is criminally and politically unjust to prosecute the defendant for several criminal offenses. Among other things, multiple punishment of a perpetrator is not allowed for the reasons of elementary equity, when in fact only one and not several criminal offenses have been committed.

Ratio legis of apparent joinder of criminal offenses consists of the presence of legal incriminations that contain the substance of several criminal offenses, and therefore it would be unjust to punish the perpetrator two times. This is due to imperfect legal norms, which are a feature of not only our, but also other criminal legislatures. The literature often cites the criminal offense of embezzlement – Article 364 of CC as an example of apparent joinder of criminal offenses, which contains all the elements of the criminal offense of embezzlement – Article 207 of CC. However, in practice, only one criminal offense of embezzlement is considered to have been committed – Article 364, and not the other – Article 207 (Criminal Code, 2005). Differentiating between real and apparent joinder of criminal offenses is based on the fact that in the case of the first, there are several criminal offenses for which the defendant is being tried, while in the second case, only one criminal offense is considered to have been committed regardless of it containing the substance of another criminal offense. Apparent joinder of criminal offenses is manifested

as apparent ideal and apparent real joinder. Even though there are opposing opinions in criminal theory that negate these forms of joinder, the majority of literature regarding criminal law contains this division (Stojanović, 2006, pp. 220–221).

3. Apparent ideal joinder

Apparent ideal joinder exists when the perpetrator commits the substance of two or more criminal offenses with one criminal act, but they are all covered by one criminal offense that contains the substance of other criminal offenses. In order for apparent ideal joinder to exist, there must be a mutual connection of several various substances of criminal offenses. Considering that legal provisions do not determine the elements which would differentiate these types of joinder, it is necessary to rely on the situation in criminal theory and the opinions expressed in court practice (Lazin, 1982, pp. 8–16).[1] In accordance with this, we can extract several forms of apparent ideal joinder expressed through relations: specialty, subsidiarity, consumption, and other.

3.1. A case of specialty

A case of specialty represents a special form of apparent ideal joinder, where the perpetrator commits two criminal offenses with one criminal act, one of which is a special form of other general criminal offense. In this case, only the special criminal offense is considered to exist, as it excludes the existence of the general criminal offense. It is perfectly in accordance with legal maxim expressed in the Latin phrase *lex specialis derogat legi generali* (special law excludes the general). The application of the specialty case means that one criminal offense contains the substances of two criminal offenses, and so the special criminal offense must contain all legal features of the general criminal offense and an additional feature that makes it special. In practice we see a large number of possibilities for the application of specialty case in relations of two criminal offenses.

Literature points to the possibility of construing a special form of specialty case called concrete specialty. It would be an independent form of apparent ideal joinder, the existence of which requires two conditions to be met

[1] Lazin lists several arguments which are used to justify the existence of apparent ideal joinder of criminal offenses. He points out: 1) legal basis, 2) long application in practice, 3) legislative and political reasons, 4) humanitarian reasons.

cumulatively: a) that in terms of the perpetrating act there is a relation of specialties between two criminal offenses and b) that all other features of these two criminal offenses (that usually do not overlap) overlap in a specific case. These two forms of specialty differ in that, with concrete specialty, the performing act can be specialized, while other features of two criminal offenses overlap only in a specific case. The specialty and concrete specialty do not differ in any other way (Lazin, 1982, p. 79).

3.2. A case of subsidiarity

A case of subsidiarity is listed among the forms of apparent ideal joinder that involve stages of a criminal offense. It exists when a criminal offense is a previous stage of another criminal offense. Here, one criminal offense is subsidiary in relation to the other criminal offense, which is primary. This form of apparent ideal joinder is expressed in the Latin legal phrase *lex primaria derogat legi subsidiariae* (primary legislation excludes the subsidiary legislation). Therefore, this deals with the relation of two criminal offenses connected by an assault on the same legally protected good, but separated by different stages of their execution. Thereby, the subsidiary criminal offense is limited to preceding or preparatory stages in relation to the primary (main) criminal offense. Criminal theory recognizes various forms of subsidiarity. One of the more significant classifications is into: formal and material subsidiarity.

Formal (explicit) subsidiarity exists when a law excludes the existence of a criminal offense if it contains features of another criminal offense. So, for example, legal description of the criminal offense abuse of the right to strike – Article 167 of CC states that it shall exist unless *elements of some other criminal offence entail* (Lazin, 1982, p. 88).[2]

Material (silent) subsidiarity stems from the interrelationships of specific criminal offenses. This type of subsidiarity is not precisely set, so it is up to the court practice to estimate its existence in specific cases. As an example of material subsidiarity, literature lists the criminal offense of brawling (Article 123 of CC), which charges those participants of a brawl who cannot be deemed responsible for criminal offenses of murder or serious bodily harm. If that is not the case, then the participants will be held responsible for these criminal offenses for which the criminal offense of participating in a brawl is subsidiary.

[2] There are opinions based on which subsidiarity cannot exist here at all as both criminal acts occurred at the same time. As opposed to that, there have to be stages of criminal offense in subsidiarity.

3.3. A case of consumption

A case of consumption exists when one criminal offense completely consumes the content of another criminal offense. From the perspective of legislature and politics, it is unjust to punish a perpetrator for both acts, as the first criminal offense has all the features of the second (consumed) criminal offense. The relation between two criminal offenses set in such a way, the main (serious) criminal offense is the consumer of the minor criminal offense. Such is the case with the criminal offense of murder – Article 113 of CC, which consumes the criminal offense of serious bodily harm – Article 121 of CC towards the same person (victim). This form of apparent ideal joinder is expressed in the Latin legal phrase *lex consumens derogate legi consumptae* (one legislation excludes another legislation encompassed by it). Consumption can exist with various forms of complicity, where, for example, one form of complicity (incitement) consumes another form (aiding and abetting). This practically means that a person who participates in the commission of the criminal offense of theft as an inciter and abettor will not be held responsible for abetting, since inciting, as a more serious form of complicity, consumes abetting, a minor form of complicity. Similar case is also with co-perpetration, which consumes abetting and inciting as minor forms of complicity. Consumption is possible with both ideal and real joinder of criminal offenses.

3.4. A case of alternativity

A case of alternativity exists when one action constitutes the substance of two criminal offenses that a perpetrator can be charged with. In this case, it is alternatively considered that only one criminal offense has taken place (Lazin, 1982, p. 96).[3] Such is the case with, for example, two forms of the criminal offense aggravated/compound larceny – Article 204 of CC, where one is committed *by a group* (paragraph 2) and another *in a particularly dangerous or brazen manner* (paragraph 3). This practically means that the perpetrators can be criminally charged for both forms of compound larceny as the content of the criminal offense covers both situations relevant to their existence.

[3] Lazin points out the inadequacy of using the phrase alternativity and alternative feature. According to this author, *alternation means the choice between two possibilities, and with criminal offenses containing mixed substance, one feature can be determined in more than two ways, so that a choice between more than two options would exist*.

However, even though it seems that there are two forms, it is actually only one form of compound larceny for which the perpetrators will be criminally prosecuted. As a result, practice qualifies the existence of only one criminal offense, and the fact that it also constitutes the substance of another criminal offense can be an aggravating circumstance during sentencing.

3.5. A case of inclusion

A case of inclusion exists when the perpetrator, while committing one criminal offense (main offense) had committed the legal substance of another criminal offense (secondary offense) that is considered insignificant in comparison with the first, and therefore, it is unjust to punish the perpetrator for both criminal offenses. In this situation, the secondary criminal offense is typically incidental or of accompanying character, and so, from the perspective of presenting danger to society, it is considered completely insignificant in comparison to the main criminal offense. For example, it is insignificant whether a perpetrator had damaged a person's belongings while shooting a victim. The specialty of this form of apparent ideal joinder is seen in the absence of all necessary conditions for the existence of real joinder. This deals with an inclusion of secondary criminal offense into another criminal offense which, in a specific case, is considered to be the main criminal offense. In criminal theory, inclusion is considered to be a special form of consumption, as the main criminal offense consumes the secondary or trivial offense.

4. Apparent real joinder

Apparent real joinder of criminal offenses exists when the perpetrator commits several offending acts which constitute the substance of several criminal offenses, and which are considered to be one criminal offense due to their interrelationship. Apparent real joinder manifests as: complex criminal offense, continuing criminal offense and collective criminal offense.

4.1. Complex criminal offense

Complex criminal offense exists when two or more criminal offenses, for which the penal law proscribes a unified punishment, are merged into one. Therefore, complex criminal offense did not come to be in a natural way, meaning that it deviates from the natural order of things. It represents a legal construction that artificially merges two or more heterogeneous criminal

offenses. Literature lists robbery or compound larceny as examples of complex criminal offenses. In both cases, there is a merger of two criminal offenses (larceny and compulsion). They differ only in the temporal moment and the reasons for using compulsion while committing larceny.

The existence of complex criminal offense is based on the will of the legislator, lacking which we would not have a joinder of two criminal offenses (in the previous example of larceny and compulsion). *Ratio legis* of this legal construction is based on the decision of the legislator to artificially create a completely new criminal offense, for which the perpetrator will be given a single sentence. Lacking this, the rules regarding joinder of criminal offenses would be applied and the perpetrator would be sentenced accordingly. Predominant opinion is that complex criminal offense is more efficient in terms of sentencing a perpetrator as opposed to sentencing for joinder of these criminal offenses.

4.2. Collective criminal offense

Collective criminal offense is a legal construction for the existence of which several special conditions need to be met. It consists of several repeated identical criminal offenses that are mutually tightly connected by the decision–making of the perpetrator and the temporal continuity of their perpetration. As with complex criminal offense, here we have an artificial legislative creation, created by the will of the legislator, and which is not possible in nature. This practically means that each individual criminal offense that enters into the composition of the collective criminal offense is completely autonomous and, as such, can exist independently. Collective criminal offense is manifested in forms of trade, occupation and out of habit.

Collective criminal offense *in the form of trade* exists when the perpetrator repeatedly commits criminal offenses in order to secure a source of income. In this way, the perpetrator acquires goods necessary for basic vital needs. To sum up, by committing criminal offenses in the form of trade, the perpetrator secures the existence for themselves or their family, or, they had the intention of securing a source of income for themselves and their family.

Collective criminal offense *in the form of occupation* exists when the perpetrator had expressed the decision to repeat the same criminal offense without intent of it being a source of income. Compared with the previous form of collective criminal offense, here, the perpetrator does not need to have the intent of acquiring financial gains, however, the offense will exist even in the case that there actually is intent.

Collective criminal offense *in the form of habit* presupposes the existence of tendency of the perpetrator to commit such or similar criminal offenses. With this form of complex criminal offense, it is necessary to determine the tendency to commit criminal offenses for the perpetrator, as such characterization is not possible without this element.

Our criminal legislature does not proscribe collective criminal offenses in the form of trade and out of habit (The Law on Public Peace and Order, 2016).[4] However, there are collective criminal offenses in the form of trade that are committed through a certain activity. Such is the case with the criminal offense of quackery – Article 254 of CC, which consists of providing medical treatment or issuing medicine by a person who does not have the appropriate expert qualifications.

As a form of apparent real joinder, collective criminal offense had its source in earlier German court practice and criminal theory. However, in Germany, this legal construction was completely abandoned, which brings into question its existence in our criminal law, especially since legislative and political reasons point to the inexpediency of its existence.

Certain dilemmas in criminal theory are provoked by the question whether a collective criminal offense can exist if only one criminal offense has been committed, or whether several criminal offenses are necessary to have been committed. Earlier authors argue for the stance that it is possible even with the perpetration of one criminal offense conditioned that the perpetrator had shown the readiness for this type of criminal offense to serve as their source of income offense in the form of trade (Srzentić & Stajić, 1954, p. 214). More recent literature abandoned this interpretation and requires the commission of several criminal offenses as a necessary feature for this legislative construction (Babić & Marković, 2013, pp. 206–207; Stojanović, 2006, p. 225–226; Mrvić Petrović, 2009, p. 225). Debating the argument of the authors that take diametrically opposing stances, we accept the interpretation that several criminal offenses are necessary to have been committed in order for the legislative construction of collective criminal offense to be applied (Babić & Marković, 2013, p. 207).[5]

[4] Criminal offense of gambling – Article 232 of CC existed in previous legislature, which was done in form of trade. By amending the Criminal Code of Serbia in 2002, this criminal offense was decriminalized and is treated as a misdemeanor – Article 8.

[5] In that sense, Babić and Marković deem the opposite standpoint unacceptable, since accepting only one criminal offense as sufficient condition for the existence of continuous criminal offense would indirectly establish punishment based on intent, which is not acceptable in modern criminal law.

4.3. Continuing criminal offense

Continuing criminal offense (*delictum continuatum*) is one of the more complex legal constructions, and therefore, significantly more attention is paid to this offense in criminal theory compared with previous forms of apparent real joinder. It exists as a reaction for the application of cumulative system of punishment for a perpetrator who had committed several criminal offenses in a specific temporal continuity. As a result, this form of apparent real joinder was used as an attempt to eliminate unjustly strict punishment for a perpetrator of several criminal offenses. In practice, the application of this form of apparent real joinder was most commonly used for serial killers, thieves, and persons who, during a shorter or longer time period, had repeatedly committed criminal offenses. Even though continuing criminal offense originated in court practice, it is up to criminal theory to define its legal physiognomy, including the conditions necessary for its application, form of punishment, etc. (Bačić, 1998, p. 356).[6]

The term continuing criminal offense can be defined as repetition of several actions that perpetrate the substances of several criminal offenses, but due to their mutual connection, only one criminal offense is considered to exist. The conditions that must be met in order for continuing criminal offense to exist can be divided into: objective and subjective. Objective conditions refer to the criminal actions that enter the composition of the extended criminal offense and are subjective to the psychological mindset of the perpetrator. In criminal theory, there are diverging opinions in regards to prioritizing the objective or the subjective component of the continuing criminal offense institution.

The starting point of *objective theory* is the objective features of criminal offenses, the criminal contents of which enter into composition of continuing criminal offense. According to this theory, in order for the continuing criminal offense institution to exist, three conditions must be met cumulatively: commonality or a commonality of criminal offenses, temporal continuity of criminal offenses, commonality of the injured party. This practically means that, in each specific case, it is necessary to determine whether all individual conditions have been met in order for the institution of continuing criminal offense

[6] Bačić is of the opinion that the institution of continuous criminal offense is unnecessary in modern criminal law, and it is more expedient to consider continuous criminal offense a real joinder of criminal offenses. According to this standpoint, punishment for continuous criminal offense would be measured based on the regulations regarding joinder of criminal offenses, with certain modifications.

to be applied to specific criminal content. In our criminal law, objective theory is accepted in dealing with continuing criminal offense (Živanović, 1935, p. 358–360).[7]

a) Commonality or similitude of criminal offenses means that the criminal offenses that enter into the composition of continuing criminal offense must be the same or belong to the same type of offense. Such is, for example, the case when several criminal offenses of theft have been committed during a specific temporal period. It is believed this condition is met when several criminal offenses have been committed, some of which belong to serious and less serious forms of the basic criminal offense (theft and aggravated larceny). However, this condition will not be met if the criminal offenses only belong to the same group of offenses as they do not necessarily belong to criminal offenses of the same type. Such is the case with the criminal offenses of theft and fraud, which belong to the same group of criminal offenses – offenses against property – Chapter XXI of the CC, but they are not considered to be offenses of the same type. Commonality or similitude of criminal offenses requires knowledge of all forms of specific criminal offenses in order for proper evaluation to be made regarding whether the offense is a continuing criminal offense.

b) Temporal continuity of criminal offenses presupposes the existence of a temporal link between several criminal offenses that have been committed. It is evaluated based on the time period between individually committed criminal offenses. The predominant stance of criminal theory is that that the period should be as short as possible, since if the opposite is true, continuing criminal offense is not applicable. However, we find many different situations in practice where the court had confirmed the existence of this condition. It is not rare that the court accepts this legal construction even with longer temporal intervals between criminal offenses if their nature requires special conditions to be perpetrated, such as time of the day or night, weekend, holidays etc.

[7] Arguing for objective theory in criminal law, Živanović proposes certain terms or elements to be met for the existence of continuing criminal offense: a) a group of more criminal offenses with several executed acts; b) uniqueness of individual criminal acts, so that they appear as specific cases of the same criminal offense; c) specific criminal offenses are committed by the same person; d) same injured parties for all criminal offenses; d) continuity in committing individual criminal offenses.

c) Commonality of the victim exists when the perpetration of several criminal offenses injures or jeopardizes goods or interests of another person. In one part of criminal theory, this condition is contested as it is believed that in order for continuing criminal offense to exist, various injured parties must exit. In that case, it is necessary for all the criminal offenses encompassed by the continuing criminal offense to be one unified continuous activity that makes a natural whole (Stojanović, 2006, p. 228).[8]

Apart from the objective conditions, *subjective–objective theory* requires for a subjective condition to be met. It consists of the physiological connection of the perpetrator and the objective elements of the continuing criminal offense, which results in a cohesive unity of all elements. In this way, the entire construction of continuing criminal offense is a unified whole. This practically means that there must be *a unified intent* which encompasses all criminal offenses and the final consequence of the continuing criminal offense. The existence of unified intent in such extreme form is not acceptable. This would require of the perpetrator to be present from the very beginning, i.e. from the first criminal offense. As a result, criminal theory deems acceptable the institution of *extended* or *continuing intent*. It would exist when the perpetrator has shown, so called, initial intent, which would initiate the psychological line. By committing each of the following criminal offenses that enter into the composition of the continuous criminal offense, such intent would only continue the original decision of the perpetrator. This interpretation of continuous criminal offense is not a part of the CC, which is why it is only a theoretical solution.

Considering that continuing criminal offense is a legislative construction, it is necessary to indicate the stance of our legislator, which follows the line of objective theory. Therefore, it excludes the mandatory presence of the

[8] This stance is presented in accordance with the conclusions from Counseling at the Supreme Court of Yugoslavia in 1965, where the following conditions were required for the existence of continuous criminal offense: 1) that the same person committed two or more actions of the same type with a temporal distance, each of which individually contains all legal features of the same criminal offense, meaning, their privileged and qualified form; 2) that certain time continuity exists between individual criminal activities; 3) that all incriminating actions present such a continuous action which makes a natural whole from the standpoint of ordinary and logical observation; 4) that the application of continuing criminal offense in a specific case is not in opposition with the demands of criminal policy, which are expressed in positive criminal-legal regulations. However, the third condition requires for one or more so called variable or alternative elements to be present (using same opportunity, same space, same victim, common intent, and other).

subjective element in continuing criminal offenses.[9] So, *a continuing offence comprises several identical offences of the same type committed in temporal continuity by the same offender, representing a whole, due to existence of at least two of the following requirements: same victim, same type of object of the offense, use of the same situation or same permanent relationship, same places or spaces of commission of the offense or same intent of offender* – Article 61, para. 1 of CC. Following the legal definition of continuing criminal offense, we can distinguish several elements without which the existence of this legal construction is simply not possible. The basic conditions or elements of continuing criminal offense include: several same criminal offenses or offenses of the same type, their temporal connection, same perpetrator, and criminal offenses must make a whole. Apart from that, two special circumstances are required: same victim, same type of object of the offense, use of the same situation or same permanent relationship, same places or spaces of commission of the offense or same intent of offender.

Legal solution of continuing criminal offense presupposes exemptions from general application of this institution. They refer to offenses against person that may constitute continuing criminal offense only when perpetrated against the same person – Article 61, para. 2 of CC. It explicitly prohibits the application of this construction for those offenses that, by their nature, do not allow combining into one offense – Article 61, para. 3 of CC. It is up to the court practice to evaluate in each specific case the nature of the committed criminal offenses the merger of which is *not permissible* (Lazarević, 2011, p. 293).[10]

When dealing with a situation where a continuing criminal offense comprises several serious and less serious forms of the same offense, it shall be considered that continuing criminal offense constitutes the most serious form of the offenses committed – Article 61, para. 4 of CC. Such is the case, for example, when the perpetrator had committed several criminal offenses of theft, some of which are serous and less serious forms of theft, aggravated larceny shall be considered to have been committed as the continuing criminal offense – Article 204 of CC.

[9] As a reminder, CC of RS primarily introduced the construction of continuing criminal offense. In this way, specific framework have been determined that should be used to evaluate the conditions and circumstances for the application of this legal construction. Through its legalization, a significant step has been made in the direction of defining the institution of continuous criminal offense, which was not the case prior to the proclamation of the current CC of RS.

[10] Lazarević believes the application of this provision to be redundant as it enables arbitrariness in the decision of the court. Furthermore, the provisions of Article 61, paragraph 1 of CC of RS clearly states that same offenses or offenses of the same type must be in question, so the introduction of the limitations in paragraph 3 of the same Article is redundant.

The subject of special legislative regulation is the situation when continuing criminal offense includes offenses the special element of which is a pecuniary amount. In this case, it shall be considered that the continuing criminal offense achieved the sum of amounts achieved by individual offenses, if comprised by single intent of the offender – Article 61, para. 5 of CC. Considering the diversity of the offenses committed, there is the question to what degree it is possible to correctly evaluate the criterion of single intent of the offender. If we take into consideration that intent, as a form of guilt, is a subjective element of criminal offense, determining intent requires the evaluation of the psychological relationship between the perpetrator and the criminal offenses that are included in this legislative construction. In our opinion, this will create problems in court practice, which will inevitably lead to arbitrary rulings.

In practice, a situation is possible that a criminal offense is not included in continuing criminal offense in the final court ruling. In this case, it will constitute a separate criminal offense or be a part of a separate continuing office depending on the conditions – Article 61, para. 6 of CC.

5. Conclusion

Apparent joinder of criminal offenses is independently regulated in the criminal legislature of Serbia. The essence of apparent joinder of criminal offenses consists of legal incriminations that constitute several criminal offenses, and therefore, double sentencing of a perpetrator would be unjust. Placing the perpetrator in an unfavorable position is avoided in this manner. Thereby, differencing between real and apparent joinder of criminal offenses is based on the fact that, in the first case, there are several criminal offenses for which the perpetrator is being tried at the same time, while in the second case, it deals with one criminal offense regardless whether it contains another criminal offense. From legislative–technical perspective, the provisions that regulate the institution of apparent joinder of criminal offenses are not defined. That is, among other things, a feature of other criminal legislatures. Apparent joinder of criminal offenses is manifested as ideal and real. This division is predominant in criminal theory. It is present in the majority of literature in the field of criminal law. Apparent ideal joinder of criminal offenses is based on the interrelationship of several substances of criminal offenses. Legal provisions do not clearly define the framework for individual forms of apparent ideal joinder. However, in criminal theory and court practice, we can differentiate several forms of apparent ideal joinder, manifested as: specialty, subsidiarity, consumption, and other. Apparent real joinder of criminal

offenses is based on the fact that the perpetrator, through several offending acts, had committed several criminal offenses that are mutually connected. As a result, only one criminal offense is considered to have been committed. Apparent real joinder is manifested as: complex criminal offense, continuing criminal offense and collective criminal offense. There are individual forms of apparent joinder within each category that can be recognized in the examples of specific criminal offenses (e.g. robbery, continuous theft, etc.)

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PRIVIDNI STICAJ KRIVIČNIH DELA U KRIVIČNOM PRAVU SRBIJE

REZIME: Prividni sticaj krivičnih dela predstavlja pravni institut kojim se odstupa od stvarnog ili realnog sticaja. U pitanju su pravne situacije u kojima se jednom ili sa više radnji ostvaruje biće više krivičnih dela ali se iz pravno–tehničkih razloga smatra da postoji samo jedno krivično delo. Sledeći podelu pravog sticaja na idealni i realni, gde se kao kriterijum uzima jedna ili više radnji krivičnih dela, prividni sticaj se, takođe, deli na idealni i realni. To praktično znači da je učinilac sa jednom radnjom (prividni idealni sticaj) ili sa više radnji (prividni realni sticaj) učinio jedno krivično delo, bez obzira što je njegovom radnjom odnosno radnjama ostvareno biće više krivičnih dela. S obzirom da institut prividnog sticaja podrazumeva čitav katalog različitih pravnih situacija, naš zakonodavac je predvideo više oblika prividnog idealnog i prividnog realnog sticaja. U njima su sadržani modaliteti radnji u kojima se ostvaruje biće više raznorodnih krivičnih dela. U krivičnoj teoriji je pitanje prividnog idealnog sticaja zaokupilo pažnju većeg broja autora. Oni su iskazivali interesovanje za proširenje kataloga zakonski određenih oblika prividnog sticaja krivičnih dela. Otuda imamo znatno veći broj oblika prividnog sticaja u odnosu na zakonske okvire u kojima se ovaj institut reguliše u našem krivičnom zakonodavstvu. Zato je neophodno, pored zakonskog, ukazati na teorijsko određenje prividnog idealnog i prividnog realnog sticaja krivičnih dela.

***Ključne reči*:** *prividni sticaj, specijalitet, supsidijaritet, konsumpcija, krivično delo.*

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COMPETENT AND PROFESSIONAL PERFORMANCE OF INSURANCE BUSINESS AS A PART OF THE PROTECTION OF THE RIGHTS AND INTERESTS OF INSURANCE SERVICE USERS

ABSTRACT: Insurance represents a business activity which is becoming increasingly important for all trends in society. Namely, all commercial and other activities beneficial to society, by means of an insurance policy, ensure the safety of business, regardless of any risks that may arise. As a result, a competent and professional performance of insurance business, which among other things protects the rights and interests of insurance service users is crucial for this business activity. That is why we, in this paper, put a particular emphasis on the obligations of a competent and professional performance of the insurance business, which are stipulated by the EU Directive on insurance distribution, as well as by the National Bank of Serbia Guidelines on minimum standards of conduct and a good practice for insurance market participants.

Keywords: *professional insurance, the Directive on insurance distribution, interest of insurance service users*

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1. Introduction

Corporate governance is based on the assumption that the overriding principle is the principle of cooperation with everyone. Different persons have different interests in relation to insurance companies (employees, creditors, shareholders, insurance service users…). According to Vasiljević and Petrović Tomić (2020), "the insurance status right is included in Insurance Law" (p. 8). Sometimes, their interest does not have to correspond to the interest of the insurance company as such. In the insurance company business, the protection of insurance service users is defined as a priority, given that article 13 of Insurance Law (2014) stipulates that supervision over the performance of the insurance business is conducted for protecting the rights and interests of insurance service users. The insurance service users, according to Insurance Law (2014), are the insured, policy holders, insurance beneficiaries, and damaged third parties (article 15). In other words, the concept of the insurance service user implies a category of persons broader than consumers, in view of the fact that according to article 5 of Consumer Protection Law (2021), a consumer is defined as a natural person who acquires goods or services in the market for purposes other than his business or other commercial activity, or as pointed out by Nataša Petrović Tomić (2014), "different EU directives define a consumer as a natural person who acquires or uses goods or services for non-professional use" (p. 45). Thus, insurance company management is obliged to act in the company's best interest, taking care to ensure the protection of insurance service users.

We could say that "modern insurance as a form of growth and development risk management appeared along with private ownership development" (Petrović, Njegomir & Počuča, 2013, p. 731), and that "its primary function does not change with insurance development, that function remains the protection of property and individuals" (Počuča & Krstinić, 2013, p. 33). However, as Smiljanić and Zarubica (2018) point out, "in the field of insurance trends, we should pay particular attention to the effect of the world crisis on the insurance market" (p. 307), as well as to the risks involved which have gained further momentum with the SARS-CoV-2 virus pandemic, and which, according to Kočović et al. (2020) bring about "devastating social, economic and political consequences" (p. 12).

The protection of insurance service users is achieved, among other things, by the competence and professionality of natural persons dealing with insurance distribution. The definition of insurance distribution is provided in article 2 of the Directive on insurance distribution (2016/97), which states

that, for the purposes of this Directive, "insurance distribution" means "the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media".

2. The obligation of competent and professional conduct of insurance business according to the European Union Directive on insurance distribution

The Directive on insurance distribution (2016/97) stipulates the obligation of the member states to ensure that insurance and reinsurance distributors and employees of insurance and reinsurance companies, who carry out insurance and reinsurance distribution activities, possess the appropriate knowledge and skills required for the performance of such activities, in order to complete their tasks and perform their duties in an adequate way (article 10).

In addition, the Directive on insurance distribution (2016/97) stipulates in its introductory provisions that it is important to guarantee a high level of professionalism and competence of the persons carrying out insurance distribution activities, and that their continuous training and development should be ensured. In that regard, natural persons involved in insurance distribution must have a good repute, professional knowledge and competence. On analysing this provision further, we can see that it implies the fulfilment of three cumulative conditions among natural persons involved in insurance distribution: that a person has a good repute, that they possess professional knowledge and, as a third condition, that those persons are competent in the conduct of insurance distribution activities. A person has a good repute if they have a clean criminal record, or any equivalent document in compliance with national regulations relating to criminal acts against property or in the field of financial operations, if they have not been declared bankrupt, unless their rehabilitation has been realized in compliance with the national law. Professionality and competence can be acquired by completing a certain educational qualifications degree, or through work experience, and it includes knowledge of insurance activities (insurance market supply, insurance service characteristics, the

activities to be taken, the rights and obligations of insurance service users, the protection of insurance service users' rights, etc.). Further on, the Directive on insurance distribution (2016/97) stipulates that the Member States guarantee that persons involved in insurance distribution should comply with the continuous training obligation, which implies no less than 15 hours of professional training or development per year (article 10).

Further on, article 17 of the Directive on insurance distribution (2016/97) stipulates that "Member States shall ensure that, when carrying out insurance distribution, insurance distributors always act honestly, fairly and professionally in accordance with the best interests of their customers." In this regard, this principle has two applications, as pointed out by Slavnić (2018): "its primary purpose is for the rules relating to the performance of distributors' duties established by this Directive and the national laws of the member states, to be applied as auxiliary rules of a general value in terms of moral character", and in its secondary application, "the application of this general principle, the effect of which is, according to art. 17 par. 1 of the Directive on insurance distribution, of a compulsory nature, and which may not be excluded or restricted in application by an agreement between the distributor and the client, as is the case with similar, or equivalent principles in the national law of contracts and torts, should serve in cases of need for creating non-existent legal norms for regulating the distributor's relation to the client in carrying out duties concerning clients" (p. 12).

In addition, with regard to this principle under article 17 of the Directive on insurance distribution (2016/97), relating to acting in the clients' best interest, as stated by Petrović Tomić (2019): "Making sure that business complies with the principle of the insurance clients' best interests represents a process, which requires a continuous observance of the principle of acting honestly, fairly and professionally. We are of the opinion that the obligation of acting in the consumers' best interest existed (and still exists) before the adoption of the Directive on insurance distribution (2016/97). It derives from the corporate governance principle, more specifically from the principle of protecting the interests of all the interested parties (the so-called stakeholders)" (p. 251).

Thus, individual obligations introduced by article 17 of the Directive on insurance distribution (2016/97) are: acting honestly, fairly and professionally. Honest and fair acting represents the introduction of the insurance distributor's obligation to act in a moral and honest way in carrying out insurance business. Professional conduct implies the insurance distributor's competence in the conduct of insurance business.

3. The obligation of professional and competent conduct of insurance business according to the Guidelines on minimum standards of conduct and good practice for insurance market participants of the National Bank of Serbia

In our economic conditions, in the last twenty years in particular, "as a result of macro changes, there has been the establishment and development of new financial instruments, the hedging methodology has been improved and the development of corporate governance encouraged" (Dukić Mijatović, 2011, pp. 15–16).

Insurance Law (2014) stipulates in article 19 that "an insurance company, reinsurance company, insurance mediation company, insurance agency company and an insurance agent are obliged to carry on their business in compliance with the law, general acts, business policy acts, rules of the insurance profession and the actuary profession, good business practice and business ethics". In addition, Insurance Law (2014) stipulates the obligation for management members to have a good business repute and the appropriate professional qualifications, knowledge and experience required for a management position (article 62).

According to article 2 of the Company Law (2011), a company is defined as "a legal entity carrying on business with the aim of acquiring profit". In this context, one of the four direct benefits of corporate governance for a company, represented in the Corporate Governance Code (2012), is better reputation, which basically indicates that "in today's business environment, reputation has become a key element of each company's goodwill. A company's reputation practically constitutes an integral part of its assets. Companies which observe the rights of owners and creditors act in a transparent and responsible way, enjoy greater public trust and a stronger goodwill, which leads to greater trust in the company and its products". By way of conclusion in this context, Stojković (2013) states that "good corporate governance is widespread nowadays, as essential for establishing an attractive investment climate, which is characterized by competent companies and efficient financial markets" (p. 46).

Further on, according to the Decision on the procedure upon the complaint of the insurance service user (2021), "an insurance company, insurance mediation company, insurance agency company, natural person – entrepreneur who is an insurance agent, as well as a bank, financial lessor or public post operator conducting insurance agency business subject to prior consent of the National Bank of Serbia in compliance with the law – are obliged to

ensure the right to information and protection of their users' rights and interests". The restrictive policy of the National Bank of Serbia is also evident in a series of adopted Regulations in the field of supervision over the performance of insurance business (2021).

Furthermore, through Guidelines No. 2 on corporate governance in insurance companies (2021), the National Bank of Serbia suggested to the insurance companies "the way of organizing and carrying out management and supervision activities in order to improve work efficiency, without imposing specific solutions. With that in mind, insurance companies (in particular those with a heterogeneous ownership structure) should adopt the adequate corporate governance policies and practices, and publish an annual statement of corporate governance". In line with the aforesaid, the Commercial Chamber of Serbia established the Education Service with a view to helping company employees to improve the existing and acquire new knowledge and skills, bearing in mind that successful companies build their competence on their employees' knowledge (Commercial Chamber of Serbia, 2021).

In addition, in 2018 the National Bank of Serbia adopted the Guidelines on minimum standards of conduct and good practice for insurance market participants, which define the frameworks and standards of conduct and good business practice in the insurance market. These Guidelines are not designed to be acts for direct application. The Guidelines on minimum standards of conduct and good practice for insurance market participants (2018), which define the frameworks and standards of conduct and good business practice in the insurance market, are intended for insurance companies, insurance mediation companies, insurance agency companies, natural persons-entrepreneurs-insurance agents, and other parties conducting insurance agency business on the basis of prior consent of the National Bank of Serbia, and they do not stipulate any timeframe for harmonizing the business of such parties with their provisions.

The Guidelines on minimum standards of conduct and good practice for insurance market participants (2018) stipulate in item 43 that an insurer is expected to ensure that "the employees involved in the activities of creating new, and innovating existing insurance services possess the required qualifications, knowledge and experience in order to adequately understand the basic features and characteristics of a specific insurance service, as well as the interests, aims and characteristics of the target market segment".

Furthermore, the Guidelines on minimum standards of conduct and good practice for insurance market participants (2018) also stipulate that an insurer[1] is obliged to provide training and continuous professional development of employees involved in the sale of insurance services and the activities conducted after the sale of insurance services, as well as employees conducting supervision of the performance of such activities (hereinafter: the employees), as well as to conduct regular reviews with respect to the employees' required knowledge and skills.

The Guidelines on minimum standards of conduct and good practice for insurance market participants (2018) stipulate that the insurer should regulate the training and continuous professional development of employees by an internal act, which they shall make accessible to the employees.

Further on, the Guidelines on minimum standards of conduct and good practice for insurance market participants (2018) also stipulate that the duration of the training courses is expected to correspond to the subject matter and the skills to be acquired, and that the training, in terms of professional level and scope, should be equivalent to training for taking the state examination for acquiring the title of authorized intermediary or authorized agent (item 48). An authorized intermediary or authorized agent is obliged to in each calendar year in which they conduct the insurance mediation, or agency business, attent professional training for at least 15 hours, except in the calendar year in which they obtained the authorization to conduct insurance mediation, or agency business, all in accordance with item 16 of the Decision on acquiring the title and training of authorized intermediaries and authorized insurance representatives (2015).

The training and professional development of authorized intermediaries and authorized representatives are conducted by the Commercial Chamber of Serbia according to the Agreement with the National Bank of Serbia (concluded according to item 3 of the Decision on alterations and amendments to the Decision on acquiring the title and training of authorized intermediaries and authorized insurance representatives (2015) from 2017).

The Guidelines on minimum standards of conduct and good practice for insurance market participants (2018) stipulate that the training syllabus

[1] The definition of an insurer is provided in item 4 of Smernice o minimalnim standardima ponašanja i dobroj praksi učesnika na tržištu osiguranja [Guidelines on minimum standards of conduct and good practice for insurance market participants] (2018), G.no. 3092 of 20 April 2018 relating to article 3 of Zakon o osiguranju [Insurance Law], i.e. an insurer is an insurance company which is a legal entity with head office in the Republic of Serbia and which is registered in the competent authority register according to the National Bank of Serbia licence for the conduct of insurance business.

should include knowledge and understanding of: the characteristics of insurance services; the users' rights and obligations, i.e. the regulations relating to those rights and obligations; sales and after-sales activities and methods of protection of users' rights and interests.

In addition, the Guidelines on minimum standards of conduct and good practice for insurance market participants (2018) stipulate that when concluding an insurance contract the insurer, or intermediary is expected to act in an honest, non-discriminatory, transparent and professional way taking into account the users' needs, rights and interests (item 51). The definition of an intermediary is provided in item 4, where it is specified an intermediary is a licensed company for mediation in insurance, a company for insurance agency, a natural person-entrepreneur-insurance agent, as well as a bank, financial lessor or public post operator conducting insurance agency business.

4. Conclusion

The Guidelines on minimum standards of conduct and good practice for insurance market participants (2018) were adopted because there was a need for the creation "of appropriate preconditions for insurance market participants to prepare for total compliance with European Union regulations in the field of their subject of work, which are expected to be, in the forthcoming period in the Republic of Serbia EU accession process, appropriately implemented in the Republic of Serbia legal system" (paragraph 2, item 2 of the Guidelines), and with the Directive on insurance distribution (2016), one part of which lays down the insurer's obligation for the employees to possess the required qualifications, knowledge and experience in order to properly understand the principal features and characteristics of any specific insurance service, as well as the interests, aims and characteristics of the target market segment, thus, in a broader sense, realizing the protection of the rights and interests of insurance service users.

Namely, as Petrović-Tomić (2019) points out, "the weaker side of insurance contracts is not adequately protected by contract law (which was realized in the EU member states a while ago), it is essential to establish an institutional basis for a supervisory authority which would control if insurance distributors, while selling insurance products, presented those products professionally and objectively. Security instruments in insurance contract law only make sense if the consumer has obtained a coverage which they find beneficial and corresponding to their needs. In our opinion, consumers should be protected against lack of competence, which most often leads them to contracts which

do not suit their needs, i.e. which are non-beneficial or do not correspond to their needs" (p. 251).

With that in mind, competent and professional performance of insurance business by natural persons involved in insurance distribution, is the basis for undertaking any activities or actions involved in the preparation, conclusion and implementation of insurance contracts.

Further on, the needs, rights and interests of insurance service users are taken into account in the insurer's or intermediary's professional conduct. This is achieved through the competence of the natural persons involved in insurance distribution, i.e. the requirement that the natural persons involved in insurance distribution possess the required qualifications, knowledge and experience which is acquired, inter alia, through training and continuous development. Insurer employees' training includes "the knowledge and understanding of:

1) the characteristics of insurance services, in particular the term of insurance contracts, the start of insurance, the insured risks and exclusions relating to those risks, the scope of the insurer's liability, the insurance premium structure (the functional premium amount and the overhead allowances, including the functional premium structure) and other important characteristics of the insurance service;
2) the users' rights and obligations, i.e. the regulations defining those rights and obligations, or the procedures of exercising those rights, such as the procedure and timeframes for filing claims and the required documentation, the right to termination of insurance contracts, the right to withdrawal from contracts, and other rights and obligations of users under insurance contracts;
3) sales and after-sales activities, in particular the manner of informing the users in the pre-contract phase and during the contractual relation, and the preparation and conclusion of insurance contracts,
4) the manner of protecting the users' rights and interests, i.e. the procedures of filing complaints and instituting mediation procedures with the National Bank of Serbia" (item 47 of the Guidelines).

Continuous training of employees results in those persons always having the relevant knowledge and skills, which in itself implies that those persons have professional training of at least 15 hours per year. With that in mind, the practice of insurance business provides the following solutions: training and continuous professional development within the insurance company or by attending the appropriate training courses, seminars or combinations of the two,

to be defined by insurance companies in their internal acts. In any event what remains to be seen is the manner of implementation of provisions stipulated by the Guidelines, the provisions of which apply to insurance companies, insurance mediation companies, insurance agency companies, natural persons-entrepreneurs-insurance agents, banks, financial lessors and the public post operator conducting insurance agency business subject to prior consent of the National Bank of Serbia.

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STRUČNO I PROFESIONALNO OBAVLJANJE POSLOVA OSIGURANJA KAO DEO ZAŠTITE PRAVA I INTERESA KORISNIKA USLUGA OSIGURANJA

REZIME: Osiguranje predstavlja delatnost koja u sve većoj meri postaje značajna za sve društvene tokove. Naime, sve privredne i druge društveno korisne delatnosti, sa polisom osiguranja obezbeđuju sigurnost poslovanja i to bez obzira na rizike koji mogu nastati. Stoga je stručno i profesionalno obavljanje poslova osiguranja, kojim se između ostalog i štite prava i interesi korisnika usluga osiguranja od krucijalne važnosti za ovu delatnost. Upravo iz tog razloga smo, u okviru ovog rada stavili naročit naglasak na obaveze stručnog i profesionalnog obavljanja poslova osiguranja koje su predviđene Direktivom o dstribuciji osiguranja Evropske unije, a potom i prema Smernicama Narodne banke Srbije o minimalnim standardima ponašanja i dobroj praksi učesnika na tržištu osiguranja.

Ključne reči: *profesionalno osiguranje, Direktiva o distribuciji osiguranja, interes korisnika usluga osiguranja.*

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FLEXIBLE FORMS OF WORK AND WORK ENGAGEMENT

ABSTRACT: Global trends in the working world clearly show the changes in the character of labor relations with a significant representation of flexible forms of work. It is an atypical form of work organization that arises as a consequence of strong globalization flows, economic crisis, information and technological revolution, and which stands against the labor law standard of a classical employment, being represented in the form of the employment contract for an indefinite period of time with full time employment. Starting from the concept of flexicurity as the dominant concept in the EU, flexicurity seeks to establish a balance between flexibility in the organization of work in order to preserve stability. Through the flexible organization of work and working hours, there establishes a kind of balance between working hours, the rest time and time for socialization and social activity. However, on the other hand, a flexible organization of work can reduce the rights of the employees and workers outside the employment relationship, especially if this form of work is abused in practice by the contracts concluded contrary to their essence or legal norm. The authors use the historical, comparative- legal and sociological method, as well as the statistical data in the analysis of research subjects with the aim of providing the concrete proposals for the improvement of the existing normative framework.

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Keywords: *work and labor relations, flexible forms of work, flexible organization of working hours.*

1. Introduction

In accordance with the social and economic changes in the world, there are changes in the world of work as well. The flexibility of work is most often considered a consequence of globalization, which represents the general connection and movement of people, goods, services, and information in the world, through the multiple connections of states and societies. Due to globalization, the social context of business is changing, there is a transformation of work and management, but also a change in the role of the state through reduced interventionism and finally, deregulation of labor regulations (Jašarević, 2012, pp. 175–176). Labor law suddenly becomes too rigid for new circumstances, and new relations between employers and employees, which leads to a reduction in workers' rights and a worsening of their position (Jašarević, 2018, p. 926).

Flexible forms of work, therefore, become inevitable given the changes in the nature of labor relations, but also strong globalization flows that lead to the abandonment of the labor law standard, in the form of a classic employment relationship (indefinite contract, full-time work), paving the way for flexible forms of work that are manifested both during employment (fixed-term contract, part-time work), and through new forms of work outside employment (contract on temporary and occasional jobs, contract on additional work), as well as through new forms of work (*telework*), (*work at home*), with new forms of platform work and work through ICT technology (Škorić, 2020, p. 1). Recently, the European Commission defined telecommuting as "employees or contractors working from home (instead of traveling to the employer's or client's premises) using information and communication technology. Teleworking is also seen as an enhanced environmental initiative to reduce suburban traffic and pollution emissions. Teleworking is also promoted to increase job satisfaction (through reduced stress and travel time) (Van Eyck, 2003, p. 19).

Flexibility in the field of employment is becoming an integral part of the organization of work and production as companies strive to reduce costs and provide competitiveness in times of rapid changes in the market and in technologies (Van Eyck, 2003. p. 1). Employers often face the reality that in order to maintain their business, they have to reduce costs, especially employee costs. Flexibility has offered new opportunities for small businesses to

connect with large companies, but it has also reduced the economic and social security of workers and increased their vulnerability to exploitation (such as discrimination, harassment, etc.), especially in situation where the labor market is insufficiently regulated (Van Eyck, 2003. p. 1).

Therefore, the functioning and regulation of labor relations is experiencing serious changes, which is visible especially in the idea that the stability of labor relations is completely rejected, as outdated, from the best intentions, to preserve employment (Midžović, 2020, p. 352). Such ideas are advocated also by the World Bank and the International Monetary Fund, the great spokespersons of neoliberalism. On the other hand, as Midžović rightly points out that with the disruption of employment stability, employees face the loss of legal and other protection, their standard of living is reduced, dignity is violated, health and safety at work is weak, social insurance of workers and their families is undermined and much more indirectly derives from employment status (Midžović, 2020, p. 352). Although flexible forms of work are increasingly used in practice, legally speaking, they are not sufficiently regulated. Many people who work in an atypical form of work, work illegally, have no protection, and on the other hand, by such actions of employers, the state is at a loss, since it does not collect taxes and contributions based on wages or monetary compensation. Such persons should be provided with social security, with at least a minimum of employment law, to provide them with decent working conditions for the sake of living a dignified life.[1]

2. Employment and non-employment in the light of work flexibility

Employment is a relationship that is established between unequal parties, the employer, and the employee, between whom there is a relationship of legal subordination, it is a bilateral employment relationship that involves personal performance of work by the employee, while the risk of job security

[1] This is exactly what is achieved in Anglo-Saxon and European continental law, in work in atypical forms of work by prescribing and providing protection against psychosocial risks such as discrimination, harassment at work, whistleblowing and more recently by introducing the principle of gender equality, to enable equal gender representation when establishing and during employment status. In the same way, in the domestic legislation, starting from 2009, positive regulations on protection from harassment at work, discrimination and whistleblowing provide equal protection for employees and workers outside employment status, which contributes to the general well-being of those persons and preservation of dignity at work. All this represents the penetration of human rights and freedoms into labor law in a situation where neoliberalism dominates, which leads to deregulation and flexibility of labor law.

carries by the employer and the employee invest his working ability, knowledge and skills in performing work tasks (on a daily, weekly, monthly level), and on the basis of which he realizes the right to salary, which the employer is obliged to pay. On the other hand, the flexibility of work implies the introduction of new forms of work, which abandons the idea of concluding an employment contract for an indefinite period with all the benefits it includes and implies, with the development of precarious or "unconventional work", with which we have less rights, worse working conditions, and uncertainty regarding the length of employment (Reljanović, 2020, p. 34). What is being implemented is a kind of flexibility of employment. It should be noted that in some countries, such as Malta (based on the Decision on National Employment Standards) and Portugal (Labor Law), it is prescribed that persons working outside employment status and legal subordination and performing jobs like those performed by employees at the employer will have the status equivalent to an employed person, which ensures labor rights, protection of health and safety, prohibition of discrimination (Jašarević, 2018, p. 933.)

Flexible forms of work, such as part-time or casual work, do not necessarily have to be associated with precarious work or insecure forms of work. In situations where labor law provides adequate social protection for flexible workers, a flexible form of work can serve as a bridge to long-term employment or a supplement to long productive activities (Van Eyck, 2003. p. 8). If we are at the level of employment outside employment status, what is unquestionably is that such workers need protection from health and safety at work, but also some social rights, such as the right to information and the right to consultation, as a solid core of social rights, in addition to social security and social protection rights. Providing a smaller scope of labor protection for workers in a flexible form of work is a challenge that labor legislation faces.[2]

[2] In our Labor Law (Articles 197-202) it is determined that work outside the employment relationship consists of the following contracts: service contract, contract on temporary and occasional jobs, contract on additional work and contract on professional training and specialization. Workers, based on these contracts, enjoy a smaller scope of rights than comparable employees engaged based on employment. They do not have the right to annual leave, they are not entitled to salary (they are entitled to financial compensation), the right to some other income arising from employment, which significantly complicates their position, making it more insecure, especially in terms of social status of these persons, since the taxes paid into disability pension funds based on cash benefits do not enter the years of mandatory pension insurance. In that way, taxes for all months or years of work outside of employment status are not included in the sum that is needed to meet one of the cumulative conditions for exercising the right to an old-age pension, which in our law is 15 years of compulsory social insurance. This is the disadvantage of work flexibility.

The concept of flexibility is becoming the dominant concept in the European Union in the new millennium. This concept is based on four pillars: reliable and flexible contractual relations, lifelong learning, effective employment policy and a modern concept of social security, through social protection of unemployed persons, through the material security system while in that status, while enabling these persons with fast access to the labor market. Through the concept of flexicurity, the representation of contracts that do not establish employment becomes dominant.

There are the following forms of atypical forms of work in our legal system. Some represent work from employment and some work outside employment. These are: fixed-term contract, part-time contract, contract with domestic and support staff, contract for work outside the employer's premises, contract for agency employment (employment relationship) and service contract, contract for temporary and occasional jobs, contract for additional work, contract on professional training and advanced training, contract on volunteer work, contract on royalties, contract on seasonal work (work outside employment). Workers who are engaged in the regime outside the employment relationship have a significantly smaller scope of rights, which contributes to the more uncertain labor and social law status of such persons, which leads to a field of "secondary position in relation to employees" (Jašarević, 2012, p. 191).

It is necessary to point out that the main law for the field of labor in Serbia does not contain a definition of employment, which *de lege ferenda* needs to be changed since mutual rights, obligations and responsibilities of employees and employers arise from employment. Employment is the pillar and cornerstone of all labor law. The Labor Law precisely defines the term employee, but if we do not have a precisely defined employment relationship, then we are in a field where abuses are possible and very common. In fact, in that way, everyone who works for an employer and is not employed has no employment rights or protection (Jašarević, 2012, p. 191). Furthermore, it is necessary to specify and define the concept of work engagement, to be clear in what it differs from the employment relationship, and especially to specify the scope of rights and protection enjoyed by workers outside the employment relationship at the employer. In practice, it often happens that forms of atypical work are abused through contracts on temporary and occasional jobs or through false self-employment, persons who were previously employed by the employer, so they continue to be engaged, e.g., through temporary employment agencies. Inspections need to be strengthened in these cases. At the same time, a fixed-term employment contract is concluded for a certain period of time, due to the temporary and specific needs of the employer (Kovačević,

2016, p. 76)[3], but in practice it is often abused, because it essentially conceals the constant and continuous need for employees, since it is easier for the employer to terminate this form of employment, with the expiration of the contract, if for some reason the employee no longer suits him.

It should be noted that flexibility is achieved not only by deregulation, through the reduction of rights and the number of employees, but also by flexible organization of work and working hours by applying innovative approaches (Jašarević, 2012, p. 178).

3. The concept of work flexibility, forms, and types of work flexibility

The concept of work flexibility is not legally defined, and its definition should be approached with caution, bearing in mind the two meanings it serves to denote new forms of work organization and special types of employment contracts (Kovačević, 2013, p. 121). The term "flexible work" means work that is adaptable and changeable in terms of conditions and the organization of work (working hours, organization of work tasks, flexibility in terms of wages, etc.). It is about adaptability to changes in the labor market, within flexibility in the field of labor and labor relations is manifested in various ways, so that the following types of flexibility in labor relations are mentioned: internal and external flexibility (outside and inside the company), functional, numerical, and financial flexibility, flexible (atypical) forms of work engagement, flexibility of working hours, flexible work organization (Jašarević, 2012, p. 179). A survey conducted by Trades Union Congress (TUC) shows that more than four out of five (82%) workers in the UK want to work flexibly in the future, up to 87% among women's workers, which is the most significant fact indicating popularity flexible workload among workers (TUC, p. 3).

[3] In our law, the Labor Law, Article 37, para. 1 prescribes that a fixed-term employment contract may be concluded for the establishment of an employment relationship whose duration is determined in advance by objective reasons that are justified by the deadline or the execution of a certain job or the occurrence of a certain event during those needs. We have a similar approach to French law, but without real control in practice of the reasons for concluding these contracts. Although it is clear from the letter of the law that the issue is a specific project or execution of work (objective reason), often in practice this contract is used for jobs for which there is a constant and continuous need with the employer. Another problem relates to succession, because several of the same or similar fixed-term employment contracts are concluded with the same employee. In our law, the amendment to the Labor Law 2014, Art. 37. par. 2 enables explicit succession, i.e., the conclusion of one or more (unlimited number) fixed-term contracts with the same persons, provided that the time is limited to 24 months, with or without interruptions.

Flexibility in employment, therefore, includes the possibility of adjusting employers and employees or workers outside employment to new working conditions, which is reflected in easier access to the labor market, faster labor movement and changes in nature of work engagement (fluctuation from employment to work outside employment and vice versa). Flexibility in employment is also characterized by the unequal relationship of the parties to the employment relationship, having in mind the legal subordination and the position of the employer as a stronger party. The notion of subordination, therefore, implies the relationship of two unequal subjects from which "one of them has less significance or narrower authority in relation to the other who is his superior and on whom he depends" (Kovačević, 2013, p. 20). Accordingly, the employer creates working and employment conditions, which employees or workers outside employment must adjust to by accepting, with a greater possibility of negotiation, if the employer has a trade union, and working conditions can be agreed by collective bargaining. If there is no union with the employer, flexibility will be reduced to the unilateral will of the employer, which unilaterally adopts general acts within the normative framework, while flexibility (adaptability) will be at a high level for the employee, because it adapts to the undoubted will of the employer, in terms of working conditions and organization.

Functional flexibility means changing the production system, technology, or work organization (more flexible work organization, which means that employees move more easily within the company; includes "job rotation", "job expansion"), additional types of work engagement (wider application of "flexible forms of work"), reduction of restrictions on employment and dismissal, allocation of production and labor (through subcontracting) to improve work efficiency (Jašarević, 2012, p. 180). Numerical flexibility means adjusting the number of workers to market demands, to harmonize labor costs with market needs, which leads to a larger number of employees outside the employment relationship and includes more flexible regulations in hiring and firing (Jašarević, 2012, p. 180). In this way, employers reduce labor costs since those hired outside the employment relationship are not entitled to severance pay upon termination of employment, the dismissal procedure is easier for them, both in terms of deadlines and legal basis (they can carry out mass dismissals without penalties), and finally, the scope of rights of this group of persons is smaller than employees who work in employment (the right to recourse, jubilee award, some additional benefits

arising from employment, such as financial assistance in case of death of a close family member, etc.).[4]

Financial flexibility means earnings that are not included in a fixed amount but are prone to change depending on economic market trends. Therefore, if there are financial problems in the business of the company, in that case the salary can be reduced, but it should not be below the minimum wages (guarantor of dignity at work and ensuring the basic existence of the employee). This guarantee usually applies to employees, not to workers outside employment status, which needs to be prescribed through labor legislation.

The most common flexible forms of work from an employment relationship are fixed-term contracts work, part-time work, work from home. Statistics show that in OECD countries the participation of women in part-time work is higher than 60%. While women tend to remain part-time employees in the Netherlands in the long run, in Sweden both men and women are more likely to switch from full-time to part-time and vice versa (Van Eyck, 2003, pp. 37–38). In the United States, employers have no obligation to provide part-time employees with proportional salaries and benefits for full-time employees, and the percentage of part-time employees is high (Van Eyck, 2003, p. 40). Work outside the employment relationship is work under a contract on occasional and temporary jobs, telework, domestic workers, self-employment, work on weekends etc (Urdarević, 2020, p. 75). We also add the temporary assignment of workers through employment agencies to the flexible form of work. New forms of work are a form of flexibility at work. By them, we primarily mean occasional work (work on call and contracts with zero working hours), work based on vouchers, employee sharing and job sharing, portfolio work, work through platforms and mobile work based on information and communication technologies (Kovačević, 2021, pp. 90–114).

4. Flexible work and working hours

The organization of working time includes measurable characteristics of work responsibilities in the company in terms of length and time, as well as the schedule (stable, i.e., fixed, or flexible) of the time in which work is

[4] Numerical flexibility is achieved by outsourcing employment contracts, where subcontractors continue to be part of production processes, but their employment relationship is no longer with the parent company. This is achieved by hiring workers through agency employment, where agencies appear as employment intermediaries. The employee concludes an employment contract with the agency and is referred to work with the employer, with whom the agency has a contractual relationship. This is a specific triple legal relationship between the employee, the agency, and the employer of the service user, where the performance of work is performed.

performed or not performed, measured during a particular day, week, month or for a longer period, so that the criteria are applied to all jobs, including informal employment. (Working Time Resolution, 2008, p. 46). Flexible forms of work need to be observed through flexible organization of working hours, which is one component of this form of work. Flexible organization of working hours, namely, is one of the key elements of work organization and the possibility of establishing a balance between professional and private life of an employee or workers outside employment status. Flexible working hours is a period of time in which the employee is obliged to perform work tasks, conscientiously and responsibly, according to the order of the employer, and which does not take place according to a fixed schedule, and the employee can organize work activities at its discretion, taking into account that work orders be completed within the set deadlines. The most common flexible working hours are *flexible working-time arrangements (*characterized by possible daily and weekly working time scheduled outside usual, fixed schedule when presence at the place of employment is compulsory) and *on-call work, zero hours or "as and when required" arrangements (*characterized by no fixed schedule of contractual hours, but there is a requirement for persons to be available for work when they are called with prior notice, for as many working hours as the employer requires up to the legally determined maximum or contractually limited number of working hours) (Working Time Resolution, 2008, p. 55).

Modern globalization trends, neoliberalism and technological revolution have caused the development of new forms of work via the Internet and information and communication technologies (smartphones, personal computers, tablets), which leads to the imposition of flexibility in the organization of working time, as a kind of necessity. In this sense, the traditional model of organization of working time, which implies a stable, standardized, uniform and strict organization of (full) working time, becomes an obstacle to cost rationalization (Kovačević, 2008, p. 225) Therefore, flexibility in organizing working hours enables employers to increase productivity and competitiveness in the market because labor costs are reduced. This is the main reason to affirm flexible working hours, which implies greater diversification of working time arrangements, so that working hours can be organized as full or part time, as fixed or flexible working hours, as working hours calculated according to weekly working hours or annually, and the like (Kovačević, 2008, p. 225) The most common forms of flexible working hours are reflected in the flexible organization of working hours, a shortened working week (which lasts four or even three working days) conditionally free working time and teleworking. In addition to a part-time work, flexibility in organizing working hours is achieved during a compressed

working week. Workers can opt for a shortened work week that includes 40 hours of work but is organized in four days (Monday to Thursday, Tuesday to Friday or until Wednesday to Saturday), so the working day lasts 10 hours with one extra day off per week. This way of organizing working hours may be relevant for companies that intend to expand the availability of their service or production (Van Eyck, 2003, p. 19). Teleworking through new information and communication technologies (ICT technologies) enables a permanent connection, producing on the other hand a blurred line between paid working time and time and space that are usually reserved for personal life (Messenger, 2018, p. 5). The shortcoming of this work organization can be seen in that.

Is technological progress a continuous work towards reducing working hours and the working week, which is the subject of constant debate in the Nordic countries? Is this possible in the world of work? This is possible but requires public policies that work to constantly promote the reduction of working hours, for workers who work too long, with a guarantee of minimum working hours for part-time workers with a small number of working hours, as well as for non-employed workers (Messenger, 2018. p. 5). Here it is important to point out that in the countries where most of the workforce is employed part-time, there exists a statistic which indicates that such workers tend to make a faster transition from work engagement to employment status; as well as move from lower-paid to higher-paid jobs, coupled with a shorter retention span and therefore faster turnover (Ostrovidov Jakšić, 2017, p. 50).

In our legal system, the decision on the schedule of working hours is made by the employer. The working week lasts 40 hours, it can be shortened to 36 hours, and in some situations to 30 hours, when we have an employee who works on jobs with increased risk. The work week can last a maximum of 48 hours, including 8 hours of overtime. This is a common legal norm in most normative systems of the countries of the world, which is in accordance with the international standard Convention No. 1 on Working Time from 1919. In our law for the field of work in Art. 55, para. 5 prescribes a provision on sliding working hours, which represents the application of the idea of work flexibility in practice. *De lege ferenda*, for the sake of legal certainty, it is necessary to specify the institute of sliding working hours.

5. Conclusion

Flexibility in the organization of labor is the response of employers and countries in the world, to the new conditions of the labor market and capital, as well as to the stage in the development of capitalism, neoliberal capitalism.

States, employers, and workers view the problem of labor flexibility from different angles. Employers want to reduce labor costs to remain competitive in the domestic and international markets. On the other hand, employees want protectionist labor and social legislation, while state preferences reduce unemployment. Flexibility in employment and labor relations exists as a tacit consent of states and employers' organizations (large capital owners) and trade unions, on the other hand, as an effective way to maintain employment, by flexible working hours and labor organization, with active access to the labor market of unemployed persons. It is a constant political struggle of the three sides of the social dialogue who are looking for the advantages of flexibilization, having in mind the changes in the legislation, the organization of work and the distribution of income. But the only way to reconcile productivity, stability and flexibility is to preserve employment stability through employment, with the possibility that some elements of work organization, such as working time, remain flexible.

To have "fair flexibility", it is necessary for employers, employees, and the state to provide equal contribution, and if there is a transition of work engagement, to help the vulnerable person in quickly finding new jobs through national and private employment agencies. It takes the state to provide social security for these persons through the social security system while the social risk of unemployment lasts. At the same time, the full application of the principle of equality should be enabled by enabling employees working in atypical forms of work to have the same rights, working conditions and scope of protection as comparably employed persons, in proportion to the length of working hours. Also, new labor law solutions must provide protection for those workers outside employment status, guaranteeing them a minimum wage, protection of health and safety at work and rights from the social security system, (Van Eyck, 2003, p. 19) in addition to collective rights (information, consulting, trade union organization), but also the right to vocational training and development to remain competitive in the labor market.

In Serbia, the flexibility of work has brought little good, since it has endangered employment security and disabled the protection of these persons, with a reduced scope of rights, which are not specified in the existing normative framework. Here we primarily mean the right of employees to vocational training and development, as well as collective rights (information, participation, collective bargaining, trade union organization). Having in mind that fact, it is necessary to specify the *de lege ferenda* of the rights, obligations and responsibilities of persons engaged outside the employment relationship. At the same time, the most frequently concluded contracts, fixed-term contracts (employment) and contracts for temporary and occasional jobs

(non-employment), are concluded contrary to the essence of these contracts and legal provisions, because they essentially conceal employment for an indefinite period by abusing the application of legal norms.

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FLEKSIBILNI OBLICI RADA I RADNOG ANGAŽOVANJA

REZIME: Globalni trendovi u radnom svetu jasno pokazuju promene u karakteru radnih odnosa sa značajnom zastupljenosti fleksibilnih oblika rada. U pitanju je atipična forma organizovanja rada koja nastaje kao posledica snažnih globalizacijskih tokova, ekomomske krize, informatičke i tehnološke revolucije, a koja stoji nasuprot radnopravnog standarda klasičnog radnog odnosa, što je ugovor o radu na neodređeno vreme sa punim radnim vremenom. Polazeći od koncepta fleksigurnosti, kao dominantnog koncepta u EU, fleksigurnost nastoji uspostaviti balans između fleksibilnosti u oganizaciji rada, a zarad očuvanja stabilnosti. Fleksibilnom organizacijom rada i radnog vremena uspostavlja se svojevrsni balans između radnog vremena, vremena za odmor i vremena za socijalizaciju i društvenu aktivnost. No, sa druge strane fleksibilnom organizacijom rada mogu se umanjiti prava zaposlenih i radno angažovanih, posebno ukoliko se ovakva forma rada zloupotrebljava u praksi ugovorima koji se zaključuju suprotno njihovoj esenciji ili zakonskoj normi. Autori koriste istorijski, uporedno pravni i sociološki metod, kao i statističke podatke u analizi predmeta istraživanja sa ciljem pružanja konkretnih predloga radi unapređenja postojećeg normativnog okvira.

Ključne reči: *rad i radni odnosi, fleksibilni oblici rada, fleksibilna organizacija radnog vremena.*

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THE SUPPLEMENTARY PROTECTION CERTIFICATE: THE RECENT DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

ABSTRACT: In recent years, public health systems in high-income countries have been heavily exposed to pressures due to high drug prices. High drug prices are affected by market monopolies that pharmaceutical companies have thanks to patents, i.e. the exclusive rights granted to them for drugs. An additional factor affecting high drug prices is the extended forms of intellectual property protection, including the extension of the exclusivity period after the expiration of a patent for medical devices. The supplementary protection certificate as a form of a supplementary protection for pharmaceutical products in the European Union is regulated by the Regulation 469/2009. This form of protection is also known in the national patent regulations. Since the entry into force of the Regulation 469/2009, there has been debated the question of whether the supplementary protection certificate should be available for new therapeutic uses of previously approved active ingredients. In addition, the subject of interpretation was also the Article 3(a) of the Regulation 469/2009 requiring that the "product" (i.e. the active ingredient or combination of active ingredients) being the subject matter of the SPC application, should be "protected by the basic patent".

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The author analyzes several important decisions of the EU Court of Justice, with an emphasis put on the recent verdicts in both the "Santen" and "Royality Pharma" cases. In the grounds of these cases, there have widely been discussed the issue concerning the encouragements given to pharmaceutical companies being involved into medical researches in order to stimulate their investment into innovation treatments.

Keywords: *patents, additional protection, pharmaceutical products*

1.Introduction

The patent is the right to the intellectual property which gives the inventor the exclusive right to production, distribution, import and use of the invention protected by the patent (Lasić, 2014, p. 178). The patent is valid for 20 years since the day of submitting the patent application, which means that the competition to the patent's inventor is prevented from economic exploitation of the invention protected by the patent. This is understandable and justifiable, bearing in mind for example great expenses which pharmaceutical companies invest in the research and development of the new medicine (Marković, 2016, p. 33). The expenses in question are especially present in the areas which are not sufficiently discovered, as for example are rare diseases. In order to be protected by the patent the invention must be new, possess a certain inventive level and must be appropriate for the industrial application. These conditions apply also to all the inventions which are protected by a patent. However, the patent protection of the pharmaceutical inventions is to a great extent specific. Namely, in the past decades the expenses for research and development in the innovative pharmaceutical industry have risen greatly. The main reason lies in the fact that the procedure for allowing the medicine to be put into circulation is long, strict and complicated (Marković, 2016, p. 34). Before getting a permission to put the medicine into circulation and distribution, many research are carried out in order to prove if a certain medicine is safe and efficient in the treatment of the certain disease (Killick & Schultz, 2008, p. 3).

On average, there may pass 13 years from the day of the submission of the patent application till obtaining the permit to put the medicine into circulation. That is the main reason why the pharmaceutical companies submit the patent application in the early stage of the medicine research and development. The research and development of the medicine, is continued, even after submitting the patent application (Fachler, 2014, p. 1062). Bearing in mind that till the medicine is permitted to be used (the research of the medicine,

the submitting and investigating the patent application, the clinical medical testing), there isn't much time left for the commercialization of the medicine (7 years on average). That means that the rest of time is devoted by the pharmaceutical companies to return the investment and make profit, which in turn, may enable further research and the development of the new medicines. For that reason the pharmaceutical industry would need the possibility of the deadline extension of the validity of the patent protection. This was made possible by the introduction of certificates of the additional protection into the patent system. The paper will further discuss this form of the additional protection for the invention of the pharmaceutical products. A special emphasis will be placed on the court practice in EU Court of Justice about the additional protection for the second medical use. This question has especially become an important issue after the recent verdict of the Court of Justice in the "Santen case" which has brought about different comments both by the experts and also by the pharmaceutical products manufacturers.

2. Supplementary protection certificate – general characteristics

Supplementary protection certificate (SPC in further text) is sui generis the intellectual property right which begins with the expiration of the basic patent (Kalden, 2015, p. 98). The protection which is recognized by the certificate refers to the medicines for human or animal use for means for the protection of plants which require the permission in order to be put to circulation and which were previously protected by the patent. There are products which are protected by the patent and which are under the jurisdiction of being approved in order to be put into circulation, but which cannot be the subject of SPC. For example, medical devices and auxiliary means in the medicine reinforce the therapeutic effect, do not possess the direct therapeutic effect for the approved indication, and thus cannot be the matter of the SPC protection (e.g. the auxiliary means in the vaccine).

SPC has a great significance. Namely, there is an opinion that up to 80% of income obtained by the pharmaceutical companies could be generated during the period of the validity of SPC (Kalden, 2015, p. 99). This right makes up for the loss in the effective validity of the patent to the carriers of the project. This loss refers to the time necessary for obtaining the permission for the putting the medicine into circulation which is protected by the patent.

SPC is recognized in all the EU countries (Bently & Sherman, 2002, p. 54). Apart from that, this kind of protection is recognized by countries which

are not members of the EU, but which are encompassed by the European patent application. In Serbia is regulated by the Law on patents.

The protection which is recognized by the certificate is limited to the products protected by the patent, and for the approval of which to be put to circulation the permission of the state body in charge is necessary. Furthermore, the certificate provides the protection for that product in the same scope as the patent on which the certificate is based. In other words, SPC refers only to the medical use encompassed by the patent protection.

The request for the recognition of SPC is submitted to the national institute for patents. When it comes to Serbia, the body in charge for the submission of this request is The Institute of the Intellectual property. The request for the recognition of SPC can only be submitted by the owner of the original patent, and within six month from the day from the date of the issuance of the permit for putting the product protected by the original patent into use. Exclusively, if the permit for putting into use was issued before the recognition of the patent, the request for the recognition of SPC can be submitted within 6 month from the date of the patent recognition.

The conditions for the recognition of the certificate which is prescribed by the Law on patent of the Republic of Serbia are aligned with the European Regulation 469/2009, as well as the Regulation no. 2019/933. Namely, SPC is recognized if the following conditions have been fulfilled:

- the product is protected by the original patent which is in force.
- the permit for putting the product as medicine into use has been issued
- the product was not previously the subject of the protection by certificate
- the permit to be put into use must be the first permit.

At first sight each of these condition which are prescribed by the Law on patents under the Act 116, and EU regulation no. 469/2009 together with Act 3 can easily be fulfilled. However, each of these conditions was the subject of the multiple interpretations of The Court of Justice of the EU.

3. The first approval of putting the product on the market as the medical product

One of the requirements for the recognition of the certificate for the additional protection which in practice has brought about numerous dilemmas and called for interpretation is “the first approval for putting the product on the market as the medical product” itself.

The attepts in the foreign court practice to broadly interpret this requirement were put to a stop by the verdict of the Court of Justice in the case

C-31/03.[1] In this verdict the EU Court of Justice has pointed out that granting the SPC to the Union member state based on the medical product for the human use permitted in that member state is annulled by the permission to put that product for the human use permitted in that member state is annulled by the permission to put that product on the market as veterinarian-medical product which was issued in the other state member prior to the stated date in Art. 19 (1) Regulation no. 1768/92. Thus, the standpoint of the court practice was that SPC for other or further medical useo f the know active ingredients is not allowed. However, it was often stated that this court practice is opposite to the basic aims of the SPC Regulation, i.e. to "ensure the sufficient protection for stimulating the pharmaceutical research".

The things have, however, changed by bringing the verdict "Neurim" in the case C-130/11.[2] In contrast with the previous court practice, which was considered as anti-patent, this verdict lead to the liberalization of the SPC recognition. It represented the encouragement to the companies to take part in the research of the new useo f the previously approved active ingredients.

Namely, the company Neurim has undertaken the research on melatonin, the natural hormone which was not the subject of the patent. The research result was that certain melatonin formulation can be used as an insomnia medicine. In the meantime, the ecompany Neurim was granted the European patent for the discovered melatonin formulation which was applied in the medicine for human use under the name of "Circadin". After Neurim got a permission to put the medicine into circulation, it requested the SPC recognition, because the patent permission to put the medicine into circulation, it requested SPC recognition, because the patent which protected that new medicine had less than five years before the protection expiry. Nevertheless, The British Institute for Intellectual Property declined to grant SPC to Neurim for the patented formulation of the melatonin for the use in sleeping treatment by the oral application of "Circadin" medicine.

The ground for refusal to recognize SPC was the fact that no matter if "Circadin" was the subject of the original patent in force, there had been a prior approval of putting into circulation by the third party for a different formulation of melatonin called Regulin- the regulation of the reproductive capacity in sheep. Regulin was protected by the patent on behalf of the company

[1] C- 31/03 Pharmacia Italia, Downloaded 2021, May 15 from https://curia.europa.eu/juris/liste.jsf?&num=C-31/03.

[2] C-130/11 Neurim, Downloaded 2021, May 15 from https://curia.europa.eu/juris/liste.jsf?num=C-130/11&language=EN.

Hoechst and ceased to exist in 2007. So the request to grant SPC for Circadin medicine was declined due to the fact that the request for the permit to put into circulation Circadin was not the first permit which referred to melatonin. The original approval/permit referred to the veterinarian, and the subsequent permit to the humane application/use.

Being unsatisfied by the result of the decision Neurim Company filed a suit and the dispute eventually ended up at the Court of Justice of EU. This Court brought the verdict in favour of Neurim. Namely, the court stand point was that "... the mere existence of an earlier marketing authorisation obtained for a veterinary medicinal product does not preclude the grant of a supplementary protection certificate for a different application of the same product for which a marketing authorisation has been granted, provided that the application is within the limits of the protection conferred by the basic patent relied upon for the purposes of the application for the supplementary protection certificate".

The pharmaceutical and agrochemical companies greeted the verdict with enthusiasm. However, the verdict, i.e. the notion of "new use" to which Neurim refers to opened some new questions. For example, what about the therapeutical indications for different diseases or with the new dosages?

At the beginning of 2019 the Court of Justice EU brought a verdict which to a great extent disappointed the pharmaceutical industry. Namely, after the "Neurim" verdict the pharmaceutical industry continued with significant investment into research and development of the new formulas which improve the efficiency of the previously approved active ingredients or their combinations. However, in the new verdict "Abraxis" in the case C-443/17 the Court was of the opinion that SPC cannot be obtained for the new formulations of the previously approved active ingredients.[3]

Abraxis is a pharmaceutical company which produces, i.e. puts into circulation a medicine Abraxane® used in cancer treatment. This medicine contains the substance paclitaxel which is made of nano-particles of the paclitaxel connected to the albumin. This active substance, called nab-paclitaxel, was protected by the company Abraxis with the use of the European patent and got the permission to put into circulation the medicine Abraxane®; the permission was obtained by the European Medicines Agency. In addition, it was proven that adding the albumin gives the nab-paclitaxel greater efficiency. In the meantime, the company submitted the request for the SPC. However,

[3] C-443/17 Abraxis Bioscience, Downloaded 2021, May 12 from https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-443/17&td=ALL.

before the Abraxis got the permission to put into circulation the medicine Abraxane®, other companies had put into circulation the active substance paclitaxel. The request for SPC was denied with the explanation Regulation 469/2009 in Art. 38(c) allows the granting of SPC for the new an innovative therapeutic application of an old active substance, but not the allocation of SPC for the new and innovative formula of that substance.

Undoubtedly Abraxis company has undertaken a lengthy and expensive research for the development Abraxane®, as well as that it required a lot of time to obtain the permit to put the medicine into circulation. Also, this company was of the opinion that nab-paclitaxel should be considered as an active ingredient. However, this opinion was rejected with the explanation that paclitaxel is an active ingredient and albumin a carrier. Yet, in its decision the EU Court of Justice has drawn a parallel between this and its prior decision in the case of C-210/13.[4] This case refers to the dilemma, whether the adjuvant of the vaccine can be considered as an active ingredient in the circumstances when the adjuvant itself did not possess the therapeutical effect, i.e. did not provide any immunity, whether against the influenza (flu) or any other disease. The court was of the opinion that the reasoning for excluding such auxiliary means from the meaning of the "product" is applied to the same extent to the exclusion of the bearer, such as is albumin, even if it is permitted for the active ingredient with which it is connected in order to perform more efficiently its therapeutical effect. The Court, also, considered this conclusion not to change the fact that although the active ingredient and the carrier are connected together in the form of nano particles, since nano particles cannot be considered as the "product" which is different from the "product" which solely consists of the active ingredient (i.e. paclitaxel). Thus, the Court was of the opinion that SPC cannot be granted for the new formulation of the previously approved product, i.e. old active substances.

In the latest verdict "Santen" in the case of C-673/18 the EU Court of Justice had to deal with the question, whether SPC which represents the award for the pharmaceutical innovation refers only to the discovery and development of the completely new active substances or the pharmaceutical companies can deal with the research about the new treatments, including the new applications of the old ingredients.[5]

[4] C-210/13 Glaxosmithline, Downloaded 2021, May 15 from https://curia.europa.eu/juris/liste.jsf?num=C-210/13.

[5] C-673/18 Santen, Downloaded 2021, May 15 from https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-673/18.

The Japanese pharmaceutical company Santen, which specializes in ophthalmology, is the carrier of the European patent which protects the ophthalmological emulsion. The active ingredient of this emulsion is cyclosporine. The Santen Company had the permit to put into the circulation the medicine "Ikervis" which is used in the treatment of the grave keratitis. In the meantime, the Santen Company submitted the request for SPC to be granted for the product under the name of "the Cyclosporine for the use in the treatment of keratitis". However, the request was rejected with the explanation that the permission to put the cyclosporine into circulation is not the first permit in the sense of the Regulation e 469/2009. Namely, the previously issued permit to put into the circulation the medicine called "Sandimmun" which also contains the active ingredient cyclosporine, and which issued to threat uveitis. The dispute reached the Court of Justice EU. As different from the "Neurim" case, in the case of "Santen" the Court started to investigate the meaning of the notion "the product". In that sense, the Court first considered if the new therapeutical application of the active ingredient can be considered as the product which differs from the other already known application of the active ingredient.

It then considered whether the permit to put into circulation with the approval for the new therapeutical application of the active ingredient can be considered as the first permit in the sense of Art. 3 (d) of the Regulation 469/2009.

The Court finally completely declined in its verdict the conclusions stated in "Neurim" verdict and opted for the strict interpretation of the "product" from the Regulation 469/2009. The Court concluded that this narrower interpretation fulfills one of the goals of the Regulation 469/2009, and it is the balance between the encouraging the pharmaceutical research and the public health interests. The Court has in its decision also taken into consideration the fact that the broader interpretation endanger the simplicity of the SPC system and lead to different decisions of the National patent institutions.

4. Product protected by a basic patent: case Royality Pharma

One of the conditions for obtaining the SPC is that the product "is protected by a basic patent in force". The CJEU had the opportunity to assess this criterion in the Teva case (C 121/17).[6] The company Gilead had the SPC for the Truvada product, which it contains tenofovir disproxil (TD) and

[6] C-121/17 Teva, Downloaded 2021, June 11 from https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-121/17.

emtricitabine. Claim 27 of the basic patent claimed TD "and optionally other therapeutic ingredients". A dispute arose as to whether this request covered the combination of TD and emtricitabine. The CJEU answered this question in its decision, namely... "the combination of the active ingredients must necessarily, in light of the description and drawings of that patent, fall under the invention covered by that patent; and each of those active ingredients must be specifically identifiable, in light of all the information disclosed by that patent". However, some questions remained unanswered. For example, the Court did not answer the question whether this test applies to single as well as combination products. Besides, the CJEU did not clarify whether the product must reflect the core inventive advance of the basic patent.

The CJEU pointed out in its decision that the product must be specifically identifiable by the person skilled in the art in light of the description and drawings of the patent, and "the prior art as at filing date or the priority date of that patent". However, it remained unclear whether the court meant that the skilled person's relevant knowledge is the "common general knowledge", rather than the prior art or a combination of both. This issue is left to the national courts to interpret. As expected, the national courts had different results in applying the Teva decision. The CJEU was nevertheless given a new opportunity to rectify the shortcomings of the Teva decision in the Royality Pharma case.

In the first half of last year, the Court of Justice of the European Union delivered its judgment in Case C-650/17, *Royalty Pharma*.[7] The case was referred to the CJEU by the German Federal Patent Court. This court requested the interpretation of Article 3(a) of the Regulation 469/2009. The contentious issue was whether an active ingredient that is neither expressly mentioned in the claims nor specifically mentioned in the patent, but which is covered by the functional definition in the claims of that patent, is protected on the basis of Article 3(a) of Regulation No. 469/2009/EC, even if that product was developed only after the filing date of the patent as a result of an independent inventive step.

The pharmaceutical company, Royality Pharma, requested SPC for sitagliptin on the basis of the basic patent and of an authorisation to place a medicinal product on the market for the diabetes product "Januvia". The German Patent Office refused to recognize due to failure to comply with Article 3 (a) of the Regulation. Namely, sitagliptin was developed by a licensee of the basic patent after the date on which the application for that patent was filed. The

[7] C-650/17 Royalty Pharma, Downloaded 2021, June 22 from https://curia.europa.eu/juris/liste.jsf?num=C-650/17&language=en.

licensee obtained a new patent for sitagliptin, which served as the basic patent for obtaining the SPC.

Sitagliptin is developed after the date on which the application for basic patent. This active ingredient is neither expressly mentioned in the claims nor provided as a concrete embodiment in the basic patent. Meanwhile, the CJEU has ruled in the case C-121/17, Teva. As stated above, it was the first SPC judgment rendered by the CJEU and was supposed to set a final standard for the assessment of the contentious Article 3(a) of the Regulation.

Even before Teva's decision, there were differences among the EU Member States in their interpretations of the criteria developed in the case-law of the CJEU on Article 3(a) of the Regulation. However, even in Teva's decision, the CJEU did not specifically address the issue, whether or not the core inventive advance of the basic patent should be taken into account when evaluating whether an active ingredient is protected by the basic patent under Article 3(a) of the Regulation.

In the latest decision (case Royality Pharma), the CJEU took the position that a product that is the subject of the SPC and that was developed after the application for a basic patent after an "independent invention step" cannot be covered by a basic patent even if it falls under the functional definition in patent claims. However, the ECJ did not provide guidance on what constitutes an "independent inventive step".

The significance of the decision of the CJEU in case C-650/17 is reflected in the fact that the court provided clarification regarding the test of "basic invention progress", as well as regarding the relevant date for assessing whether the product is protected by the basic patent. This clarification could be important in aligning relevant future decisions of national courts and authorities. Namely, the court confirmed in the analyzed decision that while an SPC must be limited to the technical characteristics of the invention protected by the basic patent, there is no requirement that SPC applicants must overcome a "core inventive advance" test to meet the criteria for eligibility, thereby finally rejecting this principle regarding Article 3(a).

5. Conclusion

SPC exists with the aim of prolonging the validity of the patent. In the greatest number of countries the patent lasts for twenty years. However, the patents also protect the products for which the permission to be put to circulation the permit by the body in charge is necessary. It happens so that this permit is obtained a few years before the expiration of the patent, thus SPC

prolongs the validity of the patent to the maximum of five years. Otherwise the companies would be de-stimulated to invest into the research of such products. The regulations about SPC have aroused dilemmas among the legal and pharmaceutical experts and required the interpretation of the institutions in charge. Even a few times have the regulations concerning SPC changed.

The dilemmas were present among the legal experts and the manufacturers of the pharmaceutical products about the interpretation of Art. 3(d) of the Regulation 469/2009. By a number court decisions the EU Court of Justice brought at the end of 2011 it was expected that the longer period in which circumstances SPC can be granted aimed at the combined products. Namely, the decision Neurim which refers to the protection of SPC for the second, i.e. further medical application expanded the possible circumstances under which this protection is accessible. The decision seemed to be taken as a guideline by the national courts and they perceived its interpretation according to their liking. However, the veredict in the case of Santen The Court has rejected its previous verdict in the case of Neurim and opted for the literal interpretation of the Regulation 469/2009. According to this interpretation SPC can not be allocated for the new applications of the previously approved products. In other words, SPC cannot be granted to the products for other medical use. However, the concern has arisen due to this verdict among the legal experts, and especially the pharmaceutical companies in the sense that it can de-stimulate the research of the new applications of the existing pharmaceutical products.

However, the good side of this verdict is that the EU Court of Justice has lined clear guidelines in it for the interpretation of Art. 3(d) of the Regulation 469/2009. Before this verdict the courts and patent institutions had an unclear approach concerning the granting of SPC for other medical use. The example for this is the decision of the Supreme Court of Great Britain from 2018 in the case Warner-Lambert&Actavis/Mylan which caused the insecurity in the manner of application of other medical use. However, the current decision about SPC will to a great extent contribute to the harmonization of regulations of SPC on the national level.

The court decision in the case of "Santen" is not very surprising bearing in mind the pressure which has been made in the recent years on the health care systems of certain European countries due to the high medicine prices (Hu, Eynikel, Boulet & Krikorian, 2020, p. 3). As the main reason of the high prices of medicines is most often stated the monopole which the pharmaceutical companies have thanks to the patents and the possibility for the extension of the patent validity period, which refer to medicines. Especially, at the same

time, the extension of the validity period is recognized as the reason because of which the medicines are not accessible to all the patients. Namely, high medicine prices force certain states to turn to the rationalization of medical treatment. As a result that means that individuals are refused the treatment and the patient′s right to health.

The extended protection based on SPC, certainly encourages the research and the development of the pharmaceutical companies. Such research is costly, present high risk and are strictly regulated. SPC is some kind of guarantee and encouragement for such research. However, the professional public is still discussing the profitability of such research and medicine development costs, which surely include the opportunity expenses (Harris, 2017, p. 1). A research has shown that there are cases in which the profit from medicine sale has surpassed the expenses of their research and development on average four years after obtaining the permit to put them into circulation (Prasad & Mailankody, 2017, p. 1570).

The Supreme Court verdict in the "Santen" case according to which SPC cannot be granted for the products for other medical use should be understood as a balance of interests between the pharmaceutical companies, the manufacturers of the generic medicines and the interests of public health. In that sense the EU Supreme Court decision is awaited with great attention in the case of Novartis (C-354/19). This verdict could to a great extent encourage the reform of the system and the manner in which SPC is granted for medicines.

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SERTIFIKAT O DODATNOJ ZAŠTITI: NEDAVNE ODLUKE SUDA PRAVDE EVROPSKE UNIJE

REZIME: Poslednjih godina javni zdravstveni sistemi u zemljama sa visokim prihodima su u velikoj meri izloženi pritiscima zbog visokih cena lekova. Na visoke cene lekova utiču tržišni monopoli koje farmaceutske kompanije imaju zahvaljujući patentima, to jest ekskluzivnim pravima koja im se priznaju za lekove. Dodatni faktor koji utiče na visoke cene lekova su

proširenі oblici zaštite intelektualne svojine, uključujući i produženje roka ekskluzivnosti prava nakon isteka patenta za medicinske proizvode. Sertifikat o dodatnoj zaštiti kao oblik dodatne zaštite za farmaceutske proizvode u Evropskoj uniji reguliše Uredba 469/2009. Ovaj oblik zaštite poznaju i nacionalni propisi o patentima. Od kada je Uredba 469/2009 stupila na snagu raspravlja se pitanje da li sertifikat o dodatnoj zaštiti treba da bude dostupan za nove terapijske primene prethodno odobrenih aktivnih sastojaka. Osim toga, predmet tumačenja bio je i član 3 (a) Uredbe 469/2009, koji zahteva da proizvod, tj. aktivni sastojak ili kombinacija aktivnih sastojaka, koji je predmet prijave sertifikata o dodatnoj zaštiti, bude zaštićen osnovnim patentom. Autor je u radu analizirao nekoliko važnih važnih odluka Suda pravde EU, sa akcentom na nedavne presude u predmetu "Santen" i u predmetu "Royality Pharma". U osnovi ovih slučajeva je dugo raspravljano pitanje o tome koje podsticaje treba dati farmaceutskim kompanijama uključenim u medicinska istraživanja kako bi se podstaklo njihovo ulaganje u nove inovativne tretmane.

Ključne reči: *patenti, dodatna zaštita, farmaceutski proizvodi.*

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THE EXOGENOUS CHARACTERISTICS OF TRAFFIC DELINQUENTS

ABSTRACT: The exogenous characteristics of traffic participants, such as: alcoholism, fatigue and psychoactive substances, have a significant impact on a safe behaviour in traffic, especially the motor vehicle drivers. In that sense, they represent the factors that can directly influence the unsafe behaviour in traffic. The influence of the exogenous characteristics on a safe behaviour of traffic participants has been analysed on the basis of the statements in documents as well as the results of numerous empirical studies. For the purposes of this paper, there have been selected and analysed the statistical data on the influential factors of traffic accidents for the period from 2010 to 2019 in Republic of Serbia. After reviewing the statistical data, both a qualitative and quantitative content analyses were performed. In addition to the statistical method, there were also used the content analysis methods, empirical method, descriptive method, comparative methods, as well as deduction and induction methods, in order to analyse the trend and presence of these influential factors of traffic accidents in Republic of Serbia. The statistical data being processed in this paper, originated from the database of the Traffic Safety Agency of Republic of Serbia. The results of the research show the extent to which the exogenous characteristics affect a safe behaviour of traffic participants, as well as the severity of the consequences of traffic accidents. Observed individually, the listed characteristics have a different intensity of influence on a safe behaviour in traffic. In this regard, from the external

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characteristics of traffic delinquents, the most common is the drunk driving as an influential factor, which especially affects the severity of traffic accidents in Republic of Serbia.

Keywords: *traffic delinquents, traffic accidents, criminal offenses, traffic safety*

1. Introduction

There is no single understanding in science about the common characteristics of traffic delinquents, despite the existence of numerous typologies. Moreover, one gets the impression that in this form of delinquency, the typologies are additionally relativized. This is indicated by the fact that the largest part of the population of a community participates in everyday life in traffic, and that both, in the role of a delinquent and in the role of a victim of traffic offenses, any citizen or participant in traffic can be found. Due to the mass nature of this negative social phenomenon, it is much more difficult to notice characteristics that affect delinquent behaviour on an individual level (Petrović, 2019, p. 46). Summarizing the results of previous research, we can identify those characteristics that are more common and typical in traffic delinquents than some others, and that affect the (un) safe behaviour of traffic participants. Thus, the mechanisms of behaviour of traffic delinquents can be explained to some extent, but not completely.

The specifics of traffic delinquency as a special type of criminal behaviour derive from the characteristics of traffic delinquents. Speaking about the aetiology of traffic offenses, i.e. criminogenic factors, it was pointed out that in most cases, the cause of a traffic accident lies in a person (Petrović, 2021, p. 115). In criminological research into the causes of traffic delinquency, it is especially important to determine the influential factors that cause behaviours that deviate from socially desirable ones. Briefly, it is necessary to point out those characteristics of traffic participants (endogenous, exogenous, sociodemographic, etc.), which lead to socially deviant behaviours and the commission of traffic offenses. The importance of studying these characteristics is reflected in their use to find adequate measures to influence the change in the behaviour of traffic participants in order to prevent traffic delinquency (Džunić, 2018, p. 54).

2. Influence of exogenous characteristics on traffic safety in the Republic of Serbia

Exogenous characteristics (drunk driving, fatigue and psychoactive substances) have a significant impact on the safe behaviour of traffic participants. In that sense, they represent factors that can directly influence safe behaviour in traffic. The influence of exogenous characteristics on the safe behaviour of traffic participants was analysed on the basis of statements in documents, results of empirical research and data on their presence as influential factors of traffic accidents in the Republic of Serbia. It is especially important to point out that the data in the ten-year period from the beginning of the application of "new" legal provisions in the field of traffic safety, tightening of penal policy and introduction of a wider range of preventive measures to improve traffic safety are analysed.

3. Driving under the influence of alcohol

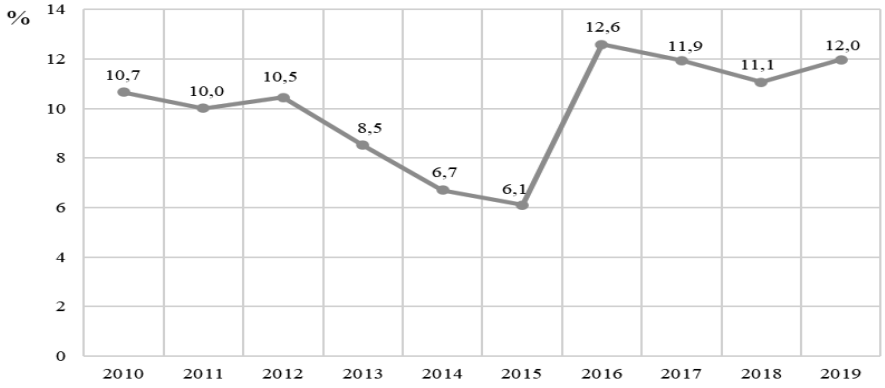
Alcohol is the only psychoactive substance consumption of which establishes a consistent and strong connection with criminal behaviour that contains elements of violence. In addition to reducing speed and using seat belts, special attention should be paid to driving under the influence of alcohol in order to improve the level of traffic safety.

Research has shown that alcohol affects driving ability and increases driver reaction time. The ability to process information and make relevant decisions is weak, which is why driving under the influence of alcohol affects risky behaviour in traffic. Driving under the influence of alcohol significantly reduces the ability of drivers, both perceptual and motor, as well as cognitive and memory. It has been medically proven that alcohol is resorbed very quickly in the body through the bloodstream (on average in 30-60 minutes), while the elimination of alcohol from the blood is a much slower process, averaging 0.017% per hour (NHTSA, 1994, p. 4). The American National Institute on Alcohol Abuse and Alcoholism conducted a study of the effect of alcohol on behaviour and found that alcohol causes a high level of aggression and violent behaviour (NIAAA, 1997). There is a direct link between the amount of alcohol consumed and the negative effects on the driver's ability. The risk of causing traffic accidents and death as their consequences increases proportionally with a higher concentration of alcohol in the blood. The concentration of alcohol in the blood over 1.5 per mille increases the risk of drivers' participation in traffic accidents by 20 to 60 times, in relation to the concentration of alcohol in the blood up to 0.5 per mille (Lipovac, 2008, p. 121). Alcohol is considered to be one of the most

significant causes of accidents with casualties (Connor, Norton, Ameratunga, & Jackson, 2004, p. 337). One of the big misconceptions is that consuming a small amount of alcohol, "a glass of brandy up to two", does not affect the driver's behaviour. Empirical research and practice have shown that, even with lower blood alcohol concentrations, a person has a poor assessment of ability, self-criticism decreases, self-confidence grows, drivers drive faster and riskier (Ronen et. al., 2004, p. 2, 6). These effects are also present at low blood alcohol concentrations up to 0.2 per mille, and when the concentration is over 1.4 per mille, the driver is considered completely incapable of driving. In the total number of traffic accidents caused by driving under the influence of alcohol, the largest number were caused by drivers whose blood alcohol concentration was relatively low (Milić, 2007, p. 270). A positive correlation was found between the delinquent behaviour of young drivers and alcohol dependence. In addition, far more men than women were injured in traffic accidents due to driving under the influence of alcohol (Petrović et al., 2020, p. 483).

The Law on Traffic Safety on the Roads of the Republic of Serbia (hereinafter: ZoBS) provides for zero tolerance to alcohol for drivers with a trial driver's license and professional drivers. The limit of the allowed amount of alcohol in the blood for amateur drivers was 0.3 per mille in 2010, and the amendments to the ZoBS from 2018 were reduced to 0.2 per mille (Road Traffic Safety Act, 2009). In the period from 2010-2019. year in the Republic of Serbia, 28,824 traffic accidents were registered, in which the influencing factor was an alcoholic condition. The percentage of this influential factor in traffic accidents shows a slight upward trend in the analysed period, Graph 1.1.

Graph 1.1 – Percentage of alcohol status as an influential factor in traffic accidents in the Republic of Serbia in the period from 2010 to 2019



Author's research

In 2010, 2,753 traffic accidents were registered, where the influential factor was an alcoholic condition (10.7%), and in 2019, 3,091 traffic accidents (12.00%). Out of the total number of registered traffic accidents caused due to alcohol, the lowest number was recorded in 2015, 1,575 traffic accidents (6.1%), and the highest in 2016, 3,250 traffic accidents (12.6%), Table 1.1.

Table 1.1 – Registered traffic accidents with dead and injured persons and the total number of traffic accidents in which the influencing factor is an alcoholic state, in the period from 2010 to 2019 in the Republic of Serbia

Year	TA with dead		TA with injured		Total number of TA	
	No.	%	No.	%	No.	%
2010	45	7,49	1054	8,86	2753	10,66
2011	51	8,49	984	8,28	2583	10,00
2012	39	6,49	1002	8,43	2700	10,46
2013	52	8,65	894	7,52	2200	8,52
2014	25	4,16	791	6,65	1733	6,71
2015	35	5,82	768	6,46	1575	6,10
2016	99	16,47	1594	13,41	3250	12,59
2017	82	13,64	1631	13,72	3082	11,93
2018	80	13,31	1524	12,82	2857	11,06
2019	93	15,47	1648	13,86	3091	11,97
Total	601	2,33	11890	46,04%	25824	100

Source: Database of the Traffic Safety Agency of the Republic of Serbia

As a consequence of traffic accidents caused by an alcoholic state, in 46.04% of cases there are accidents with injured persons, and in 2.33% of cases there are accidents with dead persons (on average in the period from 2010-2019). In that sense, it is important to emphasize that the results for the analysed period show that the consequences of the total number of registered traffic accidents in the Republic of Serbia make up 35.44% of accidents with injuries, and 1.47% of accidents with deaths (Petrović, 2021, p. 222). If these data are compared, a significantly higher percentage of casualties in traffic accidents is observed, in which the influencing factor is an alcoholic state. This

statement speaks in favour of the claims in the literature that an alcoholic state also affects the severity of the consequences of traffic accidents.

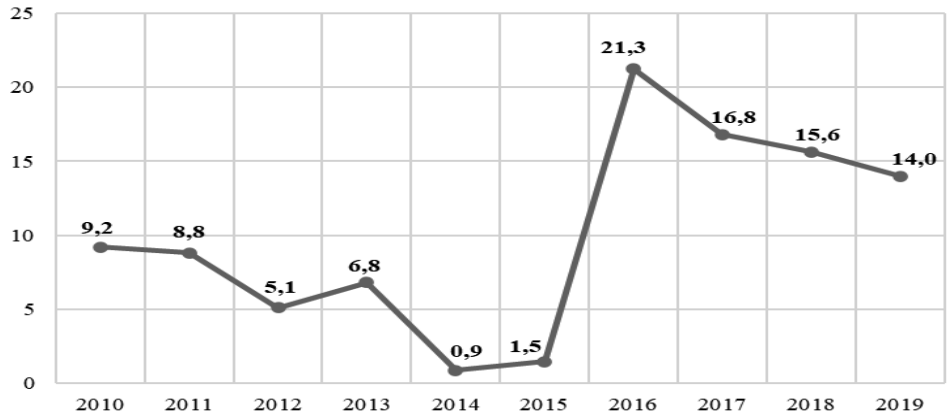
4. Fatigue

Fatigue can greatly affect safe driving behaviour. Some authors consider it an equally important accident-causing factor, as well as acute alcoholism, especially in professional drivers (Atanacković et al., 1987, p. 232). Fatigue is one of the important accident-causing factors in traffic, whose action leads to psychological and physical fatigue in drivers, which complement each other. It has been identified as a contributing factor to causing traffic accidents in a wide range of circumstances, with the implication that tired people are less likely to achieve safe performance and activities in traffic. According to Hajduković (1970), "Fatigue is a specific psychological state of the organism, caused by an activity, which usually manifests itself in a decrease in work efficiency"(cited by: Atanacković et al., 1987, p. 229).

Symptoms of fatigue, given the specific impact on driving ability, can relate to the psychological component, fatigue reflexes, automatic movements and muscle components. In addition, fatigue leads to slowing of reflexes and automatic movements. Research has shown that due to fatigue, the psychic second is prolonged, with the appearance of unnecessary and excessive movements and actions. At the beginning of fatigue there is a decrease in attention, which then weakens faster and faster. In a word, the driver's ability to safely drive a motor vehicle decreases sharply, drowsiness occurs, and there is a lack of control of traffic behaviour that results in errors. The literature states that the impact of this cause of traffic accidents is underestimated, because there are no reliable ways to determine in each specific case whether the traffic accident occurred due to driver fatigue (Stanojević, 2013, p. 72). According to the results of empirical research, the impact of fatigue typically ranges from 1-3% of the causes of all accidents (Lyznicki at al., 1998, p. 1910) and even up to 20% of accidents that occur on major roads and highways (Horne and Reyner, 1995, p. 565), while some research has shown that this share exceeds 30% (Stutts et al., 2006, p. 94).

In the structure of traffic accidents in the Republic of Serbia, fatigue as an influential factor was registered in 2,041 traffic accidents in the period from 2010–2019. years. The number of traffic accidents due to fatigue increased in the analysed period, as shown in Graph 1.2.

Graph 1.2 – Percentage presentation of fatigue as an influential factor in traffic accidents in the Republic of Serbia in the period from 2010 to 2019



Author's research

From 2010 to 2014, a decrease in the number of traffic accidents in which fatigue was registered as an influential factor can be noticed. Since 2016, there has been a sharp increase in the percentage (21.26%) of this influential factor, and then a decrease in the percentage in the following years until 2019, when it was 14.01%. It is assumed that this sudden change is the result of recording a larger number of influential factors in traffic accidents since 2016 (several influential factors are recorded instead of one).[1]

5. Psychoactive substances

Psychoactive substances affect the psychophysical ability of road users. These include drugs, drugs or other chemical substances that may affect the ability to participate safely in traffic. "Tabletomania" is a term that is often used nowadays. It signifies the fact of mass and uncontrolled consumption of drugs. While the harmful effects of alcohol on the psychophysical abilities of drivers have been thoroughly examined and well known, it is less known that consuming a large number of drugs can have a much more intense impact on damaging some body functions necessary for safe driving. It is estimated

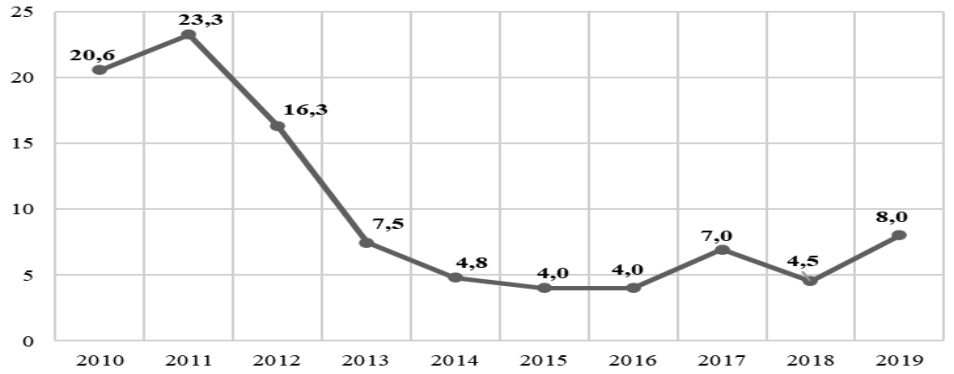
[1] These data were also influenced by the change in the method of recording the causes of traffic accidents in 2016, since several influential factors that contributed to its occurrence are recorded for each traffic accident, and not just one as was practiced until then. Variation in the data indicates the relativity of indicators of changes in the entire period, especially when we talk about fatigue, because fatigue was often a "neglected" factor in determining the cause of traffic accidents.

that in developed countries, about 20% of drivers drive a vehicle under the influence of drugs (Stanojević, 2013, p. 72). The results of meta-analyses on the effect of the use of drugs as a cause of traffic accidents, showed that users of tranquilizers have a 1.59 times higher probability of experiencing a traffic accident (Dassanayake, Michie, Carter & Jones, 2011, p. 58).

The use of drugs addictive substances, causes more severe disorders of psychophysical abilities in drivers, compared to alcohol or drugs. It causes serious disorders of mental and physical abilities, which are reflected in the loss of control over one's own actions, disorders of perception in time and space, hallucinations, etc. Numerous studies have confirmed that drug use significantly increases the risk of being involved in traffic accidents. The data indicate that in the population of drivers in Europe, the prevalence of the use of illicit drugs is 1-5%, while the permitted drugs that have a harmful effect on driving are widespread from 5-10% (Walsh et al., 2013, p. 250).

Psychoactive substances were registered as an influential factor in 374 traffic accidents in the Republic of Serbia in the period from 2010 to 2019. years. Their percentage representation by years is shown in Graph 1.3.

Graph 1.3 – Percentage presentation of psychoactive substances as an influential factor in traffic accidents in the Republic of Serbia in the period from 2010 to 2019



Author's research

As can be seen from the presented chart, the percentage of traffic accidents caused by psychoactive substances is declining (20.6% in 2010 and 8.0% in 2019). The highest percentage of traffic accidents was in 2011 (23.3%), and the lowest in 2015 and 2016 (4.0%), after which there was a gradual increase in the period from 2017 to 2019. years. Presented results indicate undeniable

influence of psychoactive substances on safe behaviour in traffic, as well as that there is a higher prevalence of registered exogenous characteristics (alcoholism and fatigue) as influential factors in traffic accidents compared to psychoactive substances as an influential factor in traffic accidents.

6. Conclusion

The results of empirical research have shown a significant impact of alcoholism, fatigue and psychoactive substances on the perception, abilities of drivers and other road users. In addition, exogenous characteristics have a direct impact on the safe behaviour of road users. In the Republic of Serbia in the period from 2010-2019, the number of traffic accidents in which the influential factor was an alcoholic condition has increased (10.7% in 2010 and 12.0% in 2019). It is important to point out that in 2018, the tolerance limit for alcoholism in traffic was reduced to 0.2 per mille (amendments to the ZoBS in 2018). By summarizing the results of research on the harmful effects of alcohol on the safe behaviour of drivers, the existence of consistent conclusions can be observed. In almost all quantities, alcohol leads to a reduction in the abilities necessary to perform complex driving tasks, hence it is considered one of the significant causes of traffic offenses. The data also show that in the analysed period, there was an increase in the share of fatigue as an influential factor in traffic accidents (9.2% in 2010, 14.01% in 2019). The share of psychoactive substances as an influential factor in traffic accidents decreased from 2010 to 2017. However, compared to 2017 (4%), there is an increase in 2019 (8%) in the share of psychoactive substances as an influential factor in traffic accidents.

Based on the presented data, it is very important to point out that it is necessary to continuously work on improving traffic safety through the application of legal regulations and stricter sanctions within the penal policy for traffic offenses. In that sense, it is especially important to point out that the application of preventive measures can significantly increase the awareness of traffic participants and improve traffic safety. What is common to exogenous characteristics is the possibility that preventive measures such as education, campaigns, informing the public about the negative impact of these causes on safe driving, can significantly affect the goal of reducing the share of these causes in the total number of accidents. The development of modern technologies could contribute to the reduction of fatigue as an influential factor in traffic accidents. These technologies refer to various systems for monitoring driver behaviour while driving, which warn the driver in case of fatigue or deconcentration.

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EGZOGENE KARAKTERISTIKE SAOBRAĆAJNIH DELINKVENATA

REZIME: Egzogene karakteristike učesnika u saobraćaju, kao što su: alkoholisano stanje, umor i psihoaktivne supstance, imaju značajan uticaj na bezbedno ponašanje u saobraćaju, posebno vozača motornih vozila. U tom smislu one predstavljaju faktore koji mogu neposredno da utiču na nebezbedno ponašanje u saobraćaju. Uticaj egzogenih karakteristika na bezbedno ponašanje učesnika u saobraćaju analiziran je na osnovu iskaza u dokumentima i rezultata brojnih empirijskih istraživanja. Za potrebe ovog rada prikupljeni su i analizirani statistički podaci o uticajnim faktorima saobraćajnih nezgoda za period 2010–2019. godine u Republici Srbiji. Nakon uvida u statističke podatke izvršena je kvalitativna i kvantitativna analiza sadržaja. Pored statističke metode prilikom istraživanja korišćene su i metode analize sadržaja, empirijski metod, deskriptivni metod, komparativne metode, kao i metode dedukcije i indukcije, kako bi se mogla izvršiti analiza kretanja trenda i zastupljenosti ovih uticajnih faktora saobraćajnih nezgoda u Republici Srbiji. Statistički podaci, koji su u ovom radu obrađivani, korišćeni su iz baze podataka Agencije za bezbednost saobraćaja Republike Srbije. Rezultati istraživanja pokazuju u kojoj meri egzogene karakteristike utiču na bezbedno ponašanje učesnika u saobraćaju, kao i na težinu posledica saobraćanih nezgoda. Posmatrane pojedinačno, navedene karakteristike imaju različit intenzitet uticaja na bezbedno ponašanje u saobraćaju. S tim u vezi od spoljašnjih karakteristika saobraćajnih delinkvenata, najveću zastupljenost ima alkoholisano stanje kao uticajni faktor, koji posebno utiče na žestinu saobraćajnih nezgoda u Republici Srbiji.

Ključne reči: *saobraćajni delinkventi, saobraćajne nezgode, delikti, bezbednost saobraćaja.*

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FAMILY LEGAL PROTECTION AGAINST DOMESTIC VIOLENCE – PROTECTIVE MEASURES AND SOME PROCESSUAL ASPECTS OF THE PROCEDURE

ABSTRACT: Domestic violence is a widespread and deeply rooted social problem. With the aim of stopping violence and preventing further manifestations of domestic violence, the Family Law prescribes protection measures, but also a special procedure for protection against domestic violence. The goal of this paper is to analyze some processual aspects of this procedure and the challenges that the courts are faced, especially as regards the beginning of the procedure, i.e. a legal nature of lawsuits for protection against domestic violence, a special urgency of the procedure and deviations from the principle of disposition, as well as the measures for protection against domestic violence and the criteria by which the court is guided in the procedure of their passing.

Keywords: *the measures for protection against domestic violence, a procedure for protection against domestic violence, the court practice*

1. Introduction

Domestic violence is a harmful and dangerous social phenomenon and, as theory states, "the factor of weakening the family and society as a whole" (Ponjavić, 2012, p. 146). By the Family Law (2005) by the general provision

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of Art. 10 para.1, a ban on domestic violence was established, while para. 2 of this article stipulates that everyone has, in accordance with the law, the right to protection from domestic violence. The provision of Art. 197 of the Family Law (2005) domestic violence is defined as behavior by which one family member endangers the physical integrity, mental health or tranquility of another family member (para. 1).[1] The Family Law also states exhaustively who is considered a family member and thus determines who can commit an act of domestic violence and according to whom that act can be committed.[2] By the same method, *numerus clausus*, all measures that can be imposed in order to protect against domestic violence are listed (Family Law, 2005, Art. 198, para. 2).

In addition to the above substantive provisions in the part of the Family Law (2005) titled "Protection from Domestic Violence" (Art. 197-200), this law constitutes a special procedure – the procedure in a dispute for protection from domestic violence (Art. 283-289), i.e. prescribes procedural provisions. Their basic characteristic is the specifics of accepted procedural principles, that is deviations from the classical principles of general litigation procedure, but also the manner of their operationalization, and it represents a certain challenge for courts in conducting procedures in a dispute for protection from domestic violence.

2. Procedure in a dispute for protection against domestic violence

In order to provide a higher level of protection to family members endangered by violence, but also to the family itself, the Family Law (2005), as stated, regulates a special litigation procedure in a dispute for protection against domestic violence. This procedure is based on the modified principles

[1] The Family Law, in Art. 197 para 2, prescribes that domestic violence is considered in particular: 1. causing or attempting to inflict bodily harm; 2. causing fear by threatening to murder or inflict bodily harm on a family member or a person close to them; 3. coercion into sexual intercourse; 4. inducing sexual intercourse or sexual intercourse with a person under the age of 14 or an incapacitated person; 5. restriction of freedom of movement or communication with third parties; 6. insult, as well as any other insolent, reckless and malicious behavior.

[2] Family members are considered to be spouses or ex-spouses; children, parents and other blood relatives, and in-laws or adoptive relatives, that is, persons bound by foster care; persons living or who have lived in the same family household; extramarital partners or former extramarital partners; persons who have been or are still in an emotional or sexual relationship with each other, i.e.. who already have a child together or a child on the way, even though they have never lived in the same family household. Family Law, 2005, Art. 197 para. 3.

of civil procedure law and is adjusted to the nature of legal matters which are the subject of protection (Stanković & Boranijašević, 2020, p. 567). In it, apart from the specific provisions of Art. 283-289, the common rules prescribed for all proceedings in family relations are applied (Family Law, 2005, Art. 201-208, as a general procedure in relation to family relations).

Although we have decided that within this paper we would especially analyze lawsuits out of procedural instruments, and then the principle of special urgency of this procedure and deviations from the principle of disposition, the measures imposed by the court for protection against domestic violence and criteria that guides the court in the procedure of their sentencing require a somewhat broader comment.

2.1. Measures of protection against domestic violence and criteria which the court is guided by

The Family Law prescribes the following measures for protection against domestic violence: 1. issuing an eviction order from the family apartment or house, regardless of the right of ownership or lease of real estate; 2. issuing an order for moving into a family apartment or house, regardless of the right of ownership or lease of real estate; 3. ban on approaching a family member at a certain distance; 4. ban on access to the area around the place of residence or place of work of a family member; 5. prohibition of further harassment of a family member. Prescribed protection measures can also be imposed cumulative, but the court, when it finds that there is domestic violence, is not authorized to determine any other measure, which temporarily prohibits or restricts the maintaining of personal relations with another family member, except those from Art. 198 of the Family Law.[3]

Measures are imposed *in concreto*, depending on the circumstances of each individual case, and in proportion to the content, intensity and duration of the manifested violence, that is, when determining the measure of protection against domestic violence, the court will take into account the degree and form of manifested violence.[4] The purpose of all measures listed by law, besides sanctioning the perpetrators of acts of violence, is to prevent future violence as a way to protect vulnerable family members and prevent

[3] In that sense, the court practice is also declares itself, e.g. Judgment of the Supreme Court of Cassation, Rev. 3040/2017 of 27.12.2017.

[4] Judgment of the Court of Appeals in Belgrade, Gž2 60/2015 of 25.02.2015.

the spread of conflict.[5] According to our court practice, the goal of imposing measures is objective prevention of further manifestations of violent behavior and providing victims of domestic violence with peace and tranquility for a certain period of time,[6] and for non-compliance with these measures, criminal liability is envisaged.[7] The measure of protection against domestic violence may last for a maximum of one year (Family Law, 2005, Art. 198 para. 3), and may be extended until the reasons for which the measure was imposed cease to exist (Family Law, 2005, Art. 199). If the reasons for which the measure was imposed cease to exist, it may end before the duration has expired (Family Law, 2005, Art. 200). Therefore, the protection provided by the court in the procedure in the dispute for protection against domestic violence consists of imposing a measure for protection against domestic violence, extension of the duration of the imposed measure and termination of the imposed measure.

According to the manner of standardization of Art. 197 of the Family Law, listing the characteristic types of domestic violence actually enables a comprehensive approach, that is, coverage of all possible types of violence, i.e. any insolent, reckless and malicious behavior that endangers the basic values of the human being – his physical integrity, mental health and tranquility. Such a broad definition of the concept of domestic violence, according to court practice, is necessary in order to enable a timely reaction of the system's institutions to domestic violence, i.e. determining the measure of protection against domestic violence while it has not yet taken more severe forms, because this may interrupt the process of escalation of violence.[8] Insolence, recklessness and malice are components of domestic violence, its essential features, which clearly distinguish it from permissible behavior. These terms represent typical legal standards, the content of which the court should fill with its own judgment. In order for the criteria for concretization of these legal standards to lead to an adequate and timely response to violence in order to prevent it, it is necessary for the court to show a "zero tolerance policy" for violence, which means that any behavior that deviates from the standard of

[5] For example, Decision of the Court of Appeals in Novi Sad, Gž2 601/2016 of 28.07.2016.; Judgment of the Supreme Court of Cassation, Rev. 2249/2016 of 15.12.2016; Judgment of the Supreme Court of Cassation, Rev.3629/2018 of 21.6.2018.

[6] Judgment of the Supreme Court of Cassation, Rev. 1169/2016 of 13.07.2016.

[7] The Criminal Code, 2005, Art. 194, para. 5, prescribes a special basis for criminal responsibility, that is, prescribes that whoever violates the measures of protection against domestic violence determined by the court on the basis of the law governing family relations, shall be punished by imprisonment of three months to three years and a fine.

[8] Judgment of the Supreme Court of Cassation, Rev. 3040/2017 of 27.12.2017.

"normal" treatment and communication with family members can be qualified as domestic violence.[9]

The subjective feeling of the victim about the endangerment is also important for initiating the procedure for protection from domestic violence, and in the light of the assessment of the existence of domestic violence and the existence of the need to determine the protection measure.[10] Therefore, the court evaluates the assessment of the risk and threat of domestic violence *in concreto,* so the reasoning of one decision states that there is no basis for imposing the measure of protection against domestic violence in a situation where the defendant has taken action against a family member which by nature and by legal definition has the characteristics of domestic violence, but it is situational and represents an incidental event, if such behavior did not occur or recur, neither before nor after the act of violence, and the family member does not feel anxious, uneasy or afraid or threatened in any way.[11] When, by the court's assessment, it is a matter of subjective experience of violence by the victim, which is not objectified by other acts, e.g. "only" the addressing of abusive words by the defendant to the plaintiff at the moment when the defendant suspected that the plaintiff had an emotional partner, which is an isolated event which was not preceded, nor did such inappropriate behavior by the defendant continue, with no acts of physical violence between the parties, the court considers that the claim should be rejected, i.e. that there is no place for imposing measures for protection against domestic violence.[12] However, in the absence of an act that could be considered domestic violence by law, there are no conditions for imposing proposed protection measures, despite the existence of dysfunctional family relations and isolated incidents among family members.[13]

Although there is an undivided view that violence is most often a matter of power and control over the victim, and violent behavior is any intentional act that damages (Milutinović, 2012, p. 17), in theory and court practice there is no agreement on whether violence exists only as pattern of behavior or it may, however, be an individual incident. In other words, the question is whether domestic violence is considered behavior that is necessarily continuous, that is, violence that lasts for some time, or only one act of violence,

[9] Judgment of the Supreme Court of Cassation, Rev. 5008/2019 of 12.12.2019.

[10] In this regard the judgment of the Supreme Court of Cassation, Rev. 624/2021 of 03.03.2021.

[11] Judgment of the Court of Appeals in Niš, Gž2. 20/2019 of 17.01.2019 – Bulletin of court practice of the High Court in Niš no. 35/2019

[12] Judgment of the Supreme Court of Cassation, Rev. 5062/2020 of 25.11.2020.

[13] Judgment of the Court of Appeals in Novi Sad, Gž2 368/2016 of 16.06.2016.

so-called incidental violence can be relevant for imposing measures of family protection (Ponjavić & Palačković, 2012, p. 55). The answer is certainly given by the stance that "in some situations in family life, a single act will be qualified as violent, while in other circumstances and occasions, an insult spoken multiple times to a family member may be insufficient to determine the state of endangerment of physical integrity, mental health and tranquility of another family member and to determine some of the protective measures (Draškić, 2008, p. 346). In that sense, in theory it is stated that one act of violence is relevant, unless especially mitigating circumstances (impulsiveness contrary to the character of the perpetrator, stressful life moment, irritating and impermissible behavior of the victim of violence) justify the legal relevance of continuous behavior (Panov, 2010, p. 375). In a word, it depends on the specific case whether individual violence will be characterized as domestic violence or an established model of behavior of a person that is of such importance that it requires the provision of legal protection.[14]

2.2. Initiation of procedure in a dispute for protection against domestic violence

The reason for initiating proceedings in a dispute for protection from domestic violence is a deviation from the standard of normal and civilized behavior of a family member, who by such behavior, violence, violates the physical integrity, mental health and tranquility of another family member, as already mentioned. The degree and form of the manifested violence are always important for the court when deciding on the qualification that the violence has occurred as well as when imposing one of the possible protection measures.[15] As the Family Law also lists family members between whom violence is possible, in practice there are difficulties in proving the emotional or sexual relationship, that is, other personal relationship to which a person seeking protection from domestic violence refers, which is also indicated in theory (Ponjavić & Vlašković, 2019, p. 464).

The procedure for imposing a measure in a dispute for protection against domestic violence is initiated by a lawsuit. The actively legitimized are family member/members against whom the violence was committed, but a lawsuit can certainly be filed on their behalf by a legal representative in case of lack of legal capacity, but the public prosecutor and the guardianship authority also

[14] In this regard the judgment of the Supreme Court of Cassation, Rev. 4775/2019 of 28.11.2019.
[15] Judgment of the Court of Appeals in Belgrade, Gž2. 60/2015 of 25.2.2015.

have legitimacy under the Family Law (Family Law, 2005, Art. 284, para. 2). This solution is certainly a consequence of the generally accepted attitude that domestic violence is a serious social problem, and not a private matter of individuals, that is, that public interests are protected through the protection of individuals and families. In theory, it is emphasized that the extreme sensitivity of this procedure, which should provide protection to victims of domestic violence even without her initiative, conditioned the extension of the right to a lawsuit for protection from domestic violence to some state authorities, because a family member could find themselves in a situation where, due to fear of the perpetrator, they do not initiate court proceedings at all or reluctantly give up under the pressure of the perpetrator of domestic violence (Draškić, 2016, p. 629). The procedure for extending the measure of protection against domestic violence is also initiated by a lawsuit, and all the aforementioned entities are actively legitimized. The Family Law prescribes, as stated, the procedure for termination of the imposed measure, which is also initiated by a lawsuit, which can be filed only by a family member against whom the measure is determined if the reasons cease to exist (Family Law, 2005, Art. 284, para. 3).

The Family Law does not prescribe the form and content of the lawsuit, but the provisions of the law governing civil proceedings apply to the court proceedings related to family relations (Family Law, 2005, Art. 202).[16] In addition to the general elements that each lawsuit must contain (designation of the court, parties and representatives and the subject matter of the dispute), the lawsuit initiating the procedure for imposing a measure / and in a dispute for protection against domestic violence must also contain data or evidence that they are victims and the bully are family members, a description of the event – actions and behaviors by which the violence was committed, as well as evidence that such action, that is, behavior was committed or a proposal to present evidence of the stated circumstances (Radaković, 2016, p. 38). The central part of the lawsuit for protection against domestic violence, as usual, is the claim, which must be precisely and clearly defined. In the subjective sense it means that the entity – the defendant against whom the determination of one or more measures of protection against domestic violence is requested and the entity – victim for whose protection the determination of the measure/measures for protection against domestic violence is requested, must be labeled,

[16] In that sense, the lawsuit must contain all those elements prescribed by the Law on Civil Procedure (Official Gazette of RS, No. 72/2011, 49/2013 – decision of the US, 74/2013 – decision of the US, 55/2014, 87/2018 and 18/2020), Art. 192 para. 1, i.e. Art. 98.

while in the objective sense, it means the designation of the measure/measures of protection against domestic violence whose determination is required, as well as the length of their duration (Radaković, 2016, p. 38). Although the basic postulate of civil litigation procedure is that the claim must be "specified" (Poznić & Rakić-Vodinelić, 2015, p. 309), concrete, which in the procedure for protection against domestic violence would mean that the plaintiff must determine one or more measures from the Family Law, which the court should pronounce by judgment if it concludes that the request is grounded, and the Family Law explicitly stipulates in Art. 287, para. 2 that the court may also impose a measure of protection (or more such measures) from domestic violence that is not requested if it assesses that such measure achieves better protection (in that sense, Draškić, 2016, p. 631). Such legal solution is conditioned by the fact that the court assesses the circumstances of the case *in concreto*, then the validity of the investigative maxim, as well as the emphasized formality and limited disposition of the parties. In practice, we find the position of the Supreme Court of Cassation which considers that a lawsuit to establish the existence of domestic violence, which does not contain a request for determining an appropriate protection measure, is allowed, because in a dispute for protection from domestic violence before determining a measure of protection from domestic violence it is always pre-examined and determined whether violence has been committed.[17] This would mean that, in the conditions of the court's non-binding to the limits of the claim, it can also impose a protection measure on the basis of a declarative lawsuit, therefore, as if a condemnatory lawsuit had been filed. A victim of domestic violence can file a lawsuit asking the court to order a temporary measure, which is not often used in practice.

A lawsuit for protection against domestic violence is, according to the position expressed in our theory, both constitutive and condemnatory in its legal nature (Stanković & Boranijašević, 2020, p. 568; Petrušić, 2006, p. 40; Radaković, 2016, p. 38). The dual legal nature of this lawsuit is a consequence of, on the one hand imposing a legal change, which is a characteristic of constitutive (transformational) lawsuits, while on the other hand, the obligation to do or not do through imposing a protection measure indicates a condemnatory character. The constitutive element is reflected in the request for the court to pronounce a certain change, the essence of which, regardless of the type of measure, is to prohibit the defendant from exercising a certain right or behavior and thus introduce a change in the existing relations of the parties, while the condemnatory element is reflected in the request for the court pronounces

[17] Decision of the Supreme Court of Cassation, Rev. 103/2016 of 10.3.2016.

a specific notice to the defendant, i.e. to order him to, in accordance with the pronounced prohibition, do something or to refrain from certain actions (Petrušić & Konstantinović Vilić, 2010, p. 32–33).

The lawsuit initiating the procedure for extension of the measure has the same character, and this procedure can be initiated successively, an unlimited number of times, until the reasons for which the measure was pronounced cease to exist, which follows from the interpretation of legal norms that do not prescribe restriction in that sense. Analogously, the judgment rendered by the court in these procedures, according to the content of the legal protection provided, has a condemnatory and constitutive character, i.e. "it is a mixed, constitutive – condemnatory judgment" (Poznić & Rakić-Vodinelić, 2015, p. 436). The operative part of the judgment states which measure(s) the court imposes, the duration of the measure(s), the distance in meters in the measure prohibiting the perpetrator from approaching the victim at a certain distance, the exact place of work or residence in the pronouncing of the measure which prohibits the perpetrator from accessing the place of residence and/or work place. According to the explicit legal provision, the appeal does not delay the execution of the judgment on determining or extending the measure of protection against domestic violence (Family Law, 2005, Art. 288), i.e. the judgment by which the court pronounced the measure(s) for protection against domestic violence may be executed even before the validity of that decision, which is certainly a specificity that should be mentioned.

2.3. Special urgency of the procedure

A special rule prescribed for the procedure in family relations, which refers to urgency, is certainly applied in this procedure as well, with the aim of preventing further escalation of violence. In principle, the rule of urgency in family disputes is realized by not submitting the lawsuit to the defendant for response and the procedure is conducted at a maximum of two hearings if it refers to a child or parent exercising parental rights (Family Law, 2005, Art. 204, para. 1 and 3). However, the Family Law additionally operationalizes the procedure in the dispute for protection against domestic violence with a special rule and prescribes special urgency (Family Law, 2005, Art. 285) and due to the need for urgent protection of the victim of domestic violence. The first hearing is scheduled to take place within eight days from the day when the lawsuit was received in court, and the second instance court is obliged to make a decision within 15 days from the day when the appeal was submitted to it (Family Law, 2005, Art. 285 para. 2 and 3), that is, files of legal matters by the first instance

court. Prescribed short deadlines should lead to court efficiency and immediate protection of victims of violence. However, the Family Law does not prescribe how much time should elapse between hearings, nor the total period in which this procedure should be completed, but the general rules from Art. 10 para. 2 of the Law on Civil Procedure (2011) on the time frame of litigation apply, which presupposes that the court implements the special urgency through the decision on the time frame of the litigation. In addition, the problem is the postponement of the hearing for various reasons (e.g. impediment or absence of a judge, absence of witnesses, expert witness or experts from the Center for Social Work, failure of this body to deliver an opinion on the appropriateness of protection against domestic violence, failure to submit findings and expert opinions, elimination of assessed deficiencies, etc.), followed by a new decision on the time frame, which all points to insufficient guarantees of the special urgency of the court's actions. In other words, although the legislator's diction regarding the special urgency of this procedure is clear, the victim of violence is not provided with any special certainty regarding the length of this procedure after the initiated procedure before the court. In addition, the fact that the court in this procedure walks a thin line should not be neglected, because on the one hand it is required to be diligent in preparing procedural materials in order to conduct the procedure in the smallest possible time frame, while on the other hand, the duty to act with special urgency regarding the request for protection from domestic violence does not authorize the court to refuse presenting of some evidence due to urgency.

2.4. Deviation from the principle of disposition

As a rule, subjects of family law relations do not have the freedom to dispose of rights and obligations due to their legal nature. For that reason, the disposition of litigants in the procedure for protection against domestic violence is limited (its initiation, holding within the deadline and termination do not depend only on the will of the parties). That is, in this procedure, the principle of court proceedings prevails over the principle of disposition, and consequently over the investigative principle. That is, in theory, it is more about the limitations in the application of the dispositive maxim and the investigative powers of the court (Draškić, 2016, p. 631).

One of the important deviations from the principle of disposition, which has already been discussed in this paper, is the expansion of the circle of actively legitimized entities, i.e. those who have the right to sue. Apart from the explicitly determined subjects of family law relations in which violence was

manifested, the right to sue is also recognized to certain entities. Furthermore, the deviation from the principle of disposition is clearly manifested in the court's authority to initiate proceedings for protection against domestic violence ex officio as an adhesion procedure, so this procedure can be conducted as an independent, separate procedure or as an associated procedure, when the court identifies acts that can be characterized as domestic violence and that there is a need for protection.

Furthermore, the court in this procedure has the authority to act outside the limits of the filed claim and is not bound by the proposal of the authorized person regarding the protection measure(s). The court is therefore free to determine the measure of protection (or more such measures) that the plaintiff did not request, if it considers that in that way better protection is achieved for the victim of domestic violence,[18] which has also already been discussed. In doing so, the court primarily has an active role in determining the existence of violence, by applying the investigative maxim. That is, the court may also establish facts that have not been presented by the parties, and those that are not in dispute between the parties, as well as present evidence that neither party has proposed. This approach can certainly indicate that the measure required by the lawsuit in a specific case cannot be expedient and effective, but that it is necessary to impose another or other measures.[19] The type of measure depends on the court's assessment of the danger to which the victim is exposed, and which protection measure will be imposed depends on the specific action that constitutes domestic violence, the danger caused by that action, the family member's anxiety, their endangerment and the assessment of the risk of recurrence. In other words, the Family Law does not prescribe any restriction regarding the type and number of measures that the plaintiff may request in the lawsuit, within the limits set by the enumeration of measures, nor a restriction of the court regarding their imposition. The opinion of the victim, but also the subjective feeling, aforementioned in the paper, but also the degree of danger that threatens them, also affects the choice of protection measure that will be determined in a specific case, because, after all, it is the victim who is protected, so subjective assessment of the victim, e.g. based on experience, presents a key factor in choosing the protection measure that will be determined in each specific case.[20]

[18] Judgment of the Court of Appeals in Novi Sad, Gž2 739/2012 of 3.12. 2012; Judgment of the Supreme Court of Cassation, Rev. 2844/2010 dated 26.05.2010.

[19] Decision of the Supreme Court of Cassation, Rev. 103/2016 of 10.3.2016.

[20] Judgment of the Supreme Court of Cassation, Rev. 3040/2017 dated 27.12.2017.

3. Conclusion

The Family Law establishes a system of family law protection against domestic violence. In order to prevent further manifestations of violence, measures for protection against domestic violence are envisaged, but a special procedure in the dispute for protection against domestic violence has been standardized. The paper analyzes some procedural aspects of this procedure (legal nature of the lawsuit, procedural legitimacy for its filing, particular urgency of the procedure, deviation from the principle of disposition, and in that sense (non)binding of the court to the limits of the claim and the authority of the court to impose a measure/measures for protection against domestic violence even without the request of a party, etc.) and the challenges that courts face in the application of special procedural institutes provided for this procedure in practice.

The analyzed theory and the formed sufficient quantum of court practice give the possibility to conclude about the unison position that the court has "zero tolerance" for violence, about the built criteria that the court is guided by in assessing whether an action is an act of domestic violence, about the need to determine adequate protection measures from domestic violence in each specific case and about the clearly emphasized temporary and preventive protection (which aims to stop further escalation of violence) provided by the court by imposing these measures. In practice, there are no inequalities, that is, uneven interpretation of procedural norms prescribed in the procedure for protection against domestic violence. Still, as stated in the paper, some provisions regulating this procedure have not been fully operationalized, so there is a need for precise standardization of the total duration of this procedure and in that sense elimination of uncertainty for the victim of violence. In addition, the adoption of further individual solutions, apart from the already existing ones, should specify the rules on collecting and presenting evidence of conducted violence, with the idea of preventing delays of the procedure (e.g. unlimited hearing of witnesses), but also rules on a more active role of the court in that sense. That provides an opportunity for consideration of possible directions of development *de lege ferenda* that would lead to improved protection of this right, through the improvement of existing and implementation of new solutions.

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PORODIČNOPRAVNA ZAŠTITA OD NASILJA U PORODICI – MERE ZAŠTITE I NEKI PROCESNI ASPEKTI POSTUPKA

REZIME: Nasilje u porodici je rasprostranjen i duboko ukorenjen društveni problem. Sa ciljem zaustavljanja nasilja i sprečavanja daljeg ispoljavanja nasilja u porodici Porodični zakon propisuje mere zaštite, ali i poseban postupak za zaštitu od nasilja u porodici. Cilj rada je analiziranje nekih procesnih aspekata ovog postupka i izazova sa kojima se susreću sudovi, posebno u odnosu na pokretanje postupka, odnosno pravnoj prirodi tužbi za zaštitu od nasilja u porodici, naročitoj hitnosti postupka i odstupanjima od načela dispozicije, kao i merama za zaštitu od nasilja u porodici i kriterijumima kojima se rukovodi sud u postupku njihovog izricanja.

Ključne reči*: mere zaštite od nasilja u porodici, postupak za zaštitu od nasilja u porodici, sudska praksa.*

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THE EMPLOYMENT OF THE MINORS IN THE CONTEXT OF EXERCISING THE CHILD'S RIGHT TO WORK

ABSTRACT: Exercising the child's right to work requires a good legislative framework for labour relations and a set of conditions prescribed to ensure that the minors work in a way that does not harm their safety, health, physical, mental and moral development and does not interfere with their education. The aim of this paper is to consider both the international and national standards regulating the children's work and challenges in their application in practice. It also points out the necessary actions aimed at improving the position of the minors in the labour law environment. A special attention is paid to the issues related to the prohibition of discrimination against children in the field of work, the consent for employment including the regulation of the minimum age for employment and protection at work. The paper focuses in particular on the issue of the implementation of labour legislation in practice of Republic of Serbia, especially in the context of the efficiency of control mechanisms and the results of inspections conducted in 2019 by the Labour Inspectorate of the Ministry of Labour, Employment, Veteran and Social Affairs, which revealed a series of violations of the child's right to work. In this paper, in order to grasp an insight into this issue, there have been used the historical comparative-legal and theoretical-analytical methods. The research findings indicate that the national labour legislation

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regulating the minors` work is harmonised with the international standards to a significant extent, but there is a room for their improvement. It is also necessary to improve the mechanisms of inspection and the efficiency of the application of legislative provisions in practice.

Keywords: *the employment of the minors, the child's right to work, the protection of the minors at work, discrimination at work, consent for employment*

1. Introductory considerations

The UN Convention on the Rights of the Child (Law on the Ratification of the Convention on the Rights of the Child, 1996), as a comprehensive and most important document in the field of child's rights, defines *child* as every human being below the age of eighteen years. One of the guaranteed rights in this document is the child's right to work. This includes, among other things, the obligation of states to regulate their labour legislation so that the exercise of this right does not harm the child's safety, health, physical, mental, moral and social development or interfere with the child's education. This implies providing for a minimum age for admission to employment and meeting a number of other conditions in the work environment that are specific to working children. The issue of employment of minors is an extremely complex topic and unfortunately cannot be explained by the application of standard rules, an analysis of the relevant normative substrate of a country.

In order to properly understand this issue, we must first start from the historical method and analyse the scope and type of abuses related to the work engagement of children. This issue was one of the fundamental principles of the working-class struggle to limit the work of children in the modern capitalist world, both in terms of age and in terms of work type.

The problem has to be approached also from the aspect of comparative law, because different countries still apply different regulations, and in no case can we say that all countries have accepted high international standards on the labour status of children. In African, Asian and Latin American countries, children are still widely used to perform inappropriate work for a minimum wage. In some parts of Asia, especially in poor families traditionally engaged in a craft activity, most children start working and training in the family craft at an early age, while only the oldest child is sent to school (Patrinos & Siddiqi, 1995, pp. 2–5). This is often the case also with the families working in agriculture, which do not send children to school but engage them in work on the family farm (Mehotra & Biggeri, 2002, p. 3).

We shall analyse the labour status of children also from the aspect of existing non-discrimination standards. On the one hand, children must be protected from any form of discrimination in terms of inadequate pay or other forms of unequal position, while on the other hand, certain provisions must be explained from the aspect of positive discrimination.

Child labour is certainly an economic issue as well. Poor societies and families without adequate social support are forced to engage their children in work, in order to provide a subsistence. This position is usually exploited by either powerful corporations or individuals. Child labour and the prohibition of child labour[1] are the top-level issues of social protection. A country that is proud of its developed social protection system will certainly have a very strict attitude towards this issue.

Child labour has to be observed and studied from the medical as well as from the psychological aspect. It is indisputable that children up to the age of eighteen are still in the process of psychophysical development, so it is strictly forbidden for children to perform work that involves high vapours, ionising radiation, high or excessively low temperatures, etc. In addition to health protection, it has to be taken into account that children are not allowed to perform work that will affect their growing up and psychological formation, such as work in casinos, night clubs, places of prostitution, etc.

This short introduction shows well how serious this issue is and how delicate it is to regulate this issue, but also to monitor the implementation of regulations, and to create the conditions that, on the one hand, ensure the child's right to work for children who need work and create appropriate working conditions, and on the other hand, prevent the abuse and exploitation of children in the work environment and ensure the protection of their rights in case of violations.

2. Sources of law regulating child labour

The development of the legislative framework for the protection of children in the field of labour began in the second half of the nineteenth century, in response to the serious consequences of child labour exploitation during the Industrial Revolution. This does not mean that children were not engaged in

[1] It should be noted that according to the International Labour Organization, the term "child labour" means the abuse of child labour in terms of the exploitation of the child, or work in conditions that harm the welfare of the child, while the terms "working children" or "economically active children" are used for children who work in adequate conditions and in accordance with prescribed standards (International Labour Organization, 2018) .

difficult and inadequate forms of work even before the Industrial Revolution, especially having in mind the position of child slaves and serfs, but the labour status of children in the today's context of exercising and protecting child's rights has been present since the Industrial Revolution and the employment of children in factories, mines and other workplaces where child labour was very difficult in an unprecedented way (Kirby, 2003, p. 1).

The first laws paving the path for regulating the position of child workers and prohibiting child labour at the international level were the laws of Prussia and England adopted in the 19th century, and then followed by the legislation of many countries with the aim of preventing child exploitation and child labour in inadequate conditions, which had spread in a large number of countries across the world in different forms. However, it was not before the 20th century that child labour was explicitly prohibited at the international level and that international standards for the regulation of the position of minor workers and the protection and exercise of child's rights in the work environment were developed.

2.1. International sources of law

The labour status of minors is regulated under the universal sources of international law: the United Nations Convention on the Rights of the Child and the conventions adopted by the International Labour Organization, in particular the Convention no. 138 on the Minimum Age for Employment (Law on the Ratification of the International Labour Organization Convention No. 138 on the Minimum Age for Employment, 1982), the Convention no. 182. on the Worst Forms of Child Labour and the Recommendation no. 190 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Law on the Ratification of the ILO Convention no. 182 on the Worst Forms of Child Labour and ILO Recommendation no. 190 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 2003).

Article 32 of the United Nations **Convention on the Rights of the Child** guarantees protection for children against economic exploitation and labour that can be dangerous or interfere with the child's education or harm the child's health, that is, his or her physical, mental, spiritual, moral or social development. The Convention on the Rights of the Child does not define specific frameworks for the regulation of labour relations, but does instruct states to regulate this field having regard to the relevant provisions of other international instruments, in particular the conventions of the International Labour Organization.

The International Labour Organization **Convention no. 138 on the Minimum Age for Employment** determines the minimum age for employment, which shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years. Exceptionally, the minimum age may be 14 years if the economy and educational facilities of a signatory state are insufficiently developed, after consultation with the organisations of employers and workers concerned (Article 2) or 13 to 15 years in case of light work which is not likely to be harmful to children's health or development or not such as to prejudice their attendance at school or their participation in vocational orientation or training programmes (Article 7). The Convention leaves the possibility to states to allow exceptions to the prohibition of employment or work in individual cases, for such purposes as participation in artistic performances, after consultation with the organisations of employers and workers concerned (Article 8). However, this provision is too general and does not contain precise regulation of the conditions under which such lowering of the age limit is allowed, or the degree of protection and inspection in such situations, in order to avoid states enabling the abuse and exploitation of younger children through an acceptable legal framework, resulting from an arbitrary interpretation of such an insufficiently precise provision.

The International Labour Organization **Convention no. 182. on the Worst Forms of Child Labour** requires the states to take effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency. In this document, the term the worst forms of child labour comprises all forms of slavery or practices similar to slavery, including the sale and trafficking of children, debt bondage, forced labour, forced or compulsory recruitment of children for use in armed conflict, child prostitution, use of a child for illicit activities and work which, by its nature, is likely to harm the health, safety or morals of children (Article 3).

The Recommendation no. 190 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour defines more precisely the work that, due to its nature or circumstances in which it is performed, is harmful for the health, safety or morals of children. One of the important segments of these two documents is the recognition of the importance of preventive measures in the context of preventing the most difficult forms of child labour, such as inclusion of children in education and early recognition of risks, as well as the importance of psychosocial support for child victims of the worst forms of child labour.

As regards the international/regional sources of law, it is important to mention the Revised European Social Charter of the Council of Europe (Law

on the Ratification of the Revised European Social Charter, 2009) and the Council Directive 94/33/EC (Council Directive 94/33/EC on the protection of young people at work, 2021).

The Revised European Social Charter also requires the states to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education. This document is in line with the labour standards guaranteed by the International Labour Organization, but we can say that it raises these standards to a higher level by including certain additional provisions that guarantee the right to a fair remuneration, annual leave and additional health protection, and stresses the importance of paying attention to their development and education.

The Council Directive 94/33/EC on the protection of young people at work includes a set of provisions aimed at ensuring the exercise of the child's rights and their protection against economic exploitation and against any work likely to harm their safety, health or physical, mental, moral or social development or to jeopardise their education (Article 1). It comprehensively regulates the issue of exercising the child's right to work in line with the standards of the International Labour Organization, additionally specifying certain working conditions that allow their more precise incorporation into the national legislation of individual countries, such as precise determination of working time and its harmonisation with educational programmes, the obligation of free medical examination, the prohibition of performing work that carries a risk to health, as well as the prohibition of night work and the provision of exceptions in which such work is allowed.

2.2. Domestic sources of law

As regards the domestic sources of law governing the labour status of minors, the most important are the Constitution of the Republic of Serbia (1998), the Law on Labour (2005), the Law on Employment and Unemployment Insurance (2009), the Criminal Code (2005), the Decree on Determining Hazardous Work for Children (2017) and the Rulebook on Preventive Measures for Safe and Healthy Work of Young People (2016).

The Constitution of the Republic of Serbia determines that the minimum age for employment shall be 15 years and prohibits that persons under 18 years of age perform work detrimental to their health or morals, and guarantees the protection of children from exploitation and other risks in the work environment (Articles 66 and 64).

The Law on Labour also determines that the minimum age for employment shall be 15 years, but a person under 18 years of age can be employed only with a written consent of his or her parent, adoptive parent or guardian provided that it does not harm his or her health, morals and education and is not prohibited by the law. Parental consent is another type of protection of the person and interests of minors and allows parents to prevent a minor from being admitted to employment if they deem that it is not in accordance with his or her well-being (Kovačević, 2017, p. 210). The requirement for the employment of a person under 18 years of age is the findings of the competent medical authority confirming his or her capability to perform the intended job and that such work is not harmful to health (Articles 24–25). Persons under the age of 18 may not perform difficult jobs that could affect their health, and include hard physical work, underground work, work under water or at high altitudes, including exposure to harmful radiation or agents that are toxic, carcinogenic and cause hereditary diseases or carry a health risk due to cold, heat, noise or vibration or may otherwise adversely affect their health and life based on the opinion of a doctor (Article 84). The law prescribes the maximum working time of 35 hours per week and 8 hours per day, while overtime or redistribution of working hours is explicitly prohibited, unless the employee under 18 years of age performs work in the field of culture, sports, art and advertising or when it is necessary to continue the work due to force majeure, if the work is such that it lasts a certain period of time and must be completed without delay, and there are not sufficient adult employees who can do the job. These provisions indicate that the Law on Labour is mainly in line with international and European standards in terms of regulating the labour status of minors, i.e. preventing the exploitation and abuse of children at work.

In order to prevent labour exploitation, Article 20 of the **Law on Employment and Unemployment Insurance** stipulates that the employment agency may not engage in the employment of minors or employment in jobs with increased risks. An additional degree of protection is provided by the **Criminal Code**, which criminalizes actions related to the labour exploitation of children or misuse of their right to work.

The Decree on Determining Hazardous Work for Children provides the protection of children from hazardous work. Hazardous work for children is defined as work that is harmful to the children's health, safety and morals, exposes them to harm and is performed in dangerous circumstances or dangerous activities for children (Article 2). This Decree specifies physical and chemical hazards for children as well as dangerous activities and circumstances in which children may not work. However, we believe that it

should be further harmonised with other regulations governing this matter. This especially refers to the selective listing of hazardous jobs and the lack of defined parameters for determining physical and biological hazards and taking into account the child's personal characteristics such as age, sex, gender identity, health status and other characteristics (Plavšić-Nešić, A , 2017, p. 383).

The Rulebook on Preventive Measures for Safe and Healthy Work of Young People prescribes preventive measures that the employer is obliged to implement to ensure the safe work of young people and eliminate the risk of harm to the health of young people at work. Article 3 of the Rulebook provides that the employer is obliged to assess the risk of injuries and harm to health for all workplaces where young people work before the commencement of work, which includes the assessment of work organisation, exposure to harmfulness, work equipment, work processes and level of training for safe and healthy work.

2.3. Supplementary sources

The judicial practice in this field has developed mainly in the context of the violation of Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which refers to the prohibition of slavery and forced labour, and procedures before the European Court of Human Rights in Strasbourg. The cases in this field were related mainly to the prevention of forced labour in terms of the protection of children who are domestic help and servants and perform community services, and the prevention of child trafficking and child prostitution.[2]

3. Discrimination

Article 18 of the Law on Labour prohibits direct and indirect discrimination of job seekers and employees, on the ground of sex, birth, language, race, colour of skin, age, pregnancy, health condition, disability, ethnic origin, religion, marital status, family obligations, sexual orientation, political or other

[2] For more information, see the applications lodged with the European Court of Human Rights, for example: C.N. and V. v. France, Application no. 67724/09, C.N. v. the United Kingdom, Application no. 4239/08, Tiunov v. Russia, Application no. 29442/18, V.F. v. France, Application no. 7196/10, M. and Others v. Italy and Bulgaria, Application no. 40020/03, J. and Others v. Austria, Application no. 58216/12, Downloaded, 2021, June 15 from https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}.

belief, social background, financial status, membership in political organisations, trade unions, or any other protected characteristic. Article 16 of the Law on the Prohibition of Discrimination (2009) also prohibits discrimination in the field of labour, in a broader way, and unlike the Law on Labour, it does not include only discrimination that is limited to persons with employment status, but covers all modalities of work engagement at all stages, including job search, employment, work engagement, as well as discrimination in connection with work engagement (Reljanović, 2004, p. 97).

In addition to the explicit prohibition of discrimination that refers to other personal characteristics, we are interested in addressing the situation related to age. In fact, if the child aged 15-18 years performs certain jobs in accordance with the employer's standards and norms, he or she may not be discriminated against in terms of salary, exercise of some basic employment rights or put in a disadvantaged position in any way. Prohibitions related to night work, certain types of work, etc. are not discriminatory in the sense of diminishing the rights of minors, but on the contrary, they should and must be interpreted as a form of state care for minors, i.e. for their proper psychophysical development through positive discrimination. The provisions that contain discriminatory elements under the Law on Labour are invalid (Reljanović, 2013, Reljanović 2010, Reljanović, 2012, Reljanović & Petrović, 2011).

Research shows that despite the explicit prohibition of discrimination in the labour law framework, implementation in practice is a problem. The findings of a 2019 survey conducted by the Commissioner for Protection of Equality show that citizens believe that discrimination is most common in the field of work and employment, as recognised and emphasized by 74% of respondents (Commissioner for Protection of Equality, 2019, p. 23). Young people often perform non-standard forms of work, accept precarious jobs for which they are poorly paid or overqualified and where they have limited access to social security and guaranteed employment rights such as meal allowance, paid transportation to work or paid sick leave (Bradaš, 2018, p. 19). In addition, more than one fifth of the total unemployed in the Republic of Serbia are young people in the age group 15-30 (Stojanović, & Ivković, 2020, p. 189), while according to the National Employment Service 13,844 unemployed persons in the age group 15-19 were recorded in April 2021 (National Employment Service, 2021, p. 21), which also indicates reduced youth employment opportunities and raises the issue of age discrimination and the lack of adequate programmes to provide young people with better employment opportunities. It is important to keep in mind that the issue of dignified work

does not only mean fulfilling the economic function and the issue of equal pay for equal work, but also fulfilling the social and psychological function (Šverko, 1991, p. 17), all of which should be kept in mind when assessing discrimination of young people at work.

4. Age as general requirement

The general age requirement for admission to employment is 15 years. The fulfilment of this requirement is simply proven by a birth certificate, an ID card or other valid document that the minor is required to present to the employer. Since this is an imperative requirement, there can be no compromises regarding the employment before the age of 15, or any conditional employment.

In case that a person is admitted to employment before reaching the age of 15, such employment will be considered illegal, and therefore invalid. However, the question arises as to whether persons who are under 15 years of age and are in factual employment can exercise some employment rights. Some authors believe that persons who have not fulfilled the 15-years-of-age requirement are in factual employment, and while such employment lasts, they can exercise the employment rights and fulfil the employment duties (Baltić & Despotović, 1997, pp. 37–38; Jovanović, 2016, p. 75), while other authors consider that the failure to meet this requirement practically means the impossibility of recognising any effect since the general requirements of material importance for the existence of both labour relations and factual employment are not met (Popović, 1980, p. 100).

However, in our opinion, it would be wrong to consider that a child who has been engaged to work, even in the illegal framework, cannot get earnings, which actually motivated him or her to work. We believe that the employer may not be released from the obligation to pay the minor in accordance with the type and amount of work performed by the minor for the employer. On the other hand, however, the employer may not be released from the responsibility for the illegal engagement of workers in accordance with the general regime of misdemeanour and criminal regulations.

5. Consent for employment of persons aged 15 to 18

Article 25 of the Law on Labour also determines that in order for the employment of persons aged 15 to 18 to be considered valid, it is necessary to obtain a written consent of their parent, adoptive parent or guardian, and such

work may not harm their health, morals and education, and may not be the work prohibited by the law. We will analyse these three categories.

The first refers to giving consent and who gives this consent. Here we have to refer to the provisions of the Law on Family (2005). This is because the Law on Labour was the first one that included a linguistic but also a substantial error. In fact, we can identify "legal pleonasm" in the provision in which *adoptive parent* is listed after *parent*. This is incorrect and inapplicable from the aspect of family legal protection, because after the adoption procedure, the child is treated as a child of adoptive parents and they are never mentioned as adoptive parents again, either in legal transactions or in life in general. It is completely irrelevant from the aspect of labour law whether parenthood is biological or legal, i.e. acquired through adoption, because the rights and obligations of adoptive parents after legal adoption become completely equal to the rights and obligations of parents (Šarkić & Počuča, 2019).

It is obvious that it is absolutely enough to say that the parents give their consent for the employment of the child. If only one parent exercises the parental right, his or her consent will be sufficient.[3] We consider that also in the case of divorce, a parent who does not exercise the parental right could not decide jointly with the other parent, within the meaning of Article 78 of the Law on Family, even when employment would be interpreted as an important issue (Draškić, 2007, p. 262). We believe that a 15-year-old child on whom the legislator conferred the legal capacity to be admitted to employment in this case is at the appropriate age to decide on important issues concerning him or her, and therefore there is no basis for applying this provision.

In case of children without parental care, the role of legal representative is assumed by guardians, and if a guardian is not appointed for the child, the role of a guardian is assumed by the guardianship authority.

The question also arises as to what happens in situations where one or both parents unjustifiably deny the consent for the child's employment. In that case, as in other cases where the child and his or her legal representative have conflicting interests, Article 265 of the Law on Family should be applied in terms of appointing a temporary ("collision") guardian to represent the child. In that case, the existing legal solution should be improved by defining more clearly that the lack of parental consent in case of conflicting interests of parents and children can be compensated by the consent of a temporary guardian (Kovačević & Novaković, 2017, p. 674).

[3] In case that the other parent is unknown, died, waived parental rights, is deprived of parental rights or only one parent exercises parental rights on the basis of court decision.

The law did not envisage a special consent form, but in our opinion it should be a form of written statement duly signed by the parent, guardian or authorised employee of the social welfare centre. Therefore, we advocate for the introduction of a notarial form in which it will have to be accurately stated that the minor will perform certain work in a certain period of time, that he or she will receive a certain remuneration for that work, and what other rights he or she will have. We also think that the consent withdrawal form should be the same as the consent form.

6. Types of work and protection at work

As mentioned above, the employment of a minor requires a parental consent that protects the minor from performing jobs that are harmful to his or her psychophysical development, growing up and schooling. The legislator has introduced another criterion related to work prohibited by the law, which must also be taken into account when analysing the work of minors. The Decree on Determining Hazardous Work for Children and the Rulebook on Preventive Measures for Safe and Healthy Work of Young People defines the work that is harmful for the health, safety and morals of children, and the employer's obligations regarding the elimination of the risk of harm to the health of young people at work.

However, the Labour Inspectorate's reports to the Ministry of Labour, Employment, Veteran and Social Affairs reveal a problem in the implementation of regulations in practice. During the inspection carried out in 2019, 33 minors were found at work, including 32 persons aged 15 to 18 and one person under 15 years of age who was found working in a bakery in the production of bread and pastries. A total of 20 persons were found working under the table, without a concluded employment contract or other contract in accordance with the Law on Labour and without being registered for mandatory social insurance. The risk of injury at work for persons who work under the table is higher because they usually perform occasional and temporary jobs without professional qualifications, previous training and introduction to working process technology (Ilić, 2017, p. 69), which is additionally disconcerting in case of minors.

With respect to the persons aged 15 to 18 with whom the employers have concluded employment contracts or contracts for temporary and occasional jobs, in several cases the inspectors established the lack of a written consent of parents or the competent medical authority's findings confirming the person's capability to perform the intended job and that such work was not harmful to their health.

7. Concluding considerations

Exercising the child's right to work requires a good legislative framework for labour relations, both in terms of prescribing the conditions for employment and in terms of implementing a set of measures aimed at protecting minors in the work environment. In principle, young people under the age of 18 should use their time to get education, and in the field of the child's right to education there are growing trends towards introducing compulsory secondary education. This raises the issue of enhanced protection at work with the aim of avoiding any harm to the child's education, especially taking into account new modes of youth work, such as entrepreneurship, start-ups, online jobs and other types of work that require new approaches to the protection of minors in the work environment. Work at the age of 15 to 18 is inevitable both in Serbia and in other countries of the world. This is also the reason why it is necessary to properly regulate the normative substrate in this field and to avoid all potential abuses or doubts.

We believe that control mechanisms should be improved and that the level of inspection should be enhanced in order to prevent any work of persons under the age of 18 that is not in compliance with legal regulations and that may adversely affect their development, health and education. In the process of inspection, it should be assessed whether the job can have an impact on the child's psychophysical development, the formation of his or her value judgments, the creation or loss of work habits, the creation or acquisition of negative personality traits or inadequate value systems, etc.

In our opinion, the legal concept of the employment of minors should be improved in the future also through social policy improvements in order to create conditions in which children will primarily dedicate to their own education, professional development, but also to their psychophysical development, especially having in mind the intention of introducing compulsory secondary education, as well as the importance of the correlation between education and work.

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RADNI ODNOS MALOLETNIH LICA U KONTEKSTU OSTVARIVANJA PRAVA DETETA NA RAD

REZIME: Ostvarivanje prava deteta na rad zahteva dobro zakonodavno uređenje radnih odnosa i propisivanje niza uslova čiji je cilj da maloletna lica rade na način da to ne ugrozi njihovu sigurnost, zdravlje, fizički, mentalni i moralni razvoj i da ne ometa njihovo obrazovanje. Cilj rada je razmatranje međunarodnih i nacionalnih standarda koji uređuju rad dece i izazova u njihovoj primeni u praksi i ukazivanje na potrebna unapređenja radi poboljšanja položaja malololetnih lica u radnopravnom okruženju. Posebna pažnja posvećena je pitanjima koja se tiču zabrane diskriminacije dece u oblasti rada, davanju saglasnosti za zasnivanje radnog odnosa, uređenju minimalne starosne granice za zasnivanje radnog odnosa i zaštite na radu. Posebno se sagledava i pitanje implementacije propisanih odredbi radnopravnog zakonodavstva u praksi Republike Srbije, naročito u kontekstu efikasnosti mehanizama kontrole i rezultata vršenja inspekcijskog nadzora u 2019. godini Inspektorata za rad Ministarstva za rad, zapošljavanje, boračka i socijalna pitanja koji ukazuje na niz kršenja prava deteta na rad. Radi sagledavanja ove problematike u radu je korišćen istorijski, komparativno pravni i teorijsko-analitički metod. Rezultati istaživanja ukazuju na to da je nacionalni radnopravni okvir u oblasti rada maloletnih lica u značajnoj meri usklađen sa međunarodnim standardima, ali da postoji prostor za njihovo unapređenje. Takođe potrebno je unaprediti mehanizme nadzora i efikasnost primene zakonodavnih odredbi u praksi.

***Ključne reči*:** *radni odnos maloletnih lica, pravo deteta na rad, zaštita maloltnih lica na radu, diskriminacija na radu, saglasnost za zasnivanje radnog odnosa*

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SIGNIFICANCE OF THE "POLLUTANT PAYS" PRINCIPLE AND THE ANALYSIS OF THE EUROPEAN FRAMEWORK FOR A CIVIL LIABILITY FOR DAMAGES CAUSED BY ACTIVITIES DANGEROUS TO THE ENVIRONMENT

ABSTRACT: The right to a healthy environment is an absolute priority of the modern society. A specific economic instrument aimed at protecting the environment at a global level is the compensation for environmental pollution, based on a principle of environmental protection called "pollutant pays". The essence of a civil liability for environmental damage is that potential pollutants should adjust their activities to the requirement of causing minimal changes in the environment and reducing the risk of damage to a minimum. In addition to the significance and characteristics of the "pollutant pays" principle, the paper presents the provisions of the Act on Environmental Protection. There is also included an analysis of the provisions of the Convention on civil liability for damage caused by environmental hazards, and the provisions of the Environmental Liability Directive related to the protection and elimination of environmental damage.

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Keywords: *Pollutant pays, environment, civil liability, The Act on Environmental Protection , the EU regulations*

1. Introduction

The concept of environmental sustainability is one of the primary principles based on the human right to a healthy environment. It is woven into regulations of a national character (Constitution, laws, and strategies), as well as into the most important European and global policies and principles.

The environment "represents everything that surrounds us, that is, everything with which human life and production activity is directly or indirectly connected" (Hamidović, 2012, p. 235). Therefore, the human right to a healthy environment is one of the basic human rights. According to Article 74 of the Constitution of the Republic of Serbia (2006), "everyone has the right to a healthy environment and to timely and complete information on its condition." However, during his activities, man changes the natural environment, often by disturbing the natural environment.

Preservation and protection of the environment is an imperative in modern society. The environment is basically one of the pillars of sustainable development. In this context, "environmental principles belong to the group of basic principles on which sustainable development, in general, is based, especially sustainable development of rural parts of a certain territory, and imply primary respect for the natural diversity of the destination" (Cvijanović et al., 2017, p. 871), and it can be emphasized that "sustainable development basically means finding a balance between social development, economic progress, and environmental protection" (Matijašević Obradović, 2017, p. 22). According to Jovašević (2009), "finding the optimal relationship between unhindered economic growth and development and the preservation and protection of the environment is not an easy task" (p. 26).

Preservation of the environment is also an unavoidable factor in the internal stability and security of a country. However, the problem of endangering the environment has long been not just a problem of internal security. According to Labudović Stanković (2012), "constant environmental pollution is a constant companion of modern economic development" (p. 1262).

Sources of environmental pollution and its elements, according to some views, in theory, can be natural and artificial (anthropogenic). Natural sources are "all processes that take place in the biosphere against the will of man (volcanoes, earthquakes, cosmic dust). Artificial (anthropogenic) are the products of all human activities (extraction and processing of mineral raw materials, thermal and

nuclear power plants, agriculture, industry, transport, tourism and other activities such as sports, recreation, and household pollutants)" (Đorđević, 2018, p. 466). Indicators of endangering the environment "give us the right to determine that the social causes of endangerment are more prevalent than natural ones and that the organization of the system of its protection and improvement depends on understanding the causes of endangerment" (Keković & Todorović, 2008, p. 24).

A specific economic instrument provided by the Law on Environmental Protection (2004) aimed at environmental protection is the compensation for environmental pollution, based on a specific principle of environmental protection called "polluter pays". According to Article 9 item 6 of the Law on Environmental Protection (2004) "a polluter pays a fee for environmental pollution when his activities cause or may cause a burden on the environment, ie if he produces, uses, or places on the market raw materials, semi-finished products or products containing harmful substances for the environment." The same point also stipulates that "the polluter bears the total costs of measures to prevent and reduce pollution, which include the costs of environmental risks and the costs of eliminating the damage caused to the environment." The Law on Integrated Prevention and Control of Environmental Pollution (2004) has a similar wording where Article 3 item 5 states that "the polluter must bear the full costs of the consequences of self activities, the costs incurred by endangering the environment which includes the costs of endangering and the risk to the environment, and the costs of removing the damage caused to the environment that is returning the site to a satisfactory state of the environment after the closure of the plant or the cessation of activities." The polluter, therefore, by the regulations, bears the total costs of measures to prevent and reduce pollution, which include the costs of environmental risks and the costs of eliminating the damage caused to the environment.

The following subtitle discusses the question of responsibility and the significance of the "polluter pays" principle. Then, the paper will deal with the issue of how the European framework of civil liability for damages caused by activities dangerous to the environment is regulated because the regulations of the European Union are an important foundation for national legislation.

2. Significance and characteristics of the "polluter pays" principle

Liability, according to the "polluter pays" principle is a special type of polluter liability, based on objective responsibility for the pollution of the environment. The introduction of this principle into our legislation, legally

based on international regulations, is primarily on the founding acts of the European Union, and then the conventions and directives of the European Union.

The legal principle "polluter pays" starts from the "principle of fairness, the reasonable assumption that the person who caused the risks to the environment should bear both the costs of precautionary measures and the costs arising from prevention, as well as eliminating the consequences of damage caused by pollutants" (Pajtić, 2015, p. 1672).

What makes this principal characteristic is that it is about future damage that occurs or may occur due to the undertaking of activities by polluters. Article 3, item 14 of the Law on Environmental Protection (2004) stipulates that "polluter" means "a legal or natural person who, by his activity or inactivity, pollutes the environment." Therefore, the formulation of the specific responsibility of polluters is for preventive action, for prevention of excessive environmental pollution.

According to Pajtić (2011a), "civil liability exists if the damage to protected goods is measurable and if the consequence consists in endangering or injuring the personal property or non-property assets of a natural or legal person. These damages are eliminated utilizing the classic right of compensation. In our legislation, the prevention of damage to protected goods is one of the basic goals of the legal policy of environmental protection" (p. 518).

The principle of "polluter pays" according to Zindović (2012), "is founded through two attributes, namely: ratione personae, because it is known in advance who pays and ratione temporis, because payment refers only to future damage" (p. 277). Here, Počuča and Milić (2018) define the essence of this principle in the sense that "instead of the costs of its repair being charged from the one who caused the damage and caused by the perpetrator, according to this principle, the operator's payment refers to future damage" (p. 236). It is, however, an "instrument of tax policy that directs the behavior of polluters towards the adoption of better options and practices from the point of view of environmental protection goals" (Pajtić, 2015, p. 1672). And precisely in the context of preventive activities in the field of environmental protection, Cvetić (2013) states that "the essence of the principle of prevention and precaution is that every person, all his associations and society as a whole, adjust their activities to the requirement to cause minimal changes in the environment. the risk of damage is reduced to a minimum" (p. 124).

The principle of "polluter pays", as Popov (2013) points out, "belongs to the group of fundamental principles on which European environmental policy is based, and given that the polluter is responsible for eliminating the

environmental damage, this is a reactive principle of prescribing costs for remediation of environmental damage" (p. 137).

Compensation for future damage according to the "polluter pays" principle in concreto must be proportionate to the risk and effects of the activities undertaken by the polluter, which could potentially cause harmful consequences for the environment.

In this section, Salma (2009) states that "in some countries, such as Austria and Germany, absolute liability has been introduced under special legislation for the environmental consequences of nuclear power plant accidents, especially for consequences in terms of damage to public health or death, whereby the law provided for a fixed compensation for each of these damages for each injured party. Absolute responsibility is responsibility in which even force majeure is not a reason to exclude responsibility" (p. 35). It is known, however, that "in the case of „ordinary" objective liability, liability regardless of guilt, if the damage was caused by force majeure, there is no liability of the holder of the dangerous item or the holder of the dangerous activity" (Salma, 2009, p. 35).

The principle of prevention in dealing with potentially dangerous activities of pollutants is also specified in the provisions of Article 156 of the Law on Obligations (1978), which stipulates that "one may require from the other to remove the source of the danger from which significant damage is threatened to a person or an indefinite number of persons, as well as to refrain from the activity from which the harassment or danger of damage arises if the occurrence of harassment or damage cannot be prevented by appropriate measures."

Considering various aspects of the application of the "polluter pays" principle, it should be noted that "polluters should bear the costs of pollution control measures such as the formation and operation of installations that prevent the spread of pollution, investment inappropriate equipment and new processes that prevent pollution. to achieve the required quality of the environment" (Tubić, 2012, p. 504).

Bingulac and Milojević (2018) here justifiably ask the question of what position to take "when there are situations in which it is not possible to identify the polluter, so this can be extended to the aspect of whether responsibility will be distributed according to the principle of equality contributed to the pollution, or will the responsibility be on the one who caused the pollution first" (p. 202)? Consulting the provisions of the 1974 Recommendation of the Council of the European Community (Recommendation OECD / LEGAL/0132), Tubić (2012) states that "in such cases, the costs of pollution

should be determined by legal or administrative means, which provide the best solution. In the case of a series of pollution, costs should be charged at a time when the number of economic factors is lower and control is easiest or at a time when it is possible to make the most effective contribution to improving the environment" (p. 503).

Given that national legislation is based on the legal framework of the European Union, in the context of the topic of the paper, it is important to present in more detail the provisions of the Law on Environmental Protection concerning the principle of "polluter pays", then the Council of Europe Convention on Civil Liability resulting from activities dangerous to the environment (1993), which is the basis of objective liability of polluters for damage that the polluter may cause during its activities, as well as the Directive of the European Parliament and the Council on liability for environmental damage 2004/35/CE.

3. The "polluter pays" principle in the Law on Environmental Protection

Article 103 of the Law on Environmental Protection (2004) stipulates that "the polluter who causes environmental pollution is liable for the damage caused according to the principle of strict liability. Also, the legal and physical person who enabled or allowed the pollution of the environment by illegal or incorrect actions is responsible for the environmental pollution."

The legislator regulates liability for damage in Article 105 of the same Law, wherein paragraph 1 stipulates that the polluter is responsible for the damage caused to the environment and space and bears the costs of damage assessment and its removal, and in particular:

1. the costs of emergency interventions undertaken at the time of the damage, and necessary to limit and prevent the effects of damage on the environment, space, and health of the population;
2. direct and indirect costs of remediation, the establishment of a new state or restoration of the previous state of the environment and space, as well as monitoring of the effects of remediation and the effects of damage to the environment;
3. costs of preventing the occurrence of the same or similar damage to the environment and space;
4. costs of compensation to persons directly endangered by damage to the environment and space.

In addition to the above, paragraphs 2 and paragraph 3 of the same article also stipulate that "the polluter is obliged to provide financial or other types of guarantees to ensure the payment of compensation for the mentioned costs during and after the performance of activities. The type of guarantees, the amount of funds, and the duration of the guarantee provided by the polluters shall be prescribed by the Government of the Republic of Serbia."

In situations where there are circumstances in which the plants or activities of polluters pose a high degree of danger to human health and the environment, Article 6 of the Law on Environmental Protection (2004) provides for the obligation to insure against liability for damage caused to third parties by accident.

In case certain damage has occurred due to the activity of the polluter, Article 107 of the same law, in paragraphs 1 and 2 prescribes that "everyone who suffers damage has the right to compensation, whereby a claim for compensation can be submitted directly to the polluter or insurer, or to the financial guarantor of the polluter if such an insurer or financial guarantor exists." Paragraph 3 stipulates that in the event of the existence of "several pollutants who are responsible for the damage caused to the environment, and the share of individual pollutants cannot be determined, the costs shall be borne jointly and severally."

In this part, it should be emphasized that "civil sanctions are determined against the debtor as a mechanism of coercion over the damaged, to bring property or personal non-property goods in a state in which they would be if there was no threat or violation of these values" (Nikolić, 2007, p. 142).

Civil liability for the harmful consequences of environmental pollution is primarily regulated by the Law on Environmental Protection (2004), while the Law on Obligations (1978) applies in all matters of liability for environmental damage not regulated by the Law on Environmental Protection. as referred to in Article 108 of this Law).

4. Council of Europe Convention on Civil Liability for Damage Caused by Activities Dangerous to the Environment

In 1993, the Council of Europe adopted the Convention on Civil Liability for Damage Caused by Activities Dangerous to the Environment (hereinafter: the Convention), to improve the quality of the environment and cooperation between states in the field of environmental protection. Arsić (2014) points out that "the Convention aims to provide adequate compensation for damage caused as a result of activities that are dangerous to the environment" (p. 92).

Based on the "polluter pays" principle, this Convention, "by a broad definition of liability, facilitates the burden of proving to claimants the right to compensation. The Convention applies to all-natural and legal persons who have influence and control over the performance of certain dangerous activities" (Pajtić, 2011a, p. 520).

According to Article 2, paragraph 7, items a and b of the Convention, "damage includes injury to persons or loss of life, damage to property of a person, excluding damage to a plant or property operated by a carrier of life-threatening activities".

Items c and d of the mentioned article and paragraph stipulate that "compensation for damage includes compensation for damage caused by damage to the quality of the environment and compensation for damage directly caused to persons or their property. Compensation for damage caused by damage to the quality of the environment refers to lost profits due to impaired quality of the environment. Compensation for damage caused by damage to the quality of the environment also includes the costs of taking measures taken at the time of the damage that was necessary to prevent the effects of the damage and measures that return the environment to its previous state."

The Convention defines the notion of dangerous activity in Article 2, paragraph 1, item c. According to these provisions, "hazardous activity is any activity related to the production, handling, storage or use of one or more hazardous substances, any activity carried out at a place intended for permanent storage of waste, as well as activities carried out during the operation of the plant for incineration, treatment, handling and recycling of waste."

Dangerous activity is also considered "production, handling, storage, destruction, disposal, release or any other activity that involves the manipulation of genetically modified organisms or microorganisms, if such activities may pose a risk to the environment, human health or their property" (Article 2, paragraph 1, item b of the Convention), while a dangerous substance is considered to be "a substance of certain physical and chemical properties that carries a significant risk to the environment, human health and property" (Article 2, paragraph 2 of the Convention).

According to Drenovak Ivanović et al. (2015), and following Article 3 of the Convention, "the basic idea of the Convention refers to the obligation to apply it in all cases where an environmental incident has occurred in the territory of a member state of the Convention, regardless of whether the consequences are felt. only in the territory of the member states of the Council of Europe or abroad" (p. 31). In doing so, Article 2, paragraph 11 defines the notion of an incident, which, according to the provisions, "could

be a sudden event, an event that recurs continuously or a series of events that have the same origin. To be considered an incident within the meaning of the Convention, these events must be of such intensity that their occurrence causes damage or poses a serious and imminent danger of harm."

According to the provisions of Article 10 of the Convention, "liability for damages is determined by the rules on strict liability" because liability is based on the selfconscious risk assumed in performing dangerous activities. Article 8, paragraph 1, item a, stipulates that "objective liability for damage caused by environmentally hazardous activities may be excluded if the holder of the environmentally hazardous activity proves that the damage occurred as a result of a state of war or riot, or a natural phenomenon that is not common for the area in which the damage occurred, which could not have been avoided" or if following point b of the same paragraph and article "it is proved that the damage occurred as a result of the activities of a third party who intended to cause damage and who this intention succeeded despite the application of safety measures appropriate to the type of hazardous activities in the particular case" or if following points c and e "damage caused by the application of measures taken by the competent authority or if the damage was caused by pollution within national limits on limit values in a certain area."

5. Directive of the European Parliament and the Council on liability for environmental damage relating to the protection and remedying of environmental damage

The Directive of the European Parliament and the Council on liability for environmental damage relating to the protection and remedying of environmental damage (hereinafter: Directive 2004/35/CE) regulates environmental liability and the prevention and remedying of damage caused to the environment. According to Pajtić (2011b), "Directive 2004/35/CE provides the direct application of the polluter pays principle, introduces the concept of „environmental damage", and numerous measures and procedures to prevent and eliminate the damage. The basic principle on which Directive 2004/35/CE is based in the establishment of financial responsibility of operators whose actions cause environmental damage or the danger of such damage, which encourages operators to adopt measures and develop procedures to reduce the risk of environmental damage, and thus their responsibility and financial exposure" (p. 261).

The question of how to determine the damage to the environment can often be very complex. Drenovak Ivanović et al. (2015) points out that in some cases "by applying the rules of civil law on compensation for damage, adequate

compensation for damage to the environment cannot be made, because it is very difficult or almost impossible to determine who the source of pollution is, and in other cases, it can identify a person who has suffered specific damage, but it is a violation that has a predominant public character" (p. 54).

Following the provisions of Article 2, paragraph 2 of Directive 2004/35/CE, the damage is defined as "a measurable adverse change in a natural good or a measurable impairment of the functions of a natural good that may arise as a direct or indirect consequence of an activity." Directive 2004/35 / EC does not apply to any damage to the environment, but to the damage explicitly stated therein. The directive "refers to future damage concerning the moment of entry into force, ie. application in national legislation. The directive has no retroactive effect" (Pajtić, 2011b, p. 261).

It is important to note that by the provisions of Article 3, paragraph 3 of Directive 2004/35 / EC, "natural and legal persons may not invoke the Directive with a claim for damages to their life and health or property caused by damage to life. the environment or the imminent danger of its occurrence". These rights are regulated by "national legislation, and the Council of Europe Convention on Civil Liability for Damage Caused by Activities Dangerous to the Environment (1993) provides basic guidelines for compensation for damage caused to natural and legal persons. However, persons affected by or likely to be affected by environmental damage, following Directive 2004/35/CE, have the right to request the application of appropriate protection measures from the competent authority, as well as to participate in the review of decisions, actions or omission of actions by the competent authority related to environmental protection" (Drenovak Ivanović et al., 2015, p. 56).

Directive 2004/35/CE refers to "operators of regulated activities, and this includes most industrial activities – e.g. chemical industry, waste management, transport and handling of hazardous substances or genetically modified organisms" (Pajtić, 2011b, p. 262).

Directive 2004/35/CE, under the provisions of Article 3 (1), introduces a distinction between "damage to the environment caused or which may result from particularly dangerous activities listed in Annex III to the Directive, and damage caused to protected species and natural habitats and which arose from the performance of activities not listed in Annex III of the Directive, and which the operator caused by acting with intent or negligence." According to Drenovak, Ivanović, and associates (2015), "in the first case, the operator is liable for damage according to the principle of objective liability for damage caused to the environment and any of its media. In the second case, the operator is liable for damage based on fault (subjective liability) for causing

damage, but not to any environmental medium, but only to protected species and natural habitats" (p. 58). In this context, Pajtić (2011b) states that Directive 2004/35/CE "adopts the principle of strict liability for operators of environmentally hazardous activities, which are listed in Annex 1 of the Directive. For all other activities outside Annex 1, Directive 2004/35/CE provides for liability under the principle of fault. While strict liability covers all types of environmental damage, liability under the guilt principle applies only to damage to the ecological system" (p. 262).

Following the provisions of the Directive, operators are obliged to inform the competent authorities about the environmental damage that may occur as a result of their activities, as well as to take appropriate measures to control, limit, secure, eliminate and manage the damage.

According to Article 8 of Directive 2004/35/CE, "the costs of measures to prevent and eliminate damage to the environment shall be borne by the operator." In that context, there are different measures of protection and measures to eliminate harmful consequences. Pajtić (2011b) points out that "Directive 2004/35/CE defines protection measures as measures taken in response to an event, action or omitted action which created an immediate threat of environmental damage, and which aim to prevent or mitigate the consequences of such damage. Remediation measures are defined as measures or a combination of measures, including damage management measures or temporary measures to eliminate damage, rehabilitation or replacement of damaged natural resources and/or similar measures, or provision of resources equivalent to damaged resources" (p. 263).

6. Conclusion

The right to a healthy environment is an absolute priority of modern society. Responsible approach and active role of potential polluters in the development of good practices within the business, organization, and way of working play a significant role in the prevention of damages and dangers that can harm the environment. Equally significant impact has the continuous professional development of employees, as well as strengthening the environmental awareness of polluters, with the insistence on the application of all available measures and prevention procedures.

A specific economic instrument aimed at protecting the environment at the global level is the compensation for environmental pollution, based on a special principle of environmental protection called "polluter pays". The introduction of this principle into our legislation is legally based on international

regulations. The essence of this concept relies on the voluntary active participation and contribution of polluters in creating a responsible approach and preventing potential dangers and damages that would harm the environment. In other words, the essence of civil liability for damage that a polluter can cause to the environment is that potential polluters adjust their activities to the requirement to cause minimal changes in the environment and reduce the risk of damage to a minimum.

Having in mind that the national legislation is based on the legal framework of the European Union, the paper presents the significance and characteristics of the "polluter pays" principle, the provisions of the Law on Environmental Protection, analyses the provisions of the Europe Convention Council regarding civil liability arising from activities dangerous to the environment (1993), and the provisions of the European Parliament Directive and the Council on liability for environmental damage related to the protection and elimination of environmental damage (Directive 2004/35/CE).

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ZNAČAJ NAČELA „ZAGAĐIVAČ PLAĆA" I ANALIZA EVROPSKOG OKVIRA GRAĐANSKOPRAVNE ODGOVORNOSTI ZA ŠTETE NASTALE USLED DELATNOSTI OPASNIH PO ŽIVOTNU SREDINU

REZIME: Pravo na zdravu životnu sredinu je apsolutni prioritet savremenog društva. Poseban ekonomski instrument usmeren ka zaštiti životne sredine na globalnom nivou jeste naknada za zagađivanje životne sredine, zasnovana na posebnom načelu zaštite životne sredine pod nazivom „za-

gađivač plaća". Suština građanskopravne odgovornosti za štete u životnoj sredini jeste to da potencijalni zagađivači svoje aktivnosti prilagode zahtevu da se prouzrokuju minimalne promene u životnoj sredini i rizik nastupanja štete svede na najmanju moguću meru. U radu su pored značaja i karakteristika načela „zagađivač plaća", predstavljene odredbe Zakona o zaštiti životne sredine, a potom su predmet analize bile odredbe Konvencije o građanskoj odgovornosti za štete nastale usled aktivnosti opasnih po životnu sredinu, kao i odredbe Direktive o odgovornosti za ekološku štetu u vezi sa zaštitom i otklanjanjem ekološke štete.

Ključne reči: *zagađivač plaća, životna sredina, građanskopravna odgovornost, Zakon o zaštiti životne sredine, EU regulativa*

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PROTECTION AGAINST DOMESTIC VIOLENCE IN THE MEANING OF THE FAMILY LAW AND THE LAW ON SOCIAL PROTECTION

ABSTRACT: Domestic violence is a complex, multidisciplinary problem, although at first glance it seems like a very clear, definite, extremely obvious, and recognizable phenomenon. In addition to the concept, characteristics, manifestation, and causes of domestic violence, the paper presents the provisions of the Family Law and the Law on Social Protection, as well as the role and competencies of the Social Services Center regarding protection from domestic violence. The so-called "dark figure" in this area indicates that there is a significant number of unreported cases of domestic violence, and the "silence" of family members can lead to immeasurable consequences. That is why it is necessary to emphasize adequate education, good coordination of institutions, but also influencing the social awareness of people that denying the perceived problem of domestic violence leads nowhere.

Keywords: *Domestic Violence, Family Law, Law on Social Protection, Social Services Center*

1. Introduction

Domestic violence is a phenomenon that has become a very current subject of scholarly analysis in recent years, but at the same time, a behavior,

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for the suppression of which the practice itself is particularly interested. Certainly, such tendencies were influenced by the development of the legal and institutional response, as well as the long-standing attitude that domestic violence is not only and exclusively a private family problem. In this regard, it is noted in theory that "domestic violence is a social phenomenon that affects both the lives of individuals and society as a whole" (Petrušić, Žunić & Vilić, 2018, p. 7).

According to Nikolić Ristanović (2002), "research on the prevalence of domestic violence in our country shows that in a sample of 700 women, every third stated that they were a victim of some form of physical and every second – psychological violence in the family" (p. 13). *Ipso facto*, Domestic violence is considered a "long-lasting phenomenon", and models and patterns of its existence and prevalence are part of patriarchal or traditional understandings of gender norms, gender patterns, and family relations" (Petrušić et. al., 2018, p. 7). Ignjatović notes that the use of the term "domestic violence", as well as "violence in intimate partnerships", but also the newer term "gender-based violence" obscures their gender dimension and the fact that women are in a much higher percentage, in a specific way and with serious consequences, victims of this type of violence" (Ignjatović, 2011, pp. 13–14).

Domestic violence can be defined as one of the most severe forms of violence, because its manifestation violates basic human rights and freedoms of family members, such as the right to life, the right to liberty and security, physical, sexual and mental integrity, and dignity (Petrušić & Konstantinović Vilić, 2010), and "occurs as a consequence of both power imbalances between individual family members, most often partners or ex-partners, and the tendency for this power imbalance to be exploited or abused by an individual to establish dominance and control over a partner or other family member who has less power in the relationship" (Žarković et al., 2012, p. 5). It is a "complex problem", for the understanding of which it is necessary to take into account the effect of several factors" (Opsenica Kostić, Todorović & Janković, 2016, p. 133).

Available research indicates that "domestic violence has very serious social and individual consequences and that its victims are far more often women and children than adult men." (Konstatinović Vilić & Petrušić, 2003, p. 27).

Domestic violence, at first glance, seems like a very clear, definite, extremely obvious, and recognizable problem (Dragojlović & Matijašević Obradović, 2019, p. 56). However, we must not lose sight of the fact that more often than not, phenomena that seem simple, are very complex. Also, we should not ignore the fact that examples from practice can surpass even the most thorough theoretical claims and legal provisions. Accordingly, Njagulović (2012) points out

that "good legal regulations are canceled by social reality daily, and the number of reported cases is increasing from year to year, but it does not reflect the true state of affairs, given that many violent behaviors never cross the family threshold" (p. 594). Additionally, it should be noted that there is no single view of the circle of behaviors that are considered violent.

The following text will discuss the concept, forms, and causes of domestic violence, and then the subject of analysis will be the provisions of the Family Law and the provisions of the Law on Social Protection, in the part concerning protection from domestic violence, where it is important to mention the role of the Social Services Center, in the part of the application of social protection measures in cases of domestic violence.

2. The Concept, Forms and Causes of Domestic Violence

As already mentioned, domestic violence is reported far less frequently than actual representation in practice. Patriarchal perceptions of family relationships, fear of revenge of the perpetrator, fear of condemnation of the social environment or friends, reasons of existential nature, are some of the reasons why victims rarely report this form of violence. The so-called "dark figure" in this area indicates that there is a significant number of unreported cases of domestic violence, and the "silence" of family members can lead to immeasurable consequences.

According to Article 197, paragraph 1 of the Family Law (2005), "domestic violence is behavior by which one family member endangers the physical integrity, mental health or tranquility of another family member". The same definition is used in the publication by Žarković et al. (2012, p. 5). Domestic violence can also be defined as "a form of violence committed within the household, kinship or partnership, regardless of whether the persons live together" (Petrušić & Konstatinović Vilić, 2010, p. 138). According to Jovanović and Lukić (2003), "although research on domestic violence shows that it is a phenomenon whose intensity increases over time and which, as a rule, changes forms, criminal law, and criminological definitions recognize violence only as physical violence and/or threat of physical violence. However, the practice sees the constant of domestic violence as all other types of coercion (threats, coercion and/or use of force) aimed at controlling the victim's behavior, establishing power over them, or abusing their trust "(p. 7).

It can be said that there is no one universal definition of domestic violence. However, according to Opsenica Kostić and associates (2016), "as a common denominator of different definitions, we could consider forms of violence that

should be sanctioned, and these are physical, psychological, economic and sexual violence" (p. 132). It should also be emphasized that in practice female victims of domestic violence, often "do not separate the physical from the sexual abuse. Thus, the results of the research of the Group for Women's Human Rights of the European Movement in Serbia show that sexual abuse was the most common accompaniment of particularly severe or most severe forms of physical violence" (Lukić & Jovanović, 2001, p. 139). Thus, the notion of "domestic violence" and "domestic violence against women" can be interpreted within a social construct, changed over time and reflecting power dinamics within a relationship" (Opsenica Kostić et. al., 2016, p. 139).

According to Petrušić and Konstatinović Vilić (2010), "domestic violence occurs in several forms: marriage violence, partner violence, violence against members of the joint household, violence against children" (p. 138).

The following table shows how domestic violence manifests itself, from which it can be concluded that this phenomenon can manifest in several ways.

Table 1. Forms of manifestation of domestic violence

Forms of domestic violenc	**Description of manifestation forms**
Physical Violence	It encompasses inflicting or attempting to inflict bodily injury (hitting with hands, feet, or hard objects, pulling hair, squeezing the neck, pushing, throwing on the ground, stabbing with a knife or other sharp object, etc.)
Sexual Violence	It encompasses forcing or inducing sexual intercourse (rape, incest, unwanted touching, coercion into certain sexual acts or pornography, humiliating sexual intercourse, etc.)
Psychological Violence	It encompasses emotional threats or injury (threats, causing fear, restricting freedom of movement or communication with third parties, insulting, calling derogatory names, ridicule, humiliation, etc.).
Economic Violence	It implies economic subordination of the victim to the perpetrator (unequal access to common funds, denial, control of access to money, prevention of employment or education and professional advancement, denial of property rights, etc.).

Source: Žarković, M., Šurlan, T., Kiurski, J., Matić, M. & Josimović, S. (2012). *Ka boljoj zaštiti žrtava nasilja u porodici – odgovor pravosuđa [Towards better protection of victims of domestic violence – the response of the judiciary]*. Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, p. 6.

Forms of domestic violence can in theory be divided into passive and active violence against women, which is presented in the following table.

Tabl 2. The theoretical framework of domestic violence against women

Forms of domestic violence against women	Passive violence	Undermining the physical status of women includes violence against health: neglect of the importance of pregnancy and childbirth, mortality of mothers and female newborns.
		Undermining the psychological position of women, which includes four subgroups: – emotional violence: the imperative of caring for another, and at the same time not caring about oneself, self-hatred of women, glorification of motherhood; – sexual violence: reduction of female sexuality exclusively to the reproductive sphere, the great importance of marriage, abduction and trafficking in women, imperative of female innocence, fidelity and fertility; – motivational violence: inability to make decisions, prohibition in the behavior of girls and women, ritual humiliation of women; – cognitive violence: illiteracy of women, poorer education of women, the transmission of bad ideas about themselves to future female generations.
		Undermining the economic position of women: cyclical nature of work obligations, discontinuity of working hours, forced labor, care for children, the sick and the elderly, unpaid work.
	Active violence	Active violence against women occurs when perpetrators of violence switch to, based on their social position, or due to physical superiority in family relationships, the direct use of violence. These include slapping, shooting, hitting, using weapons, and more.

Source: Popadić, D. & Bogavac, Lj. (2003). *Tehnike intervjuisanja dece i žena koji su preživeli seksualno zlostavljanje* [*Interview techniques for children and women who have survived sexual abuse*]. Beograd: Incest trauma centar, p. 19.

In addition to the above-mentioned, the theory recognizes several forms of domestic violence, which we'll mention here. These are the following forms of domestic violence:

1. Violence in partnerships – Partnership violence against women is "violence committed by current and former partners, regardless of whether they are married or unmarried, and whether they live together or in separate households" (Opsenica Kostić, et. al., 2016, p. 139). It differs from other forms of domestic violence "in that it is a relationship of seemingly equal standing, as opposed to the children and parents, adults and adult children and their parents "(Ajduković, 2000, p. 55).
2. Marital violence – The term "marital violence" means the "victimization" of a person with whom the abuser had or has established a marital union. It includes both violence against women and violence against men "(Stanković, 2014, p. 15). Domestic violence is also defined as "a series of behaviors used by a person to gain or retain power and control over a spouse. Such behaviors can happen once, in a longer period, continuously, or from time to time " (Balić et al., 2001, p. 76).
3. Violence in cohabitation – Violence in cohabitation could be defined as "physical, psychological, economic and sexual abuse or coercion by a man against a woman, and a woman against a man, or between persons of the same sex, between whom there is a community of life established under the law" (Stanković, 2014, p. 19).
4. Violence in same-sex relationships – Violence in same-sex relationships can be defined as "physical, psychological, emotional, sexual and economic abuse by a person of one sex towards a person of the same sex, who is in a relationship" (Stanković, 2014, p. 19).
5. Domestic violence against children – Under the term domestic violence against children, the National Strategy for Prevention and Protection of Children from Violence (2020) uses the definition of the World Health Organization according to which "child abuse or abuse includes all forms of physical or emotional abuse, sexual abuse, neglect or negligence. conduct, as well as commercial or other exploitation, leading to actual or potential impairment of the child's health, survival, development, or dignity within a relationship involving responsibility, trust, or power. According to Milosavljević Đukić and Tanković (2018), "children may be exposed to the risk of direct and indirect victimization by violence within the family environment. This means that a child can be victimized directly, when he or she is a direct victim of violence, or

indirectly when he or she witnesses violence against other family members" (p. 69).

If we analyze the causes of domestic violence, we can say that the characteristics of the "social system in which we find ourselves, a transition period characterized by, among other things, a high degree of instability and existential insecurity." (Matijašević Obradović, Stefanovič, 2017, p. 16), can lead to different possibilities of violent behavior in one family, and consequently, the causes of domestic violence can be numerous and very pronounced.

According to Nikolić Ristanović (2003), transition-related factors influencing domestic violence can be "classified into two groups: factors influencing exposure to domestic violence and factors preventing victims from leaving the perpetrator"(p. 6). Nikolić Ristanović (2003) further points out that the factors "influencing the increased vulnerability, especially of women, to domestic violence are: 1. Oppression of men and marginalized masculinity (crisis of masculinity) in the public sphere as opposed to strengthening traditional expectations and sides of the man under which he should act in the private sphere (power/impotence dichotomy); 2. Deterioration of the socio-economic status of men; 3. The transition of women to a better socio-economic status and the widening gap between the socio-economic status of men and women/partners; 4. Crisis of male and crisis of generational identity as a factor of violence of adult dependent sons; 5. Low/declining (under the influence of social stress) communication skills of men and women" (p. 6).

It is interesting to mention that, according to research, how women – victims of violence, most often react in situations where they are exposed to violence. According to Čudina Obradović & Obradović (2006), these are most often the following reactions: "denial of the problem (they believe that the problem does not exist, so no solution should be sought); reshaping the problem (expect the situation to get better because of the children, love, etc.); self-accusation and seeking justification (they suffer violence in everyday life and try to justify it); self-control and control of others (they adhere to the attitude that the abuser is "provoked" and carefully choose actions and words in the communication); seeking social support (they seek support in the current situation, most often from friends and relatives, while it is difficult to seek help from a professional service); active problem solving (they have a hidden solution in case the situation becomes too dangerous)" (p. 486).

3. Protection from domestic violence in the sense of the Family Law

Family Law (2005) "regulates: marriage and marital relations, extramarital relations, child-parent relations, adoption, foster care, guardianship, alimony, family property relations, protection from domestic violence, procedures related to family relations and personal name" (Article 1).

The ninth part of the Family Law (2005) regulates the area of protection against domestic violence. Thus, in the sense of Article 197, paragraph 2, domestic violence, in the sense of the definition given in paragraph 1, "shall be considered in particular: infliction or attempted infliction of bodily injury; causing fear by threatening to kill or inflict bodily harm on a family member or a person close to them; coercion into sexual intercourse; inducing sexual intercourse or sexual intercourse with a person under the age of 14 or an incapacitated person; restriction of freedom of movement or communication with third parties; insult, like any other insolent, reckless and malicious behavior."

The same article, in paragraph 3, stipulates that "family members are considered to be: spouses or ex-spouses; children, parents and other blood relatives, and persons who are in-laws or adoptive relatives, persons bound by the foster care; persons living or who have lived in the same family household; extramarital partners or former extramarital partners; persons who have been or are still in an emotional or sexual relationship with each other, or who have a child together or the child is about to be born, even though they have never lived in the same family household ".

Article 3 of the Family Law (2005) stipulates that "marriage is a legally regulated union of life between a woman and a man. It can be concluded only with the free consent of future spouses. Spouses are equal." In addition to marriage, the law also recognizes the extramarital union, "as a more permanent union of life between a woman and a man, between which there are no marital obstacles – extramarital partners." Extramarital partners have the rights and duties of a spouse under the conditions determined by law " (Article 4).

Article 10 of the Family Law (2005) stipulates that "domestic violence is prohibited". In doing so, everyone has, by law, the right to be protected from domestic violence.

Pursuant to Article 198, paragraph 1, of the Family Law (2005), "against a family member who commits violence, the court may order one or more measures of protection against domestic violence, which temporarily prohibits or restricts personal relations with another family member."

Measures of protection against domestic violence, which are given in paragraph 2 of the same article, include: "1. issuing an eviction order from the family apartment or house, regardless of the right of ownership or lease of real estate; 2. issuing an order for moving into a family apartment or house, regardless of the right of ownership or lease of real estate; 3. a restraining order on approaching a family member at a certain distance; 4. A restraining order on access to the institution around the place of residence or place of work of a family member; 5. Prohibition of further harassment of a family member."

The measure of protection against domestic violence, in accordance with paragraph 3 of Article 198 of the Family Law (2005) may last for a maximum of one year. Article 199 stipulates that a measure "may be extended until the reasons for which the measure was imposed ceases to exist, and may cease before the expiry of the duration if the reasons for which the measure was imposed cease to exist".

4. Protection from domestic violence in the sense of the Law on Social Protection

Article 2 of the Law on Social Protection (2011) stipulates that social protection is "organized social activity of public interest whose goal is to provide assistance and empowerment for an independent and productive life in the society of individuals and families, as well as preventing and eliminating the consequences of social exclusion.". Article 3 regulates the goals of social protection. The goals of social protection in the part concerning protection against domestic violence are given in points 4) and 5) and refer to "preservation and improvement of family relations, as well as promotion of family, gender and intergenerational solidarity", as well as to "prevention abuse, neglect or exploitation, or remedy of their consequences."

Article 4 of the Law on Social Protection (2011) stipulates that "every individual and family in need of social assistance and support in order to overcome social and life difficulties and create conditions for meeting basic life needs have the right to social protection, under the law." According to Article 14, "established rights and provision of social protection services" are exercised by the Social Services Centre.

In accordance with Article 41, it is determined that the goals of social protection are "achieved by providing services to beneficiaries". As a special group of social protection beneficiaries, Article 41, paragraph 2, item 6 defines a group of persons for whom "there is a danger of becoming a victim or if they are a victim of abuse, neglect, violence, and exploitation, or if their physical, mental or

emotional well-being and development are endangered by the actions or omissions of a parent, guardian or another person who directly cares for them".

Article 120 of the Law on Social Protection (2011) stipulates that the Social Services Centre: "1) assesses the needs and strengths of beneficiaries and risks they are exposed to and plans the provision of social protection services accordingly; 2) carries out procedures and decides on the rights to material benefits and the use of social protection services; 3) takes prescribed measures, initiates and participates in court and other proceedings; 4) keeps the prescribed records and take care of keeping the beneficiaries documentation."

In addition to the above-mentioned tasks of the Social Services Center, in terms of domestic violence, has "other tasks" regulated in Article 121 which are also considered important. In the field of social protection on the territory of the local self-government unit for which it is established, the Center initiates and develops preventive and other programs that contribute to the prevention and suppression of social problems and performs other tasks in the field of social protection, in accordance with law and other regulations.

Uncovering of individual cases of domestic violence "experts of the Social Services Center – guardianship authority, happens directly in the performance of their scope of work closely related to social and family protection, and indirectly, through reports from other government agencies, victims, relatives, and citizens" (Special Protocol on the Procedure of Social Services Center – Guardianship Bodies in Cases of Domestic Violence and Women in Partnerships, 2013, pp. 20–21).

The Social Services Center – guardianship authority is obligated to "provide directly and in cooperation with other services and bodies in the local community the service of immediate intervention and help for victims of domestic violence, when it is necessary to take measures to ensure safety and health, or when failure to take urgent measures and services within the competence of the Social Services Center – guardianship authority can endanger the life, health, and development of the victim of violence in the family or a person in need of protection. Immediate intervention must be realized immediately or no later than within 24 hours from the moment of learning about the case" (Special Protocol on the Procedure of Social Services Center – Guardianship Bodies in Cases of Domestic Violence and Women in Partnership, 2013, p. 23).

Regarding the powers that the Social Services Center has in its work, it is important to mention the Rulebook on the organization, norms, and standards of work of Social Services Center (2008). Thus, among others, the provision of Article 4 of this Ordinance (2008) states the public powers of the Center regarding protection against domestic violence, which: "conducts the procedure

of mediation in family relations (conciliation and settlement); submits the finding and expert opinion, at the request of the court, in litigations in which decisions are made on the protection of the rights of the child or the exercise or deprivation of parental rights; submits, at the request of the court, an opinion on the expediency of the measure of protection against domestic violence requested by another authorized prosecutor; assists in obtaining the necessary evidence to the court before which the proceedings in the dispute for protection against domestic violence are being conducted; conducts the procedure of assessing the general suitability of foster parents, adoptive parents, and guardians, etc."

The aforementioned powers of the Center should be understood in terms of giving broader prerogatives that seek to complement the area of domestic violence regulation.

5. Conclusion

With global social changes, there are changes in every special sphere of society, even in the family itself. Primarily, the family is losing more and more of its importance. The information society and the high mobility of citizens put a lot of choices in front of people. Among these choices, the family is becoming less and less prioritized on the list of priorities.

Domestic violence is a complex and multidisciplinary problem.

In addition to the concept, characteristics, manifestation forms, and causes of domestic violence, the paper presents the provisions of the Family Law and the Law on Social Protection, in the part concerning protection from domestic violence, emphasizing the role of the Social Services Center and powers which this body has in terms of protection from domestic violence. However, it is important to mention that good legislation is often overcome by some life situations, so it is necessary to constantly deal with issues such as domestic violence, and "keep up" with criminological tendencies in the dynamics of manifestation and development of this type of problem.

It can also be said that the number of reported cases of domestic violence is increasing every year. However, having in mind that this area is still recognizable by the "dark figure", it is concluded that a large number of violent acts in marital and partnership relations remains undiscovered, despite all efforts to change such tendencies.

In the light of all of the above, it is necessary to emphasize adequate education, good coordination of institutions, but also influencing the social

consciousness of people that denying the perceived problem of domestic violence leads nowhere. Also, good coordination of institutions has proven to be extremely important in the effective solution of problems, primarily referring to the cooperation of the police, the Social Services Center, and the Judiciary system in sanctioning and preventing domestic violence.

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ZAŠTITA OD NASILJA U PORODICI U SMISLU PORODIČNOG ZAKONA I ZAKONA O SOCIJALNOJ ZAŠTITI

REZIME: Nasilje u porodici je složen, multidisciplinaran problem, iako na prvi pogled deluje kao vrlo jasna, određena, krajnje očigledna i prepoznatljiva pojava. Pored pojma, karakteristika, načina ispoljavanja i uzroka nasilja u porodici, u radu su predstavljene odredbe Porodičnog zakona i Zakona o socijalnoj zaštititi, kao i uloga i ovlašćenja Centra za socijalni rad u pogledu zaštite od nasilja u porodici. Tzv. „tamna brojka“ u ovoj oblasti ukazuje da postoji znatan broj neprijavljenih slučajeva nasilja u porodici, a „ćutanje“ članova porodice može dovesti do nemerljivih posledica. Zato je potrebno staviti naglasak na adekvatnu edukaciju, dobru kordinaciju institucija ali i uticanje na društvenu svest ljudi da negiranje uočenog problema nasilja u porodici ne vodi nikuda.

Ključne reči: *nasilje u porodici, Porodični zakon, Zakon o socijalnoj zaštiti, Centar za socijalni rad.*

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DETECTION, CONSEQUENCES AND INFLUENCE OF INJURING A CHILD BY A CORPORAL PUNISHMENT AS A METHOD OF UPBRINGING

ABSTRACT: Upbringing of a child and choosing a method, consciously or unconsciously, has existed since parenting. The aim of this paper is to present the choice of a violent method in upbringing – a corporal punishment of a child, the way how it affects a child's development and consequences it can cause. Having in mind the complex and sensitive character of the phenomenon, the topic was explored from the aspect of a legal science, but also from the point of non-legal disciplines, such as psychology, sociology of a family and pedagogy. Observations of the achivements from the point of a child`s psychology are of an exceptional importance for the analysis of the consequences that a corporal punishment has on a child. The conclusion indicates that, although the family environment is the most desirable environment for a child, the choice of violent methods in education affects the proper growth and development of children, and it can lead to both temporary and permanent consequences related to a child`s mental and physical health as well as its emotional development. There are difficulties in determining how violent parenting affects a child's emotional and physical safety and health, unless the result is a more serious physical injury or death. Although the responsibility lies primarely with the family and the activities of the parents, in practice, the

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most desirable approach is a close cooperation of all adults working with children, including educators, doctors and the whole society.

Keywords: *injuries, violent methods, psychological consequences.*

.1. Corporal punishment in upbringing

The concept of corporal punishment can be studied from both, legal and a medical point of view. International legal standards recognize the right of human dignity for every child, as well as the right to legal protection (General Comment No. 8., p. 5). The protection of the child's right to proper development is one of the basic principles of international law, too. However, while the interpretation of the conceptual definition what proper development implies is a central concern of disciplines such as psychology, pedagogy, sociology, as well as various medical fields, there is not much analysis of the child's right to proper development (Peleg, 2012, p. 3).

Proper development includes the choice of parenting style, which implies relatively consistent ways of behaving in order to establish overall relationship with the child (Stefanović Stanojević, 2006, p. 77). The modern form of upbringing means a relationship that includes rights and obligations on both sides. It is desirable to include schools, social and health institutions, other members of the community, to reach a common goal – the proper development and guidance of the child towards adulhood. The definition of upbringing, without entering further into the field of pedagogical and psychological sciences, should be understood as a relationship of love and respect in which a child develops properly and healthy, having in mind mental, emotional and physical development, on the way to adulthood.

The traditional model of upbringing, which is still present in our country, includes elements of corporal punishment, which directly endangers the child's right on physical integrity, human dignity and the right to equal protection before the law. The real scale of the problem is underestimated in many countries. It is partly because assessments are made on the basis of administrative data, by health and justice system, rather than the results of national surveys, and partly as a result of the widespread view, that violence is seen as a social norm rather than a problem requiring attention (WHO & ChildPact, 2020, p. 13). It should be emphasized that "elements of domestic violence is most common in women, children, and elderly people" (Počuča, 2010, p. 51).

We will mention in the same context the example of traditional cultures of Southern Asia, where corporal punishment is quite common, and where

research done by international organizations has revealed extensive lists of various forms of child injury, over forty. One such list, based on discussions with children and social workers, included: hitting with the stick, forcing children to kneel for a long time, tying, twisting ears, and more (Save the Children, 2008, p. 11). However, in accordance with the opinion of the Worl Health Organization (WHO), physical assult on a child should not be understood only as a body injury, but also as harm to the health and human dignity of the child (Makzoum, 2015, p. 11).

The attitude about the acceptability of corporal punishment of a child is changing. It has long been considered one of the educational methods of influencing a child's behavior, which is conceptually different from physical violence. However, over time, it became known how this way of treating a child can affect the child's psyche and self-confidence.

The Committee on the Rights of the Child expressed the opinion that corporal punishment is "any punishment by which physical force is used with the intention of causing pain or discomfort, no mater how easy it may be". It usually involves hitting (slapping, hand, stick, other objects) but also kicking, shaking, throwing a child, scratching, pinching, biting…" (General Comment No. 8., chapter III, para. 11).

According to a recent UNICEF survay from 2016, which referred to the former Yugoslav republics, violence against children is quite widespread, so in Macedonia and Montenegro about 70% of children have experienced corporal punishment, in Bosnia about 55%, in Serbia more than 40%. Survay included children aged 2 to 14 years old (UNICEF, 2021).

We will mention also the research conducted in Institutions for social protection, which showed that alsmost half of number of children wewrw exposed to violence by relatives, before coming to the institution (Srna & Stevanović, 2010, p. 8).

In the United States, for example, there is a consensus that, except in cases of serious physical injuries, people outside the family environment do not get involved, as injuries other than "serious" are a family matter. Corporal punishment in the sense of "reasonable" is allowed, and "inappropriate discipline" is not allowed. It can be concluded that the most important is to distinguish the degree of injuries, so some forms are acceptable, while others are not (Colleman, Dodge & Campbell, 2010, p. 108).

Today, most experts in Serbia believe that corporal punishment of a child is a serious violation of children's rights and demand a complete ban (Profesion and activism against corporal punishment of children).

2. Influence and consequences of corporal punishment

Corporal punishment can be a directcause of a large number of injuries, even the death of children. Research testifies to the seriousness of physical violence that children experience in the name of "disciplining" in upbringing. The risk of escalating violence is increased due to the fact that adults, who raise children in this way, are often very angry or under some kind of stress, which can easily lead to an increase in use of force.

The immediate consequence of corporal punishment for a child is to cause feelings of humiliation, anger, helplessness, increased sensitivity. However, children can also become indifferent, confused and insensitive, and the consequences themselves are difficult to be measured. Consequences can also be physical (somatic disorders, disability), emotional difficulties, changed self-image, post-traumatic stress, mental retardation. Selective disorders, developmental disharmony, intellectual inhibition, problems with concentration can also occur (UNICEF, 2017, p. 7).

Exposing a child to violent behavior at an early age can impair brain development, damage parts of the nervous system, as well as the endocrine, circulatory, musculoskeletal, reproductive, respiratory and immune systems, with life consequences (APA PsycNet: ACE Study, 2021). One Scandinavian study showed that children exposed to violent behaviors grow into adults who are more vulnerable and more susceptible to the negative health cosequences of violence they might experience in adulthood. If those children are exposed to violence later in life, they are at higher risk of mental health problems (Thoresen, Myhre, Larsen, Aakvaag & Hjemdal, 2015, p. 19).

Medical term defined in the scientific literature as ACE, Adverse Childhood Experience, (Thoresen et al., 2015, p. 22) represents a traumatic life events a person experienced during childhood and remebers when grows up, which includes among other cases, behavior with elements of community violence. One of the consequences is an uncertain pattern of bonding in relationships (Thoresen et al., 2015, p. 52). Several negative effects of corporal punishment are considered in the professional literature (Nešić, Popović & Ćitić, 2018, p. 243). It has been noticed that three types of aggression are developing, imititative, reflected in the learning of agresive behavior by imitating the actions of parents; operative agression, which is an attack as a form of escape, and deceptive aggression, reaction to punishment directed at any person. Another consequence, considered as the most serious danger is a permanet disruption of social relations (Nešić et al., 2018, p. 244).

3. Consequences of physical development

The health aspect is reflected in a consequences ranging from direct endangerment of life and severe disability, to subtle but permanent deformations in the process of forming the child's personality (Stevković, 2006, p. 26). In addition to the consequences for health that manifest themselves in the form of various disorders in mental development, the consequences of body injuries can be visible or not, and the most severe is the death of the child (Mihić, 2002, p. 55). The younger the child, the more serious the consequences of corporal punishment, and injuries of the skin and subcutaneous tissue are reported, when traces of the objects can be seen (Banjanin Đuričić, 1998, p. 50). Among the long-term consequences, the literature mention injuries and damage of the head, eyes, jaw, nosem ear, skull fractures, deformities and disability, but also mental retardation, blindness, cerebral paralysis. Studies in the UK indicate the death of one child per week (Elliman & Lynch, 2000, p. 197). The most serious consequence of physical violence is certainly death. Further, permanent disability, injuries of organs and chronic diseases. The most common causes of death of children are head injuries (40-50%), liver and spleen injuries, caused by a hit to the abdomen, and in a smaller percentage injuries of the pancreas, kidneys and adrenal glands, when the mortality rate is up to 50% of hospitalized children (Milosavljević Đukić & Tankosić, 2018, p. 72).

Research hasalso pointed to the fact that, no matter what moves a parent who uses corporal punishment, a large percentage of this punishment turns into physical abuse. Due to the proven close connection between these two phenomena, and based on the analysis of the causes of child mortality from physical abuse in thirty developed countries, UNICEF defined corporal punishment as "the most common form of violence in the industrialized world (Gershoff & Bitensky, 2007, p. 242). The criminological definition of the term refers to the phenomenological and etiological characteristics of each form of abuse that violate the physical and mental development of the child (Ibid, p. 242).

As one way to reduce child mortality, UNICEF strongly advocates a global ban on corporal punishment. Physical assults on a child can be cosidered a form of child abuse, since many authors consider physical abuse of a child in the family by the physical actions of a parentor guardian, which intentionally, by using physical force, with or without other objects, cause or may cause physical injury or death of a child (Ljubojev, 2008, p. 87).

4. Detecting situations of corporal punishment of children

In the most traditional context, respect of the right to life means a ban on endangering life, or taking life away. However, when it comes to the child, the right to life, survival and development needs to be interpreted more broadly, as a set of all activities to provide a child with a healthy and safe environment, but also healthy growth and personal development. In that sense, the family environment can be risky for a child.

It was only during the nineteenth century that, rarely, teachers, educators and employers used to write about violence against children. At the beginning of the twentieth century violence perpetrated by parents in the family environment was revealed (Nikolić Ristanović & Konstantinović Vilić, 2018, p. 138). Contemporary literature combines all forms of violence against children through the comprehesive notion of "abuse and neglect". According to the social protection system institutions records, the number of families in which children were victims of violence is yearly growing, e.g. in 2013 that number was 3637, and in 2017 – 8292 (UNICEF, 2019, p. 44). UNICEF survey showed that every third parent in Serbia is of opinion that "the beating stick came from heaven" and physical force is used when upbringing a child (Ombudsman and UNICEF against corporal punishment of children).

The inclusion of clinical and psychiatrics aspects influenced the definition of *"battered child"* syndrome as a medical diagnosis, which term includes "serious" injuries inflicted on a child by parents and other adults.

The risk we mention is reflected in the difficulties of detecting violent behavior, and in practice two ways of detecting are recognized (Išpanović Radojković, Ignjatović & Kalezić Vignjević, 2011, p. 68):

- Detection by recognizing signs of injury on the child or by observing the behavior of the child and family members.
- Detection when the child directly entrusts to a close prson, as well as indirect knowledge by another person close to the child.

Mentioned methods of detection are important because in childhood it often happens that children are injured in various ways, which do not include injuries by adults, as a way of disciplining a child, by using corporal punishment. The literature lists certain indicators that describe how child suffers from physical attacks. Physical indicators include injuries of soft tissue, skeleton and internal organs, without adequate explanation (Žegarac, 2004, p. 25).

The problem of injuring a child by the practice of corporal punishment is difficult to understand properly without cooperation that includes all adults in

contact with children. UNICEF reports show the extent of all forms of violent behavior, using criteria which includes human rights, public health and the child's health care. Results of the report are warning that "permanent change is needed" (Pinheiro, 2006, p. 15), and in addition entire community should accept responsibility for improving children's health. Professionals, such as doctors, psychologists and social workers, have a major role when it comes to detecting situations that might involvecorporal punishment. While physicians deal with physical consequences, phychologists and social workers investigate the social and behavioral effects (Halu Halu, 2013, p. 35). However, when we discuss about the need for preventive activities, it seems insufficiently clear who should be responsible for detecting situations in which a child is exposed to corporal punishment as a way of upbringing.

Our legislation (Family Law, 2005, Art. 263, para. 3) defines the duty of state bodies, various institutions (for education, health care, and social protection) as well as all citizens to, once when recognized, report violent behavior towards a child to the City center for social services, institution representing the guardianship authority, as well as to inform the Public Prosecutor. The law stipulates that the obligation to report applies to every case of abuse and neglect, which indicates that corporal punishment (as the use of force) is also covered by definition.

5. Protection of the child from injury by corporal punishment

Corporal punishment has for a long time been recognized as a risk factor in a child's development. At the international level a global ban project has been launhed in all countries in the world, and in most countries it is prohibited by law in schools and other institutions where children are present. The experience in countries where prohibition of corporal punishment is established are encouraging, and the Committee on the Rights of the Children supports by detailed guidelines possible ways to implement reforms (Save the Children, 2009, p. 44).

Children have the right to feel safe in all environments. In order to make it possible, one of the basic requirements is to detect situations of violent behavior and to adequately respond to it. In our country educational institutions are, in accordance with the law, obliged to form teams for protection against violence and to implement protection programs. To define the roles and clarify the procedures descibed, the Ministry of Education has drafted various documents: Special Protocol for the Protection of Children and Students from Abuse and Neglect in Educational Institutions, Manual for the Implementation

of the Special Protocol, Rulebook on the Institution's Response to Violence, as well as the Action Plan for the Prevention of Violence.

When we discuss about the judical authoritiesand their activities, we could mention the European Court for Human Rights, which found that the practice of corporal punishment is contrary to the generally accepted standards of international legal protection of the child (Ware, 1983, p. 6). It is visible how strong theinfluence of the court practice, related to the change of attitude on corporal punishment is, in countries where it is acceptable way of treating children. This might be ilustrated by the fact that, since year 2000 in England and Wales, it hase become mandatory to take into account the opinions of the European Court of Human Rights, when court cases are related to corporal punishment (Arthur, 2005, p. 9). However, in some countries such an attitude has been standard for a long time, as in Italy in one court case back in 1996, the Supreme Court prohibited any violence relted to the upbringing of a child (Country Report for Italy, 2019).

Obligations to directly protect children from all forms of physical and mental injury are contained in Article 19 of the Convention on the Rights of the Child, which stipulates that all members of the community have to engage, are obliged to report and institutions are obliged to investigate, monitor and address to the court for the protection, when necessary. A proposal for the necessary protection measures can also be found in the Council of Europe's Recommendation on the Prohibition of Corporal Punishment, as well as in General Comment No. 8.

6. Conclusion

In relation to our country, there are indicators that parents do not perceive "mild" physical discipline (e.g. slapping) as a violent method, but it is considered as "justified and reasonable" discipline. The reasons and/or excuse for the persistant survival of the method of corporal punishment during upbringing can be found in strong influence of tradition in our society. On the other hand, we might notice a lack of empathy in social relations, and insufficient cooperation related to adults with whom a child can come in contact. Most often, the reaction in society becomes visible once a child has been exposed to this form of violence for a longer period of time. Even then, there is doubt who is responsible for detecting the situation within the family environment. We believe that the responsability remains with every member of society, as this is the only way for children to have an opportunity for their right to healthy and proper development to be respected. We can notice that the existing support programs for the prevention of violence against children currently

do not result with sufficient impact to change the legal norms. The willingness of top-level decision-makers to amend existing legislation, in a way to ensure an explicite ban on corporal punishment in the family environment – is a reflection of their commitment (UNICEF, 2020, p. 15).Until then, all adult members of society can be held responsible for disrespecting the child's right to physical integrity and the right to healthy and proper development.

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DETEKTOVANJE, POSLEDICE I UTICAJ POVREĐIVANJA DETETA TELESNIM KAŽNJAVANJEM KAO METODOM VASPITAVANJA

REZIME: Vaspitavanje deteta i izbor metoda, svesno ili nesvesno, postoji od kada i roditeljstvo. Cilj ovog rada je prikaz izbora nasilne metode u vaspitavanju – telesnog kažnjavanja deteta, detektovanja pojave, načina na koji ona može uticati na detetov razvoj i posledice koje može izazvati. Imajući u vidu složen i osetljiv karakter pojave koja se proučava, tema se posmatra sa aspekta pravne nauke, ali i iz ugla nepravnih disciplina, kao što su psihologija, sociologija porodice i pedagogija. Dostignuća dečje psihologije su od izuzetnog značaja za analizu posledica koje po dete ima telesno kažnjavanje. Zaključci ukazuju da, iako je porodično okruženje najpoželjnija sredina za dete, izbor nasilnih metoda u porodičnom vaspitavanju utiče na pravilan rast i razvoj dece, a može dovesti do privremenih i trajnih posledica po psihičko i fizičko zdravlje deteta, kao i njegov emocionalni razvoj. Postoje teškoće da se utvrdi koliko nasilno vaspitavanje utiče na emocionalnu i fizičku sigurnost i zdravlje deteta, osim ukoliko je rezultat teže fizičko povređivanje ili smrtni ishod. Iako je odgovornost prvenstveno na porodici i postupcima roditelja, u praksi je najpoželjniji pristip bliska saradnja svih odraslih koji rade sa decom, uključujući vaspitače, lekare i celokupno društvo.

Ključne reči: *povrede, nasilne metode, zakonodavstvo, posledice.*

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CORRECTION: Cross-border succession issues and the attempts of Serbian legislation to be harmonized with the European legislation on succession matters

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De Negri Laura PhD

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ISPRAVKA: Prekogranični naslednopravni slučajevi i pokušaji harmonizacije srpskog zakonodavstva sa evropskim zakonodavstvom u oblasti naslednog prava
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The editorial board has the right to adjust the manuscript to the editorial rules of the journal.

General information about writing the manuscript:

The manuscript should be written in the Microsoft Word text processor, Times New Roman font of the value of 12 pt, in Latin letters, with a spacing of 1,5. One is supposed to use the value of 25 mm for all margins. The scope of the manuscript can be of 12 pages at most in an A4 format including a text, tables, pictures, graphs, literature and other additional material.

The title-page of the paper should contain the title of the paper work in English, and below it there should be written the same thing in Serbian of the font size of 14 pt, Bold. After that, there is a spacing and, then, there should be stated the author's name and surname, his/her title, affiliation (the work place **with obligatory stating the name of the country too)**, an e-mail address and contact phone, the font size of 12 pt. If the author has his/her ORCID number, it should be stated immediately after his/her name and surname. For more information about ORCID iD, please visit https://orcid.org and after the registration insert your ORCID iD number.

Then, there is a spacing, and after that there should be written an abstract of the length to 250 words in English, and in Serbian below it of

the font size of 12 pt. An abstract represents a brief informative contents review of the article enabling the reader's quick and precise judgment of its relevance. The authors have to explain the goal of their research or to state the reason why they decided to write the article. Then, it is needed the methods being used in a research to be described including a short description of the results being reached in a research.

Key words are stated after one line of a spacing below the abstract written in English, and, also, in Serbian below it. There should maximally be five of them, of the font size of 12 pt, Italic. Then comes a two-line spacing and the text of the paper work.

Manuscript should be written concisely and intelligibly in a logical order which, according to the rule, includes the following: an introduction, the working out of the topic and a conclusion. The letters of the basic text should be of the font size of 12 pt. Titles and subtitles in the text are supposed to be of the font size of 12 pt, Bold.

The name and number of illustrations (diagrams, photographs, graphs) should be represented in the middle of the line above the illustration, the font size of 12 pt. The name and number of a table should also be represented in the middle of the line above the table, the font size of 12 pt. Below the illustration or table, it is obligatory the source to be stated ("Source:…"), the font size of 10 pt. If the results of the author's research are represented in the form of a graph or table, there should be stated as a source below the illustration or table: Author's research.

If the author of the text writes a thank-you note or states the project references within which the text has been written and the like, he/she does it in a special section – Acknowledgments, which, according to the ordinal number, comes after the Conclusion, and before the author's affiliation and the summery of the text written in Serbian.

Use APA style to write references (The hand book for publishing, the American Psychological Association) as an international standard for writing references. Remarks, namely footnotes, may contain additional explanations or comments referring to the text. Footnotes are written in a font size of 10 pt.

Within the APA style, the used source is stated **inside the text,** in the way the elements (the author, the year of publication, the page number where the quoted part is) are indicated in parentheses immediately before the full stop and separated by a comma.

Citing rules inside the manuscript

If the cited source has been written by one author:

When a sentence contains the author's name and his/her cited words, then, after the author's name, there is stated the year of publication of the cited text in the brackets. At the end of the sentence, it is necessary the page number on which there is a sentence from the cited text to be indicated:

There is an example:

As Besermenji (2007) points out, "it is especially present the problem of the air pollution, which is explicitly a consequence of an extremely low level of ecological awareness as well as the lack of professional education in the field of environment" (p. 496).

In the case when the author is not mentioned in the sentence, his/her surname, the year of publication of the paper work and the page number in the paper should be put in brackets and at the end of the sentence.

There is an example:

Also, "rural tourism is expected to act as one of the tools for sustainable rural development" (Ivolga, 2014, p. 331).

A note: If a citation has been made by paraphrasing or resuming, then it is not necessary the page number to be stated.

There is an example:

The environment represents everything that surrounds us, namely everything with which a human's living and producing activity is either directly or indirectly connected (Hamidović, 2012).

If the cited source has been written by two authors:

There should be put "and" or "&" between the authors' surnames depending on the fact whether the authors are mentioned in the sentence or not.

There are some examples:

Chaudhry and Gupta (2010) state that as many as 75% of the world's poor live in the rural areas and more than one-third of rural areas are in arid and semiarid regions.

Hence, "rural development is considered as a complex mesh of networks in which resources are mobilized and in which the control of the process consists of interplay between local and external forces" (Papić & Bogdanov, 2015, p. 1080).

If the cited source has been written by three to five authors:

When such a source is cited for the first time, all the authors should be stated:

There is an example:

(Cvijanović, Matijašević Obradović & Škorić, 2017)

When this source is later cited again, there should be stated only the first author's surname and added "et al.".

There is an example:

(Cvijanović et al., 2017)

If the cited source has been written by six and more authors:

By the first and all further citations, the first author's surname should be stated and added "et al.".

There is an example:

(Savić et al., 2010)

If the author of the cited text is an organization:

In the case when the author of the cited text is an organization, then its name should be put in brackets as an author of the text. If the organization has a known abbreviated name, then one has to write this abbreviated name in a square bracket, after the full name, in the first citation, while any further citation should be marked by this abbreviated name.

There is an example:

the first citation: (Serbian Academy of Sciences and Arts [SASA], 2014)

further citations: (SASA, 2014)

If the authors of the cited text have the same surname:

In the case of the authors having the same surname, there should be used the initials of their names in order to avoid the confusion.

There is an example:

The attitude made by D. Savić (2017) is presented...

If there are cited several references of the same author from the same year:

If there are two or more references cited from the same author and from the same year, then, after the fact of the year, there have to be added the marks "a", "b", etc.

There is an example:
(Dragojlović, 2018a)
(Dragojlović, 2018b)

If there exist two or more texts in one citation:

When one cites two or more texts in one citation, then, in brackets, there are stated the surnames of the authors of original texts in the order of publication and they are separated by a semicolon.

There is an example:

Obviously, living and working in rural areas has always been connected with specific material and symbolical relations to nature (Milbourne, 2003; Castree & Braun, 2006).

If there is cited the newspaper article with the stated author:

There is an example:

In *NS uživo* there was published (Dragojlović, 2021) that...

In the list of the used references, this reference should be written in the following way: Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.

If there is cited the newspaper article without the author being stated:

There is an example:

Published in *Politika* (2012)

In the list of the used references, this reference should be written in the following way: *Politika*. (2012). Straževica gotova za dva meseca [Straževica finished in two months]. February 1.

If the personal correspondence is cited:

The example: According to Nikolić's claims (2020),

In the list of the used references, this reference should be written in the following way: Nikolić, A. (2020). Pismo autoru [Letter to the author], 21. novembar.

If it is cited the text in press, at the end of the reference, and before the full stop, it is obligatory to add "in press".

If the court decisions, the praxis of the European court for human rights, and other sources from both national and international court praxis are cited, a reference should contain as much precise facts as it is possible: the type and number of the decision, the date when it was made, the publication where it was published.

The example in the text: (The Decision of the Superior court in Belgrade - A special department K.Po1 no. 276/10 from 26th January 2012)

The example in the text: (Borodin v Russia, par. 166.)

A note:

The sources from the court praxis **are not stated** in the list of the used literature. A full reference from the court praxis **is stated** in a footnote. While citing the European court for human rights praxis there should be indicated the number of the submitted petition.

There is an example of a reference in a footnote:

As it is stated in the Decision of the Superior court in Belgrade - A special department K.Po1 no. 276/10 from 26th January 2012 Intermex (2012). Bilten Višeg suda u Beogradu [Bulletin of the High Court in Belgrade], 87, p. 47.

Borodin v Russia, the petition no. 41867/04, the sentence ECHR, 6. 2. 2013, par. 166.

If the laws and other regulations are cited:

When citing a legal text or other regulation, in the text there should be stated a full name of law or other regulation including the year when the law or regulation was enforced.

There is an example:

(The Code of criminal procedure, 2011)

(The Book of rules on the content of the decision on conducting the procedure of public procurement made by several consignees, 2015)

This rule is also applied to laws and other regulations not being in force any longer.

There is an example:

(The Criminal law act of Republic of Serbia, 1977)

When citing the international regulations, in the text it is enough to state a shortened name of the document together with its number and year when it was accepted.

There is an example:

(Regulation No. 1052/2013) ili (Directive 2013/32)

If there is cited the text of the unknown year of publication or the unknown author's paper work:

In the paper work, such a kind of text should be cited in the way that in the place of the year there is stated "n.d." (non dated).

There is an example:

Their significance for parliamentary processes is unmeasureable (Ostrogorski, n.d.).

If there is a paper work of the unknown author used in a manuscript, there will be stated the title of the paper being cited together with the year, if it is known.

There is an example:

All these are confirmed by a mixed, objective-subjective theory (The elements of a criminal offense, 1986, p. 13).

An important note:

The cited sources (regardless the fact in which language they have been written) are not supposed to be translated into English, except the title of the paper work (publications, a legal act or bylaw) which should be translated and written in a square bracket.

The example:

1.) Matijašević Obradović, J. (2017). Značaj zaštite životne sredine za razvoj ekoturizma u Srbiji [The importance of environmental protection for the development of ecotourism in Serbia]. *Agroekonomika*, *46* (75), pp. 21-30.

2.) Jovašević, D. (2017). *Krivična dela ubistva* [*Murder as a Crime*]. Beograd: Institut za kriminološka i sociološka istraživanja.

3.) Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, no. 102/10

4.) Zakon o turizmu [The Law on Tourism]. *Službeni glasnik RS*, no. 17/19

At the end of each text, in the section under the name of "**References**", it is obligatory to state the list of all cited references according to an alphabetical order. The titles in foreign languages beginning with definite or indefinite articles ("a", "the", "Die", ...) are ordered as if the article does not exist. The reference list should only include the works that have been published or accepted for publication.

The editorial board insists on the references of recent date, which will specially be taken into account while choosing the manuscripts to be published. At the end of each reference, it is obligatory to state a DOI number, if the cited reference contains it. If the cited reference does not contain a DOI number, the author can refer to the URL address.

The example of the stated reference together with a DOI number:

Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2

The example of the stated reference together with an URL address:

Milosavljević, B. (2015). Pravni okvir i praksa primene posebnih postupaka i mera za tajno prikupljanje podataka u Republici Srbiji [Legal framework and practice of application of special procedures and measures for secret data collection in the Republic of Serbia]. In: Petrović, P. (ured.), *Posebne mere tajnog prikupljanja podataka: između zakona i sudske prakse* [*Special measures for secret data collection: between law and case law*] (pp. 5-33). Beograd: Beogradski centar za bezbednosnu politiku. Downloaded 2021, January 15 from https://bezbednost.org/wp-content/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf

The examples of the used references being stated at the end of the paper work:

References:

1. Agencija za privredne registre. *Privredna društva* [*Companies*]. Downloaded 2020, January 10 from https://www.apr.gov.rs/o-agenciji.1902.html
2. *California Secretary of State*. Downloaded 2020, December 15 from https://www.sos.ca.gov/business-programs/
3. Dukić-Mijatović, M. (2011). Korporativno upravljanje i kompanijsko pravo Republike Srbije [Corporate Governance and Companies Business Law of the Republic of Serbia]. *Pravo -teorija i praksa*, *28* (1-3), pp. 15-22.
4. Dragojlović, J., & Bingulac, N. (2019). *Penologija između teorije i prakse* [*Penology between theory and practice*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.
5. Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.
6. Gopalsamy, N. (2016). *A Guide to Corporate Governance*. New Delhi: New Age International.
7. Jesover, F., & Kirkpatrick, G. (2005). The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries. *Corporate Governance: An International Review*, *13* (2), pp. 127-136. DOI: 10.1111/j.1467-8683.2005.00412.x
8. Milosavljević, B. (2015). Pravni okvir i praksa primene posebnih postupaka i mera za tajno prikupljanje podataka u Republici Srbiji [Legal framework and practice of application of special procedures and measures for secret data collection in the Republic of Serbia]. In: Petrović, P. (ured.), *Posebne mere tajnog prikupljanja podataka: između zakona i sudske prakse* [*Special measures for secret data collection: between law and case law*] (pp. 5-33). Beograd: Beogradski centar za bezbednosnu politiku. Downloaded 2021, January 15 from https://bezbednost.org/wp-content/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf
9. Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of

Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2
10. Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013.
11. Škorić, S. (2016). *Uticaj poslovnog imena privrednog društva na njegovo poslovanje - doktorska disertacija* [*The influence of the business name of the company on its business - doctoral thesis*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.
12. Škulić, M. (2007). *Krivično procesno pravo* [*Criminal Procedural Law*]. Beograd: Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik.
13. Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, br. 102/10.
14. Veljković, N. (2017*). Indikatori održivog razvoja: Srbija i svet* [*Sustainable development indicators: Serbia and the world*]. Downloaded 2017, October 22 from http://indicator.sepa.gov.rs/o-indikatori
15. Zakonik o krivičnom postupku [Criminal Procedure Code]. *Službeni glasnik RS,* no. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19.