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PREDGOVOR

Pokrajinski zaštitnik građana – ombudsman i Institut za kriminološka i sociološka istraživanja iz Beograda 16. i 17. novembra 2017. godine u Novom Sadu organizuju Međunarodnu naučnu konferenciju pod nazivom „SLOBODA, BEZBEDNOST: PRAVO NA PRIVATNOST“. Međunarodna naučna konferencija se organizuje uz podršku Organizacije za evropsku bezbednost i saradnju – Misije u Srbiji i Pravosudne akademije. Povodom organizovanja naučne konferencije publikovan je i istoimeni zbornik radova podeljen u dve tematske celine: „Sloboda i pravo na bezbednost“ i „Pravo na privatnost – krivičnopravni aspekti“. U tekstu koji sledi dat je kratak prikaz naučnih i stručnih radova koji će biti prezentovani na međunarodnoj konferenciji i koji će, nadamo se, dati neke od odgovora na brojna aktuelna pitanja o poštovanju čovekove slobode i prava na bezbednost i privatnost.

SLOBODA I PRAVO NA BEZBEDNOST

Prvu tematsku celinu posvećenu slobodi i pravu na bezbednost čini jedanaest naučnih i stručnih radova koji kroz prizmu javnog i privatnog prava, uz filozofski i teorijski pristup, ukazuju na neke od različitih aspekata slobode, bezbednosti i privatnosti. Ići ka ujednačenim standardima zaštite prava čoveka i građanina, poštujući vladavinu prava, zadatak je kome moramo svi biti posvećeni.

U radu „Regulisanje privatnosti u javnom pravu“, prof. dr Jevgen Streltsov, profesor Pravnog fakulteta Univerziteta u Odesi, ukazuje na dijalektiku savremenog razvoja čovečanstva, koju karakteriše integracija svih sfera društvenog života. Uz pozitivne rezultate, nastaju i određeni društveni i pravni rizici, od kojih su mnogi povezani sa pojavom pretnji nepovredivosti privatnog života. Upravo položaj privatnosti (pojedinca) ukazuje na dve glavne komponente civilizovane evolucije: opšteg stepena slobode u određenom društvu i nivoa političkog, ekonomskog, društvenog i pravnog razvoja određene države, a koji su zauzvrat od uticaja na (ne)priznavanje pomenute države od strane međunarodne zajednice. Značaj ovih okolnosti nalaže pravnu analizu i procenu celishodnosti pravnog mehanizma zaštite privatnosti. U tom smislu, ovaj rad pokušava načelno da istraži složene pojmove regulisanja privatnosti u javnom pravu u jednoj državi u procesu tranzicije.

Dr Jovan Ćirić, sudija Ustavnog suda Srbije, ukazuje da poglavlje 24 Evropskog zakona nosi naziv „Pravda, sloboda i bezbednost“ i u tekstu „Sloboda ili hleb“ bavi se pitanjem: „Šta je važnije – sloboda ili hleb (bezbednost)?“ Da li možemo da kažemo da je sloboda u suprotnosti sa bezbednošću? Sloboda i bezbednost su dva suprotna, oprečna fenomena, smatra autor ovog teksta. Ali u sadašnjoj situaciji strah od terorizma je raširen po celom svetu, ljudi se boje i spremni su na to da ne razmišljaju o slobodi već o bezbednosti. Pod izgovorom borbe protiv terorizma, mnoge slobode i ljudska prava mogu biti ograničena ili osporena. Ovde je najinteresantnije to što većina građana prihvata ta ograničenja, takve mere. Oni se dobrovoljno odlučuju za bezbednost a ne za slobodu. S tim u vezi možemo takođe pomenuti manipulacije medijima, ali uopšteno govoreći to nije ništa novo. Erih From je o tome pisao u svojoj knjizi „Bekstvo od slobode“, gde objašnjava da celo društvo može dobrovoljno da se odluči na različite oblike totalitarizma, fašizma. Pre Froma, Dostojevski je takođe o tome govorio u svom romanu „Braća Karamazovi“. On je razvio ideju da se većina ljudi vrlo lako odluči za hleb a ne za slobodu. Suočeni sa socijalnom i ekonomskom neizvesnošću, ljudi su spremni da odaberu materijalne vrednosti i konfor (bezbednost), umesto slobodu. Autor ovog teksta smatra da je to istina. To je glavna poenta ovog članka pod nazivom „Sloboda ili hleb“, članka koji bi takođe mogao biti nazvan „Sloboda ili bezbednost“.

U radu „Načelo svetovnosti i sloboda veroispovesti – deprivatizacija religije u Republici Srbiji“, prof. dr Darko Simović, redovni profesor na Kriminalističko – policijskoj akademiji i prof. dr Vladan Petrov, redovni profesor Pravnog fakulteta u Beogradu, ukazuju da se načelo svetovnosti smatra neizostavnim elementom savremene ustavne države. Istovremeno, multikonfesionalnost savremenih država nameće uvažavanje uloge religije u društvenom životu, što ujedno podrazumeva i potpuno afirmisanje svih segmenata izrazito kompleksnog ljudskog prava, slobode veroispovesti. Međutim, proces desekularizovanja javnog prostora zahvatio je i Republiku Srbiju, budući da se religija sve više izmešta iz privatnog života pojedinaca u javnu sferu. Opasnost od zloupotrebe religije postaje realna, a institucionalni model svetovne države ne predviđa odgovarajuće mehanizme zaštite. Pod uticajem repolitizacije religije, koncept ustavne svetovne države iznova se preispituje. Religija treba da ostane isključivo deo privatnog života čoveka i asocijacija kojima se on svojevoljno pridružuje. Država ima obavezu da dosledno ostvaruje princip tolerantnosti koji omogućava stvaranje društvenog ambijenta u kome će pripadnici svih crkava i verskih zajednica slobodno moći da ostvaruju svoje verske potrebe.

U radu „Aksiološka perspektiva normativnosti krivičnog prava u društvu koje se menja“, Jevgenija Večerova, docent pravnih nauka, doktorand na Katedri za krivično pravo, analizirajući krivičnopravnu normativu, zastupa stanovište da krivično pravo nije samo način regulisanja društvenih odnosa, nego prevashodno temelj osnovnih vrednosti određenog društva (njihova matrica). To je moguće posredstvom ključne odlike poput normativnosti. Zaključak je da je pretpostavka za prelazak normativnosti krivičnog prava u održivi razvoj u određenom vremenskom periodu organsko jedinstvo stabilnosti i dinamizma krivičnog prava, usmerenosti ka ljudskom biću, te ispunjenje očekivanja od društva u pogledu pravičnosti, a u odnosu na celishodno postupanje države kako u određivanju normi, tako i primeni krivičnog prava. Ukratko, određene specifične odlike i vodeći tokovi u daljem razvoju normativnosti krivičnog prava kroz prizmu procesa globalizacije, oličenih u savremenosti i multikulturalizmu, ukazuju na to da su oni u neposrednoj vezi sa uticajem međunarodnog prava. Zapravo, ono promoviše kriminalizaciju dela na državnom nivou, što nije linearno i zavisi od mnogih faktora.

Autor rada „Moralna dekompozicija evropskog čoveka i ulazak u stanje opšte nebezbednosti“ doc. dr Aleksandar Stevanović, docent na Pravnom fakultetu za privredu i pravosuđe u Novom Sadu, polazi od stanovišta da postoji međuzavisnost strukture moralnog sistema i nivoa bezbednosti u jednom društvu. Pokušavajući da utvrdi određene parametre kvaliteta moralnih sistema, autor pokazuje da se odsustvo pojedinih od njih direktno odražava na prirodu odvijanja međuljudskih odnosa. On postavlja pitanje: „Da li su možda promene u moralnom sistemu vrednosti i moralnom obrazovanju i vaspitanju bile direktan uzročnik narušavanja bezbednosnog okvira u kome danas funkcionišu pojedinac, društvo i čovečanstvo?“ Zatim analizira moralne sisteme, kroz koje je prošao evropski čovek, sistem prvobitnog hrišćanstva, rimokatolički, protestantski i sekularni i pokazuje kako je od XI veka do danas, došlo do dekompozicije prvobitnog moralnog sistema u stanje, koje stvara preduslove za ulazak u situaciju opšte nebezbednosti. Autor zaključuje da se u ovom trenutku evropski čovek nalazi ili pred nužnošću promene moralne paradigme ili kontinuiranom jačanju društvene kontrole, sa svim negativnim posledicama, koje iz toga mogu da proisteknu.

Prof. dr Jurij Pudovočkin, profesor Državnog pravnog fakulteta u Moskvi, u radu „Kriminal kao neizvesnost“ pažnju posvećuje istraživanju fenomena krivičnog dela u kontekstu metodoloških mogućnosti kategorije „neizvesnosti”. Zaključuje se da su u savremenom svetu svi ključni parametri krivičnog dela (javna opasnost i nezakonitost) izgubili svojstvo dvoznačnosti, te dobili izrazito subjektivan i pretpostavljeni karakter koji stvara ozbiljne poteškoće tokom njihove kriminalizacije.

U radu „Pravo na privatnost u kontekstu prikupljanja podataka o etničkoj (nacionalnoj) pripadnosti“, prof. dr Goran Bašić, viši naučni saradnik u Institutu društvenih nauka u Beogradu, ističe da su u savremenoj liberalnoj državi etničkim (nacionalnim) manjinama priznata kolektivna prava čija svrha je zaštita njihovih kulturnih identiteta. Međutim, u velikom broju slučajeva ostvarivanje kolektivnih prava je uslovljeno prikupljanjem osetljivih podataka o etničkom (nacionalnom) identitetu građana, a prilikom ostvarivanja pojedinih prava i pristankom građana pripadnika etničkih manjina da se izjasne o etničkoj pripadnosti. Glavna teza koju autor razvija u radu je kako uspostaviti ravnotežu između prava na privatnost i realne potrebe za prikupljanjem, obradom i iskazivanjem podataka o etničkom poreklu.

Prof. dr Igor Vuletić, vanredni profesor Pravnog fakulteta Sveučilišta u Osijeku, u radu „Krivična kleveta i sloboda štampe u sudskoj praksi Evropskog suda za ljudska prava“ ističe da se sloboda štampe smatra kamenom temeljcem demokratije u svakom civilizovanom društvu. Slobodno i nezavisno izveštavanje štampe o sumnjivim ili nezakonitim aktivnostima vladinih zvaničnika informiše javnost i sprečava dalju štetu po društvo. U tom smislu, štampa igra ulogu „nadzornika“ društva i čuvara moderne demokratije. Stoga, važno je da države ne usvajaju zakone koji bi imali efekat odlaganja slobode štampe. Oštri krivični zakoni o kleveti imaju takve efekte. Kako bi izbegli takvu zakonodavnu praksu, Evropski sud za ljudska prava razvio je određene kriterijume kojih bi svaka država trebala da se pridržava dok kriminalizuje klevetu ili uvredu. U ovom radu, autor opisuje relevantnu sudsku praksu Evropskog suda za ljudska prava u ovoj osetljivoj pravnoj oblasti i artikuliše vodeće principe koji su utvrđeni ovom sudskom praksom.

Autor rada „Pravo na privatnost i anonimnost u okviru oblasti slobode i bezbednosti“ doc. dr Aleksandar R. Ivanović, asistent na Departmanu za pravne studije Univerziteta u Novom Pazaru bavi se pitanjima prava na privatnost i prava na anonimnost u okviru slobode i bezbednosti. U tom smislu, autor daje definicije i karakteristike privatnosti i anonimnosti, ukazujući na razlike u značenju između ova dva termina. Potom, ukazuje na značaj zaštite prava na privatnost i anonimnost u današnjem virtuelnom svetu, za uživanje osnovnih sloboda i ljudskih prava, kako u sferi interneta, tako i van interneta. Pored toga, autor povezuje pravo na privatnost i pravo na anonimnost sa bezbednošću, u smislu da zaštita privatnosti i anonimnosti na internetu pruža ogromne mogućnosti za kriminalne aktivnosti koje ugrožavaju sve nivoe bezbednosti, počev od individualne, javne, društvene, ekonomske, finansijske, i slično, pa sve do državne bezbednosti. Cilj

rada je da kroz razmatranje ovih pitanja definiše smernice za izradu zakonskih okvira koji će obezbediti ravnotežu između privatnosti i anonimnosti na internetu i zahtevati od države da zaštiti bezbednost.

Sudija Apelacionog suda u Beogradu dr Dragica Popesku, u radu „Vidovi prava na privatnost i građanskopravna zaštita“ ističe da je pravo privatnosti pravo ličnosti kojim se štite podaci koji se odnose na nečiji privatan život, kao i lični zapisi te osobe. Pravo na privatni život je vid prava privatnosti kojim se štiti lični domen aktivnosti svakog čoveka, radi očuvanja njegovih bioloških, zdravstvenih, moralnih, socijalnih, kulturnih i ostalih potreba, kao pojedinca, ali i u okviru društvene zajednice. Pravom na lične zapise, koje spada u drugi vid prava privatnosti, štiti se pravo na zapis lika, glasa ili lični pisani zapis neke osobe. Pravo privatnosti jedno je od najpovređivanijih prava ličnosti. Neovlašćenim aktima organa vlasti, organizacija i udruženja, ali i medija, moguće je vršiti nedozvoljene upade u privatnost ljudi, čemu svakako pogoduje razvoj tehnike. Posredstvom medija u javnost se često iznose fotografski, filmski, zvučni zapisi, ali i lični spisi, sa zabeleženim intimnim podacima, čime se može povrediti nečija privatnost. Povreda privatnosti se može činiti i neposredno od strane druge osobe, ali i pravnog lica, ili grupe lica, sa i bez posredstva medija, kao neposrednog povredioca. Zaštita ovog prava, koje je zajemčeno ustavnim odredbama i međunarodnim konvencijama, regulisana je građanskopravnim i krivičnopravnim odredbama i drugim imperativnim propisima.

U radu „Migranti su takođe ljudska bića“ Elena Tilovska – Kečeđi, vanredni profesor na Pravnom fakultetu Univeziteta „Sv. Kliment Ohridski” u Bitoli, ističe da smo svi mi ljudska bića sa svojim ljudskim pravima, koja treba da se poštuju ne samo u odnosu jednih prema drugima, nego i od strane državnih i nedržavnih aktera. Ranjive društvne grupe, u koje spadaju i migranti, su takođe ljudska bića čija prava su zajemčena međunarodnim pravom ljudskih prava, Konvencijama koje se tiču statusa izbeglica i mnogim drugim Protokolima i Konvencijama. Međutim, danas, usled terorističkih i pretnji po bezbednost širom sveta i velikih priliva migranata, migranti, tražioci azila i izbeglice poimaju se kao društveno preteće pojave. Ljudska prava ne smeju se ugrožavati u nastojanju da se očuvaju sloboda i bezbednost u svetu, te se stoga ni migranti, kao ljudska bića i pripadnici jedne ranjive društvene grupe, ne smeju ugrožavati.

PRAVO NA PRIVATNOST – KRIVIČNOPRAVNI ASPEKTI

Drugu tematsku celinu zbornika sa Međunarodne naučne konferencije pod nazivom „Sloboda, bezbednost: pravo na privatnost“ čini osamnaest naučnih radova u kojima se analiziraju krivičnopravni aspekti prava na privatnost i zaštita ovog prava u trenutku u kome se nalazimo, idući od neprava ka pravu, od neslobode do poštovanja i zaštite ljudskih prava i sloboda, uvažavajući posebno pravo na privatnost.

Autorka rada „Bezbednost kao preduslov za slobodu - (ne)efikasnost zaštite krivičnog zakona“ dr Zorica Mršević sa Instituta društvenih nauka u Beogradu, bavi se analizom nedavnih slučajeva javno i privatno počinjenog homofobičnog i transfobičnog nasilja protiv LGBT osoba u Srbiji, koje je dovelo do ograničenja lične bezbednosti, a time i do smanjene slobode i osnovnih prava članova ove populacije. Fizičko nasilje protiv osoba koje nemaju tradicionalnu seksualnu orijentaciju niti binarni rodni identitet, kao i govor mržnje u javnim razgovorima, a s druge strane nekažnjavanje onih koji su počinili takva dela, predstavljaju glavne razloge zbog kojih veliki broj osoba koje pripadaju LGBT populaciji živi u strahu za ličnu bezbednost, značajno im je smanjeno kretanje, komunikacija, obrazovanje i profesionalne ambicije, tokom čega vode „duple“ živote bojeći se dalje viktimizacije, a zbog kojih ne prijavljuju slučajeve zločina iz mržnje. Iako je članom 54a Krivičnog zakonika propisano da govor mržnje i zločin iz mržnje predstavljaju otežavajuće okolnosti, do danas niko nije osuđen na osnovu ove odredbe.

Prof. dr Zoran Pavlović, pokrajinski zaštitnik građana – ombudsman, u radu „Pravo na privatnost – izazovi novih obaveza“ ukazuje da nema prava na privatnost bez slobode i bezbednosti. Demokratska država mora da obezbedi pravila da bi građani bili zaštićeni u konzumiranju svog prava na privatnost i zahteva da imaju slobodan i bezbedan život. Zaštićeni ne samo od rada organa javne vlasti, već i od drugih pojedinaca. Borba protiv terorizma, kriminala ili zahtevi javnosti da zna ne mogu biti suprotni pravu na privatnost, slobodi, miru i spokojnom životu. Podaci o ličnosti ne mogu se koristiti suprotno razlogu zbog koga su i prikupljani. Pravo na privatnost kao pravo *sui generis* sa svojim posebnostima prostorne, komunikacijske i informatičke privatnosti danas zahteva moguću konstitucionalizaciju kroz posebno pravo, uključujući i *habeas data*. Republika Srbija pod uticajem delovanja Evropskog suda za ljudska prava, Saveta Evrope i EU, radi na ujednačavanju svog zakonodavstva sa pravom EU. Usaglašavanje domaćeg zakonodavstva sa međunarodnim standardima i pravnom tekovinom EU u odnosu na pravo na privatnost nameće nove obaveze onima koji ih primenjuju.

Unapređenja i zaštite ljudskih prava nema bez rešavanja izazova koji se nalaze pred svima nama.

Sudija Ustavnog suda Srbije i redovni profesor Pravnog fakulteta Univerziteta u Beogradu, prof. dr Milan Škulić, u radu „Načelo javnosti i zaštita privatnosti u krivičnom postupku“ objašnjava osnovne ustavne i krivičnoprocesne aspekte načela javnosti. Autor zaključuje da je u krivičnom postupku često veliki problem efikasna zaštita privatnosti. Ljudska intima je dragocena, ali se u krivičnom postupku ona ponekad i teško povređuje. O velikom značaju privatnosti govore i neki primeri iz umetnosti, pa tako, Dostojevski kaže da postoje tri vrste stvari: jedne su one koje čovek govori svojim prijateljima, druge su one koje drži samo za sebe, ne govori ih ni prijateljima, a postoje i one za koje se boji da ih otkrije i samom sebi. Krivični postupak nažalost, nekada podrazumeva i razotkrivanje čovekove intime, ali je i tada potrebno naći pravu meru. U radu se ističe da je jedan od klasičnih razloga za isključenje javnosti zaštita interesa maloletnih lica, uz konstataciju da su nažalost, neke greške u krivičnom postupku nepopravljive. To je slučaj i sa povredom načela javnosti u određenoj situaciji. Naime, to načelo je povređeno i tada je to jedna od apsolutno bitnih povreda odredaba krivičnog postupka, onda kada sud vodi glavni pretres nejavno, a nije bilo razloga da se javnost isključi. Tada se presuda proistekla iz takvog postupka ukida rešenjem žalbenog suda i novi se glavni pretres vodi javno. To je greška koja se može popraviti. Obrnuto je nepopravljivo. Ako je sud vodio glavni pretres javno, a trebalo je javnost isključiti, to se više ne može ispraviti, slično kao što se objašnjava odnos prve vesti i njenog demantija. Prva vest je kada se džak perja prospe sa petog sprata, a demanti te vesti je kada se to perje na zemlji skuplja i vraća u džak… Autor zaključuje da je posebno značajna zaštita privatnosti određenih ranjivih kategorija, a posebno, dece i maloletnih lica uopšte, jer *dete je „otac čoveka“*. Od deteta nastaje čovek, a ako je dete žrtva nekog teškog krivičnog dela, a naročito krivičnog dela koje je nasilničkog karaktera, pa još ako nepotrebno bude dodatno povređen u krivičnom postupku, njemu se bitno smanjuju šanse da postane uspešan čovek. U romanu „Braća Karamazovi“, Dostojevski zaključuje da „ni najveća sreća čovečanstva nije vredna jedne suze nevinog deteta“. Dete žrtva zločina nosi teške ožiljke kroz ceo život, a naročito kada je žrtva seksualnog nasilja i posebno kada je učinilac bliska osoba. Toj deci treba pomoći, što je moguće kako kvalitetnim zakonodavstvom, tako i boljom praksom postupanja sa žrtvama u krivičnom postupku. Međutim, kada se takvo dete izloži medijskoj poplavi, koja je nekada, što je užasno, čak i svojevrsne „fekalne prirode“ i kada njegovo lice, a naročito rane i ožiljci počnu da pune naslovne strane, onda je ono teško žigosano i njegova budućnost postaje krajnje neizvesna.

Dr Ivana Stevanović, viša naučna saradnica i direktorka Instituta za kriminološka i sociološka istraživanja u Beogradu, rad „Pravo deteta na privatnost i mediji u Republici Srbiji – u kontekstu zaštite dece od prinudnog rada i eksploatacije “ zasniva na analizi medija, institucionalnog i normativnog okvira u Republici Srbiji relevantnog za zaštitu dece od prinudnog dečjeg rada i eksploatacije u kontekstu prava deteta na privatnost, imajući na umu kvantitativnu i kvalitativnu analizu medijskih napisa pod nazivom ‘Medijsko izveštavanje o dečjem radu u Republici Srbiji’. Interes deteta da bude zaštićeno, uključujući i pravo na privatnost, je iznad svih drugih interesa i pretpostavljen je javnom interesu za informisanjem koji obuhvata lične informacije na osnovu kojih se dete i/ili njegova porodica može identifikovati, koje mogu narušiti njegovo dostojanstvo i psihološki integritet. U nastojanju da se ova pojava prepozna, kao i da bi se unapredila praksa izveštavanja o njoj, potrebno je edukovati urednike i novinare o tome kako da izveštavaju na takav način da u potpunosti poštuju načela novinarske profesije, bez ugrožavanja dostojanstva i integriteta deteta.

U radu „Posebne istražne radnje i pravo na privatnost“ prof. dr Ljubinko Mitrović, ombudsmen za ljudska prava Bosne i Hercegovine i redovni profesor na Fakultetu pravnih nauka Panevropskog Univerziteta APEIRON u Banja Luci i doc. dr Goran Gajić savetnik ministra finansija u Vladi Republike Srpske i docent na Fakultetu pravnih nauka Panevropskog Univerziteta APEIRON u Banja Luci ističu da su rasprave o posebnim istražnim radnjama i u slučajevima njihove primene mogućim kršenjima osnovnih ljudskih prava i sloboda stare koliko i same posebne istražne radnje. Po njihovim zagovornicima, a posmatrajući ove radnje isključivo iz ugla postignutih rezultata prilikom otkrivanja i dokazivanja najtežih krivičnih dela, naročito organizovanog kriminaliteta, ove radnje su sasvim opravdale očekivanja. S druge strane, čini se da je dosta neistraženo polje njihovog delovanja zasnovano na najvišim domaćim i međunarodnim dokumentima a tiče se zaštite prava na privatnost i poštovanja porodičnog života, posebno kada je praktični aspekt, odnosno konkretno, primena određene posebne istražne radnje u pitanju, te odgovor na važno pitanje: mogu li ove radnje, ovakve kakve su danas, izdržati kontrolu i kritiku savremenika? U svakom slučaju, ni krivičnoprocesno zakonodavstvo u Bosni i Hercegovini nije odolelo njihovoj širokoj primeni, ali, po automatizmu, ni pitanjima i problemima koja se pri tom otvaraju. Ono što je karakteristično kada ih posmatramo u nekom njihovom razvojnom putu u Bosni i Hercegovini, a koji traje skoro 20 godina, čini se da se povećava broj posebnih ili prikrivenih oblika istraživanja, dok se, s druge strane, veoma često, opet

pod izgovorom borbe protiv najtežih oblika kriminaliteta, posebno, primera radi, terorizma, značajno liberalizuju uslovi za njihovu primenu.

Autorka rada „Pravo na privatnost u svetlu rumunskog zakonodavstva – kaznenopravna politika nasuprot zadovoljstva građana“ dr Laura Marija Stanila, viši predavač na Pravnom fakultetu Zapadnog univerziteta u Temišvaru ukazuje da je pravo na privatnost nedavno postalo jedno od pitanja o kojima se najviše raspravlja u oblasti pravosudne doktrine, posebno u oblasti krivičnog prava i zakonske doktrine krivičnog postupka. Suočavajući se sa sve većom potrebom za zaštitom u sukobu sa veoma opasnim i/ili uznemirujućim socijalnim fenomenima društvo počinje da uči prve lekcije o davanju, u svrhu dobijanja zaštite. Drugim rečima, bezbednost i privatnost su suprotstavljene jedna drugoj. U tom kontekstu, potrebno je prilagoditi zakonsku kaznenu politiku tako da ona može efikasno da odgovori na neke specifične opasnosti po društvo: terorizam, organizovani kriminal, trgovinu drogom, trgovinu ljudima, itd. Potrebno je obrezati i suštinske i proceduralne krivične norme prema zahtevima javne zaštite. Ali, dok suštinske norme kao *ratio legis* imaju za cilj da zaštite pravo na privatnost, proceduralne norme, posebno one koje regulišu posebne tehnike istrage, upravo su suprotne, one imaju tendenciju da se opasno umešaju u privatne živote građana Rumunije u svim njihovim aspektima.

U radu „Tajno praćenje komunikacije kao posebna tehnika istrage u fokusu Evropskog suda za ljudska prava“ dr Milica Kolaković – Bojović, naučni saradnik Instituta za kriminološka i sociološka istraživanja i dr Veljko Turanjanin, vanredni profesor Pravnog fakulteta Univerziteta u Kragujevcu, fokusirani su na nekoliko važnih pitanja koja se bave tajnim praćenjem komunikacije kao posebnom tehnikom istrage. Glavna perspektiva ove analize se bazira na sudskoj praksi Evropskog suda za ljudska prava koja se odnosi na ovo pitanje, ali i na potrebi da se propišu detaljna pravila i uslovi kojima se reguliše pitanje tajnog praćenja komunikacije treće strane u svrhu sprečavanja, istraživanja i/ili prikupljanja dokaza vezanih za zločin. Obe perspektive su rezultat dva paralelna procesa: s jedne strane intenzivan razvoj IKT omogućava različite moderne tehnike i metode istrage zločina, ali takođe može da dovede do novih tipova zločina koji se mogu počiniti korišćenjem IKT-a; S druge strane, ekspanzija osnovnih prava i njihova zaštita, posebno u Evropi, dovodi do podizanja opšte svesti o pravu na privatnost i potrebi da se ono zaštiti. U tom pravcu, izgleda da je glavno pitanje na koje zakonodavci treba da daju odgovor sledeće: Gde je granica između prava na privatnost i javnog interesa da se istraži ili spreči zločin i prikupe dokazi. Potrebno je da se posebna

pažnja obrati na pravo osoba čija se komunikacija prati, kako bi one bile obaveštene da se njihova komunikacija tajno pratila.

U radu „Povreda privatnosti putem tajnog prisluškivanja razgovora“, dr Veljko Delibašić, advokat i naučni saradnik na Univerzitetu u Beogradu, naglašava da poštovanje prava na privatnost predstavlja važnu dimenziju ličnih prava svih ljudi. Na osnovu Ustava Republike Srbije, Zakonik o krivičnom postupku, kao i Zakon o bezbednosno – informativnoj agenciji, Zakon o vojno – bezbednosnoj agenciji i Zakon o vojno - obaveštajnoj agenciji, predviđaju mogućnost povrede privatnosti kroz sprovođenje posebnih dokaznih aktivnosti na koje se ovaj rad fokusirao. Posebna pažnja je posvećena tajnom prisluškivanju razgovora, specifičnoj dokaznoj aktivnosti koja se najčešće koristi u praksi i koja može da dovede do zloupotrebe. Stoga ona može ozbiljno da ugrozi privatnost na nezakonit način, te tako dovede do ozbiljne povrede ljudskih prava. Pored toga, čak i kada se ova posebna dokazna aktivnost sprovodi u skladu sa zakonom, postoji mogućnost da se prilikom njenog korišćenja tokom suđenja bespotrebno naruši privatnost. Rad, shodno tome, traga za mehanizmima kojima će se s jedne strane to sprečiti, a s druge obezbediti puno pravo na odbranu okrivljenog. U završnom delu, rad nudi zaključke i daje predloge kako se može zaštititi privatnost tokom krivičnih postupaka, tj. kako izbeći povredu privatnosti kod tajnog prisluškivanja razgovora i ukazuje na neustavne odredbe za koje predlaže da budu ukinute ili izmenjene kako bi se usaglasile sa Ustavom Republike Srbije.

Autor rada „Zaštita prava na privatnost ugroženih svedoka u sudskim postupcima“, dr Jasminka Džumhur, ombudsmenka za ljudska prava Bosne i Hercegovine, ukazuje na to da zaštita svedoka u krivičnom postupku, posebno ukoliko se radi o žrtvi, predstavlja izazov s obzirom da svedoci imaju nepovoljniji položaj u odnosu na optuženog. Ovo često zahteva dodatne mere zaštite pre, u toku i posle krivičnog postupka, posebno ako se radi o svedocima pod pretnjom i/ili ugroženim svedocima. Cilj ovog rada je da ukaže na zaštitu prava na privatnost ugroženih svedoka u sudskim postupcima, posebno u slučaju kada su u odnosu na ugrožene svedoke, u krivičnom postupku određene mere zaštite. U radu je prezentovan zakonski okvir koji uređuje zaštitu ugroženih svedoka i pravo na privatnost, a potom dat osvrt na njegovu primenu. Analizirano je i pitanje zaštite prava na privatnost ugroženih svedoka u postupku za naknadu štete kada je svedoku u krivičnom postupku određena mera zaštite identiteta.

U radu „Zaštita ličnih podataka u postupcima međunarodne kaznenopravne i policijske saradnje u evropskom pravu“, doc. dr Matko Pajčić, docent na Pravnom fakultetu

Sveučilišta u Splitu, analizira pravno uređenje zaštite ličnih podataka u postupcima međunarodne kaznenopravne i policijske saradnje u pravu Veća Evrope i Evropske unije. S obzirom na jačanje kriminala s međunarodnim obeležjima, intenzivna saradnja između policijskih i pravosudnih tela različitih država postaje nužnost. Jedan od najvažnijih oblika te saradnje jeste razmena informacija koje u pravilu sadrže i lične podatke ne samo osumnjičenih i okrivljenih, već i drugih osoba. Budući da je tehnološki napredak omogućio prikupljanje, obradu i pohranu velike količine takvih ličnih podataka, što dovodi do vrlo ozbiljne pretnje od povrede prava na privatnost i prava na zaštitu ličnih podataka, potrebno je uspostaviti pravni okvir koji će omogućiti efikasnu razmenu informacija između nadležnih tela različitih država, ali uz očuvanje temeljnih prava svake osobe.

Prof. dr Aleksandar Bošković, Kriminalističko-policijska akademija u Beogradu, u radu „DNK baze podataka i pravo na privatnost“ ukazuje da se metoda DNK profilisanja u svetu primenjuje već više od trideset godina, s tim što ističe da na našim prostorima još uvek nema toliki značaj kao što je to u svetskim okvirima. Razlozi za to su mnogobrojni kao npr. neadekvatna zakonska regulativa, nepostojanje utvrđenih standarda koje bi laboratorije koje vrše DNK analize morale da ispune, zatim formiranje i sadržina DNK baza podataka, itd. Cilj ovog rada jeste da predstavi model po kojem je metoda DNK profilisanja odgovarajućim propisima ustanovljena u Engleskoj koji bi u dobrom delu mogao da posluži kao osnova za adekvatno uređenje ove materije i u srpskom zakonodavstvu. U radu će biti izvršen kratak osvrt na istorijski razvoj ove metode u Engleskoj, a biće predstavljeni i neki slučajevi u kojima je primena metode DNK profilisanja dovela do otkrivanja učinilaca pojedinih krivičnih dela. Posebna pažnja će biti posvećena zakonskom uređenju DNK baze podataka u Engleskoj (NDNAD) koja je ustanovljena još 1995. godine, odnosno pitanjima od kojih lica i pod kojim uslovima može biti uzet uzorak za DNK analizu, koji su ti uzorci, kao i to da li se tako pribavljen uzorak može čuvati i koliko dugo. Biće prezentirana i odgovarajuća sudska praksa Evropskog suda za ljudska prava kojom su derogirani pojedini propisi u Engleskoj upravo zbog narušavanja prava na privatnost. Na ovaj način, u neposrednu vezu će se dovesti struktura i organizacija DNK baze podataka, s jedne strane i pravo na privatnost, s druge strane, imajući u vidu da se DNK profil jedne osobe izrađuje na osnovu genetskih uzoraka koji sadrže veoma osetljive genetičke informacije pojedinaca.

Autor rada „Pravo na privatnost u Švajcarskoj – pregled i savremena sudska praksa“, dr Marko Levante, matičar i naučni savetnik u Federalnom vrhovnom sudu Švajcarske i predavač predmeta Privatno pravo na Univerzitetu Sv. Galen, ukazuje na to da član 28

Građanskog zakonika Švajcarske garantuje zaštitu pravnog subjektiviteta. Sve povrede prava na kontrolu korišćenja ličnih atributa u javnosti su nezakonite osim u slučajevima kada su opravdane na osnovu saglasnosti koju je dala osoba čija su prava povređena, primarnog privatnog ili javnog interesa ili zakona. Pod zaštitom na osnovu švajcarskog zakona zabranjuje se svaka vrsta ponašanja kojom se ugrožava pravo na privatnost. Ovaj članak daje kratak pregled pravila kojima se uređuje pravo na poštovanje privatnog i porodičnog života, uključujući načela Evropske konvencije o ljudskim pravima i Federalni ustav Švajcarske. U članku su sumirane neke nove odluke Federalnog vrhovnog suda Švajcarske i objašnjeni načini na koje se pravo na privatnost sprovodi u privatnom pravu. Slučajevi koji su opisani bave se nadzorom u javnosti i analizom do koje mere povreda može biti opravdana primarnim javnim interesom. Drugi slučaj ispituje pravo na privatnost pravnog lica i njegovo pravo da potražuje štetu, ali i zadovoljenje. Na kraju, ovaj članak istražuje nekoliko aspekata međunarodnog privatnog prava.

Prof. dr Gal Ištvan Laslo, redovni profesor Pravnog fakulteta, rukovodilac Odeljenja za krivično pravo Univerziteta u Pečuju, u radu „Sloboda, bezbednost, terorizam i finansiranje terorizma“ ističe da je teroristički akt jedno od najopasnijih krivičnih dela. Njihov zaštićeni zakonski interes je javni interes u pogledu obesnaženog i neometanog rada država, vladinih agencija, i nadalje neometanog, mirnog načina života stanovništva bez straha. Finansiranje terorizma je tema koja je katapultirana u centar pažnje nakon tragičnih događaja 11. septembra 2001. godine. Terorizam je značajno porastao od Drugog svetskog rata. Terorizam sada ima mnogo novih oblika, uključujući nuklearni terorizam, eko-terorizam, biološki terorizam i kiber-terorizam. Sve ove vrste terorističkih aktivnosti zahtevaju finansijska sredstva, i sve imaju finansijske posledice. Cilj ovog članka je da se da pregled o terorizmu, finansiranju terorizma i troškovima terorističkih napada. Studija takođe analizira mađarske aspekte finansiranja terorizma.

U radu „Pravni okvir borbe protiv terorizma u Španiji i zaštita ustavnih principa – posebni osvrt na zločine podstaknute terorizmom“, prof. dr Huan Karlos Karbonel, profesor krivičnog prava na Institutu za kriminologiju i krivično pravo Univerziteta u Valensiji i dr Horhe Koreher, profesor krivičnog prava, Institut za kriminogiju i krivično pravo Univerziteta u Valensiji, daju pregled u pogledu kriminalne politike borbe protiv terorizma u španskom pravnom sistemu. U tom smislu, pored opisivanja pravnog okvira u skladu sa zakonskim reformama uvedenim u Krivičnom zakoniku, govori se o adekvatnosti i koherentnosti njegovih odredaba, u skladu s njihovim odnosom sa ustavnim principima. Shodno tome, moguće je naglasiti stav izuzetnosti španskog

krivičnog sistema, koji je jasno određen prihvatanjem Krivičnog zakona o neprijateljskoj doktrini (*Feindstrafrecht)* kao vodećeg kriterijuma kriminalnih politika za borbu protiv terorizma u Španiji. Ovo je bio trend zakonskih okvira usvojenih u španskim kaznenim reformama kako bi se kontrolisale terorističke aktivnosti ETA-e, takođe i protiv novih pretnji bezbednosti koje predstavlja džihadistički terorizam. Kako bi se objasnili konkretni slučajevi gde kriminalne politike borbe protiv terorizma predstavljaju sukob sa zaštitom ustavnih principa, govoriće se o razmatranju reforme navedene u zločinima podstaknutim terorizmom i ponižavanju žrtve, putem Zakona 2/2015 o terorističkim zločinima. U tu svrhu, razmatraju se propusti u zakonskom okviru, uzimajući u obzir stvaranje niza pravila gde je kažnjavanje smernica jer pokazuje mogućnost oštre kazne kada se ova ponašanja vrše putem društvenih mreža. U tom smislu, ovaj rad predstavlja pristup ograničenjima koja su nametnuta slobodi govora proširivanjem zločina na izjave na društvenim mrežama u vezi sa političkim izborima ili izrazima crnog humora koji bi prema moralnim procenama mogli da se smatraju uvredljivim. Ovaj trend, koji je poslednjih meseci prihvatio Nacionalni sud, pretpostavlja mišljenja na društvenim mrežama koja nisu u vezi s terorizmom, ali se mogu smatrati neslaganjem u pogledu političke i kulturne hegemonističke ideologije, i kao takva biti predmet inkriminisanja.

Prof. dr Mirko Kulić, rektor Univerziteta Privredna akademija, Novi Sad i prof. dr Goran Milošević, profesor Pravnog fakulteta u Novom Sadu, u radu „Zaštita tajnih podataka u poreskom postupku“ ukazuju na to da su službena lica i sva druga lica koja učestvuju u poreskom postupku dužna da čuvaju kao tajne podatke svaki dokument, informaciju, podatak ili druge činjenice o poreskom obvezniku, kao i podatke o tehničkim pronalascima ili patentima, kao i sve druge podatke o tehnološkim postupcima koje primenjuje poreski obveznik, a do kojih su došla u poreskom, prekršajnom, predistražnom ili sudskom postupku. U radu se analizira načelo čuvanja službene tajne u poreskom postupku, koje je propisano u poreskom zakonodavstvu Republike Srbije. Definisani su tajni podaci u poreskom postupku i ukazano je na obavezu njihovog čuvanja. Ukazuju i na situacije kada obaveza čuvanja tajnog podatka nije povređena.

U radu „Posebne metode nadzora ili istrage u novom Zakonu o krivičnom postupku Rumunije i njihov mogući negativni uticaj na osnovna ljudska prava i slobode“, Darian Rakitovan, student doktorskih studija na Pravnom fakultetu Zapadnog univerziteta u Temišvaru, Rumunija, navodi da je analiza kriminoloških i krivičnih rezultata u praksi pokazala da tradicionalne metode borbe protiv kriminala nisu dovoljno efikasne u

suzbijanju organizovanog i/ili drugih oblika velikih zločina. Suočene sa povećanjem organizovanog kriminala, terorizma i korupcije, kao i njihovih posledica koje su mnogo ozbiljnije nego posledice „klasičnog“ kriminala, moderne demokratske zemlje primorane su da usvoje nove zakonske propise kako bi suzbile ove ekstremno opasne društvene pojave. Tako, postojeće mere u polju otkrivanja krivičnih dela i njihovih počinilaca, kao i u pogledu pribavljanja dokaza, zamenjene su novim metodama i modernim sredstvima. Osnovni cilj je suzbijanje glavnih krivičnih dela i omogućavanje efikasnijeg prikupljanja verodostojnih dokaza neophodnih za donošenje optužnica i donošenje sudskih presuda u postupcima protiv počinilaca. Međutim, sama primena ovih mera često može biti opasna po pojedinačna ljudska prava i slobode zagarantovane dokumentima međunarodne zajednice i državnim propisima. U čl. 138-153 Poglavlja IV, Naslova IV Opšteg dela, novi Zakon o krivičnom postupku Rumunije, koji se primenjuje od 1. februara 2014. godine, propisuje ukupno jedanaest, precizno naznačenih, „posebnih metoda nadzora ili istrage“ koje se mogu primeniti u posebnim slučajevima, pre svega kada su u pitanju krivična dela organizovanog kriminala. Ovaj rad daje jednu konciznu analizu pomenutih posebnih metoda propisanih u novom Zakonu o krivičnom postupku Rumunije, sa posebnim osvrtom na procenu njihovog mogućeg negativnog uticaja na osnovna ljudska prava i slobode.

Prof. dr Velimir Rakočević, profesor na Pravnom fakultetu Univerziteta Crne Gore, Podgorica, u radu „Kriminalne aktivnosti ubistvo i teško ubistvo u zakonodavstvu Crne Gore“ bavi se krivičnom analizom svih osnovnih elemenata najozbiljnijih zločina nad životom nekog lica, a to su bez sumnje ubistva i teška ubistva. Akcenat je stavljen na objašnjenje samog čina, posledica, uzročnih odnosa, žrtve, kvalifikovanih oblika, sakupljanja informacija i drugih suptilnih elemenata konkretizacije. Iskustveni deo istraživanja prikazuje oblik i trend zločina u ovoj oblasti.

U svom radu "Da li policija radi u javnom interesu? Međunarodno poređenje - Francuska i Engleska", prof. dr Damijan Kasan, profesor na odseku za studije policije na Univerzitetu Safok u Ipsviču u Velikoj Britaniji, bavi se međunarodnim poređenjem odnosa između policije i javnosti u Francuskoj i Engleskoj. Pitanja koja autor postavlja su da li policija radi u javnom interesu i na koji način ova institucija, odgovorna za kvalitet bezbednosti, služi javnosti i komunicira sa njom? Autor zastupa stanovište da je suprotan socio-istorijski konstrukt policije u Francuskoj i Engleskoj doveo do različitih prioriteta policije, stavova i poslovnih kultura koje utiču na 'interes' javnosti, njenu slobodu i bezbednost. Koristeći ekstenzivne etnografske podatke prikupljene tokom nekoliko godina u francuskoj državnoj policiji i nekoliko britanskih jedinica policije

koje se bave proučavanjem procesa učenja u policiji i obavljanja poslova policije, njene socijalizacije i policijske kulture, autor diskusiju razvija u prilog tezi da britanski model *vršenja policijske službe sa građanima* predstavlja veliki kontrast u odnosu na francuski model *vršenja policijske službe protiv građana*.

FOREWORD

The Provincial Protector of Citizens - Ombudsman and the Institute for Criminological and Sociological research from Belgrade, supported by the Organization for Security and Co-operation in Europe – Mission to Serbia and Judicial Academy, organized the International Scientific Conference „Freedom, Security: The Right to Privacy“ in Novi Sad, Serbia, on 16-17 November 2017. Conference papers and presentations have been compiled in publication of the same title, divided into two chapters: Freedom and the Right to Security and The Right to Privacy - Criminal Law Aspects. The text below offers a short overview of scientific and expert papers presented at the Conference. The papers will, hopefully, answer some of the many current questions on observation human freedom and the right to safety and privacy.

FREEDOM AND THE RIGHT TO SECURITY

The first thematic area is dedicated to freedom and the right to security. It includes eleven scientific and expert papers which, approaching the matter philosophically and theoretically through the prism of public and private law, point to some of the various aspects of freedom, security and privacy. Striving for harmonized standards of human and citizen's rights while observing the rule of law is a task we all of must be dedicated to.

In the paper „Regulating Privacy in Public Law“, Ievgen Streltsov, PhD, Professor from the Faculty of Law of the University of Odessa points towards the dialectics of the contemporary development of humanity which is characterized by the integration of all spheres of the public life. Along with the positive results, there are also certain social and legal risks, many of which are connected with the private life violations threats. The position of privacy (of the individual) shows that there are two main components of the civilised evolution: the general degree of freedom in a specific society and the level of political, economic, social and legal development of a certain country which are in return affecting (non) acceptance of the abovementioned state from the international community. The importance of these circumstances imposes the legal analysis and the assessment of worthiness of the legal mechanism of privacy protection. In this sense, this paper tries to make a general research of the complex notions of regulating privacy in the public law in one state in the process of transition.

Jovan Ciric, PhD, a Judge of the Constitutional Court of Serbia, points to the Chapter 24 of the European Law entitled 'Justice, Freedom and Security' and in his text 'Freedom or Bread' deals with the question of what is more important: freedom or bread (security)? Can we say that freedom is opposed to security? The author of this paper thinks that freedom and security are two opposite phenomena. However, in the current situation the fear of terrorism has been spread around the world, people are afraid and they are ready to replace freedom with security. Under the excuse of the fight against terrorism, many freedoms and human rights can be limited or denied. The most interesting fact here is that the majority of citizens accept these measures and these limitations. They are voluntarily prioritising security over freedom. In relation with this, we can also mention manipulation in the media, bit generally speaking it is nothing new. Erich Fromm wrote about this is in his book „Escape from Freedom“ and in it he explains that the whole society can voluntarily choose different forms of totalitarianism, fascisms. Before Fromm, Dostoyevsky also spoke about this in his novel „Brothers Karamazov“. He has developed an idea that the majority of people very easily deduce to take the bread instead of freedom. Faced with the social and economic insecurity, people are ready to pick material values and comfort (security) over freedom. The author of this paper holds this as true. It is the main point of the article named „Freedom of Bread“ which can also be called „Freedom or Security“.

In his work „The Principle of Secularity and Freedom of Religion – deprivatisation of religion in the Republic of Serbia“, Darko Simovic, PhD, Professor at the Police Academy in Belgrade and Vladan Petrov, PhD, Professor at the Faculty of Law in Belgrade shows that the principle of secularity is considered as the necessary element of the contemporary constitutional state. At the same time, multi-confessionalism of contemporary states imposes respecting of the role of religion in the social life which at the same time includes the total affirmation of all segments of a very complex human right, the freedom of religion. However the process of de-secularisation of the public space has started in the Republic of Serbia, considering the fact that religion is being more and more displaced from the private life of individuals into the public sphere. Danger from abuse of religion is becoming real and the institutional model of the secular state does not predict certain mechanisms of protection. Under the influence of the re-politicisation of religion, the concept of the constitutional secular state is being questioned over and over again. Religion should remain in the sphere of private life of a man and associations he is voluntarily joining. The state is obliged to consequently

realise the principle of tolerance which enables members of different denominations and religious groups to freely realise their religious needs.

In his paper „Axiological perspective of the normativity of criminal law in the society which is being changed, Evgenia Vecherova, Assistant Professor of legal sciences and a PhD student of criminal law, while analysing the criminal legal norms supports the view that criminal law is not just a way to regulate social relationships but primarily the foundation of the basic values of a certain society (their mould). It is possible due to the key features such as normativity. The conclusion is that the assumption for transition of normativity of criminal law into sustainable development in a specific time frame is an organic unity of stability and dynamism of the criminal law, orientation towards the human being and fulfilment of expectations from the society regarding righteousness and in relation to the expedient actions of the state in forming the norms and application of criminal law. In short, certain specific features and leading streams in the further development of normativity of criminal law through the prism of the process of globalisation which are mirrored in the contemporary multiculturalism, show that they are directly connected to the influences of the international law. In fact, it promotes criminalisation on the state level which is not linear and depends on many factors.

The author of the paper “Moral Decomposition of the European Man and Entering the State of General Insecurity”, Aleksandar Stevanovic, PhD, Assistant Professor at the Faculty of Law for Economy and Judiciary in Novi Sad, starts from the claim that there is an interdependence of structures of the moral system and the level of security within one society. By trying to confirm certain parameters of the quality of moral systems, the author shows that the absence of some of them directly affects the nature of relationships among humans. He poses a question: “Were the changes in moral system of values and moral education and bringing up the direct cause of violation of the security framework within which the individual, society and humanity function?” He then also analyses moral systems through which the European man has gone through, the system of the primary Christianity, Roman Catholicism, Protestantism and secularism and show that there was a decomposition of the primary moral system into the state which creates preconditions for global insecurity since the 11th century until now. The author concludes that in this moment European man is facing the necessity to change the moral paradigm or continual strengthening of state control, with all the negative consequences.

In his paper named “Crime as Uncertainty”, Yuri Pudovochkin, PhD, Professor at the State Faculty of Law in Moscow analyses phenomenon of criminal offence in the context of methodological possibilities of the “uncertainty” category. The conclusion is that in the contemporary world all key parameters of the criminal offence (public danger and illegality) lost their ambiguity and received a very subjective character which creates serious difficulties during their criminalization.

In his paper “The Right to Privacy in the context of collecting data on ethnicity (nationality), Goran Basic, PhD, the senior research fellow at the Institute of social sciences in Belgrade claims that in the contemporary liberal state ethnic or national minorities are given collective rights which have the purpose to protect their cultural identities. However, in the large number of cases, realization of collective rights is conditioned by collecting sensitive data on ethnical or national identity of citizens, and people voluntarily accept to talk about their ethnic or national identity. The main thesis which author develops in his paper is establishing the balance between the right to privacy and real need for collecting, processing and publishing data on ethnic origin.

Igor Vuletic, PhD, who teaches at the Faculty of Law in Osijek in his paper “Criminal Defamation and Freedom of Press in Legal Practice of the European Court for Human Rights” claims that the freedom of press is considered as the foundation of democracy in every civilized society. Free and independent reporting on the suspicious or illegal activities of governmental officials informs the public and prevents further damage to the society. In this sense, the press is playing the role of the “supervisor” of the society and the guardian of modern democracy. Therefore it is important that the states do not accept laws which would delay the freedom of press. General criminal laws on defamation have such effects. In order to avoid such legal practice, European Court for Human Rights has developed certain criteria which all states should respect while criminalising defamation. In this paper, the author describes relevant legal practice of the European Court for Human Rights in this delicate field of law and articulates leading principles which are determined with this legal practice.

The author of the paper “The Right to Privacy and Anonymity Within the Field of Freedom and Security” Aleksandar P. Ivanovic, PhD, from the Department for Legal Sciences of the University in Novi Pazar is analysing questions related to the right to privacy and right to anonymity. He stresses out that these notions have different meanings. Furthermore, he is stressing out the importance of the right to privacy and anonymity in today’s virtual world, for enjoying basic freedoms and human rights in the

sphere of internet and outside of it. Additionally, the author connects the right to privacy and the right to anonymity with security in the sense that the protection of privacy and anonymity on internet offers huge possibilities for criminal activities which are endangering all levels of security from individual, public, social, economic, financial and alike through to state security. The purpose of this paper is to define guidelines for creating legal framework which will enable balance between privacy and anonymity on internet and demand security protection from the state.

The judge of the Appellation Court in Belgrade, Dragica Popesku, PhD, in her paper "Types of the Right to Privacy and the Civil Law Protection" claims that the right to privacy is the right of an individual which protects data related to someone's private life as well as personal data of that person. The right to private life is a type of the right to privacy which is protecting the personal domain of every man's activities for the purpose of protecting his biological, health, moral, social, cultural and other needs. A person is therefore protected as an individual and as a member of the society. The right to protection of private date is the second type of the right to privacy and it protects the recording of the face or voice or any personal data that belong to a specific individual. The right to privacy is one of the most violated right of the person. With unauthorised acts of the governmental bodies, organisations and associations, but also the media, it is possible to conduct forbidden intrusions into the privacy of citizens and technology makes this easier. Thanks to the media, photographs, videos, audio recordings and personal data often enter the public space and thereby enable privacy violations. Privacy violations can be done directly by another person, by a legal entity or a group of people, with or without mediation of the media. The protection of this right which is guaranteed by the Constitution and international conventions is regulated by the civil law, criminal law provisions and other imperative regulations.

In her paper "Migrants are Also Human Beings" Elena Tilovska-Kechedji, Assistant Professor at the Faculty of Law, University St. Kliment Ohridski in Bitola claims that we are all human beings with our human rights which should be respected not just in relation to each other, but also by state and non-state actors. Vulnerable social groups such as migrants are also human beings whose rights are guaranteed by the international law on human rights, conventions which are related to the status of migrants and many other protocols and conventions. However, due to the threats of terrorism and threats for security around the world and huge number of migrants, asylum seekers, migrants and refugees are treated as groups who pose a threat to the society. Human rights should not be violated with the aim to preserve freedom and security in the world, and therefore

migrants as human beings should not be endangered as they are also human beings and members of a vulnerable social group.

THE RIGHT TO PRIVACY - CRIMINAL LAW ASPECTS

The second chapter of the International Scientific Conference „Freedom, Security: The Right to Privacy“ publication includes eighteen scientific papers analyzing the criminal law aspects of the right to privacy and the current protection of this right, going from non-law to law, from no freedom to human rights and freedoms observation, with special consideration of the right to privacy.

The author of the paper “Security as the Precondition for Freedom – (non) Efficiency of the Protection by Criminal Law”, Zorica Mrsevic, PhD, of the Institute of Social Sciences in Belgrade is analysing the recent cases of publicly and privately committed homophobic and transphobic violence against the members of the LGBT population in Serbia. This violence has caused limitations of personal security and thereby also limited freedom and basic rights of the members of this population. Physical violence against persons which do not have the traditional sexual orientation or the binary gender identity as well as hate speech in public discussions, and on the other hand the lack of punishment for people who committed these violent acts are the main reasons for a large number of LGBT persons to live in fear for personal security and their mobility, communication, education and professional ambitions are considerably limited, and these people often lead “double lives” because they are afraid of further victimisations and because of which they do not report the hate crimes. Even though the article 54a prescribes that hate speech and hate crimes make aggravated circumstances, until today nobody was convicted based on this article.

Prof. Zoran Pavlovic, PhD, the provincial ombudsman in his paper “The Right to Privacy – Challenges of the New Commitments” points out that there is no right to privacy without freedom and security. A democratic state has to provide rules in order to protect citizens so that they can consume their right to privacy and demand that they have a free and safe life. They should be protected not only from the work of the government but also from other individuals. The fight against terrorism and crime or demands of the public to find out whether they are possibly opposing the right to privacy, freedom, peace and peaceful life. Personal data should be used only for the purpose they were collected for in the first place. The right to privacy as a *sui generis* right with all its specificities of the spatial, communicational and informational privacy

today demands possible constitutionalisation through a specific right including *habeas dama*. Under the influence of European Court for Human Rights, the Republic of Serbia is working on aligning its legislation with the EU law. This imposes new obligations to those who are applying the right to privacy. Improvements and protection of human rights are impossible if there are no solutions to the challenges with which all of us are faced.

The judge of the Constitutional Court of Serbia and the Professor at the Faculty of Law of the University in Belgrade, Milan Skulic, PhD, in his paper "The Principle of Publicity and Protection of Privacy in the Criminal Proceedings" explains the basic constitutional and criminal procedural aspects of the principle of publicity. The author concludes that the big problem in the criminal proceedings is often the efficient protection of privacy. People's intimacy is precious, but in the criminal proceedings it is sometimes heavily violated. Some examples from art also speak about the great importance of privacy. Dostoyevsky says that there are three types of things: the ones which a human being is talking about with their friends, others which he is keeping for himself and does not share with his friends, and the ones which he is afraid to reveal even to himself. A criminal proceeding sadly sometimes includes revealing individual's intimacy but even then it is necessary to find the right balance. This paper claims that one of the classical reasons for excluding the public is the protection of interests of the minors, along with the claim that sadly some mistakes in criminal proceedings are irreparable. This is also the case with the violation of the principle of publicity in a specific situation. Namely, one of the absolutely crucial violations of the provisions of the criminal proceedings occurs when the court is not leading the main trial in public and there were no reasons to exclude the public. In this case, the verdict from such proceedings is being abolished by the solution of the Court of Appellations and the new main trial is being held in the public. This is a mistake which can be correct while the reverse case is impossible to correct. If the court conducts the main trial in public, and the public should have been excluded, it is impossible to correct the mistake, similarly to the relation between the original news and its denial. For example, if the original news is that the sack of feathers was spilled from the fifth floor, the denial is to claim that the feathers are being collected from the ground and returned in the sack… The author concludes that the protection of privacy of the members of vulnerable groups is exceptionally important, especially children and minors because a child is the "father of the man". Child grows up into a man and if the child is a victim of a heavy crime, especially a criminal offence which involves violence and if it is unnecessarily additionally hurt in the criminal proceedings, its chances to grow up into a successful

man are considerably lowered. In the novel “Brothers Karamazov”, Dostoyevsky concludes that even “the biggest happiness of the mankind is not worthy of a tear of an innocent child”. A child victim carries heavy scars throughout his or her life, especially when it is a victim of sexual violence and when the perpetrator is a close person. Such children need to be helped and this should be done with a quality legislation and better practice of treating victims in the criminal proceedings. However, when such child is exposed to the media flood which sometimes worryingly has a “faecal nature” and when its face and its scars start filling newspaper covers, then it is stamped and its future becomes uncertain.

Ivana Stevanovic, PhD, a Senior Research Fellow and Director of the Institute for Criminological and Sociological Research in Belgrade, bases her paper entitled "The Right to Privacy of the Child and Media in the Republic of Serbia - In the Context of the Protection of Children Labour Abuse and Exploitation" on media, institutional and normative framework analysis in the Republic of Serbia relevant for children's protection from forced labor and exploitation in the context of the right of children to privacy and with reference to the 'Media Reporting About Child Labor in the Republic of Serbia' quantitative and qualitative media analysis. A child's interest to be protected, including the right to privacy, is above all other interests and is superimposed to the public interest for information that includes personal information based on which a child and/or its family could be identified, that could violate its dignity and psychological integrity. Advocating for recognition of this phenomenon, as well s to improve the practice of reporting about it, it is necessary to educate editors and journalists about reporting in a way that fully abides by the principles of journalism, without jeopardizing children's dignity and integrity.

In his paper “Special Investigative Activities and The Right to Privacy”, Ljubinko Mitrovic, PhD, the ombudsman for human rights of Bosnia and Herzegovina and Professor at the Faculty of Law at the Pan European University APEIRON in Banja Luka and Assistant Professor Goran Gajic, PhD, who is also an advisor to the minister of finances in the government of the Republic of Srpska and associate professor at the Faculty of Legal Sciences of the Pan European University APEIRON in Banja Luka both claim that discussions on special investigative actions and in cases of their application possible violations of human rights and freedom are as old as investigative activities themselves. According to their supporters, and considering these actions exclusively from the angle of accomplished results during the revelation and proving the heaviest crimes, especially organised crime, these actions have completely justified

expectations. On the other hand, it seems that the under investigated field of their activities is based on the highest domestic and international documents and it concerns protection of the right to privacy and respect of family life, especially when the practical aspect or, concretely, the application of a certain specific investigative action is in question, the answer to the important question: can these actions as they are today survive the control and critique of the contemporaries? In any case, criminal legislation in Bosnia and Herzegovina did not resist their wide application but according to the automatism, they did not resist questions and problems which are being opened either. When we are observing them in their development in Bosnia and Herzegovina which lasts for almost 20 years, it seems that the number of special of hidden models of investigation is rising while, on the other hand, very often, under the excuse of the fight against the heaviest forms of crime, especially terrorism considerably liberalise conditions for their application.

The author of the paper "The Right to Privacy in the Light of the Romanian Legislation – Penal Legal Policy Against Satisfaction of Citizens" Laura Maria Stanila, PhD, senior lecturer at the Faculty of Law at the Western University in Timisoara claims that the right to privacy has recently become one of the most talked about issues in the field of law, especially in the field of criminal law and legal doctrine of the criminal proceeding. While facing an increasing need for protection in conflict with very dangerous and/or disturbing social phaenomena the society begins to learn the first lessons on giving with the purpose of giving with the aim of getting protection. In other words, security and privacy are opposed to each other. In this context, the penal policy should be adjusted so as to it can efficiently reply to some specific dangers for society: terrorism, organised crime, drug and human trafficking etc. Essential and procedural criminal norms should be adjusted according to the demands of the public protection. However, while the essential norms as *ratio legis* have the purpose to protect the right to privacy, procedural norms, especially the ones which are regulating specific technics of investigation, they are exactly opposite, they have the tendency to dangerously interfere into private lives of citizens of Romania in all of the aspects.

In her paper "Permanent Monitoring Communications as a Special Technique of the Investigation in the Focus of the European Court for Human Rights", Milica Kolakovic Bojovic, PhD, research fellow at the Institute of Criminological and Sociological Research and Veljko Turanjanin, PhD, Associate Professor at the Faculty of Law of the University in Kragujevac, were focusing on several important questions related to permanent technique of investigation. The main perspective of this analysis is based on

court practice of the European Court for Human Rights which is related to this question, but also on the need to prescribe detail rules and conditions which regulate the question of permanent monitoring of communication of the third side with the purpose of preventing, researching and/or collecting profs related to the crime. Both perspectives are the result of the two parallel processes: on the one hand, the intensive development of IKT is enabling different modern techniques and methods of investigating crimes, but also can lead to new types of crimes which can be committed by using IKT. On the other hand, expansion of the basic rights and their protection, especially in Europe leads to raising consciousness on the right to privacy and the need for it to be protected. In this direction, it seems that the main question to which the law makers should provide an answer is the following: where is the borderline between the right to privacy and public interest to investigate or prevent a crime and collect evidence. It is necessary to draw attention to the rights of persons whose communication is being monitored so as to they are informed that their communication is being permanently monitored.

In the paper “The breach of privacy by means of secret eavesdropping of conversations”, Veljko Delibasic, PhD, atorney and scientific consultant at the University of Belgrade, emphasizes that the respect of right to privacy represents an important dimension of personal rights of all people. In accordance with the Constitution of the Republic of Serbia, the Code of Criminal Procedure, as well as the Law of Security and Information Agency, Law of Military Informational Agency, envision the possibility of breaching privacy through the enactment of special evidential activities on which this paper is focused. Special attention is devoted to secret eavesdropping of conversations, a specific evidentiary activity which is most widely used in practice and which can lead to abuse. Consequently, it can seriously jeopardize privacy in an illegal fashion, thus causing a serious breach of human rights. Besides that, even when this special evidentiary activity is conducted in accordance with the law, there is always a possibility when it is used during the trial that it can breach privacy. The paper, in conformity with that, searches for mechanisms which will on one side bring this to a halt, and on the other side secure the intact right to a defense of the indicted. In the last part of the paper, it provides conclusions and gives suggestions how to protect privacy during criminal proceedings i.e. how to avoid the breach of privacy when using secret eavesdropping of conversations and points to unconstitutional provisions for which suggests should be abolished or revised so that is conforms with the Constitution of the Republic of Serbia.

The author of the paper “Protection of the right to privacy of endangered witnesses in judicial proceedings”, Jasminka Dzumhur, PhD, ombudsman for human rights of Bosnia and Herzegovina, indicates that the protection of witnesses in criminal proceedings, especially when it is regarding a victim, presents a challenge with the respect to the fact that witnesses have an unfavorable position as opposed to the accused. This regularly demands further measure of protection, during and after criminal proceedings, especially when it is about witnesses who are being threatened or are endangered. The goal of this paper is to point to protection of the right to privacy of endangered witnesses in legal proceedings, especially in the case when there are enacted special measures of protection towards endangered witnesses. The legal framework is presented in the paper which regulates the protection of endangered witnesses and the right to privacy, and after that is given a retrospect on its application. It is also analyzed the issue of protection of right to privacy of endangered witnesses in the indemnity proceeding when the witness is under the measure of identity protection in a criminal proceeding.

In the paper “Protection of personal information in proceedings of international criminal and police cooperation in the European legal system” Matko Pajcic, PhD, Assistant Professor at the Faculty of law at the University of Split, analyzes the legal regulative of protection of right to personal information in proceedings of international criminal and police cooperation in the right of the Council of Europe and the European union. With regard to the strengthening of crime with international designation, intensive cooperation between police and judicial bodies of different countries becomes a necessity. One of the most important forms of this cooperation is the exchange of information that as a rule contain personal information of not only suspects and accused, but also of different persons. Seeing as the technological advance made possible the collection, treatment and entering a large portion of these personal information, which leads to very serious threat of infringing upon the right to privacy and the right to protection of personal information, its necessary to set up a legal framework which will enable an efficient exchange of information between amenable bodies of different countries, but with conserving basic rights of every person.

Professor Aleksandar Boskovic, PhD, The academy of criminalistics and police studies in Belgrade, in his paper “DNA databases and the right to privacy”, reveals that the method of DNA profiling in the world is used for more than thirty years, but puts an accent on the fact that in our region there is still no significant meaning put into it like in the world. The reasons for that are numerous like for example, inadequate legal policy,

thenonexistence of set standards which the laboratories that conduct DNA analysis would need to fulfilll, then the formation and the content of DNA databases and so forth. The aim of this paper is to present a model of DNA profiling which corresponds to rules established in England which can to a great degree serve as a basis for adequate regulation of this subject also in the Serbian legislation. The paper will briefly shine the light on the historical development of this method in England, and also will present some cases in which the application of the method of DNA profiling lead to the discovery of perpetrators of some crimes. Special attention will be devoted to the legislative organization of the DNA database in England (NDNAD) which was established in 1995, with reference to the issues from which persons and under which circumstances could the sample be taken from them for DNA analysis, which are the samples, as well as can they be stored and how long when they are taken in this fashion. There will be presented also the corresponding judicial practice of the European court for human rights which derogated some of the regulation in England because of the breach of the right to privacy. In this fashion, it will be brought in direct correlation between the structure and the organization of DNA databases, on one side and the right to privacy on the other, having in mind that the DNA profile on one person is made on the basis of genetic samples which contain very sensitive genetical information of individuals.

The author of the paper “The right to privacy in Switzerland – an overview and the contemporary judicial practice”, Marco Levante, PhD, registrar and the scientific adviser at the Federal supreme court of Switzerland and the lecturer for the subject of private law at the University of St Gallen, indicates that the article 28 of the Civil Code of Switzerland guarantees protection of legal personality. All infringements of the right to control the use of personal attributes in public are illegal except in cases when they are justified on the basis of consent which is given by the person whose rights are breached, primarily private or public interest or law. Under protection on the basis of Swiss law is prohibited any kind of behaviour which endangers the right to privacy. This article gives a brief summary of the rules which regulates the right to respect of private and family life, including the maxims of the European Convention of Human Rights and the Federal Constitution of Switzerland. In the article are summarized some on the new decisions of the Federal court of Switzerland and the ways are explained by which the right to privacy is administered in private law. The cases which are described deal with the adview in public and the analysis of up to what point can the infringement be justified by a primary public interest. The second case investigates the right to

privacy of a legal person and its right to seek compensation and also satisfaction. In the end, this article investigates a few aspects of international private law.

Istvan Laszlo Gal, PhD, Professor at the Faculty of Law, head of the Criminal Law Department at the University of Pecs, in his paper “Freedom, Security, Terrorism and Financing of Terrorism” points out that a terrorist acts are among the most dangerous crimes. Their legally protected interest is the public interest in terms discouraged and the smooth running of the country, government agencies, and further undisturbed, peaceful way of life without fear. Financing of terrorism is a topic that has been catapulted into the limelight after the tragic events of 11th September 2001. Terrorism has increased significantly since the Second World War. Terrorism now has many new forms, including nuclear terrorism, eco-terrorism, bio-terrorism and cyber-terrorism. All these kinds of terrorist activities require funding, and on the other hand, they all produce financial consequences. The main aim of this article is to give an overview of terrorism, financing and costs of the terrorist attacks. The study also analyzes the Hungarian aspects of the financing of terrorism.

In their paper "The Legal Framework of the Fight Against Terrorism in Spain and the Protection of Constitutional Principles - special emphasis on terrorism spurred crimes," Juan Carlos Carbonell, PhD, Professor of Criminal Law at the Institute of Criminology and Criminal Justice at the University of Valencia and Jorge Correher, PhD, Professor of Criminal Law, Institute of Criminology and Criminal Justice at the University of Valencia, are giving an overview regarding the criminal policy of combating terrorism in the Spanish legal system. In this regard, They are describing not only the legal framework in line with the legal reforms implemented in the Criminal Code, but discussing the adequacy and coherence of its provisions, in accordance with constitutional principles. Consequently, It is possible to emphasize the attitude of specialty of the Spanish criminal justice system, which is clearly determined by accepting the enemy's doctrine (Feindstrafrecht) in Criminal Code as the leading criteria of criminal policy to combat terrorism in Spain. This was the trend of the legal framework adopted in the Spanish criminal policy reforms aimed to control the terrorist activities of ETA and also to control new security threats created by developing jihadist terrorism. In oreder to explain the specific cases where the policy of combating terrorism is in conflict with the protection of constitutional principles, the paper is analyzing the reforms listed in the terrorism spurred crimes in Law on terrorist crimes 2/2015 and the humiliation of the victim. For that purpose, considering the gaps in the legal framework, bearing in mind the creation of a set of rules where the punishment is

the main guideline since it shows the possibility of severe penalties when these acts were made through social networks. In that sense, this paper presents an approach to restrictions imposed on freedom of speech by extending the crimes on statements made within social networks related to elections or political expressions of black humor which, according to the moral assessments could be considered as offensive statements. This trend, which has recently been adopted by national court, implies thoughts expressed on social networks which are not related to terrorism, but can be considered as a disagreement with political and cultural hegemonic ideology, and as such be subject of criminalization.

Mirko Kulic, PhD, rector of the University of Business Academy, Novi Sad and Goran Milosevic, PhD, professor at the University of Novi Sad, in the their paper "Protection of Secret Information in the Tax procedure" suggest that the officials and all other persons participating in tax procedure are obliged to keep the information in question as confidential document, information, data or other relevant facts about the taxpayer, as well as information on technical inventions and patents, as well as any other information concerning the technological processes used by the taxpayer, they find out in the tax, misdemeanor, pre-investigation or court proceedings. This paper also analyzes the principle of official secrecy in tax procedure laid down in the tax legislation in the Republic of Serbia. The secret information in the tax procedure are also defined and the obligation of keeping it is underlined as well. Finally, they point on cases where the obligation to protect and keep secret information is not violated.

In the paper related to "Special methods of surveillance or investigation in the new Criminal Procedure Code of Romania and their possible negative impact on basic human rights and freedoms," Darian Rakitovan, a PhD student at the Law Faculty of the Western University of Timisoara, Romania, alleges that the analysing of criminological and criminal results in practice has shown that traditional methods of fighting crime are not effective enough in combating organized and / or other forms of serious crimes. Faced with an increasing of organized crime, terrorism and corruption, and taking into account that their consequences are much more serious than the consequences of the "classical" crime, modern democratic countries are forced to adopt new legislation to combat this extremely dangerous social phenomenon. Thus, the existing measures in the field of identifying the crimes and their perpetrators and obtaining evidence, have been replaced by new methods. The main goal is the prevention of major crimes and enabling more efficient gathering of credible evidence necessary for the indictment and issue a court judgment in proceedings against the perpetrators. However, the application of

those measures could often be dangerous for individual human rights and freedoms guaranteed by international documents and national regulations. In Art. 138-153 of Chapter IV of Title IV of the General Part, new Criminal Procedure Code of Romania, which is applicable from 1 February 2014, provides a set of eleven precisely designated "special methods of surveillance or investigation" that can be used in special cases , especially when it comes to organized crime. This paper provides a concise analysing of the aforementioned special methods prescribed by the new Criminal Procedure Code of Romania, with special emphasis on the assessment of their possible negative impact on basic human rights and freedoms.

Velimir Rakocevic, PhD, a Professor at the University of Montenegro, Podgorica, in the paper "Criminal activities of murder and aggravated murder in the legislation of Montenegro" is engaged in criminal analyzing of all basic elements of the most serious crimes against the life of a person what murder and it’s aggravated form undoubtedly are. Emphasis is placed on the explanation of the act, result, causal relationships, victims qualified form of collecting information and other subtle elements of concretization. Empirical part of the research shows the shape and trend of crime in this area. with special emphasis on the assessment of their possible negative impact on basic human rights and freedoms. Velimir Rakocevic, PhD, a Professor at the University of Montenegro, Podgorica, in the work of "Criminal activities murder and aggravated murder in the legislation of Montenegro" is engaged in criminal analysis of all the basic elements of the most serious crimes against the life of a person, and they are undoubtedly murder and severe murder. The author focused on the explanation of the act, result, causal links, victims, qualified forms, collecting information and other subtle elements of concretization. Empirical part of the research shows the shape and trend of crime in this area.

In his paper 'Does the Police work in the public interest? An international comparison between France and England', Damien Cassan, PhD, Professor in police studies at the Univesity of Suffolk, Ipswich, UK, deals with an international comparison of the relationship between the police and the public in France and in England. The questions the authors asks are whether the police work in the public interest and how this institution, responsible for security value, serve and interact with the public? The author holds that the opposite socio-historical construct of the police in France and in England has led to distinctive police priorities, attitudes and occupational cultures that all impact the "interest" of the public, its freedom and security. Using extensive ethnographic data collected during several years within the French national police and several British

police forces studying police learning of the police job, police socialisation process and police culture, the authors argues that the British model of *policing with people* greatly contrasts with the French model of *policing against people*.

I POGLAVLJE / CHAPTER I

SLOBODA I PRAVO NA BEZBEDNOST

FREEDOM AND RIGHT TO PRIVACY

Ievgen Streltsov[*]

REGULATION OF PRIVACY IN PUBLIC LAW

Abstract*. Dialectics of the modern development of mankind is characterized by the integration of all spheres of social life. Along with positive results, certain social and legal risks arise, many of which are associated with the emergence of threats to the inviolability of private life. It is the position of privacy (of an individual) that indicates two main components of a civilized evolution: the overall degree of freedom in a society and the level of political, economic, social and legal development of a state, which, in turn, have effect on recognition or non- recognition of such a state by the international community. The importance of these circumstances requires legal analysis and assessment of the effectiveness of the legal mechanism of the protection of privacy. In this regard, in the paper there is made an attempt to conduct overall investigation into complex issues of regulation of privacy by public law in the state in transition.*

Keywords: *state in transition, privacy and its inviolability, public law regulation, branches of public law*

1. Introduction

At the present stage of the state development, despite the constant expansion of public communications, the “sovereignty” of a person, concern about human rights and freedoms is increasing. Reliable provision and protection of rights and freedoms by public law allow a person not only to regulate his relations with other people, society as a whole, the state, but also feel himself a person and a citizen.

In turn, the more people are aware of their rights and freedoms and able to use them, the better these rights and freedoms are ensured by public law instruments, the more persons are capable of taking real part in social processes and to really contribute to the civilized development of the statehood. This is determined not only by people's desire. The need for civilized development must be understood by any democratic state that

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really considers its citizens a source of power and a carrier of sovereignty. Therefore, the state should not only proclaim basic human rights and freedoms, but also make every effort to guarantee and protect them. This task is also in front of Ukraine.

The main burden in such efforts of the state rests on one of the main types of social regulators – law as an integral part of the establishment and regulation of human rights and freedoms. It is law, along with other components that acts as a regulator of the functioning of this mechanism. Law through its rules forms legal relations, provides for the rights and obligations for participants, and thereby creates the necessary legal basis, legal conditions for the possibility for citizens to enjoy their rights and freedoms and formally authorizes the public, its bodies and representatives to legal intervention in the processes taking place in public life (Стрельцов, 2016, p. 15 -23). Such considerations underscore the need for public legal regulation of all processes related to the protection of human rights and freedoms and its analysis, taking into account two aspects - the legal regulation of the establishment and consolidation of human rights and freedoms and the legal regulation of the protection of human rights and freedoms.

This paper begins by examining a concept of privacy wherein the author places focus on the doctrinal history of emergence of the concept (Section 2). Section 3 of the paper draws attention on the basic international law instruments regulating human rights and freedoms protection giving emphasis on the right to privacy. The paper then in section 4 considers issues of privacy protection in the Ukrainian perspectives. Further (section 5) the author gives an overview of the national Ukrainian law on the protection of privacy highlighting the importance of the interbranch approach to addressing it. Section 6 concludes this paper by making some suggestions about the current situation in the field of human rights protection and identifies requirements the law should meet.

2. Definition of the concept of privacy

One of the fundamental rights and freedoms in the overall complex of rights and freedoms is the right to privacy, which involves the ability of each individual to establish legal measures of their relationships with other people, society and the state. It is believed that this issue was first raised in the John Locke's work "Two Treatises of Government", dated 1690. The main idea of this study was based on the understanding of the human rights priority, rather than rights of authority, in social life: "…the power …being the preservation of all of his society it can have no other end or measure … but to preserve the members of that society in their lives, liberties, and possession and so can not be an absolute, arbitrary power over their lives and fortunes…" (Locke, 1690,

p. 180). Law scholars Warren and Brandeis further developed this perception in the scientific article “The Right to Privacy” published in the United States in 1890. This article was largely related to the activities of the press, the emergence of new technologies of that time - photographs, and stated "… invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury” (Warren & Brandeis, 1890, p. 193-220). It is in this article that the term “privacy” was first introduced. Since that time the concept has widely been studied at different levels when it comes to discussing overall complex human rights, freedoms, civil liability and state-building processes issues. Numerous studies on the subject matter have been carried out by Ukrainian scholars. Among them are: Антонович М., Копейчиков В., Недбайло П., Тодыка Ю., Рабинович П., Рудницька О. and others.

Despite the certainty of the concept of privacy, nevertheless there is no unity in its application in different countries. In some countries along with the notion of privacy the concept of “personal life” is used. For instance, this is happening in Ukraine. Thus, Part 1 of art. 32 of the Constitution of Ukraine states: “There shall be no interference in his *personal* (emphasis – I.S.) and family life, except as provided for in the Constitution of Ukraine”.[1] Furthermore, principal international instruments provide for the notion of “privacy”. Evidently there occurs a question of correlation of these concepts.

It should be taken into account that the difference between concepts of “privacy” and “personal life” lies not solely in the area of legal definition. Both serve, in my opinion, as a definite reflection of essential political aspects that characterize features of a state, its political system, economic model of operation etc. Thus, under socialism the idea of private property was completely rejected and the idea of collective property developed, which included personal (individual) property just as its component. In this regard, rights and freedoms of citizens were designed as individual rights and freedoms. Accordingly, the proclaimed rights and freedoms were in conformity, at least on the surface, with the socialist political system. Therefore the notion “personal” was treated positively, and the notion “private” - negatively. Such an approach was developed regarding everything that was associated with the notion “private”. Respectively, the legislation provided for the protection of personal human rights as those not having property content and such that cannot be separated from the personality of an individual (right to name, honor, dignity) (Шишкина, 1999). Alike, dictionaries of that time explained the definition of “personal” as something related to an individual, and

[1] Конституція України 1996, Закон від 28. 06. 1996 № 254 к/96-ВР
http://zakon2.rada.gov.ua/laws/show/254к/96-вр (accessed 19 October 2017)

regarded “private” as an amorphous concept that related neither to the state nor to the public (Даль, 1956). Either, the phrase “private affairs” was interpreted in terms of distinguishing it from the “state affairs” or “public affairs” (Ожегов, 1982). Further studies have not largely changed such an approach to the assessment of these concepts. [2] Therefore as a matter of fact the Russian version of the International Covenant on Civil and Political Rights employs the term “personal” instead of “privacy” (Майоров & Поперина, 2012, p. 34 -38).

But in recent times there has increasingly been dominated an idea of using the term “privacy” in the basic national instruments on the subject matter (Срьогін, 2010; Кириченко, 2013, p. 34 - 40). Furthermore, this illustrates the overall awareness of the increasing importance of a particular person’s life (Стрельцов, 2014).

Thus, the importance of this issue as well as certain legal problems arising out of the identification of its basic concepts require addressing its normative legal regulation.

3. Regulation by international instruments.

The above brief observation applies to the doctrinal history of the emergence of the concept of “privacy”. As to the legislative provision of the concept it worth noting that it was first mentioned in Article 12 of the Universal Declaration of Human Rights, which stated: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”. [3] These provisions were further developed in a number of international treaties and documents, for instance: Convention for the Protection of Human Rights and Fundamental Freedoms (Rome Convention), 4 November 1950; International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, adopted by the UN General Assembly, 16 December 1966. These documents are binding on all states, including Ukraine that ratified them.

Basically, provisions of the mentioned documents establish the so-called legal balance between the rights and freedoms of individuals and the general interest of a democratic society in cases of a conflict of interests. However despite the importance of privacy

[2] See in more detail: Стогова О. (2014). Особисте життя людини: проблеми визначення поняття. *Правовий вісник Української академії банківської справи*, 1(10), с. 6-10.

[3] The Universal Declaration of Human Rights, 10 December 1948 http://www.un.org/en/universal-declaration-human-rights/ (accessed 10 October 2017)

and its inviolability the above statement should not be idealized. In modern conditions, given the recent terrorist attacks in different regions of the world maintaining the balance, especially at the legislative level, between private interests of an individual and interests of other individuals, the public and the state, is regarded fairly problematic. It is the “public interest” that allows some kind of interference with privacy, but here as well certain legal limitations need to be set up. Relevant provisions, in the form of certain reservations, are introduced in international instruments. For example, Art. 29 of the Universal Declaration of Human Rights applies general methodological approach to limitation of human rights in international and national legislations: “ Eeveryone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

Paragraph 1 of Art. 8 of the European Convention states: “Everyone has the right to respect for his private and family life, his home and his correspondence”. Furthermore its Paragraph 2 establishes virtually same exemption from the general rule of non-interference as those provided for in the above Declaration: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. [4]

Accordingly the notion of unlawful interference means that no interference (by a public authority, other public and private organizations and their representatives, other persons) is possible except in cases provided by law. In this case the concept of “arbitrary interference” may also be used to protect the right to privacy. In addition interference must necessarily comply with the basic provisions, objectives and tasks of international instruments, and be employed justifiably. Current European approach to the rights of individuals to privacy is reproduced in Art. 8 “The right to respect for private and family life” of the European Convention. Hence, provisions of Art. 8 not only establish and guarantee right to privacy, but also set restrictions on rights to

[4] Convention for the Protection for Human Rights and Fundamental Freedoms, Rome, 4 November 1950 . http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 15 October 2017)

intervene in privacy, thus creating opportunities for the protection of this area of human life.

4. Situation with protection of privacy in Ukraine.

Concerns about human rights violations and protection of privacy in Ukraine relate to both traditional and new areas. On the whole, human rights activists view the human rights issue as "an iceberg in the ocean of reforms"[5]. The first group of occurrences of human rights violations relate to the complex processes taking place in Crimea and eastern Ukraine. As a consequence, today the biggest migration in Europe is being observed since World War II. In addition to the migration Ukrainian human rights activists name: extrajudicial executions, enforced disappearances, arbitrary arrest and unlawful detention, torture and so on. War crimes should also be added to this list (Захаров, 2015). Similar data are provided not only by Ukrainian specialists. The monitoring Commission of the UN that has been working in Crimea since March 2014 published a report signed by the UN High Commissioner for Human Rights in September 2017. This report draws attention to a number of serious human rights abuses in the peninsula (Crimea), including non-compliance with the principles of objective justice, arbitrary change of legislation, reduction in the level of healthcare and others. Specific attention is drawn to the position of those groups - Crimean residents who refused to acquire Russian citizenship or did not meet the statutory requirements and became, thus, foreign citizens, etc. [6]

Identical complex occurrences have taken place in the east of Ukraine and been reported by the UN Commission. Among the most typical were pointed up: violation of the right to freedom of movement, freedom of opinion and expression, peaceful assembly etc. In addition the report mentions violations of the right to social protection, to adequate housing, land and property rights. Due consideration was given to the compliance with the provisions on the displaced persons. [7]

The second group of violations, conditionally speaking – traditional violations typical not only for Ukraine, are largely associated with certain difficulties in socio-

[5] Два роки дії Національної стратегії у сфері права людини: результати моніторингу. https://www.prostir.ua/?focus=dva-roky-diji stratehiji---natsionalnoji u-sferi-prav-lyudyny-rezultaty-monitorynhu (accessed 6 October 2017).

[6] ООН заявила о нарушении прав человека в Крыму: что есть в докладе? https://www.bbc.com/russian/news-41386295 (accessed 13 October 2017)

[7] The report on situation with human rights in Ukraine 16 February - 15 May 2017. Доклад о ситуации с правами человека в Украине , 16 февраля – 15 мая 2017 г. http://www.ohchr.org/Documents/Countries/UA/UAReport18th_RU.pdf (accessed 17 September 2017).

economic development. According to the systematization carried out by representatives of the Ukrainian Helsinki Group as of the current year numerous groups of violations need addressing. For instance, due regard should be given to the respect for banking secrecy as an integral component of private life, which has recently undergone interference by public authorities, including the National Bank of Ukraine and law enforcement agencies. Focus is also placed on cases of unlawful removal of information from communication channels especially during undercover investigation actions. Surveillance carried out by law enforcement agencies also raises some questions about the legitimacy of such actions. Such occurrences of breach of privacy are brought to the public by prominent politicians, journalists and businessmen.

Among the violations deserving of attention are those linked with the functioning of surveillance cameras in public areas, which does not necessarily disregard for privacy, but the problem may arise when the cameras are employed as part of a crime detection system. Insufficient legal regulation of the issue may lead to the breach of the terms of privacy. Yet important issue is the need in clarifying the regulation of trade in technical means of obtaining information. Likewise, issues relating to the protection of personal data, maintaining appropriate registers and identification documents require further consideration. Violations of rights to privacy may occur during searches and inspections, when, for instance, inspection is, in fact, replaced by searches, or the problem arises out of the inadequate settlement of the return of valuables that are seized during the search.

Another area regarded as an important is the violation of “physical privacy”. For example, forced medical procedures, such as centralized vaccination of children, are the subject of discussion in the media, primarily due to the dubious quality of vaccines, provided by the Ministry of Health. In this connection there is being observed mass refusal of vaccination despite the doctors’ warning about the threat of epidemics. There still exist problems dealt with the current procedure for the forced placement of a person in a psychiatric hospital, which does not properly protect the person from arbitrary actions. The sphere of transplantation and donation is still being improperly regulated, in particular with regard to the social protection of donors. [8]

[8] See in more detail: Тополевський Р. Право на приватність. https://helsinki.org.ua/pravo-na-pryvatnist-r-topolevskyj (accessed 18 September 2017).

5. Regulation of the sphere of privacy by national laws.

Ukraine as a state in transition along with the general problems of legal regulation of private life, inherent to virtually all the countries of this group, has its own, conditionally speaking "personal" issues deserving of attention. In first instance this is the matter of national legal regulation of privacy and its protection on both theoretical and practical levels. Despite the attempts of the state, public organizations and individual human rights activists to provide this sphere with the qualitative protection there is still being felt a need for further effective solutions. According to an opinion of Ukrainian experts, basically, the notion of privacy is in line with the generally accepted definitions and may be defined as a person's behavior outside of his work, study and social activities, to which he gives the status of confidentiality, closing this area of his life for third-party observance and intervention.[9] Private life is an area where an individual decides what and to what extent can be made public.

Sphere of privacy in Ukraine includes the following components: 1) the confidentiality of the sphere of human existence, such as its housing; 2) confidentiality of medical and biological conditions of a person's life, involving information on his health and physical development, such as medical inspection data, information on anatomical or physiological characteristics of a person (so-called "physical privacy"); 3) confidentiality of the intimate and family life, including the sphere of love; personal problems; contents of diaries, letters etc.; 4) information and communication privacy, including inviolability of both direct personal communication with other people, and communication through the use of postal, telephone, electronic and other means of communication, etc. Basically, two main features of this sphere should be taken into account when determining the scope of private life and the possibility of intervention in it. On the one hand, this is permission of a person, and, on the other, - the forced state intervention. Both shall be provided by relevant legislative provisions. Currently it is possible to distinguish two interconnected directions of legal regulation of private life and ensuring its protection. These are the differentiated directions deserving special analysis, but considering the general nature of this paper, I will attempt to examine them jointly.

The first direction deals with the regulation of major organizational and legal measures. One of the fundamental national instruments in this area is the National Strategy for

[9] See: Гарантії недоторканності приватного життя. http://pidruchniki.com/12560607/pravo/garantiyi_nedotorkannosti_privatnogo_zhittya (accessed 6 October 2017).

Human Rights approved by the Decree of the President of Ukraine, August 25 2015. [10] The text of the Strategy is divided into several sections, including: the purpose and results of implementation of the Strategy's provisions; principles of the Strategy; strategic directions; prevention of unlawful actions; ensuring of the implementation of fundamental rights and freedoms of a man and a citizen, etc. It worth highlighting the section of this document named "Ensuring the right to privacy " stating that despite the adoption of a new progressive law on personal data protection the issue on the right to privacy still remains problematic. In particular, there are still no effective means for protection of the right to privacy, for the prevention and cessation of violations of legislation during the processing of personal data; there is no effective independent institutional mechanism for monitoring compliance with the right to protection of personal data; the issue of the existence of excessive personal data bases owned or administered by state authorities has not been resolved; the practice of violation of the right to non-interference in the personal and family life of persons who are in places of detention under judicial decisions or decisions of the administrative body continues. In this context the primary goal of the Strategy is ensuring compliance with the established standards of the right to privacy protection. Among the Strategy's outcomes are indicated: creation of an effective institutional mechanism for monitoring the observance of the right to privacy; the introduction of an effective system of independent control over the activities of law enforcement bodies in respect of the right to privacy; minimization and clear legislative regulation of state interference in the right to privacy; ensuring the right to privacy of persons in places of detention under judicial decisions or decisions of the administrative body, in particular when providing psychiatric assistance forcibly; ensuring compliance with the standards of the right to privacy during the use of video surveillance systems; the introduction of a system that would not allow the creation of excessive state databases of personal data and would exclude the possibility of unlawful interference with privacy. Periodic reports on the implementation of the Strategy's provisions show that, along with successes in this area, some problems still remain unsettled.

The second of the above-mentioned directions of legal regulation of privacy is associated with the establishment of relevant rules of the national legislation.

The principal Ukrainian law - the Constitution – in Art. 3 states that the rights and freedoms of people and their guarantees determine the content and direction of the state.

[10] National Strategy in the field of human rights. Approved by the Decree of the President of Ukraine, August 25, 2015, № 501/2015. http://zakon5.rada.gov.ua/laws/show/501/2015 (accessed 20 October 2017)

The state is responsible to the person for its activities. Establishment and maintenance of human rights and freedoms is the main duty of the state. Article 23 of the Constitution determines that every person has the right to the free development of his personality, provided rights and freedoms of other people are not violated, and has duties to the society in which the free and all-round development of his personality is ensured. Article 32 of the Constitution stipulates that no one shall be subjected to interference with his privacy, family, except the Constitution of Ukraine. Art. 30 guarantees everyone the inviolability of the housing, art. 31 – the privacy of correspondence, telephone conversations, other means of communication.

These basic provisions of the Constitution are both of direct effect and being realized through other branches of Ukrainian legislation. For example, the Civil Code of Ukraine contains provisions that regulate so-called permissible processes in this sphere, recognize and consolidate personal non-property relations in the life of a person. In general, the list of the bases of the civil legislation begins with the definition of the principle of inadmissibility of arbitrary intervention in the sphere of privacy. This finds its resolution in a number of articles of the Second Book of the Civil Code entitled "Personal non-property rights of an individual", particularly in articles 286, 289, 300, 301, 303, 306, 307, 311 and others.

Besides, provisions of the Civil Code directly govern the legal regulation of certain aspects of privacy: physical integrity and medical treatment; preservation of personal data and access to personal data; reputation of a person and its protection; sexual life; family life; housing; correspondence, etc.[11]

It should be noted that the provisions of the Civil Code not only consolidate human rights to privacy, but also provide for the regulation of the legal protection of privacy. Thus, provisions of Art. 61 refer to court as a means of protecting civil rights and interests with the aim of recognizing one's right; recognizing a transaction as invalid; terminating of actions that violate rights; restoring the state of matters, which existed before the violation; compulsory performing of the obligation; changing of legal relationship; terminating of the legal relationship: compensating for damages; compensating of moral (non-material) harm; recognizing of decisions, actions or inaction by the body of state power, local self-government, officials .

[11] Цивільний кодекс України, від 16.01.2003 № 435-IУ. Поточна ред. від 19.07.2017. http://zakon2.rada.gov.ua/laws/show/435-15 (accessed 22 October 2017)

Separate attention should be paid to the provisions of the criminal law, which are systematized in the Criminal Code of Ukraine. Turning to this branch of legislation, it should be borne in mind that it has not only a punitive character: as a branch of public legislation, it must fulfill the “tasks” that the state sets before it. Therefore, it is always important to understand the objectives that the state plans to address, taking into account the specifics of this branch of legislation, and “own” tasks and objectives of this legislation (Стрельцов, 2016, p. 7 - 22).

A more detailed analysis of the norms of the Criminal Code of Ukraine allows giving a description of personal non-property rights in the sphere of private life in terms of their protection and responsibility for their violations. According to the provisions of Article 178 of the Criminal Code of Ukraine, “violation of privacy” means “illegal collection, storage, use or dissemination of confidential information about a person without his consent, or the dissemination of this information in a public statement, a work that is shown publicly or through mass media”.

The Criminal Code also provides for responsibility for the violation of inviolability of housing (art. 162), violation of the secrecy of correspondence, telephone conversations, telegraphic or other correspondence, which is transmitted by means of communication or through a computer (art. 163), disclosure of the secrecy of adoption (art. 168), that can also be viewed as a means of the privacy protection[12].

On the one hand, the existence of a solid number of articles in the Criminal Code testifies to the complex approach of the state to the protection of private life, but, on the other hand - points to the existing inaccuracies in establishing criminal liability for the violation of conditions of privacy, first of all, due to the lack of allocation of the sphere of private life as an object of encroachment and due to the absence of the system of norms that would be able to comprehensively regulate responsibility for dangerous acts in this area.

[12] Кримінальний кодекс України, від 05.04.2001 № 2341-III. Поточна редакція від 03.09.2017 . http://zakon3.rada.gov.ua/laws/show/2341-14 (accessed 21 October 2017)

6. Conclusion.

Summing up, it should be noted that the basic legislation of Ukraine provides for comprehensive regulation and protection of privacy in Ukraine. At the same time, the activities of the state and experts towards the improvement of the legislation have an objective perspective. Here are some my considerations on this matter.

Despite the increasing use of the notion of “privacy” in the Ukrainian doctrine and legislation, there is still a need for concrete measures to achieve conceptual certainty of the “inner” sphere of human and citizen’s life. The following points deserve of attention.

Firstly, it is a concern about terminological and substantial certainty. The establishment of a single concept of “privacy” will allow developing an effective legislation, avoiding double and “fuzzy” meaning. Secondly, the above mentioned shortcomings of the Ukrainian legislation also make it difficult to clearly and fully allocate privacy as a special legal category, which, from my point of view, needs separating it as a single sphere of regulation. Otherwise, the whole complex of legal regulation of the sphere of ensuring privacy, including the legal regulation of its protection, will prove ineffective. Therefore, it is of crucial importance having a clear and comprehensive definition of the concepts of “privacy”, “protection of privacy”, etc.

Activities on the improvement of the quality of legal regulation, in turn, should be carried out in several directions. One of them is the interbranch, conditionally speaking joint regulation of this sphere by resources of all branches of legislation involved in the creation of the necessary legal framework. Accordingly, there arises a need for coherence in the adoption or improvement of legislation, which will act as a basis for regulating and protecting the sphere of privacy, in particular: consistency in the development and adoption of relevant regulations; not only their external, but also internal coherence, that is, when the legal norms of each branch of legislation will not only complement the provisions of the norms of another branch of law, but, figuratively speaking, will fill the entire space of regulation of this sphere.

Similar considerations apply to the provisions of each branch of legislation. Criminal legislation also needs a systemic approach enabling the sphere of private life to be identified comprehensively as a generic (group) object of crime; the aspects of private life, which primarily require legal protection, to be defined clearly. This evidently

affects the quality of criminal law norms; allows designing dispositions of such norms (the notion and signs of an act) and sanctions clearly and precisely.

And finally, legal regulation and legal protection of the sphere of private life nowadays require not only a professional but, in my opinion, a creative approach to the development of a system of legislation that can introduce an adequate legal basis. Especially in the conditions of the modern stage of the development of civilization, which is characterized largely by rapid development of all aspects of life associated with information technology. People, on the one hand, are eager to “reveal themselves” in social networks, and, on the other hand, - to preserve the inviolability of their private life. It is in this dualism of desires that legislation in general and each of its branches should meet the challenges of the reality.

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Ievgen Streltsov*

REGULISANJE PRIVATNOSTI U JAVNOM PRAVU

***Apstrakt**: Dijalektiku savremenog razvoja čovečanstva karakteriše integracija svih sfera društvenog života. Uz pozitivne rezultate, nastaju i određeni društveni i pravni rizici, od kojih su mnogi povezani sa pojavom pretnji nepovredivosti privatnog života. Upravo položaj privatnosti (pojedinca) ukazuje na dve glavne komponente civilizovane evolucije: opšteg stepena slobode u određenom društvu i nivoa političkog, ekonomskog, društvenog i pravnog razvoja određene države, a koji su zauzvrat od uticaja na (ne)priznavanje pomenute države od strane međunarodne zajednice. Značaj ovih okolnosti nalaže pravnu analizu i procenu celishodnosti pravnog mehanizma zaštite privatnosti. U tom smislu, ovaj rad pokušava načelno da istraži složene pojmove regulisanja privatnosti u javnom pravu u jednoj državi u procesu tranzicije.*

***Ključne reči:** država u transziciji, privatnost i njena nepovredivost, regulativa u oblasti javnog prava, grane javnog prava*

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FREEDOM OR BREAD

Abstract: *The chapter 24 of the European Law is titled „Justice, freedom and security“. The author of this text makes the question: „what is more important – freedom or bread (security)?“ Can we say that the freedom stays in confrontation with the security? Freedom and security are two opposite, contrary phenomenons, thinks the author of this text. But, in nowadays situation the fear from terrorism is spread all around the world, people are scared and ready to think not about the freedom, but about the security. Under the excuse of the fight against terrorism, many freedoms and human rights could be limited or denied. The most interesting thing here is that the majority of citizens accept those limitatition, those measures. They voluntary decide for the security and not for the freedom. In the conection with that we could speak also about some media manipulations, but generaly speaking this is not the new one situation. Erich Fromm was the one who wrote about that in his book „Escape from Freedom“, where he explained that the whole society voluntary can decide for various forms of totalitarism, fashism. Before Fromm, Dostojevski also was the one who was speaking about that in the novel “Brothers Karamazovs“. He developed the idea that the majority of people very easily decides for the bread and not for the freedom. Facing social and economic uncerainty, people are ready to choose materialistic values and conformity (security), instead of freedom. The author of this article thinks that it is true.That is the main point of this article titled „Freedom or Bread“, the article that also could be titled „Freedom or Security“.*

Keywords: *freedom; bread; security; terrorism; chapter 24; Erich Fromm; Dostojevski*

A few days ago the Serbian newspaper „Politika“ published an article about the new proposals for the French Code against terrorism. The Serbian newspaper transmitted the article about that new French legislation, the analysis from the „New York times“. That article started with a question: „Freedom or security?“ The author of that article concluded that French people for the first time in their history would choose the

security, but no freedom.[13] Those words from that article were some kind of confirmation for our idea to write an article, an essay about the freedom and the bread.

This short essay about freedom and bread should be started with the words of a well-known Serbian, Bosnian writer from the XIX century, Petar Kočić. He said: „Who sincerely and passionately loves freedom and truth is free and fearless like a God, but contemptible and hungry like a dog“.[14] So, freedom is not without any price. If you want to be free you need to accept something else, at least not to have too much bread. If you want a comfortable life, then you need to make some compromise with your freedom. Dostojevski used to write about that. In his novel „Brothers Karamazov“ he described the imaginary dialogue between the Bishop, so-called the Grand Inquisitor and Jesus Christ. In that novel of Dostojevski, Jesus Christ appeared again in the XV century in southerm Spain and, in a word, the Grand Inquisitor visited Jesus and turned to him: „Go back to the history, and do not come back anymore. People do not need you. Instead of you and your freedom, they need bread.“ Could we say that Dostojevski, who used to live

in the XIX century, predicted the nowadays situation in the XXI century. The materialistic way of thinking and life won all ideals, but first of all, the ideal of freedom. The people are not ready to fight for freedom, especially if they need to pay a high price for that. In that sense, another famous writer, American researcher, Erich Fromm wrote a book in the XX century - „Escape from Freedom“.[15] In that book he, besides else, described how people instead of freedom chose security, he meant conformity. Every freedom means responsibility, peronal initiative and activity, but also many challenges. Most of the people are conservative and they are not ready for something new and something unknown, something that could disturb their security and the established way of their lives. Erich Fromm had in mind Hitler's Germany, but what is the situation in the nowadays world and challenges with terrorism and criminality in general?

Nowadays, everybody is talking about criminality and terrorism. Mass-media are full of stories about terrostic attacks and some horrible crimes, so we could say that the fear from the criminality is something that is dominant in today's society. That fear prepares the publicity to accept many new political and legal measures that could be very

[13] „POLITIKA“ – 06. October 2017. Pp.-03. – an article named: „Francuski zakon protiv terorista zabrinjava UN“

[14] www.бука.com/novosti/655/narodni-tribun-petar-kocic

[15] That book first was published in the USA in 1941, and its first translation to Sebian laguage was finished in 1981.

problematic when we are talking about democracy, human rights and freedom. Could we speak about political and media manipulations in that sense?[16] Could we say that the new dilemma: freedom or security is, as a matter of fact, the old dilemma: freedom or bread. The people are ready to sacrifise a part of their own freedom but being sure that they are not going to become victims of some terrostic attack, or some criminal act. In that sense the people are ready to accept cameras on every corner, if that could increase their security. It is similar to privacy and many other things. So the question that Dostojevski made: „freedom or bread“, now could be formulated like „freedom or security“.

The dilemma of freedom and security is particulary in the focus after the events of September 11th in New York. We have in mind the so called Patriotic Act which was in force in the USA after those events[17] Some solutions in this law were extremely undemocratic, but they were accepted by most people who were frightened by what they saw on TV.[18] So, that law had the support of the majority of citizens and therefore it had some kind of legitimacy.[19] But, that is the main problem here: the legitimacy and the majority. Whether the majority is always right. The majority is, as a rule, conservative and retributive. No progress in history would ever have been made if always the majority had been listened to.[20] So, the majority is not always right. The people believed in many prejudices and lies. The human history is full of such examples. One might say that now the manipulations, lies, prejudices and fears are considerably higher than they used to be before. The people today do not believe in witches, but they believe in the great danger of terrorism. The people today do not accept the stake, but they accept severe punishments for terrorists and criminals. The people persecute those who are different.[21] Once those were the Jews, today all of those who are different, especially if they are comming from Arabic countries. In one word all of those who may threaten our comfort and safety.

Generally said, the majority of the people is ready to sacrifise everything else, just to protect their own comfort and their own safety.You just need to suggest them that it is for their own good. It is for your own sake to record phone conversations. It is for your

[16] Sergej Kara-Murza; - Manipulacija svešću, 2011, translated from Russian to Serbian

[17] Vesna Ćorić; - Nove metode u suzbijanju terorizma u SAD nakon 11. septembra; - „Strani pravni život“ 1-3/2006.

[18] ibidem

[19] Kam C.Wong; - USA Patriot Act: A Preliminary Study; - “Strani pravni život“; - 1-2/ 2007. str. 130-173.

[20] Jovan Ćirić, - Brojke i pravo, “Revija za krininologiju i krivično pravo”- br. 2-3/2016

[21] Jovan Ćirić, - Teroristi - oni i mi, - “Politika nacionalne bezbednosti”, 1/2016

own sake that the state has all informations about you, from your bank accounts to your diseases. It is for your own sake to put as many cameras, including in your own bedroom. It is for your own sake to develop a system of neighborhood watch and to know everything about your neighbor.[22] It is for your own sake that the judicial proceedings be as short and as efficient as possible, neglecting the human rights of the accused person. After all, the question remains: what about freedom. May be in the future, we will be very safe and have enough bread, but without freedom. We could ask ourselves if Musolini's Italy, Stallin's Soviet Union and today's North Korea are ideal places for life. Who would like to live in such countries?[23] In that sense we have to mention a story of the „iron prefect“ Cezare Mori, who was extremelly brutal, but thanks to him the Sicilian Mafia was destroyed in the thirties.[24] The brutality and no freedom were the price for the safe life without criminality. The criminality is on the other side the price for the life in democracy and liberalism. What price would you pay? If politicians, experts and mass media every day would suggest you that the biggest problem in the country is the criminality, that the problem of criminality is high and that we must fight against it, than you would chose the security and no freedom, because it is more comfortable. More comfortable first of all for the majority of those who are not educated and who are collecting all informations from mass media. We must have in mind that mass media manipulate with informations.

Anyway, the question is what is more important to the people: bread or freedom? That is the dilemma between physicality and convenience on the one hand and idealism on the other. So,when we say bread we do not mean the bread in the literal sense of the word. It must be said that a life without freedom is not much worth. But it also has to be said that a life without bread is impossible. So, what is more important? The answer is clear – more important is the life, however it may be. That is why the bread is still more important than the freedom. In that sense the famous French writer Albert Camus used to say that for today’s man the freedom is still a luxury that can wait.[25]After all, the security and protection of the security and life are more important than the freedom itself. But, we can say that an exaggeration in the protection of the security at the end endangers the life itself.

[22] Jovan Ćirić, - Đenoveze sindrom; - “Strani pravni život“, 1/2010

[23] Zoran Stojanović – “Politika suzbijanja kriminaliteta”; - Novi Sad, 1991.

[24] Jovan Ćirić, - Sicilijanski gvozdeni prefekt, in the text collection. “Suprotstavljanje savremenim oblicima kriminaliteta”, - Tara 2015.

[25] http://filozofskimagazin.blogspot.rs/2017/03/alber-kami-prometej-u-paklu.html

Under the pretext of protecting the security we can give unlimited power to the state authorities. To what can that lead? It can lead to the situation that the state can put in prisons, concentration camps, or hospitals[26] all those who are considered dangerous for the safety. At the end the state could even eliminate them. All the terrorists, all the strange people that are different, all the criminals, all the homosexuals. May be in such a society we would be safe, but many of us would not be alive. You might want to perform a genetic testing. If you conclude that the baby will grow up to be a dangerous lunatic or terrorist, you could just make an abortion.Would you like to live in such a society, where everything is regulated and there are no differences between people?

The lack of freedom means that at the end there would be no bread, or better said no life. So, it is very important to find the right balance between those two things – bread (security) and freedom, materialism and idealism. Thanks to the media and political manipulations, the fear from criminality and terrorism is spread all around the publicity and in a such situation it is very difficult to find that right balance between those two sides of the humanity. Thinking only about their own interests, their own conformity, people, voters in one society accept radical solutions that are offered by the politicians.

I can not find a job in my own country because of the migrants. I do not feel safe because of them. So, the solution is to eliminate them.The first measure is to bring them back to their own countries, the second measure is to record them and their conversations, but who can say what would be the third measure. Once you open the Pandora's box, everything is possible, not only for the strangers, but for all of us. In that sense we should recall a poem written by a German priest, poet Martin Niemoeler from the thirties.

„First Nazis came to pick up communists,
I was silent, because I was not communist.
Then they came to pick up social democrats,
I was silent, because I was not social democrat.
Then they came to pick up Jews,
I was silent, because I was not Jew.
Finally, they came to pick me up,
But there was no one to say anything and to stay on my side.“

[26] Vojin Dimitrijević; - Međunarodno zaštićena ljudska prava i Jugoslavija; - „Anali Pravnog fakulteta u Beogradu“, 6/1987

We can make a paraphrase of those words and we could say: „First they came to pick up terrorists, - criminals, - lunatics, - finally they came to pick me up, but almost all were imprisoned and there was no one who would say anything in my favour.“

Returning back to the article from the newspaper „Politika“, we mentioned at the beginning of this our short essay that we have to point out several interesting, but problematic solutions in that French anti-terroristic legislation. Those who are suspected only for sympathies in favor of terrorists would be isolated and arrested. The police would have the right to enter into the homes of those supporters and to investigate them without any judicial permission. That law predicts a right of the state authorities to shut down mosques or other religious places, places that disseminate dangerous ideas. Who is going to say which ideas are dangerous and which ideas are not dangerous? How to prove which place is dangerous, in which proceeding? Could you imagine such a regulation in Serbia or in Russia. What would be the reaction in the Western publicity?

Here it has to be said that in the last year of his regime, Slobodan Milošević tried to put in force a special anti-terrostic law, but, thanks to other political parties, that idea was stopped.[27] In that sense, we could also say that those who make attacks against France, UK,USA, or Germany are terrorists, but those who make attacks against Serbia or Russia are fighters for the freedom, or at least extremists. What do you think about that?

Here, we have to say also a few words about the general „pre-crime“ concept. That concept is a criminological concept that tries to enter into the Criminal law. That concept usually makes some legal problems, problems in the everyday functioning of the law. The pre-crime concept means a preventive performance of the state authorities. In the traditional legal sense, the state has the right to react only when one crime happens, but here, in the pre-crime concept the state has the right to react even when there is no crime. With that concept, we are facing many constitutional problems, problems of democracy and human rights.[28] Traditionally there is a crime, there is the police, investigation, prosecution, judges and at the end the perpetrator goes to jail, but with the pre-crime concept, there is no crime, but a man also is isolated. He goes to the jail only because someone thinks that he is a dangerous man.

[27] Slobodan Antonić, - Nije još gotovo; - Beograd, 2015

[28] Radovan Lazić; Svetlana Nenadić; - Javno tužilaštvo pred izazovima Zakona o sprečavanju nasilja u porodici; - u zborniku radova „Reformski procesi i poglavlje 23 /godinu dana posle/-krivičnopravni aspekti; - Zlatibor 2017, pp 494

Who is the one who will decide that someone is dangerous? The police, prosecutor, judge, psychologist, psychiatrist or social worker? The logic of the law is completely different than the logic of the psychology.[29] What would be the procedure in which it would be decided about someone's danger? When one is declared dangerous would he/she have the right to appeal? When it comes to the French law how to decide if a mosque is a dangerous place? Who will make the decision? May be a theologian, but an islamic or a christian one? Anyway, it would be a funny situation with priests in the court.

You can not just say that someone or something is dangerous. That must be regulated by procedure. Who, when, how and under which procedure someone could be declared as a dangerous person? It is easier when you have objective criteria, when there is a criminal offense. The psychologists always express a subjective opinion. That opinion depends not only on the knowledge of the psychologist, but also on his/her ideological attitude and many prejudices.[30] One judge is not without any prejudice and ideological attitude, but generally speaking in the law there are not so many prejudices. The law operates with objective criteria.

It is true that one individual could be very dangerous and that he/she could make a big damage to the society, but here we have to say that the damage made by the society to the individuals is usually bigger. So, when we are talking about the freedom and the bread (security), about the danger, about the damage made to individuals and the damage made to the society, we are talking about the balance. How to make a balance between freedom and security? The German Constitutional Court gave some opinions and made some decisions about some typical situations. Here, we are mentioning some of those opinions and decisions.

The police in Germany took data about islamic students and graduated students of the age from 18 to 40 or students coming from Islamic countries. The German Constitutional Court ruled that it violates the human rights if such a thing is not justified in every particular case.[31] The second situation is an infiltration into the personal

[29] Franjo Bačić; - Krivično pravo i Opšta deklaracija o pravima čoveka; Međunarodni pakt o građanskim i političkim pravima, te Međunarodni pakt o ekonomsko-socijalnim i kulturnim pravima; - „Arhiv za pravne i društvene nauke; - 4/1968

[30] Thomas Szasz; - Proizvodnja ludila – uporedno proučavanje inkvizicije i pokreta za brigu o duševnom zdravlju; - (prevod sa engleskog) Zagreb, 1982

[31] Bodo Pieroth; - Sloboda nasuprot bezbednosti; - „KOPRA – Kontinentalno pravo“ godina 1, broj 1, 2017. pp 18 – we have to mention here that the title of this article, translated to English is „Freedom vs. Security

computers to monitor and analyze their memory. That has to be an exception, said the Constituitonal Court of Germany. That means that actual evidences prove a concrete danger.[32] The next problem is the obligation of the telecommunication companies to submit data to the police. That must be proportional to the significance of the fundamental human rights. This attitude of the German Constitutional Court was confirmed by the ECHR.[33] What about the authority to shoot down a plane that is about to be used in some terrostic purposes. The German Constitutional Court considers that such authorization is not consistent with the right to life and human dignity.[34]

Those attitudes and opinions of the German Constitutional Court are interesting and useful, but we must say that there is no general rule that could be in effect in every social situation. Every situation must be treated separately, on a special, different way. That is the only conclusion that we can make when we are talking about the general relation „Freedom vs. Security“, or „Freedom vs. Bread“ like the title of this article says. Sometimes the freedom would be in the first plan, but sometimes it would be the security (bread).

The chapter 24 of the European law is titled: „Freedom, security and justice“ and in that sense it could be said that the justice is that balance between the freedom and security. But, what is the justice – that is the question.[35] For someone who lives in the socialism, the justice is one thing, but for someone who lives in a liberal democracy and capitalism, the justice is something else. Sometimes the justice is when you give priority to the freedom, but, in other situations the justice is when you give priority to something else, to the security. There is no definitive answer that will work in every situation. And it does mean that sometimes the answer of what is justice and what is justful depends on some extra-legal influences on the men that are deciding in one concrete case. The influence of the mass media in today’s world is very important, so we could speak about trials by media, or at least, the imposition of quick and easy solutions in the process of adopting a new legislation.[36] Here we could speak about penal populism, where the justice is always understood as severe punishments and nothing else. So, to find the definition of justice between the freedom and security (here called „bread“) is a very complicated process that depends on many psyhchological and sociological factors. In

[32] ibidem- pp.19

[33] ibidem

[34] ibidem

[35] Hans Kelzen – Šta je pravda; - „Pravni život“ 12/1995

[36] Aleksandra Ilić; - Mediji i kriminalitet – kriminološku aspekti; - doctoral thesis, July 2017 at the Belgrade Faculty of law.

that sense, we can conclude that the fear of criminality and terrorism is so spread among Europeans and Americans that they are ready to accept everything, only to protect themselves, their security and conformity. It could be said that it is a step backward compared with those of some earlier times. Many writers and philosophers, such as Dostojevski, Fromm and Camus, wrote about the relation between the freedom and bread (security). So we just wanted to remind that in the nowaday's world that is full of stories about criminality and terrorism.

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SLOBODA ILI HLEB

Apstrakt: *Poglavlje 24 u procesu usklađivanja srpskog prava sa pravom EU, nosi naslov: „Sloboda, bezbednost i pravda“. Autor ovog članka postavlja pitanje da li i koliko „sloboda“ i „bezbednost“ stoje u međusobnoj suprotnosti. Ovo je naročito karakteristično za najnovija vremena straha od terorizma. Pod izgovorom zaštite od terorizma, mnoge individualne slobode i ljudska prava danas bivaju ograničene i uskraćene. Što je najvažnije, najveći broj građana sasvim svesno i svojevoljno prihvata ta ograničenja i svesno se opredeljuje ne za slobodu već za bezbednost. U vezi sa tim se naravno može govoriti i o različitim medijskim manipulacijama, ali situacija uopšte nije nova. O tome je govorio i Erih From u svojoj knjizi „Bekstvo od slobode“, kada je pokazao da se vrlo lako može dogoditi da se čitava društva svesno mogu opredeliti za različite oblike totalitarizma, od fašizma do komunizma. O svemu je još pre toga govorio i Dostojevski u svom romanu „Braća Karamazovi“, kada je razvio ideju i stav da se najveći broj građana vrlo lako opredeljuje ne za slobodu, nego za hleb. Pred socijalnom i ekonomskom neizvesnošću, ljudi će se, smatra Dostojevski, a autor ovog članka se slaže sa tim, svesno opredeljivati za materijalne vrednosti i bezbednost. O tome je reč u ovom članku: „Sloboda ili hleb“, članku koji bi se isto tako mogao nasloviti i „Sloboda ili bezbednost“.*

Ključne reči: *Sloboda; hleb; bezbednost; terorizam; poglavlje 24; Erih From; Dostojevski.*

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NAČELO SVETOVNOSTI I SLOBODA VEROISPOVESTI – DEPRIVATIZACIJA RELIGIJE U REPUBLICI SRBIJI

Apstrakt: *Načelo svetovnosti smatra se neizostavnim elementom savremene ustavne države. Istovremeno, multikonfesionalnost savremenih država nameće uvažavanje uloge religije u društvenom životu, što ujedno podrazumeva i potpuno afirmisanje svih segmenata izrazito kompleksnog ljudskog prava, slobode veroispovesti. Međutim, proces desekularizovanja javnog prostora zahvatio je i Republiku Srbiju, budući da se religija sve više izmešta iz privatnog života pojedinaca u javnu sferu. Opasnost od zloupotrebe religije postaje realna, a institucionalni model svetovne države ne predviđa odgovarajuće mehanizme zaštite. Pod uticajem repolitizacije religije, koncept ustavne svetovne države iznova se preispituje. Religija treba da ostane isključivo deo privatnog života čoveka i asocijacija kojima se on svojevoljno pridružuje. Država ima obavezu da dosledno ostvaruje princip tolerantnosti koji omogućava stvaranje društvenog ambijenta u kome će pripadnici svih crkava i verskih zajednica slobodno moći da ostvaruju svoje verske potrebe.*

Ključne reči: *Ustav Srbije, svetovnost, sloboda veroispovesti, desekularizacija, konstitucionalizam.*

1. Uvod

Jedan od neizostavnih zahteva savremenog konstitucionalizma je svetovnost države (Sajo, 2008: 620). Uopšteno posmatrano, načelo svetovnosti države može biti operacionalizovano na dva različita načina. Manje je zastupljen model striktne separacije države i crkve, dok pretežniji broj država počiva na modelu kooperativne separacije (Simović, 2015: 721-739). Ipak, nije reč o jednoobraznim modelima jer svaka država, saglasno svojoj tradiciji i postojećim potrebama, uobličava optimalni model odnosa između države i crkve. Ukoliko se izuzme model agresivnog ateizma koji bitno sužava mogućnost ostvarivanja slobode veroispovesti, model striktne separacije države i

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crkve može biti otelovljen u ustavnoj formi militantnog sekularizma ili tolerantnijeg oblika striktne separacije. S druge strane, postoji niz modaliteta i stepena saradnje između države i crkve, tako da se u samoj praksi gotovo ne mogu pronaći dva istovetna modela kooperativne separacije (Petrov, Mikić, 2015: 637-641).

Multikonfesionalnost savremenih država je pravilo, a takva socijalna struktura zahteva striktnu separaciju države i crkve, ali i prepoznavanje uloge koju religija ima u društvenom životu (Draškić, 2013: 37). Ipak, pogrešna je pretpostavka zasnovana na tezi da je modernizacija savremenih država valjano uspela da neutrališe uticaj religije u javnom životu. Tradicionalne crkve su toliko snažne da ne prihvataju marginalizovanu ulogu, svedenu isključivo na privatnu sferu života ljudi, koju im nudi koncept svetovnosti države (Casanova, 1994: 5). Nesumnjivo, savremene države u velikoj meri obeležava raskorak između normativnog i stvarnog u sferi odnosa države i crkve. Posledica takve političke prakse je neminovnost razlikovanja pojmova sekularizma (svetovnosti) i sekularizacije. Dok se načelo sekularnosti odnosi na pravno definisanje odnosa između političkih i crkvenih vlasti, sekularizacija se odnosi na socio-kulturološku dimenziju procesa istiskivanja religije iz javnog života (Gasda, 2015: 67). Prema tome, mnoge države, iako nominalno svetovne, nisu uspele da eliminišu snažan uticaj religije u javnom životu. Religije, bez izuzetka, postaju važan politički činilac (Jevtić, 2007: 67). Nesumnjivo, snažnije prisustvo religije ugrožava temelje moderne ustavne države – neutralnost i svetovnost (Lobeira, 2014: 386).

Srbija nema jasno izgrađen model svetovnosti. Nakon, gotovo poluvekovnog, komunističkog perioda u kome je religija, po marksističkoj matrici, shvatana kao opijum za narod, a sloboda veroispovesti povremeno u potpunosti gušena politikom agresivnog ateizma, Srbija je iznova trebalo da pronađe svoj model svetovnosti. Ustav Srbije od 1990. godine je afirmisao slobodu veroispovesti, a svetovni karakter države je proizlazio iz ustavne odredbe koja je predvidela da su verske zajednice odvojene od države i slobodne u vršenju verskih poslova i verskih obreda (član 41, stav 2). Sve do 2000. godine, pod snažnim uticajem komunističkog nasleđa, Srbiju obeležava dosledno sprovođenje načela svetovnosti, ali i nesmetano ostvarivanje slobode veroispovesti. Međutim, u XXI veku, usled različitih faktora, a delom i zbog nerazumevanja pravog značenja načela svetovnosti, Srbiju je zahvatio proces deprivatizacije religije. Otuda, ovaj rad, imajući u vidu značaj ustavnog načela svetovnosti države, ima za cilj da ukaže na njegov odnos sa postojećim procesom deprivatizacije religije. U prvom, suštinski uvodnom delu rada biće reči o ustavnim načelima uopšte i u Ustavu Srbije od 2006, dok će drugi deo rada biti posvećen ustavnosudskom operacionalizovanju načela svetovnosti države u Srbiji. Treći deo rada ukazuje na konkretne primere izmeštanja religije iz

privatne sfere i njenog prodiranja u javnu sferu. Naposletku, u okviru zaključnih razmatranja, autori ukazuju na nužnost doslednijeg ostvarivanja načela svetovnosti zbog njegovog neporecivog značaja za savremeni pojam konstitucionalizma.

2. Ustavna načela uopšte i u Republici Srbiji

O ustavnim načelima ili ustavnim principima, njihovoj sadržini i značaju, malo je i uzgredno pisano u domaćoj ustavnopravnoj literaturi. S obzirom na pojačano interesovanje za koncept ustavnog identiteta, uglavnom se u pokušajima definisanja ovog koncepta spominju i kategorije kao što su ustavna načela, ustavne vrednosti i sl.

Srpski ustavni pravnici ustavna načela, po pravilu, određuju sa stanovišta pozitivnog prava. Ratko Marković piše: „U njemu se (misli na Ustav – *V. P*) uređuju (...) i načela koja prožimaju odnose između države i njenih građana, s jedne, i države i drugih država u međunarodnoj zajednici, s druge strane. Obično se ta načela izlažu na udarnom mestu, na samom njegovom početku, u odeljku koji nosi naziv ili *uvodni deo*, ili *osnovne odredbe*, ili *osnovna (opšta) načela*, ili *osnovni članovi ustava*, ili, jednostavno, *ustavni naziv države*. Te odredbe (...) imaju drukčiju pravnu prirodu od ostalih pravnih normi ustava, jer se one, po pravilu, ne mogu neposredno primenjivati. Njihov smisao je da posluže kao oslonac pri tumačenju neodređenih i nejasnih normi u ustavu ili popunjavanju eventualnih pravnih praznina u ustavu“ (Marković, 2013: 29).

Sve što profesor Marković tvrdi o ustavnim načelima može se smatrati tačnim, osim njihovog „lociranja“ isključivo u prvi deo Ustava i u formalni ustav uopšte. Ako se ustavna načela odrede kao fundamentalne norme koje ne samo da služe za tumačenje ostalih ustavnih normi, već na kojima počiva celokupni ustavni poredak (Stojanović, 2013: 218) onda je praktično indiferentno da li su one proklamovane u ustavu ili nisu, nego se pretpostavljaju, odnosno izvlače iz celine ustava. Pri tom, s obzirom na njihov fundamentalni karakter, ona se odnose ili prožimaju, suštinski određuju celokupni ustavni poredak. Stoga je teško, pa čak i neprihvatljivo, vezivati ustavno načelo za jednu ustavnu odredbu, član ili deo ustava. Kao što ćemo kasnije pokazati, za određenje sadržine i smisla načela svetovnosti u ustavnom poretku Srbije nije relevantan samo član 11, koji sadrži dve relevantne komponente ovog načela: 1) odvojenost crkve i verskih zajednica od države i 2) zabranu uspostavljanja monopola jedne religije. Moraju se uzeti u obzir i neke druge odredbe Ustava.

S druge strane, ako pogledamo ustave uporedno, kao i Ustav Srbije od 2006. lako ćemo doći do zaključka da nisu baš sve ustavne odredbe u prvom delu ustava, po svojoj

suštini, ustavna načela. U Ustavu Srbije, odredbe o političkim strankama (član 5), o glavnom gradu (član 9), kao i o zaštiti državljana i Srba u inostranstvu (član 13) i položaju stranaca (član 17), jesu važne, ali nisu fundamentalne, identitetske, odnosno nemaju karakter ustavnih načela.

U svakom slučaju, bilo gde da se (pro)nalaze ustavna načela i bilo koliko da su sadržinski precizno definisana, ostaje „manevarski prostor“, štaviše nasušna potreba da se ta načela dograđuju, objašnjavaju, konkretizuju, upravo stoga što najčešće nisu neposredna primenjiva. U tom smislu, od izuzetnog značaja je uloga ustavnog suda, i to ona „proaktivna“, ona koja se u nauci naziva ustavnosudskim aktivizmom i koja podrazumeva da se ustavni sud u tumačenju ustava oslanja ne samo na „slovo ustava“, već i na merila kao što su „duh ustava“, „celina ustava“, „jedinstvo ustava“, „kontinuitet ustavnopravnog poretka“ i sl. Iako se za Ustavni sud Srbije ne može reći da je u dosadašnjoj praksi pokazao preterani „aktivizam“, u njoj se mogu naći primeri u kojima je ovaj organ doprineo tumačenju sadržine ustavnih načela, pa čak i njihovom delimičnom „kreiranju“ (Petrov, Manojlović, 2014: 80-94). Tako će i u ovom radu biti nekoliko reči o ulozi Ustavnog suda u definisanju načela svetovnosti.

Ratko Marković ustavna načela klasifikuje na sledeći način: 1) definicija države; 2) odnosi između državnih vlasti i granice državnih vlasti; 3) teritorijalno uređenje države; 4) obeležja identiteta države; 5) odnos države, pojedinca i institucija društva; 6) spoljna politika države i odnos međunarodnog i ustavnog prava (Marković, 2013: 29). Iako smo pokazali da je određenje ustavnih načela koje daje profesor Marković suviše usko, s obzirom na to da je pozitivno-pravno, njegova klasifikacija ovih načela, u kojoj značajno mesto zauzimaju i ona koja se tiču odnosa države, pojedinca i institucija države, potvrđuje da je doktrina priznala status ustavnog načela svetovnosti. Pri tom, svetovnost se kao ustavno načelo podjednako može podvesti i pod definiciju države, granice državne vlasti i obeležja identiteta države. Svetovnost je suštinski ugrađena u samu definiciju građanske države koja pretenduje da bude ustavna demokratija. Ona je, kako ćemo u ovom radu pokušati da dokažemo, i jedna od temeljnih vrednosti modernog konstitucionalizma.

Dakle, ako za polaznu, uzemo definiciju ustavnih načela koja kaže da su ova načela „po pravilu, norme fundamentalnog karaktera, bilo da se nalaze u formalnom ustavu bilo u nepisanom ustavnom pravu, koje čine temelj pravnog poretka, - dakle, osnov državnog i društvenog uređenja -, iz kojih se, s jedne strane, izvlače ostale, posebne ustavne norme, dok s druge, služe upravo za njihovo tumačenje radi obezbeđivanja jedinstva ustavnog poretka“, kao i da „zajedno s ustavnim vrednostima (...) čine ustavni identitet

države“ (Petrov, 2016: 508), nema nikakve dileme da načelo svetovnosti objedinjuje sve bitne elemente ove definicije.

3. Ustavnosudsko operacionalizovanje načela svetovnosti u Srbiji

Za razliku od prethodnog ustava iz 1990, ustavotvorac od 2006. godine je izričito, u okviru dela posvećenom načelima Ustava, proklamovao svetovnost države (član 11, stav 1). U nastojanju da donekle precizira značenje ovog načela predviđa se da su crkve i verske zajednice odvojene od države (član 11, stav 2), kao i da se nijedna religija ne može uspostaviti kao državna i obavezna (član 11, stav 3). Pri tumačenju načela svetovnosti od značaja je i definisanje pravnog statusa crkava i verskih zajednica. U tom kontekstu izrečeno, Ustav jamči ravnopravnost crkava i verskih zajednica i proklamuje njihovu autonomnost pri uređivanju svoje unutrašnje organizacije, verskih poslova, javnog vršenja verskih obreda, osnivanja verskih škola, socijalnih i dobrotvornih ustanova, kojima samostalno upravljanju (član 44).

Budući da je već nagoveštena njegova elastičnost i nedovoljno precizan pojmovni sadržaj, izvesno je da načelo svetovnosti može biti na različite načine ovaploćeno u stvarnosti. Premda je nauka državno-crkvenog prava nedovoljno razvijena u Srbiji, u našoj teoriji su se pojavila dva dijametralno suprotna stanovišta o sadržini i domašaju ustavnog načela svetovnosti.

Prvo gledište apostofira evoluiranje ustavnih rešenja u pravcu jasnog opredeljivanja za dosledno ostvarivanje načela svetovnosti države. Naime, Ustav od 1990. godine nije izričito proklamovao svetovni karakter države, ali se takvo opredeljenje ustavotvorca moglo zaključiti iz ustavne odredbe koja predviđa da su verske zajednice odvojene od države i slobodne u vršenju verskih poslova i verskih obreda (član 41, stav 2). Osim toga, za praćenje evolucije odnosa države i crkve od značaja je i rešenje u starom ustavu koje je predviđalo mogućnost države da materijalno pomaže verske zajednice (član 41, stav 4). Imajući u vidu činjenicu da je za razliku od prethodnog ustava, kao ustavno načelo proklamovana svetovnost države, ali da je istovremeno izostavljena mogućnost države da materijalno pomaže verske zajednice, može se zaključiti da su ustavna rešenja evoluirala u pravcu doslednije separacije države i crkve. Otuda, u našoj teoriji izveden je zaključak „da se Ustav od 2006. opredelio za sistem stroge odvojenost između verskih zajednica i države, dok je Ustav od 1990. ostavio to pitanje unekoliko otvorenim dopustivši da se zakonodavnim putem priznaju i pojedini elementi kooperativne odvojenosti“ (Marinković, 2011: 379). Prema tome, razvitak ustavnih rešenja u pravcu jasnijeg izražavanja svetovnog karaktera države ne bi trebalo da je

posledica slučajnosti, već jasnog opredeljenja ustavotvorca da promeni prirodu odnosa države i crkve. Svesnim odustajanjem od pominjanja materijalne ili neke druge pomoći države crkvi otklonjena je mogućnost da u uređenju odnosa države i crkve zakonodavnim putem budu priznati i pojedini elementi sistema kooperativne odvojenosti (Draškić, 2013: 39). Države koje se opredeljuju za sistem kooperativne odvojenosti unose odgovarajuće odredbe o tome u svoje ustave, pa prema tome sam ustavni tekst ne opravdava da se načelo svetovnosti države protumači u smislu kooperacije, jer „istorijsko i sistematsko tumačenje jasno navode na suprotan zaključak – da je ustavotvorac imao na umu sistem stroge, a ne kooperativne odvojenosti“ (Marinković, 2011: 383).

Opozitno gledište je zasnivano na drugačijim premisama. Ignorisanjem evoluiranja ustavnih rešenja, zagovornici kooperativnog modela odvojenosti države i crkve svoje argumente zasnivaju na načelnom tumačenju načela svetovnosti države. U tom kontekstu izrečeno, apostrofira se prevashodno deklatorno značenje ustavnog načela svetovnosti države, a negira se njegovo pravno-tehničko značenje (Avramović, 2011: 298). „Drugim rečima, pominjanje sekularnosti, ne može uticati na određivanje vrste i kvaliteta sistema odnosa države i crkve, pogotovu ne u smislu da on nužno implicira sistem *striktne* odvojenost države, crkve i verskih zajednica“ (Avramović, 2011: 298). „Uostalom, ni u jednom ustavu u svetu se izričito ne pominje kooperativna odvojenost, pa ona ipak predstavlja ne samo dozvoljenu realnost, nego i sve poželjniji oblik separacije države i crkve“ (Avramović, 2011: 297). Prema tome, ustavno načelo svetovnosti države ne predstavlja prepreku da se odnos između države i crkve uspostavi na načelu kooperativnosti. „U izvesnom smislu, nije moguće ni zamisliti da nema saradnje između crkava i verskih zajednica i države, ako ni u čemu drugom, a onda upravo u cilju ostvarivanja slobode veroispovesti, odnosno omogućavanja crkvama i verskim zajednicama da regulišu sopstveno delovanje i slobodno upravljaju svojim poslovima“ (Đurić, 2013: 46).

Odlučujući o ustavnosti Zakona o crkvama i verskim zajednicama[37] Ustavni sud Srbije je prihvatio drugo gledište i meko poimanje načela svetovnosti. Naime, Ustavni sud je zaključio da ustavna rešenja iz 2006. godine „same po sebi, ne znače sistem potpune separacije crkve od države, već da nema državne crkve i da nema identifikacije države sa posebnom religijom ili religijom uopšte, te da su crkve i verske zajednice slobodne da samostalno utvrđuju svoju unutrašnju organizaciju i verske poslove i da država ne

[37] Zakon o crkvama i verskim zajednicama, Službeni glasnik RS, br. 36/2006.

sme da ometa donošenje i primenu autonomnih propisa i odluka“[38]. Osim ovog načelnog osvrta na ustavna odredbe, svoje gledište Ustavni sud je, unekoliko neuobičajeno, zasnivao i pravdao već postojećim zakonskim rešenjima. Naime, odredbe Zakona o radiodifuziji[39], predviđaju da su, pored ostalih subjekata, i crkve i verske zajednice ovlašćeni predlagači članova Saveta Republičke radiodifuzne agencije, dok odredbe Zakona o osnovama sistema obrazovanja[40], predviđaju da se jedan od članova Nacionalnog prosvetnog saveta za predškolsko, osnovno i srednje opšte i umetničko obrazovanje bira, pored ostalih, i iz redova Srpske pravoslavne crkve, odnosno ostalih tradicionalnih crkava i verskih zajednica. Osim toga, Ustavni sud je konstatovao da je prema ranijem Zakonu o ministarstvima, koji je važio do 2012. godine, postojalo Ministarstvo vera i dijaspore, a da je nakon toga, uredbom Vlade konstituisana Kancelarija za saradnju sa crkvama i verskim zajednicama. Saglasno takvom rezonovanju, Srbiju već uveliko odlikuje kooperativna separacija države i crkve, te otuda i ustavno načelo svetovnosti treba tumačiti upravo na takav način.

Ipak, odluka Ustavnog suda kojom se potvrđuje ustavnost Zakona o crkvama i verskim zajednicama nije doneta jednoglasno. U izdvojenom mišljenju sudije Marije Draškić naglašava se: „Ustavni sud je, potpuno zamenjujući teze, svoj zaključak o tome da u ustavnom poretku Srbije ne postoji sistem stroge odvojenosti crkve i države, već sistem kooperativne odvojenosti, zasnovao na odredbama nekih zakona koje sve odreda upravo mogu biti potencijalno sumnjive sa stanovišta ustavnog načela o svetovnosti države! Umesto da se izjašnjava o tome kakva je prava priroda ustavnog načela o svetovnosti države koje jemči čl. 11. Ustava, odnosno da iznese razloge zbog kojih smatra da je odnos crkve i države prema tom Ustavu organizovan kao sistem kooperativne odvojenosti, te da na osnovu takvog tumačenja ocenjuje ustavnost i ovog osporenog, kao i svih drugih potencijalno spornih zakona, Ustavni sud zaključuje da baš postojanje pomenutih zakonskih odredbi dokazuje da je reč o sistemu kooperativne odvojenosti crkve od države u Republici Srbiji!“[41].

4. Proces deprivatizovanja religije u Srbiji

Odluka Ustavnog suda Srbije kojom se prihvata meko poimanje ustavnog načela svetovnosti države delom je posledica i već uveliko odmaklog procesa deprivatizacije

[38] IUz – 455/2011.

[39] Zakon o radiodifuziji, Službeni glasnik RS, br. 42/2002.

[40] Zakon o osnovama sistema obrazovanja, Službeni glasnik RS, br. 72/2009 i 52/2011.

[41] Izdvojeno mišljenje sudije Marije Draškić u predmetu IUz – 455/2011.

religije. Nakon tzv. demokratskih promena iz oktobra 2000. godine, koji je označio i obračun sa svim recidivima komunizma, započet je retrogradan proces deprivatizacije religije koji podrazumeva njeno prodiranje u već sekularizovane sfere društvenog života, kao što su politika, javni obrazovni sistem ili odnosi među polovima.

Bez odgovarajuće pripreme i istraživanja usmerenog ka iznalaženju optimalnog modela za srpsko multikonfesionalno društvo, već u junu 2001. godine uvedena je verska nastava u osnovne i srednje škole kao fakultativni predmet.[42] U međuvremenu, veronauka je postala jedan od dva obavezna izborna predmeta. Akternativni predmet je Građansko vaspitanje. Verska nastava je konfesionalnog tipa i pravo da je realizuju u državnim školama imaju tradicionalne crkve i verske zajednice koje egzistiraju na teritoriji Republike Srbije.[43] Sagledano sa čisto pravnog stanovišta, ustanovljeni model verske nastave u skladu je sa postojećim međunarodnopravnim standardima i ustavnim zahtevom svetovnosti države. Verska nastava jeste konfesionalnog tipa, ali se roditeljima i deci ostavlja mogućnost optiranja za alternativni predmet, ukoliko je religiozni pogled na svet suprotan njihovim ubeđenjima. Prema tome, ustanovljeni model verske nastave ne ugrožava slobodu od religije. Ipak, ono što je usaglašeno sa ustavom, ne znači da je istovremeno legitimno i celishodno. Pre svega, treba imati u vidu činjenicu da je na prostoru bivše Jugoslavije religija značajno zloupotrebljavana u političke svrhe zarad mobilisanja nacija u građanskim ratovima 90-ih godina minulog veka. Građanski ratovi, premda motivisani stvaranjem nacionalnih država, poistovećivani su sa verskim ratovima, a posledice u vidu verske netrpeljivosti i visoke etničke distance i dalje su prisutne i predstavljaju ozbiljan konfliktni potencijal (Simović, Simeunović-Patić, 2017: 114). Otuda, uvođenje veronauke u tranzicionoj državi, u kojoj se nacionalni identitet gradi na dominantnoj verskoj pripadnosti, može biti dodatni faktor dezintegrisanja nestabilnog multikonfesionalnog društva.

S obzirom na značaj koji religija ima u savremenom društvu, izraženo je gledište da u svetovnim državama treba da postoji „predmet koji bi na vrednosno neutralan, racionalan i kritički način upoznavao učenike sa opštom istorijom svih religija i verskom etikom“ (Draškić, 2013: 43). Saglasno karakteru naše civilizacije, „nesporno je da su objektivna i pluralistički intonirana znanja o tri najveće monoteističke religije neophodna za razumevanje filozofije, istorije, književnosti, slikarstva, arhitekture i

[42] Uredba o organizovanju i ostvarivanju verske nastave i nastave alternativnog predmeta u osnovnoj i srednjoj školi, Službeni glasnik RS, br. 46/2001.

[43] Reč je o Srpskoj pravoslavnoj crkvi, Islamskoj zajednici, Katoličkoj crkvi, Slovačkoj evangeličkoj crkvi, Jevrejskoj zajednici, Reformatorsko hrišćanskoj crkvi i Evangelističkoj hrišćanskoj crkvi.

mnogih drugih oblasti ljudskog stvaralaštva i svetske tradicije, te da su sastavni deo opšte kulture i civilizacije“ (Draškić, 2013: 43).

Nedugo nakon uvođenja veronauke u javni obrazovni sistem, u januaru 2004. godine, Bogoslovski fakultet je vraćen u okrilje Beogradskog univerziteta, ali je i dalje ostao pod snažnim institucionalnim uticajem Srpske pravoslavne crkve. Bogoslovski fakultet mogu upisati samo oni koji su kršteni i koji imaju blagoslov nadležnog episkopa. Ukoliko je reč o pripadniku neke druge verske zajednice, on mora imati saglasnost arhijereja Srpske pravoslavne crkve. Dakle, ne postoje objektivna merila prilikom upisa na Bogoslovski fakultet, što ostavlja mogućnost i za diskriminatorsko ponašanje.

Izuzev sfere obrazovanja, Zakon o crkavama i verskim zajednicama pruža i druge primere koji se mogu osporavati sa stanovišta načela svetovnosti države. Najviše kontroverzi izaziva zakonsko rešenje da država, za izvršenje pravnosnažnih odluka i presuda koje izdaju nadležni organi crkava i verskih zajednica, pruža odgovarajuću pomoć, na njihov zahtev u skladu sa zakonom (član 7, stav 2). Svoje gledište o ustavnosti pomenutog zakonskog rešenja Ustavni sud je zasnovao tezi da je reč o mogućnosti, a ne o obavezi državnog organa da asistira u sprovođenju pravnosnažnih odluka nadležnog organa crkve ili verske zajednice, kao i na odredbama Zakona o državnoj upravi[44] i Zakona o policiji[45] o nadležnostima policije kao organa državne uprave za obavljanje poslova koji se odnose na bezbednost države i građana. Ipak, ostaje dilema kakve bi to prirode mogla biti odluka crkve ili verske zajednice čije sprovođenje treba da pomognu državni organi, a da to ne proizlazi iz njihove zakonske obaveze koja se odnosi na zaštitu bezbednosti ili održavanje javnog reda i mira?

Proces deprivatizacije religije zahvatio je i vojsku Republike Srbije. Naime, Uredba o vršenju verske službe u Vojsci Srbije[46] sadrži određena rešenja koja mogu biti okvalifikovana spornim sa stanovišta načela svetovnosti države. Izrazito neuobičajeno, pored toga što treba da doprinosi ostvarivanju slobode veropispovesti njenih pripadnika, verskoj službi u Vojsci Srbije dodeljuje se značajna, a čini se i neprimerena misija. Verska služba u Vojsci Srbije organizuje se radi ostvarivanja slobode veroispovesti, jačanja duhovnih i moralnih vrednosti pripadnika Vojske Srbije, negovanja vojničkih vrlina i patriotizma, kao i oblikovanja građanske odgovornosti (član 3, stav 1). Ona se organizuje u funkciji razvoja, izgradnje, održavanja i povećanja njenih operativnih

[44] Zakon o državnoj upravi, Službeni glasnik RS, br. 79/2005, 101/2007 i 95/2010.

[45] Zakon o policiji, Službeni glasnik RS, br. 101/2005 i 63/2009.

[46] Uredba o vršenju verske službe u Vojsci Srbije, Službeni glasnik RS, br. 22/2011.

sposobnosti prilikom izvršavanja svih definisanih misija i zadataka (član 3, stav 2). Osim što se sastoji iz pojedinih apsurdnih fraza, potpuno nesvojstvenih pravnom aktu (da doprinosi negovanju vojničkih vrlina i patriotizma ili oblikovanju građanske odgovornosti), ovakva misija dodeljena verskoj službi predstavlja nedvosmisleno kršenje principa svetovnosti i vrlo transparentno dopušta desekularizovanje vojne službe. Iako je ustanovljena radi ostvarivanja slobode veroispovesti njenih pripadnika, uvođenje verske službe se pravda i višim državnim razlogom - povećanja operativnih sposobnosti Vojske Srbije.

Izuzev desekularizovanja pravnog sistema, o kome je bilo reči, i javna sfera zahvaćena je permanentnim procesom deprivatizacije religije. Ne tako retko, najviši državni organi organizuju sastanke sa visokim predstavnicima crkve sa kojima razmatraju neka od aktuelnih izrazito svetovnih pitanja (status Kosmeta, odnosi sa Republikom Srpskom, evropski integracioni procesi itd.). Gotovo da nema značajnije političke stranke koja ne obeležava stranačku slavu.[47] Deprivatizovanje religije karakteriše i nivo lokalne samouprave. Naime, pretežniji broj opština u Srbiji obeležava slavu. Primera radi, u Beogradu se kao gradska slava obeležava Spasovdan, koja nakon liturgije u prisustvu predstavnika grada, podrazumeva i litiju centralnim gradskim ulicama. Premda je prevashodno reč o porodičnom prazniku, ovakvu praksu prihvata i veliki broj javnih ustanova (fakulteti, škole, bolnice itd.). Na taj način, „krsne slave od porodičnih praznika dobijaju državni, javni karakter“ (Ilić-Popov, 2015: 270).

Izloženi primeri svedoče o izrazito niskom nivou pravne i političke kulture i nerazumevanju pravog značenja načela svetovnosti. Budući da je Srbija multikonfesionalno društvo, prodiranje religije u javnu sferu može da vodi povredama osnovnih ljudskih prava i negiranju osnovnih zahteva savremenog konstitucionalizma.

Zaključni osvrt

Svetovnost države je ustavno načelo koje je istovremeno i jedna od temeljnih vrednosti modernog konstitucionalizma. Država je ustavna demokratija, između ostalog, i prema tome koliko se ovo načelo dosledno realizuje u praksi.

Premda je Ustav Srbije od 2006. godine proklamovao načelo svetovnosti države, postojeća praksa, ali i stanovište Ustavnog suda je da se umesto dosledno sprovedene

[47] Srpska napredna stranka slavi Sv. Petku, Demokratska stranka i Demokratska stranka Srbije slave Đurđevdan, Srpska radikalna stranka slavi Tri jerarha, dok forum žena Socijalističke partije Srbije obeležava Vavedenje Presvete Bogorodice.

separacije države i crkve prihvati model kooperativne separacije. Imajući u vidu multikonfesionalnu prirodu srpskog društva, dosadašnju ustavnopravnu tradiciju, izričito konstitucionalizovanje načela svetovnosti države, kao i izrazito negativnu ulogu koju su tradicionalne crkve imale za vreme građanskih ratova na tlu bivše Jugoslavije, primerenijim bi se moglo smatrati nastojanje da se separacija države i crkve doslednije sprovede. Snažnije prodiranje religije u javnu sferu ugrožava delotvorno ostvarivanje principa neutralnosti i tolerantnosti koji omogućavaju stvaranje društvenog ambijenta u kome će pripadnici svih crkava i verskih zajednica slobodno moći da ostvaruju svoje verske potrebe.

Separacija države i crkve predstavlja jedan od najbitnijih progresa u ljudskoj istoriji, a to je ujedno i jedini put koji omogućava toleranciju, koegzistenciju i demokratiju u okviru države (Bennoune, 2007: 314). No, istovremeno treba apostrofirati i to da dosledna separacija države i crkve ne isključuje saradnju među njima. Društvena realnost čini neminovnim njihovu saradnju. Međutim, budući da sloboda veroispovesti nije apsolutno zaštićeno pravo, njeno ostvarivanje može biti u koliziji sa ostvarivanjem nekih drugih ljudskih prava ili može protivrečiti nekim drugim društvenim vrednostima, kao što su razvijanje duha tolerancije i očuvanje javnog reda, društvenog mira i bezbednosti. Otuda opravdanje da država doslednije ostvaruje načelo svetovnosti, koje treba da brani, ukoliko je neophodno, i militantnom formom demokratije.

Suprotno preovlađujućem trendu jasnog prepoznavanja opasnosti od procesa deprivatizacije i repolitizacije religije, Srbija se kreće sasvim drugim pravcem koji, unekoliko i artificijelno, uvlači religiju u javnu sferu. Jedan od faktora koji nesumnjivo doprinosi takvom retrogradnom procesu je i skromna pravna kultura i elementarno nepoznavanje značaja i suštine načela svetovnosti. Ona je delom posledica i nerazvijenosti državno-crkvenog prava kao naučne discipline, koja je posle Drugog svetskog rata gotovo potpuno zamrla. Upravo zbog takvog društvenog miljea separacija države od crkve mora biti doslednije ostvarena sve dok ne bude ustanovljeno postsekularno društvo koje je zasnovano na široko rasprostranjenoj svesti građana da žive u sekularnom društvu.

Proces deprivatizacije i repolitizacije religije u velikoj meri ugrožava svetovni karakter države. Budući da sekularni konstitucionalizam nastoji da istisne religiju iz javnog života, crkve i verske zajednice sve snažnije iniciraju političku i institucionalnu borbu protiv njega. Otuda treba tragati za institucionalnim odgovorima na izazove koje nameće sve snažnije prisustvo religije u javnoj sferi. Načelo svetovnosti ne sme da bude dovedeno u pitanje, jer ono predstavlja osnovu na kojoj se razvija savremena ustavna

država. Religija treba da ostane isključivo deo privatnog života čoveka i asocijacija kojima se on svojevoljno pridružuje.

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THE PRINCIPLE OF SECULARISM AND FREEDOM OF RELIGION – DEPRIVATISATION OF RELIGION IN THE REPUBLIC OF SERBIA

***Abstract**: The principle of secularism is considered as the necessary element of a contemporary state. At the same time, multiconfessionalism of contemporary states is imposing respect of the role of religion in social life, which also means full affirmation of all the segments of a very complex human right – the freedom of religion. However, the process of de-secularisation of the public space has spread onto the Republic of Serbia sue to the fact that religion is being more and more displaced from the private life of an individual into the public sphere. The danger of abuse of religion is becoming realistic, and the institutional model of a secular state is not including appropriate protection measures. The concept of a constitutional secular state is being re-examined under the influence of re-politicisation of religion. Religion should remain a part of private life of a man and an association which one can freely join. The state is obliged to consistently exercise the principle of tolerance which enables creation of a social ambience in which members of all churches and religious groups will freely be able to realise their religious needs.*

***Keywords**: Constitution of Serbia, secularity, freedom of religion, de-secularisation, constitutionalism*

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АКСИОЛОГИЧЕСКОЕ ИЗМЕРЕНИЕ НОРМАТИВНОСТИ УГОЛОВНОГО ПРАВА В ОБЩЕСТВЕ, КОТОРОЕ ТРАНСФОРМИРУЕТСЯ

Аннотация: *публикация посвящена ценностному измерению нормативности уголовного права. Утверждается, что уголовное право - это не только регулятор общественных отношений, но и, прежде всего, фиксатор тех ценностей, которые в конктетном обществе являются базовыми (их матрица и «ретранслятор»), что становится возможным посредством такого ключевого его свойства как нормативность. Делается вывод о том, что предпосылками перехода нормативности уголовного права к устойчивому развитию во времени является органическое единство стабильности и динамизма уголовного права, его человекомерность, обеспечение реализации справедливых ожиданий общества относительно эффективной деятельности государства как при создании, так и при применении уголовно-правовых норм. Резюмируется, что специфические черты и ведущие тенденции дальнейшего развития нормативности уголовного права в пространстве сквозь призму глобализационных процессов современности и мультикультуризма непосредственно связаны с проблематикой влияния международного права на процессы криминализации деяний на национальном уровне, которое является нелинейным и зависит от множества параметров.*

Ключевые слова: *нормативность уголовного права, ценности, время, пространство, глобализация.*

1. Предварительные замечания

Прежде чем непосредственно перейти к аксиологическому измерению нормативности уголовного права и его анализу в обществе, которое трансформируется, целесообразно выяснить содержательное наполнение центральной категории данного исследования. Речь идет о понятии и правовой природе нормативности уголовного права.

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Нормативность – комплексное явление, которое изучается не только в правоведении, но и в философии, социологии и т.д.

Так, в философии при исследовании нормативности основной акцент делается на том, что она представляет собой сферу должного (Кабальський, 2008, с. 15).

В социологии нормативность освещается в контексте вопросов управления социальными процессами (речь идет о нормативных и ненормативных социальных регуляторах) (Плахов, 1985, с. 140,170). Ведь право, как известно, – это далеко не единственно возможный нормативный социальный регулятор.

В правоведении нормативность очень часто и безосновательно сводится к структурному элементу права (совокупности норм права) или же его признаку (нормативному характеру права). Такой взгляд на нормативность является почти классическим и характерен для позитивистского типа правопонимания, когда право отождествляется с законом.

Кроме того, даже среди того небольшого количества ученых, которые все же верно определяют статус нормативности как свойства права, бывают случаи одновременного ее рассмотрения и как свойства права, и как признака права, что является ошибочным (Заморська, 2014, с. 132).

Нами дополнительно было замечено и то, что при верной идентификации нормативности, как свойства права, далеко не всегда корректно раскрывается ее истинный смысл, который по логике вещей должен коррелировать с феноменологией свойства как такового (речь идет о его способности быть качественной первичной объективной характеристикой и внутренней стороной явления) (Романюк, 2013, с. 4), что опять таки является следствием смешения понятий «свойства» и «признаки» права.

На наш взгляд, чтобы избежать подобной путаницы, следует четко разграничивать понятия «норма» уголовного права, «нормативность» уголовного права» и «нормативный характер» уголовного права, ведь, в таких ситуациях речь идет о различных сущностных характеристиках уголовного права. Норма – структурный элемент уголовного права (наряду с функциями и принципами уголовного права). Нормативность - свойство уголовного права (Полонка, 2013, с. 7), а нормативный характер – признак уголовного права (то есть его способность к

объективации в реальной действительности в форме уголовного законодательства) (Вечерова , 2016, с. 684-701).

Приоритетное значение среди представленных сущностных характеристик уголовного права (речь соответственно идет о структуре, свойствах и признаках уголовного права) принадлежит именно свойствам уголовного права, которые положены в основу его структуры и признаков.

Отталкиваясь от вышеизложенного, под нормативностью уголовного права мы предлагаем понимать ***базовое глубинное свойство уголовного права, которое носит объективно-субъективный характер, лежащее в основе его структуры и признаков, благодаря которому уголовное право выступает не только средством упорядочения общественных отношений, но и, прежде всего, фиксатором тех ценностей, которые в конкретном обществе являются основополагающими (их «матрица» и «ретранслятор»).***

2. Сущность аксиологического измерения нормативности уголовного права и современные реалии.

Для юридических исследований, ориентированных на современные требования науки и научного знания, методологическая состоятельность является фундаментальным условием научной корректности и теоретической обоснованности результатов.

Что касается непосредственно методологического обеспечения исследования нормативности уголовного права, то, в свете идей об интегративном характере научных изысканий, несомненную утилитарность представляет методология мета - уровня или же философская методология, видное место в арсенале которой отведено аксиологическому (ценностному) подходу.

Аксиологический (ценностный) подход - это общая стратегия исследования, которая определяет рассмотрение права сквозь призму его соответствия определенным ценностям, которые могут обеспечиваться правом и быть его основой (Фальковський, 2011, с. 8). В соответствии с данным подходом, ценности – это структурная первооснова права (Горобец, 2013, с. 86).

«Ценность» - это важность, значимость; явление, предмет, имеющий то или иное значение, важный или существенный в каком-либо смысле. Ценности как

положительная или отрицательная значимость объектов окружающего мира для человека, группы, общества в целом, определяется не их свойствами самими по себе, а их вовлечением в сферу человеческой жизнедеятельности, интересов и потребностей, социальных отношений; критерий и способы оценки этой значимости отражаются в нравственных принципах и нормах, идеалах, установках, целях.

Ценности непосредственно связаны с человеком и проявляют заинтересованное отношение людей к окружающему их миру. В философско-правовом смысле ценностями являются объекты, явления, идеи, общественные процессы и их свойства, к которым человек относится как к удовлетворяющих ее социальные потребности, интересы, желания и которые она вовлекает в сферу своей жизнедеятельности. Ценности выступают неотъемлемой составляющей культуры общества и отражаются в сознании людей (Патерило, 2006, с. 9).

Примечательно, что ценности в правовой сфере сами по себе не являются регулятивами, поскольку не устанавливают никаких правил, их следует относить к сфере правового воздействия, а не правового регулирования (Горобец, 2013, с. 180). Ценности сами по себе не являются и нормативными, поскольку они не устанавливают границ дозволенного, однако они актуализируются в момент, когда эти границы нарушаются в результате индивидуального акта действия, направленного на достижение глубоко индивидуализированной цели или как результат лишения, потери (Тарасов, 2001, с. 3).

Иначе говоря, имеет место взаимообусловленность нормативности права и ценностей. С одной стороны, ценности отражаются (проявляются) в нормативности права, а с другой – именно ценности, неся в себе элементы должного, обеспечивают нормативности права общеобязательность и общезначимость. Данное суждение в полной мере распространяется и на взаимосвязи нормативности уголовного права и ценностей.

Кроме того, важное значение для аксиологического измерения нормативности уголовного права с методологической точки зрения имеет целесообразность разграничения категорий «ценности» и «оценки» (Демидов, 1975, с. 9-26).

Если категория «ценность» является по своему характеру объективно-субъктивной, то категория «оценка» - сугубо субъективна, поскольку является

продуктом, функцией сознания субъекта (в нашем случае речь идет об отражении ценностей в сознании законодателя и правоприменителя) (Грищук, 2017, с. 29-30). Учитывая вышеизложенное, аксиологическое измерение нормативности уголовного права уместно интерпретировать с позиций рассмотрения двух блоков вопросов.

Во-первых, речь может идти о собственной ценности уголовного права, то есть спектре ценностей, которые требуют уголовно-правовой охраны и их иерархичности (диапазон, приоритеты и средства уголовно-правовой охраны).

Во-вторых, речь может идти об инструментальной ценности уголовного права (его способности с помощью своих содержательных и формальных свойств удовлетворять потребности, быть инструментом реализации и согласования интересов и т.д.) (Грищук, 2017, с. 32).

Выражаясь более предметно, основными «индикаторами» собственной ценности уголовного права выступают объекты уголовно-правовой охраны и меры уголовно-правового воздействия (Оробець, 2016, с. 224).
Инструментальная же ценность уголовного права конкретизируется в его задачах и функциях.

Следует согласиться с точкой зрения о том, что «...чем меньше уровень соответствия уголовной политики существующим в культуре ценностям, тем в большем объеме необходимо использовать потенциал принуждения для реализации уголовно-правовых норм» (Бибик, 2008, с. 98).

В результате подобных искусственных манипуляций со стороны государства уголовное право в общественном сознании рано или поздно из ценности превращается в антиценность

К примеру, по справедливому замечанию В.К. Грищука, наиболее типичными вариантами возможного преобразования норм уголовного права в антиценность являются, в частности, такие: 1) нарушение законодателем доктринальных принципов криминализации деяний человека (несоответствие естественному праву, демократическим целям и назревшим потребностям прогрессивного общественного развития; отсутствие социальной обусловленности норм уголовного права; игнорирование экспертных оценок или предложений ученых; неадекватное, негармоничное или несвоевременное отражение доминирующих

общественных потребностей и интересов; злоупотребление уголовно-правовыми средствами в регулировании и охране общественных отношений; чрезмерная «жесткость» или «мягкость», неясность уголовно-правовых норм); 2) злоупотребление судебными и правоохранительными органами в применении уголовно-правовых средств; 3) использование норм уголовного права как средства политической борьбы; 4) использование норм уголовного права как средства конкурентного противодействия; 5) неприменение норм уголовного права по политическим мотивам (Грищук, 2017, с. 35-36).

Что касается констатации существующего положения вещей в сфере нормативности уголовного права, то можно утверждать о том, что нормативность уголовного права современности находится в кризисе, обусловленном, помимо всего прочего, спецификой времени, в котором она находится (речь идет о феномене сжатия или ускорения исторического времени) (Капица, 2004, с. 3-16). Присущими ей чертами являются отставание от потребностей общественного развития, инфляция норм уголовного права, их несоответствие функциям и принципам уголовного права, политическая конъюнктурность и т.д. Но видение этого, уже дает нам возможность разрешения ситуации.

3. Основные направления дальнейшео развития нормативности уголовного права во времени и в пространстве.

Ценности правовой сферы - достаточно подвижная, гибкая и адаптивная система (Горобец, 2013, с. 59, 121), которая зависит от многжества факторов (в первую очередь временных и пространственных параметров).

Исходя из взаимозависимости ценностей и нормативности уголовного права, далее рассмотрим основные направления развития нормативности уголовного права во времени и в пространстве, обусловленные трансформацией аксиосфери. Как представляется, выходом из ситуации, которая диагностируется по отношению к нормативности уголовного права во времени является следование положениям концепции устойчивого развития.

Понятие «устойчивое развитие» связано с процессом изменений, которые, в конечном счете, обеспечивают качество жизни не только нынешних, но и будущих поколений людей. Социальная составляющая устойчивого развития ориентирована на человека и предусматривает сохранение и эволюцию социальных и культурных систем (Баулин, 2013, с. 856).

Устойчивое развитие нормативности уголовного права - это процесс, в рамках которого происходят ее изменения (трансформации, реформы), продиктованые стремлением совершенствовать закон и практику его применения, которые не вступают в противоречие с самой природой и социальным назначением уголовного права и не могут, таким образом, привести в будущем к последствиям, исключающим или существенно затрудняющим эффективное использование уголовно-правовых норм для решения задач, связанных с адекватным реагированием государства на совершаемые преступления.

Устойчивое развитие нормативности уголовного права одновременно предполагает как ее стабильность, так и динамизм.

Стабильность уголовного законодательства – это неотъемлемая составляющая его развития, которая представляет собой способность уголовного законодательства оставаться неизменным в течение длительного промежутка времени и проявляется в преемственности уголовно-правовых предписаний (Вечерова, 2017, с. 221-223).

Динамизм уголовного законодательства - это неотъемлемая составляющая его развития, которая представляет собой способность уголовного законодательства к интенсивным трансформациям (Вечерова, 2017, с. 221-223).

Общество и государство заинтересованы прежде всего в стабильности УК, то есть в постоянстве и относительной неизменности его основных, принципиальных положений. Стабильность уголовного закона свидетельствует об устойчивости и прогнозируемости уголовно-правовой политики государства, дает возможность полномочным государственным органам и должностным лицам должным образом овладеть положения ми уголовного закона, сформулировать стабильную практику их применения, а гражданам – ознакомиться с содержанием УК, определенным образом контролировать деятельность органов уголовной юстиции, согласовывать свое поведение с требованиями УК и т.д. Основой стабильности УК является высокое качество уголовного закона. В свою очередь, такое качество обеспечивается соответствием УК как по своему содержанию, так и по юридической форме прежде всего положениям Конституции государства, требованиям законодательной техники, положениям науки уголовного права и т.д. (Баулин, 2013, с. 857).

Вместе с тем, общество и государство заинтересованы в том, чтобы уголовное законодательство адекватно и своевременно реагировало на изменения в преступной среде, а также в уголовно-правовых средствах борьбы с преступностью, то есть было динамичным. Динамизм УК свидетельствует о том, что уголовный закон развивается, меняется, находится в движении (Баулин, 2013, с. 857).

Кроме органического сочетания стабильности и динамизма, предпосылками для переформатирования нормативности уголовного права является четкое осознание того факта, что уголовное право – это фундаментальная отрасль, которая защищает права человека, Конституцию и демократические ценности в государстве, обеспечивает справедливый и равный режим распределения государственного принуждения к лицам, которые нарушили единственный уголовный закон государства. А это означает, что для перехода нормативности уголовного права к устойчивому развитию важно обеспечить реализацию справедливых ожиданий общества относительно эффективной деятельности государства как при создании, так и при применении уголовно-правовых норм (Баулин, 2013, с. 857).

Относительно выявления специфических черт и ведущих тенденций дальнейшего развития нормативности уголовного права в пространстве, то данный вопрос, по сути, является составляющей более общей проблемы под названием глобализационные процессы современности, которая все более активно обсуждается не только специалистами в области уголовного права, но и другими специалистами (философами, теоретиками и тому подобное).

Действительно, в условиях глобализации влияние международного права на процессы криминализации на национальном уровне является объективной реалией, с которой трудно поспорить. Однако при этом резонно возникает два вопроса.

Во-первых, можно ли однозначно утверждать, что такое влияние носит исключительно положительный характер?

Во-вторых, какими должны быть допустимые границы такого влияния? (Вечерова, 2013, с. 645-648).

Как представляется, право является инструментом, который создается каждым обществом для решения конфликтов, которые возникают в нем. Ориентация на международно-правовые стандарты являются возможной лишь в пределах их согласованности с национальными ценностями, нормами, институтами и процедурами.

Следует иметь в виду и то, что международное право сегодня далеко от идеального и характеризуется фрагментарностью.

Такая ситуация объясняется тем, что концептуальную основу действующего международного права де факто составляют философские убеждения западного общества и западной культуры.

Как обоснованно подчеркивают международники, система ценностей, которая составляет основу современного международного права, в основном ориентирована на западные государства, а само международное право обслуживает интересы Западного мира (Кузьмин, 2007, с. 129).

Один из общих законов управления гласит не регулировать те участки жизни, которые в этом остро не нуждаются, то есть саморегулюються. Данное правило можно применить и к проблематике согласованности международных и внутригосударственных норм. Когда национальное уголовное право справляется с социальной нагрузкой и не имеет чрезмерных издержек на этом пути, реформировать его только на том основании, что этот участок правовой системы еще не обновлен, значит нарушать базовые принципы управления. Вмешательство международного права в национальное уголовное право должно быть экономным, ограниченным, рассудительным и деловитым (Бойко, 2008, с. 17-18).

При конструировании оптимальных пределов влияния международного права на процессы криминализации деяний на национальном уровне следует иметь в виду, что международное и внутригосударственное уголовное право – разнопорядковые правовые конструкции, поэтому они объективно не могут быть или становиться частью друг друга.

Кроме того, следует учитывать национальные интересы государства (принцип культурного суверенитета) и сущностные характеристики преступности как системно-структурного явления.

Не существует единого механизма влияния международного права на процессы криминализации на национальном уровне. Характер такого влияния должен дифференцироваться в зависимости от того, в какой сфере совершается преступление.

Максимальная степень воздействия международного права на процессы криминализации на национальном уровне целесообразны в отношении преступлений против мира, безопасности человечества и международного правопорядка, несколько более умеренная - в отношении транснациональных преступлений, минимальная - в отношении общеуголовных преступлений.

Согласно представленным степеням влияния, целесообразно вести речь об универсализации, регионализации и локализации нормативности уголовного права в условиях глобализации как параллельно существующие и присущие последней плюралистические тенденции.

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Evgenija Večerova

AKSIOLOŠKA PERSPEKTIVA NORMATIVNOSTI KRIVIČNOG PRAVA U DRUŠTVU KOJE SE MENJA

Apstrakt: *Rad je posvećen analizi iz normativne perspektive. U njemu se zastupa stanovište da krivično pravno nije samo način regulisanja društvenih odnosa, nego prevashodno temelj osnovnih vrednosti određenog društva (njihova matrica). To je moguće posredstvom ključne odlike poput normativnosti. Zaključak je da je pretpostavka za prelazak normativnosti krivičnog prava u održivi razvoj u određenom vremenskom periodu organsko jedinstvo stabilnosti i dinamizma krivičnog prava, usmerenosti ka ljudskom biću, te ispunjenje očekivanja od društva u pogledu pravičnosti, a u odnosu na celishodno postupanje države kako u određivanju normi, tako i primeni krivičnog prava. Ukratko, određene specifične odlike i vodeći tokovi u daljem razvoju normativnosti krivičnog prava kroz prizmu procesa globalizacije, oličenih u savremenosti i multikulturalizmu, ukazuju na to da su oni u neposrednoj vezi sa uticajem međunarodnog prava. Zapravo, ono promoviše kriminalizaciju dela na državnom nivou, što nije linearno i zavisi od mnogih faktora.*

Ključne reči: *normativnost krivičnog prava, vrednosti, vreme, prostor, globalizacija.*

Doc. dr Aleksandar Stevanović[*]

MORALNA DEKOMPOZICIJA EVROPSKOG ČOVEKA I ULAZAK U STANJE OPŠTE NEBEZBEDNOSTI

Apstrakt: *U ovom tekstu autor polazi od stanovišta da postoji međuzavisnost strukture moralnog sistema i nivoa bezbednosti u jednom društvu. Pokušavajući da utvrdi određene parametre kvaliteta moralnih sistema, autor pokazuje da se odsustvo pojedinih od njih direktno odražava na prirodu odvijanja međuljudskih odnosa. On postavlja pitanje: „Da li su možda promene u moralnom sistemu vrednosti i moralnom obrazovanju i vaspitanju bile direktan uzročnik narušavanja bezbednosnog okvira u kome danas funkcionišu pojedinac, društvo i čovečanstvo?“ Zatim analizira moralne sisteme, kroz koje je prošao Evropski čovek, sistem prvobitnog hrišćanstva, rimokatolički, protestantski i sekularni i pokazuje kako je od XI veka do danas, došlo do dekompozicije prvobitnog moralnog sistema u stanje, koje stvara preduslove za ulazak u situaciju opšte nebezbednosti. Autor zaključuje da se u ovom trenutku Evropski čovek nalazi ili pred nužnošću promene moralne paradigme ili kontinuiranom jačanju društvene kontrole, sa svim negativnim posledicama, koje iz toga mogu da proisteknu.*

Ključne reči: *moralni sistemi, bezbednost, Evropa, hrišćanstvo, sekularizam.*

> *„Problem osnivanja države može se rešiti, ma koliko to grubo zvučalo, i za sam narod đavola (samo ako imaju razuma), a rešenje glasi ovako: „Gomilu razumnih bića koji kao celina traže opšte zakone u interesu svoga opstanka, a od kojih svaki pojedinac želi potajno da izmakne, urediti i dati im ustav tako da njihova privatna htenja, međusobno oprečna, budu jedno drugome prepreka, te da rezultat njihovih javnih postupaka bude isti kao da takvih rđavih namera uopšte nije ni bilo.“*[48]
>
> *Imanuel Kant „Večni mir“*

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[48] Kant, Imanuel, (1995), *Večni mir*, Gutenbergova galaksija, Beograd – Valjevo: str. 65 – 66

1. O moralnim osnovama bezbednosti

U ovom radu pokušaćemo da osvetlimo važnost morala kao preduslova bezbednosti. Pretpostavka bilo kakvog slobodno učinjenog čina, samim tim i pravne odgovornosti predstavlja sloboda volje. Upotreba sopstvene slobodne volje u velikoj meri zavisi od našeg pogleda na svet i vrednosti koje usvajamo. Teroristički akt jednog fanatika predstavlja upotrebu (u ovom slučaju zloupotrebu) ljudske slobodne volje i zasnovan je na apsolutnoj ubeđenosti u ispravnost onoga što se čini. U tom smislu, sistem moralnih vrednosti jedne zajednice neposredno će uticati na bezbednost pojedinca i same te zajednice u celini.

U čemu se sastoji jedan sistem moralnih vrednosti? Malo je reći da on predstavlja konsenzus pripadnika jedne zajednice o tome šta bi i kada trebalo činiti, a šta ne, odnosno šta je ono što je dobro i ispravno, a šta neispravno i zlo. Sami sistemi moralnih vrednosti podložni su promenama u vremenu i zato je veoma važno ispitati i način na koji je iz jednog sistema moralnih vrednosti nastao drugi, iz kojih razloga i sa kojim posledicama po ljudsku ličnost.

Mi svakako ne bismo mogli da nazovemo sve moralne sisteme jednakovrednim, čak i ako ne bismo mogli odmah da pružimo objektivan kriterijum uspostavljanja njihove hijerarhije. Neki od tih moralnih sistema izgrađuju proaktivnog i sebičnog pojedinca usmerenog poglavito na ispunjenje sopstvenih ciljeva, drugi zastupaju mogućnost surove kazne zajednice nad svojim članom, za postupanje po svojoj volji, koje ne ugrožava drugoga. Dodatni problem nastaje stoga što svaki čovek poseduje sopstvenu svest o onome što je, sa njegove tačke gledišta ispravno ili neispravno i sklon je da sa tog stanovišta pristrasno posmatra na stvari.

Međutim, činjenica je da pojedine zajednice (uglavnom male i izolovane)[49] poseduju izuzetan stepen bezbednosti, ako bismo pod bezbednošću mogli da posmatramo ono što nastaje kada pojedinac u ispunjavanju onog što smatra ispravnim, ne ugrožava nijednog drugog člana zajednice, uključujući i sebe, a posredno (ili neposredno) radi i na opštem dobru. Na ovaj način među pripadnicima jedne zajednice nastaje međusobno poštovanje, solidarnost, dobronamernost i drugi kvaliteti, koji u međuljudskim

[49] Bušmani na Jugu Afrike, australijski Aboridžini, stanovnici plemena u Amazoniji i dr.

odnosima čine da nijedan član te zajednice ne narušava integritet i dostojanstvo drugog člana, što je, po sebi, preduslov postojanja bezbednosti.[50]

Još jedna od osobina, koje moralni sistemi pružaju, a koja je veoma važna sa stanovišta bezbednosti, jeste predvidivost u međuljudskoj komunikaciji. Oni moralni sistemi, koji čine da unutar zajednice ili društva vladaju nepredvidivi međuljudski odnosi nestabilni su, i izvor nebezbednosti. Oni obično ukazuju na krizu zajednice i potrebu nalaženja nove moralne paradigme.

Ono što je važno napomenuti jeste, da moralni sistemi nisu proizvoljno utemeljeni, već da svaki od njih u sebi sadrži jedan skup vrednosti, čijem se ostvarenju u praksi teži. Moralni sistemi su ciljno usmereni, i na osnovu pravila, koja u jednom društvu vladaju, može se napraviti relativno dobra procena, kakvom tipu ličnosti se, kao idealu, u tome društvu daje prednost.

U svakom moralnom sistemu, vrednosti se usvajaju vaspitanjem,[51] praktično od prvih dana. Najveći broj tih pravila u svim ljudskim društvima je isti, i svodi se na to, kako da dete usvoji pravila bezbednosti i ne povredi se. Na kasnijem stadijumu, dete usvaja više vrednosti i uči se kako da postane dobar član jedne zajednice. U društvima, koja imaju nestabilne moralne sisteme, društvima u krizi, dete, pod uticajem nepredvidivosti zbivanja, može uopšte i da ne usvoji nikakve više vrednosti, i da mu, i u zrelom dobu, pitanje bezbednosti i opstanka bude na prvom mestu. U stanju neposredne ugroženosti, čovek ne može da razvije ni svoje moralne kapacitete ni svest o slobodi volje, savesti ili dobronamernosti. Najviši oblik organizacije u takvim društvima je razbojnička družina, a vrednost solidarnost.

Dakle, mi bismo ipak mogli da istaknemo nekakve karakteristike, koje jedan moralni sistem odvajaju od nekog drugog, a to su: sposobnost samostalnog odlučivanja u stvarima od ličnog interesa, svest o opštem dobru, preispitivanje ispravnosti sopstvenih odluka, poštovanje drugih i njihove slobode, solidarnost, odsustvo straha u međusobnoj komunikaciji, predvidivost itd.

[50] „Oglala Sijuksa započinje sledećim rečima: „To je priča o čitavom životu koji je svet i o kome je dobro da se govori, o nama dvonošcima koji ga delimo sa četvoronošcima i krilima na nebu i svim zelenim stvarima, jer svi su deca jedne majke i otac im je jedan Duh““ u *Vakan'tanka me čuje – pesme i priče severnoameričkih indijanaca*, (1990), (priredili Zoran Petković i Mihajlo Ristić), Kosmos, Beograd: str. 6

[51] *„Ljudski rod treba da postepeno sam iz sebe izvodi svojim vlastitim trudom – svu svoju prirodnu dispoziciju čoveštva. Jedna generacija vaspitava drugu."* Kant, Imanuel, (1999) *Vaspitavanje dece*, FAMILET – LOGOS ART, Beograd: str. 4

Moralni sistemi, koji poseduju ove karakteristike, (sada uvodimo jedan vrednosni kvalitet), bolji su od onih u kojima postoje njihove suprotnosti. Jedan od važnih elemenata zbog kojih su ti moralni sistemi bolji od onih drugih jeste to, što su društva u kojima vladaju takvi moralni sistemi – bezbedna društva, odnosno međusobnim dobovoljnim ograničavanjem sloboda i poštovanjem zakona uspostavljaju opštu sigurnost.[52]

Pošto je poštovanje zakona iako pravno obavezujuće pre svega moralna obaveza, sve ono što smo ovde rekli vezano za društvo, vezano je i za državu, kao način društvene organizacije. Karakter jedne države i način poštovanja zakona u njoj, u potpunosti su zavisni od moralnog sistema, koji u toj državi vlada. Država u kojoj ne postoji jedinstvena moralna paradigma, nestabilna je, nepredvidiva i nebezbedna ili svoju bezbednost uspostavlja izraženom sklonošću ka prisili i zastrašivanju, kako prema pojedincu, tako i zajednicama u njoj.

U tom smislu, i pitanje bezbednosti kao pitanje državne politike svoj koren ima u razumevanju moralnog sistema. Pošto je svaki moral zasnovan na nekoj vrsti nasleđa, odnosno, sposobnosti čoveka da određene vrednosti, putem vaspitanja prihvati kao ispravne i neispravne (dobre ili zle), u centar izlaganja moralne dimenzije fenomena bezbednosti, stavlja se ovde pitanje načina moralnog obrazovanja ljudske ličnosti.[53] U različitim sistemima vrednosti prisutno je različito moralno obrazovanje, jer se, kao što smo videli više, način na koji se doživljava čovek u svojim potrebama i ciljevima razlikuje. Samo se po sebi nameće pitanje: Da li su možda promene u moralnom sistemu vrednosti i moralnom obrazovanju i vaspitanju bile direktan uzročnik narušavanja bezbednosnog okvira u kome danas funkcionišu pojedinac, društvo i čovečanstvo?

Pošto se s pravom može reći da je Evropski čovek u poslednjih nekoliko stotina godina ostvario najveći uticaj na istoriju čovečanstva, pokušaćemo da ispitamo momente razvoja moralnih sistema na tlu Evrope i analiziramo ih po njihovim posledicama.

[52] „„Sigurnost“ označava stvarnost postojanja nekog domena delovanja koji sledi iz onog ograničavanja slobode i na njemu zasnovane garancije. Iz toga, međutim sledi da su mogućnost predviđanja i sigurnost u suštinskoj vezi.“ Babić, Jovan, (2005), *Moral i naše vreme*, Službeni glasnik, Beograd: str. 124

[53] Na značaj moralnog obrazovanja ukazuje još Heraklit iz Efesa: „*Jedan* je meni koliko i *deset hiljada* samo ako je najbolji.“ fragment 49. Heraklit, (1990) *Fragmenti*, Moderna, Beograd: str.48

2. Evropski moralni poredak do XI veka

Kada govorimo o onome, što je uspostavilo prvobitni opšteprihvaćeni moralni sistem na tlu čitave Evrope i Sredozemlja, još u antici, onda govorimo o hrišćanstvu. Religija je, praktično oduvek, predstavljala temelj moralnosti, jer se moral zasniva na autonomiji lične uverenosti u ispravnost nečega.[54] Kriza moralnosti, koja je na prostoru ogromne Rimske imperije trajala od početka prvih vekova naše ere, okončala se u vreme vladavine Konstantina Velikog prihvatanjem hrišćanstva. Od tog trenutka hrišćanska paradigma, gotovo do našeg vremena, postaje nezaobilazna činjenica u izgradnji moralnih sistema na tlu Evrope.

Koje su prvobitne karakteristike te paradigme, očuvane u velikoj meri u kontinuitetu u pravoslavlju?

Pre svega, to je potpuno nov način zajednice zasnovan na ljubavi prema Bogu i bližnjima. Unutar nje, ljudska ličnost posmatra se kao najviša vrednost, a kao njen osnovni zadatak, javlja se njeno spasenje, odnosno reintegracija pale ljudske prirode u prvobitno rajsko stanje putem Božije milosti. U tom smislu Crkva, kao zajednica vernih, ima svoju vremensku i vanvremenu dimenziju, odnosno postoji i kao zajednica ljudi na zemlji i kao zajednica svetih na Nebu. Prisustvo onostranog, metafizičkog sadržaja i mistične zajednice učinilo je da se u prvobitnom hrišćanstvu razviju svi oni aspekti dobre moralne zajednice, koje smo naveli više: autonomija moralnog delovanja, dobronamernost i solidarnost, ljubav i požrtvovanje.

Krute i formalne, i utilitarno orijentisane vrednosti kasnoantičkog perioda doživljavaju svoju potpunu degradaciju uspostavljanjem hrišćanstva kao državne moralne paradigme carstva. Već od vremena Justinijana I uspostavlja se čvrst državni poredak zasnovan na hrišćanskoj moralnoj paradigmi. Koje su bile karakteristike ovog političkog sistema?

Pre svega, njega čini jasna podela vlasti na svetovnu i duhovnu, sa relativno jasno razgraničenim poljima delovanja. Božiji zakoni stajali su u samoj osnovi ustrojstva Crkve i Carstva, koji su sopstvenom simfonijom trebali da omoguće blagotvorne uslove za spasenje ljudi, kao Božijih bića. Narušavanjem ove simfonije narušili bi se sami ti zakoni, a narušavanjem Božijih zakona nestalo bi Božije blagodati na zemlji, čime bi se znatno otežala mogućnost spasenja. Osnova društvene svesti toga doba, zasnivala se na

[54] O značaju vere za uspostavljanje moralnosti videti Kant, Imanuel, (1976), *Logika*, Grafos, Beograd: str. 165.

shvatanju da politički poredak sopstveni temelj crpi iz metafizičkog izvora Božanskog suvereniteta[55]. U čemu je bila suština ove simfonije? U tome što je Carstvo postojalo da bi omogućilo nesmetano i slobodno delovanje Crkve, a Crkva se starala da žitelji Carstva zemaljskog istovremeno postanu i žitelji Carstva Božijeg. U takvom poretku Crkva nije imala nikakvu političku vlast, ali je njen moralni autoritet vršio uticaj, kojim se onemogućavala ili ograničavala carska samovolja i autokratija i način vladanja vršio po Božijim zakonima.

Temelj tadašnjeg obrazovanja imao je za cilj da olakša neposredno uspostavljanje veze između čoveka i Boga, i osposobi čoveka za duhovnu delatnost u cilju spasenja njegove duše. U tom smislu, osvešćenje lične odgovornosti pred Bogom i važnosti sopstvenog moralnog integriteta u ličnoj duhovnoj borbi i osvešćenje sebe kao dela Vaseljenske i večne zajednice svetih, Crkve, predstavljalo je osnovni cilj obrazovanja i vaspitanja. U takvom poretku ličnost čoveka bila je skladno uklopljena u širi okvir slike sveta i večni poredak Carstva Nebeskog, a moralno obrazovanje zasnivalo se na jačanju autonomije ličnosti na njenom putu ka svetiteljstvu, čiji je izvor bila Ljubav Božija, kroz koju se na ljudsku ličnost izliva milost i blagodat. Zajednica uspostavljena na ovaj način imala je metafizičke prerogative, podela dužnosti i vlasti u njoj služila je obezbeđivanju sklada, koji je u sebi nosio Božanski poredak.

Nivo bezbednosti ovakve političke zajednice imao je, za današnje prilike, fantastično visok stepen, jer je pretpostavljao postojanje svesne žrtve pojedinca za zajednicu[56], ali bez fanatizovanja, pošto je to bila mera, čiji je krajnji cilj predstavljalo očuvanje sopstvenog moralnog integriteta i zajednice sa Bogom. Univerzalna država i Univerzalna crkva, kao institucije koje svoj poredak crpu iz Univerzalnih Božijih zakona, garantovale su nemogućnost podela po nacionalnim i teritorijalnim principima i predstavljale osnov za objedinjavanje celokupnog čovečanstva.[57] Pripadnici te Države i te Crkve, na ljude, koji nisu bili njihovi članovi, mogli su da gledaju samo kao na potencijalne zajedničare, ali ne i na neprijatelje po sebi. Oni su, tako, imali pravo da se brane, ako bi bili napadnuti, ali je njihova odbrana vršena sa ciljem pre svega duhovnog, a ne fizičkog opstanka, odnosno, oni su morali da brane politički poredak ustanovljen

[55] „Zemaljski vladar i njegova politička vlast je u subordinaciji u odnosu na vlast Gospoda i Svedržitelja i ona je izvedena iz te apsolutne vlasti. Legitimna politička vlast zemaljskog vladara nije od iskona, ona je samo dar Božiji, ograničena u vremenu.“ Grozdić, Borislav (2016), „Shvatanje o izvoru i poreklu državne vlasti – prilog izučavanju političke filosofije Nemanjića“, *SPM 2016/1*, Beograd: str. 313

[56] „Od ove ljubavi niko nema veće da ko život svoj položi za prijatelje svoje.“ *Sveto Jevanđelje* (Jov 15,13)

[57] O specifičnosti univerzalnog suvereniteta Rimskog carstva videti Ostrogorski, Georgije (1998), *Istorija Vizantije*, Narodna knjiga – ALFA, Beograd: str. 191 i dalje

po Božijim zakonima da ne bi, padom tog poretka ugrozili osnov sopstvenog duševnog spasenja. Ovakav etos upostavljao je univerzalnu moralnu odgovornost pojedinca.[58]

Univerzalno Carstvo, čiji je politički poredak omogućavao blagotvorni uticaj Crkve Božije na zemlji u svrhu spasenja ljudskih duša, gradeći dvostruku zajednicu među svojim građanima (svetovnu i duhovnu) obezbeđivalo je, sa jedne strane, opšti konsenzus oko moralnih vrednosti, a izgradnjom do tada najsavršenijeg pravnog aparata, uživanje izuzetno velikih ličnih sloboda i visok stepen civilizacijskog razvoja. Skladno povezavši viskog nivo svetovnog i naučnog obrazovanja, sa duhovnim temeljom moralnih vrednosti, obrazovanje toga doba obezbeđivalo je visok sinhronicitet ličnog i javnog morala, i potreba i sloboda pojedinca i zajednice.

Ono što je veoma važno napomenuti, u tom moralnom sistemu autonomija ljudske ličnosti u njenom moralnom delovanju nije dovedena u pitanje, jer joj je priznata bezuslovna vrednost,[59] koja je, sa druge strane, potencirala njenu potpunu moralnu odgovornost u praktičkom delovanju.

3. Etape moralne dekompozicije Evropskog čoveka

Iz ovog prvobitnog stanja moralnog sistema u Evropi razvile su se istorijski tri osnovne moralne paradigme, prva je katolička od XI veka, zatim protestantska, koja se javlja krajem XV i početkom XVI veka i na kraju sekularna, čiji se zametak može uočiti od vremena Prosvetiteljstva. Budući da su ove tri paradigme nastale vršeći direktan istorijski uticaj jedna na drugu, mi ćemo ih tako hronološki i izložiti. Ovaj odeljak rada taj proces izdvajanja moralnih sistema u Evropi naziva dekompozicijom, jer je svaki naredni moralni sistem gubio nešto od prethodnog.

[58] U *Žitiju svetog Ćirila* navedeno je mesto kada Filosov, kako se Ćirilo (Konstantin) naziva, polemiše sa Saracenima, koji mu postavljaju sledeće pitanje: „Ako je, dakle, Hristos vaš Bog, zašto ne činite kao što zapoveda. U jevanđeljskim knjigama je, naime, napisano: „Molite se za neprijatelja, dobro činite onima koji vas mrze i progone, i okretate obraz onime koji vas udara. Vi pak, ne radite tako, već oštrite suprotno oružje protiv onih koji vam tako čine“. Konstantin najpre postavlja pitanje: „Kada su u zakonu dve zapovedi, ko izvršava zakon: da li onaj ko ispunjava jednu ili onaj koji obe? Odgovoriše oni da onaj koji obe. A Filosof produži: – Bog je kazao „Molite se za one koji vas vređaju“. On je opet rakao: ’Od ove ljubavi niko veću ne može ispoljiti u životu nego da dušu svoju položi za prijatelja’. Radi bližnjih svojih mi to činimo da ne bi zajedno sa telesnom ropstvom i duša njihova zarobljena bila“. Kliment Ohridski, Konstantin Preslavski i Nepoznati pisci, (1964),*Ćirilo i Metodije, žitija, službe, kanoni, pohvale*, priredio Đ. Trifunović, preveli I. Grickat, O. Nedeljković, Đ. Trifunović, SKZ, Beograd: str. 239.

[59] „Jer kakvu će korist imati čovjek ako sav svijet pridobije a sebe upropasti ili sebi naudi?“ *Sveto Jevanđelje* (Lk 9, 25)

3.1 Katolička moralna paradigma

Prvo veliko odstupanje od prvobitne hrišćanske moralne paradigme nastao je u XI veku, kada i rimokatoličastvu dolazi do stapanja svetovne i duhovne vlasti. Iako je ova tendencija na zapadu Evrope postojala vekovima pre[60] u svom punom obimu, ona se ispoljila tek posle tzv. Velike šizme 1054. i političkog rastrojstva Carstva u narednim vekovima. Polaganjem prava na univerzalno dodeljivanje svetovnih titula, koje je od samog početka, bilo u isključivoj nadležnosti institucije Rimskog cara, papstvo je uspostavilo moralnu paradigmu novog Evropskog poretka.

Uspostavljanjem nove političke paradigme, uspostavljena je i suštinska promena u načinu poimanja vrednosti, odnosno, u moralu kao takvom. Neprikosnovenost moralne autonomije ljudske ličnosti narušena je uspostavljanjem političke institucije, koja se, budući i crkva, kao temeljni nosilac kriterijuma moralne ispravnosti, postavila između Boga i čoveka. Potrebom papstva da polaže pravo na ekskluzivnu vezu sa Bogom, putem posedovanja formalnog zastupanja političke vlasti božanskog suvereniteta,[61] moralna odgovornost preneta je sa pojedinca na instituciju, odnosno sa savršenosti ljudske ličnosti na njenu političku podobnost.

Veoma je važno razumeti suštinsku promenu, koja se na tlu Evrope dogodila u tom trenutku. Metafizički okvir ljudskog morala, uspostavljen verom i zasnovan na duhovnoj praksi, pretvara se u realan odnos prema instituciji, koja, kao vrhovni moralni i politički autoritet, osnovnu vrednost ljudske ličnosti prosuđuje prema njenoj sposobnosti da ostvari ciljeve te institucije. Aktivna implementacija Božijih zakona iz ranijeg perioda, gubljenjem moralne autonomije ljudske ličnosti i njenim vezivanjem za instituciju, pretvara se u formalno poštovanje propisanih dogmata i realno pokoravanje političkim zapovestima, koji se sada, predstavljaju kao vrhovni kriterijum dobra i zla. Svesno prenošenje sopstvene moralne autonomije u prosuđivanju dobra i zla sa sebe na bezličnu instituciju, predstavlja moralnu eutanaziju ljudske ličnosti i osnovu fanatičkog pogleda na svet.[62] Tako objedinjavanje dve razdvojene, ali sinhrone sfere (svetovne i duhovne vlasti) postaje uzročnik fanatičnog mišljenja sa svim negativnim posledicama, koje iz toga proističu.

[60] O pravima na koje je rimokatolička crkva polagala na osnovu tzv. „Konstantinove darovnice“ pogledati A. D. Udaljcov, E. A. Kosminski, O. I. Vajnštajn, (2011) *Istorija srednjeg veka I,* Naučna KMD, Beograd

[61] Ideje o Božijoj državi na zemlji, na kojima je rimokatolička crkva temeljila legitimitet svoje političke moći iznete su još u delu sv. Avgustina iz Hipa O državi Božijoj (Sveti Avgustin, (1982), O državi božjoj, Zagreb: Kršćanska sadašnjost)

[62] O prirodi fanatičkog mišljenja pogledati Stevanović, Aleksandar, (2017) „Homo fanaticus kao model savremenog čoveka“, SPM 2017/2, Beograd: str. 69 – 84

Prenošenje metafizičke kategorije svetosti sa ličnosti na instituciju ostavilo je čoveka toga vremena u stanju moralnog vakuuma, a prirodnu moralnu situaciju sposobnosti prosuđivanja dobra i zla i slobodu volje, deformisalo u prilagođavanje potrebama institucije, koja je, ovim obratom, postala bezlični kriterijum njegove lične vrednosti i krajnje svrhe. Praktično celokupan sistem vrednosti, uključujući čak i naučne istine, počeo je da zavisi od njihove podobnosti potrebama rimokatoličke crkve kao vrhovnog autoriteta.

Zato se kao osnovni kvalitet moralnog obrazovanja toga doba, javlja potreba da se čovek vaspita u apsolutnoj pokornosti i slepoj veri u ispravnost dogme jedne institucije, kao vrhovne vrednosti. Ova apsolutizacija dogme u prosuđivanju dobra i zla, narušavajući prirodno stanje moralnosti ljudske ličnosti, vršila se uspostavljanjem oštre podele na pripadnike zajednice i „one druge“. Percepcija odnosa čoveka prema čoveku suštinski se menja, a načelni odnos dobronamernosti univerzalnog Hrišćanstva, postaje odnos nedvosmislenog neprijateljstva prema onima, koji ne pripadaju zajednici. Razbijanje univerzalnog osećanja pripadnosti čovečanstvu sopstvenom „ekskluzivnošću“, uz snažnu fanatizaciju ljudske ličnosti, bila je osnovna odlika ovog prvog stupnja u dekompoziciji moralnosti evropskog čoveka.

Uspostavljanjem nove moralne paradigme, smanjuje se nivo lične bezbednosti, jer je mogućnost ustanovljavanja nečije političke podobnosti u okviru institucije, automatski povlačilo i njegovo prosuđivanje kao moralno „dobrog“ ili „zlog“. Problem podobnosti instituciji javlja se sada kao pitanje bezbednosti prvog reda, a zavisnost moralne i fizičke egzistencije ljudske ličnosti od tog faktora, u potpunosti narušava njenu moralnu autonomiju.

Ovaj gubitak moralne autonomije ljudske ličnosti i vezivanje njene vrednosti za kriterijum institucionalne podobnosti, čini osnovnu odliku prve etape dekompozicije evropskog morala.

3.2 Protestantizam

Naredni momenat u moralnosti Evropskog čoveka nastao je u XVI veku pojavom protestantskog sistema vrednosti. Ova promena sastojala se u deinstitualizaciji papskog prava na apsolutno uspostavljanje moralnog kriterijuma i borbu za slobodu uspostavljanja moralnog kriterijuma u zajednici od strane pojedinca samog. Pokušavajući da obnovi izgubljenu neposrednu vezu čoveka i Boga ukidanjem papskog

autoriteta, protestantizam je, međutim, ukinuo univerzalnost moralne paradigme. Ukidanjem jedne i nastankom ogromnog broja moralnih paradigmi na osnovama ličnog autoriteta, sa protestantizmom nastaje nova epoha nebezbednosti. Strahote verskih i građanskih ratova toga doba prevazilaze bilo šta što se do tada događalo na tlu Evrope.[63]

Budući da je, u protestanskom pogledu na svet, izvor vrhovnog autoriteta moralna dogma koju uspostavlja čovek sam, u protestantskom moralnom obrazovanju umesto pokoronosti instituciji, počinje da se odgaja ideal jake ličnosti, spremne da preuzme odgovornost za druge ljude, odnosno socijalni angažman u cilju napretka svoje zajednice, pre svega njenog ekonomskog blagostanja. U tom momentu nastaje moralni kriterijum „funkcionalne upotrebljivosti“[64] kao vid prosuđivanja vrednosti ljudske ličnosti. Aktivna strana protestantizma, uključuje i angažovanje svih ljudskih sposobnosti za opštu dobrobit[65]. U tom smislu, kao moralne vrednosti par excellence smatrane su radinost, skromnost, požrtvovanje, častan i pošten odnos prema pripradnicima svoje zajednice, i, pre svega, poštovanje vrhovnog autoriteta (Boga, odnosno doktrine sopstvene verske zajednice).

U ovoj etapi moralne dekompozicije gubi se univerzalno važenje moralnog sistema. Instituciju papstva zamenjuje snažni pojedinac, a odnos prema Bogu zadržava se u domenu ispovedanja verske dogme i poštovanja pravila. Na ovaj način pospešuje se i rast fanatizma, jer, u situaciji prisutnosti neposredne konkurencije moralnih paradigmi svaka denominacija mora da vrši snažniju kontrolu nad svojim članovima.

3.3 Sekularizam

Na ovaj način, u Evropi se stvara stanje neprekidnog društvenog vrenja u kome konkurentske političko/verske zajednice proizvode nove vrednosti u cilju privlačenja novih članova svojoj moralnoj paradigmi. Iako je ovakvo stanje predstavljalo stanje kontinuirane bezbedonosne krize, ono je pogodovalo razvoju trgovine, nauka i

[63] „Nemačka je u Tridesetogodišnjem ratu bila podvrgnuta bezbrojnim pohodima najamničkih vojski... Stanovništvo Nemačke smanjeno je, po nekim izvorima, od 16 000 000 na 6 000 000. U Falačkoj, koja je najviše stradala izgubilo je život oko 90% stanovništva“, Grupa autora, (1975), *Vojna enciklopedija*, t. 10, Izdanje redakcije vojne enciklopedije, Beograd: str. 123

[64] Za šire objašnjenje pojma “funkcionalne upotrebljivosti“ videti Aleksandar Stevanović (2017), „Srpski pravoslavni etos i ratno stanje“, zbornik *Pravoslavlje i rat* (priređivač Borislav Grozdić), IFDT – VIC „Odbrana“, Beograd

[65] „Veberov duh kapitalizma odnosi se, dakle, ne samo na radnu etiku u užem smislu već i na vrline, kao što su štedljivost, racionalan pristup problemu rešenja, preokupacija onim „sada i ovde“ koja nagoni pojedince da ovladaju svojim okruženjem pomoću inovacija i rada.“ Fukujama, Frensis, (1997), *Sudar kultura*, Zavod za udžbenike i nastavna sredstva, Beograd: str. 55

umetnosti i potrebe da se prosuđivanje vrednosti vrši oslanjanjem na moć ljudskog uma. Budući da um, kao formalni aparat, poseduje sposobnost uspostavljanja bezuslovnih istina i opštu primenljivost, u doba Prosvetiteljstva javlja se ideja, da se umesto mnoštva konkurentskih dogmi uspostavi konsenzus oko opšterazumljivih vrednosti zasnovanih objektivnim i nepristrasnim uvidima ljudskog uma.[66]

Umesto izgubljene prvobitne univerzalne povezanosti metafizičkim odnosom čoveka i Boga, javlja se ideja univerzalnog povezivanja ljudi na osnovu kriterijuma sposobnosti umskog prosuđivanja. Jedan od osnovnih postulata ovog sistema vrednosti predstavlja vera u objektivnost naučnog saznanja. Na ovaj način, iz protestantske moralne paradigme nastaju počeci sekularne kulture, kao završnog stadijuma moralne dekompozicije.

U tom periodu nastaju moralni sistemi, koji po svojoj strukturi podražavaju naučnoj argumentaciji i često se nazivaju ideologije. Pokušaj da se moral zasnuje autoritetom objektivnog umskog dokazivanja, do poslednjeg stepena razara lični kriterijum moralnosti, pretvarajući je u formalni protokol, čime se ukida i mogućnost zasnivanja moralne zajednice.[67]

Pozivajući se, načelno, na slobodu odlučivanja, sekularna moralna paradigma zadržava ingerencije same ljudske ličnosti na nivou autonomije izbora zadovoljstva i odsustvu potrebe za, na širim osnovama postavljenom zajednicom, izuzev zajednice iz ličnog interesa. Stanje opšte bezbednosti održava se zadovoljavanjem interesa pretežnog dela zajednice[68] i mogućnošću potpune društvene kontrole, koja i sama, zbog mogućnosti njene zloupotrebe, postaje sredstvo nebezbednosti. U tom smislu, sekularna moralna

[66] „Nekoliko filosofa francuskog prosvetiteljstva, Volter i Turgo između ostalih, u potpunosti su odbacili hrišćanski religiozni pogleda na svet i usvojili anti-hrišćanska, anti-tradicionalna uverenja, koja do danas preovlađuju... Smatrali su da je sekularno razmišljanje jedino neophodno za ljudsko razumevanje i progres. Ljudski um, a ne Bog, bio bi dovoljno „progresivna osnova“ za buduće društvo.“ Šejfer, Frenk, (2004), Plesati sam, TVRDOŠ – Bratstvo SV. SIMEONA MIROTOČIVOG, Trebinje – Vrnjci: str. 122 – 123

[67] U otvorenom društvu prisutna je stalna tenzija, jer se borba za ostvarenje ličnih ciljeva i socijalni položaj odvija u kompetitivnom odnosu prema ostalim pripadnicima zajednice Popper, Karl (1977), The Open Society and Its Enemies, Routledge & Kegan Paul, London: I 174

[68] Karakter tzv. „potrošačkih društava“ i „konzumerizma“ kao društvene pojave, suštinski je vezan za prihvatanje mogućnosti uživanja dobara (pre svega materijalnih) kao vrednosti po sebi. Koliki uticaj je, nezavisno od političkog sistema, imao ovakav vrednosni stav, vidi se iz činjenice, da je na tajnom sastanku u Berhtesgadenu 1937. g., jedan od dva osnovna razloga, koje je Adolf Hitler naveo za otpočinjanje Drugog svetskog rata, pored osvajanje životnog prostora, bilo očuvanje standarda nemačkog naroda. „Moram li ja, dakle, uzviknuo je Hitler, pristati na sniženje životnog standarda nemačkog naroda i tako izgubiti pozicije koje sam sa toliko muke osvojio počev od 1933 godine. Ne! To nikada!“ Kartje, Rajmon (1951), Ratne tajne otkrivene na suđenju u Nirnbergu, Beograd: MEĐUNARODNI PROBLEMI Izdavačko preduzeće FNRJ: str. 44

paradigma u kojoj vlada stanje opšte suprtostavljenosti interesa, podseća pomalo na opis „Države đavola“, koju Imanuel Kant pominje u zaglavlju ovog rada.

Put od početnog moralnog sistema hrišćanstva do sekularizma praćen je tako gubitkom moralne autonomije ljudske ličnosti, razaranjem univerzalne moralne zajednice, fanatizacijom pojedinca i društva, svođenjem krajnje svrhe na lično zadovoljstvo i uspostavljanjem kriterijuma moralnosti u vidu formalnog protokola, kojim je moguće opravdavanje bilo kakvog čina u interesu bilo koje društvene grupe.

Posle svega navedenog, mogli bismo da zaključimo na sledeći način: ako je činjenica da između moralnog sistema i bezbednosti postoji snažna međuzavisnost, onda celokupni evropski politički prostor ili mora uspostaviti kvalitativno novu moralnu paradigmu i pokrenuti reverzibilni proces u odnosu na dugotrajne istorijske tendencije, ili mora kontinuirano jačati sredstva društvene kontrole, što predstavlja opasan put, jer se ta ista sredstva mogu upotrebiti i protiv njega samog.[69] U tom kontekstu, pitanje moralnog obrazovanja postaje za Evropu pitanje prvog reda.

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[69] „Ako je moje objašnjenje našeg moralnog stanja ispravno, i mi treba da zaključimo da se mi već izvesno vreme takođe nalazimo na prekretnici. U ovoj fazi je bitna izgradnja lokalnih oblika zajednice unutar kojih se mogu mogu održati uljudnost i intelektualni i moralni život u novom mračnom dobu koje nas je već zahvatilo... Ovoga puta, međutim, varvari ne čekaju na granicama; oni već izvesno vreme vladaju nama. I upravo naš nedostatak svesti o toj činjenici sačinjava deo naše nevolje.“, Makintajer, Alaster, (2006), Traganje za vrlinom, Plato, Beograd: str. 335

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MORAL DEGRADATION OF THE EUROPEAN MAN AND ENTERING THE STATE OF GENERAL INSECURITY

Abstract: *In this text the author starts from the view that there is a interdependence between the structure of the system of morality and the level of security in a society. By trying to determine specific parameters of quality of the system of morality, the author shows that absence of some of them directly reflects on the nature of human relations. The author asks the question: Are the changes in values in the system of morality and education in morality perhaps the direct cause for the destruction of a security framework in which the modern-day individual, society and humanity function? Further on, the author analyses the systems of morality which shaped the European man, the system of early, Roman Catholic, Protestant or Secular Christianity and shows how , form the 9th century onwards, there was a degradation of the early system of morality to a state which creates pre-conditions to enter a new state of general insecurity. The author concludes that at this point the European man stands to move either towards the necessity for changing the moral paradigm or towards the continuous strengthening of social control with all the negative consequences that may arise from it.*

Keywords: *systems of morality, security, Europe, Christianity, secularism*

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ПРЕСТУПЛЕНИЕ КАК НЕОПРЕДЕЛЕННОСТЬ

Аннотация: *Статья посвящена исследованию феномена преступления в контексте методологических возможностей категории «неопределенность» .Доказывается, что в современном мире все основные параметры преступления (общественная-опасность и противоправность) утратили свойство однозначности, приобрели в значительной степени субъективный и оценочный характер, что создает серьезные сложности в процессе криминализации.*

Ключевые слова: *преступление, оценка общественной опасности, неопределенность критериев общественной опасности*

Преступление не без оснований считается центральной категорией уголовного права. Именно вокруг нее и на основе нее формируется и реализуется весь комплекс нормативных предписаний, составляющих содержание нашей отрасли права. Характеристике понятия преступления, его признаков и специфических особенностей посвящено множество научных публикаций и, тем не менее, сказать определенно, что есть преступление, не представляется возможным. Одна из причин этого, как ни странно это звучит, заключается в недооценке методологических возможностей категории «неопределенность» в праве. Исследование преступления в контексте неопределенности позволяет обнаружить и по-новому рассмотреть несколько значимых аспектов его правовой природы и юридической конструкции.

Неопределенность исходных начал криминализации

«Отбор» тех или иных деяний, признание их общественно опасными и официальное закрепление в качестве преступлений (криминализация) составляет, как известно, важнейшее направление уголовной политики государства. При этом, пожалуй, лишь этап официального закрепления деяния в законе лишен

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явных элементов оценочности (хотя и здесь они не исключаются, например, при выборе тех или иных технических приемов описания признаков состава преступления в уголовно-правовой норме). Два первых этапа работы – выбор и оценка деяния – являют собой яркий пример подчеркнуто оценочной деятельности.

Как и всякая оценка, они не лишены субъективизма, конъюнктурных соображений, а порой и ошибок. В связи с этим особое значение приобретает вопрос об основаниях, критериях, принципах, правилах криминализации.

С одной стороны, и это признано Конституционным Судом РФ, федеральный законодатель, реализуя принадлежащие ему по предметам ведения Российской Федерации полномочия, самостоятельно определяет содержание положений уголовного закона, в том числе устанавливает преступность конкретных общественно опасных деяний, их наказуемость и иные уголовно-правовые последствия совершения лицом преступления. Однако, и это тоже подчеркнуто высшим органом конституционного контроля, поскольку в Российской Федерации как демократическом правовом государстве человек, его права и свободы являются высшей ценностью, а признание, соблюдение и защита прав и свобод человека и гражданина – обязанностью государства, закрепление в законе уголовно-правовых запретов и санкций за их нарушение не может быть произвольным[70].

Конституционный Суд РФ в ряде своих решений сформулировал значимые положения, которые сегодня справедливо рассматривать в качестве определенных правил криминализации[71]. Их наличие, а также признаваемая большинством специалистов доктрина криминализации общественно опасных деяний, в сочетании с особой, установленной для федеральных законов, процедурой принятия решений, дают некоторые гарантии того, что криминализация в целом

[70] Постановление Конституционного Суда РФ от 19.03.2003 г. № 3-П «По делу о проверке конституционности положений Уголовного кодекса Российской Федерации, регламентирующих правовые последствия судимости лица, неоднократности и рецидива преступлений, а также пунктов 1 - 8 постановления Государственной Думы от 26 мая 2000 года «Об объявлении амнистии в связи с 55-летием Победы в Великой Отечественной войне 1941 – 1945 годов» в связи с запросом Останкинского межмуниципального (районного) суда города Москвы и жалобами ряда граждан» // Вестник Конституционного Суда РФ. – 2003. – № 3.

[71] См.: Пудовочкин Ю.Е. Основания, принципы и правила криминализации общественно опасных деяний в правовых позициях Конституционного Суда Российской Федерации // Российское правосудие. – 2008. – № 5 (25)

является объективной и адекватно отражает как спектр существующих угроз, так и потребности личности, общества и государства в обеспечении безопасности.

Однако факт того, что границы преступного определяются законодателем «субъективно», дал основание некоторым специалистам утверждать, что «в реальной действительности нет объекта, который был бы «преступностью» (или «преступлением») по своим внутренним, имманентным свойствам, sui generis, per se. Преступление и преступность – понятия релятивные (относительные), конвенциональные («договорные» – как «договорятся» законодатели), они суть – социальные конструкты, лишь отчасти отражающие некоторые социальные реалии»[72].

Признак конвенциональности в характеристике преступления проявляется не только в несовпадении круга преступных деяний в разных странах в одно и то же время, но и в изменении нормативного объема деяний, признаваемых преступными; зависимости законодательных решений о криминализации не только от объективной динамики экономических и социальных отношений, но также от политического режима, идеологических установок власти и многих иных факторов, составляющих сферу политического.

Такие объективно неизбежные несовпадения в реальной жизни сочетаются еще с одним проявлением оценочного характера общественной опасности. Речь идет об известной относительности, релятивности практически любых социальных оценок.

Современное общество – не есть монолит, скованный религиозными или партийными догмами. Оно переживает ряд фундаментальных трансформаций, отражающихся на его структурной, ценностной, властной и иных характеристиках, которые уже стали предметом детального анализа в работах социологов и футурологов, однако еще не в полной мере проанализированы представителями уголовно-правовой науки. В числе таких трансформаций наиболее значимыми в контексте исследуемой проблематики надо назвать:

[72] Гилинский Я. Девиантология: социология преступности, наркотизма, проституции, самоубийств и других «отклонений». – СПб., 2004. – С. 192.

- фрагментаризацию общества, его сегментацию на множество малочисленных социальных групп, объединенных на основе все более индивидуализирующихся потребностей;
- разрушение единой, универсальной системы ценностей, становление множества параллельных ценностных иерархий, убыстряющиеся темпы оборота ценностей.

Как известно, любое преступление можно и должно рассматривать в качестве посягательства на те или иные ценности, которые признаются и разделяются большинством общества, создающего уголовное право. Именно этот тезис обеспечивает универсальное восприятие преступления общественным сознанием и оправдывает, легитимирует государственное насилие в отношении преступника. Если же общество теряет качество монолитности, если множащиеся мелкие социальные группы исповедуют различные системы ценностей, формирование номенклатуры преступлений значительно усложняется, в первую очередь, по причине отсутствия консенсуса в определении того или иного деяния как общественно опасного.

Можно, не боясь преувеличений, констатировать, что сфера криминализации представляет сегодня обширную область неопределенности, компонентами которой выступают, как минимум:

- неопределенность содержания и иерархии социальных ценностей, которые согласованно требуют защиты уголовно-правовыми средствами,
- неопределенность критериев для оценки тех или иных деяний в качестве общественно опасных,
- неопределенность целей, ради которых деяния признаются общественно опасными и преступными,
- неопределенность круга субъектов, продвигающих и защищающих свои интересы посредством принятия криминализационных решений.

Неопределенность критериев общественной опасности

Общественная опасность, как главный критерий криминализации общественно опасных деяний и их категоризации на виды в структуре уголовного закона, есть категория оценочная, и от того в современных условиях – подчеркнуто

неопределенная. Наука и судебная практика ставят своей приоритетной задачей снять эту неопределенность, конкретизировать представления об опасности, сделать эту категорию в большей степени инструментальной для решения задач уголовной политики и уголовного права.

Некоторым итогом этих совместных усилий можно считать ставший традиционным взгляд на оценку общественной опасности через призму двух ее показателей – характера и степени. Постановление Пленума Верховного Суда РФ от 22.12.2015 г. № 58 «О практике назначения судами Российской Федерации уголовного наказания»[73] провозгласило, что характер общественной опасности преступления определяется уголовным законом и зависит от установленных судом признаков состава преступления. При учете характера общественной опасности преступления судам следует иметь в виду прежде всего направленность деяния на охраняемые уголовным законом социальные ценности и причиненный им вред. Степень общественной опасности преступления устанавливается судом в зависимости от конкретных обстоятельств содеянного, в частности от характера и размера наступивших последствий, способа совершения преступления, роли подсудимого в преступлении, совершенном в соучастии, от вида умысла (прямой или косвенный) либо неосторожности (легкомыслие или небрежность). Обстоятельства, смягчающие или отягчающие наказание (статьи 61 и 63 УК РФ) и относящиеся к совершенному преступлению (например, совершение преступления в силу стечения тяжелых жизненных обстоятельств либо по мотиву сострадания, особо активная роль в совершении преступления), также учитываются при определении степени общественной опасности преступления.

Казалось бы, все волне определенно. Однако более пристальный взгляд на проблему позволяет выявить некоторые обстоятельства, подрывающие убедительность построений или в любом случае доказывающие, что такая конкретизация сама нуждается в дополнительных разъяснениях.

Не является секретом, что оценка деяния как общественно опасного происходит на двух уровнях: на уровне законодателя при принятии решения о криминализации и на уровне правоприменителя при решении вопроса о выборе оптимальной формы реализации ответственности субъекта. Промежуточным уровнем (или этапом) оценки можно считать нормативную дифференциацию

[73] Бюллетень Верховного Суда РФ. – 2016. – № 2.

преступлений по уровню общественной опасности (с ныне предусмотренной возможностью ее судебной корректировки). Соответственно этим уровням, сама оценка общественной опасности происходит на основе несовпадающих критериев.

При оценке общественной опасности деяний на этапе криминализации и субъекты, и параметры, и критерии оценки имеют существенно большую вариативность, нежели отмечено выше. Здесь шире спектр возможностей, больше рисков, в том числе риска неправильных оценок опасности.

Можно утверждать, что на этом этапе происходит не столько собственно оценка общественной опасности, сколько формирование представлений о ее наличии; выражаясь языком постмодернизма, происходит конструирование общественной опасности. И поскольку вывод о наличии опасности здесь только предполагается, он, по логике вещей, не может формироваться на основе критериев самой опасности. Общественная опасность не дана нам «в ощущениях», у нас нет ни эталона, ни модели общественной опасности, с которым можно было бы сравнить поступок, подлежащий криминализации, для того, чтобы сделать умозаключение о необходимости его закрепления в уголовном законе.

Следовательно, критерии оценки деяния как опасного отличаются от оценки деяния признанного опасным. Представляется, что наиболее точное понимание исследуемого аспекта оценки общественной опасности было предложено А.Э. Жалинским. Он писал, что «интегральными, системными показателями общественной опасности являются: а) характер, потенциальная ценность и социальная уязвимость охраняемого правового блага, взятого как обобщенное целое, отраженное в единой модели; б) интенсивность посягательства; в) социальная непереносимость преступления»[74]. Действительно, ценность объекта и терпимость общества в отношении посягательств на него – вот ориентиры для принятия решения о криминализации. Но очевидно также, что сами эти ориентиры весьма неопределенны и сугубо оценочны.

В такой ситуации результат оценки во многом зависит от мировосприятия субъекта принятия решения, а также от его представлений о собственной безопасности. При этом чем «ближе» субъект принятия решения к обществу, к

[74] Жалинский А.Э. Уголовное право в ожидании перемен. – 2-е изд., перераб. и доп. – М., 2009. – С. 362.

«рядовым гражданам», чем теснее совпадают их оценки происходящего, тем более социально обусловленным будет уголовно-правовой запрет.

Неопределенность критериев оценки опасности проявляется и на уровне категоризации преступлений по степени общественной опасности. Сегодня зримо представлены в ст. 15 УК РФ лишь два критерия градации преступлений: размер санкции и форма вины. Но, во-первых, санкция производна от общественной опасности, а во-вторых нет никаких правил корреляции между уровнем опасности и санкцией (ее вариативностью, размером). Как следствие, и возможны, и реально проявляют себя на практике ситуации, когда, что называется «росчерком пера» группа самых разных преступлений, за совершение которых установлено одинаковое максимальное наказание, переводится из одной категории в другую, без учета объекта, последствий преступления и других факторов, с которыми собственно и должна быть связана оценка их общественной опасности. Равно как вызванное какими-либо (в том числе эмоциональными) обстоятельствами повышение санкции мгновенно переводит преступление в иную категорию.

Что касается оценки общественной опасности уже криминализированного деяния на уровне конкретного акта правоприменения, то она здесь подчинена иным целям (принятие справедливого решения о мере ответственности конкретного лица) и учитывает иные факторы. Пленум Верховного Суда РФ указал, какие именно. Не будем вступать в дискуссию, относительно того, насколько удачно описаны эти факторы, насколько верно разведены сами показатели характера и степени опасности, насколько, в принципе, целесообразно выделять эти два показателя и т.д. Возьмем за данность, что такой подход отражает согласованное мнение профессионального сообщества о критериях измерения общественной опасности преступления. Но обратим внимание лишь на то, что высшая судебная инстанция указала только сами факторы, но не предложила критериев для их оценки. К примеру, форма вины и виды умысла или неосторожности – это критерии оценки опасности деяния, но каковы критерии оценки самих видов вины? Оправданно ли здесь утверждение, что преступление с прямым умыслом всегда более опасно, нежели преступление, совершенное по легкомыслию? Или такой показатель опасности, как характер последствий и их размер. Чем определяется характер последствий высшая судебная инстанция умалчивает, это вообще относительно новый и непривычный термин. И каковы критерии оценки размера последствий? Перечень вопросов можно продолжать долго. Факт остается фактом: критерии оценки оценочной категории общественная опасность

сами по себе являются оценочными понятиями с неопределенными параметрами оценки (тавтология здесь намеренная).

Каждый такой критерий (а их список в постановлении не может быть признан исчерпывающим, что дополнительно усугубляет проблему), как правило, имеет две крайние точки, задающие своего рода континуум, в рамках которого и надлежит дать ему оценку. Но у нас нет инструментов для оценки этого критерия и нет «шага» для оценки.

Кроме того, есть основания полагать, что при бесконечном диапазоне оценки каждого из критериев имеются все же некоторые границы, преодоление которых, хотя и оказывает формальное влияние на общественную опасность преступления, тем не менее, не оказывает влияния на виды и размеры уголовного наказания. Это связано не только с ограниченностью самого уголовного наказания законодательными рамками, невозможность назначать его в беспредельных масштабах. Это связано еще и с тем, что по достижении некоторой границы опасности деяние перестает восприниматься как выходящее за эту границу. К примеру, убийство трех лиц существенно отличается от убийства одного человека, но различие восприятии убийств 19 и 23 человек вряд ли будут столь заметны; кража миллиона рублей заметно отличается от кражи миллиарда, но различия между кражей 400 и 600 миллионов рублей вряд ли ощутимы. Можно предположить, что наш аппарат восприятия и оценки общественной опасности (по аналогии со слуховым аппаратом) настроен на восприятие некоторого диапазона опасности, причем этот диапазон специфичен для каждого вида преступления. Здесь есть и некий «порог слышимости», за которым деяния не воспринимаются как опасные, и своего рода «болевой порог», преодоление которого уже не влияет на нашу способность дифференцировать оценку опасности для решения уголовно-правовых задач.

Проблема неопределенности видится в том, что мы не знаем ни границ этого диапазона, ни единицы измерения общественной опасности каждого отдельного деяния в рамках этих границ. Представляется, что таковая оценка, по большей части, осуществляется субъективно и интуитивно, при руководстве трудно поддающихся верификации факторов.

В практической плоскости это находит отражение, среди прочего, в работе судов по отмене и изменению приговоров в связи с неадекватным назначением уголовного наказания. В 2016 году, согласно официальным данным Судебного

Департамента при Верховном Суде РФ, из 7769 отмененных в апелляционном порядке обвинительных приговоров 37 (0,5%) были отменены в виду мягкости назначенного судом первой инстанции наказания; из 18361 измененного приговора 18112 (98,7%) изменены со смягчением ранее назначенного наказания. В кассационном порядке в этот же год было изменено 4142 приговора, в том числе 17 (0,4%) – с усилением наказания и 4047 (97,7%) – со смягчением наказания. Из 27 дел, измененных в порядке надзора Верховным Судом РФ в 2016 году, все 100% были изменены со смягчением уголовного наказания.

Сама по себе эта практика свидетельствует о том, что представления об общественной опасности даже внутри судейского корпуса, даже при единых нормативных стандартах оценки разнятся, а значит, и судьба человека может зависеть от того, каким именно судьей будет рассматриваться его дело. Сказанное подтверждает, что в условиях неопределенности итог любого решения во многом (если не во всем) определяется особенностями субъекта решения, его уровнем компетентности, профессионализма, личной ответственности за сделанный выбор.

Неопределенность уголовно-правовой сферы

Значимым аспектом неопределенности в толковании преступления выступает тот, что связан с выбором законодателем того или иного отраслевого закона для закрепления признаков общественно опасного деяния. Наиболее ярко проблема такого выбора возникает, когда речь заходит об отнесении деяния к уголовному или административно-деликтному законодательству, причем она многократно усложняется в свете концепции уголовной сферы, разработанной в практике Европейского Суда по правам человека и признанной отечественным Конституционным Судом.

Если поставить традиционный вопрос: на основании каких критериев законодатель относит деяние не к административным проступкам, а именно к преступлениям, на него можно получить стандартный ответ: на основании показателей характера и степени общественной опасности. Но неудовлетворительность такого ответа подтверждается рассмотренным свойством неопределенности самой общественной опасности. Мы не обладаем ни системой измерения общественной опасности, ни математически выверенными представлениями о том, какой уровень опасности достаточен для

административно-деликтного права, а какой требует подключения уголовно-правовых мер реагирования и предупреждения.

Практика Европейского Суда по правам человека в части определения критериев уголовной сферы не вносит здесь ясности. С одной стороны, она меняет устоявшиеся представления о разграничении преступлений и проступков. Но с другой стороны, будучи подчиненной цели обеспечения надлежащих гарантий прав обвиняемого в рамках любого публичного процесса, она в большей степени направлена на выяснение общих признаков преступления и проступка, нежели на их надлежащую дифференциацию.

При отнесении противоправного деяния к уголовной сфере в европейской практике в расчет принимаются: а) характер правонарушения, совершение которого является основанием ответственности (в частности, Суд указывал, что уголовно-правовой запрет, как правило, адресован неопределенному кругу лиц); б) характер и строгость наказания (согласно позиции Суда, уголовное наказание имеет карательную и предупредительную, но не восстановительную цели, причем оно не обязательно связано с лишением свободы[75]. Эти критерии общности преступлений и проступков были разработаны в качестве определенной системы сдержек и противовесов непререкаемой в принципе свободе усмотрения государства при отнесении тех или иных деяний к числу преступлений или проступков. Злоупотребление этой свободой создавало возможность для государства произвольно менять отраслевую принадлежность опасных деяний и вместе с этим также произвольно устанавливать гарантии защиты об обвинения. Европейский Суд по правам человека поставил заслон на пути таких нарушений.
Используя критерии уголовной сферы, можно обособить некоторую группу деяний, требующих повышенных гарантий при обвинении в их совершении. Но концепция не создает правил разграничения преступлений и проступков, не содержит критериев их дифференциации. Для Европейского Суда по правам человека они не представляют особого интереса, а то и вовсе не имеют значения.

В связи с этим возникает закономерный вопрос о том, насколько целесообразна принятая в России градация общественно опасных деяний на преступления и проступки и насколько продуктивен непрекращающийся поиск оснований их разграничения. Принимая обязательства по обеспечению равных гарантий

[75] Гурин Д.В. Концепция «уголовной сферы» в новейшей практике Европейского Суда по правам человека // Библиотека криминалиста. Научный журнал. – 2016. – № 4. – С. 257 – 262.

обвиняемым в преступлениях и проступках, мы тем не менее, держимся своего права определять различную отраслевую принадлежность опасных деяний, сохраняя известный очаг неопределенности и субъективного выбора.

Более того, можно утверждать, что мы сознательно эту зону неопределенности множим, когда создаем правовые механизмы, позволяющие применять меры административной ответственности в случае совершения преступлений (известный советскому праву институт освобождения от уголовной ответственности с привлечением к административной ответственности) или напротив, применять меры уголовной ответственности в случае повторного совершения административного проступка.

Неопределенность отраслевой противоправности

Оценка законодателем общественной опасности деяния находит свое непосредственное выражение в тексте нормативных актов при описании тех или иных составов правонарушений. От того, насколько точно проведена эта оценка и насколько адекватно ее результат описан в законе зависит решение вопроса об отраслевой принадлежности подлежащей применению правовой нормы. Очевидно также, что и на этапе оценки опасности деяния, и на этапе ее словесного выражения в законе возможны неточности, заблуждения, дефекты и сознательные ошибки, которые вносят неясность в понимание правовой природы этого деяния, что порождает произвольное толкование правовых норм со всеми его негативными спутниками.

На конституционном уровне вопросы определенности правовых норм в свете установления противоправности деяния поднимались и рассматривались неоднократно. Можно выделить несколько проблемных ситуаций.

Первая заключается в том, что описание признаков общественной опасности деяния в законе настолько некачественно в силу своей неопределенности, что позволяет привлекать к ответственности за деяния, лишь формально отвечающие признакам состава, описанного в законе. Как следствие, противоправное деяние устанавливает там, где его в принципе нет.

Следующая проблемная ситуация заключается в том, что описание признаков общественной опасности таково, что позволяет правоприменителю по своему

усмотрению решать вопрос о том, обладает то или иное деяние признаком уголовной противоправности или же предусмотрено нормами иных отраслей.

Еще одна проблема связана с неопределенностью вопроса о соотношении уголовного и гражданского права в оценке некоторых актов поведения, прежде всего в экономической сфере (совершение сделок, предпринимательство). Она находит двоякое выражение: как в прикрытии преступных деяний гражданско-правовой формой, так и в уголовно-правовом вмешательстве в реальную экономическую деятельность.

Любое проявление неопределенности в установлении правовой природы деяния, наличия и вида противоправности чревато значительными рисками нарушения конституционных прав граждан, содержание и последствия которых достаточно хорошо известны.

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KRIMINAL KAO NEIZVESNOST

Apstrakt: *Rad je posvećen istraživanju fenomena krivičnog dela u kontekstu metolooških mogućnosti kategorije„neizvesnosti”. Zaključuje se da su u savremenom svetu svi ključni parametri krivičnog dela (javna opasnost i nezakonitost) izgubili svojstvo dvoznačnosti, te dobili izrazito subjektivan i pretpostavljeni karakter koji strava ozbiljne poteškoće tokom njihove kriminalizacije.*

Ključne reči: *krivično delo, procena javne opasnosti, neizvesnost kriterijuma za javnu opasnost*

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PRAVO NA PRIVATNOST U KONTEKSTU PRIKUPLJANJA PODATAKA O ETNIČKOJ (NACIONALNOJ) PRIPADNOSTI[76]

Apstrakt: *U savremenoj liberalnoj državi etničkim (nacionalnim) manjinama su priznata kolektivna prava čija svrha je zaštita njihovih kulturnih identiteta. Međutim, u velikom broju slučajeva ostvarivanje kolektivnih prava je uslovljeno prikupljanjem osetljivih podataka o etničkom (nacionalnom) identitetu građana, a prilikom ostvarivanja pojedinih prava i pristankom građana pripadnika etničkih manjina da se izjasne o etničkoj pripadnosti. Glavna teza koju razvijam u radu je kako uspostaviti ravnotežu između prava na privatnost i realne potrebe za prikupljanjem, obradom i iskazivanjem podataka o etničkom poreklu.*

Ključne reči: *etnicitet, privatnost, statistika.*

Vladavina prava i pravo na privatnost

U živu i inspirativnu institucionalnu i kolokvijalnu raspravu o zaštiti privatnosti u Evropi naša stručna i društvena javnost se uključuje sporadično. S vremena na vreme Poverenik za informacije od javnog značaja i zaštitu podataka ličnosti, organizacije civilnog društva i stručnjaci koji se bave zaštitom prava na privatnost skrenu pažnju javnosti na rizike s kojima se građani svakodnevno suočavaju kada lične podatke unose u formulare ili ugovore koje zaključuju, ili nastoje da ih zaključe, sa privatnim organizacijama, bankama i firmama ili ih prilikom pokretanja postupaka za ostvarivanje pripadajućih prava „daju“ različitim organima javne vlasti. Stručnjaci skreću pažnju na to da se pravo na privatnost krši i snimanjem bez pristanka građana na javnim mestima i u javnim ustanovama, objavljivanjem fotografija u medijima, ali i zloupotrebama društvenih mreža i interneta, telefonske i druge komunikacije, te da savremene tehnologije omogućavaju pristup različitim ličnim podacima ne samo službama koje su

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[76] Rad je napisan tokom rada na projektu Instituta društvenih nauka “Društvene transformacije u procesu evropskih integracija – multidisciplinarni pristup, (br. 47010) koji podržava i finansira Ministarstvo prosvete, nauke i tehnološkog razvoja Republike Srbije. (Zahvalnost za podatke o međunarodnim standardima zaštite prava na privatnost dugujem mr Ivani Stjelji istraživačici u Resursnom centru za podršku istraživanjima u Institutu društvenih nauka u Beogradu

ovlašćene da se staraju o ličnoj i nacionalnoj bezbednosti, već i mnogo širem krugu zainteresovanih.

Građani u Srbiji nemaju dovoljno informacija i znanja o tome kada im je povređeno pravo na privatnost (zaštitu podataka o ličnosti), a ni o tome na koji način mogu da potraže zaštitu ovog prava koja je garantovana međunarodnim konvencijama, Ustavom i zakonom. Štaviše, često ni oni koji lične podatke upotrebljavaju na način koji zakon zabranjuje nisu svesni prekršaja. Zabrinjavajuće je to što ne postoji svest ljudi kako o tome da kada obavljaju svoje profesionalne zadatke često neovlašćeno zadiru u nečiju privatnost, tako i o tome da time ugrožavaju etičnost svoje profesije. U to sam se uverio nedavno kada je jedan ugledni beogradski dnevni list, u kratkom periodu dva puta objavio moju fotografiju snimljenu na šalteru banke. Kada sam se kod urednika tog lista pozvao na povredu prava na privatnost, kao i na to da ću se povodom tog slučaja obratiti Savetu za štampu, suočio sam se sa iskrenim zaprepašćenjem i objašnjenjem da taj list svakodnevno objavljuje fotografije građana, te da sam prvi koji se žali zbog toga. Još je interesantnije iskustvo koje sam stekao obavljajući određene poslove koji podrazumevaju i uvid u informacije o privatnosti ličnosti. Većina kolega s kojima sam sarađivao prihvatila je da u službenoj javnoj komunikaciji anonimizuje podatke o ličnosti, ali ne i da je to nužno: najčešće objašnjenje bilo je da će oni koji su zainteresovani za lične podatke na ovaj ili onaj način doći do njih. Izlišna su bila objašnjenja da čak ukoliko je njihovo zapažanje tačno, a nažalost pokazalo se da jeste, ljudi mahom ne žele da dele lične podatke sa svima.

Većini ljudi je teško da razluči, ili uopšte ne razmišlja o tome, kada lični podatak postaje javan. Često iz medija saznajemo različite informacije iz života ljudi koji obavljaju javne funkcije i koji se odnose na njihovu privatnost. To je opravdano, posebno u slučaju kada su ti podaci od važnosti za obavljanje javne funkcije, ali objavljivanje pojedinih ličnih podataka ili njihovo prenaglašavanje u javnosti, a koji nisu uslov za obavljanje te funkcije, otvara i pitanje zakonitog postupanja i etičnosti. Nedavno su mediji objavili podatke i kopije dokumenata o ocenama sa studija pojedinih javnih funkcionera. Nesumnjivo, reč je o ličnom podatku i on bi trebalo da je dostupan javnosti samo u slučaju kada je to propisano i kada je u interesu građana. Svakako da je u interesu građana da se o njihovim pravima, javnim politikama i poslovima bave obrazovani i kompetentni stručnjaci, ali postavlja se pitanje da li je taj podatak javan ili bi trebalo da je dostupan samo telima koja utvrđuju ispunjenost uslova kandidata za obavljanje određene javne funkcije ili posla. Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti je u slučaju izbora zamenika javnog tužioca smatrao da su podaci o prosečnoj oceni tokom studija kandidata javni i učinio ih je dostupnim

javnosti[77]. Ne osporavajući mišljenje Poverenika, želim da ukažem na šire probleme koji nisu samo pravne prirode – na poverenje i na odgovornost kao dva instituta na kojima pored stručnosti javna uprava gradi odnos sa javnošću.

Nesporno je da kandidati koji obavljaju javne funkcije treba da budu dobro obrazovani i stručni, ali iz perspektive naše teme važno je da su takvi uslovi propisani u dokumentima na osnovu kojih se javni funkcioneri kandiduju za određenu javnu funkciju. Za proveru tih podataka imenuju se različita tela, a i većina organa javne vlasti ima stručne službe koje su ovlašćene da proveravaju podatke o ispunjenosti uslova kandidata. I tu bi, ukoliko postoji vladavina prava, trebalo da se okonča provera ličnih podataka koji se odnose na određene propisane kvantitativne uslove. Ukoliko postoji poverenje u tela i administraciju koja vrše te provere i nesporna je odgovornost stručnjaka u tim telima, mislim da nije nužno da se lični podaci dostavljaju javnosti. Kako, međutim, stvari stoje, bilo zbog nepoverenja u rad administracije i stručnih tela bilo zbog neodgovornosti njihovih članova, pojedini lični podaci građana postaju značajni za javnost. U vezi s tim trebalo bi voditi računa o članu 5 Konvencije o zaštiti lica u odnosu na automatsku obradu ličnih podataka[78] kojom se jemči pravedno i zakonito pribavljanje i obrađivanje ličnih podataka koji su sačuvani u određene legitimne svrhe, i ne smeju se koristiti suprotno svrsi zbog koje su sačuvani; koji su odgovarajućeg obima u odgovarajućem obliku i koji se ne smeju čuvati duže nego što je potrebno. Konvencija štiti i pravo pojedinca na informisanost o tome da li se o njemu čuvaju podaci, pristup tim podacima, i, ako je nužno, ispravljanje takvih podataka. Ako želimo da u raspravi o ovom problemu idemo još dalje možemo postaviti pitanje: da li je potrebno da se prilikom izbora za bilo koju javnu funkciju pojedini lični podaci cene kao bitan uslov za obavljanje funkcije čime oni po logici stvari postaju interesantni javnosti. U opisanom slučaju otkrili smo, zahvaljujući nepoverenju javnosti u rad organa koji je Narodnoj skupštini predložio kandidate za zamenike javnog tužioca, da je važan činilac prilikom izbora kandidata bila i prosečna ocena tokom studija. Međutim, uvidom u propise kojim je uređen izbor zamenika javnog tužioca takav uslov nije propisan[79]. Ako uslovi nisu propisani, zašto su podaci o njihovoj ispunjenosti javni? Takođe, ako je razlog taj što se sumnja u rad Državnog veća tužilaca koje je ovlašćeno

[77] Slobodan pristup informacijama: Stavovi i mišljenje Poverenika, Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti, Beograd, 2017, str. 77.

[78] http://www.poverenik.rs/yu/pravni-okvir-zp/medjunarodni-dokumenti-zp/1359-konvencija-o-zastiti-lica-u-odnosu-na-automatsku-obradu-podataka.html

[79] Zakon o radnim odnosima u državnim organima („Službeni glasnik RS“, br.48/91, 44/98 – dr. zakon, 49/99 – dr zakon, 34/2001 – dr. zakon i 39/2002); Zakon o javnom tužilaštvu /čl. 76 – 77a/, "Sl. glasnik RS“, br. 116/2008, 104/2009, 101/2010, 78/2011 – dr. zakon, 101/2011, 38/2012 – odluka US, 121/2012, 101/2013, 111/2014 – odluka US, 117/2014, 106/2015 i 63/2016 – Odluka US)

da predlaže Narodnoj skupštini kandidate za zamenike javnog tužioca, onda se suočavamo s problemom koji je značajniji od pitanja zaštite prava na privatnost, a to je odsustvo vladavine prava.

Načelo vladavine prava podrazumeva nadmoć prava nad voluntarizmom političke moći i izraz je dugog razvoja političkih institucija i političke misli (Stanovčić, 2005: 31). Međutim, da bi vladavina prava ostvarivala svoju svrhu, potrebno je da društvo u kojem se ona uspostavlja barem teži izbegavanju zamke s kojima se demokratija suočava (Bašić, 2017: 147). Vladavina prava podrazumeva i to da postoje odgovorne institucije i odgovorni građani i da je uspostavljeno bazično poverenje između njih. Stabilna demokratija i poverenje su veoma važne za zaštitu prava na privatnost, jer je ono u međunarodnom pravu ljudskih prava derogabilno, odnosno može se i ograničiti nacionalnim propisima ukoliko je to neophodno. Ukoliko ne postoji poverenje i odgovornost institucija, teško je odgovoriti na osnovna pitanja iz političke teorije: šta je to demokratsko društvo, i ko ima pravo da ograniči ljudska prava (zakonodavna ili izvršna vlast), a još teže na ona koja se odnose na sadržinu prava na privatnost (privatni život, porodični život, poštovanje doma, poštovanje prepiske) i njegovu zaštitu.

Etnicitet i privatnost

Pravo na privatnost se definiše kako u odnosu na individuu i njegov identitet i potrebe, tako i u odnosu na društvene interakcije. U kontekstu odnosa države i pojedinca lako je definisati sadržaj i zaštitu prava na privatnost, ali nedoumice se javljaju u vezi s ličnim podacima koji su ukorenjeni u grupne identitete kojima pojedinci pripadaju (rasa, etnička grupa, nacija, veroispovest). Savremena liberalna država i međunarodno pravo priznaju rasne i etnokulturne identitete građana i kolektivna prava koja proističu iz tih identiteta. Rasnim i etnokulturnim grupama koje se nalaze u položaju manjine međunarodne institucije i države priznaju, zbog zaštite i očuvanja kolektivnih identiteta, određena prava – kulturna autonomija, različiti oblici samouprave, mere afirmativne akcije i druga (Bašić, 2016: 51). Međutim, pored institucionalnog priznavanja identiteta i razvijanja pravne, društvene i logističke infrastrukture za ostvarivanje prava na zaštitu i očuvanje etnokulturnih identiteta potreban je i pristanak pripadnika grupe.

Pristanak podrazumeva to da se pripadnik rasne, nacionalne, etničke ili verske manjine javno izjasnio da na osnovu toga što pripada određenoj „manjinskoj“ grupi želi da ostvaruje kolektivna prava koja se odnose na zaštitu identiteta grupe – da govori jezikom grupe kojoj pripada na određenoj teritoriji, da se obrazuje i da bude informisan na tom jeziku, da neguje kulturu i običaje u zajednici sa drugim pripadnicima grupe ili

da bira i da bude biran u organe javne vlasti ili manjinske samouprave po osnovu „grupne“ ekskluzivnosti. Ukoliko je participativna demokratija izraz „zrelog“ društva, onda ostvarivanje ovih prava i izjašnjavanje o rasnom, etničkom, nacionalnom poreklu ili veroispovesti nije opterećeno strahom pripadnika grupe da će trpeti negativne posledice ukoliko se javno izjasni o etničkom poreklu i pripadnosti. U takvim društvima pojedinac se slobodno opredeljuje o načinu na koji će usmeravati lične planove (Bašić, 2007; 105).

Problem je, međutim, sa društvima u kojima je različitost prepreka ostvarivanju demokratije, i gde postoje realni problemi u vezi sa ostvarivanjem „kolektivnih“ prava. U takvim društvima pribegava se etničkoj mimikriji, asimilaciji, izgradnji veštačke zajednice građana koja zanemaruje primordijalnost kulturnih identiteta ili institucionalnom priznavanju „manjinskih“ identiteta i njihovih prava, ali bez uspostavljanja integrativnih društvenih veza. Pravo na zaštitu privatnosti u takvim društvima ima poseban značaj. Razvoj demokratije, zaštita ljudskih prava, „osvajanje“ slobode primarni su zadaci ovih društava, a oslobađanje od straha da identitet nije uzrok neprijatnosti i diskriminacije uslov je njihovog ostvarivanja.

Sloboda izjašnjavanja o nacionalnom ili etničkom identitetu i poreklu i zaštita od zloupotreba i diskriminacije na osnovu pripadnosti tim identitetima su realna opasnost u multikulturalnim državama koje nisu razvile integracioni društveni model (Bašić; Pajvančić, 2014; 36). U takvim društvima pripadnici „manjinskih“ grupa se, uprkos institucionalnom priznanju identiteta, suočavaju i sa institucionalnim zanemarivanjem i sa društvenom distancom. Često je etničko poreklo uzrok neprijatnosti, prepreka za zapošljavanje i napredovanje u profesiji i ostvarivanje drugih priznatih prava, a u ekstremnim situacijama i povod za najgrublje povrede prava i diskriminaciju. Zbog toga se pripadnici etničkih manjina, Romi najčešće, prikrivaju u susednim identitetima, a limitrofne tačke dodira različitih identiteta na taj način, umesto da su osnova interkulturalnih prožimanja, postaju agregat za asimilaciju manjinskih identiteta.

Da bi se to izbeglo i da bi se ublažile posledice etnocentrizma, preduzimaju se na međunarodnom i na nacionalnom nivou mere koje štite privatnost pripadnika nacionalnih manjina kroz posebnu zaštitu prikupljanja i obrade „osetljivih“ podataka o njihovim etničkom, i nacionalnom identitetu.

Direktiva Evropskog parlamenta i Saveta 95/46/EZ od 24. oktobra 1995. o zaštiti građana u vezi s obradom podataka o ličnosti i o slobodnom kretanju takvih podataka[80] je osnovni pravni akt o zaštiti podataka Evropske unije. Njom se državi članici zabranjuje obrada podataka o ličnosti koje se, pored ostalih ličnih svojstava, odnose i na rasno ili etničko poreklo. Prikupljanje i obrada takvih podataka je dopuštena samo uz izričit pristanak lica; ako je obrada neophodna radi izvršavanja obaveza i posebnih prava u oblasti radnog prava; ako je obrada neophodna radi zaštite vitalnih interesa lica koje je fizički ili zakonski nesposobno da dá pristanak; ukoliko se obrada odnosi na podatke koje je lice javno saopštilo ili je obrada neophodna radi uspostavljanja, izvršenja ili odbrane pravnih zahteva i drugo.

Opštom uredbom o zaštiti podataka[81] iz 2016. godine Evropski parlament nastoji da obezbedi poštovanje prava na zaštitu ličnih podataka u Evropi, i da stimuliše razvoj jedinstvenog digitalnog tržišta u Uniji[82]. Uredba članom 9 zabranjuje obradu posebnih kategorija ličnih podataka, odnosno podataka koji se odnose na rasu, etničko poreklo, političke stavove, religijska i filozofska uverenja, članstvo u sindikatu, genetičke podatke, biometrijske, podatke o zdravstvenom stanju i seksualnom životu i seksualnoj orijentaciji. Uredba kao i pomenuta Direktiva predviđa izuzetke od ove zabrane u slučaju izričitog pristanka, zbog javnog interesa, naučnih i istorijskih istraživanja i drugo. Obrada „osetljivih“ podataka je načelno zabranjena instrumentima Saveta Evrope i EU, ali trebalo bi imati na umu i to da postoji iscrpna lista izuzetaka od tog pravila na kojoj su izričita saglasnost osobe čiji se podaci obrađuju, vitalni interesi osobe čiji se podaci obrađuju, legitimni interesi drugih, javni interes i drugo.

U Republici Srbiji Ustavom je uređena zaštita prava na privatnost (čl. 39 i 40) i zajamčena je zaštita podataka o ličnosti (čl. 42). Ovim članom je predviđeno: a) „prikupljanje, držanje, obrada i korišćenje podataka o ličnosti uređuju se zakonom“ (st. 1); b) „zabranjena je i kažnjiva upotreba podataka o ličnosti izvan svrhe za koju su prikupljeni, u skladu sa zakonom, osim za potrebe vođenja krivičnog postupka ili zaštite bezbednosti Republike Srbije, na način predviđen zakonom“ (st. 2) i v) „svako ima pravo da bude obavešten o prikupljenim podacima o svojoj ličnosti, u skladu sa zakonom, i pravo na sudsku zaštitu zbog njihove zloupotrebe“ (st. 3).

[80] www.poverenik.rs/yu/pravni-okvir-zp/medjunarodni-dokumenti-zp/699--9546-24101995-.html

[81] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN

[82] https://europa.rs/evropski-parlament-usvojio-nova-pravila-eu-o-zastiti-licnih-podataka/

Zakon o zaštiti podataka o ličnosti[83] (član 16) kao naročito osetljive podatke navodi *nacionalnu pripadnost*, *rasu*, pol, *jezik, veroispovest*, pripadnost političkoj stranci, sindikalno članstvo, zdravstveno stanje, primanje socijalne pomoći, žrtvu nasilja, osudu za krivično delo i seksualni život. Izričito se navodi da se ovi podaci mogu obrađivati na osnovu slobodnog pristanka lica, osim ukoliko zakonom nije dozvoljena obrada ni uz pristanak. Zakon navodi da se ovaj pristanak mora dati pismenim putem, a omogućuje i opoziv pristanka za obradu naročito osetljivih podataka.

Takođe, Krivični zakonik[84] u čl. 146 predviđa krivično delo neovlašćeno prikupljanje ličnih podataka i propisuje novčanu kaznu ili kaznu zatvora do jedne godine za lica koja podatke o ličnosti koji se prikupljaju, obrađuju i koriste na osnovu zakona, neovlašćeno pribave, saopšte drugom ili upotrebe u svrhu za koju nisu namenjeni. Kazna do tri godine zatvora propisana je za lica koja u svrhu službe neovlašćeno prikupljaju, obrađuju ili distribuiraju podatke o ličnosti.

Ovim ustavnim i zakonskim odredbama iscrpljena je zaštita prava na privatnost i zaštita podataka o ličnosti pripadnika nacionalnih manjina. Međutim, podaci o nacionalnoj (etničkoj) pripadnosti često su predmet povrede. Primera radi, svaki put kada se u medijima saopšti sadržaj u kojem se prenaglašava nacionalna pripadnost lica, a to se čini uglavnom u vezi s prekršajima ili krivičnim delima, jeste povreda prava na privatnost. U javnosti, a i u praksi Poverenik za informacije od javnog značaja i zaštitu podataka ličnosti su karakteristična dva tipa povrede prava na privatnost – u vezi s prikupljanjem podataka o ličnosti (nacionalnost) od strane nacionalnih saveta nacionalnih manjina, i u vezi s ostvarivanjem mera pozitivne diskriminacije (mera afirmativne akcije) koje se preduzimaju u cilju ostvarivanja suštinske ravnopravnosti pripadnika nacionalne manjine.

Način na koji je bio propisan upis u poseban birački spisak za izbor Nacionalnog saveta nacionalne manjine na izborima održanim 2010. godine, izazvao je povrede prava na privatnost, zloupotrebe i doveo je u pitanje legitimnost izbora pojedinih manjinskih samouprava. Poverenik je vršeći kontrolu iz svoje nadležnosti utvrdio nezakonitu obradu podataka u Subotici, Vršcu, Novom Sadu, Nišu i Kragujevcu, a postupak u vezi s povredom ovog prava je vođen i u Požarevcu i Velikom Gradištu. Poverenik je utvrdio, a kasnije je njegovo mišljenje u odvojenom postupku potvrdio i Zaštitnik

[83] Zakon o zaštiti podataka o ličnosti („Službeni glasnik RS", br. 97/2008, 104/2009 - dr. zakon, 68/2012 - odluka US i 107/2012)

[84] „Službeni glasnik RS“, br. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009 i 111/2009

građana, da je do povrede došlo zbog kontroverznih uputstava u Instrukciji o postupku upisa u poseban birački spisak nacionalne manjine[85] koje su omogućavale da predaju zahteva za upis u poseban birački spisak izvrši treće lice, bez punomoćja lica koja se u zahtevima navode kao podnosioci. Naime, uprkos tome što je u propisima kojima je bio propisan izbor manjinskih samouprava uređena zaštita podataka ličnosti, utvrđene su zloupotrebe i nepravilnosti koje su proizilazile iz nedorečenosti pomenute Instrukcije[86].

Poverenik je neposredno pre održavanja izbora za manjinske samouprave 2010. godine utvrdio i to da su nacionalni saveti nemačke i bošnjačke nacionalne manjine nezakonito pribavljali i obrađivali podatke o ličnosti i naložio je brisanje 26 pripadnika nemačke nacionalne manjine i 32.458 pripadnika bošnjačke nacionalne manjine iz internih baza podataka koje su formirane u vezi s podnošenjem zahteva za upis u poseban birački spisak za izbor nacionalnog saveta nacionalne manjine[87].

Izmenama Zakona o nacionalnim savetima nacionalnih manjina ove nepravilnosti su otklonjene, tako da prilikom izbora manjinskih samouprava 2014. godine one nisu uočene, ali postupci koje su 2010. godine vodili nezavisni državni organi Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti i Zaštitnik građana bitno su uticali na promene propisa i poštovanje zakonitosti i pravne sigurnosti prilikom izbora manjinskih samouprava. Poverenik je tada jasno ukazao na to da kako Zakonom o nacionalnim savetima nacionalnih manjina manjinskoj samoupravi nije dato pravo ni da prikuplja zahteve od građana i da ih u njihovo ime predaje nadležnom opštinskom organu niti da podatke prikupljaju radi svojih evidencija i drugih potreba, jedini osnov za obradu podataka pripadnika nacionalnih manjina je slobodno dat pristanak lica na način kako je to uređeno Zakonom o zaštiti podataka o ličnosti.[88]

Drugi karakterističan slučaj u vezi sa zaštitom prava na privatnost pripadnika nacionalnih manjina odnosi se, kako je pomenuto, na primenu mera afirmativne akcije. Zakon o zaštiti prava i sloboda nacionalnih manjina u čl. 4 uređuje da organi vlasti „mogu u skladu sa Ustavom i zakonom da donose propise, pojedinačne pravne akte i da preduzimaju mere u cilju obezbeđenja i efektivne ravnopravnosti između pripadnika

[85] Instrukciju je 7. decembra 2009. godine pod brojem 290-111-00-00009/2009-05 donelo Ministarstvo za ljudska i manjinska prava.

[86] Videti Mišljenje zaštitnika građana 16-1– 725/10 (http://www.pravamanjina.rs/index.php/podaci/dokumenta/zaštitnik-građana/454-preporuka)

[87] Videti rešenja Poverenika: 011– 00– 00206/20090– 5 od 28. maja 2010. i 1640– 1– 00002/2010– 06 od 29. jula 2010.

[88] http://www.poverenik.org.rs/yu/formulari-zastita-podataka/70-stavovi-misljenja-zastita-podataka.html

nacionalnih manjina i pripadnika većinske nacije“, te da se na taj način doneti akti i preduzete mere ne smatraju aktom diskriminacije. Ustav Republike Srbije u čl. 21 utvrđuje da se „ne smatraju diskriminacijom posebne mere koje Republika Srbija može uvesti radi postizanja pune ravnopravnosti grupe lica koja su suštinski u nejednakom položaju sa ostalim građanima“, a u članu 76 ističe da se ova odredba posebno odnosi na nacionalne manjine. Najzad u čl. 77 ističe se sledeće „pri zapošljavanju u državnim organima, javnim službama, organima autonomne pokrajine i jedinica lokalne samouprave vodi se računa o nacionalnom sastavu stanovništva i odgovarajućoj zastupljenosti pripadnika nacionalnih manjina.

Svrha afirmativne akcije je da se grupama poput Roma, drugih etničkih manjina, osoba sa invaliditetom, žena koje su se dugotrajno nalazile u nepovoljnom i obeshrabrujućem položaju i koje iz različitih razloga bez intervencije države i društva ne mogu prevazići i eliminisati uzroke tog položaja, priznaju određene prednosti prilikom ostvarivanja priznatih prava. Njima se omogućava društvena ravnopravnost (Bašić, 2014.a; 13). Za primenu mera afirmativne akcije potrebni su podaci koji ukazuju kako na postojanje neravnopravnosti, tako i na korisnike ovih mera, što znači i prikupljanje podataka o etničkoj (nacionalnoj pripadnosti).

Uvreženo je mišljenje da je prikupljanje podataka o etničkoj pripadnosti zabranjeno, i zbog toga je u nekim slučajevima nemoguće doći do podataka o etničkoj pripadnosti učenika, lica koja su prijavljena na evidencije na tržištu rada i slično. Istraživanje koje je Zaštitnik građana sproveo 2013. godine o primeni Strategije unapređenja položaja Roma[89] ukazuje da organi javne vlasti različito postupaju u vezi s prikupljanjem podataka o etničkoj pripadnosti građana. Jer dok pojedini državni organi (Ministarstvo spoljnih poslova, Ministarstvo unutrašnjih poslova) takve podatke prikupljaju prvenstveno da bi zbog prirode posla obezbedili učešće pripadnika nacionalnih manjina u svom radu, većina njih, uključujući i organe u lokalnoj samoupravi, takve podatke ne prikuplja. Razlozi zbog kojih organi javne vlasti ne primenjuju mere afirmativne akcije je poštovanje propisa koji zabranjuju neposrednu i posrednu diskriminaciju lica koja traže zaposlenje, i po osnovu nacionalne pripadnosti[90]. U ovoj preporuci i Preporuci koju je istovremeno uputio Službi za upravljanje kadrovima[91] Zaštitnik građana je jasno

[89] http://www.pravamanjina.rs/attachments/IZVESTAJ%20ZG%20O%20SPROVODJENJU%20STRATEGIJE.pdf

[90] Videti Preporuku Zaštitnika građana 4331 od 25. juna 2009. godine. (http://www.pravamanjina.rs/attachments/420_PREPORUKA%20ORGANIMA%20DRZAVNE%20UPRAVE.pdf

[91] Del.br. 4564 od 25.. juna 2009. (http://www.pravamanjina.rs/attachments/419_PREPORUKA%20SLUZBI%20ZA%20UPRAVLJANJE%20KADROVIMA.pdf

ukazao na to da je potrebno da organi državne uprave vode evidenciju o nacionalnoj pripadnosti zaposlenih, poštujući pravo svakog da se ne izjašnjava o svojoj nacionalnoj pripadnosti (čl. 47. Ustava), u cilju praćenja izvršavanja ustavnih i zakonskih obaveza i planiranja mera za unapređenje zapošljavanja pripadnika nacionalnih manjina.

Prikupljanje osetljivih podataka je evropskim propisima dozvoljeno, ali pod uslovima da su namenjeni određenim ciljevima i da postoje jasne garancije zaštite. Većina evropskih država odbija da prikuplja segregisane podatke zbog restriktivnog tumačenja nacionalnih zakona o zaštiti podataka, iako direktive EU to omogućavaju.[92]

Očigledan je, međutim, nedostatak legislative i sudske prakse koji bi razrešio napetost između potrebe za prikupljanjem osetljivih podataka i zaštite podataka o ličnosti[93] i koji bi uspostavio ravnotežu između prava na privatnost i standarda ljudskih prava. Antidiskriminaciono zakonodavstvo naglašava važnost statističkih podataka u pravnim procedurama, a naročito prilikom utvrđivanja posredne diskriminacije. U Direktivi Saveta 2000/78/ec od 27. novembra 2000. – opšti okvir za ravnopravan tretman u zapošljavanju i profesiji i Direktivi Evropskog saveta 2000/43 o primeni principa jednakog tretmana među osobama bez obzira na njihovo rasno ili etničko poreklo, navodi se da se indirektna diskriminacija može ustanoviti bilo kojim načinom uključujući i na osnovu statističkih dokaza. I u odlukama Evropskog suda za ljudska prava statistički podaci se koriste kao dokaz, na primer, u presudi Oršuš i drugi protiv Hrvatske,[94] statistički podaci koji se odnose na broj romskih učenika u školi navedeni su kao dokaz u presudi kojom je utvrđeno da je došlo do povrede člana 14 Konvencije u vezi s članom 2 Protokola br. 1, odnosno da je došlo do diskriminacije, jer romskim učenicima nisu obezbeđene jednake mogućnosti u obrazovanju.

Dakle, standardi ljudskih prava, a posebno pravo na privatnost, ne isključuju prikupljanje podataka o etničkoj pripadnosti ukoliko se radi o prikupljanju podataka u svrhu borbe protiv diskriminacije, mada ovi standardi definišu osnovne zaštitne mere i ograničenja koja se odnose na obim i način na koji se osetljivi podaci mogu prikupljati i obrađivati (Schuter, Ringelheim: 35). Prikupljanje osetljivih podataka nije zabranjeno ni evropskim ni nacionalnim zakonima, ali pravo na privatnost ograničava i definiše

[92] https://www.opensocietyfoundations.org/reports/ethnic-origin-and-disability-data-collection-europe-measuring-inequality-combating

[93] https://www.opensocietyfoundations.org/reports/ethnic-origin-and-disability-data-collection-europe-measuring-inequality-combating

[94]https://hudoc.echr.coe.int/eng#{"display":["0"],"languageisocode":["HRV"],"appno":["15766/03"],"documentcollectionid2":["GRANDCHAMBER"]}

njegove granice. U Saopštenju poverenika[95] o Zakonu o Registru zaposlenih, izabranih, imenovanih, postavljenih i angažovanih lica kod korisnika javnih sredstava[96] kojim je pored ostalog predviđeno da se u Registar unose i obrađuju podaci o nacionalnoj pripadnosti zaposlenih, ističe se: „ne podrazumeva se obaveza zaposlenih u javnom sektoru da se izjašnjavaju o nacionalnoj pripadnosti, i da taj upis može biti vršen samo fakultativno, samo onda kad i ako to oni žele.“

Ovo mišljenje Poverenika je svakako tačno i ključno za razumevanje odnosa afirmativnih mera i prava na privatnost. I jedno i drugo pravo imaju za svrhu zaštitu prava građana, prvo, na ostvarivanje suštinske ravnopravnosti građana koji se u nepovoljnom položaju dugotrajno nalaze zbog pripadanja određenom identitetu (rasa, etnija, pol), a drugo, da zaštiti privatnost građana. Ostvarivanje prava na mere afirmativne akcije isključuje delimično pravo na privatnost, jer da bi mere afirmativne akcije ostvarile svrhu i obezbedile ravnopravnost etničkim manjinama, oni u javnom polju moraju dobrovoljno, ali jasno da iskažu volju da žele da ih koriste, a to podrazumeva i određene dokaze o pripadništvu određenom etničkom identitetu. Takav pristup podrazumeva sledeće: da su afirmativne mere kreirane sa svrhom da obezbede ravnopravnost pripadnika etničkih manjina, da se prilikom njihovog ostvarivanja u javnim politikama jasno iskaže „korist“ koje pripadnici te grupe ostvaruju od tih mera i najzad, ne manje važno, da se one preduzimaju samo u odnosu na pripadnike grupe koji dobrovoljno, bez ikakvih pritisaka, pristanu na ove mere, odnosno koji se izjasne o svom etničkom (nacionalnom poreklu).

Izazovi ljudskih prava

U evropskoj političkoj kulturi i pravnim sistemima nema jedinstvenog pristupa uspostavljanju javnih politika koje sadrže afirmativne mere za ranjive grupe i zaštitu prava na privatnost. Za pojedine države, Englesku, Irsku, Slovačku i Mađarsku, ove mere se preduzimaju isključivo da bi se položaj dugotrajno zanemarivanih ili diskriminisanih društvenih grupa što više ujednačio sa statusom „većine“. U Engleskoj su preduzimane različite akcije kako bi se suština ovih „balansirajućih“ mera objasnila i približila građanima i doneti su zakoni[97] na osnovu kojih je trebalo da se afirmativne

[95] http://www.poverenik.org.rs/yu/formulari-zastita-podataka/70-stavovi-misljenja-zastita-podataka.html

[96] Zakon o Registru zaposlenih, izabranih, imenovanih, postavljenih i angažovanih lica kod korisnika javnih sredstava ("Službeni glasnik RS", br. 68/2015 i 79/2015. ispr.)

[97] Zakon o jednakosti (Equality Act) iz 2010. godine je donet s ciljem da objedini antidiskriminacione mere i mere kojima se podstiče faktička jednakost ranjivih grupa (rasne i seksualne manjine, osobe sa invaliditetom, žene, posebno trudnice).

mere sprovedu i razvijaju (Bašić, 2014.a: 15). U Holandiji afirmativne mere su važna poluga u strategiji upravljanja različitosti, pomoću koje bi trebalo trajno otkloniti uzroke i posledice diskriminacije i stereotipa. Skandinavske države Danska i Švedska smatraju da mere afirmativne akcije imaju smisla samo ukoliko za njihovo sprovođenje postoji snažna društvena podrška. Austrija, nasuprot još jednom često navođenom mišljenju da su mere afirmativne akcije privremene i da su namenjene samo ranjivim grupama, uspostavlja koncept po kojem su one dostupne svakom ko se nađe u nepovoljnom položaju[98].

U Evropskoj uniji i drugim evropskim zemljama ne postoji jedinstvena strategija ili politika mera afirmativne akcije prema ranjivim grupama. Evropska komisija je direktivama[99], preporukama i uspostavljenjem antidiskriminacionih instrumenata i tela nagovestila osnov nad kojim će se razvijati javne politike u kojima će afirmativne mere biti poluga pomoću koje bi trebalo obezbediti normativnu i faktičku jednakost ranjivih grupa. Od države do države, takve javne politike se razlikuju, a uspešnost sprovođenja afirmativnih mera zavisi od toga da li su takve mere društveno prihvaćene, da li su jasno propisane i da li su obezbeđeni uslovi za njihovo ravnomerno sprovođenje u lokalnoj zajednici (Bašić, 2014.a: 17).

Pravo na privatnost je neotuđivo ljudsko pravo i njegova suština je da čoveku omogući da samostalno odlučuje o tome šta će iz svoje privatnosti saopštiti u javnosti. Međutim u savremenom svetu privatnost je dinamična kategorija i pristup privatnosti je uslovljen različitim faktorima. Sučeljavanje sa terorizmom i vođenje računa o globalnoj i nacionalnoj bezbednosti najveće su prepreke ostvarivanju prava na privatnost. Podaci o etničkom, nacionalnom poreklu i veroispovesti se u tom kontekstu ne tretiraju kao osetljivi već kao poziv na oprez u vezi sa mogućom terorističkom akcijom. U takvim slučajevima primenjuju se mehanizmi koji isključuju zaštitu ljudskih prava u izuzetnim slučajevima. Pored toga, ljudi nemaju dovoljno informacija o tome kada se izlažu mogućim neprijatnostima i zloupotreba kada daju lične podatke. Podatke koje ostavljamo na internetu da bi pristupili određenim sadržajima su pogodni za različite zloupotrebe, pri tome najčešće dati su dobrovoljno.

[98] „International Perspectives On Positive Action Measures – A Comparative Analysis In The EU, Canada, USA and South Africa“, EC & University of Bradford, 2009.

[99] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 – 0022; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022 – 0026.

Uprkos nastojanju međunarodnih organizacija da standardizuju zaštitu prava na privatnost i država da ih implementiraju, nisu postignuti očekivani rezultati, a u određenim slučajevima, poput zaštite prava etničkih (nacionalnih) manjina, postoje snažne napetosti u primeni i potrebni su dodatni pravni i regulatorni mehanizmi. Pravo na privatnost u kontekstu zaštite prava etničkih manjina ukazuje na snagu i kompleksnost prirode ljudskih prava. Čovek se ostvarujući prava ne sučeljava samo sa nizom ograničenja koja proizilaze iz društvenih odnosa i nastojanja drugih da ostvare ista prava, već i sa prirodom identiteta kojim pripada. Da bi se oba prava dovela u prirodnu ravnotežu potreban je društveni ambijent koji nije ograničavajući ni u kakvom pogledu, odnosno koji je eliminisao rasizam, diskriminaciju, etničke predrasude i podele na „nas“ i „njih“. Kako je stanje demokratije takvo da je ova ravnoteža još uvek građanski ideal potrebne su određene norme pravne zaštite.

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Goran Bašić*

THE RIGHT TO PRIVACY IN THE CONTEXT OF CITIZENS' ETHNICITY DATA COLLECTION[100]

Abstract: *In a contemporary liberal state, national / ethnic minorities are granted collective rights, the purpose of which is protection of their cultural identities. In many cases, however, exercise of collective rights is conditioned by collection of sensitive data on citizens' ethnic (minority) identity, happening while exercising some of their specific rights and with the consent of the citizens belonging to ethnic minority groups to declare, aka openly state or disclose their ethnicity. The main idea the author discusses in this paper is on balancing the right to privacy and the actual need for data collection, analysis and presentation concerning citizens' ethnicity.*

Keywords: *ethnicity, privacy, statistics*

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Igor Vuletić[*]

CRIMINAL DEFAMATION AND PRESS FREEDOM IN JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *Press freedom is considered a cornerstone of democracy in every civilized society. Free and independent press reporting on suspicious or illegal activities of government officials informs public and prevents further damage to the society. In that sense, the press plays a role of a societies "watchdog" and a keeper of modern democracy. Therefore, it is important that states do not enact laws that would have deterring effect on freedom of the press. Harsh criminal defamation laws have such effects. To avoid such legislative practice, European Court of Human Rights has developed certain criteria that each member state should keep up to when criminalizing defamation or insult. In this paper, author describes the relevant jurisprudence of ECHR in this sensitive area of law and articulates guiding principles that are established by this jurisprudence.*

Keywords: *defamation, insult, honor and reputation, freedom of speech, media , democracy*

1. Introduction

Freedom of expression is one of the basic rights of the first generation. As probably the most important part of the heritage of enlightenment philosophy, freedom of speech is guaranteed by majority of legal systems around the globe and it is considered a cornerstone of modern democracy. One of the aspects of this right is the right to a free press. Namely, free press through its ability to disclose to public potential misuses and wrongdoings of state authority, plays an essential role in modern democracy as a "watchdog" of state power. Bearing that in mind, most international standards recommend complete decriminalization of defamation. Yet, some states still decide to activate their privilege of sovereignty on this issue and to do just the opposite: criminalize defamation, sometimes even with prison sentences. Although such choice is usually justified by the need for protection of honor and reputation (also one of the

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human rights protected by majority of constitutions around the Globe), one cannot neglect the potential danger of missuses of defamation criminal law in purposes of concealing governmental mistakes and pressurizing media to a self-censorship in fear of criminal liability.

This paper discusses that issue from the perspective of European Court of Human Rights in Strasbourg (further: ECHR; the Court). The Court started to build up its jurisprudence on this issue from mid- seventies of the last century. Since then, it has modeled clear standards on acceptable limits of freedom of speech, especially concerning media and independent reporting in a democratic society. Each legislator in member states of Council of Europe is obliged to follow those standards. Therefore, in this paper I will analyze the Court`s most important decisions in this area and try to recognize and articulate guiding principles established in the Court`s jurisprudence.

2. Press freedom in democratic society: establishing principles in ECHR`S jursiprudence

European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), together with national jurisdictions and the European Court of Justice, is one of the three keepers of human rights in modern Europe. However, unlike the previous two, Convention has additional significance since it is an international treaty valid at the territory of almost entire Europe (and not only specific state or just member-states of the European Union). Convention is not special only by its jurisdiction, but also by its specific goal to "reaffirm profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained…by a common understanding and observance of the Human Rights".[101] It is therefore justified to claim that this international treaty is the treaty with a purpose to "benefit individual users, i. e. people in the jurisdiction of contracting states"(Nastić, 2009, 33).

In the freedom of expression field, Convention`s Article 10 is considered to be a certain regional equivalent of Article 19 of the International Covenant on Civil and Political Rights (Clooney and Webb, 2017, 21). Article 10 of the Convention stipulates that:

1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

[101] Preamble of the European Convention.

without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subjected to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This provision is structured in a way that first establishes fundamental guarantees and safeguards for the freedom of expression (Article 10 (1)), but then declares that these rights are not of the absolute nature (Article 10 (2)). In another words, quoted article sets the right, but at the same time predicts restrictions on the freedom of expression and leaves it to the discretion of each member state to decide on the scope of imposition (Yanchukova, 2003, 876).

European Court of Human Rights is the supervisory body and the main interpreter of the Convention. It has a great significance in the region since its case- law has served as a benchmark for legal reforms across the Europe for many years now (O`Boyle, 1993, 264). In context of freedom of expression, over the years the Court has set certain standards for a proper interpretation of Article 10. The basis were set in the early seventies, in the case of *Handyside v. United Kingdom*. The applicant was Mr. Handyside, the publisher of a schoolbook for children of the age 12 and upwards (*"The Little Red Schoolbook"*). Mr. Handyside used this book to stimulate children to take a liberal attitude towards sex matters. He was charged under the Obscene Publications Act 1959 and convicted for obscene publications. He was sentenced to a fine. His publication was withdrawn from the market and confiscated. Mr. Handyside addressed ECHR and complained that the actions against him constituted breach of Articles 1, 7, 9, 10, 13 and 14 of the Convention and Article 1 of the Protocol No. 1. The Court agreed that the applicant`s criminal conviction was, without any doubt, "an interference by public authority in the exercise of his freedom of expression" guaranteed by Article 10 (1) of the Convention.[102] The Court emphasized freedom of expression as one of the essential values in a democratic society and "one of the basic conditions for its progress

[102] Handyside v. the United Kingdom, App. No. 5493/72, (Eur. Ct. H. R. Dec. 7, 1976), para. 43.

and for the development of every man".[103] It made it clear that Article 10 is applicable to all information and ideas, including the ones that are offensive, shocking or disturbing to the State or other sectors, because there could be no democratic society without pluralism, tolerance and broadmindedness.[104] The Court also stated that every sanction imposed by the state in this sphere must be proportionate to the legitimate aim.[105] However, the Court also clarified that, since there is no uniform standard of moral, each State has a discretional wright to decide what measures are necessary for protection of moral.[106]

After this decision, the Court has gradually developed standards of interpretation of Article 10 in context of press freedom and (de)criminalization of defamation. Some authors criticize Court`s activity in this area. *Clooney and Webb* point that Court has significantly restricted the freedom of speech, based on the Article 17 of the Convention. That provision says that „nothing in Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention“ (Clooney and Webb, 2017, 22).[107]

Despite the fact that the Court has never explicitly excluded the possibility of maintaining criminal defamation laws, it succeed to establish a set of precise criteria for the evaluation of the breach of Article 10. The Court has developed quite consistent jurisprudence on limits of criminal defamation and insult in context of freedom of media. Although it didn`t articulate them *expressis verbis* as such, careful observer is able to read between the lines and spot certain guiding principles. Those principles could also serve as guidelines if one wants to put certain legislation on test of Article 10 and freedom of media. In my opinion, the Court has established three basic principles regarding defamation criminal law and freedom of media[108]:

1) Bounds of allowed criticism are wider with regard to government and political figures than private individuals.

[103] *Id*, para. 49.

[104] *Id.*

[105] *Id.*

[106] *Id*, para. 48.

[107] In my opinion, such objections are missing clear argumentation in Court`s jursiprudence.

[108] Some authors mention even more guiding principles. However, I have decided to focus only on those that we consider the most important for debated issue.

2) The proof of truth of a value judgement cannot be required by the applicant.
3) Sentence has to be a proportional mean of protecting the reputation of others.

At this point, I will describe those principles on the examples of leading cases in which the Court dealt with an issue of dissemination of press information and opinions in the media about political figures and public officials. Overview of the Court`s practice in subject matter is of a great importance for the debate on any of the national laws, since it could help to set the criteria for evaluation of each of those systems.

2.1 Bounds of allowed criticism are wider for political figures and government

It should be no doubt that politicians, as public figures, do not enjoy the benefit of protection of their privacy, honor and reputation at the same level as regular citizens. Politicians have the status of public officials, which by its definition means that they have been elected by citizens to carry out some portion of a government`s sovereign powers (Garner, 2009, 1245). Such (relatively unprotected) status of their wrights can be justified by the inarguable fact that politicians have the power to make decisions significant for the future of certain society so the public has legitimate interest to make sure that they do not abuse the entrusted power (Thomson, 1981, 228). One might say that there is a *praesumptio iuris et de iure* that politicians, once they have been elected to a certain public position, have voluntary abandoned the wright for protection of honor and privacy in a way they had that wright till they were just ordinary citizens. Therefore, their level of sensitivity to public criticism of their public work increases proportional with the position they gain.

This cornerstone principle has been recognized by the ECHR for the first time in 1986, in the decision brought after the second application in case *Lingens v. Austria.*[109] The applicant was Mr. Lingens, chief editor of an Austrian journal. He was convicted by Austrian courts for criminal offence of defamation, for publishing two articles in his journal that were insinuating that Mr. Bruno Kreisky, Austrian Chancellor at the time, has accommodating attitudes towards Nazis. The first published article was describing Nazi- past of Mr. Friedrich Peter, lieder of Austrian Liberal Party in that period. The article claimed that Peter was a member of SS tropus during the Second World War. In

[109] In first application in 1975 Court didn`t find any breach of Article 10 (1) of the Convention. However, in the decision after second application in 1986, the Court changed its earlier viewpoints and declared the breach of mentioned article. Therefore. In this text we will devote our attention only to the second verdict of the Court.

the second article, it was suggested that Kreisky is protecting Peter from investigation on his SS past and, therefore, acts as an "opportunist". Kreisky started criminal proceedings against Lingens and the latter was convicted by Austrian courts for defamation and sentenced for a fine, under the Article 111 of Austrian Criminal Code. ECHR has found that such conviction violates Article 10 of the Convention. It emphasized the importance of freedom of expression and concluded that Lingens` conviction was unnecessary interference from the higher values point of view. Among other arguments, the Court especially stressed the following:

"The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both, journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt that Article 10 (2) enables the reputation of others…to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."[110]

In the decisions that were about to follow, the Court continued to affirm this principle. In *Oberschlick v. Austria* the applicant was Mr. Oberschlick, a journalist and the editor of Austrian newspapers *Forum*. In his newspapers, he published an article in which he accused Austrian politician Mr. Grabher-Meyer that his statement that family allowances for Austrian mothers should be larger than the ones for immigrant mothers is a pro- Nazi policy and that Grabher- Mayer is therefore a Nazi sympathizer. Grabher-Mayer sued Oberschlick and the latter was convicted under the same article as Lingens (Article 111). ECHR decided that this conviction constitutes breach of Article 10 (1) of the Convention. The Court stated that "the limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual".[111] In later decision in same case, Court also pointed that "a politician who express himself in such terms exposes himself to a strong reaction on the part of journalists and the public".[112]

Even more important is the case *Castells v. Spain*, since it has defined gradation of the bounds of permissible criticism. The applicant, Mr. Castells, was a member of the

[110] Lingens v. Austria, App. No. 9815/82 (Eur. Ct. H. R. Jul. 8, 1986), para. 42.

[111] Oberschlick v. Austria No. 1, App. No. 11662/85 (Eur. Ct. H. R. May 23, 1991), para. 59.

[112] Oberschlick v. Austria No. 2, App. No. 20834/92 (Eur. Ct. H. R. Jul. 1, 1997), para. 27

Spanish senate. He accused the police for murder of Basque activist and criticized government for covering the police from investigation and punishment. He was prosecuted and convicted for serious insult and false accusations of the government under the Article 161 and a62 of Spanish Criminal Code. He was sentenced to a prison sentence of one year. In a review of conviction, the Court concluded that, although the freedom of political debate has certain limits, those limits are considerably wider with regard to the government than to a private citizen, or even to a politicians. Therefore, plaintiffs should be separated into three categories – regular citizens, politicians, and the government – and judged differently. The cases that involve government should be estimated under the closest scrutiny, politicians under intermediate, and regular citizens under the least scrutiny.[113] The Court confirmed this principle also in its later decision in similar case *Thorgeirson v. Iceland*, which concerned press criticism of police brutality. In that decision, the Court pointed that there should be no distinction made between political discussion and discussion of other matters of public concern and that politicians are obliged to "display a greater degree of tolerance" towards public criticism.[114]

Those and several others judgments of the Court[115] take us up to the conclusion that the Court`s jurisprudence has established very clear principle that bounds of acceptable criticism are as wider as the person involved is at a higher level of public service, with government at the tops of that "pyramid".

2.2 The proof of truth of a value judgement cannot be required

The cornerstone decision of the Court in this matter is the decision in case *Schwabe v. Austria.* The applicant, Mr. Scwabe, as a member of the SVP (The South Tyrolean People's Party) released a press statement accusing the Head of the Regional Government (Mr Wagner) of ignoring that his Deputy (Mr. Fruhbauer) had caused an accident under the influence of alcohol. This statement was based on an article that had appeared in the press several years earlier and was a response to a statement by the Head of the Regional Administration who had called upon a local mayor (Mr. Tomaschnitz) to resign for having caused a traffic incident while driving under the influence of alcohol. Fruhbauer started criminal proceedings against Scwabe for

[113] Castells v. Spain, App. No. 11798/85 (Eur. Ct. H. R. Jun. 25, 1992), para. 23.

[114] Thorgeirson v. Iceland, App. No. 13778/88 (Eur. Ct. H. R. Jun. 25, 1992), para. 42.

[115] *See* e.g. Incal v. Turkey, App. No. 22678`93 (Eur. Ct. H. R. Jun. 9, 1998), para. 54; Jerusalem v. Austria, App. No. 26958/95 (Eur. Ct. H. R. Feb. 27, 2001), para. 38; etc.

defamation and the latter was sentenced to a fine, under the Article 111 of Austrian Criminal Code. Conviction was based on the fact that Scwabe was unable to prove the truth of his statement. ECHR used this case to establish very important principle according to which the proof of thruth of a value judgement cannot be asked from the applicant, since his statement was a value judgement and therefore impossible to prove. Among others, the Court stressed following:

„The applicant`s conviction for defamation stemmed,..., from the fact that he failed to prove the thruth of his statement. Austrian courts interpreted the words „while under the influence of alcohol“...as meaning an alcohol content of 0.8 per mille or more, on the basis of the comparison made with Mr Tomaschnitz`s accident. The Court does not...consider it established that the applicant`s statement about Mr Frühbauer`s alcohol consumption was misleading. It moreover points out that the two accidents were not the subject of direct comparison but were mentioned only in relation to the different attiutude of Mr. Wagner towards them. It is significant that the applicant described both accidents in completely different terms. He nevertheless concluded that they had enough features in common to warrant the resignation of both the politicians concerned. The impugned comparison thus essentially amounted to a value- judgment, for which no proff of thruth is possible. The Court notes in this connection that the facts on which the applicant based his value- judgement were substantially correct and his good faith does not give rise to serious doubts. He cannot be considered to have exceeded the limits of freedom of expression.“[116]

The Court than continued on to apply this principle in other similar cases.[117] In my opinion, the Court`s viewpoint on this matter could be expressed through the following formula:

Substantially correct facts + value judgement based on such facts = no defamation or insult

2.3 Sentence has to be a proportional mean of protecting the reputation of others

This is one of the general principles of criminal law, also known as the “principle of proportionality”. It is considered to be one of the fundamental principles of modern

[116] Schwabe v. Austria, App. No. 13704/88 (Eur. Ct. H. R. Aug. 28, 1992), para. 34.

[117] *See* e.g. De Haes and Gijsels v. Belgium, App. No. 19983/92 (Eur. Ct. H. R. Feb. 24, 1997); Colombani et al. V. France, App. No. 51279/99 (Eur. Ct. H. R. Jun. 25, 2002); Pedersen v. Denmark, App. No. 49017/99 (Eur. Ct. H. R. Dec. 17, 2004) ; Oberschlick v. Austria etc.

society. However, it has been often argued that this principle is of the most violated ones, not only in history, but also in modern criminal law (Goh, 2013, 41 – 68).

This principle has specific meaning in context of freedom of expression and, especially, in terms of press freedom in a democratic society. Therefore, this principle deserves special attention. It was established in several verdicts of the ECHR. One of the most important is certainly *Dalban v. Romania*. Again, it was a case concerning a journalist (Mr Dalban), who wrote several articles in which he accused several public figures (senator, head of the state company etc.) for involvement in fraud. He was convicted for defamation of the executive and the Senator and sentenced to a prison sentence of three months and a fine. Appeal court, however, acquitted him with regard to the executive on the grounds that he acted in good faith. With regard to the senator, the conviction remained the same. Since Mr Dalban passed away in the meantime, ECHR admitted the application of his widow and decided the newspaper article concerned a matter of public interest.[118] It has also pointed that prison sentence in this case "amounted to disproportionate interference with the exercise of his freedom of expression as a journalist".[119]

In *Cevlan v. Turkey*, the Court also stressed that "the nature and the severity of the penalytl imposed are factors to be taken into account when assessing the proportionality of the interference".[120] In *Cumpănă and Mazăre v. Romania,* the Court emphasized that prison sentence for a press offence is incompatible with freedom of speech and Article 10 of the Convention, except in very exceptional cases such as hate speech or incitement to violence.[121]

Those and many other cases show clear attitude of the Court in sense that national courts should be very prudent in sentencing of press agents, since imposing of too harsh penalties could have the "chill off" effect for the investigation journalism. In that sense, prison sentence must be avoided without any exceptions. Same applies for an unusually large fines and temporary or permanent disqualifications from practice.[122]

[118] Dalban v. Romania, App. No. 28114/95 (Eur. Ct. H. R. Sep. 28, 1999), para. 50.

[119] *Id*, para. 52.

[120] Cevlan v. Turkey, App. No. 23556/94 (Eur. Ct. H. R. Jul. 8, 1999), para. 37.

[121] Cumpănă and Mazăre v. Romania, App. No. 33348/96 (Eur. Ct. H. R. Dec. 17, 2004), para 115.

[122] *See* Elena Yanchukova, *supra note 6*, p. 868.

2.4 Did the states follow guidelines?

From the above presented, it is clear that the Court has established a set of guiding principles for both, national legislators and jurisprudence. The aim of those principles is obviously to protect the freedom of press as the last branch of democracy in every civilized society. It is, therefore, important to know to what extent are the Court`s principles accepted and applied in member states.

Among member states of the Council of Europe, there are three types of legislations concerning defamation laws and press freedoms. First type are those systems that have fully decriminalized defamation made by the press and left that area for other branches of law to deal with (civil law above all, and in certain cases administrative law). Examples of such model can be found e. g. in Serbia or Monte Negro (Ristivojević, 2014, 153 – 174). The second type or model is represented by those countries that keep defamation and insult within the borders of criminal law but without prison sentences or disproportionate fines. Good example is Croatian Criminal Code after the latest reforms (Novoselec, 2016, 443 – 468). In this group there are also countries that still do have defamation in their criminal codes but tend not to apply it in practice. This is especially present in common law countries, such as the UK or Ireland (Griffen et al, 2017, 7). The third group consist of the countries that still criminalize defamation and insult with prison or large fines. It is worth mentioning Russia as a very specific example of country that first decriminalized defamation against state and government officials,[123] but then recriminalized it again (Reid, 2013, 1 – 36).

3. Conclusion

In this paper, I have opened and discussed very important issue of freedom media in context of ECHR` jurisprudence on national defamation criminal laws. This issue is a key one from the perspective of modern democratic society, since independent media reporting plays an essential role of a keeper or “watchdog” of democracy. Therefore, press freedom to report on the abuse of power made by the state or government officials is one of the essential freedoms and it should not be limited by disproportionally harsh sanctions.

It is truth that ECHR has never clearly stated that criminalization of defamation (or insult) of any of the state’s bodies (or the state itself) should be *a priori* considered as a

[123] During that short period, defamation was still kept in administrative law with very large fines, even larger than while it was a part of (old) criminal law.

breach of article 10 of the Chapter. In that sense, the Court clearly wanted to leave final decision on the choice of adequate branch of law to the states themselves. That is one of the prerogatives of the state`s sovereignty. However, the Court did express very clear that any system that would involve imposing harsh penalties to the press would have a "chill off" effect to the independent reporting. Therefore, any such system constitute a violation of article 10, without any doubt. To clarify its criteria, the Court has established (in my opinion) three main principles. Those principles, as described above in the text, must be used as guidelines by national legislators and judges.

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Igor Vuletić*

KRIVIČNA KLEVETA I SLOBODA ŠTAMPE U SUDSKOJ PRAKSI EVROPSKOG SUDA ZA LJUDSKA PRAVA

Apstrakt: *Sloboda štampe smatra se da je kamen temeljac demokratije u svakom civilizovanom društvu. Slobodno i nezavisno izveštavanje štampe o sumnjivim ili nezakonitim aktivnostima vladinih zvaničnika informiše javnost i sprečava dalju štetu po društvo. U tom smislu, štampa igra ulogu „nadzornika“ društva i čuvara moderne demokratije. Stoga, važno je da države ne usvajaju zakone koji bi imali efekat odlaganja slobode štampe. Oštri krivični zakoni o kleveti imaju takve efekte. Kako bi izbegli takvu zakonodavnu praksu, Evropski sud za ljudska prava razvio je određene kriterijume kojih bi svaka država trebala da se pridržava dok kriminalizuje klevetu ili uvredu. U ovom radu, autor opisuje relevantnu sudsku praksu Evropskog suda za ljudska prava u ovoj osetljivoj pravnoj oblasti i artikuliše vodeće principe koji su utvrđeni ovom sudskom praksom.*

Ključne reči: *kleveta, uvreda, čast i ugleda, sloboda govora, mediji, demokratija*

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THE RIGHT TO PRIVACY AND ANONYMITY WITHIN THE SCOPE OF FREEDOM AND SECURITY

Abstract: *The author deals with the issues of the right to privacy and the right to anonymity in the framework of freedom and security. In this regard, the author gives definitions and characteristics of privacy and anonymity, indicating the differences in the meaning of these two terms. Then, the author points to the importance of protecting the right to privacy and anonymity in today's virtual world, for the enjoyment of fundamental freedoms and human rights, both at online and offline sphere. In addition, the author brings in relation right to privacy and the right to anonymity with security, in the sense that protection of privacy and anonymity on the Internet provides enormous opportunities for criminal activities that endanger all levels of security, ranging from individual, public, societal, economic, financial, and similarly, all the way to national security. The aim of the paper is that through consideration of these issues defines guidelines for the development of legal frameworks that will ensure the balance between privacy and anonymity on the Internet and requires from the state to protect security.*

Keywords: *privacy, anonymity, freedoms, rights, security.*

1. Introduction

Privacy and anonymity are two different terms, as well as right to it. Right to privacy, and right to anonymity are both very important in digital era of nowadays, as we get increasingly wiretapped and tracked, or our personal information are collected and recorded by a large number of subjects, legally so or not, and it’s important to understand why they are an integral part of our civil liberties and what is their relationship with security. In relation to this we will first point out on definition of this two terms and civil rights, and then we will put in relations of security with special focus of its realization in online sphere. Also we will try to define basic principles for legal framework which will provide balance between right to privacy and anonymity

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and state authorities' intention to protect security from endangering by severe form of crimes.

2. Right to privacy – definition and characteristics

Before we start with determination of meaning of the right to privacy, it is necessary to point out first of all what is considered by the term of privacy at all. In every day communication, the term privacy is mainly related to intimacy (referring to a relational space that is close and exclusive), as well as with autonomy (referring to the control we like to have when negotiating boundaries with our environment) and human dignity (referring to the equal respect due to every human person) (Hildebrandt, 2006:44). However, for these terms can be said that they present just aspects of privacy, rather than synonyms for privacy. It should be pointed out here that there is no generally accepted definition of privacy, first and foremost, because approaches in defining of this term are mostly with the very different aspects. Thus, the notion of privacy can be regarded as a natural need, as an explicit wish, or request, as an ability, as a value and at the end as a right guaranteed by law. It should be noted here that there are also those who advocate an idea that privacy should not be defined at all with universal definition, mainly because of the multidimensional character of this term. According to them such definition would bear the risk of limiting and "freezing" its meaning and effects (especially in the legal field) (Gellert & Gutwirth, 2012:261). Consequently, in this paper we will not even try to give a universal definition of this term, instead that we will point out how privacy is mainly defined through the mentioned aspects.

Privacy as a natural need is something that is especially characterized for humans, but also to some species of animals, and is reflected in the natural need for intimacy. From the perspective of a humans, privacy as a need has its foundations in monotheistic religions, such as Christianity and Islam. As Kevin Keenan notice that: "The Bible says that Adam and Eve felt the need to clothe their bodies once they were expelled from the Garden of Eden. Also, according believing of Muslims the home should be the most private of all places because the Qur'an places a priority on the privacy of family relations, or *al-istitar* (Keenan, 2005:1)". Therefore, privacy as a natural need is reflected in the fact that usually people are seeking isolation from the outsiders (eyes of others) because of their intimacy and they find it impolite that others attack on it. This need is best shown in argues of Robert Gerstein which says: "…intimate relationships simply could not exist if we did not continue to insist on privacy for them" (Gerstein, 2007:265).

From the aspect of privacy as explicit wish, or request privacy is defined as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others (Westin, according to Sharma, 1994:1).

When it comes to privacy as an ability, it should first be emphasized that this aspect observation of privacy is a consequence of the development of digital technologies and that in determining the term of privacy from this aspect, it starts from the user's defense capabilities. Thus Ian Goldberg, David Wagner and Eric Brewer specifies privacy as: "the ability of the individual to protect information about himself" (Goldberg, Wagner & Brewer, 1997:103).

Privacy as value represents the ideal which insists that individuals should be allowed to define themselves, and to decide how much of themselves to reveal or to conceal in different situations (Rosen, 2011:8). Privacy is theoretically understood as allowing an individual space away from the public gaze to make life choices that are best for her both personally and politically, regardless of the beliefs of the majority (McThomas, 2013:1). In this sense privacy is value that should to be protected, and for this protection we can use a whole range of legal instruments (legal obligations, individual rights and liberties), that define in a much more precise manner what exactly one is entitled to (Hildebrandt, 2006:45).

At the end privacy is defines as human right. One of the first definitions of privacy as right originates from the year 1890 by young Boston lawyers Samuel Warren and Louis Brandeis which define privacy as "right to be let alone" (Warren & Brandeis, 1890:193). Warren and Brandeis argued that it was necessary for the legal system to recognize the right to privacy because, when information about an individual's private life is made available to others, it tends to influence and even to injure the very core of an individual's personality "his estimate of himself" (Warren & Brandeis, 1890:197). According to this view, the right to privacy implied the protection of personal autonomy, moral and physical integrity, the right to choose a lifestyle and lifestyle, interactions with other people, and so on. To inventors of the right to privacy, its meant that each individual had the right to choose to share or not to share with others information about his or her private life, habits, acts, and relations (Glancy, 1979:2). This simple definition reflects the recognition of privacy at the end of the 19th century, when print media and new technological innovations like photography were responsible for the growing invasion on private and domestic areas. The authors express that the circulation of personal information is perceived as privacy to violation and suggest

prioritizing human's basic right over the interest of the society to spread information (Kolter, 2010:21). Over time, this understanding is supplemented by mechanisms for practicing these rights. Thus, the citizen is enabled to have certain expectations from the entities that process his data in relation to the way this data is used.

In the legal theory of the United States (U.S.), at the end of the nineteenth century, the right to privacy, beginning with the article Warren and Brandeis, began to be recognized in court practice sometime in 1930 while over time becoming recognized in greater number of U.S., first of all as a right by which is protect somebody private life. (Popesku, 2016:74). It should be noted here that the term a "right to privacy" doesn't appear once in the Constitution or Bill of Rights. And yet, American courts have shaped, honored, debated, and protected right to privacy of U.S. citizens for two hundred years. They done that by looking at existing law and court decision to see how constitutional principles apply to each new case. With his article, Warren and Brandeis have been credited with the first concept of an American legal right to privacy and the need to protect against an invasion of privacy. Courts have used their wording and logic ever since (Kemper, 2015:6). Despite fact that word "right to privacy" doesn't exist in the Constitution of U.S., courts have determined time and again that American citizens do in fact have such a right. The courts have agreed on and honored privacy rights that can be derived from the spirit of the amendments. In total, six different amendments have repeatedly gone to legal bat protecting the right to privacy, each takin on a different aspect of the issue (Kemper, 2015:10). Taking into account the fact that the explanation of each of the six amendments would exceed the scope of this paper, in the paper we will make only a short review of the fourth amendment which is most related to the right to privacy in the legal system of U.S. Namely, the fourth amendment of Constitution of U.S. prescribes the right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Initially this Amendment is designed to protect citizens against trespass by the state on private property, but according to the opinion of many legal theorist this Amendment establishes the right to privacy in American constitutional law. The Supreme Court must periodically examine cases pertaining to privacy rights in order to define contemporary instances of trespass. However, the Supreme Court is not the sole determinant of privacy rights for American citizens. The U.S. Congress plays a defining role in crafting legislation, such as the USA Freedom Act[124], that establishes

[124] The USA Freedom Act (H.R. 2048, Pub. L. 114-23).

statutory protections of privacy, while protecting national security interests. This approach, which allows for democratic input from concerned citizens, presents the challenge that advances in technology and surveillance often outpace legislative efforts to regulate and limit their potential infringements on individual privacy.[125] It should be noted here that the Supreme Court of the U.S., accepting an individual's interest, determines, on the one hand, a broad constitutional right to privacy based on autonomy, while on the other hand, accepting the interest of society, it also imposes the right to privacy a permanent restriction in the form of a freedom of the press guaranteed by the first amendment to the U.S. Constitution. In this way, the absolute right to privacy defined by itself through apparently contradictory decisions of the Supreme Court becomes a limited right to privacy defined for itself (Gajin, 1991:34). Namely, in the U.S., transparency, the right to freedom of speech, and the right to be informed by the public generally have priority over privacy, for example, in relation to the deletion of published truthful information on the Internet from the private life of an individual, since it is considered that this activity in the interests of protecting the right to privacy in some way represents censorship, as well as potentially violating the constitutional right to freedom of expression in the U.S. (Ivanović & Dečković, 2016:484).

In Europe right to privacy was established in the European Convention on Human Rights (ECHR) was drafted in 1950[126], and contained an article declaring that everyone has the right to respect for private and family life. Namely, Article 8 of paragraph 1 (ECHR) prescribes that everyone has the right to respect for his private and family life, his home and his correspondence. In the Article 8 paragraph 2 (ECHR) prescribes that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. European Conventions have continued to meet to establish standards to protect the privacy of information from European citizens. Namely, under European Union law, personal data can only be gathered legally under strict conditions, for a legitimate purpose. Furthermore, persons or organizations which collect and manage personal information must protect it from misuse and must respect certain rights of the data owners which are guaranteed by European Union law.

[125] Privacy and Security: A Comparative Constitutional Law Conversation, available at: http://www.kas.de/wf/doc/kas_41868-544-1-30.pdf?150720180444, page accessed 23 September 2017.

[126] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html, accessed 8 October 2017.

The European Union's Data Protection Directive[127] also foresees specific rules for the transfer of personal data outside the EU to ensure the best possible protection of personal data when it is exported abroad.

In Republic of Serbia right to privacy as value, or complex construct is not protected by Constitution, like it is guaranteed by the constitutions of many countries (Teofilović, 2013:133). Instead that in Constitution of Republic of Serbia[128] in several Articles, guarantees the rights which arising from the right to privacy. Which means that only some of aspect of privacy are protected by Serbian Constitution, and that aspects includes, inter alia, the right to inviolability of home (Article 40) and the right to confidentiality of letters and other means of communication (Article 41) and the protection of personal data (Article 40).

3. Right to anonymity – definition and characteristics

The term anonymity originates from Greeks word “anonymia” (ἀνωνυμία), which means namelessness, not identified, or unknown name, and usually bear on a person’s appearance in public. Consequently, anonymity occurs if a person’s identity being involved in a not-transparent/not disclosed process in non-determinable since the acting person remains unknown to the other acting entities or makes no appearance towards the other participants of acts within the anonymous process without recognizable name (Weber & Heinrich, 2012:1). However, anonymity does not necessary presuppose the complete anonymousness of a person’s identity or the lack of a name. For existence of anonymity even the unrenownedness of an individual’s name could be suffice. In order to distinguish anonymity from undetectability, it is therefore imperative that one party vaguely knows about the existence of another party without knowing his/her complete identity. Also it is necessary make further differentiation of anonymity towards pseudonymity which is characterized by the use of a false name even though this practice may lead to anonymity, too. Actually we can freely say that pseudonymity can be described as a common variant of anonymity where another name than the real author is shown. Example one of the most important Serbian writers of all time Branislav Nušić (1864 - 1938) due to anti-regime attitudes he was forced to write under the pseudonym Ben Akiba.

[127] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal L 281 , 23/11/1995 P. 0031 – 0050.*

[128] Constitution of Republic of Serbia, ("Official Gazette of the Republic of Serbia", No. 98/2006).

Taking into account that communication can take place in offline and online sphere, then we can talk about offline anonymity, that is, anonymity in the real world and online anonymity or anonymity in the digital world. In the offline sphere communication realized through talking by telephone, writing letters or even talking face to face. In every day offline communication there is a lot of anonymity because in lot of cases of this sort of communication complete identity of actors is of minor importance. Example, while paying a bill by cash. Also in offline communication is not always easy to provide anonymity because this type of conversation is usually practice in the form face to face. In this type of communication persons usually practicing anonymity in the situation when they don't want to others know its real identity from legitimate on illegal reasons. Legitimate reasons could be example in the case of giving an anonymous report on the perpetrated criminal offense of the police by citizens who are afraid of vengeance of the perpetrator of the criminal offense (example it is act of criminal organization, a criminal offense is committed by a superior at work, etc.) (Ivanović B. A. & Ivanović, R. A., 2013:62). Also in sense of legitimate reasonse there is anonymity of whistleblowers. Namely, whistleblowers always taking a risk to pay a havy price for their efforts to protect the public interest. They can be dismissed, demoted, discriminated against, ostracized, harrasted, assaulted even worse. So there is need for some cainde of their protection. One option is to allow whistleblowers to hide under a cloak of anonymity (Kleinig, 1996:187). So this also can be legitimate reasons for somebody anonymity. Illegal reasons can be intent to commit criminal offence of fraud, so in that purpose person hiding its real identity from victim of fraud. Or in the case of committing criminal offense of extortion anonymously threatens with attack on life or body in order to prevent its potential detection in such criminal activities.

As regards for the anonymity in online world. First of all we must notice that digital technology and internet has increased the sease for a peoples to distribute anonymously od by pseudonyme messages. With anonymity at internet comes complete freedom of speech, but also enables malignant behavour, and could end up destroying the social fabric of the community (Bhatt, 2017:146). But we must realized that anonymit on the Internet is almost never 100%, there is always a posibility to find the prepetrator, especialy if the same person uses the same way to gain anonymity multiple times (Palme & Beglund, 4). Concerning this issue Michael Froomkin distinguishes between four forms of imprecise or absent identification in cyberspace: 1) Traceable anonymity – In the case of communication by email Froomkin refers to traceable anonymity if the receiver of an email gets no information about the identity of the email's originator directly but could find it out by contacting interconnected operator. 2) Untraceable anonymity - In the case of communication by email the author of the email is

unidentifiable at all. 3) Traceable pseudonymity - In the case of communication by email if the used pseudonym can be traced back to the originator regardless of whether by the mail's recipient or by someone else. 4) Untraceable pseudonymity - In the case of communication by email if the email's originator uses a false and untraceable identity and, in contrast assumes (Froomkin 1995:11). In this situation a continuous identity or persona allows communication with a correspondent but there is no way to link the pseudonym to the correspondent's identity in real world.

According to Froomkin there was tree period of history of anonymity on internet. First was the period when it was easy to provide anonymity in internet, if you knew what are you doing. Which mean that in this period it was easy to provide anonymity at internet. Second was the period when the remailers died off and strong anonymity was reduced to what he named as a 'safety valve' technology. According to him it was no longer as easy for the technologically adept to achieve strong anonymity, but it was still technically feasible. In this period for most people anonymity was either not available at all or it was foreseeably traceable. And third period is nowadays where, anonymity online is not even a "safety valve", where is providing of anonymity at internet is increasingly difficult, sometimes impossible, for everyone (Fromkin, 2015:123). Froomkin highlights reasons for this state: 1) Existence of widespread ideology according to which anonymity is a bad thing in itself and ought not to be allowed; 2) Existence of profit motive, according to which there is quite a lot of profit in not having anonymity; 3) Building a series of tools that greatly improve abilities of governments and the private sector to track users online; 4) The lack, or slow creation of laws, both national and supranational, which regulating this field (Froomkin, 2015:124).

Which means that right to anonymity is protected by law in real world, while in cyberspace context of the right to anonymity has triggered controversial points of view. Namely, on the other hand, the obvious risk of misuse of anonymity, has caused some countries (like it case in France) to try special legislation concerning anonymity, especially on the Internet, for example laws requiring that all messages on the Internet must be identified with the real identity of their source. This mean that while we have protection of anonymity at offline sphere, with one side, with other side we have cases of prohibition of anonymity in online sphere by governments and tech companies.

4. Differences between privacy and anonymity

As already pointed in the introduction of this paper privacy and anonymity are two different terms. Privacy is the ability to keep some things for yourself, regardless of

their impact to society. Privacy implies that nobody sees what we do, but potentially knowing who we are. Example, in the case of privacy of home. Everyone knows who lives there, but nobody knows what we do inside of it. So privacy is term which describing activities that person keep entirely for yourself, or for a limited group of people. In contrast to this, anonymity is when we want people to see what we do, but not that we are doing it. Which mean that anonymity is when nobody knowing who we are, but potentially seeing what we do. The typical example would be if we want to blow the whistle on abuse of power or other forms of criminal manifestation in our organization without risking career or position in the organization, which is why we typically have strong laws that protect sources of the free press. Also there is a possibility to post such information anonymously online through a VPN, the TOR anonymizing network, or both. Regarding to this, anonymity is often used to protect the privacy of people, for example when reporting results of a scientific study, when describing individual cases, when whistle-blower want to make his message public and so on. When we speak about privacy and anonymity as rights, both are important for the individual. But also, there is society's interest overall that every individual have these rights. Because there is not just an individual benefit, but a collective benefit. Namely, privacy helps individuals maintain their autonomy and individuality and without anonymity in society, we've essentially lost the ability to keep our government in check. Anonymity and pseudonymity lend to both privacy and these safeguards for safety and peace of mind. Also anonymity isn't just important to blow the whistle. It can be useful for developing society, example in the field of breaking taboos or forwarding forbidden causes that were later vindicated.

5. Definition of security and relation with privacy and anonymity

We can say with certain that the security is backing element of human society, from its foundation and to now days. People, individuals, human groups, organizations and institutions always need to worry about their security. This fact stems from the inherent instinct for self-preservation. In this respect, in all periods of development of human society, by social groups, certain activities undertaken to achieve, maintain and develop a level of security, in order to survive (Ivanović, 2010:2). There are many different opinions among theorists of science of security about what is meant by security. According to one group of theorists, security means a condition in the community, organization, institution or a specified area, characterized by no existing some threats or dangers. By the other group, security are considered and some of the activities, measures and actions that the entities (individuals, social groups, organizations and institutions) take in order to achieve, preserve and develop required level of security.

Some theorists identify this term with the security system of organizations and institutions formed to conduct security concerns. Also, this term is used to denote a certain felling of individuals and social groups about possible threaten and danger. Based on the foregoing, we can conclude that the theory talks about security as condition, as well as function, security as need, security as the interest, security as an organization and security as the feeling. Such complexity in the meaning of the term security, greatly hinders giving a comprehensive definition that would include all its aspects, which would again be denied the extra listing and description. In the narrow sense of perspective, the security is considered a specific condition that is characterized by the absence of danger to people, individuals, social groups and communities. In a broader sense of observing, security covers the activities of certain subjects taken in order to achieve this condition, then the system of organizations and institutions that are responsible for undertaking these activities, as well as a feeling or perception by the individuals and social groups (Arifović, Ivanović & Zyrapi, 2017:267). According to the professor Predrag Ilić opinion, the definition of security should include not only the desirable situation, and what the people or social groups, organizations and institutions undertake to be achieved and, also, what impact, as well as positively and negatively to that condition. In this context, he defines the security as "the totality of objective and subjective factors (events, relations and processes, institutions and activities) of which depend on the survival, stability and normal functioning of individuals, social groups, institutions, organizations or a communities (Ilić, 2012:137)”.

Taking into account the subjects whose security is protecting, we can talk about national security, economic security, security of social groups, individual security, health security and environmental security. Each of these types of security is endangered by some kind of serious criminal manifestation. For example, national security is threatened by terrorist organizations, as well as by the operation of organized criminal groups. Then, the security of social groups and individual security are threatened by the action of internal political extremists and organized criminal groups. Environmental and health security are endangered by the activities of organized criminal groups in the field of ecological crime, while economic security is endangered by the activities of organized crime groups in the field of economic crime (Ivanović & Munižaba, 2013:101). Endangering of security, especially national security is the main argument used by most governments to justify their opposition to privacy and anonymity. In their view, the Internet is a safe harbor for terrorist groups since it can be used as a platform to facilitate illegal activities, such as human trafficking, arms sales, and child pornography. In essence, these concerns are legitimate and directly feed into a noble objective, yet one cannot justify blanket policies that prohibited privacy and anonymity

online because it excludes its critical value as a facilitator of free speech and opinion. It is unthinkable to prevent and combat terrorism and organized crime without the application of modern tools, methods and techniques. Implementing these measures and actions violate the right and freedoms of citizens (such as right to privacy and right to anonymity) which guaranteed by a huge number of international and national documents, but it is proved they are necessary and represent one of the most effective mechanisms available to the state in the fight against organized crime and terrorism (Ivanović & Faladžič, 2011:332). Authorities of many countries are seemingly more concerned with how the Internet could be used as a safe haven for serious form of criminal activity; hence, many governments are implementing hardline policies that compromise basic human rights like right to privacy and right to anonymity. Nevertheless, the lack of protective legal mechanisms is considered a significant drawback, since most project laws related to privacy and anonymity are punitive and restrictive. In this regard, there is importance of establishing strong procedural and judicial safeguards to guarantee the right to due process of any individual whose use of encryption or protection privacy or anonymity is subject to restriction.

6. Conclusion

In the period when there is no digital technologies, or internet we could be anonymous by choice, or we can keep our privacy easier. In nowadays digital technologies makes it more difficult to keep privacy an anonymity. This is because activities through digital technologies always leave some trace. Example using mobile phones, paying with a credit card, using the accessing online services, searching the Web and so on, is never totally privacy or anonymous. Also, there is still possibility to keep privacy and anonymity in cyberspace, which criminal and terrorist organization offering opportunities to on easier way realize its criminal intent. And to prevent eventually detection and prosecution members of these groups. Because of that the concept of protection of security outweighs any possibility of balance *vis-à-vis* the right to anonymity vs privacy. Regarding to respect of right to privacy and anonymity with one side, and to protect of state interest to protection security in other side, there is need for balance between this two demands. This balance should be achieved only by precise law provision. In this regard we present the basic principles on which the law related to privacy and anonymity should be conceived, and which established by Jacob Palme and Mikael Berglund. First, law should allow for anonymity and pseudonymity on the Internet. Second, the law might however require, that the real identity behind anonymous messages should be available for retrieval, but if so only in accordance with the privacy policy of the web server distribution the message. Third, every site which

allows anonymity must publish a privacy policy, which explains exactly in what cases they will break the anonymity. And fourth, since some people are afraid that means for the police to find the real person behind anonymity will be misused by some authorities, it should be allowed to communicate through a series of anonymity servers as described above, provided that each server follows the law on anonymity on the Internet (Palme & Berglund, 12).

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PRAVO NA PRIVATNOST I ANONIMNOST U OKVIRU SLOBODA I BEZBEDNOSTI

Apstrakt: *Autor se bavi pitanjem odnosa prava na privatnost i prava na anonimnost u okviru sloboda i bezbednosti. S tim u vezi, autor najpre daje definicije i karakteristike privatnosti i anonimnosti, ukazujući na razlike u značenju ova dva pojma. Autor zatim, ukazuje na značaj zaštite prava na privatnost i anonimnost u virtuelnom svetu današnjice za ostvarenje osnovnih sloboda i ljudskih prava, kako u on-line tako i off-line sferi. Pored toga, autor dovodi u vezu pravo na privatnost i pravo na anonimnost sa bezbednošću, u smislu da zaštita privatnosti i anonimnosti na internetu pruža ogromne mogućnosti za kriminalne aktivnosti kojima se ugrožavaju svi nivoi bezbednosti počevši od individualne, javne, socijetalne, ekonomske, finansijske, i sl., pa sve do nacionalne bezbednosti. Cilj rada je da se kroz razmatranje ovih pitanja odrede smernice za izgradnju pravnih okvira u kojima će se obezbediti ravnoteža između privatnosti i anonimnosti na internetu i zahteva države za zaštitom bezbednosti.*

Ključne reči: *privatnost, anonimnost, slobode, prava, bezbednost.*

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TYPES OF THE RIGHT TO PRIVACY AND CIVIL LAW PROTECTION

Abstract: *The right to privacy is a personality right which protects information relating to someone's private life, as well as personal records of that person. The right to private life is a type of the right to privacy which protects the personal domain of every man's activity in order to preserve his biological, health, moral, social, cultural and other needs, both as an individual and within the social community. The right to personal records, which belongs to another type of the right to privacy, protects the right to the recording of a person's image, voice or a personal written record. The right to privacy is one of the most violated personality rights. By unauthorized acts of authorities, organizations and associations, as well as the media, it is possible to make unlawful intrusions into the privacy of people, to which the development of technology is certainly beneficial. Photographic, film, sound recordings, as well as personal files, with recorded intimate data are often presented to the public through the media, which can hurt someone's privacy. A violation of privacy may also be done directly by another person, and also by a legal person or a group of persons, whether by means of media, as a direct violator, or not. Protection of this right, which is guaranteed by constitutional provisions and international conventions, is regulated by civil law and criminal law provisions and other imperative regulations.*

Keywords: *right to privacy, private life, personal records, protection of rights, spheres of privacy.*

1. Defining the right to privacy

The need for rapid communication in contemporary society, along with the freedom of expression, which is protected by the European Convention on Human Rights[129], leads to a large flow of different information, in order to inform the public. For this purpose,

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[129] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, November 4, 1950, hereinafter referred to as the ECHR, ratified by the Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Journal of Serbia and Montenegro – International Treaties, no. 9/2003) guarantees freedom of expression in Article 10 Paragraph 1, so that everyone has the right to it, which right includes the freedom to hold own opinions, receive and impart information and ideas, without interference by public authority and regardless of frontiers.

different information about someone's life is collected and published, and photographic, video, sound records or personal files are published, as well as other data.

Through transmission of information which encroaches personality rights, personal properties, such as honor, reputation, identity (authenticity), mental integrity, privacy and other properties, as objects of certain personality rights, can be violated (Finžgar, 1988: 71-167; Vodinelić, Krneta, 1978: 911-925).

Regardless of the tendency of many countries for democratic progress and respect for personality rights, violations of these rights, and the right to privacy, are present, especially via mass media, as means of transmitting information from communicators to recipients.

The right to privacy is a specific right of an individual to protect personal activities and conditions from interference of the state and third parties who do not have a legitimate interest in them. It includes the protection of data regarding private life, as well as personal records, including personal written records (Popesku, 2008: 11 and further). The right to privacy, as one of personality rights, is an absolute and subjective right of every person (Vodinelić, 1976: 373-399 (esp. 384-388); Vodinelić, Krneta, 1978: 910-924).

The right to privacy is guaranteed, as a human right, by the provision of Article 8 Paragraph 1 of the European Convention on Human Rights, which guarantees that everyone has the right to respect for his private and family life, his home and his correspondence.[130] In support of this right, the ECHR, in Article 10 Paragraph 2, provides for restrictions on freedom of expression, also a guaranteed human right by the

[130] *The Constitution of the Republic of Serbia* (Official Gazette of the Republic of Serbia, No. 98/2006) does not explicitly guarantee the right to privacy, but the provision of Article 40 guarantees the inviolability of home, so no one may enter a person’s home or other premises without a court order, against the will of their tenant nor conduct a search in them, during which the tenant of the home or other premises shall have the right to be present in person or through his legal representative together with two other witnesses who may not be under age, unless this is necessary for the purpose of immediate arrest and detention of a perpetrator of a criminal offense or eliminating direct and grave danger for people or property in a manner stipulated by law. Article 41 of the Constitution protects the confidentiality of letters and other means of communication, which the Constitution states shall be inviolable; derogation shall be allowed only for a specified period of time and based on decision of the court if necessary for conducting criminal proceedings or protecting the safety of the Republic of Serbia, in a manner stipulated by law. Article 42 of the Constitution provides for the protection of personal data, so collecting, keeping, processing and using of personal data shall be regulated by law, with everyone having the right to be informed about personal data collected about them, in accordance with the law, and the right to judicial protection in case of their abuse.

Constitution[131] and international conventions. The freedom of expression is limited in the ECHR for “protection of the reputation or rights of others”, but also for “preventing the disclosure of information received in confidence”.

With the justification of doing so in the public interest, the media often publish unauthorized personal information and personal records, although the right to privacy is indirectly guaranteed by the Constitution, which provides for protection of human rights and freedoms, which include inviolability of home, confidentiality of letters and other means of communication, as well as protection of personal data[132] (Popesku, 2008: 238). Unauthorized publication results in numerous violations. Because information is traveling at high speed via electronic networks, the violations are multiplied by the transmission of the information from one mass media to another.

2. The right to privacy in narrow sense

The right to privacy includes the right to private life and the right to personal records as forms of privacy[133] (Popesku, 2014: 26).

[131] *The Constitution of the Republic of Serbia* provides for restrictions of human and minority rights guaranteed by the Constitution in Article 20; they may be restricted if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right, because the attained level of human and minority rights may not be lowered. When restricting these rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means. The provision of Article 22 of the Constitution provides for the protection of human and minority rights and freedoms, so that everyone shall have the right to judicial protection if any human or minority rights guaranteed by the Constitution is violated or denied, as well as the right to elimination of consequences arising from the violation; the citizens shall also have the right to address international institutions in order to protect their freedoms and rights guaranteed by the Constitution. Human rights and freedoms guaranteed by the Constitution include the freedom of thought and expression (Article 46), which includes the freedom to seek, receive, and impart information and ideas through speech, writing, art or in some other manner; freedom of expression may be restricted by law if necessary for the protection of the rights and reputation of others, upholding the authority and the impartiality of the court and the protection of public health, morals of a democratic society and national security of the Republic of Serbia.

[132] “*... The means of public information do so, not only in situations where the general interest so requires, as in the case of the protection of health or morals, the prevention of disorder or crime, the protection of the rights and freedoms of others, and in national or public security interest, or economic benefit, in which cases the ECHR provides for a restriction of the right to respect for private and family life, but also publishes it when it is, in their judgment, interesting for the public – in fact, profitable for the medium*.”

[133] “The right to privacy protects data and records related to someone's private sphere, whether this information is true or false (broadcasting of fictitious information, photomontage, audiomontage of personal records, editing of personal files, etc.). In case of a violation of protected personal property, such as an unauthorized publication of personal information or records, it is possible to violate more than one personality right, and not just the right to privacy. The division of life spheres into public and private is not sufficiently precise to indicate the extent to which someone else’s privacy may be entered. Privacy is a set of different

1. *The right to private life* is the personal domain of an individual's activities, in order to preserve and develop his physical, moral, emotional and social integrity[134] (Gajin, 1998: 166-168; Maričić, 2001: 344). Every person has the right to protect their privacy from external violations and this is an absolute subjective right of every natural person to decide whether other people will be introduced to their private lives.[135] The span of information which can fall under the right of privacy is difficult to determine, but it is not considered to be information in relation to someone's public function, professional activity, charity work and activities in general public interest which are subject to constructive social criticism.

The position of holders of public and political functions who are elected or appointed by other persons is specific, and they are therefore obliged to endure critical opinions regarding the results of their work, i.e. the policy they implement, all related to exercising a certain function, regardless of the personal sense of injury.[136] The dose of constructive criticism must not be based exclusively on insults concerning personal and family circumstances, i.e. the private life of those persons (functionaries and other public figures), or on publication of records of this kind, unless they indicate the incompatibility of the person with the function which they perform.

2. Another type of the right to privacy is *the right to personal records*, which has several aspects. It is, above all, *the right to image*, as an absolute subjective right of a natural person, and exclusive to natural persons (and the *nasciturus*, on whose behalf a legal representative makes decisions), to independently decide on acquainting third parties, or the public, with his/her image, live or recorded in a suitable way (Gajin, 1988: 163-164; Vodinelić, 2003: 81-84; Vodinelić, 1978: 921-922).

degrees of manifestation of the personality of a person, which are divided into the secret or the intimate sphere; the personal or the private sphere; the sphere of confidentiality; the sphere of confidentiality; the private-public and the common sphere."

[134] "... Thus, the private life of an individual could be determined as a set of his/her activities and the conditions he/she is in, which third parties have no legal interest in knowing..."

[135] This refers to a natural person, although legal persons – legal entities, have the right to a business secret, which is a narrower right, more property-related in nature than the right to privacy of a natural person; Author's comment.

[136] See Article 8 of the Law on Public Information and Media (Official Gazette of the Republic of Serbia, nos. 83/2014, 58/2015 and 12/2016 – authentic interpretation). The previous Law on Public Information (Official Gazette of the Republic of Serbia, nos. 43/2003, 61/2005, 71/2009 and 89/2010 – CC ruling) prescribed in the provision of Article 9 Paragraph 1, that the holders of state and political functions had limited rights to the protection of privacy which persons whom the information relates to had, if the information is important to the public given the fact that the person whom it relates to performs a particular function. The provision of Paragraph 2 of this Article stipulated that the rights of these persons are limited in proportion to the justified interest of the public in each specific case.

The object of this right is a person's image, which, as well as their physical appearance, is observed by eyesight and can be recorded by technical means on an image carrier. The holder of the right is authorized to allow others to use his image by recording it or by using an already created recording of image, once, for a certain period of time, or forever, whether for a specific purpose or without determining purposes. This authorization may be revoked by the holder of the right, unless he/she has agreed on a fee for recording his image. In Serbia, this right is protected by the Law on Public Information and Media, and it was previously protected by regulations protecting intellectual property (Popesku, 2016: 82).

Within the right to personal records, *the right to voice*, similar to the right image, is an absolute, subjective right of a natural person to allow or prohibit others to get acquainted with his/her voice through recording (Gajin, 1998: 164; Vodinelić, 2003: 81-84; Vodinelić, 1978: 922-923).[137] Voice, as personal property is, like the image, the object of the right to physical (bodily) integrity of a person. Voice (speech) is the product of human speech and thought apparatus, which is influenced by physical characteristics – deviation of organs etc., which makes each person's voice distinctive[138] (Popesku, 2016: 82).

The scope of the right to privacy also includes *the right to personal written records*, as part of it and a type of the right to personal records. Like the rights to image and voice, it is an absolute, subjective right of a natural person to allow or prohibit others to be acquainted with his/her personal written records, such as diaries, letters, a concept for a work of authorship or the work itself, which has not been published, and similar records. The object of this right is a personal written record that the holder of the right has manually composed, written or dictated to another person and signed or acknowledged for his own or recorded it by technical means, on different carriers. A personal written record may be incomprehensible to others; it need not be composed of

[137] Finžgar (1988) writes about the recording of someone's voice without the consent of that person, as encroaching into a legally protected personal sphere.

[138] "*... The voice in general also represents human speech, as the materialization of thoughts with a certain sense, for the purpose of communicating with people. Voices of individuals are distinguished by the voice and speech, but also by the interpretation of melodies, poems, verses; the same applies to interpreters, who enjoy the protection of the right to interpretation, according to the provisions of the Law on Copyright and Related Rights. Voices contain peculiarities of melodicity, volume, pitch, range, timbre, speech defects, eloquence. They can be recorded by technical means on a voice carrier; however, recording of the voice, i.e. speech, without the consent of the recorded person constitutes an unauthorized entry into the private sphere...*"

letters, but also of symbols, drawings, numbers, and does not need to have a particular meaning[139] (Popesku, 2016: 82-83).

3. The current Law on Public Information and Media of the Republic of Serbia also prescribes that information from private life, or personal records (letter, diary, note, digital record, etc.), recording of images (photographs, drawings, film, video, digital, etc.) and audio recordings (tape-recordings, gramophone records, digital, etc.) shall not be published without the consent of the person whose private life the information refers to, or of the person whose words, image or voice it contains, if such publication can lead to the reveal of that person's identity.[140] According to this Law, the consent shall also be needed for the live transmission of image or voice via television, radio etc., and the information from private life and personal records shall not be published without the consent of the person they refer to, if such publication would violate that person's right to privacy or any other right. The said law provides that the consent granted to one publication, to a specific manner of publication or for publication for a specific purpose, shall not be deemed consent to repeated publication, to publication in a different manner or to publication for a different purpose.

Consent of other persons is a condition prescribed by the Law on Public Information and Media, in case the person whose private life the information or personal written record refers to, is deceased. The consent for publication shall then be given by the spouse of the deceased, independently by his/her child having reached sixteen years of age, by his/her parents or brothers or sisters, by the legal person that the deceased participated in (as an official, a member, or an employee) in the event the information or record refers to his/her activities in that legal person. Termination of a legal person shall not terminate the rights of the person that had participated in the legal person and that has been personally affected by the information or record, and the consent may also be given by a person appointed for that purpose by the holder of the right before his/her death.[141]

[139] "... Regarding private correspondence, the European Court of Human Rights solved cases of violation of the right to privacy when applications were filed by prisoners whose right to the inviolability of correspondence with a lawyer or a court was violated. There are known cases of restriction of telephone communication and correspondence with a relative, of persons under guardianship (Margaret and Roger Anderson v. Sweden (1992) case), censorship of correspondence, which may also constitute a violation of the right to private life (Messina v. Italy (2000) case)..."

[140] See Article 80 of the *Law on Public Information and Media*.

[141] See Article 81 of the Law on Public Information and Media.

3. Spheres of privacy

In European law, there is a division of privacy into spheres created in order to protect the right to private life, composed of information sorted into secret or intimate sphere, personal or private sphere, sphere of confidentiality, a private-public or common sphere (Petrović, 1966: 64-66). This division is of a theoretical nature and domestic imperative regulations are not familiar with it, but the jurisprudence differentiates the spheres of privacy as a secret (intimate), a private and a private-public sphere. This division is subjective in nature and concerns the personal criteria of the person whose right to privacy has been violated, and is as such subject to individualization of the personality (Finžgar, 1988: 139 and further; Gajin, 1998: 163-170).

Whether a person will consider his/her right to privacy violated, depends on the personal experience of violation, or subjective classification of an event or information in one of the mentioned spheres, which he/she will have to prove in court[142] (Popesku, 2016: 78-79). As the violation of the right to privacy does not come only by publishing untrue information, the violation of the right is even greater if true information is transmitted, in which way someone's intimacy is revealed. However, a violation of the right to privacy exists even when personal information, not particularly intimate or unpleasant to the holder of the right, is given to the public. This particularly refers to the publication of recording of images (photo, video) of family members, housing, personal vehicles, etc. Behind the prohibition of publishing this information, there is usually the fear of the holder of the right for his/her safety and the safety of people close to him/her. By contrast, certain individuals intend to commercialize personal records, so they do not allow their publication without monetary or other compensation. Therefore, the interest of the holder of the right to protect his/her privacy from violation must be determined individually in each case, in addition to assessing the interests of others, and particularly the public, to disclose it, especially if it is in the public interest.

[142] "... In jurisprudence, the secret or intimate sphere is considered the area of hidden intimate information that will be rarely disclosed, and the person keeps them in strict confidentiality, because their discovery intimately feels unfavorable to him/her. These are often personal secrets which also protect other people, for whom they also represent the intimacy. Intimate information can be certain behavioral deviations which the person is aware of, certain personal and family secrets, unpleasant memories, etc. The private sphere is a somewhat more familiar sphere of life of an individual, within the circle of family or friends of a person, where everyone is familiar with the way of life of the holder of the right, as well as with family and health problems, business, financial successes and failures, political and religious determination, life plans, hobbies, but also social and intimate relationships with other people. The private-public sphere is the semi-private and most familiar sphere of activities and conditions, i.e. the life of a person, where he/she, as the holder of the right to privacy, allows third parties to learn about those aspects of his/her life that take place in a public place, where they may also be present, like a street, a park, a public institution, an airport, a movie theater, a hotel, and so on."

4. Limitation of the right to privacy

The right to privacy, guaranteed by Article 8 Paragraph 1 of the ECHR, is also limited by the provision of Article 8 Paragraph 2 of the said Convention, which provides that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. This means that the right to privacy may be limited by the freedom of expression, depending on the higher interest, and the stated values, which include both human rights and personality rights (freedom of expression and the right to respect for private and family life) can be interdependent, depending on the justified interest of the public in each particular case[143] (Popesku, 2008: 245). Restriction of the right to privacy is therefore permitted if there is a necessary social interest which justifies it, in terms of Article 8 Paragraph 2 of the EHCR[144] (Vodinelić, 2003: 8-9).

In domestic law, information from private life or a personal record may exceptionally be published without the consent of the person it refers to. The Law on Public Information and Media provides for cases when the consent of the holder of the right is not needed for the publication of private information or personal records: if the public interest to know the information or the record (which also constitutes information, but in image, audio, or written form) prevails over the interest to prevent the publishing of the information. It is deemed that the public interest prevails over the interest of the holder of the right to prevent the publishing of the private information or personal records, particularly if the person had intended the information or the record for the public or sent it to the media for publishing; if the information, i.e. record pertains to a person, event, or occurrence that is of interest to the public, especially if it pertains to a holder of public office or political function; if the person has attracted the public attention by his/her statements or behavior in private, family or professional life and therefore given rise to the publication of such information or record; if the information has been disclosed or the record made in a public parliamentary debate or a public debate in a parliamentary body; if publication is in the interest of judiciary, national security or

[143] "... Every situation of violation of personal goods, and therefore also privacy, via mass media, must be evaluated in each particular case, and the restriction of the right of the media to inform, i.e. the restriction of the freedom of the media must be: necessary, appropriate and non-excessive."

[144] This refers to 'the right of mass media', as a legal term. Freedom of expression is the basic postulate of the right of mass media, that is, the right to public information.

public security; if publication is in the interest of science or education, or if publication is necessary to alert of a danger; if the record includes a multitude of persons or voices, or it is a record of a public gathering; if the person is shown as part of landscape, natural setting, human settlement, square, street or a similar scene.[145]

The court uses a method of qualitative and quantitative evaluation of the opposed protected values. By assessing the cumulation of the intensity of opposing interests, according to all circumstances of a particular case, it is determined whether there is a justified (legitimate) interest of the public to know the published information, thereby limiting the personality right, or the personality right outweighs it and is protected, and thus also the right to privacy of a person (Vodinelić, 2003: 55-65).

5. Protection of the right to privacy

1. The right to privacy is protected by Article 17 of the International Covenant on Civil and Political Rights of 1966,[146] so that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and everyone has the right to the protection of the law against such interference or attacks. Article 8 of the ECHR guarantees the right to respect for private and family life, home and correspondence. The limitation of the right to privacy is prescribed in order to respect higher interests.

Constitutionally guaranteed human and minority rights may be limited by law to the extent necessary to satisfy the constitutional purpose of the restriction in a democratic society, without encroaching upon the substance of the guaranteed right. Restriction of rights shall not lower the attained level of human rights, which include certain personality rights. Consequently, courts must take into account the substance of the rights being limited, the importance of the purpose of the restriction, the nature and extent of the restriction, and whether there is a way to achieve the purpose with less restrictive means.[147]

2. The Constitution of the Republic of Serbia of 2006, in the part entitled ‘Human and Minority Rights and Freedoms’, guarantees the inviolability of home, and the

[145] See Article 82 of the Law on Public Information and Media.

[146] International Covenant on Civil and Political Rights, adopted by Resolution 2200A (XXI) of the General Assembly on December 16, 1966. It entered into force on March 23, 1976, in accordance with Article 49.

[147] See Article 20 of the Constitution of the Republic of Serbia.

confidentiality of letters and other means of communication and protection of personal data, as certain aspects of privacy. It is apparent that a provision which would guarantee the right to the inviolability of private life, in the manner that this right is guaranteed by the aforementioned international acts, is missing.[148] However, as the provision of Article 194 of the Constitution prescribes the hierarchy of domestic and international general acts, so that ratified international treaties and generally accepted rules of international law, which may not be in noncompliance with the Constitution, shall be part of the legal system of the Republic of Serbia, and laws and other general legal acts enacted in the Republic of Serbia may not be in noncompliance with the Constitution and with ratified international treaties and generally accepted rules of international law, protection of the right to privacy is indirectly guaranteed by ratification of international acts.[149]

3. In the field of civil law, personality rights, including the right to privacy, are protected by the provision of Article 157 of the Law on Obligations, which stipulates that everyone shall be entitled to demand that the court or other competent authority order the cessation of an action by which the integrity of human personality and family life, or other rights pertaining to his/her person, is violated. The provision of Article 156 of the same Law stipulates that everyone may demand from another that he/she eliminates a source of danger threatening considerable damage to him, should the ensuing disturbance or loss be impossible to prevent by adequate measures. These provisions may be adapted with negatory claims for disturbance and with quasi-negatory claims for omission in case of a specific danger of a repeated disturbance.[150]

[148] The previous *Constitution of the Republic of Serbia* (Official Gazette of the Republic of Serbia, no. 1/90) guaranteed the inviolability of human dignity and the right to a private life of a person in Article 18; Article 19 guaranteed the inviolability of privacy of mail and other means of communication, from which it could have been departed pursuant to an order of the court, and only if prescribed by law, while Article 20 provided a guarantee of the protection of secrecy of personal data, and Article 21 guaranteed the inviolability of home.

[149] The *Criminal Code of the Republic of Serbia* (Official Gazette of the Republic of Serbia, nos. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 121/2012, 104/2013, 108/2014 and 94/2016, in Chapter 17, which foresees criminal offenses against honor and reputation, also contained prescribes the criminal offense ‘Dissemination of Information on Personal and Family Life’ in Article 172, so that: 1) whoever relates or disseminates information of anyone’s personal or family life that may harm his honor or reputation, shall be punished with a fine or imprisonment up to six months. The right to privacy is also protected by criminal law. However, the constitutionally guaranteed right to inviolability of home, as an aspect of privacy, is also guaranteed when there is no violation of some other personality right due to the violation of home. Cumulation of the violation of the right to privacy and the right to honor and reputation, as conditions for criminal law protection, in the criminal offense ‘Dissemination of Information on Personal and Family Life’, Art. 172 of the Criminal Code of the Republic of Serbia, has no basis in the Constitution. Therefore, there is an unequal treatment of the right to privacy in this criminal offense in domestic criminal law, whose execution is conditioned by a violation of the person's right to honor and reputation.

[150] The *Law on Obligations* (Official Gazette of SFRY, nos. 29/1978, 39/1985, 45/1989, 47/1989, Official Journal of FRY, nos. 31/1993, 22/1999, 23/1999, 35/1999, 44/1999), stipulates that everyone shall be entitled

4. The Law on Personal Data Protection of 2008,[151] the Law on Liability for Violations of Human Rights of 2003,[152] the Law on Health Care of 2005,[153] and the Law on Advertising of 2016,[154] provide for the protection of the right to privacy, i.e. personality

to demand that the court or other competent agency order the cessation of an action by which the integrity of human person and family life is violated and other rights pertaining to his person by threatening the payment of a certain amount of money, determined as a lump sum or per time unit, to the benefit of the person suffering damage in Article 157. Article 156 of the Law on Obligations, on demand to eliminate a danger of damage, stipulates that everyone may demand from another that he eliminates a source of danger threatening considerable damage to him or to an unspecified number of persons, as well as to refrain from an activity causing disturbance or danger of loss, should the ensuing disturbance or loss be impossible to prevent by adequate measures; More on this: Vodinelić, 1989: 127-148, especially 135-137, where it is stated that in Article 156 of the Law on Obligations, only disturbance due to a source of danger constitutes sufficient grounds for claiming protection also for the violation of personal rights, while Article 157 of the Law on Obligations, on demand to cease with violation of personality rights, specifies some personality rights, such as the integrity of human personality, personal and family life, and ultimately the protection of other personality rights, without precise determination.

[151] *Law on Personal Data Protection* (Official Gazette of the Republic of Serbia, nos. 97/2008, 104/2009 – other law, 68/2012 – CC ruling and 107/2012), see Art. 3, 4, 5, 11, 12.

[152] The *Law on Liability for Violation of Human Rights* (Official Gazette of RS, nos. 58/2003 and 61/2003) prescribes in Article 6 that the violation of human rights in terms of that Law is any act of a person designated by that Law, which offends the right to privacy of another person and which has been executed with the aim of obtaining information relating to or belonging to that person, in order to provide such information to the Security Information Agency (BIA) or to the former or other corresponding service. A violation of human rights exists even when the act was executed on the order of a superior, and when it was not unlawful according to the internal regulations that were valid at the time of its execution, but was unlawful according to the provisions of the International Covenant on Civil and Political Rights.

[153] The *Law on Health Care* (Official Gazette of RS, nos. 107/2005, 72/2009 – other law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – other law, 93/2014, 96/2015 and 106/2015), stipulates human rights and values in health care in Article 25, so that every citizen has the right to be provided health care while respecting the highest possible standard of human rights and values, i.e. he/she has the right to physical and mental integrity and to the security of his/her personality, as well as to the respect of his/her moral, cultural, religious, and philosophical affiliations.

[154] The *Law on Advertising* (Official Gazette of RS, no. 6/2016), starting from Article 44 ending with Article 48, refers to the use of personal property in advertising. Article 44 Paragraph 1 prescribes that if an advertisement contains a name, personal data, a personal record, a recording of image – photo, drawing, film, video or digital recording, a recording of voice or spoken words – a tape, gramophone or digital recording, written records – a letter, a diary, a note or a digital recording (herewith: personal property), on the basis of which the identity of a person may be determined or recognized, the advertisement may not be published without the prior consent of the person to whom the property refers. Paragraph 2 of the same Article provides that if the person to whom the personal property refers dies, the consent in terms of Paragraph 1 of the same Article is given by the spouse, children, parents of the deceased, or a person who is designated by legacy. Paragraph 3 of the same Article foresees that for a physical person incapable of looking after his/her own interests, the consent in terms of Paragraph 1 of the same Article is given by his/her legal representative. Paragraph 4 of the same Article provides that the consent of the person to whom the personal good refers, given for use of the personal property on other grounds, with or without compensation, and not on the grounds of advertising, shall not also be considered the consent for its use in an advertisement. Article 45 refers to the consent given for use of personal property in one advertisement, for a certain advertising period, a certain manner of advertising, or advertising for a certain purpose; Article 46 refers to the right to withdraw consent for the use of personal property; Article 47 refers to the right to compensation for the use of personal property, for the subsequent consent to the use; and Article 48 Paragraph 1 of this Law refers to the prohibition of the

rights, which include the right to privacy as a specific personality right. The Law on Advertising prescribes in Article 15 that if an advertisement contains personal property based on which a person's identity can be determined or recognized, the advertisement shall not be published without the prior consent of the person to whom the personal property refers. Personal information, personal record, recording of image (photographic, drawn, graphic, film, video and digital record), sound recordings of voice and spoken words of a particular natural person are considered personal properties.

Privacy is also protected by banking regulations. The Law on Banks[155] envisages that a bank secret is a business secret, which is considered to be data known to a bank relating to personal data, financial condition and transactions, as well as to ownership or business relations of the clients of such bank or another bank; also, data on balances and flows on individual deposit accounts, and other data obtained by the bank in operation with clients.[156] Therefore, there is an obligation of the bank and members of its bodies, shareholders, and employees, as well as the bank's external auditor and other, not to disclose such data to third parties.[157]

The Law on Civil Procedure[158] prescribes the obligation of a witness to keep a secret about facts he/she learned in trust as an attorney, a religious confessor, a lawyer, a doctor, or a member of another profession, if there is an obligation to keep a professional secret; the presiding judge of the panel will warn these persons that they are entitled to withhold their testimony, if there is an obligation to keep in confidence all that has been learned in the course of these specific activities pertaining to any such

use of personal property of public figures, musicians, actors, athletes, politicians, etc. in advertising products intended for minors, as well as the sale of which is prohibited to minors.

[155] *Law on Banks* (Official Gazette of RS, nos. 107/2005, 107/2010 and 14/2015).

[156] See Article 46 Paragraph 1 Items 1, 2, 3 of the *Law on Banks*.

[157] See Articles 46, 47, 48, 49 of the *Law on Banks*. A bank secret shall be kept, during the status based on which access to this data has been obtained and after its termination; client data considered a bank secret may be disclosed to third parties only based on the client's approval in writing. This Law provides for exemptions from obligation to keep bank secret, particularly if data are disclosed based on the decision or request of the competent court; for the needs of the authority competent for money laundering prevention, in accordance with the regulations on the prevention of such a phenomenon; in connection with the property procedure, based on a request of the guardian of assets or consular representative offices of foreign states, upon submission of written documents showing legitimate interest of those persons; or if the data are disclosed to the tax administration, to the authority competent for the supervision of foreign exchange operations, etc. The National Bank of Serbia, courts and other bodies vested with public authorities may use the obtained data exclusively for the purpose for which such data were obtained, and may not disclose such data to third parties or enable third parties to learn and use such data, except in cases envisaged by the law.

[158] See Articles 248 and 249 of the *Law on Civil Procedure* (Official Gazette of RS, nos. 72/2011, 49/2013 – CC ruling, 74/2013 – CC ruling and 55/2014).

profession. Also, the witness may withhold the answer to certain questions if there are important reasons for that, especially if he/she would, by answering such questions, expose to severe shame, himself/herself or his/her lineal relatives by sanguinity to any degree and lateral relatives up to the third degree, inclusive his/her marital or non-marital partner or in-laws up to the second degree.

6. The privacy torts

Domestic civil law falls into the continental legal circle and, unlike the common law system, does not foresee specific delicts in case of violation of the right to privacy.
A violation of privacy may be done directly by a natural person, a legal person or a group of persons, without the media as an indirect means of violation or as a direct violator. The protection of this right, which is guaranteed by constitutional provisions and international conventions, is regulated by civil law provisions.

According to domestic civil law, a person who has suffered a violation of personality rights (and the right to privacy) is authorized to require termination of that violation through negatory forms of protection (claim for disturbance),[159] but also to demand prevention of the occurrence of these violations through quasi-negatory forms of protection (omission claim, if there is a specific danger of republishing incorrect, incomplete, or other unauthorized information that violates the right of the holder of the right). Also, the holder of the right may file a declaratory claim, in order to proclaim the violation. In addition, the person whom the information published in the media refers to and which may violate his/her (personality) right or interest, may request from the editor-in-chief to publish a *reply* or a *denial* (as a means of temporary-provisional protection, which serves as a defense against possible violation of some right or interest) or he/she may file a claim against the editor-in-chief for the publication of a *correction*, which, as well as a claim for publication of a *revocation*, is a claim for removal, a reactive claim that affects the consequences of the violation of a right. If damages (material or non-material) have ensued as a result of a violation of the right, the holder of the right may file a *claim for damages* for restitution, or satisfaction.

[159] See Avramović, S., Stanković, O. (1996): *negatory claim* (actio negatoria) is primarily a claim of the holder of a (property) right against anyone who unlawfully disturbs him/her in another way, not by taking away things, such as when filing a reivindicatory or publician claim. It can be filed during the unlawful disturbance of the holder of the right. Unlike the nugatory claim, *actio quasi negatoria*, is an omission claim, which is filed in case of existence of a specific threat of repeated unlawful disturbance.

The Law on Public Information and Media, which is a *lex specialis*, protects the right to private life and personal records in Article 80, while Article 101 of the same Law prescribes the content of the particulars of claims for the protection of this right. If the publication of information or record violates the right to privacy, determination of whether the publication of information or record had violated a right or interest, as well as non-publication of information or record, ban from republishing of the information, and also handover of the record, removal or destruction of a published record (deleting a video recording, deleting an audio record, destroying a negative, removing from publications, etc.), may be requested by a claim. The claims referred to shall be filed against the editor-in-chief of the medium in which the information or record was published, in terms of Article 103 of the said Law.

Also, in accordance with Article 83 of the Law on Public Information and Media, the person whom the information refers to and may breach his/her right or interest, may request from the editor-in-chief to publish free of charge a reply (denial) in which he/she claims the information is incorrect, incomplete or inaccurately conveyed. If the editor-in-chief fails to publish the reply, having no reasons for not publishing the reply set out in this Law, or if he/she publishes the reply in an unprescribed manner, the holder of the right of reply may file a claim against the editor-in-chief for the publication of the reply. The proceedings for the publication of the reply shall be limited only to establishing the facts and regarding the obligation of the editor-in-chief to publish a reply, and the reasons for not publishing a reply are stipulated in Article 98 of the same law. It has been stated that the claim for publishing a reply is a means of temporary (provisional) protection, while the claim for publishing a correction, as provided for in Article 84 of the same Law, is a means of reactive protection, as well as the request for publishing a revocation of information, which institute is envisaged in Article 199 of the Law on Obligations. The right to a correction is the right of a person whose right or interest has been violated by the publication of incorrect, incomplete or inaccurately conveyed information, may demand by a claim that the editor-in-chief publish free of charge his/her correction of that information as incorrect, incomplete or inaccurately conveyed. It is not possible to request a correction of correct, complete or accurate information from private life or a true record, even though its publication may also violate the right to privacy, since the proceedings on the publication of a correction are limited to the fact of incorrect, incomplete or inaccurately conveyed information and to whether the information violated the plaintiff's right or interest etc.

The Law on Public Information and Media also provides for the right to compensatory damages (material and non-material) for the person to whom the information that was

prohibited to be published refers in accordance with this Law, including the information from the domain of the right to privacy; and also if that person's reply, correction or other information were not published, because of which that person had suffers damages, although said publication was ordered by a competent court. In terms of Article 112 of that Law, which is a *lex specialis*, damages are to be awarded in accordance with the provisions of the Law on Obligations, as a general regulation. Pursuant to Article 113 of this Law, a journalist or an editor-in-chief shall be liable for damage incurred, if proven that he/she is to blame for the damages incurred due to the publication of information from the domain of the right to privacy, with the possibility of joint liability with a publisher, as en employer for the work of an employee at the moment of causing the damage, in terms of the provision of Article 115 of the Law on Public Information and Media, and in conjunction with Article 170 Paragraph 1 of the Law on Obligations (on the principle of liability for other persons),[160] unless he/she proves that the employee was working under the rules in given circumstances (the standard of due diligence). However, pursuant to Article 114 of the Law on Public Information and Media, the publisher may also be liable under the principle of strict liability (regardless of guilt), such as liability for dangerous activity, for damage incurred in terms of Article 112 of the Law on Public Information and Media, by publishing information that was prohibited to be published.

Conclusion

The right to privacy protects data and records which relate to someone's private life, whether this information is true or false. In case of a violation of protected personal property, such as unauthorized publishing of a personal information or record, it is possible to violate more than one personality right by the same act. The division of life spheres into public and private is not sufficiently precise to indicate the extent to which someone else's privacy may be entered. Civil law protection of the right to privacy is based on provisions of general regulations such as the Law on Obligations and the Law on Civil Procedure, but also on special regulations, of which one of the best-known is the Law on Public Information and Media. The right to privacy is one of the most violated personality rights in the mass media.

[160] Liable for the damage to a third party caused by an employee while working or in relation to work, shall be the employer who the employee was working for at the moment of causing the damage, unless the employer proves that the employee, in given circumstances, had proceeded as he/she should have.

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Dr Dragica Popesku*

VIDOVI PRAVA NA PRIVATNOST I GRAĐANSKOPRAVNA ZAŠTITA

Apstrakt: *Pravo privatnosti je pravo ličnosti kojim se štite podaci koji se odnose na nečiji privatan život, kao i lični zapisi te osobe. Pravo na privatni život je vid prava privatnosti kojim se štiti lični domen aktivnosti svakog čoveka, radi očuvanja njegovih bioloških, zdravstvenih, moralnih, socijalnih, kulturnih i ostalih potreba, kao pojedinca, ali i u okviru društvene zajednice. Pravom na lične zapise, koje spada u drugi vid prava privatnosti, štiti se pravo na zapis lika, glasa ili lični pisani zapis neke osobe. Pravo privatnosti jedno je od najpovređivanijih prava ličnosti. Neovlašćenim aktima organa vlasti, organizacija i udruženja, ali i medija, moguće je vršiti nedozvoljene upade u privatnost ljudi, čemu svakako pogoduje razvoj tehnike. Posredstvom medija u javnost se često iznose fotografski, filmski, zvučni zapisi, ali i lični spisi, sa zabeleženim intimnim podacima, čime se može povrediti nečija privatnost. Povreda privatnosti se može činiti i neposredno od strane druge osobe, ali i pravnog lica, ili grupe lica, sa i bez posredstva medija, kao neposrednog povredioca. Zaštita ovog prava, koje je zajemčeno ustavnim odredbama i međunarodnim konvencijama, regulisana je građanskopravnim i krivičnopravnim odredbama i drugim imperativnim propisima.*

Ključne reči: *pravo privatnosti, privatni život, lični zapisi, zaštita prava, sfere privatnosti.*

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A MIGRANT IS A HUMAN BEING TOO

Abstract: *We are all human beings and we have our own rights the human rights, these rights should be respected not only amongst people but also by the State and Non-state actors. Vulnerable groups in which category fall the migrants are also human beings with rights constituted in the International Human rights Law, the Conventions on the Status of Refugees and many other Protocols and Conventions. But today due to the terrorist and security threats in the world, due to the large inflows of migrants, migrants, asylum seekers, and refugees are categorized as a threat to the society. But in order to safeguard the freedom and security in the world, the human rights cannot be jeopardized, therefore migrants cannot be jeopardized as human beings and as a vulnerable group.*

Keywords: *Migrant, human rights, freedom, border control, detention*

1. Introduction: What is a migrant and do human rights apply to migrants?

In my previous work (2016) I asserted the definition for a migrant from the article “Is the humanitarian migration crisis different?” explaining that the term migrant is a person that moves to another country with the intention of staying in that country for a short period. And there is a long-term migrant who moves to a country for a longer period. The Asylum seeker has submitted a request for asylum but the asylum procedure is not completed. (Tilovska-Kechedji, 2016 pg. 2-3) Furthermore, the meaning of the term refugee was specified in the 1951 Convention of the Status of Refugees in Article 1: “Refugee …is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion”. (Convention and Protocol Relating to the Status of Refugees, pg. 1) On the other hand, voluntary migrants migrate to other countries by their own choice (labor migrants, family reunification or foreign students). Forced migration consists of refugees and internally displaced people who are in that situation due to a conflict, environmental disaster, and

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e.t.c. (International Migration, Health & Human Rights, 2003 pg.9) Therefore, the refugee is living its country of origin because he/she is afraid for his/her life or his /her family existence. And under Article 6.1 Part III of the International Covenant on Civil and Political Rights, “Every human being has the inherent right to life. This right should be protected by law. No one shall be arbitrarily deprived of his life”. (International Covenant on Civil and Political Rights, pg.4)

“Human Rights are universal values and legal guarantees that protect individuals and groups against actions and omissions primarily by State agents that interfere with fundamental freedoms, entitlements, and human dignity”. Human Rights belong to all of us. (Human Rights, Terrorism and Counter-Terrorism, pg. 3) Human rights can be civil, cultural, economic, political, and social, these rights are universal and protect us from actions that oppose freedoms and human dignity. They apply to all migrants, refugees and other non – nationals. And they should be used to create legislative and policy guidelines and rules. (International Migration, Health & Human Rights, 2003 pg.8-9) States are obliged to “respect, protect and fulfill human rights”. (Human Rights, Terrorism and Counter-Terrorism, pg. 4)

1.1 Migration

Why people migrate to other states? In my previous work, I cite Koslowski who says that migration is an economic phenomenon that occurred due to a voluntary movement of people from poor countries to more prosperous countries. Migration in the past was needed because of the cheap workforce and the economic perspectives of that country, but today this is not the case. Today migration does not happen because of the economic problems it happens due to political problems, civil uprisings and many other factors. Furthermore, in my work, I present Schmid statistics that there are almost one million migrants in the world, from this number 740 million are domestic migrants and 215 million are international migrants. In 2015, in the EU, there were 1.9 million asylum seekers and they all came from Syria, Afghanistan, Iraq, Pakistan and all four countries have the background of disturbance, chaos, violence, civil wars, and terrorism. (Tilovska-Kechedji, 2017 pg. 5) In the numbers presented above are included the migrant workers, permanent immigrants, refugees, asylum seekers and not included irregular or “Illegal” migrants. (International Migration, Health & Human Rights, 2003 pg.9) Migration existed always and in the past was used as an economic movement but after many terrorist attacks the governments and the media linked migration to terrorism. Terrorists have great influence on migrants because they are aware of their weaknesses and they used these weaknesses to control them or to attract them. But these

percentage of migrants that are seduced by the terrorist ideas it is not very high which means that we cannot place all the migrants in the category of terrorists. (Tilovska-Kechedji, 2017 pg.11)

2. Migration as a threat to security and border control as a threat to human rights

Migration is understood as a threat and many states feel the need to protect their territory and their people. Terrorism fuels this view even more, therefore borders need to be secured even more. The borders between richer and poorer countries have become protected by sophisticated control. The US Mexico border, for example, is guarded by patrols with special equipment, with intensity lighting, steel fencing, body heat motion detection, video surveillance and a wall fence. The same high surveillance was noticed on the border of Spain and Morocco and Gibraltar. (Pecoud and Guchteneire, 2006 pg. 70) Furthermore, other western democracies have also straightened their territorial borders with personnel and technology. The EU launched a multi-billion border project in 2013 in Spain with drones, satellites, and aerostats in order to increase border surveillance, specifically for boats of irregular immigrants. (Oberoi and Taylor-Nicholson, 2013 pg. 172)

Governments and the media have declared a war on immigration. They present immigration as a threat to security, public services, and labor markets, a threat to cultural and national identity. This idea places the migrant as the “other”, a threat to the State. Marginalization and discrimination are the synonyms of poor and vulnerable people as they migrate because of the need for survival. (Oberoi and Taylor-Nicholson, 2013 pg. 170) Furthermore, the European Union also deals with migration as a security matter. Migrants are unwanted and are viewed as a threat to the stability of the Union. (Ceccorulli, pg. 1)

Migration and human rights crisscross each other with the migrants crossing the border. Human rights law recognizes the right to leave the country of origin but there is no written right that allows entrance in another country, therefore the new state decides whether the migrant entered properly and whether the migrant will stay and these do not collide with human rights principles. On the other hand, even if the migrant entered without authorization the state does not have the right to disrespect the basic rights. (Touzenis and Cholewinski, 2009 pg. 1) Because the Convention and Protocol relating to the Status of Refugees “stipulate that subject to specific exceptions, refugees should not be penalized for their illegal entry or stay”. (Convention and Protocol relating to the

Status of Refugees, pg. 3) This is because it should be understood by the States that refugees are a vulnerable category that needs to be protected by the new states because their home of origin was either destroyed, and they were banished for their different political views or they are just striving for their lives. And it is up to the States institutions or administrative personnel to see (rightfully) if these people are in the real sense refugees or are they economic migrants or terrorist. If the border personnel is trained to differentiate between them then there will be no need to put so much security at the borders.

The newly established border and migration policies will represent a threat for migrants but also for the human rights and democratic principles because border controls are not compatible with the functioning of democracies. “The values that guide societies cannot stop at their borders they also inspire attitudes towards outsiders”. (Pecoud and Guchteneire, 2006 pg. 74) Furthermore, border control includes surveillance measures (cameras in public spaces, identity checks, body searches) or the use of biometric data that apply to all the citizens which lead to the intrusion of private lives of all citizens. (Pecoud and Guchteneire, 2006 pg. 70) The border control policies challenge several human rights: First, migration measures for irregular migrants have consequences on the asylum principle where all human beings are entitled to seek protection from persecution. Furthermore, the procedure taken to prove the prosecution of a fake or a real refugee leads to human rights abuses and suffering. Also, the attempts by the states to control migration before they reach the border affects the procedure of refugees to seek asylum. The migrants are faced with another human rights challenge, trafficking, and human smuggling. The crossing of borders is a well-paid business and criminal activities prosper due to irregular migration. Crossing the borders illegally is costly but the most tragic cost is death on their way to the receiving countries. At the US-Mexico border, one migrant dies every day. (Pecoud and Guchteneire, 2006 pg. 72-73)

As border zones expended the border crossing is a very dangerous activity, it made migration more irregular and placed the migrants at risk of violence and exploitation by non-State and State actors. The governance regimes and the enforcement frameworks do not pay attention to the principles and standards of international human rights law. (Oberoi and Taylor-Nicholson, 2013 pg. 169) Furthermore, border management is becoming more discriminatory presenting different treatments to migrants on grounds such as nationality, legal status, ethnicity, age, gender or religion. In 2001 the Council of Europe expressed its concern that everyone has the right to be treated with respect for his or her human dignity rather than considered to be a criminal or guilty of fraud. Criminalization has placed migrants to be vulnerable to human rights abuses, violent

crime, kidnapping, extortion and e.t.c. (Oberoi and Taylor-Nicholson, 2013 pg. 171). The broader policies and administrative measures including counter smuggling laws and measures that criminalize irregular migrants impact the human rights. This places migrants to abusive facilitators, smugglers and traffickers. This increased restrictions on regular migration channels, particularly for low skilled and low waged workers, and reunification with family. (Oberoi and Taylor-Nicholson, 2013 pg. 172-173) Therefore the securitization of borders and the stricter laws will not stop the migration of people but it will, in fact, produce more crime on all levels, more violence which will lead eventually to breaking of all the universal values that are the foundation of our societies.

2.1 Interception measures another step toward breaking the human rights

States are concerned with their sovereignty and preoccupied with national security due to the irregular migration and the asylum-migration and are devoting a lot of energy and resources in order to turn back migrants before they arrive at their border. (Brouwer and Kumin, pg. 6) The interception measures do not include proper procedures for the authorized people to distinguish between the migrants who need protection from those who don't. And unless current practices are reformed to comply with human rights and refugee protection norms, the asylum system will not work. What is an interception? The definition was proposed by UNHCR, and it is "encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination". (Brouwer and Kumin, pg. 7) But by preventing the migrants to come on the border there right to apply for Asylum procedure is denied. Although the EU under the Dublin Agreement presented the asylum policy in which the key principle is for applying for asylum procedure in the first country it enters and that country will process the application. (Tilovska-Kechedji, 2016 pg.5) But as we know Dublin will not work until all the member states agree to be unanimous in their decisions. And also Dublin only applies to the EU member states what about the other countries.

Here are some examples of interception: in August 2001, Tampa a "vessel" from Norway rescued 430 Afghanistan people from a sinking Indonesian boat. The immigrants asked to be taken to Christmas Island, Australia to seek asylum. Australia stopped Tampa and insisted Norway or Indonesia to take the immigrants but none of the states wanted the immigrants. Australia sent troops to prevent Tampa to reach land. On Sept. 1 Australia paid the government of Nauru a Pacific Island a sum of 10 million US $ in aid in order to take the asylum seekers and the Nauru official approved of these

deal. (Therefore Australia concluded a business deal in order not to take the immigrants on her territory) Another interception case out of many is the case of S. an Iraqi widow and her 9-year-old daughter. In 2002 the two of them were smuggled of Iraq. They were brought to Iran where they stayed for 2 months, a smuggler arranged European passports in late 2002 and they flew from Teheran to Dubai and from there, they had to go to Canada were the woman married alternatively with a man she did not know but a Canadian citizen. Before they reached the passport control area the woman was told to act as the smugglers wife and the child was told to walk ahead and to act as she does not know them. She passed but the woman and the smuggler were stopped and they were held at the airport for 2 days. The woman admitted to her doing and was sent back to Iran since The Emirates have not signed the Convention on Refugees. She had 90 days to leave Iran and her bail was paid by the Canadian man. The child reached Canada applied for asylum but she remains separated from her mother. (Brouwer and Kumin, pg. 7-8) From this two cases of interception and there are many we can conclude that interception does more damage than good especially in the case of the child because she was a minor separated from her mother and alone in a different country.

2.2 Detention of the migrants

The 9/11 attacks frightened not only the American people but the whole world and led to the anti-immigration politics. These views were supported due to the fact that the 19 suicide bombers were noncitizens or they were foreigners. Discriminating immigrants is easier when there is security crisis. David Cole states that “government officials have found it easier to sacrifice the rights of non-voting foreign nationals for the purported security of the nation than to ask voting Americans to sacrifice their own right and liberties in the name of promises of greater security”. (Cole, 2006 pg. 630) The targeting of foreigners due to the above reasoning has taken forms like detention and torture, preventive detention, systematic surveillance and ethnic profiling. The worst initiative has been taken through immigration law because it was twisted to serve the purpose, it led to secret arrests without charges, secret trials, detentions without a cause and rendering of foreigners to other countries for torture. (Cole, 2006 pg. 630)

States are detaining refugees, asylum seekers and migrants in inhumane detention centers. Migrants are often detained without the need for detention, without an independent court review, in places similar to jails under penal conditions. Only a few states have systems that have an alternative to detention. The migration detention system is inconsistent with international human rights law. In 2011 the United States detained 400000 migrants and asylum seekers in jails and other similar institutions.

Australia detention length is indefinite and very long. Also, there is a deficiency of medical care in Egypt, Libya and the US. Although States have the authority to regulate migration, the immigration policies and practices should be coordinated with the International human rights law, because they are usually ignored. (Immigration Detention and the Human Rights of Migrants and Asylum Seekers: Key Challenges, 2012 pg. 2) The words of an immigration detainee in a US immigration facility "….Our hands were handcuffed and our ankles were tied. I couldn't tell what was day and what night was –there were no windows and 24 hours light. …" (Immigration Detention and the Human Rights of Migrants and Asylum Seekers: Key Challenges, 2012 pg. 2)

In 2009 due to escalating numbers of migrants in detention, the UN General Assembly resolution "Protection of Migrants" requested that states have the sovereign right to take migratory and border security measures but they have the duty to respect international law and international human rights law. (Immigration Detention and the Human Rights of Migrants and Asylum Seekers: Key Challenges, 2012 pg.3) There should be individualized judgments that lead to detention rather than automatic one that is practiced in Australia and the US. Also, there should be alternatives to detention. Detention should be the last thing to do, for example in the US, ATD pragmas have been conducted (Vera Institute of Justice & Lutheran Immigration and Refugee Service) both programs introduced different assessments: individualized case judgments, criteria, legal advice, access to adequate accommodation, information about rights and duties and consequence of non- compliance, humane and respectful treatment. (Immigration Detention and the Human Rights of Migrants and Asylum Seekers: Key Challenges, 2012 pg.4-5) And these projects may work they are respectful of the Human rights but also serve as a protection and security systems.

Furthermore, immigrant detention had its rise in Western Europe a lot of abuses were suffered by the migrants and asylum seekers. There was a rise in deaths in the process of deportation. The EU Human Right watch research revealed that migrants in Greece and Spain are held in detention in substandard conditions and without the ability to exercise their procedural right. In Greece, migrants were placed in filthy, overcrowded, roach infested, police detention facilities. The migrants were not allowed fresh air, fresh food, and healthcare. The conditions were "cruel, inhuman and degrading treatment". Furthermore, the detention was for a long period of time, because the home countries did not want or could not provide documents for them to return. The migrants were detained without charge, with no right to appeal and without a deportation process, all these violated Article 5 of the European Convention on Human Rights, Article 9 of the International Covenant on Civil and Political Rights and the customary law restriction

for arbitrary detention. In Spain, more than 500 migrants were kept in a 50 people space. Detainees were cut off from outside world, no telephones, no visits, they cannot leave the premises no fresh air or sunlight. The medical care and sanitary conditions very poor. The detainees had no information about their rights, no interpretation or translation even when signing documents no legal representation and individualized judicial oversight of their cases. ("The Human Rights Dimensions of E.U. Immigration Policy: Lessons from Member States", 2002 pg. 3-4) Due to the values and principle of sovereignty, humanity and democracy, the detention system is certainly a proof that there will be a collapse of the universal principles that humanity swears upon.

2.3 Biometric data and the privacy of migrants and of all

Furthermore, to add to the border controls, the interception measures and the detention, migrants have reported unreasonable confiscation or destruction of the identity documents and property of migrants both by private actors or smugglers and state officials usually border guards and all of this is a violation of human rights. Migrants are subject to the new technology of surveillance at borders. Biometric data rise human rights concerns such as intrusions into privacy and no personal data protection. Biometric data can also be used for religious, ethnic or racial characteristics used for profiling. Data sharing principles point out that individuals should know what data is being collected about them, with whom and for what it is being shared. Migrants at borders are rarely able to assert this right to privacy. (Oberoi and Taylor-Nicholson, 2013 pg. 175)

The UN called upon States in the resolution on privacy to establish and maintain existing independent, judicial, administrative mechanism capable of ensuring transparency and accountability of personal data. (Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci, 2017 pg. 6) In 2016 the Court of Justice of the European Union delivered a judgment to remind the member states of their duties to respect, promote and protect the human rights to privacy. "The interference entailed by such legislation in the fundamental rights… must be considered to be particularly serious. The fact that the data is retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance…" This data should only be gathered for the fight against terrorism and serious crimes. (Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci, 2017 pg. 7-8) The border data inflows and modern information technology requires a global approach to the protection and promotion of the right to privacy. If the flow of information is a global one with all the serious

advantages to humankind the environment needs to be responsible, dependable and ethical. This environment cannot discriminate between nations, origins, races, sex, age, abilities… also, the exchange of information in the virtual world needs private, trustworthy and secure methods. (Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci, 2017 pg. 9) The inflow of private information and data does not only apply to the migrants but to all the people. And this data should be used only ethically, with security and without any judgments, aspirations or applications.

Article 17 of the International Covenant on Civil and Political Rights protects everyone from arbitrary interference with their privacy. The security threats in the world have led to biometric technologies to make accurate identity checks. Biometrics are physiological or behavioral characteristics used to recognize the identity of a person. Physiological characteristics include fingerprints, hand geometry, iris shape, face, voice, ear shape, and body odor. Behavioral characteristics include handwritten signatures and the way a person walks. But the biometrical data places human rights implications through the processing and distribution of a person's unique physical identities causing irritation between the security interests and the right to privacy. And if we look this from the migrant's perspective it is discriminatory towards migrants too. Privacy is a fundamental human right under Article: 12 of the Universal Declaration of Human Rights as well as article 17 of the UN Covenant on Civil and Political Rights and it applies to all people no matter their nationality, immigration status age or sex. (Rebekah, 2005 pg. 1)

2.4 Migrants fall in the hands of the smugglers

The immigration restrictions and controls have pushed migrants to turn to smugglers and other ways to enter a country. They use dangerous paths and conditions that violate human rights. The transiting migrants are exploited by the smugglers in illegitimate labor and trafficking of human beings. In the beginning of 2011 more than 14.000 people died trying to enter the EU. Uncounted numbers of migrants, refugees, and trafficked persons lose their lives when they board on boats, they are left to die at sea or are shut by the border guards. Lethal violence occurs at borders by border guards, military or non-state actors like traffickers, smugglers or airline officials. Girls and women are vulnerable to all kinds of violence (sexual). Unjustifiable profiling and interference with the right to privacy, torture, detentions have also been documented by human rights experts. (Oberoi and Taylor-Nicholson, 2013 pg. 173-174) States deport migrants in no-man's land or to the vicinity of the border of a country, and this is

especially terrifying for unaccompanied or separated children. (Oberoi and Taylor-Nicholson, 2013 pg. 174)

3.Human rights apply to migrants

Refugees are usually victims of the asylum policies and the relations between refugee law and human rights law should be fixed in order to clear the obligation of the state and clear their position towards refugee and asylum seekers. (Chetail, 2014 pg. 2) There is, unfortunately, a gap between the written laws and the Conventions and the reality of migrant's lives who are vulnerable in terms of dignity and human rights. It should not be excluded that the human rights treaties apply to both nationals and non-nationals. (Touzenis and Cholewinski, 2009 pg. 1) Migrants are entitled to the fundamental human rights. Some human rights are linked to migrants as a vulnerable group: exploitation, employment rights, from discrimination, and equality before the law and some are economic and social rights. These rights are interdependent and inseparable. (Touzenis and Cholewinski, 2009 pg. 6) The International regime of human rights is clear that all migrants no matter their legal status are entitled to enjoy "all human rights by virtue of their humanity". (Oberoi, 2009 pg. 19)

Furthermore, Miller states that a human right to immigrate is a universal right of all the people in the world that is applied to all states, and not to prevent people who want to settle on a state's territory from doing so. The right to immigrate is achieved as long as the other human rights are protected. This would rule out the bad image and leave up to the immigrants to bear the justificatory burden. (Miller, 2015 pg. 6). A perfect idea in an imperfect world.

The EU and UN share the same values that created the Charter of the UN and the Universal Declaration of Human Rights. The migration crisis and the security threats have placed a big burden on the fundamental values. In 2016 the UN plenary meeting aimed to secure new commitments, greater opportunities for resettlement and expanded opportunities for refugees like self-reliance through access to education, legal employment and other measures. ("Migration, Human Rights and Security Nexus" pg.1)

4. Conclusion

Migrants, refugees and asylum seekers are human beings like every other person. They are placed in the vulnerable category because they are usually people, women, families, children who lost their homes, lost their security and peace in their homeland and they

are striving either for their lives, their freedom, peace and a better life. But on their way to the new country they either die, are left to the smugglers or treated with disrespect, placed in horrible conditions and mistreated at the border controls, at the detention centers or are intercepted. With all of the above, their human rights are disrespected. Human rights were acknowledged so we can feel free and protected as human beings. If the State and non-state actors are not obliged to them than tomorrow who will guarantee that all of us as human beings will be respected, treated with dignity, protected under the universal values.

Human rights are not a matter of charity but they are a matter of justice, respect and duty of the States. (Oberoi and Taylor-Nicholson, 2013 pg. 178)

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Elena Tilovska-Kechedji*

MIGRANTI SU TAKOĐE LJUDSKA BIĆA

Apstrakt: *Svi smo mi ljudska bića sa svojim ljudskim pravima, koja treba da se poštuju ne samo u odnosu jednih prema drugima, nego i od strane državnih i nedržavnih aktera. Ranjive društvene grupe, u koje spadaju i migranti, su takođe ljudska bića čija prava prava su zajemčena međunarodnim pravom ljudskih prava, Konvencijama koje se tiču statusa izbeglica i mnogim drugim Protokolima i Konvencijama. Međutim, danas, usled teriritičkih i pretnji po bezbednost širom sveta i velikih priliva migranata, migranti, tražioci azila i izbeglice poimaju se kao društveno preteće pojave. Ljudska prava ne smeju se ugrožavati u nastojanju da se očuvaju sloboda i bezbednost u svetu, te se stoga ni migranti, kao ljudska bića i pripadnici jedne ranjive društvene grupe, ne smeju ugrožavati.*

Ključne reči: *migranti, ljudska prava, sloboda, kontrola granice, pritvor i zadržavanje*

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II POGLAVLJE / CHAPTER II

PRAVO NA PRIVATNOST – KRIVIČNOPRAVNI ASPEKTI

THE RIGHT TO PRIVACY – CRIMINAL LAW ASPECTS

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SECURITY AS A PREREQUISITE OF FREEDOM - (NOT)EFFICIENCY OF CRIMINAL LAW PROTECTION

Abstract: *The paper presents an analysis of recent cases of publicly and privately committed homophobic and transphobic violence against LGBT people in Serbia, resulting in essential limitation of personal security, and consequently, reduced freedom and basic rights of the members of this population. Physical violence against persons of non-traditional sexual orientation and non-binary gender identity, as well as hate speech in public discourse, and on the other hand, the impunity of those who committed these acts are the main reasons why a large number of LGBT people live in fear for personal safety, significantly reduced movements, communications, educations and professional aspirations, while conducting a "double" life, and fearing of further victimization, does not report hate crimes cases. Although the Criminal Code contains Article 54a stipulating hate speech and hate crime as aggravating circumstances, to date there has been no one sentenced with a call to that provision.*

Keywords: *Personal safety, reduced freedom, hate motivated crime, hate speech, impunity of perpetrators, nobody sentenced*

> *Human security, from a human rights' perspective, has been defined as a life sustaining environment, the meeting of essential physical needs, respect for the identity and dignity of persons and groups, protection from avoidable harm and expectations of remedy from them. (Reardon, Hans, 2010)*

1.Introduction

The European Commission against Racism and Intolerance (ECRI), a human rights body of the Council of Europe in its latest report on combating racism and intolerance for Serbia, launched on 16 May 2017, concluded that much needs to be done to address the continued rise in hate speech, fight racism among sport fans, protect LGBT persons (ECRI, 2017). Constant negative public reactions to protection of rights of sexual

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minorities that are still dominant in the public discourse in Serbia, which still contribute to justification of violence as the acceptable means of fighting the unacceptable “other”. In the publicly present homophobic discourse, the same-sex love is forbidden or taboo and the people’s representatives sometimes do not hesitate to animate their voters through hate speech, making use of the fact that they are protected by their parliamentary immunity (Mršević, 2014a). Therefore, as one negative development noted by ECRI is the continued rise in hate speech in Serbian political discourse. The use of inflammatory language is reminiscent to the situation before the recent wars in the region. More decisive action is needed to combat hate speech from racist organizations and, in particular, from football fan groups. According to the experts “this issue is of particular importance, given the role that racist and violent football fan groups played in the outbreak of the recent wars in the region” the report stresses.

Threats, street violence, intimidation, attacks and inappropriate comments regarding LGBTI individuals are still a big part of everyday life in Serbia. Up to this day, no final verdict was brought declaring guilt for a crime motivated by hate based on sexual orientation or gender identity. Although legal and strategic platforms of protection exist, the reaction of the institutions in charge regarding attacks motivated by homophobia and transphobia are often lacking (Đan, 2016, 10). Sports clubs and associations, and the sporting arenas are still particular venues of undisturbed public display of high-intensity homophobia and transphobia that occurs as a “normal” addition to sporting duels, fan groups and chants. Legal regulations and other policies in this domain are still insufficient as the sportsmen and the audience are unprotected against discrimination based on sexual orientation and gender identity. As if nothing had changed, the start of the football season 2017 was also marked by penalties given to the best Serbian clubs due to fan incidents. Namely, UEFA punished the Red Star, the Serbian Vice-Champion, by closing the northern part of its stadium at the next European play and by fine of eight thousand Euros due to fan banner, "... we will not let Serbia be a country of faggots", highlighted at the match against Florian (Mozart sport, 2017: 10.07).

Every second citizen in Serbia believes that homosexuality is a disease, and every tenth believes that the "wrong" sexual orientation is to be cured by beatings (Đorđević, 2014: 03.05). Still is a greater shame that somebody’s child is a gay, than a criminal, even a murderer (Jovanović, Mihajlović, 2014). The youth have repeatedly expressed their attitude that they regard violence against LGBT as justified. In public debates about the LGBT population, that they are perceived as a provocation and a threat to the Serbian society (Pančić, 2012). In this social atmosphere, it is often the case that the victims of

the violence are blamed to have caused violent outbursts without any activity, only by their appearance and existence, in fact by what is seen as their “provocations”.

Violence against LGBT persons as the main source of their personal insecurity has been documented as such mainly in the records of the group for the protection of the rights of LGBT persons (Mršević, 2015: 296). For example, research on violence, which did “Labris” for the period 2006/2010 indicates that 90% of respondents were informed of such cases against persons of different sexual orientation other than heterosexual, and 60% of the respondents had personally experienced violence because different sexual orientation other than heterosexual. In two out of ten families in Serbia a homosexual child suffers violence, with the threat of eviction (even murder), as "not to ashamed family," in six family members try to convince them that they are not normal and should be submitted to medical treatment, only one out of ten families accept such child, or at least, ignore the child's sexual orientation (which can take a lifetime) (Pašić, 2012: 30.11).

2. Hate crime in the Criminal Code

Hate crime was firstly codified in domestic criminal legislation in January 1, 2013, as an aggravating circumstance. Special circumstances for determining the penalty for a criminal offense committed by hatred by the Article 54a: “If a criminal offense is committed by hatred due to race or religion, national or ethnic origin, gender, sexual orientation or gender identity of another person, this circumstance will be judged by the court as an aggravating circumstance, unless it is prescribed as a feature of a criminal offense.”

Since then, the authorities have not adequately dealt with crimes that had hatred for the motive, and there has not been a judicial epilogue to date, in which the authorities called on that Criminal Code provision. Unfortunately, until now we have no conviction that refers to that legal provision, and we can assume that the reason is the lack of training of the holders of judicial functions. According to that statement, prosecution employees need to be empowered to be the first in their prosecutor's office to indict the member in the indictment or to be the first judges to invoke Article 54a. (Nenadović, 2017, 11.02).

Complete number of recorded cases in period from 1August 2016 to 1 August 2017 is 79. Methodology used by Association Da Se Zna! (*Make It Known*) to record cases of discrimination and violence against LGBTIQA+ people is developed to list the cases in

two different categories: Hate speech, 56 cases, hate crime, 22 cases (Da se zna – *Make it known*, 2017). That's why it may be concluded that the legislation in Serbia is relatively good, but the implementation in practice is another story. Therefore, the main answer to question, how to protect personal security, still is primarily in the consistent and strict obedience of current laws[161] including their enforcement, stipulated prosecution and punishment of offenders. Necessary are also education, refraining from the use of hate speech, affirmative statements of the most responsible, and continuously changing curricula in primary secondary schools and colleges (RTS, 2013: 02.02).

3. Underporting the hate crime as a threat to group and personal security

The latest ECRI report also notes that homophobic and transphobic violence is heavily underreported: in 2015, the authorities registered only 33 racist, homo and transphobic hate crimes in the whole country, whereas in a survey of the same year, 23% of Serbian LGBT persons said that they had suffered physical violence in the past; frequently from family members.

Institutions do not implement laws. One of the best examples of avoidance of applying this article, is the case of a father who beat his son when he learned that he is a gay. But instead this fact to be used as aggravating moment, as stipulated by the Criminal Code, it is used as a relief in defense. Namely, the violent father in front of all institutions, e.g. the Center for Social Work, the Prosecutor's Office and the Civil Court, were repeatedly stating, "I beat him, but I did not beat him until I found out he was gay." This case illustrates that for all institutions during any legal procedures, openly expressed homophobia still is not a relevant fact for implementation the article 54a.

Victims' fear. Another reason, this one on the victims' side, is lack of victims' reports on hate motivated crime. LGBT people live in fear, remain without support in the family, at work and in the institutions that should protect them. Violence in the family motivated by sexual orientation, hate speech on the streets, graffiti with the message "kill faggot" and, on the other hand, the impunity of those who are participants in such activities, argues the president of the association "Make it known!" Dragoslava Barzut, are the main reasons why a large number of LGBT people do not report hate crimes.

[161] Laws which explicitly stipulate sexual orientation and / or gender identity as a generally protected ground against discrimination are the Labor Law, the Law on Higher Education, the Law on Public Information, the Broadcasting Law, the Youth Law, amendments to the Law on Health Insurance Law on Social Protection and the Law on Amendments and Supplements to the Criminal Law. However, these laws are not applied nor regularly neither properly.

Impunity of violence perpetrators. There is also the third reason. Namely, in Serbia, here and while implemented is noticed the practice, not to punish the perpetrators of various forms of violence, from private, domestic, to publicly committed. That is exactly the reason why their behavior is encouraged: because by that institutional lack of reaction, they get a message that their hate morivated deeds are allowed and legitimate!

4. The most recent hate motivated crime committed in Serbia reported by media

Sombor, Trans woman Ivana Kuharic (28) raped a driver of a Bulgarian truck. March 10th (Informer, 2015: 10.03). „He held his knife under my neck and raped me“. Police from Sombor arrested a Bulgarian citizen V. Ž. (49) because of the suspicion that on Saturday, sometime after midnight, with a threat of a knife, he raped a transsexual woman Ivana Kuharić (28). Bulgarian man was arrested the same night and detained. „Before I left the truck, he told me, „I do not stand trans scums and I like to rape them. You are not the first one," said Ivana.

Novi Sad, Physical attack on a transsexual woman in Jevrejska Street in Novi Sad, July 30th (Naše Novine, 2015: 30.07). Transgender woman Diana Pospis was threatened in July 2015. in Jewish Street, in the center of Novi Sad. A large man, about two meters tall, who was known to the victims since earlier, attacked Diana shouting: "I will kill you, you dirty faggot! I will slaughter you! "- Diana managed to escape from the attackers and immediately called the police.

Smederevo, An androgin model was beaten on the public concert, September 11th: “He pointed his finger at me and said - He is the one, and then hit me with a fist”(Kurir, 2015: 30.09). A model Igor Ivanović (21) was beaten in Smederevo. He said that a hooligan hit him with his fists in the head and kicked him in the butt while his girl friends also got hit by trying to defend him. “The attacker then shouted that he would kill me because I can not be alive because of my appearance. Then he pulled me and started threatening me. He did not have enough of it, so he ran to my girl friend and staggered her around the neck, and hit her with fists. The victim says that thanks to the police's quick intervention, the guy who attacked him was detained and a lawsuit for violent behavior will be filed against him.

Belgrade, An (allegedly) unprofessional police response to an attack on a trans person? May 2th (N1, 2017: 02.05). Five men beat and kicked trans woman Leona in Saturday April 30th in downtown Belgrade. They hit her by a belt buckle, shot at her concrete blocks, cursed and insulted her. The victim was left alone on the streets by a taxi driver who did not want to give her a lift. He allegedly said – "We do not drive transvestites, fagots and bleeding people", although as a public transport service they were obliged to drive passengers. Upon receipt in the Emergency Center, she was diagnosed with a broken finger bone and several cuts on the face and body. After the necessary help was provided, Leona returned to the police station to report the attack, when the duty inspector told her: "Now are the holidays and during these days we will not work on the applications. And Kennedy was killed, and also there was no one found guilty."

5. The most recent hate motivated crime committed in Serbia, recorded and reported by activists of human rights groups

Hate speech to LGBT in Nis: 01/07/2017 (Da se zna – *Make it known,* 2017:01.07). Members of the right wing organizations "Obraz" and the "Serbian sabor zavetnici" from Nis were sticking a leaflet in front of the Labeerint Club in which the Nis Pride Week was taking place. In the leaflet, the LGBT community was insulted and blamed for the destruction of the family, and ridiculing the dignity people. Incident was motivated by homo / transfobia. The Constitutional Court of Serbia banned "Obraz" in 2012. This violated the following rights: the right to freedom and security of personality and the freedom of peaceful assembly

Inflicted bodily injury in Belgrade: 08/05/2017(Da se zna – *Make it known*, 2017:08.05). L. and her friends, an unknown young man aged 20 to 23 years old, attacked on Monday, May 8, about 3.45 in the "Trg" pizzeria on the Republic Square in Belgrade while they were buying a pizza. Two men came, one of them spoke: "I can not believe the trans scum stands next to me and buys a pizza." At the moment when Lela paid the pizza, an unknown man approached her from the back and began hitting her with fists in the head and cheek area, and then with her legs. Lela fell under the blows to the corner of the pizzeria next to the cabin and hit one of them chin, broke his tooth and struck the other in the body.

This physical attack violates the following rights: the right to life, the right to liberty and security of personality, freedom of movement and choice of place of residence.

Attack on Trans young men in Vlasotince: October 13, 2016 (Da se zna – *Make it known,* 2017:13.10). Vanja, in the night between Tuesday and Wednesday, sometime after midnight, went out to a bakery located in the immediate vicinity of his house which worked all night. As soon as he came out of the house on the street, he was surrounded by three men who began to disturb him. The attackers started hitting him. One hit him in the right eye area. "I just covered my head. Then they shot me down and started kicking and insulting me that I was a trans-person, V. said. One of the attackers hit Vanja in the nose and bled him. They shouted to him: "Dirty woman, what you have is a cunt, but you want to get sew to you a dick! You have already been told to stay calm! "V. loudly appealed for help during the attack, but the people who were in the bakery just watched motionless what was happening. At one point, two police officers appeared in gray car, but they instead of taking all the actions necessary to catch the perpetrators, started to laugh at V. The policemen did not take information, but suddenly went going to catch the attackers. After that, the police never contacted the victim. These physical attacks, psychological abuse, threats and discrimination violated the following rights: the right to freedom and security of the person, freedom of movement and choice of place of residence.

Physical attack on an activist in Belgrade: August 22, 2016 ((Da se zna – *Make it known,* 2017, 22:08). One of the organizers of Belgrade Pride, B.S., spoke on the phone when one from the group of attackers started to shout: "Here's the gay guy!", then he hit a strong blow in the upper arm area and continued to shout insults on his face, based on sexual orientation. This physical attack violated the rights: the right to life, the right to freedom and security of the person, and caused physical injuries and psychological abuse.

The latest case of a court's avoidance to implement hate crime provisions (13. October, 2017). D.P. from Valjevo was physically attacked, when the attacker openly said that he was "irritated" by the fact that the victim "dressed as a woman". The court did not apply Article 54a of the Criminal Code stipulating aggravating circumstances as a ground to more severe punishment for a crime motivated by hatred. The attacker was sentenced only for a one-year probation (suspended sentence). This was the reason for activists' initiative addressed to Republic Prosecutor's Office to file a request for protection of legality, while awaiting the decision of the Supreme Court of Cassation against this case verdict issued by the Basic Court in Valjevo.

6. LGBT people personal security

Violence against LGBT persons falls into the category of so-called hate crimes because such acts are the result of mechanisms of homophobia. Such acts are regularly followed by the elevated rate of underreporting, invisibility and even denial of the existence or at least, tries to reduce its the frequency, severity and consequences (Vlada, 2013: 42-52).

Almost all LGBT respondents indicate that they are victims of long-term emotional violence as the most common form of violence against the LGBT persons. Psychological violence consists in stigmatizing, avoiding, jeers, stereotyping, condemnation, provocation, rejection, devaluation, ignorance, deny, threats, intimidation, blackmailing, feigned courtship and provocation in the school, workplace, sports club, humiliation, open accusations that they all promiscuity, sick and sexual deviants.

Physical violence against LGBT persons includes pushing, slapping, hitting, kicking, beating, group attacks, obstructing work of clubs and cafes in which gather members of the LGBT community, attacking on the offices of the group for LGBT rights, attacking on LGBT cultural events such as, art exhibitions, panel discussions, film screenings, etc.

Existential violence is very prevalent form of violence especially against young LGBT persons. It includes fully/partially denial of the usual parental support and rejection by family, denial of funds, expulsion away from homes, death threats, job loss, confiscation of valuable property especially housing, disinheritance, forced medical treatment in and out of metal disorder institutions, and the like (Mirković, Mikašinović, 2013: 31-08).

Sexual violence against LGBT persons includes rape and attempted rape by an individual or group of rapists, incitement to prostitution, trafficking, exploitation of sexuality in pornography, sexual harassment involving physical contact, sexual harassment that does not involve physical contact, indecent assault, exhibitionism, voyeurism (Mršević, 2015: 297).

Peer violence or bullying of LGBT persons because of their actual or perceived LGBT orientation is a particular problem: 65% feel unsafe in school, 58% suffer forced dispossession of personal belongings in schools, they are five times more absences from school, 28% drop out of school (Puača, 2009:250).

Due to all said, as well as because of the lack of support, psycho-social assistance, adequate reaction of institutions, LGBT persons, particularly the younger ones in the adolescent age, are three times more prone to suicide than their heterosexual peers. Actually, they belong to the group that is the most exposed to the risk of suicide, such as persons suffering from depression or incurable diseases (Mršević, 2015: 287). Only 10% of respondents reported the experienced acts of violence to the police. As the reason for their reluctance to report, they regularly mention their lack of trust in institutions, fear of continued torture and fear of disclosing their sexual orientation to family, school and workplace colleagues.

Attacks on LGBT rights activists are specific forms of violence against LGBT persons. Under this term are included publicly committed attacks on individuals known as defendants of human rights, acts of violence and life threats against activists in places of their private residence, attacks on official premises the LGBT groups, attacks on LGBT cultural manifestations of creativity, such was the attack on "Queer Beograd" festival, in September 2008, etc (Mršević, 2015: 295).

Young LGBT suffer multiple (intersectional) discrimination: because of their sexual orientation/gender identity (when usually share the fate of the entire LGBT groups (Živanović, 2013:4), further combined with increased denial of the right to self-determination), if they are lesbians as women (when exposed to typical forms of discrimination against women, misogyny and male violence, further combined by their parents' rejection and family violence (Devor, 1997), but also because of their youthood (when they suffer all forms of marginalization typical for young persons, further combined with the interruption of studies, the aggravated conditions in the labour market and finding a job).

All of this makes Fukuyama's question whether we are poor because of the economic situation or because of our "dysfunctional social habits" all the more applicable. These are the deeply rooted habits that would be at work even if the economic situation were better and that lead us in the direction opposite of progress (Fukuyama, 1997: 20). These dysfunctional social habits include intolerance, accepting discriminative behaviour as norm, rejection of young LGBT by their parental families and their exposure to the manifold risk of violence, homelessness and extreme poverty.

7. Conclusion: no institution can not do it all alone

Lives of the LGBT people are under strong influence of misogyny, homophobia and transphobia of the social environment (Califia, 1997). Safety is the main priority for lesbians and the LGBT population of all generations in general and their situations cannot be further improved without it (Strategija, 2013). The fundamental right of all citizens is the protection of their personal safety and the basic duty of each country is to ensure it (Pleck, 1987). When mistreated as the members of national and religious minorities by the general public, they are still accepted within their families and communities and are in a specific way protected by their language, culture, religion, unconditional parental love and support. This micro-social acceptance is is more emphasized as the external rejection grows. Only LGBT is the minority that are additionally rejected by the members of their own parental families, by those closest to them, those whose support should be given unconditionally at all times. Many authors (e.g. Stacey 1996), report that even the best families do not always serve the interests of their LGBT members, considering the prevalence of family violence, against them. Violence, hate speech, and intolerance are all parts of a clear public homophobia that the state has so far not reacted to in a prompt, efficient and adequate manner.

Preventing the development of a normal, innate sexuality is dangerous for children and adolescents. Rejection, mistreatment, violence and discrimination from their families, peers, and schools make the process of their maturation much more difficult and cause psychological crises, desperation, and suicidal moods. As the identity is formed by inherited (nature) and upbringing (nurture), the clash between nature and nurture brings forth an interiorized homophobia that leads to self-hatred and self-loathing (Gelles, 1995). Because of this attitude of the families, the warnings about the risk of homeless LGBT, especially younger ones, are becoming more common and this is even more dramatic in a time of high unemployment and the general crisis. Reproduction of homophobia is, among other things, realized through authoritative promotion of non-scientific attitudes and prejudice in the media space in the attempt to protect the “traditional Serbian values”, both religious and moral, so parents are often called out to be the actors of protection of these “right” values.

Every new generation leaves school ready for violence towards different minorities, LGBT persons in particular. A possibility to pave the way for a better society for generations to come is not being used here. No measures have been taken to increase the level of information and awareness among the people, the youth, the media, the public

figures, the political decision-makers, and the educational system in general that lesbianism is not a disease but a variety of normal human sexuality; that there is no danger of spreading homosexuality by publicly talking about the topic and without any prejudice, by holding pride parades or other public events, or by giving legal acknowledgement to same-sex communities.

One of the recommendations of the Commissioner for the Protection of Equality directed to the Ministry of Education and Science, the National Council for Education, and the Institute for Improvement of Education is to undertake urgent measures to ensure the introduction of affirmative and correct depictions of same-sex sexually-emotive orientations, transgenderism, transsexualism, and intersexualism in all school books (for both social and natural sciences), including the examples of LGBT individuals as a part of the historic and contemporary democratic societies. The attitude that no child or young person should be afraid for his or her own personal safety in their family or school has been adopted a while ago, but that does not seem to apply to lesbian and transgender girls, which is why postponing, especially if it is endless, is not a solution for the problem at hand. Non-discriminative education is one of the assets for the development and the current situation represents an obstacle as it is dominated by unscientific, discriminating attitudes towards almost every “other”, the lesbians in particular. This is why it is important to examine the possibilities of non-discriminatory education as the necessary tool in the battle against intolerance, discrimination and readiness for violence against everyone that is perceived as the “other” or the “different”. These attitudes of the youth are acquired from and supported by the educational system so the changes should be made primarily in the field of education (Mršević, 2013).

Therefore there must be cooperation between institutions, independent bodies, non-governmental sector, education an media, as well as the necessary institutional synergy against extremism. It must be monitored and adequately documented cases of violence and discrimination. It is necessary to educate staff who works in institutions. Institutional procedures are underused due to the high level of distrust of LGBT persons in their work, their effectiveness, readiness to act, one to understand the specifics of LGBT existence and discretion (Mršević, 2013: 71) and changes in family perception of LGBT youth. Family together must find a way to deal with discrimination and prejudice.

It is necessary to permanently analyse all possible moments of discrimination of the present system of education, since the school system still openly expressed intolerance, and proposals for changes still sound even as utopian. It is recommended as necessary (Commissioner, 2013), that the teaching materials, teachers and their teaching practices and ways of working with male / female pupils foster awareness about diversity, promote non-violent culture, equality and non-discriminatory practices, as truly and necessary postulates of a democratic society based on respect for human rights; raising awareness of diversity, intercultural relations and common values through the presentation of famous persons of different ethnic and religious groups and cultures, etc; teaching contents and teaching materials should present different family models in contemporary society (single parents, foster families, families without children, same-sex partners families, etc.); elimination of stereotyping of gender roles / profession and encouraging varieties; insist on the multiplicity and complexity of human identity, value individuality, creativity and solidarity, regardless of gender (Mršević, 2014b: 141).

At last, but not the least, there should be mentioned that the new concepts of sex and gender identity clearly indicate damages as resulting of the rigid division of gender roles if strictly and forcibly applied. The rigid binary division of gender roles prevents LGBT girls and boys, women and men, to develop their full potential and individuality if and when expose them to rigid and violent forms of “normalization” (Mršević, 2017: 21). There even is a movement to enabling children to have acceptable interim period of gender neutrality, in development their own gender identity (which is increasingly gained popularity during the eighties and nineties) (Coltrane, 1997:109). Maybe it is perhaps one of the possible ways to mitigate rejection of LGBT people in Serbia.

Required are awareness raising training of police, as the recently implemented ones, aiming to the improved relation of police officers towards LGBT community and how to exercise full cooperation with the community in order to ensure safety. These trainings are aimed to primarily reduce violence and homophobia, but also to provide the conditions in which police services is to become a place of trust in which LGBT persons feel protected from violence, abuse and discrimination (Labris, 2014).

Among top priorities ECRI recommends the Serbian Parliament and Government to adopt codes of conduct which prohibit the use of hate speech. Violence, hate speech and intolerance as forms of publicly expressed homophobia have obviously not yet being met by a timely, efficient and adequate institutional response. It should be noted that when talking about discrimination, it is often the discrimination of that intensity that

literally leads to life jeopardy. The state must denounce the negative effects of discrimination, violence and intolerance towards the “others” and the “different” ones instead of ignoring or even supporting them. It should not miss a chance to open the door to new generations of significantly better society. Any discriminatory policy is dangerous. The only reasonable goal, the only honourable goal is to fight for each and every citizen is to be treated as citizens with full rights, no matter what its origin (Maluf, 2003:116). Everything related to basic human rights, can not be denied to any citizen under the pretext of maintaining our beliefs, traditions, customs. We also know that the driving force behind some of the possible ways and directions of changes may not be exclusively motivated by material well-being. Thus, we are all, and each of us, and not just the state authorities and or politicians, obliged to take responsibility for our future (Kamps, 2007:6).

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Zorica Mršević

BEZBEDNOST KAO PREDUSLOV ZA SLOBODU - (NE)EFIKASNOST ZAŠTITE KRIVIČNOG ZAKONA

Apstrakt: *Rad predstavlja analizu nedavnih slučajeva javno i privatno počinjenog homofobičnog i transfobičnog nasilja protiv LGBT osoba u Srbiji, koje je dovelo do ograničenja lične bezbednosti, a time i do smanjene slobode i osnovnih prava članova ove populacije. Fizičko nasilje protiv osoba koje nemaju tradicionalnu seksualnu orijentaciju niti binarni rodni identitet, kao i govor mržnje u javnim razgovorima, a s druge strane nekažnjavanje onih koji su počinili takva dela, predstavljaju glavne razloge zbog kojih veliki broj osoba koje pripadaju LGBT populaciji živi u strahu za ličnu bezbednost, značajno im je smanjeno kretanje, komunikacija, obrazovanje i profesionalne ambicije, tokom čega vode „duple“ živote bojeći se dalje viktimizacije, a zbog kojih ne prijavljuju slučajeve zločina iz mržnje. Iako je članom 54a Krivičnog zakonika propisano da govor mržnje i zločin iz mržnje predstavljaju otežavajuće okolnosti, do danas niko nije osuđen na osnovu ove odredbe.*

Ključne reči: *lična bezbednost, smanjena sloboda, zločin čiji je motiv mržnja, govor mržnje, nekažnjavanje počinilaca, niko nije osuđen*

Zoran Pavlović*

THE RIGHT TO PRIVACY – CHALLENGES OF NEW COMMITMENTS

Abstract: *There is no right to privacy without freedom and security. A democratic state must ensure that citizens are protected in the exercise of their right to privacy and demands that they have a free and safe life. Protected not only by the work of public authorities but also by other individuals. The fight against terrorism, crime or the public's request to know cannot be contrary to the right to privacy, freedom, peace and peaceful life. Personal data cannot be used contrary to the reason for which they have been collected. Today, the right to privacy, as a sui generis right with its specific features of spatial, communications and information privacy, requires possible constitutionalization through a special law, including habeas data. Under the influence of the European Court of Human Rights, the Council of Europe and the EU, the Republic of Serbia is working towards harmonization of its legislation with the EU law. Harmonization of domestic legislation with international standards and EU acquis in relation to the right to privacy imposes new obligations on those who apply them. Advancement and protection of human rights does not resolve the challenges that are before us all.*

Keywords: *freedom, security: the right to privacy - spatial, communication and information, sui generis law.*

Introduction

The achieved level of human rights exercise and protection of in a community can be perceived from various perspectives , including through the guarantees contained in documents of national, supra- or international and regional character, through decisions of the UN Human Rights Committee, the European Court of Human Rights, the Inter-US Court of Human Rights and other institutions. This applies to the protection of all generally accepted values. These are the rights that were defined and specified in the contemporary sense during and after the adoption of the UN Charter and the Universal

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Declaration of Human Rights of 1948. Compliance with the obligations of the *erga omnes* principle derives from treaties and other sources of international law and is fully aligned with the customary principle of *pacta sunt servanda*. Violation of these rules can be sanctioned not only by the UN Security Council, but by other international organizations and states individually as well. The aim that it wants to achieve is simple: to establish and preserve justice, as elusive a notion as it may be.

State responsibility for observation of fundamental rights and freedoms exists wherever their violation happens. The practice of the European Court of Human Rights, to refer to someof its cases *exempli gratia* , as in the Al Jedda v. UK [162], indicates that the European Convention on Human Rights and Fundamental Freedoms (ECHR) can also apply to acts and procedures outside the legal space (*espace juridique*) of the member states of the Council of Europe (Pavlović and Pasca, 2017: 270). With all due consideration of the public's right to information, it does not mean or imply that this right can be extended to parts of public figures' private life in special circumstances. This implies establishing a balance between the right to privacy and the right to information, as decided by the ECHR in *Von Hanover v. Germany*.[163] In this way, an effective way of human rights protection is provided in Europe, observing the standards that are now more than ever becoming an integral aprt of the foundations of every state aiming towards rule of law, found in the catalogue of human rights values contained in Article 5 of the ECHR - The Right to Freedom and Security of Personality (and Article 9 of the International Pact on Civil and Political Rights of the MPGPP), Article 6 of the ECHR - The Principle of Fair Procedure (see Article 14 of the MAFF, which is a *ius cogens* today) and Article 8 of the ECHR - The Right to Private and Family Life (Article 17 of the MAFWE). The non-observance of these rights, with the right to an effective remedy and the prohibition of discrimination (Articles 13 and 14 of the ECHR), are considered credibility indicators of courts and other competent institutions with a human rights protection mandate as their basic role.

The Republic of Serbia (RS) signed the Stabilization and Association Agreement (SAA) between the European Communities and their members in 2008. The agreement entered into force on September 1, 2013, after it had been ratified by RS and EU member states, followed by the European Council adopting a decision to accept the SAA. Once the SAA entered into force, the Republic of Serbia became bound to work on harmonizing

[162] All Jedda v. UK, ECHR, Grand Chamber, EctHR, 27021/08, http://hudoc.echr.coe.int/sites/eng

[163] Von Hannover v. Germany, Application no. 59320/00, http://www.5rb.com/case/von-hannover-v-germany-2

its existing ones and adopting future ones concerning justice, freedom and security, observation of privacy. Obligations concerning observation of these rights started thus before the opening of certain EU accession and integration process negotiation chapters. Observation of the listed institutes, citizens' right to use them and their limitation solely by means of court decisions implies existience of safeguards against abuse. To determine the limits of allowed vs. prohibited measures, legal from unlawful interference (Pavlovic and Boskovic, 2017: 309) is very complex. Who determines them and how, who controls them and how, over which period and what happens to them if not used in court proceedings are special questions.

Therefore, achieving a balance between security and freedom on one hand, and privacy on the other, is one of the main goals of a democratic state. Individual freedom is not possible without privacy. Which of the two has more priority: security or privacy? Challenges, risks and threats to individuals' security and the state as a whole, resulting from accelerated technological and technical development, inter-state alliances and coalitions and migrations, cause permanent efforts of security services, the police and public authorities in general to violate the right to freedom increasingly.

This requires as much control and protection of the right to privacy and human rights in general as possible, in accordance with the aforementioned Agreement and obligations and solutions stated in relevant Conventions. In the constant search for balance between human rights, security and freedom, not only the practice of the European Court of Human Rights and other international bodies dealing with human rights protection has a great role, but also the practice of domestic courts in charge of authorizing and controlling application of special measures of secret data collection, as well as use and protection of personal data. There is, however, still little discussion concerning the role of other independent institutions.

A democratic society must be the one protecting itself within the given legal framework, yet never above and beyond the law. It is therefore of the utmost importance that legislators, the law-creators, bound also to work within the bounds of their legal authority, are familiar with national regulations and legal practice, as well as international standards in this field. The role of the human rights watchdog - the ombudsman institution to encourage, caution and advise public authorities that freedom, security and the right to privacy should not be underestimated or threatened is thus not negligible. The human rights to privacy, freedom and a safety are imperative rights constituting the very human nature and existence.

Several Examples and Current Issues

The extent to which freedom of reporting can jeopardize the security and privacy of an individual are highly disputable. A recent publication of personal data, namely the names of close relatives of one of the ministers in the Serbian Government obtained from the property reports database in 2016, could not be strictly linked to the public's right to know and investigative journalism. Namely, anti-corruption regulations require public officials to register their property within thirty days from the date of assuming office by means of a proscribed procedure. Such transparency should not lead to threats to anyone's safety. Assets of appointed public officials are something that should be publicly known, in accordance with the Law on the Anti-Corruption Agency. Publishing data on property or personality data of persons that are not public officials, but are related to them or other public figures, is a completely different matter, and it is necessary to create conditions for protection of those third parties and their privacy. [164]

Publication of the address of the ministers' family members cannot, therefore, be justified and it constitutes a disproportionate and unlawful personal data processing . In such cases the question is whether freedom of press has greater value of the over the right to privacy in cases when an information is not related to issues of public interest. Perhaps standards for determining public interest should be established in the light of the legitimate expectations of public figures concerning their privacy. The assumption is that the limits of freedom of press are more extensive when they concern politicians. The borderline between the right to privacy and the right to free information is unclear, yet there must certainly be an established minimum to it. Today, protecting the right to privacy and personal data protection, is much more than an issue of technical information processing. It is one of the basic political issues in any society.

Privacy implies that it must be equally accounted for not only in relation to public figures but also as a right of all citizens in a given community. Bearing children's best interest in mind, their privacy in cour prodeedings is maximally protected. The general public, in this case, is completely excluded. However, it is a fact that before such trials, aka going to the court, so many details have already reached the public that it is difficult to believe that their psychological or any other integrity has not been jeopardized. But is

[164] www.politika.rs/sr/clanak/370543/, Daily newspaper - Politika, accessed on 21.12.2016. at 19,56.

there any privacy in the digital age if not enough attention is paid to it? (Pavlović, Z. 2017:124). Digital violence and abuse on the Internet do not lead to the promotion of the right to privacy. Most applications for media content browsing pre-condition us to allow them access to our private data contained in our phones. How secure is then the privacy of our healthcare records data from hackers?

In a 2017 case, still handled by the Provincial Protector of Citizens - Ombudsman Institution (PPCO) on its own initiative and concerning actions of a primary school from a child's best interest perspective, there has been a individual abuse by the attorney of one of the parties. Namely, at a lawyer's request, the school provided notes from which it was evident what and how the children responded, along with all their data. These data have been publilcly disclosed, which certainly cannot contribute to protecting childen's rights and their privacy.

Questions that are so open could require individual processing. They range from what is the scope of protection of the right to privacy, including freedom and security of public figures, especially in relation to their family members. In order to establish a fair balance between conflicting private interests for protection and the public interest, it is necessary to know if by referrring to crime prevention certain private information can be published as a legitimate public interest of a given society, violating at the same time the presumption of innocence and other principles of judicial proceedings.

A special issue isto be addressed here, bearing in mind the whole range of different authorities and official bodies that collect and dispose of data that fall into the sphere of privacy. Do we know which public authorities, as well as legal and physical entities, aka authorities and individuals alike, collect, record and (could) control citizens' data? What should the nature of responsibility the ones jeopardizing our right to privacy be? Should protection from it fall within the domain of civil or penal law, or just be handled by administrative, executive authorities?

Thre are traffic camera videos that appear as exclusive footage in tabloids , as well as those taken by usingcameras in the entrances of residential buildings and/or family houses. Questionnaires that we have to fill in with different authorities, as well as private companies, in order to exercise a right or to get a loan are another, yet similar matter. In any case, many personal data about people are available to anyone, with no guarantee whatsoever that such - even our own - data will not be used for any other purpose than intially asked, aka given for.

Bearing all this in mind, the initial assumption is the following: regardless of individual guarantees from the Constitution of the Republic of Serbia, is there a necessity to establish a special, *sui generis* right to privacy? The lines that follow aim at offering a more specific picture of the matter.

The Right to Privacy

People have always had a need to keep their privacy, along with their freedom and security, for themselves, to own it. It often depends on culture, sociological parameters or traditions of a society. Citizens, regardless of the level of freedom they enjoy in a society, need their privacy. The right to privacy as an elementary human right - in French: *droit au respect de la vie*, in German *Recht auf Privatsphäre* or *Recht auf Privatheit* - is part of a human need that people react to and out of whenever the authorities want to exercise systemic and constant control over them. On the other hand, states often resorts to state secrets to conceal their activities in order to avoid responsibility for human rights violations in general. Creation of a normative framework by which a state allows its citizens to access information on public authorities' opetarion and guarantees citizens' privacy of by defining the use of personal data is a *conditio sine qua non* of a democratic society. Until there is no such framework or until it is disregarded, a society can not have a democratic prefix .

The right to a private life implies expectation that confidential or personal matters from people's private lives will not be accessible to third parties, but is it really the case?

The nine-eleven terrorist attacks just after the millenium transition caused both the World and personal privacy never to be the same again. Global increase in security measures is becoming a worldwide threat to personal data protection . The fathers of *The Right to Privacy* syntagm (Warren and Brandeis, 1890, IV: 193) as *the right to be left alone* - has been replaced by the idea that citizens have nothing to hide from the state. However, the information flowing through the Internet today go beyond the usual conventions of social relations, causing citizens themselves to violate their own privacy voluntarily.

It is very difficult to follow up and ensure the right to privacy by means of a single law: the state of public opinion indicates that there is a prejudice that such a type of privacy, the one implying that services and people who collect information about us cand be

controlled, simply does not exist. It is not just about services that are still unjustifiably referred to as Agencies. Any better equipped company providing physical security services can access data from our private sphere.

Protecting the right to privacy does not imply only permissible limitations, but also the question of the extent to which we can inavde someone else's privacy . Looking at the issues through the standards of criminal law, the conclusion is that not every invasion of privacy has to be *contra legem*, even if it is without a court permission. Namely, this is a matter where legality and justice could go their separate ways as far as provisions of special privacy laws and personal data are considered. The way of implementing privacy protection in our law relies on three pillars. These are *lex*, *ius* i *iure*. Legality, legitimacy and (being grounded on) justice/fairness serve the purpose of protecting these human rights (Pavlović, 2010:210). The latter term - justice, indicates directly that this is not common unlawfulness, a data breach, but violation of a person. Preserving someone's privacy is a *condition sine qua non* of any democratic legal system, but its results are anything but visible. Unlawful entering someone's privacy does not imply unlawfulness in a criminal sense (Article 14 of the Criminal Code). Information and communication technology has led from human rights previously referred to *habeas corpus* to the *habeas data* ones. This gives a whole new dimension to privacy as compared to the way it had traditionally been perceived before. The ability to maintain control over personal data distribution and access to them potentially leads to formation of a new, constitutionalized human right - the right to privacy in the light of *habeas data*. This means that it is not a violation of information in the traditional sense of the word, but violation of personal and intangible, non-material values contained in such information. In such cases, it is the subject of law (i.e. the citizen) and his freedoms, rights, interests and parts of the most private life that are being violated.

Privacy implies several different levels in a person's life. An intimate sphere, in which no one but ourselves has the right to enter. The private level of privacy includes what we as individuals share with our family and members of our household, doctors, lawyers and people alike. Without our consent, this information cannot be shared with third parties, except under special conditions (e.g. a medical secret, lawyer's secret, etc.). The private-verging-on-public sphere is something that is already sufficiently jeopardized because such data cannot be used beyond the extent in whic one is especially highlighted as compared to others. A special part of privacy applies to the public sphere of someone's life. The politicians' or the public sphere of persons appearing in a society's public life , generally, constitutes a part of their lives related

to their public role and in it they do not have any right to privacy. However, in relation to all other areas of their life not related to their public role they have the right to privacy that corresponds to the right to a dignified and peaceful life.

A particular form of violation of the right to privacy happens in the field of labor and employment. Besides procedures and actions related to work processes, occupational safety and the like, it is most certain that records concerning absence from work due to illness or sick leave, as well as types of illnesses is not grounded in the law.

A modern state is obliged to ensure protection of its citizens and their dignity by preventing misuse of their data collected by different state administration bodies, as well as individuals and other legal entities.

Constitutional Legal Framework for Privacy Protection in Serbia

Human privacy, as a fundamental human right *per se*, is not as specifically stipulated in the Constitution of the Republic of Serbia (2006). However, bearing in mind the provisions of Article 16, paragraph 2 and Article 18, paragraph 2 of the Constitution, it is undisputed that, according to it, human and minority rights are applied directly, guaranteed by the generally accepted rules of international law, confirmed international treaties and laws. Thus, the Constitution protects also the right to private and family life as defined under Article 8 of the ECHR. The Constitution itself guarantees the rights based on the right to privacy: spatial privacy, communication and information privacy.

Spatial Privacy (Article 40 of the Constitution - Inviolability of one's apartment) denotes our home or apartment as an inviolable space in which we live separately from others. No one should know what the physical space of an individual is. This applies not only to the place we live in. It concerns even the contents of the desk where we create. If without our knowledge and/or consent, those areas, , can be entered only upon the written decision of the court, or, exceptionally, without this decision, if it is necessary for the immediate deprivation of liberty of a perpetrator of a crime, elimination of immediate and serious danger to people or property, in the manner proscribed by law.

Communication privacy (Article 41 of the Constitution - Confidentiality of letters and other means of communication) implies a form of privacy that concerns personal notes and correspondence, as well as any other form of communication. This type privacy means absolute secrecy that is inviolable except by a court decision if it is necessary for

an undisturbed implementation of a criminal procedure or protecting security of the Republic of Serbia. Development of techniques and technology of electronic data interchange, from video conferencing onwards, put citizens' communications privacy of at the epicenter of public interest. The specifics of e-privacy and protection of data already in the base stations themselves represent information about us. Personal data obtained by profiling or by the so-called digging process can reveal much information about us. Profiling can be perceived in the context of our private environment and in our private time, as well as occupational environment we have at our workplace. Concerning privacy of communication users in their spare time, there is an apparent violation of the constitutional right to privacy of communications under Article 41 of the Serbian Constitution. A currently still pending question concerns people's workplace: how much is it contrary to the Constitution that the employer controls our freedom and privacy of correspondence? Is there a general method or technique of controlling employees that does not unlawfully undermine the communication privacy of an employee, regardless of the contractual consent given to the employer to do it.

The third, but not the least important form of privacy regulated by the Constitution (Article 42 of the Constitution - Personal Data Protection) is *IT* privacy. Personal data collection, keeping, processing and use refers to the guaranteed protection of personal data. Computer privacy implies prohibition and punishment of using someone's personal data outside the purpose for which they were collected, except for the purpose of conducting criminal proceedings or protecting ecurity of the Republic of Serbia. A citizen has the right to be informed of the data collected about his person, as well as the right to court protection in case of their abuse.

All of these three rights today, regulated by a series of legal texts of various power - and beyond any doubt falling under unregulated constitutional matter concerning the hierarchy of legal acts in general - through the postmodernist perception of the privacy issue and the new media non-culture, lead to an ever graver diminishing of the right to privacy as a fundamental individual right, leading also to an identity crisi. At the same time, it leads to a crisis of journalism, in which a person's right to privacy is abolished due to people being watched, recorded and publicly displayed (aka the Big Brother is watching us all). Market-oriented journalism and sensationalism, as well as abuse by the authorities, certainly diminishes or minimizes the right to privacy by making citizens' personal data publicly accessible, regardless of how they have been obtained.

The right to privacy is a unique right, regardless of the privacy concept of we choose to adhere to. With the expansion of information and communication technologies (ICT) it starts being shaped as a new right. This new right stems from privacy, but it is certain that it is independent from it. The Stabilization and Association Agreement, which entered into force, as well as constitutional standards refer us directly to another two sources here, that precisely identify the existence of this new right: the Charter of Fundamental Rights of the European Union and Treaty on the Functioning of the EU.
Article 8 of the EU Charter of Fundamental Rights specifies that:

1. Everyone has the right to protection of their personal data;
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified;
3. Compliance with these rules shall be subject to control by an independent authority.

Article 16 of the Treaty on the Functioning of the EU (Kostoris 2017: 6-76) states something similar and, apart from protection, a special emphasis is placed on the control by an independent body.

Challenges and Standards of New European Solutions in the Field of Privacy and Criminal Law

Information and communication privacy is being disrupted by violating the balance between freedom and security, today particularly accentuated by the need for protection due to terrorist attacks. This is why there is an increased need for the exchange of personal data between the authorities dealing with such cases. Personal data can also be processed as part of a criminal investigation and a criminal trial. The dialogue that has been established has totally different positions: one side considers the threat of terrorism to be such as to completely abolish the right to privacy, whereas the other holds that the right to privacy has no alternative.

Neither of these two positions is fully acceptable. Protection of freedom and security cannot be turned into absolute personal data control, and vice versa. Privacy of an individual cannot be placed above security. The right to privacy has many more aspects than it seems at first glance. The discussion here is about inalienable human rights: the right to safety, the right to liberty, the right to privacy. Giving priority to one of them

over the other is a very sensitive matter. Human dignity and privacy must not be contrary to security and *vice versa*. Emphasizing the need to arrive at balanced solutions represents an aspiration for them to coexist in unison. The solution could be in one of technical, software solutions which might contribute to this proportionality.

In a nutshell, from the initial dilemma whether to equally protect an individual's right to privacy and those to freedom and security, there has been a shift towards a demand to protect the same right of *nomen nescio* when it comes to personal data processing, transfer and storage.

Fulfillment of these objectives should be contributed to by the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.[165]

The directive came into force on May 5, 2016 and the Member States should introduce it into national legislation by May 6, 2018.

a) Objective and the structure of the Directive

The aim of the directive is to contribute to advancement in the areas of freedom, security, and justice. It includes respecting fundamental rights and freedoms and the right to protection of personal data, regardless the citizen's country of residence.

At the same time, it is necessary to provide for a free flow of personal data between responsible bodies for purposes prevention, investigation, detection or prosecution of criminal offenses or execution of criminal penalties, and on the free movement of such data. This includes protection against and prevention of threats to public security within the Union, as well as the transfer of such personal data not only to third countries, but also to international organizations. The idea of the Directive is to provide protection of persons in relation to personal data processing by the authorities in the field of judicial and police cooperation.

[165] ELI: http://data.europa.eu/eli/dir/2016/680/oj

The directive has two profiles: one which applies to those who are obliged to Directive (subjective) and the other concerning the manner of personal data processing referred to by the Directive (objective profile).

Subjective profile: The Directive applies to all persons who process data for prevention, investigation, detection or prosecution of criminal offenses or execution of criminal sanctions. At the same time, the activities of the Directive exclude activities related to national security and personal data processing in connection with it. The second exception concerns personal data processing by institutions, bodies, offices and EU Agencies.

Objective profile: The Directive applies to all types of personal data processing.

b) Positive aspects of the Directive

The EU Directive 2016/680 has many positive sides.Firstly, increased awareness of personal data protection as a form of individuals' protection. It determines sensibility regarding personal data protection . This is an autonomous right concerning personality protection.

Secondly, it is about the person to whom the collected data refer to. This person has the right to access such information, can request their correction and even delete or restrict some of the data.

The Directive has also certain restrictions in relation to these two rights, where, under precisely determined conditions, the persons to whom the data relate to may be suspended, restricted or excluded from receiving information about themselves. It must be precisely determined when and who can define such measures, under circumstances requiring protection of public or national security, rights and freedoms of others, to avoid biased conduct or prosecution of criminal offenses and the like.

When presenting the data to the person they relate to (with the aforementioned restrictions), the personal information controller must take reasonable steps to make this data available, simple and free of charge, using the available tools.

c) Other principles of the Directive

In the field of individuals' protection with regard to personal data processing , the Directive recognizes the principles of lawful processing, proportionality, necessity, legitimacy, and security of processing. Privacy must be respected at all times. Given that ICT enables instant data transfer, it must always be adequately protected.

The Directive provides equal protection for processing of personal data for preventive and repressive purposes, which can only lead to the increase of personal data protection guarantees for preventive purposes in the Member States.

d) Possible problems in the implementation of the Directive

Since decision-making in the individual Member States is based exclusively on automatic data processing, including profiling, this can lead to violation of Article 6 of the European Convention on Human Rights (ECHR), or a trial could not be considered fair if there would be no cross-examination of automatic processing and profiling. In other words, the right to release from decisions based solely on automatic data processing should be constituted.

The Directive itself provides for a distinction between the persons and the status of the persons to whom the data relate, depending on their procedural position: the suspect, the accused, the victims or potential victims, witnesses, the injured parties, but also the defense counsel and the proxy. Does this distinction of the data controllers affects the presumption of innocence when it comes to the suspect or the accused? The authors of the Directive did not offer an appropriate answer here.

A particular problem may also be the technical and technological solutions that enforce rights in relation to personal data. Are human technology solutions in the service of protecting human rights or not?

Privacy protection by means of software packages will certainly require adequate data security, but can a right be entirely subdued to technological solutions?. The right to personal data protection implies also certain costs related to the data controller or the technology that supports them in their work. This can make the process of the Directive implementation in the personality data processing more relevant.

e) Concluding remarks about the Directive

Personal data protection of should contribute to the realization of freedom, security and justice by applying the EU Directive 2016/680. Creating awareness of personal data protection as a form of individuals' protection , harmonic principles that support the Directive, establishing a balance between security principles and the right to privacy and more guarantees as a result of equal protection when it comes to the prevention, investigation, detection, and prosecution of criminal offenses or the execution criminal sanctions are some of the basic elements of this Directive.

Automated individual decision-making, the problem related to respect for the presumption of innocence, the dispute over whether thetechnology preceeds law or vide versa, as well as cost-effectivenes issues are possible obstacles to full implementation of the Directive. Some authors(Signorato, 2017: 422), therefore, advocate for establishing a right by which decisions based solely on automated processing would not be obligatory.

Instead of a Conclusion

The right to privacy in the modern era has a different connotation than the one that existed not only a century or half-century ago, but also in relation to the way it was two or three decades ago. Invading citizens' spatial, informational or communication privacy is becoming a major problem. Protecting privacy from illegitimate and unauthorized actions of the state or individuals strives towards preventing human rights violation. Today, each of theese aspects of the right to privacy is especially vulnerable to ICT. The field of information curiosity has expanded far beyond purely military, economic, industrial and other ascpects. Activities of public authorities, the intelligence community and different legal entities have led to the greatest ever known level of invasion of individuals' privacy.

Unauthorized disclosure of information about ethnicity, some biometric data, using DNA and other features, requires such a data processing system enabling the best possible way to legally and conscientiouslycollect, process, store and use data. On the other hand, however, insisting on the consistent application of laws, t preventing unauthorized collection of personality data, a matter supported by all, without further legislative initiative to balance law and life could also undermine the right to healthcare,

for example, when certain data are collected to protect particularly sensitive social groups. Further collection of such data by the controller should not be allowed.

Every aspect of the privacy may be limited in its consumption through criminal proceedings, the exercise of police actions, healthcare and thelike. Such actions are governed by special laws, but it does not mean that the right to privacy must be turned into a public informational right of all facing an individual's right. Preserving confidentiality policy, regardless of which authority or legal entity we provide data to - as users of healthcare services or welfare institutions, taxpayers, scientific researchers and/or when falling ill, is s part of the right to privacy. Therefore, data cannot be further distributed without our explicit consent, through a well-informed source of close investigation, for example. Some details about our policy can be further protected as part of the state, commercial or other secrets.

Protecting personal data e by means of solutions offered in the EU Directive is surely contributing to a better protection of the right to privacy from a particular aspect, regardless of where the personal information is sought or collected from.

Working on awareness-raising about the necessity for personal privacy protection ,as well as the principles on which the right to privacy is based, we come to the basis that should offer a necessary standard to approach this right responsibly. A positive approach to protecting the right to privacy will necessarily lead to respect for citizens' fundamental rights and interests.

A basic human right, the right to privacy is increasingly threatened by the use of modern technological developments in the information society. This includes new methodology in accessing and processing personal data. The key solution would be to set up a unique strategy and legal regulation in protecting the right to privacy.

Only by determining the hierarchy of legal acts in a country's highest legal act, the Constitution, it is possible to initiate a better quality approach to protection of this basic human right. Its complete protection is not possible unless the turbulent legislative reform and adopting new ideas do not observe solutions from systemic or organic laws with which the provisions of other laws must be in compliance. Before that, though, it is necessary to constitutionalize the right to privacy as a *sui generis* right, including *habeas data*. This is a way towards privacy protection regarding personal life and intangible values contained in the information obtained in violation of that right, when

a citizen's freedoms, rights, interests, and parts of the most intimate life have been invaded.

The right approach to unlawfulness in relation to the right to privacy is the second step in resolving human rights challenges for the protection of the right to privacy and the modern age, while disposing of collected personal data from all three spheres of privacy would be the first step along the way.

Possible threats to the citizens' safety and their freedoms through unlawful and prohibited violation of the right to privacy and personal data disclosure should be stopped preventively and repressively. The fluidity of the concept of privacy certainly incorporates the notion of private life including not only physical and psychological integrity, but by all means an individual's right to personal development and the right to establish and develop relationships with other people and the world around him or her in citizens' spatial, IT or communications privacy.

Protecting human autonomy, freedom and security is part of the legal heritage of every democratic society. Regardless of the fact that there is no extensively defined definition of the right to privacy, it does not mean that this circumstance undermines the principle of legal certainty. Prohibition of violation of the right to privacy is one of the fundamental principles of every community. By respecting it, no questions would be raised as to whether and how the public sphere interfered with the private, regardless of who did it, increasing observation of the right to privacy of all citizens. In order to protect and promote human rights, a democratic state is obliged to control the guardians of these rights, taking into account not only their work and respective responsibilities, but also protection of the right to privacy.

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Zoran Pavlović*

PRAVO NA PRIVATNOST – IZAZOVI NOVIH OBAVEZA

Apstrakt: *Nema prava na privatnost bez slobode i bezbednosti. Demokratska država mora da obezbedi pravila da bi građani bili zaštićeni u konzumiranju svog prava na privatnost i zahteva da imaju slobodan i bezbedan život. Zaštićeni ne samo od rada organa javne vlasti, već i od drugih pojedinaca. Borba protiv terorizma, kriminala ili zahtevi javnosti da zna ne mogu biti suprotni pravu na privatnost, slobodi, miru i spokojnom životu. Podaci o ličnosti ne mogu se koristiti suprotno razlogu zbog koga su i prikupljani. Pravo na privatnost kao pravo sui generis sa svojim posebnostima prostorne, komunikacijske i informatičke privatnosti danas zahteva moguću konstitucionalizaciju kroz posebno pravo, uključujući i habeas data. Republika Srbija pod uticajem delovanja Evropskog suda za ljudska prava, Saveta Evrope i EU, radi na ujednačavanju svog zakonodavstva sa pravom EU. Usaglašavanje domaćeg zakonodavstva sa međunarodnim standardima i pravnom tekovinom EU u odnosu na pravo na privatnost nameće nove obaveze onima koji ih primenjuju. Unapređenja i zaštite ljudskih prava nema bez rešavanja izazova koji se nalaze pred svima nama.*

Ključne reči: *sloboda, bezbednost: pravo na privatnost – prostornu, komunikacijsku i informatičku, pravo sui generis.*

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NAČELO JAVNOSTI I ZAŠTITA PRIVATNOSTI U KRIVIČNOM POSTUPKU

U radu se objašnjavaju osnovni ustavni i krivičnoprocesni aspekti načela javnosti. Autor zaključuje da je u krivičnom postupku često veliki problem efikasna zaštita privatnosti. Ljudska intima je dragocena, ali se u krivičnom postupku ona ponekad i teško povređuje. O velikom značaju privatnosti govore i neki primeri iz umetnosti, pa tako, Dostojevski kaže da postoje tri vrste stvari: jedne su one koje čovek govori svojim prijateljima, druge su one koje drži samo za sebe, ne govori ih ni prijateljima, a postoje i one za koje se boji da ih otkrije i samom sebi. Krivični postupak nažalost, nekada podrazumeva i razotkrivanje čovekove intime, ali je i tada potrebno naći pravu meru.

U radu se ističe da je jedan od klasičnih razloga za isključenje javnosti zaštita interesa maloletnih lica, uz konstataciju da su nažalost, neke greške u krivičnom postupku nepopravljive. To je slučaj i sa povredom načela javnosti u određenoj situaciji. Naime, to načelo je povređeno i tada je to jedna od apsolutno bitnih povreda odredaba krivičnog postupka, onda kada sud vodi glavni pretres nejavno, a nije bilo razloga da se javnost isključi. Tada se presuda proistekla iz takvog postupka ukida rešenjem žalbenog suda i novi se glavni pretres vodi javno. To je greška koja se može popraviti. Obrnuto je nepopravljivo, Ako je sud vodio glavni pretres javno, a trebalo je javnost isključiti, to se više ne može ispraviti, slično kao što se objašnjava odnos prve vesti i njenog demantija. Prva vest je kada se džak perja prospe sa petog sprata, a demanti te vesti je kada se to perje na zemlji skuplja i vraća u džak…

Autor zaključuje da je posebno značajna zaštita privatnosti određenih ranjivih kategorija, a posebno, dece i maloletnih lica uopšte, jer dete je „otac čoveka“. Od deteta nastaje čovek, a ako je dete žrtva nekog teškog krivičnog dela, a naročito krivičnog dela koje je nasilničkog karaktera, pa još ako nepotrebno bude dodatno povređen u krivičnom postupku, njemu se bitno smanjuju šanse da postane uspešan čovek. U romanu „Braća Karamazovi“, Dostojevski zaključuje da „ni najveća sreća čovečanstva nije vredna jedne suze nevinog deteta“. Dete žrtva zločina nosi teške ožiljke kroz ceo život, a naročito kada je žrtva seksualnog nasilja i posebno kada je učinilac bliska osoba. Toj deci treba pomoći, što je moguće kako kvalitetnim zakonodavstvom, tako i boljom praksom postupanja sa žrtvama u krivičnom postupku. Međutim, kada se takvo dete izloži medijskoj poplavi, koja je nekada, što je užasno, čak i svojevrsne „fekalne prirode“ i kada njegovo lice, a naročito rane i ožiljci počnu da pune naslovne strane, onda je ono teško žigosano i njegova budućnost postaje krajne neizvesna.

***Ključne reči**: načelo javnosti, privatnost, krivični postupak, krivično procesno pravo. deca, maloletna lica.*

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1. Uvodna razmatranja o osnovnim krivičnoprocesnim načelima

Smatra se da u krivičnom procesnom pravu egzistira izvestan broj načela na kojima se zasniva sistem krivičnog postupka, koja inspirišu organizaciju postupka i uređenje pojedinih procesnih instituta, a ta su osnovna načela krivičnog procesa, nekada izraz političkih tendencija, nekada rezultat stručnog i pravno-tehničkog iskustva, ili što je najčešće, predstavljaju kombinaciju jednih i drugih faktora.[166] U teoriji krivičnog procesnog prava pojam krivičnoprocesnih principa nije definisan na jedinstven način, pa se tako po jednom shvatanju princip određuje kao *osnovna* ili *opšta ideja*, po drugom kao određena *postavka* za sagledavanje i rešenje jedne problematike, princip se zatim, definiše i kao sam po sebi određeni *zahtev*, a može se odrediti i u vidu „definicije za pravnike”, po kojoj krivičnoprocesni principi predstavljaju „postavke na kojima je zasnovano i pomoću kojih je izgrađeno krivično procesno pravo”.[167] Procesne maksime su se razvile na stotinama godina dugoj tradiciji i povezano se odnose kako na omogućavanje delovanja pravila pravne države, tako i na zaštitu građanskih prava,[168] vitalnih ljudskih prava i onih tekovina koje se smatraju obeležjima pravne države.

Pravna načela se uopšte posmatrano, objašnjavaju kao apstraktne norme koje su izvedene iz niza manje apstraktnih normi i koje važe za čitav niz slučajeva obuhvaćenih nižim normama, a stvaraju se na osnovu normi koje važe za više ustanova.[169] Prihvatljiva je i definicija po kojoj se pod principom ili načelom krivičnog postupka podrazumeva institut ili odredba koja generalno utvrđuje način (formu) postupanja za ceo postupak, delove postupka, ili u više određenih slučajeva, pri čemu se naglašava da među principima postoje oni koji su osnovni (elementarni, bitni), koji su nužno uvek prisutni, a ima i onih koji su rukovodni (usmeravajući), tako da su povrede osnovnih principa redovno procesno sankcionisane, dok povrede rukovodnih načela, po pravilu ne podrazumevaju posebno sankcionisanje.[170] Principi krivičnog postupka predstavljaju opšte zakonske smernice za postupanje kako svih službenih aktera krivične procedure, tako i drugih subjekata postupka. Veliki mislilac *Gandi* je isticao: „Život bez principa je brod bez kormilara”, što se na adekvatan način može parafrazirati i u odnosu na krivični postupak. U teoriji krivičnog procesnog prava nema saglasnosti koji su to sve

[166] Više o tome: T. Vasiljević, Sistem krivičnog procesnog prava SFRJ, Beograd, 1981, str. 56.

[167] D. Dimitrijević, Krivično procesno pravo, Beograd, 1967, str. 37.

[168] W. Beulke, *Strafprozeßrecht (6, neubearbeitete Auflage),* C. F. Müller, Heidelberg, 2002, стр. 9.

[169] R. Lukić, Metodologija prava, Beograd, 1977, str. 215–216.

[170] B. Petrić, Priručnik za primenu Zakona o krivičnom postupku, Beograd, 1985, str. 9

krivičnoprocesni principi, odnosno koja su merila ili elementi na osnovu kojih bi se određeni viši pojam mogao smatrati (utvrditi) kao princip.[171] Nesporno je da se formulisanje osnovnih načela krivičnog postupka ispoljava kao važan faktor sistematskog proučavanja krivičnog procesnog prava. Govoreći o značaju ustanovljavanja osnovnih načela, V. Bayer[172] ističe da je jedan od osnovnih zadataka teorije krivičnog procesnog prava da sistematski prikaže materiju tog prava, te da na taj način omogući pravnicima koji primenjuju krivično procesno pravo, da imaju jasan pregled čitavog tog pravnog područja, pri čemu „postavljanje tih načela pridonosi boljem shvatanju toga prava”. U tom smislu, u krivičnoprocesnoj teoriji se ističe da načela (maksime ili principi) krivičnog postupka predstavljaju procesna pravila vezana za vrhunske procesne pojmove ili bića (procesne subjekte i procesne radnje), koje određuju karakter (tip) krivičnog postupka, tako da procesna organizacija zasnovana na jednom načelu (npr. istražnom) daje jedan tip krivičnog postupka (*istražni* ili *inkvizitorski*), dok ona koja je zasnovana na drugom, suprotnom načelu (npr. optužnom), daje potpuno drugi tip krivičnog postupka (*optužni* ili *akuzatorski*).[173]

Osnovna krivičnoprocesna načela se temelje kako striktno na odredbama Zakonika o krivičnom postupku – *zakonska načela* (na primer, načelo legaliteta oficijelnog krivičnog gonjenja, načelo slobodne ocene dokaza itd.), ili su istovremeno ne samo zakonska, nego i ustavna načela – *ustavno-zakonska načela* (na primer, načelo javnosti, načelo raspravnosti itd.), a neka proizlaze iz duha i suštine krivičnog postupka – *implicitna krivičnoprocesna načela*, a povezano sa drugim zakonski striktno utvrđenim načelima. Takav je slučaj donedavno bio sa načelom *in dubio pro reo*, koje se u ZKP-u nije spominjalo, ali je nesporno važilo u našem krivičnom postupku i pre nego što je i formalno (Zakonom o izmenama i dopunama ZKP-a iz 2009. godine), uvedeno u tada pozitivni Zakonik o krivičnom postupku, da bi potom, striktno bilo propisano i u novom Zakoniku iz 2011. godine. Pored toga, neka krivičnoprocesna načela su utemeljena relevantnim izvorima međunarodnog prava, koji su od strane naše države prihvaćeni – *međunarodnopravna načela*, što važi za većinu načela koja su istovremeno i ustavnopravnog karaktera, a posebno se odnosi na načelo pravičnog (poštenog) vođenja krivičnog postupka (princip *fair* procedure), koji se do nedavno nije spominjao izričito ni u našem Zakoniku o krivičnom postupku, niti u ustavnopravnim aktima naše zemlje,

[171] Ibid., стр. 9–10.

[172] V. Bayer, Југославенско кривично процесно право, „Књига прва – Увод у теорију кривичног процесног права”, Загреб, 1980, стр. 155.

[173] M. Grubač, Načela krivičnog postupka i njihova transformacija, Jugoslovenska revija za krivično pravo i kriminologiju, br. 1–2/95, Beograd, 1995, str. 72.

ali on ne samo da je propisan odgovarajućim odredbama međunarodnopravnih akata, koje je naša država izričito prihvatila, već to načelo u dominantnoj meri počiva i na duhu i smislu naše krivične procedure.

Osnovna načela (maksime ili principi) krivičnog postupka predstavljaju bazična pravila koja se odnose na osnovne krivičnoprocesne pojmove, odnosno subjekte krivičnog postupka, njihove osnovne procesne funkcije, položaj u krivičnom postupku i radnje koje spadaju u njihovu nadležnost ili njihova ovlašćenja. Sadržajem tih načela se utvrđuje dominantni tip i karakter krivične procedure, a osnovni principi krivičnog postupka predstavljaju izraz osnovnih političkih, istorijskih, ekonomskih, opštedruštvenih faktora, gde je poseban značaj pravne tradicije, kao i stepena razvijenosti i samostalnosti krivičnoprocesne nauke, te svih drugih bitnih uslova i okolnosti koji vladaju u određenoj državi, koja projektuje svoj pravni sistem, a okviru njega kreira i osnovne izvore svog krivičnog procesnog prava. U najopštijem smislu, cilj osnovnih krivičnoprocesnih načela je da služe ostvarenju osnovne svrhe krivičnog postupka. Krivičnoprocesna načela *po pravilu nemaju apsolutni karakter*, što znači da za njih skoro uvek važe i određeni *izuzeci*, u smislu da se načelom utvrđuje osnovno pravilo, ali da se po izuzetku od njega može i odstupiti, kao što je to slučaj na primer, sa mogućnošću da se javnost isključi sa glavnog pretresa, kao izuzetak u odnosu na načelo javnosti itd. Jedino načelo, od kojeg se nikada ne bi moglo odstupiti u zakonskoj krivičnoj proceduri jeste i najvažnije osnovno krivičnoprocesno načelo, a to je načelo pravičnog vođenja krivičnog postupka, a to važi i za neka druga načela koja su sa njim povezana, odnosno koja logički ne trpe izuzetek, kao što je to na primer, slučaj sa principom *in dubio pro reo*.

Krivični postupak se odvija u skladu sa određenim osnovnim krivičnoprocesnim načelima, koja se odnose na: 1) krivično gonjenje, 2) izvođenje dokaza i 3) vođenje krivičnog postupka. Sva krivičnoprocesna načela se mogu svrstati u ove osnovne grupe, a jedna od podgrupi se odnosi na načela forme vođenja krivičnog postupka. U načela forme vođenja krivičnog postupka spadaju: a) načelo raspravnosti, b) načelo usmenosti i v) načelo javnosti.[174]

[174] M.Škulić, Krivično procesno pravo, Pravni fakultet Univerziteta u Beogradu, 10. izmenjeno i dopunjeno izdanje, Beograd, 2017., str. 75.

2. Osnovni normativni elementi načela javnosti

Načelo javnosti je jedno od klasičnih krivičnoprocesnih načela, koja su tipična za akuzatorske i mešovite tipove krivičnih postupaka. Javnost suđenja je i važan element većine ustavnopravnih garancija u nacionalnim pravnim sistemima, a ona je predviđena i u najvažnijim međunarodnopravnim izvorima koji se odnose na krivični postupak. Javnost postupka je generalni princip savremenog krivičnog procesnog prava, a javnost saslušanja je očigledno sredstvo boljeg obezbeđenja da suđenje koje je pod javnim nadzorom bude fer, a posebno da se prava optuženog ne krše i da sud postupak vodi nepristrasno.[175] Javnost krivičnog postupka se ogleda u pravu svakog građanina, ne samo stranaka, već i drugih lica koja inače nisu direktno i vitalno zainteresovana za ishod postupka, da prisustvuju suđenju, te da o postupku budu obaveštena i putem sredstava javnog informisanja. Javnost može da bude *neposredna* (fizička), kada lica prisustvuju procesnim radnjama ili *posredna* (tehnička), do koje dolazi zahvaljujući davanju publiciteta sprovedenim radnjama u krivičnom postupku, posredstvom sredstava javnog informisanja. Smatra se da neposredna javnost može da bude *stranačka* (ograničena na procesne stranke) ili opšta (kada ona obuhvata i publiku), ali je u stvari samo opšta javnost prava neposredna javnost u postupku, jer je prisustvo stranaka po pravilu neophodna procesna pretpostavka, mada ni ona nije apsolutna, jer se tako na primer, pod određenim zakonskim uslovima glavni pretres može voditi i u odsustvu optuženog (suđenje u odsustvu).

Inače, načelo javnosti koje se posmatra kao jedno od temeljnih načela savremenog krivičnog postupka, za koje se smatra da bi trebalo, između ostalog, da obezbeđuje apsolutnu nezavisnost suda, se poslednjih decenija suočava sa novim pravnim problemima, vezanim pre svega za određene potrebe ograničenja dejstva tog načela.[176] Iako je u savremenom krivičnom postupku načelo javnosti izuzetno značajno, veliki značaj ima i mogućnost izuzetnog odstupanja od tog načela, koje u opravdanim slučajevima postoji u svim demokratskim i liberalnim krivičnim procedurama. Načelo javnosti se u nacionalnim krivičnoprocesnim zakonodavstvima odnosi pre svega na fazu suđenja u užem smislu, odnosno na glavni pretres, te „dejstvuje u postupcima protiv odraslih ili mlađih punoletnih lica, dok je primena tog načela isključena u postupku prema maloletnicima”, kakav je slučaj na primer u nemačkom krivičnom postupku, mada se tamo, kada je u pitanju postupak prema maloletnicima, on može po izuzetku

[175] A. Cassese, *International Criminal law*, „Oxford University Press“, London, New York, 2003., стр. 397.

[176] C. Roxin, *Aktuelle Probleme der Öffentlichkeit im Strafverfahren*, in. J. Bauman und K. Tiedamann, *op. cit.*, стр. 393–394.

voditi javno, ukoliko isključenje javnosti nije u interesu optuženog maloletnika u spojenom postupku protiv punoletnog lica.[177]

Načelo javnosti u našem krivičnom postupku važi pre svega za glavni pretres u opštem i skraćenom krivičnom postupku, odnosno za krivične postupke koji se vode protiv punoletnih lica, dok u postupku prema maloletnicima načelno nema javnosti, a samo se po izuzetku određenim kategorijama lica može dopustiti da prisustvuju toku postupka. Obrnuto, kada se postupak vodi protiv punoletnog lica, on je po pravilu javan, a po izuzetku se javnost može isključiti. U prethodnom postupku nema opšte javnosti, već postoji samo tzv. stranačka javnost, ali ni ona nije uvek potpuna. Opšta javnost je u prethodnom postupku izražena samo kroz obaveštavanje javnosti o toku istrage. Glavni pretres je javan, što znači da njemu mogu da prisustvuju punoletna lica, pod uslovom da ne nose oružje ili opasno oruđe, osim čuvara okrivljenog koji može da bude naoružan. Takođe se i sednica veća drugostepenog suda u postupku po žalbi po pravilu održava javno, a javnost se može isključiti samo pod opštim uslovima koji se odnose na isključenje javnosti sa glavnog pretresa. Zakonikom su predviđeni brojni *izuzeci od načela javnosti,* odnosno razlozi za odstupanje od načela javnosti (čl. 363–365), kao i čitav niz procesnih mehanizama koji su sa time povezani, što se detaljnije objašnjava u delu udžbenika koji se odnosi na održavanje glavnog pretresa.

Povreda načela javnosti je striktno sankcionisana, te je propisana kao bitna povreda odredaba krivičnog postupka, te tako, ako je protivno Zakoniku bila isključena javnost na glavnom pretresu, pobijana presuda mora biti ukinuta. Obrnuta povreda pravila Zakonika koja se odnose na javnost tokom glavnog pretresa, sama po sebi nije relevantna. Naime, ako se radilo o nekom slučaju koji se odlukuje postojanjem razloga za isključenje javnosti (na primer, potreba čuvanja tajne), a sud je pogrešio i nije doneo odluku o isključenju javnosti, takva povreda uopšte neće biti relevantna, osim ako je njome, ili u vezi sa njom, istovremeno došlo i do nekog drugog propusta, koji jeste bitna povreda odredaba krivičnog postupka, kao na primer, ako se proceni da je zbog toga povređeno pravo na odbranu optuženog na glavnom pretresu, što nije verovatno u većem stepenu, ali predstavlja *questio facti.* Takvo „obrnuto” ogrešenje o načelo javnosti, odnosno pravila koja se odnose na (ne)prisustvo javnosti na glavnom pretresu nije relevantno, jer s jedne strane, takva povreda nije ni propisana kao bitna povreda odredaba krivičnog postupka (samo je protivzakonito isključenje javnosti bitna povreda), dok je s druge strane, ona sama po sebi nepopravljiva, jer se eventualnim

[177] U. Hellmann, *Strafprozeßrecht,* „Springer“, Berlin, Heidelberg, New York, 1998, стр. 197.

ukidanjem presude i vođenjem novog pretresa sa kojeg bi bila isključenja javnost, ništa ne bi moglo postići odnosno, ne bi bilo moguće eliminisanje štetnih posledica prethodnog javno vođenog glavnog pretresa, iako su postojali razlozi za isključenje javnosti sa njega.

3. Ispoljavanje načela javnosti na glavnom pretresu

Značaj načela javnosti se primarno ispoljava na glavnom pretresu kao centralnom procesnom stadijum, koji predstavlja *suđenje u užem smislu.* Javnost glavnog pretresa predstavlja ustavno i zakonsko pravilo, dok potpuno ili delimično isključenje javnosti na glavnom pretresu, ima značaj odgovarajućeg ustavnog i zakonskog izuzetka.

3.1. Javnost glavnog pretresa kao procesno/ustavno pravilo

Glavni pretres je javan. Zakonodavac omogućava da glavnom pretresu prisustvuju (kao publika) samo lica starija od 16 godina, koje pri sebi nema oružje ili opasno oruđe,.

Ovo je promena u odnosu na ranije pravilo po kojem je načelo javnosti podrazumevalo pravo svakog *punoletnog građanina,* koji pri sebi nema oružje ili opasno oruđe i koji nije procesno zainteresovan, odnosno nema nikakvu procesnu funkciju, da prisustvuje glavnom pretresu i prati njegov tok.

3.2. Isključenje javnosti na glavnom pretresu kao procesni/ustavni izuzetak

Načelo javnosti podrazumeva i postojanje mogućeg *izuzetka* u vidu postojanja razloga iz kojih se javnost u potpunosti ili delimično može isključiti sa glavnog pretresa.
Od otvaranja zasedanja, pa do završetka glavnog pretresa, veće može, po službenoj dužnosti ili na predlog stranke ili branioca, ali uvek nakon njihovog izjašnjenja, isključiti javnost za ceo glavni pretres ili za jedan njegov deo, ako je to potrebno radi zaštite sledećih alternativno propisanih vrednosti:

1) interesa nacionalne bezbednosti;
2) javnog reda i morala;
3) interesa maloletnika;
4) privatnosti učesnika u postupku; te
5) drugih opravdanih interesa u demokratskom društvu.

Svi razlozi za isključenje javnosti sa glavnog pretresa koji se alternativno propisuju u novom ZKP-u su u određenim terminološkim varijantama, suštinski postojali i ranije, osim poslednjeg razloga, koji se zbog svoje izrazite *širine,* pa i poprilične nejasnoće i nepreciznosti, donekle svodi na svojevrsnu „kaučuk” normu, što nije dobro, jer je javnost glavnog pretresa načelo koje se ustanovljava ne samo Zakonikom o krivičnom postupku, već i Ustavom Srbije.

Pitanje je i da li je razlog za isključenje javnosti zbog potrebe zaštite „drugih opravdanih interesa u demokratskom društvu”, u skladu sa Ustavom Srbije, odnosno po svemu sudeći, radi se o *protivustavnoj normi,* jer naš Ustav ne poznaje takav razlog kao *poseban osnov* za isključenje javnosti, već tu formulaciju striktno povezuje sa *javnim redom i moralom*, dok se u ZKP-u „javni red i moral”, te „drugi opravdani interesi u demokratskom društvu”, definišu kao *dva samostalna i odvojena, odnosno jedan od drugog nezavisna razloga* za isključenje javnosti na glavnom pretresu.[178]

Isključenje javnosti se nikad ne odnosi na stranke, branioca, oštećenog i njegovog zastupnika, kao i punomoćnika oštećenog kao tužioca ili punomoćnika privatnog tužioca. Onda kada je javnost koja je *pravilo*, isključena sa glavnog pretresa, što predstavlja *izuzetak,* moguće je da se tada, odlukom veća, dodatno ustanovi i *izuzetak* u odnosu na takav *izuzetak,* pa da se određenim licima dopusti prisustvovanje glavnom pretresu na kojem je inače, javnost isključena. Veće može dozvoliti da glavnom pretresu na kome je javnost isključena prisustvuju pojedina službena lica, naučni, stručni i javni radnici, a na zahtev optuženog može to dozvoliti i njegovom bračnom drugu, bliskim srodnicima i licu sa kojim živi u vanbračnoj ili drugoj trajnoj zajednici života.

Predsednik veća će upozoriti lica koja prisustvuju glavnom pretresu na kome je javnost isključena, da su dužna da kao tajnu čuvaju sve ono što su na pretresu saznala i ukazaće im da odavanje tajne predstavlja krivično delo. Faktička svrha ovog upozorenja je potreba da se zaštiti vrednost koja je razlog za isključenje javnosti, a krivičnopravna svrha upozorenja predsednika veća je da se i formalno otkloni mogućnost pozivanja na pravnu zabludu lica koje bi postupilo suprotno.

[178] Prema članu 32 stav 3 Ustava Srbije (norma koja je segment prava na pravično suđenje), javnost se može isključiti tokom čitavog postupka koji se vodi pred sudom ili u delu postupka, samo radi zaštite interesa nacionalne bezbednosti, javnog reda i morala u demokratskom društvu, kao i radi zaštite interesa maloletnika ili privatnosti učesnika u postupku, u skladu sa zakonom.

Rešenje veća o isključenju javnosti mora biti obrazloženo i javno objavljeno, a u tom rešenju veće može odlučiti i o tome kojim licima je dozvoljeno da glavnom pretresu prisustvuju. Rešenje o isključenju javnosti može se pobijati samo u žalbi protiv presude ili rešenja koje odgovara presudi.

Poseban slučaj isključenja javnosti postoji u vezi sa ispitivanjem jedne posebne kategorije davaoca iskaza – tzv. „kooperativnih svedoka”. Ovde zakonodavac u stvari, ni ne definiše neki poseban razlog za isključenje javnosti (što takođe potencijalno može da se smatra izuzetno spornim sa stanovišta usklađenosti sa Ustavom),[179] već sama po sebi konkretna dokazna radnja koja se preduzima na glavnom pretresu, a čiji je akter jedan vrlo specifičan procesni subjekt, predstavlja osnov zbog kojeg se javnost može isključiti.

Javni tužilac može predložiti sudu da se javnost isključi sa glavnog pretresa prilikom ispitivanja okrivljenog saradnika ili osuđenog saradnika. Pre donošenja odluke o predlogu javnog tužioca, predsednik veća će zatražiti od optuženog i njegovog branioca da se izjasne o predlogu za isključenje javnosti.

4. Elementi zaštite privatnosti prilikom ispitivanja svedoka

Svedočenje je iskaz određenih lica o krivičnom delu i njegovom učiniocu, a da bi sud pozvao neko lice za svedoka, potrebno je da budu ispunjeni materijalni i formalni uslovi. Svedoci se u teoriji često označavaju kao „lično dokazno sredstvo”.[180] Ispitivanje svedoka se smatra složenom radnjom, koja pretpostavlja poznavanje ne samo procesnih odredbi koje regulišu tu materiju, nego i kriminalističke taktike i psihologije.[181] Ispitivanje svedoka se tradicionalno smatra važnim segmentom dokaznog prava u krivičnom postupku, odnosno u okviru krivičnog procesnog prava.[182]

[179] Prethodna citirana ustavna norma (član 32 stav 3 Ustava Srbije), ustanovljava taksativno i limitativno razloge za isključenje javnosti, tako da je mogućnost da se javnost sa glavnog pretresa isključi bez zasnivanja rešenja suda na nekom od tih razloga, već samo zbog toga što se vrši konkretna dokazna radnja, tj. ispituje okrivljeni saradnik ili osuđeni saradnik (što samo po sebi, ne predstavlja razlog), potencijalno protivna Ustavu Srbije.

[180] G. Pfeiefer, *Strafprozeßordnung und Gerichstverfassungsgesetz*, 2. neuberarbeitete und erweiterte Auflage, C. H. Bedck’ Verlagasmuchhandlung, München, 1999, стр. 64.

[181] B. Simonović, Pribavljanje i ocena iskaza pred policijom i na sudu, Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 1997, str. 77.

[182] H. Gerland, *Der deutsche Strafprozess – Eine systematische Darstellung*, Mannheim, Berlin, Leipzig, 1927, стр. 187.

Svedočenje se sastoji u uzimanju iskaza od lica koje se smatra svedokom, jer je verovatno da će dati obaveštenja: 1) o krivičnom delu i učiniocu (objektivni i subjektivni elementi koji se odnose na predmet krivičnog postupka) ili 2) o drugim činjenicama koje se utvrđuju u postupku. U samom Zakoniku se svedok definiše kao lice za koje je verovatno da će dati obaveštenja o krivičnom delu, učiniocu ili o drugim činjenicama koje se utvrđuju u postupku.

Za svedočenje je potrebno da se ispune određeni materijalni i formalni uslovi. Materijalni uslov postoji u *pozitivnom* i *negativnom obliku.* U pozitivnom obliku se materijalni uslov svodi na određivanje u opštem smislu ko može da bude svedok. Svako lice koje može da prenese svoja saznanja ili opažanja u vezi sa predmetom svedočenja, tj. u odnosu na krivično delo i učinioca ili druge relevantne činjenice, ima sposobnost svedočenja. Kao svedoci mogu se ispitati i lica koja su istovremeno i u nekim drugim procesnim svojstvima, gde spadaju: 1) oštećeni, 2) oštećeni kao tužilac i 3) privatni tužilac.

Osim u pozitivnom obliku, materijalni uslov se u pogledu svedočenja ispoljava i u negativnom obliku, što se svodi na pravila po kojima su određena lica isključenja od dužnosti svedočenja. *Zabrana ispitivanja određenih lica* u svojstvu svedoka svodi se na nemogućnost određenih lica da budu svedoci, dok se eventualno za njihovo ispitivanje ne ispune određeni Zakonikom definisani posebni uslovi.

Od dužnosti svedočenja isključena su određena lica, što znači da ta lica ne mogu biti ispitana kao svedoci dok se eventualno za to ne ispune posebni uslovi. Tu spadaju: 1) lice koje bi svojim iskazom povredilo dužnost čuvanja tajnog podatka, dok nadležni organ, odnosno lice organa javne vlasti alternativno: a) ne opozove tajnost podatka ili b) lice ne oslobodi dužnosti čuvanja takvog podatka; 2) lice koje bi svojim iskazom povredilo dužnost čuvanja profesionalne tajne (verski ispovednik, advokat, lekar, babica i dr.), osim ako je oslobođeno te dužnosti posebnim propisom ili izjavom lica u čiju je korist ustanovljeno čuvanje tajne; 3) lice koje je branilac o onome što mu je okrivljeni kao svom braniocu poverio, te 4) maloletno lice koje, s obzirom na uzrast i duševnu razvijenost, nije sposobno da shvati značaj prava da je oslobođeno od dužnosti svedočenja, osim ako to sam okrivljeni zahteva.

Izuzetno od ovih pravila, sud može na predlog okrivljenog ili njegovog branioca *odlučiti da ispita* lice koje je isključeno od dužnosti svedočenja, iz čega proizlazi da su

sada *relativizovani* svi slučajevi isključenja određenih lica od mogućnosti da budu ispitani kao svedoci.

Iz ovoga proizlazi da sud može, ako prethodno takav predlog uputi okrivljeni ili branilac, vrlo jednostavno da *devalvira dužnost čuvanja tajnog podatka,* odnosno *profesionalne tajne*, što u praksi može nekada biti izuzetno opasno i štetno. Konačno, kakva je uopšte svrha mogućnosti da branilac bude saslušan kao svedok u pogledu činjenica koje mu je okrivljeni poverio kao svom braniocu. Takva mogućnost je nekada postojala u Zakonu o krivičnom postupku (pre stupanja na snagu ZKP-a iz 2001. godine), ali se to u praksi izuzetno retko primenjivalo i bilo bez većeg praktičnog značaja, jer je branilac po logici stvari, bio „vezan” odnosom poverenja prema svom branjeniku i svakako bi bilo teško zamisliti da bi branilac kao svedok, svojim iskazom „teretio” okrivljenog, naročito s obzirom da je i tada za tako nešto, bilo neophodno da to zahteva sam okrivljeni, a zašto bi on to učinio, osim ako ne bi smatrao da će iskaz takvog svedoka za njega da bude koristan.

U ovom pogledu novi Zakonik pravi i daleko veću grešku, za koju je nemoguće naći valjan *ratio legis,* jer omogućava da se lice koje je inače isključeno kao svedok, saslušava i na predlog ne samo okrivljenog, već i njegovog branioca, što znači da bi branilac (mada je to u praksi zaista teško zamislivo), mogao sam sebe da predloži kao svedoka, a što bi onda, stvorilo i vrlo neugodnu mogućnost da u nekom hipotetičkom slučaju, branilac koji narušava odnos poverenja između sebe i svog klijenta, postane svedok „u prilog optužbe”. Ovakav izuzeta, mada bi do njega u praksi, svakako moralo veoma retko dolaziti, ne samo što nije logičan u krivičnoprocesnom smislu, već on stvara prostora, da se između ostalog, povredi i privatnost svedoka.

Formalni uslov za ispitivanje svedoka je davanje procesne inicijative da se neko lice pozove i ispita kao svedok, tj. odgovarajućeg dokaznog predloga usmerenog na izvršenje te krivičnoprocesne radnje, ali je, pored toga, potrebno i da organ krivičnog postupka prihvati taj predlog, s tim da sud može i po sopstvenoj inicijativi, onda kada takvog predloga nema, da određeno lice pozove i ispita u svojstvu svedoka, isto kao što organ krivičnog postupka nije ni u procesnom smislu vezan podnesenim predlogom. Pored toga, kada svedoka ispituje javni tužilac u istrazi, onda on to, po pravilu, čini odnosno može činiti i bez nekog formalnog predloga, već po sopstvenoj inicijativi.

Dužnost svedočenja je kako pravna, tako i moralna obaveza. Svako lice koje se kao svedok poziva dužno je da se odazove pozivu, a ako Zakonikom nije drugačije

određeno, kao kada se radi o licima koja su isključenja ili oslobođena dužnosti svedočenja, dužno je i da svedoči. Određena lica su oslobođena od dužnosti svedočenja, što znači da ta lica *mogu* da svedoče ako to žele, ali *ne moraju* da svedoče ukoliko se odluče da ne budu ispitana kao svedoci. Od dužnosti svedočenja oslobođena su sledeća lica: 1) lice sa kojim okrivljeni živi u braku, vanbračnoj ili drugoj trajnoj zajednici života; 2) srodnik okrivljenog po krvi u pravoj liniji, u pobočnoj liniji do trećeg stepena zaključno, kao i srodnik po tazbini do drugog stepena zaključno; te 3) usvojenik i usvojitelj okrivljenog. *Ratio legis* u nekim od ovih slučajeva se može temeljiti i na zaštiti privatnosti.

Zaštita privatnosti u odnosu na svedoke, koji su nekada i oštećeni krivičnim delom, postiže se i pravilima o mogućnosti svedoka da uskrati odgovor na pojedina pitanja. Naime, svedok se pre ispitivanja opominje da je dužan da govori istinu i da ne sme ništa da prećuti (centralna i suštinski najvažnija obaveza svedoka), a zatim se upozorava da davanje lažnog iskaza predstavlja krivično delo. Svedok se, pored toga, upozorava i da nije dužan da odgovori na određeno pitanje ako je verovatno da bi time izložio sebe ili lice koje mu je blisko (krug lica koja su oslobođena dužnosti svedočenja, poput bračnog druga, bliskih srodnika itd.), nekoj od opciono propisanih posledica: 1) teškoj sramoti, 2) znatnoj materijalnoj šteti ili 3) krivičnom gonjenju. Takvo upozorenje se unosi u zapisnik. Pitanje i odgovor na njega, koji se odnose na *tešku sramotu*, mogu faktički da budu povezani sa privatnošću svedoka.

4.1. Zaštita privatnosti u pogledu posebno osetljivih svedoka

Određena zaštita privatnosti se u pogledu kategorije *posebno osetljivih svedoka,* može postiti i pravilima iz Zakonika o krivičnom postupku, koja se odnose na ovu kategoriju svedoka, što je od posebnog značaja kada se radi o oštećenima, naročito u pogledu zaštite od sekundarne viktimizacije, gde po logici stvari, posebnu zaštitu zaslužuju deca i uopšte maloletna lica.

U srpskom Zakoniku o krivičnom postupku do skoro nije bilo mnogo posebnih pravila koja se odnose na zaštitu svedoka. Takva su pravila prvi put uvedena Zakonikom o krivičnom postupku iz 2006. godine, koji nikada nije u celini bio primenjen, već je primenjivan samo jedan sasvim mali broj njegovih odredbi, među kojima su bile i one koje su se odnosile na zaštitu svedoka u krivičnom postupku. Pravila sada sadržana u pozitivnom Zakoniku o krivičnom postupku Srbije iz 2011. godine su u velikoj meri slična onima koja su postojala u ZKP-u iz 2001. godine.

Ovde je od posebnog značaj i Direktiva Parlamenta EU i Saveta Evrope 2012/29 od 25. oktobra 2012. godine, o uspostavljanju minimalnih standarda prava i zaštite žrtava krivičnih dela, za države članice EU utvrđen je niz obaveza koje se odnose na poboljšanje položaja žrtava krivičnih dela u krivičnom postupku.[183] Deo tih pravila se svodi ne elemente tzv. restorativnog pravosuđa.[184]

U Zakoniku o krivičnom postupku se u osnovi radi o tri grupe pravila: 1) pravila koja se odnose na načelno pravo svedoka na korektan odnos u krivičnom postupku, što uključuje i načelnu i zaštitu opšteg tipa; 2) pravila koja se odnose na zaštitu određenih vrsta svedoka, tj. onih svedoka koji spadaju u tzv. posebno ranjive ili naročito osetljive svedoke, a što se u stvari, svodi na zaštitu tih svedoka «od krivičnog postupka», odnosno od određenih anomalija tipičnog načina izvođenja određenih dokaznih radnji, čime je moguće proizvesti štetne posledice poput sekundarne viktimizacije oštećenog ili dodatne traumatizacije oštećenih i posebnih vrsta svedoka; te 3) zaštita svedoka od štetnih posledica kojima bi mogao biti izložen zbog toga što se uopšte i pojavio kao svedok u konkretnom krivičnom postupku, odnosno dao iskaz u svojstvu svedoka.

Svedok ima načelno pravo na korektan odnos prema njemu od strane organa krivičnog postupka, a u Zakoniku su posebno propisana i pravila kojima se obezbeđuje zaštita svedoka, koja postoji u tri oblika: 1) osnovna i načelna zaštita svih svedoka i 2) zaštita posebno osetljivih svedoka, te 3) davanje statusa zaštićenog svedoka.

Odredbom člana 102. Zakonika o krivičnom postupku uređena je osnovna zaštita svedoka, koja nije precizirana, već je samo načelnog karaktera i odnosi se na obavezu organa postupka, što znači kako suda, tako i javnog tužioca da svedoka zaštite od uvrede, pretnje i bilo kojeg oblika napada. Dalje preciziranje se odnosi na pravila koja se tiču dve vrste svedoka: 1) posebno osetljivih svedoka, te 2) zaštićenih svedoka.

Status posebno osetljivog svedoka organ postupka može po službenoj dužnosti ili na zahtev stranaka, odnosno samog svedoka, odrediti svedoku koji je posebno osetljiv s

[183] M.Škulić, Položaj žrtve/oštećenog u krivičnopravnom sistemu Srbije uopšte i u odnosu na Direktivu EU 2012-29, tematska monografija „Kaznena reakcija u Srbiji VI deo, edicija Crimen, Pravni fakultet Univerziteta u Beogradu, Beograd, 2016., str. 40 – 41.

[184] Više o tome: M.Škulić, National Report – Serbia, in: F.Dünkel, J.Grzywa-Holten, P.Horsfield (Ed.), Restorative Justice and Mediation in Penal Matters – A stock-taking of legal issues implementation strategies and outcomes in 36 European countries, Vol. 2, Band 50/2 Forum Verlag Godesberg, Schriften zum Strafvolzug, Jugendstrafrecht und zur Kriminologie, Greifswald, 2015, str. 803 – 804.

obzirom na neku od sledećih opciono propisanih okolnosti: 1) uzrast, 2) životno iskustvo, 3) način života, 4) pol, 5) zdravstveno stanje, 6) prirodu, način ili posledice izvršenog krivičnog dela, odnosno 7) druge okolnosti slučaja.

Rešenje o određivanju statusa posebno osetljivog svedoka donosi: a) javni tužilac, b) predsednik veća ili v) sudija pojedinac. Protiv rešenja kojim je usvojen ili odbijen zahtev da se svedoku odredi status posebno osetljivog svedoka nije dozvoljena posebna žalba. Zaštita posebno osetljivog svedoka postiže se postavljanjem punomoćnika, ili posebnim načinom ispitivanja, kojim se izbegava „sekundarna viktimizacija”, odnosno druge štetne posledice krivičnog postupka u odnosu na svedoka.

Ako smatra da je to potrebno radi zaštite interesa posebno osetljivog svedoka, organ postupka donosi rešenje o postavljanju punomoćnika svedoku, a javni tužilac ili predsednik suda postavlja punomoćnika po redosledu sa spiska advokata koji sudu dostavlja nadležna advokatska komora za određivanje branilaca po službenoj dužnosti.

Posebno osetljivom svedoku pitanja se mogu postavljati samo preko organa postupka koji će se prema njemu odnositi sa posebnom pažnjom, nastojeći da se izbegnu moguće štetne posledice krivičnog postupka po ličnost, telesno i duševno stanje svedoka. Ispitivanje se može obaviti uz pomoć psihologa, socijalnog radnika ili drugog stručnog lica, o čemu odlučuje organ postupka. Ako organ postupka odluči da se posebno osetljivi svedok ispita upotrebom tehničkih sredstava za prenos slike i zvuka, ispitivanje se sprovodi bez prisustva stranaka i drugih učesnika u postupku u prostoriji u kojoj se svedok nalazi.

Posebno osetljivi svedok može se ispitati i u svom stanu ili drugoj prostoriji, odnosno u ovlašćenoj instituciji koja je stručno osposobljena za ispitivanje posebno osetljivih lica, a u takvom slučaju organ postupka može odrediti da se koriste tehnička sredstva za prenos slike i zvuka, odnosno ispitivanje obavi uz pomoć psihologa ili drugog stručnog lica.

Posebno osetljivi svedok ne može biti suočen sa okrivljenim, osim ako nisu kumulativno ispunjena dva uslova: 1) potrebno je da sam okrivljeni zahteva suočenje, te 2) neophodno je da organ postupka dozvoli suočenje, vodeći računa o stepenu osetljivosti svedoka i o pravima odbrane.

Greška je u Zakoniku o krivičnom postupku, što nije isključio mogućnost da se prilikom unakrsnog ispitivanja posebno osetljivih svedoka, postavljaju sugestivna pitanja, koja su prema opštem zakonskom pravilu, moguća kada se radi o unakrsnom ispitivanju svedoka na glavnom pretresu.[185] Sugestivna pitanja su u odnosu na posebno osetljive svedoka izuzetno opasna i lako mogu dovesti do njihove naknadne traumatizacije, te se ispoljiti kao vid sekundarne viktimizacije. Po logici stvari, posebno osetljivi svedoci će u daleko najvećem broju slučajeva biti oni svedoci i po pravilu, oštećeni, koje je za svedočenje predložio javni tužilac, koji bi ih tada na glavnom pretresu i ispitivao „osnovno”, a onda bi se okrivljenom i braniocu dala prilika za *unakrsno ispitivanje*, pri čemu bi mogli da svedoku i oštećenom postavljaju i sugestivna pitanja. Ovo je veoma loše zakonsko rešenje, a naročito kada se radi o maloletnim licima, gde mogu biti u pitanju i deca u krivičnopravnom smislu (lica koja nisu navršila četrnaest godina), pa čak i deca koja su sasvim mala, poput predškolske dece, pri čemu se može raditi i o krivičnim delima koja su izuzetno „malignog karaktera”, prema prirodi psiholoških i drugih posledica koje prouzrokuju u odnosu na oštećene.

Pored toga, notorna je činjenica da su maloletna lica uopšte, a posebno sasvim mala deca, odnosno uopšte lica koja su izuzetno mlada, veoma osetljiva na sugestivne uticaje, tako da mogućnost postavljanja sugestivnih pitanja ovim kategorijama svedoka, ne samo što takve svedoke, a naročito kada su u isto vreme i oštećeni krivičnim delom, ne samo da u izuzetno visokom stepenu dodatno traumatizuje i izlaže sekundarnoj viktimizaciji, već i puno utiče na dokazni kredibilitet njihovog iskaza.

[185] Prema odredbi člana 98 stav 3 ZKP, kad svedok završi svoj iskaz, a potrebno je da se njegov iskaz proveri, dopuni ili razjasni, postaviće mu se pitanja koja moraju biti jasna, određena i razumljiva, ne smeju sadržati obmanu, niti se zasnivati na pretpostavci da je izjavio nešto što nije izjavio, i ne smeju predstavljati navođenje na odgovor osim ako se radi o unakrsnom ispitivanju na glavnom pretresu. Na ovaj je način omogućeno da se tokom unakrsnog ispitivanja svedoka na glavnom pretresu, postavljaju i sugestivna pitanja, koja inače, nisu dozvoljena kada se ova dokazna radnja sprovodi u istrazi ili čak eventualno, u predistražnom postupku. Ne samo što zakonodavac suštinski greši što bezuslovno omogućava postavljanje sugestivnih pitanja, baš uvek kada se radi o unakrsnom ispitivanju svedoka na glavnom pretresu, dakle i onda kada su u pitanju posebno osetljivi svedoci, pa čak i maloletna lica, a naročito deca, već bi iz zakonske formulacije skoro mogao da proizide zaključak da bi tokom unakrsnog ispitivanja na glavnom pretresu, bilo moguće postavljati svedoku i obmanjujuća, pa čak i neodređena i nerazumljiva pitanja. Naravno, to nije bila intencija zakonodavca i takvo bi tumačenje ipak bilo preterano, ali nije sporno da je konkretna odredba Zakonika nejasna i pravno-tehnički veoma loše formulisana.

5. Zaštita privatnosti u postupku prema maloletnicima

Postupak prema maloletnicima predstavlja poseban krivični postupak.[186] Osnovna karakteristika posebnih krivičnih postupaka jeste ta da njihov glavni predmet uvek predstavlja *causa criminalis*, tj. krivično delo ili delo koje je protivpravno i zakonom propisano kao krivično delo (kada je reč o neuračunljivom učiniocu), ali se o njemu rešava po određenim posebnim pravilima u odnosu na pravila opšteg krivičnog postupka. Pravila svakog posebnog krivičnog postupka predstavljaju *lex specialis* u odnosu na koja su pravila opšteg krivičnog postupka, koja su *lex generalis*.

Postupak prema maloletnicima više nije regulisan odredbama Zakonika o krivičnom postupku, već su sve odredbe ovog posebnog krivičnog postupka sadržane u Zakonu o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica.

Kada je reč o krivičnoprocesnim odredbama Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica sadrži *dve grupe* takvih odredbi: 1) odredbe koje se odnose na postupak prema maloletnicima i 2) odredbe koje se odnose na krivični postupak u kome se maloletno lice pojavljuje kao oštećeno određenom kategorijom krivičnih dela, koje i ne predstavljaju neki poseban krivični postupak, već se njima samo modifikuju određena pravila krivičnog postupka u kome se pojavljuje oštećeni koji spada u određenu posebnu starosnu kategoriju.[187]

5.1. Opšta pravila postupka prema maloletnicima

Opšta pravila postupka prema maloletnicima se svode na zakonsko definisanje određenih posebnih načela koja važe u ovom postupku, odnosno na modifikovanje određenih krivičnoprocesnih načela koja deluju u opštem krivičnom postupku, te uopšte, drugačije uređenje konstrukcije postupka, prava i dužnosti određenih procesnih subjekata, formulisanje nekih drugih procesnih mehanizama u odnosu na opšti krivični postupak itd. Sva ova opšta pravila se mogu grupisati u tri celine: 1) pravila koja predstavljaju modifikaciju određenih opštih krivičnoprocesnih načela, 2) pravila koja se mogu smatrati posebnim načelima karakterističnim za postupak prema maloletnicima, te 3) ostala opšta pravila postupka prema maloletnicima.

[186] M.Škulić i T.Bugarski, Krivično procesno pravo, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2016., str. 553.

[187] Више о томе: М.Шкулић, *Малолетничко кривично право,* Правни факултет Универзитета у Београду, Београд, 2011., стр. 319 – 320.

Osim određenih pravila u postupku prema maloletnicima, koja predstavljaju odstupanja u odnosu na odgovarajuća opšta krivičnoprocesna načela, postoje i načela koja su tipična samo za postupak prema maloletnicima. Tu spadaju sledeća načela: 1. načelo procesne protektivnosti u odnosu na maloletnika; 2. načelo funkcionalnog spajanja pripremnog postupka i faze suđenja; 3. načelo terminološke povlašćenosti maloletnika, 4. načelo hitnosti u postupanju, te 5. načelo specijalizovanosti službenih aktera postupka prema maloletnicima.

Načelo procesne protektivnosti u odnosu na maloletnika prema kome se vodi postupak je osnovno načelo procedure prema maloletnicima i moglo bi se smatrati da ostala izdvojena načela, na izvestan način proizilaze iz načela procesne protektivnosti. Ona su sa tim osnovnim načelom povezana očiglednim *funkcionalnim vezama*, jer je njihova osnovna funkcija da služe poboljšanju procesnog položaja maloletnika, (da ga dakle, procesno posmatrano – maksimalno zaštite), odnosno u širem smislu, da omoguće potpuno ostvarenje svrhe postupka prema maloletnicima.

Dominantni model krivičnog postupka prema maloletnicima bi se mogao označiti kao „*protektivni*”, budući da se zasniva na pretpostavkama o društvenoj uslovljenosti kriminaliteta mladih i na potrebama za društvenom zaštitom i pomoći, pa se u tom smislu kreću i empirijska istraživanja, koja polaze od doktrinarnih stavova o ciljevima i sadržini kriminalne politike prema maloletnicima, uz nastojanje da se efikasno utvrdi da li i koliko institucionalni sistemi „maloletničkog pravosuđa” i izvršenja krivičnih sankcija, funkcionišu u skladu sa tim pretpostavkama.[188] *Protektivnost* u odnosu na maloletne učinioce krivičnih dela se ogleda u nizu najrazličitijih društvenih sfera: u merama socijalnog staranja i zaštite, psihološko-pedagoškim merama koje se preduzimaju u specijalizovanim ustanovama, a u korpusu zakonodavstva, u okviru propisa materijalnog krivičnog prava,[189] krivičnog procesnog prava, propisa koji se odnose na izvršenje krivičnih sankcija, mera tzv. postpenalne zaštite, kao i u oblasti praktičnog postupanja nadležnih organa krivičnog postupka, što spada u domen specijalizovanih *kriminalističkih znanja*, te u sferu vođenja određene kriminalne politike, itd.

[188] M.Obretković, op. cit., str. 43

[189] Više o trendovima humanizovanja krivično-pravnog položaja i tretmana maloletnih učinilaca krivičnih dela – M. D. A. Freeman, The Rights and Wrongs of Children, London, 1983, str.. 190–196.

5.2. Poseban značaj načela povišenje procesne diskrecije u postupku prema maloletnicima

Načelo povišene procesne diskrecije u postupku prema maloletnicima se ogleda u postojanju striktnih zakonskih pravila, kojima se u tom tipu krivične procedure, načelo javnosti svodi na najmanju moguću (i nužno potrebnu) meru, u cilju potpune zaštite interesa maloletnika, efikasnijeg vođenja postupka, sprečavanja stigmatizacije maloletnog lica, tokom trajanja procedure i posebno radi njegove lakše i uspešnije resocijalizacije, nakon okončanja krivičnog postupka i posle izvršenja krivične sankcije, ukoliko dođe do njenog izricanja. Specifično načelo procesne diskrecije ima *dva osnovna oblika*: 1) isključenje javnosti sa suđenja i 2.) procesna ograničenja u pogledu obaveštavanja javnosti.

Kada se sudi maloletniku, uvek će se isključiti javnost, a veće može dozvoliti da glavnom pretresu prisustvuju lica koja se bave zaštitom i vaspitavanjem maloletnika ili suzbijanjem prestupništva mladih.

U toku glavnog pretresa veće može narediti da se, osim javnog tužioca za maloletnike, branioca i predstavnika organa starateljstva, iz zasedanja udalje sva ili pojedina lica, a za vreme izvođenja pojedinih dokaza ili govora stranaka, veće može narediti da se maloletnik udalji iz zasedanja. Ratio legis ovakvog udaljavanja maloletnika je nastojanje da se maloletnik zaštiti, odnosno da se u određenim situacijama sačuva njegov lični integritet, kao kada bi na primer, bilo reči o njegovom duševnom stanju (kada nije prikladno da maloletnik bude upoznat sa ocenom njegove psihe i tsl.) ili o mikro-socijalnoj sredini maloletnika, kao kada bi na primer, bilo govora o karakteristikama porodice iz koje potiče i tsl.

Bez dozvole suda ne sme se objaviti tok krivičnog postupka prema maloletniku, niti odluka donesena u tom postupku. Može se objaviti samo onaj deo postupka, odnosno samo onaj deo odluke za koji postoji odobrenje, ali u tom se slučaju ne smeju navesti ime maloletnika i drugi podaci na osnovu kojih bi se moglo zaključiti o kom je maloletniku reč.

Nepridržavanje odredaba o tajnosti postupka koji se vodi prema maloletniku predstavlja krivično delo iz člana 337 stav 2 KZ.[190] Za razliku od pravila opšteg krivičnog

[190] O. Perić, Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, Beograd, 2005, str. 187.

postupka, u postupku prema maloletnicima je *javnost uvek isključena sa suđenja*, a smisao ovakvog normativnog rešenja se ogleda u legislativnom nastojanju da se spreči „razglašavanje slučaja”, koje bi moglo da štetno utiče na maloletnika.[191] U sudskoj praksi se ustalilo shvatanje da postoji povreda odredbe krivičnog postupka kojom se zabranjuje javnost suđenja maloletniku, ukoliko se u presudi koja je doneta u opštem krivičnom postupku u pogledu krivičnog dela punoletnog optuženog, *navedu puna imena i prezimena* maloletnih saučesnika, s obzirom da se i na taj način prouzrokuju štetne posledice po maloletnike, što i predstavlja ratio legis zabrane javnog suđenja maloletnicima.[192]

6. Zaštita privatnosti u krivičnom postupku čiji je predmet krivično delo kojim je oštećeno maloletno lice

Krivični postupak, koji može biti kako protiv punoletnog okrivljenog, tako i prema maloletniku (postupak prema maloletnicima), kada se radi o krivičnom delu određene vrste (krivična dela protiv polne slobode, života i tela, nasilje u porodici itd.), kojim je oštećeno maloletno lice, ne predstavlja poseban krivični postupak, već se radi o vrsti *posebnih modifikujućih krivičnoprocesnih odredbi*, kada slično, pravilima koja se odnose na relaciju između opšteg i posebnih krivičnih postupaka, i ovde postoji odnos tih normi i opštih krivičnoprocesnih normi, koji je tipa odnosa između normi koje su *lex specialis* i onih koje su *lex generalis*.

Posebne odredbe koje se odnose na odgovarajuće modifikovanje opštih krivičnoprocesnih pravila, onda kada se u krivičnom postupku pojavljuje oštećeni određenim krivičnom delom, a koji je maloletno lice, nisu sadržane u Zakoniku o krivičnom postupku (iako ZKP sadrži određene specifične odredbe o posebnoj zaštiti svedoka i oštećenih u krivičnom postupku), već u Trećem delu Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnika.[193] Te se odredbe, zavisno od vrste krivičnog dela koje je predmet postupka, mogu primeniti kako u

[191] Đ. Lazin, Posebni i pomoćni krivični postupci, Beograd, 1998., str. 69.

[192] Vrhovni sud Srbije Kž. br. 2857/64, od 28.12.1964 – Prema: Z. Jekić: Krivično procesno pravo, Beograd, 1994, str. 427–428.

[193] Inače, već naslov ovog Zakona u njegovom drugom delu koji se odnosi na položaj maloletnih lica kao oštećenih određenim krivičnim delima, apsolutno nije adekvatan, jer se tu uopšte ne radi o krivičnopravnoj zaštiti maloletnih lica, kojom se inače bavi jedan deo Krivičnog zakona (krivična dela protiv braka i porodice, neki oblici krivičnih dela protiv života i tela itd.), već je u pitanju zaštita maloletnih lica u samom krivičnom postupku u kojem se oni pojavljuju kao oštećeni i svedoci, a u odnosu na neke često uobičajene negativne posledice klasične krivične procedure, koja u mnogim situacijama može dovesti do tzv. sekundarne viktimazacijje žrtve, tj. oštećenog.

opštem, tako i u skraćenom krivičnom postupku, odnosno zavisno od drugih procesnih uslova, u obzir dolazi njihova primena i u drugim tipovima krivičnog postupka.

Posebna pravila postupka čija je osnovna svrha zaštita psihičkog integriteta maloletnih lica kao posebne kategorije oštećenih, primenjuju se onda kada se vodi krivični postupak protiv punoletnih lica za određeno krivično delo kojim je oštećeno maloletno lice.[194] Radi se o krivičnim delima za koja je po pravilu karakteristično da prouzrokuju visok stepen sekundarne viktimizacije,[195] gde spadaju određena krivična dela protiv života i tela (teško ubistvo[196] i teška telesna povreda), krivična dela protiv slobode i prava (otmica), krivična dela protiv polne slobode (silovanje itd.), protiv braka i porodice (nasilje u porodici itd.), kao i niz drugih taksativno nabrojanih krivičnih dela. Zakonodavac ostavlja mogućnost da javni tužilac koji je stekao posebna znanja iz oblasti prava deteta i krivičnopravne zaštite maloletnih lica, pokrene postupak protiv punoletnih okrivljenih za druga krivična dela, u skladu sa odredbama koje omogućavaju posebnu zaštitu maloletnih lica kao oštećenih, onda kada javni tužilac oceni da je to potrebno radi posebne zaštite takvih maloletnih lica.

U pogledu nadležnosti i sastava suda koji vodi postupak protiv punoletnih okrivljenih za krivična dela učinjena na štetu maloletnih lica, shodno se primenjuju odrede Zakonika o krivičnom postupku, ako nisu u suprotnosti sa odredbama Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnika. Inače, krivični postupak protiv okrivljenih za krivična dela kojima su oštećena maloletna lica, a kada se

[194] Pojam „maloletnog lica” je širi od pojma „maloletnika”, tako da obuhvata sva fizička lica koja nisu navršila 18 godina, tj. nisu postala punoletna, a gde u krivičnopravnom smislu, spadaju kako deca (lica koja nisu navršila 14 godina, tako i maloletnici (lica koja imaju 14 godina, a još nemaju 18 godina). Prema članu 112 stav 10 KZ, maloletnim licem se smatra lice koje nije navršilo osamnaest godina.

[195] Uobičajeno se smatra da time što određeno lice postaje žrtva određenog krivičnog dela, nastupa njegova primarna viktimizacija, a da zatim, kako zbog primene određenih redovnih postupaka u krivičnoj proceduri (ispitivanje oštećenog kao svedoka, suočavanje sa okrivljenim itd.), a posebno zbog neadekvatnih procesnih pravila, te grešaka u krivičnom postupku, dolazi do naredne i nove, tzv. sekundarne viktimizacije, koja se svodi na ponovno psihičko doživljavanje kod žrtve već pretrpljenog zla nastalog krivičnim delom.

Naime, svako novo podsećanje na krivično delo učinjeno na štetu žrtve, a naročito kada se to učestalo dešava u krivičnom postupku (posebno u slučaju ponovljenih ispitivanja oštećenih), dovodi i do nove patnje žrtve, koja u takvom slučaju nije ponovo fizički povređena, ali doživljava psihičke povrede, koje ponekad mogu biti i teže od realnih, tj. fizičkih povreda. U nekoj meri je ovo neizbežno, ali je sekundarna viktimizacija u velikom broju slučajeva posledica neadekvatnog postupanja u krivičnom postupku, te nepostojanja adekvatnih procesnih formi za njeno minimiziranje.

[196] I ovde treba imati u vidu da isto lice može istovremeno biti pasivni subjekt krivičnog dela i oštećeni, ali da to ne mora uvek da bude slučaj, a što i opravdava svrstavanje teškog ubistva u grupu ovih krivičnih dela. Do takve će situacije doći samo ako se, ili radi o pokušaju teškog ubistva u odnosu na maloletno lice, ili je u pitanju svršeno teško ubistvo, a maloletno lice je oštećeno s obzirom na svoj srodnički odnos sa pasivnim subjektom ovog krivičnog dela.

primenjuju posebna protektivna pravila u odnosu na oštećene, sprovodi se prema odredbama Zakonika o krivičnom postupku.

Posebna pravila postupka o zaštiti maloletnih lica kao oštećenih u krivičnom postupku mogu se grupisati u nekoliko osnovnih normativnih segmenata: 1) pravilo obavezne specijalizacije svih službenih aktera ovakvih krivičnih postupaka; 2) načelno pravilo minimiziranja sekundarne viktimizacije; 3) primena posebnih pravila saslušanja maloletnih oštećenih; 4) zabrana suočavanja u cilju sprečavanja sekundarne viktimizacije; 5) obavezno pravno zastupanja maloletnog oštećenog; 6) posebna pravila prepoznavanja, te 7) načelna hitnost takvog krivičnog postupka.

U svim fazama ovog postupka primenjuje se *pravilo obavezne specijalizacije*, što znači da se u postupku pojavljuju službeni akteri koji su stekli posebna znanja iz oblasti prava deteta i krivičnopravne zaštite maloletnih lica,[197] što se odnosi na: 1) istražnog sudiju koji sprovodi istragu u ovakvim slučajevima,[198] 2) specijalizovane službenih organa unutrašnjih poslova koji učestvuju u istrazi, 3) predsednika veća koje sudi punoletnim okrivljenim u ovakvim slučajevima, 4) javnog tužioca koji krivično godini punoletne okrivljene za krivična dela učinjena na štetu maloletnih lica, te 5) advokate koji su u funkciji punomoćnika oštećenih maloletnih lica.

Zakonodavac pogrešno određuje da policajci koji postupaju u istrazi krivičnih dela na štetu maloletnih lica moraju biti posebno specijalizovani. Takvo pravilo nema nikakve posebne svrhe jer se u istrazi samo dve dokazne radnje mogu poveriti policiji, a to su pretresanje stana ili lica, odnosno privremeno oduzimanje predmeta, a kada se radi o takvim aktivnostima, pravilo o obaveznoj specijalizaciji je potpuno besmisleno. Obrnuto, ono bi imalo puni smisao kada su u pitanju određene policijske radnje u

[197] Kao i kada se radi o postupku prema maloletnicima i ova specijalizacija je formalne prirode, tako da se o sticanju posebnih znanja u vezi zaštitem maloletnih lica kao oštećenih, stara Pravosudna akademija u saradnji sa resornim ministarstvima i drugim relevantnim subjektima, a o obavljenim proverama znanja i stručnim usavršavanjima Pravosudna akademija izdaje odgovarajuće sertifikate.

[198] Ovaj deo Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica nije usaglašen sa novim Zakonikom o krivičnom postupku, koji je uveo javno-tužilačku istragu, te isključio „istražnog sudiju” iz krivičnog postupka. Po analogiji sa pravilom o specijalizovanosti nekadašnjeg istražnog sudije, koja bi se primenjivala kao metod tumačenja, sve dok se ZM ne usaglasi sa ZKP-om, trebalo bi smatrati da subjekt koji vodi istragu u ovakvim slučajevima, mora biti specijalizovan iz oblasti prava deteta i krivičnopravne zaštite maloletnih lica, što bi se odnosilo na konkretnog javnog tužioca, odnosno njegovog zamenika. Isto kao što nije apsolutno bitna povreda odredaba Zakonika o krivičnom postupku, ako je postupao sud u odgovarajućem funkcionalnom obliku, koji nije bio specijalizovan u skladu sa odredbama ZM-a, ne bi postojala takva povreda, ni ako je istragu u ovakvoj situaciji (u pogledu krivičnog dela određene vrste kojim je oštećeno maloletno lice), vodio javni tužilac, odnosno nosilac javno-tužilačke funkcije, koji nije bio formlano specijalizovan, jer bi suprotno tumačenje, praktično bilo baš na štetu maloletnog oštećenog.

predistražnom postupku, pre svega, prikupljanje obaveštenja od maloletnog lica koje je oštećeno, a što zakonodavac nije striktno regulisao. Kao što je i inače objašnjavano u odnosu na pravilo o obaveznoj specijalizaciji u postupku prema maloletnicima, treba smatrati da bi postupanje određenog službenog aktera krivičnog postupka koji nije bio formalno specijalizovan, predstavljalo samo relativno bitnu povredu odredaba krivičnog postupka. To se ovde, tj. u ovom tipu krivične procedure, odnosi čak i na sud, s obzirom da se s jedne strane, ne može identifikovati nijedna odredba koja bi takvu grešku svrstavala u apsolutno bitne povrede odredaba krivičnog postupka, dok bi s druge strane, suprotan rezon samo otvarao mogućnost za ukidanje sudske odluke zasnovane na takvoj grešci, a što bi bilo direktno na štetu samog maloletnog lica kao oštećenog, što svakako nije bila intencija zakonodavca.
Načelno pravilo o minimiziranju sekundarne viktimizacije svodi se na uvođenje posebne formalne obaveze za službene aktere krivičnog postupka čiji je predmet krivično delo kojim je oštećeno maloletno lice. Kada vode postupak za krivična dela učinjena na štetu maloletnih lica, javni tužilac, istražni sudija i sudije u veću odnosiće se prema oštećenom vodeći računa o njegovom uzrastu, svojstvima ličnosti, obrazovanju i prilikama u kojima živi, posebno nastojeći da se izbegnu moguće štetne posledice postupka na njegovu ličnost i razvoj.

Saslušanje maloletnog lica se posebno reguliše, tako što se: 1) uvodi pravilo o obaveznoj stručnoj asistenciji takvom saslušanju; 2) načelno ograničava broj saslušanja u istom krivičnom postupku; 3) omogućava saslušanje putem audio-video linka; te 4) stvara procesna mogućnost za saslušanje van sudnice.

Saslušanje maloletnog lica obavlja se uz pomoć psihologa, pedagoga ili drugog stručnog lica. Ako se kao svedok saslušava maloletno lice oštećeno krivičnim delom koje spada u kategoriju dela koja zahtevaju primenu posebnih pravila, saslušanje se može sprovesti najviše *dva puta,* a izuzetno i više puta ako je to neophodno radi ostvarenja svrhe krivičnog postupka. Ukoliko se maloletno lice saslušava više od dva puta, sudija je dužan da posebno vodi računa o zaštiti ličnosti i razvoja maloletnog lica. Zakonodavac uvodi mogućnost korišćenja *audio-video linka* prilikom saslušanja oštećenog maloletnog lica. Takav način saslušanja predstavlja *posredno uzimanje iskaza* u faktičkom smislu, jer se svedok saslušava van prostorije u kojoj se odvija suđenje, ali ono nije i formalno odstupanje od načela neposrednosti u njegovom objektivnom smislu, jer i ovaj svedok svoj iskaz daje tokom trajanja suđenja i u realnom vremenu, a svi akteri postupka koji i inače imaju to pravo mogu da mu postavljaju pitanja, odnosno predlažu sudiji da svedok odgovori na određeno pitanje. Ako s obzirom na osobenosti

krivičnog dela i svojstva ličnosti maloletnog lica oceni da je to potrebno, sudija će narediti da se maloletno lice saslušava upotrebom tehničkih sredstava za prenos slike i zvuka, a saslušanje se sprovodi bez prisustva stranaka i drugih učesnika postupka, u prostoriji u kojoj se svedok nalazi, tako da mu stranke i lica koja na to imaju pravo, pitanja postavljaju posredstvom sudije, psihologa, pedagoga, socijalnog radnika ili drugog stručnog lica. Maloletna lica, kao svedoci i oštećeni, mogu se saslušavati u svom stanu ili u drugoj prostoriji, odnosno ovlašćenoj ustanovi-organizaciji, koja je stručno osposobljena za ispitivanje maloletnih lica, a prilikom saslušanja ovakvog svedoka i oštećenog, može se narediti i korišćenje audio-video linka. Ukoliko je maloletno lice saslušavano van sudnice, na glavnom pretresu se uvek čita zapisnik koji sadrži njegov iskaz, odnosno pušta se snimak saslušanja.

Zakonodavac načelno isključuje *suočenje* između oštećenog maloletnog lica, koje spada u kategoriju posebno osetljivih lica i okrivljenog. Ratio legis ove odredbe temelji se na činjenici da je suočenje po definiciji vrlo tenziona procesna radnja, čija suština i jeste u izazivanju odgovarajućeg „konflikta” između dva davaoca suprotnih iskaza, da bi se na temelju toga ili jedan od davaoca iskaza nagnao da odstupi od lažnog iskaza ili da bi se tako, omogućilo sudiji da bolje stekne sopstvenu neposrednu impresiju o dokaznom kredibilitetu i uopšte o verodostojnosti pojedinih međusobno suprostavljenih iskaza. S druge strane, u praksi suočenje vrlo retko dovodi do odstupanja u odnosu na već dati iskaz, tj. ono se ne smatra efikasnom radnjom. Stoga, suočenje, kao radnju koja je istovremeno izuzetno tenziona i načelno je konfliktnog karaktera, a nije dovoljno efikasna u praksi, po pravilu ne treba ni sprovoditi u postupku za krivična dela kojima je oštećeno maloletno lice, a ono je formalno i zabranjeno kada je maloletno lice u posebno teškom stanju, tj. spada u kategoriju tzv. posebno ranjivih lica. Ako se kao svedok saslušava maloletno lice koje je usled prirode krivičnog dela, posledica ili drugih okolnosti, posebno osetljivo, odnosno nalazi se u posebno teškom duševnom stanju, zabranjeno je vršiti suočenje između njega i okrivljenog.

Maloletno lice kao oštećeni mora imati *punomoćnika* od prvog saslušanja okrivljenog. U slučaju da maloletno lice nema punomoćnika, njega će rešenjem iz reda advokata koji su stekli posebna znanja iz oblasti prava deteta i krivičnopravne zaštite maloletnih lica, postaviti predsednik suda, a troškovi takvog zastupanja padaju na teret budžetskih sredstava suda. Iako to u Zakonu nije striktno naglašeno, radi se samo o krivičnim postupcima u kojima se i inače primenjuju posebna pravila zaštite maloletnih oštećenih. Nije sasvim jasno da li maloletno lice mora imati punomoćnika od trenutka kada započinje prvo saslušanje okrivljenog, ili od trenutka kada je ono već završeno. Iako to

procesno nije sasvim logično, a nije ni sasvim u skladu sa duhom našeg jezika, jer izraz „od” po pravilu upućuje na momenat završetka neke radnje, a ne tek na njen početak, odnosno započinjanje radnje, zakonodavac je verovatno smatrao da maloletno lice mora imati punomoćnika već od početka prvog saslušanja okrivljenog, bez obzira što oštećeni, kao ni njegov punomoćnik, inače nemaju pravo prisustvovanja tom prvom saslušanju. Ovo proizlazi iz opšte intencije zakonodavca da u najranijim fazama krivičnog postupka, omogući što povoljniji položaj ovog kategoriji oštećenih. S druge strane, iako je u ovom slučaju kvalifikovano zastupanje maloletnih lica kao oštećenih striktna zakonska obaveza, zakonodavac nije uspostavio posebne procesne mehanizme za sankcionisanje propuštanja da se maloletnom oštećenom postavi punomoćnik koji je specijalizovan. Naime, tu bi se radilo samo o relativno bitnoj povredi odredaba krivičnog postupka, koja u osnovi po pravilu, ne bi bila od značaja, jer bi eventualno ukidanje sudske odluke zbog takve povrede, po logici stvari, skoro uvek bilo na štetu samog oštećenog, koji bi se morao ponovo pojaviti u krivičnom postupku, a što bi bilo direktno suprotno intenciji zakonodavca da minimizira sekundarnu viktimizaciju i oštećenog što je moguće više poštedi od ponovljenih saslušavanja.

Kada maloletno lice vrši *prepoznavanje okrivljenog*, sud će postupati posebno obazrivo, a takvo prepoznavanje će se u svim fazama postupka vršiti na način koji u potpunosti onemogućava da okrivljeni vidi maloletno lice. Krivični postupak čiji je predmet krivično delo učinjeno na štetu maloletnog lica je *hitan*.

7. Zaključak

Ljudska intima je dragocena, ali se u krivičnom postupku ona ponekad i teško povređuje. O velikom značaju privatnosti govore ne samo brojni primeri koji su pravnog karaktera, već i mnogi primeri iz umetnosti, nauke, a posebno psihologije, pa i neki iz književnosti

Dostojevski u jednom svom delu kaže da postoje tri vrste stvari: jedne su one koje čovek govori svojim prijateljima, druge su one koje drži samo za sebe, ne govori ih ni prijateljima, a postoje i one za koje se boji da ih otkrije i samom sebi. Privatnost se ne može naravno, tako široko shvatiti sa stanovišta klasične krivičnopravne zaštite ljudske intime, poput krivičnih dela kojima se štiti tajna, ali ni sa aspekta krivičnog postupku, koji nažalost, nekada podrazumeva i razotkrivanje čovekove intime, ali je i tada potrebno naći pravu meru.

Jedan od klasičnih razloga za isključenje javnosti je zaštita interesa maloletnih lica, kao i zaštita privatnosti uopšte, Nažalost, neke greške u krivičnom postupku nepopravljive. Takve greške često mogu najteže da pogode baš maloletna lica, iako se ona inače, načelno posebno štite u pravnom sistemu uopšte, pa i naravno, u krivičnopravnom sistemu, kako sa stanovišta krivičnog materijalnog prava, tako i sa stanovišta krivičnog procesnog prava.

To je slučaj i sa povredom načela javnosti u određenoj situaciji. Naime, to načelo je povređeno i tada je to jedna od apsolutno bitnih povreda odredaba krivičnog postupka, onda kada sud vodi glavni pretres nejavno, a nije bilo razloga da se javnost isključi. Tada se presuda proistekla iz takvog postupka ukida rešenjem žalbenog suda i novi se glavni pretres vodi javno. To je greška koja se može popraviti. Obrnuto je nepopravljivo, Ako je sud vodio glavni pretres javno, a trebalo je javnost isključiti, to se više ne može ispraviti, slično kao što se objašnjava odnos prve vesti i njenog demantija. Prva vest je kada se džak perja prospe sa petog sprata, a demanti te vesti je kada se to perje na zemlji skuplja i vraća u džak…

Naime, jedna od *apsolutno bitnih povreda odredaba krivičnog postupka* jeste povreda koja se odnosi na povredu *načela javnosti*, ali samo ako se radi o *jednom smeru povrede* – ako je protivno Zakoniku bila isključena javnost na glavnom pretresu.

Povreda u *drugom suprotnom smeru,* praktično i nije relevantna, što znači da obrnuto, ako bi se radilo o slučaju da javnost nije bila isključena, a trebalo je da bude isključena (što je stvar, faktičke procene), ne bi bila u pitanju apsolutno bitna povreda odredaba krivičnog postupka, a samo bi se u retkim situacijama, ovde radilo o relativno bitnoj povredi odredaba krivičnog postupka. Ovo suštinski proizlazi iz prirode takve povrede, koja se više ne može popraviti.

Naime, ako je glavni pretres vođen uz prisustvo javnosti, a javnost je trebalo isključiti (na primer, radi čuvanja tajne, potrebe zaštite interesa maloletnika itd.), nije moguće ili bi bilo apsurdno, da se zbog toga ukida presuda, te da se potom ponovi vodi glavni pretres, ali sada bez javnosti. Kako je javnost u ovakvom slučaju već bila prisutna, to se ne može nikakvom formalnom odlukom anulirati, jer je u takvom slučaju, onaj interes radi čije je zaštite trebalo isključiti javnost i inače povređen (na primer, tajna je saznata, određeni interes maloletnika povređen i tsl.), odnosno doveden u pitanje i njega jednostavno nije moguće „revitalizovati” ponovnim vođenjem glavnog pretresa, ali sada, bez javnosti.

Posebno je značajna zaštita privatnosti određenih ranjivih kategorija, a naročito, je velika važnost kvalitetne i dosledne zaštite privatnosti dece i maloletnih lica uopšte, jer *dete je „otac čoveka“*.

Od deteta nastaje čovek, a ako je dete žrtva nekog teškog krivičnog dela, a naročito krivičnog dela koje je nasilničkog karaktera, pa još ako nepotrebno bude dodatno povređen u krivičnom postupku, njemu se bitno smanjuju šanse da postane uspešan čovek. U romanu „Braća Karamazovi“, Dostojevski zaključuje da „ni najveća sreća čovečanstva nije vredna jedne suze nevinog deteta“. Dete žrtva zločina nosi teške ožiljke kroz ceo život, a naročito kada je žrtva seksualnog nasilja i posebno kada je učinilac bliska osoba. Toj deci treba pomoći, što je moguće kako kvalitetnim zakonodavstvom, tako i boljom praksom postupanja sa žrtvama u krivičnom postupku.

Međutim, kada se dete koje je bilo žrtva nekog teškog krivičnog dela, a naročito, krivičnog dela sa elementima nasilja i posebno kada se radi o deliktu za koji je karakterističan visok stepen *sekundarne viktimizacije,* još dodatno izloži medijskoj „poplavi“, pa i „bujici“ koja je nekada, što je užasno, čak i svojevrsne „fekalne prirode“ i kada lice takvog deteta, a naročito rane i ožiljci, kao i uopšte neposredni ili posredni podaci o njegovom identitetu, počnu da pune naslovne strane, onda je ono nažalost, teško žigosano i njegova budućnost postaje krajne neizvesna.

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Prof. Milan Škulić, PhD*

THE PRINCIPLE OF PUBLICITY AND THE PROTECTION OF PRIVACY IN CRIMINAL PROCEEDINGS

Abstract: *The paper discusses about the basic constitutional and criminal procedural aspects of the public's principle. The author concludes that in criminal procedure, often problem is an effective protection of privacy. Human intimacy is valuable, but in the criminal procedure sometimes it could be badly hurt. Some examples of art speak of the great importance of privacy, so Dostoevsky says that there are three types of things: the ones that a man speaks to his friends, others are the ones he keeps for himself, he does not tell them not even to his friends, and there are those for which he is afraid to reveal them to himself. Unfortunately, the criminal procedure sometimes involves revealing human intimacy, but even then it is necessary to find the right measure.*

The paper emphasizes that one of the classic reasons for excluding the public is the protection of the interests of minors, with the conclusion that, unfortunately, some mistakes in the criminal procedure are irreparable. This is also the case with the violation of the principle of publicity in a particular situation. Namely, this principle is violated and then it is one of the absolutely substantive violations of the provisions of criminal procedure, when the court leads the main hearing inaudibly, and there was no reason to exclude the public. Then the judgment which came out of such a procedure is abolished by the decision of the appellate court and the re-trial is public. This is a mistake that can be repaired. Reversal is irreparable. If the court conducted the main trial publicly, and the public should have been excluded, it can no longer be corrected, much like explaining the relationship of the first news and its denial. The first news is when a sack of feathers sprays from the fifth floor, and the denial of that news is when the feathers on the ground are collected and returned to the sack.

The author concludes that the protection of the privacy of certain vulnerable categories, especially children and juvenile in general, is particularly important because the child is "the father of a man". A man will become from the child, and if a child is a victim of a serious criminal offense, and in particular a criminal offense that is violent, and even more if it is unnecessarily further injured in a criminal proceeding, the chances of becoming a successful man are considerably reduced. In the novel "The brothers Karamazov", Dostoevsky concludes that "even the greatest happiness of humanity is not worth one tear of an innocent child". A child victim of a crime carries severe scars throughout his life, especially when it is a victim of sexual violence and especially when a perpetrator is a close person. These children should be assisted as much as possible by quality legislation, as well as better practice of treatment with victims in criminal proceedings. However, when such a child is exposed to a media flood, which is

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sometimes, which is terrible, even a kind of "fecal nature" and when his face, and especially wounds and scars start to fill the cover pages, then it is hardly stigmatized and his future becomes extreme uncertain.

***Keywords**: The principle of publicity, privacy, criminal proceedings, criminal procedural law, children, juvenile.*

Ivana Stevanović, PhD*

THE RIGHT TO PRIVACY OF THE CHILD AND MEDIA IN THE REPUBLIC OF SERBIA
In the context of the protection of children labour abuse and exploitation

Abstract: *In this paper the author based on analysis of the media institutional and normative framework in the Republic of Serbia relevant for the protection of children from child labour abuse and exploitation in the context of the right to privacy of the child, having in mind the quantitative and qualitative analysis of media reports: "Media reporting on child labour in the Republic of Serbia". The interest of the child to be protected, including the right to privacy, is above all other interests and takes precedence over the public interest to receive information that includes personally identifiable information about a child and his/her family, which could damage his/her dignity and psychological integrity. In order to recognise the phenomenon, as well as to improve practices in reporting about it, it is necessary to educate editors and journalists in such a way as to fully respect the parameters of professional journalism and not threaten the dignity and integrity of the child*

Keywords: *child, right to privacy, media, research*

Introduction

Protection of children from child labour should be done within a unified system of protection from abuse, neglect and exploitation of children in the Republic of Serbia (Stevanović, I., Vujović, R., 2011: 164-173). Abuses by the media are also prohibited in the framework and according to the rules contained in media legislation and codes of ethics. It is the duty of the media to inform the general public fully, accurately and in a timely manner. However, the interest of the child to be protected, including the right to privacy, is above all other interests and takes precedence over the public interest to receive information that includes personally identifiable information about a child and his/her family, which could damage his/her dignity and psychological integrity (Vujić,

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N., 2017: 379-391). This is especially pressing because the documents pertaining to this matter are not mutually harmonised, which further complicates their implementation in practice. For instance, the Code of Journalists of Serbia defines the professional and ethical standards of journalists. In accordance with the code, the media are bound to put the public interest for full, timely and truthful information above all other interests. However, the Law on Public Information and Media determines that the interest of a minor that his/her privacy be protected outweighs the public interest to have the information.

In this paper the focus is also to presenting some relevant data of the study: "Media reporting on child labour in the Republic of Serbia."[199] Selection of the reports was made on the basis of the available articles and texts archived by the Kliping agency. In the analysed period, the mentioned agency's archive contained 703,438 articles from the print media, 223,408 from Internet portals and 146,996 television reports. The main intention of this study is to determine how and to what extent the Serbian media report on child labour abuse, taking into account the importance of the role of media in shaping public opinion on children and the occurrence of child labour, as well as the impact of such public opinion on attitudes, decisions and procedures undertaken with regard to children.

Definition of Child Work and Child Labour Abuse and Exploitation

Child work may present an abuse and exploitation of a child, but not always and in all situations. Age, state of health of the child, the type of work, the circumstances under which it takes place, and difficulties in or disruption of education will determine whether it is permissible/useful child work or a case of child labour.

There is a distinction between *child labour* and *child work*, where *child labour* means work that is harmful to the health, mental and physical development of the child – unsuitable to the interest, age and developmental needs of the child – whereas *child work* is used for the so-called permittable work of a child in the right conditions. The Serbian language does not make a terminological distinction between the terms child work and child labour in this way. For this reason, at the very beginning of the study it

[199]The study which was conducted by searching inside the period from 1 October 2015 to 30 September 2016. Funding for this study was provided by the United States Department of Labour (Country Level Engagement and Assistance to Reduce Child Labour [CLEAR] Project) and International Labour Organization (ILO).

is necessary to clarify why the precise expression is important when it comes to this phenomenon.

When a child helps his/her parents with housework, takes part in the family business or earns pocket money in his/her spare time or during the holidays, and at the same time all these tasks are appropriate to his/her age and mental-physical abilities, provision of safety equipment, and the nature of the task, then we cannot talk about this as an instance of child labour. On the contrary, the timely and occasional involvement of children in the performance of certain tasks can contribute to their development, teach them skills and give them experience important for the future (Vorkapic, 2002: str. 3). Also, this kind of work affects the adoption of positive values including knowledge of the relations between effort and realised benefits.

When the engagement of children (*child work*) takes place in accordance with the best interests of the child and within the law, it is not considered to be a case of child labour. In almost all countries in the world, it is considered that a child may be employed at 14, 15 or 16 years of age. This age usually coincides with the completion of primary education or some form of professional training of the child, which is also recommended by international law. In countries where there is appropriate consideration of the rights of the child, for ages 15–18 there are even special employment restrictions or prohibitions stipulated in relation to night work, work with hazardous chemicals, etc. However, problems arise where children at a very early age work under extremely difficult conditions, with minimal or no compensation, because this is when child labour occurs.

The term child labour refers to work that, by its nature and the circumstances in which it is carried out, harms the well-being of the child, abuses and exploits children and prevents or hinders their education, development and future life. This work can be paid or unpaid, may take place on the market or outside it, and can be in the form of regular or occasional jobs. Child labour corresponds to work that is mentally, physically, socially and morally dangerous and harmful to the child and that affects the child’s education by:

- hindering the child from attending school,
- forcing the child to drop out of school prematurely, or
- obliging the child to attend school under extremely difficult conditions.

The International Labour Organisation (ILO) uses the term “child labour”, but also the terms “working children” and “economically active children”. When the ILO uses the term “child labour”, it refers to the abuse of child work. This work can be paid or unpaid, may take place in the market or outside it, and can be in the form of regular or occasional jobs.

According to the ILO Convention on the Worst Forms of Child Labour No. 182 (1999),[200] the term “the worst forms of child labour” comprises:

a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

It is important to note that this international document applies to all persons under the age of 18. Of special note is paragraph (d), indicating that hazardous child labour is work in dangerous and harmful conditions that may result in a child’s death or injury, or illness (often permanent) as a consequence of poor safety and health standards and business arrangements.

An ILO Member State has an obligation to determine what form of work that is, according to its national laws or regulations or by its competent authority, after consultation with the organisations of interested employers and workers, taking into account relevant international standards, in particular ILO Recommendation No. 190 (1999) concerning the prohibition and immediate action for the elimination of the worst forms of child labour. After consultation with the organisations of interested employers and workers, the competent authority identifies the existence of such types of jobs. The

[200] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO

list oof defined jobs is periodically examined and revised as necessary, in consultation with organisations of interested employers and workers.

The aforementioned ILO Recommendation No. 190 concerning the prohibition and immediate action for the elimination of the worst forms of child labour provides that in determining the types of work referred to in Article 3 (d) of Convention No. 182, and in identifying cases of their existence, it is necessary, inter alia, to consider: (a) work which exposes children to physical, psychological or sexual abuse; (b) work underground, under water, at dangerous heights or in confined spaces; (c) work with dangerous machinery, equipment and tools, or work which involves the manual handling or transport of heavy loads; (d) work in an unhealthy environment in which children can be, for example, exposed to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health; and (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

“For the forms of work referred to in Article 3 (d) of the Convention No. 182 and specified circumstances to be taken into account when determining the worst forms of labour – national laws or regulations or the competent national authorities could, after consultation with the interested organisations of workers and employers, give permission for employment or work from the age of 16 on condition that the health, safety and morals of the children concerned [be] fully protected and that the children [acquire] the corresponding actual experience or [complete] vocational training in the relevant branch of activity” (Jovanovic, 2016: 41).

The normative framework in Serbia does not recognise a uniform definition of child labour (Stevanović, 2017: 213). The worst forms of child labour are incriminated by specific offences contained in the Criminal Code, such as: neglect and abuse of minors, solicitation of prostitution, display of pornographic material and exploitation of minors for pornography, exploitation of computer networks or other means of communication to commit offences against the sexual freedom of a juvenile, trafficking in human beings, etc. The latest amendments to criminal legislation for the first time contain a clear definition of the concept of abuse of children in pornography (child pornography). In addition to the determination that a child who has attained 15 years of age may be given employment only with the consent of parents, adoptive parents or a guardian – and only if such work does not endanger his/her health and moral and educational development, or if such work is not prohibited by law – the Labour Law stipulates that

such an employee cannot perform particularly jobs. Under particularly difficult jobs the Labour Law includes those that would, based on the findings of the competent health authority, have increased and detrimental risk of affecting a child's health and life, taking into account his/her mental and physical abilities.

The role of the media, the right to privacy of the child and child labour abuse

The primary role of the media is placing media content through video, photos, audio and text that transmit the editorial design of information, ideas and opinions, as well as other content intended for public dissemination to an unspecified number of users. This information should be placed in such a way that applies the rules of the journalistic profession with full respect for the rights of citizens to be informed accurately, fully and in a timely manner about matters of public concern. The development of new media has largely changed the traditional unidirectional placement of information. The traditional media (TV, radio and print) have experienced radical changes: they have introduced online editions, and also developed a two-way communication with their audience through social networks. On the other hand, citizens have not only become an active factor of public communication, but social networks have also made it possible for every individual to become a "medium" (expressing personal views on social networks, blogging, creating photo and video content and publishing on Instagram, YouTube, etc). Communication has become much faster, but its control has been significantly disabled.

Bearing in mind the interest of the child, the key question regarding the role of the media is their impact on public opinion, namely, those who make decisions about children – parents, adults who directly deal with children, decision-makers and institutions. The formulation and realisation of the state policy towards children is usually carried out in consultation with experts. However, priority setting and the way children and even the phenomenon of child labour are put on a state's social and political agenda depend on public opinion, which is largely formed under the influence of the media. Therefore, the importance of the role of the media in forming public opinion and their influence on setting social priorities, including on the issue of child labour, is extremely large. "In relation to that, Dale Kunkel and Stacy Smith emphasise: 'The way one state conceptualises childhood, how it perceives or stereotypes the behaviour of young people, how it treats its children – in terms of laws that should protect them and the policies that should favour them – depend on how children are seen by its citizens. All this is certainly influenced by the knowledge that people have

about children, and one of the main sources of such information is the media.' (Korać & Vranjećević, 2001: 77-87)".

Knowledge about children in general is the main prerequisite for prevention of any occurrence of child labour (Stevanović, I., 2017: 210). In addition to standard education programmes aimed at professionals and parents, the media are the ones who not only have the possibility but also a great responsibility to work on this very important task – not only within educational programmes and content, but also through systematic shaping of public opinion on children that is mostly carried out through programmes and content that reach the widest public. This applies primarily, but not exclusively, to informative, cultural and educational content. Thus, the education of journalists and editorial personnel (who make the selection of topics, as well as their placement) becomes even more important. In the first place, the basis of their training should be made of elementary knowledge about the development, needs and rights of children as well as the skills necessary for journalism related to, for instance, economy, sports and culture. Comprehensive knowledge is a necessity in order to provide an adequate journalistic approach to the coverage of anything child-related.

Overview of International and National Institutional and Normative framework for the Media Relevant to Protection of Children from Child Labour Abuse

The international framework relevant to the issues of preventing and protecting children from abuse and exploitation of child labour is encouraging, which enables states, the EU and international institutions and organizations to deal seriously with this issue by creating directions for future national measures.

In the Republic of Serbia ratified international treaties are implemented directly, and by their legal force laws on ratified international agreements are positioned immediately after the Constitution. However, the direct implementation of international treaties is in practice challenged due to both objective and subjective limitations. Therefore, in order to realise child rights, it is essential to ensure the implementation of ratified international treaties, as well as to comply legal texts with the ratified treaties.

The national normative and strategic framework of the Republic of Serbia is largely in line with international standards, but there is room for improvement and further harmonization. Hence, it is necessary to work on the creation, promotion and

implementation of the normative framework that will ensure a comprehensive institutional and systemic prevention of, and protection of children from child labour, especially the worst forms of child labour.

Selected International Instruments

The largest number of international documents regulating issues related to child labour was adopted within the ILO, founded in 1919, owing to which states have accepted a large number of conventions and recommendations governing the right to work. Analysis of the ILO conventions that are significant for the domain of child rights show that attention is primarily focused on the protection of children from exploitation in work.

International Labour Organisation Convention No. 5 Fixing the Minimum Age for Admission of Children to Industrial Employment[201] *and International Labour Organisation Convention No. 138 concerning Minimum Age for Admission to Employment*[202]

Throughout its existence, the ILO has at all times sought to establish a minimum age for admission to employment, as well as basic criteria for defining and regulating child labour. The first international agreement of this kind was enacted in 1919 with Convention No. 5 Fixing the Minimum Age for Admission of Children to Industrial Employment. This convention prohibits labour for children under the age of 14 in industrial plants. Conventions whose adoption follows this one represent an attempt to ban child labour, namely, the establishment of clear lines distinguishing acceptable and unacceptable forms of child labour. Convention No. 138 concerning Minimum Age for Admission to Employment (1973) is to date the highest standard in this area. This convention covers all areas of labour, paid or unpaid, and has very ambitious goals related to child labour in certain industries. While Convention No. 138 does not establish a minimum age for employment, it defines a policy that is aimed at the eradication of child labour and raising the age limit for admission to employment.

[201] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312150:NO

[202] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312283:NO

International Labour Organisation Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour [203]

In June 1996, at the regular meeting of the ILO, the governments of the organisation's Member States agreed to start the process of adopting a new convention that would particularly pertain to child labour. The suggestion was that the new convention put the focus on those types of child labour that can no longer be tolerated, in order to prohibit forms of child labour that are the most harmful and dangerous, and that involve the highest level of exploitation. In June 1999, the aforementioned Convention No. 182 was adopted (together with Recommendation No. 190)[204] relating to the prohibition and immediate action in order to eliminate the worst forms of child labour. This international document applies to all persons under the age of 18 and obliges States Parties to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour. In addition to the definition of the worst forms of child labour, this document stipulates that countries prohibit any work of children that, by its nature and the circumstances under which it is performed, is likely to harm their health, safety and morals.

In addition to the conventions adopted under the auspices of the ILO, there are other international documents that regulate issues related to child labour. For the purposes of this study we highlight the most authoritative international document in the field of child rights, which guarantees, among other things, the protection of children from exploitation and child labour.

UN Convention on the Rights of the Child

By ratifying the Convention on the Rights of the Child (CRC), the States Parties have, inter alia, committed to the protection of every child from exploitation and from performing any work that is likely to be harmful to the life and health of the child, and that endangers and/or violates their physical, emotional and sexual integrity. By ratifying the CRC, our country has made a commitment to undertake measures to prevent child labour exploitation. The CRC obliges States Parties, in accordance with

[203] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO

[204] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312528:NO

the applicable international regulations in the field of labour, to determine the minimum age for employment, regulate working hours and working conditions, and provide for appropriate sanctions for non-compliance with these provisions. A specific article of the CRC prohibits the exploitation of child labour in terms of the obligation of the state to "recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development" (Article 32 of the CRC). In order to achieve this right, States Parties are required to take all legal, administrative, social and educational measures, and in particular to:

- provide for a minimum age or minimum ages for admission to employment;
- provide for appropriate regulation of the hours and conditions of employment; as well as
- provide for appropriate penalties or other sanctions to ensure the effective implementation of the right of the child to be protected from economic exploitation.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography requires States Parties to, inter alia, undertake measures to ensure appropriate training, particularly legal and psychological, for the persons who work with victims of illegal activities prohibited under this protocol, and adopt measures to protect the safety and integrity of persons and/or organisations involved in the prevention and/or protection and rehabilitation of victims of such offenses.

On 19 December 2011, the UN General Assembly adopted the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. A communications procedure allows an individual, group of individuals or their representatives, who claim to be victims of a violation of rights committed by the State Party to the CRC to submit a complaint to the Committee on the Rights of the Child, under the condition that the State Party has accepted the procedure, and that the complainants have exhausted all viable domestic legal remedies (Stevanović, I. 2014: 13-29).

Relevant Legislative Framework for the Operation of Media

The media and their work is defined by a series of relevant laws, but codes of ethics and practice, as well as adopted documents of the REM, have a very important role in the regulation of labour. This normative framework is important for the media and their role in informing the public and shaping public opinion in order to protect children from child labour.

Law on Public Information and Media

This law regulates the manner of exercising the freedom of public information, which specifically includes the freedom to collect, publish and receive information; freedom to form and express ideas and opinions; freedom to print and distribute newspapers and freedom of production, delivery and publishing of audio and audio-visual media services; freedom of expansion of information and ideas over the Internet and other platforms; as well as freedom of publication of media and performing activities of public informing. This law also regulates the principles of public informing and public interest in public information. In addition, the law regulates the special rights and obligations of public informing, information about a person, the means and methods of legal protection, supervision over implementation of the law, as well as penal provisions. Thus, the Law on Public Information and Media foresees mandatory consent for publication relating to private life and writings, without special provisions for minors, which is an omission.

The law stipulates that a minor cannot be made recognisable in information that may violate their rights or interests. Disclosure of information from private life is conditioned by the consent of the person. In the case of minors it is the parents' consent, but also the consent of minors of a certain age. This age limit is not defined by law, so it can be understood as the age of 16 since a child of 16 years of age can consent to the publication of information about their deceased parents, and consequently for themselves, unless the publication would be contrary to the best interests of the child.

As an exception, when the information about private life may be published without the consent of the person, the Law envisages a situation where the public interest for the publication outweighs the interest of a person the information is about. This is the standard that we have to consider in the context of rules from other relevant laws in

order to understand its range. First, we return to the Code of Criminal Procedure,[205] which as a rule provides that main hearings be public (the interest of the public to have the information outweighs the respect of the right to privacy of the person in the process). However, this rule does not apply when the proceeding includes a minor as an injured party or the offender because the law provides for the possibility of excluding the public in order to protect minors.

The Law on Civil Procedure[206] bases this procedure on the principle of the public. The public may be excluded only when it is required by law. One of the reasons given for this option is to protect the privacy and interests of minors. Furthermore, the Family Law[207] completely excludes the public in disputes relating to family legal relations, which include the procedure for the protection of child rights. So, the laws in general stipulate that *the interest of the minor that his/her privacy be protected outweighs the public interest in having the information*.

All laws governing the provision of services to minors in domains of health, social issues and education clearly and unambiguously protect the child's right to privacy and determine the age limit whereby this right is protected, even with regard to the right of parents to obtain information about the child.

The conclusion that can be drawn unambiguously is that the limits of the public's right to be informed are bounded by law and the interests of minors that information about them not reach the public. The legal system gives *absolute priority* to the rights and interests of minors, thus in the legal system of the Republic of Serbia the right of minors to protection of privacy is a stronger right than the public's right to be informed.

Law on Electronic Media[208]

This law regulates the conditions and manner of audio and audiovisual media services, conditions and procedures for issuing licenses for the provision of audio and audiovisual media services, and other issues relevant to the field of electronic media. This law defines the organisation and operation of the REM, in charge of, inter alia, determining the detailed rules for the protection of minors (Art. 22, paragraph 1, item 15).

[205] Code of Criminal Procedure, *Official Gazette of the Republic of Serbia* No. 71/2011, 55/2014

[206] Law on Civil Procedure, *Official Gazette of the Republic of Serbia* No. 72/2011, 55/2014

[207] Family Law, *Official Gazette of the Republic of Serbia*, No. 18/2005, 72/2011, and other law 6/2015

[208] http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2014/2512-14Lat.pdf

Rules on the protection of the rights of minors in the field of provision of media services[209]

This regulation was adopted by the REM and principally governs the protection of minors from information that may be harmful to them. The rules also govern issues "in connection with the participation of minors in the programme and the publication of information that is directly or indirectly related to minors" (Art. 1). Article 3 of the rules obliges the media service provider to act in the best interests of minors in the participation of minors in the content and publication of information on the minor or his/her family. Article 20 of the rules defines children's programmes (ages up to 12 years) and programmes aimed at minors (ages 12 to 18).

Law on Public Media Services[210]

This law regulates the operation of two public media institutions: Radio-Television of Serbia and Radio-Television of Vojvodina, including their activities and the principles that underpin the performance of activities, the public interest they serve, the publicity of their work, the method of selection of bodies and authority, the drafting of laws, as well as provision of tools for their work and methods of their financing. The importance of this law lies in the fact that it regulates the work of public media institutions that are of great importance for creating public opinion on the issue of the protection of child rights, including the protection of children from child labour.

Code of Journalists of Serbia [211]

The code defines the ethical and professional standards of journalists. In accordance with the code, the media are bound to put the public interest for full, timely and truthful information above all other interests. However, the *Law on Public Information and Media determines that the interest of the minor that his/her privacy be protected*

[209] http://rem.rs/uploads/files/Pravilnici/6075-Pravilnik%20o%20zastiti%20maloletnika%20u%20oblasti%20pruzanja%20medijskih%20usluga%20za%20sajt.pdf

[210] http://www.parlament.gov.rs/upload/archive/files/cir/pdf/zakoni/2014/2513-14.pdf

[211] http://www.savetzastampu.rs/cirilica/kodeks-novinara-srbije

The Code is a joint document of the two journalists' associations. The Code of Journalists of Serbia was adopted in 2006 by the Independent Association of Journalists of Serbia and the Association of Journalists of Serbia. In 2013 the journalist associations amended the code with provisions on the prevention of corruption and conflict of interest.

outweighs the public interest in having the information. Therefore, at this point it is important to underline this again.

The code contains special provisions relating to the protection of the rights and dignity of children. A journalist is forbidden to use inappropriate, disturbing, pornographic and other content that can have a harmful impact on children. According to the code, minors, as a rule, may be interviewed only in the presence of or with the consent of parents or guardians. The journalist is obliged to ensure that the child is not endangered or at risk due to the publication of his/her name or photograph or recording with his/her image, the house or the community in which he/she lives, or recognisable surroundings.

The code also lays out guidelines that closely define the work of journalists in accordance with the code. The guidelines suggest that representatives of state and public institutions dealing with the protection of children are sometimes unaware of the impact of the media and their way of working. Thus, the information they provide to journalists often involves revealing the identity of minors. A journalist, however, must not abuse their benevolence or ignorance. Information provided by physicians, social workers, educators, etc., that directly or indirectly indicates the identity of the minor should not be published. All decisions on whether the Code of Journalists of Serbia has been violated are delivered by the Appeals Committee of the Press Council. If the Appeals Committee decides that there has been a violation of the journalistic code, the media outlet that published the content in question must publish the committee's decision.

The code lists examples from the practice of the Appeals Committee of the Press Council.

Shortly after a minor E.B. was killed in Becej, his parents had shared with a mass circulation daily newspaper a picture of the dead boy with a visible hematoma on his face. Their wish was to deny the thesis that their child died in an accident, but to prove that he died of being beaten. The photo was published on the front page, to which the Child Rights Centre appealed. The Appeals Committee decided that in this case multiple points of Article IV of the Code of Journalists of Serbia had been violated: in addition to publication of inappropriate content that can have a harmful impact on children, it is a question of why was there no protection of "the rights and dignity of children, victims of crime, persons with disabilities and other vulnerable groups". Most members of the committee considered that the publication of such photos could not be justified by the public interest or the desire of the editorial board to prove that the young man was murdered and that the authorities were not doing their job. In their view, there was no need for such a dramatic act, especially because the photo is not accompanied by any serious analysis of events.

This case well illustrates the provisions of the code concerning the attitude towards sources of information – in this case, to the family of the deceased young man. Article VI states that a journalist must not abuse the emotions of other people or their ignorance – in particular, he/she has to bear in mind that the sources are not always aware of the power of the media and the consequences that their statements (or actions) may have for them personally, as well as other people. "Intentional abuse is incompatible with the profession of journalism, as well as negligence that can potentially result in abuse of interviewees", according to the Guidelines' Article V.

Guidelines for the implementation of the Code of Journalists of Serbia in the online environment[212]

Although the Code of Journalists of Serbia is equally applicable to all media, regardless of the way they are released, it was necessary to give a proper interpretation and guidance for the successful and correct application of professional standards in the online environment. This gave rise to the passing of these guidelines, which are primarily intended for journalists and media available online, but are also applicable to other forms of expression on the Internet, where the editorial media content is present on different platforms. The aim is to clarify a number of concerns relating to the implementation of standards that require journalistic attention, the attitude towards sources of information, the way the media content is transmitted, respect for privacy, respect of authorship and other important matters governed by the code. The document is divided into chapters that follow the structure of the Code of Journalists of Serbia. It applies to media and communication channels over which the Press Council in accordance with its statute has jurisdiction, and also to other entities dealing with journalism in the broadest sense, and which are willing to accept the jurisdiction of the Press Council.

General Protocol on Protection of Children from Abuse and Neglect[213]

The general protocol was adopted in 2005 by the Government of the Republic of Serbia. This document should contribute to the establishment of an effective coordinated procedure for the protection of children from abuse and neglect, and which should

[212] http://www.savetzastampu.rs/smernice-za-primenu-kodeksa-novinara-srbije-u-onlajn-okruzenju.html

[213] http://www.pravadeteta.com/attachments/653_286_OPSTI%20PROTOKOL.pdf

provide adequate intervention, recovery and conditions for further safe development of the child. Following the adoption of the general protocol, relevant ministries adopted specific protocols for social care institutions (2006), the police (2006, as amended in 2012), the educational system (2007), the healthcare system (2009) and the judiciary (2009).

Institutional framework

Steering Committee on the Rights of the Child

On 14 July 2016 the National Assembly of the Republic of Serbia established the Steering Committee on the Rights of the Child of the National Assembly of the Republic of Serbia as its special standing working body. The Steering Committee on the Rights of the Child considers draft laws from the aspect of protection of child rights; it monitors the implementation and enforcement of laws and regulations governing the status and protection of child rights; it verifies the harmonization of national legislation with international standards related to child rights; it cooperates with national and international institutions and bodies, and local authorities; it initiates amendments to the regulations and proposes the adoption of certain acts and measures to protect the rights of the child; it promotes the rights of the child; and it considers other issues of importance to child rights.

The Council for Child Rights of the Government of the Republic of Serbia

The Council for Child Rights of the Government of the Republic of Serbia, in its new configuration, was constituted on 20 December 2016. This advisory body has existed since 2002, but it has not been operational in its full mandate. It was formed with the aim of initiating measures for the harmonization of government policies in areas relating to children (health, education, culture, social affairs), initiating measures to build a comprehensive and coherent policy towards children, and proposing policy for the realisation of the rights of the child in accordance with the Convention on the Rights of Child, as well as monitoring the realisation and protection of child rights in the country.

The Ministry of Culture and Information of the Republic of Serbia

The Ministry of Culture and Information of the Republic of Serbia, as a state administration body, was established by the Law on Ministries,[214] and its scope of work was defined by Article 15 of this Law. The ministry, among other things, carries out public administration tasks related to: the system of public information; monitoring the implementation of laws in the field of public information; monitoring the work of public enterprises and institutions in the field of public information; monitoring the activities of foreign information institutions, the media, and correspondent bureaus in the Republic of Serbia; informing national minorities; registration of foreign information institutions and assisting in the work of foreign journalists and correspondents; cooperation in the field of cultural heritage protection, cultural creativity and information in the languages and alphabet of the Serbian people in the region; the establishment and development of cultural and information centres abroad; and other activities specified by law. One of the sectors within the ministry is the Department of Information. Tasks performed within this sector include: preparation and implementation of strategic acts in the field of public information; analysis of the situation and suggesting measures for improvements in the field of public information; preparation of draft laws and regulations in the field of public information; overseeing the implementation of the laws governing the field of public information; monitoring, proposing and implementing measures of the media and audiovisual policy; providing expert opinions on draft laws and regulations in whole or in part related to public information; preparing draft laws to be adopted by the government; dealing with complaints as an appellate body in resolving administrative matters; digitalization of electronic media; normative regulation of new media; monitoring, proposing and implementing measures to protect the public interest in the field of information; providing conditions for the realisation and promotion of the right to information of persons belonging to national minorities; providing conditions for the realisation and promotion of the right to information of specific categories of persons; and preparation of reports on the implementation of the conventions of the United Nations and the Council of Europe on the situation of human rights in the Republic of Serbia within the jurisdiction of the department.

[214] Official Gazette of the Republic of Serbia, No. 72/12 and 76/13.

The Regulatory Authority of Electronic Media

The Regulatory Authority of Electronic Media (REM) is an autonomous independent regulatory organisation with the status of a legal person exercising public authority aiming at: effective implementation of the established policy in the field of providing media services in the Republic of Serbia; improving the quality and diversity of electronic media services; and contribution to the preservation, protection and development of freedom of opinion and expression, in order to protect the public interest in the field of electronic media and the protection of users of electronic media, in accordance with the provisions of the Law on Electronic Media and in a manner befitting a democratic society. The REM is functionally and financially independent of state bodies and organisations, media service providers and operators. For carrying out activities within its jurisdiction the REM is responsible to the National Assembly, and for performing professional or administrative tasks professional REM services are formed, whose basic rules of organisation and operation are regulated by the statute of this organisation. The authorities of the REM are the Council and the President of the Council. It has nine members elected by the National Assembly of the Republic of Serbia from the ranks of distinguished experts from areas of importance to carry out the activities under the REM's responsibilities.

Self-regulatory bodies, professional and business organisations and associations

a) Press Council

In the Republic of Serbia, the only operating self-regulatory body is the Press Council. The Press Council is an independent self-regulatory body that brings together publishers, owners of print media and professional journalists. It was founded in early 2010 in accordance with the Law on Associations,[215] in order to monitor compliance with the Code of Journalists of Serbia in the media and solve complaints from individuals and institutions related to media content. The jurisdiction of the council also includes mediation between the harmed individuals or institutions, as well as the issuing of public warnings for violation of ethical standards established by the Code of Ethics of Journalists of Serbia. The council focuses on education for acting in compliance with the Code of Journalists and strengthening the role of the media in Serbia. Each individual, organisation or institution that is directly affected by the published content

[215] Official Gazette of the Republic of Serbia, No. 51/09.

can file a complaint to the council. The complaint may be filed on someone's behalf, but the written consent of that person must be provided. An appeal on behalf of a child may be filed by a legal representative of the child or a third party with the written consent of the legal representative. Complaints against television and radio programmes are not the responsibility of the council, but of the REM.

All decisions on whether the Code of Journalists of Serbia has been violated are delivered by the Complaints Commission (consisting of representatives of the media industry, professional associations of journalists and representatives of the public). If the Appeals Committee decides that there has been a violation of the journalistic code, the media that published the content in question must publish the committee's decision. Joining the membership of the council is on a voluntary basis.
Such self-regulatory bodies do not exist in the field of electronic media.

b) Professional and business organisations and associations

In the Republic of Serbia, several professional associations of journalists are established and operating, mostly financed by their own funds (membership fees) and donations. The main function of these associations is to promote free and independent journalism and pluralism, as well as to improve professional and ethical standards in journalism and the media in general, protect the rights and interests of journalists, protect the public from media abuse and promote ethically responsible journalism. Also, one of the important roles of these associations is their positive impact on all the important issues in the field of public information, as well as on the process of determining the strategic policy of the state in the field of development of a public information system, as well as the adoption of regulations in this area.

Analysis of Media Content in Print, Broadcast and Online Media in Serbia
- Related to Child Labour -

Media reporting on child labour in the Republic of Serbia - The analysis sample consisted of 111 reports from 27 print media outlets, 108 posts on 54 Internet portals and 17 broadcasts on nine television stations. The analysis was conducted by searching within the period from 1 October 2015 to 30 September 2016. Selection of the reports was made on the basis of the available articles and texts archived at the Kliping media monitoring agency in Belgrade. In the analysed period, the agency's archive contained 703,438 articles from the print media, 223,408 from Internet portals and 146,996

television reports. For the purpose of making a relevant sample, 120 keywords related to the phenomenon of child labour in the Republic of Serbia were searched.

- In the selected sample, a total of 236 posts were recorded about child labour. Of the total number of archived articles at the Kliping agency (1,073,842), 0.02% are devoted to child labour.
- By media type, the most media texts were recorded in the press (111), three fewer were recorded on Internet portals (108), and television broadcasts had the fewest contributions (17).
- The largest number of articles were published in the daily newspaper *Blic*. As for the frequency of publishing, articles published in daily editions prevailed (96), followed by weeklies (13), biweeklies (one) and monthly magazines (one). The Internet portal of the daily newspaper *Blic* published the largest number of articles (11), and the television station *Kopernikus* and the public service television *RTS* recorded four broadcasts each. Among television stations with national coverage, the largest number of reports were recorded on *RTS1* (four), followed by *TV Pink* (three), *B92* (one), *Happy* (one) and *Prva* (one). Out of 111 analysed articles about child labour in print media, 18 were published on the front page.
- One third of total releases have no identified authors (87), followed by the posts of the news agency Tanjug (17). In third place are texts with signed authors, where the newspaper *Blic* takes the lead.
- The number of media reports per individual media outlet shows that in the top ten there are seven daily newspapers or their portals. The exception is the site of the public service *RTS*, with seven published articles on child labour.
- In relation to child labour, in the analysed period more than 65% of media reports cover current events. e.g. arrests of persons who in some way abused minors; events organised by ministries, NGOs and international organisations on the occasion of Universal Children’s Day or World Day Against Child Labour; the publication of a report of an independent control body, such as the Ombudsperson, etc.
- The largest number of titles are informative – 149 (63%), while 70 (30%) are sensationalistic and 17 (7%) are offensive.
- Media releases on child labour do not include a variety of information sources. Thus 48 media posts (18%) originate from the police, 11 posts (5%) cite a centre for social work as a source of information on child labour, and

50% of posts cite information from other institutions, organisations and individuals. A significant number of posts (63, or 27%) report information from other unnamed sources.

- The analysis showed that, most often, the gender of child labourers is not specified in the media, i.e. in 50% of the coverage. In second place are releases identifying children of the male gender (27%), while in 23% of the releases, girls are mentioned in the context of exploitation of child labour. Instead of specifying the child's gender, the media generally use the terms "minors" or "kids/little ones", or mention their initials, which hinders their gender identification.
- Regarding the visibility of family status, in 69% of the releases the media do not clearly specify the family status of the child labourer. In 31% of the posts the child's family status is visible. The largest number of releases in which the family status is visible shows that the child lives in the biological family (50% of releases); this is followed by children living on the street (19%); children living in an institution (10%); other (8%); child refugees, asylum seekers and migrants; children in the process of readmission (6%); and children without parents (5%) or in a foster family (2%).
- When reporting on child labour, 87% of media releases do not indicate the child's nationality/ethnicity. A total of 13% of the releases do indicate the nationality. Out of the total number of releases indicating the ethnicity of the child, 35 of them (85%) note that the child was Roma.
- Comparison of the age of minors whose work is abused in some form shows that in 63% of the releases the persons' age is unknown. Next come school children from 14 to 18 years of age (23%), school children from 7 to 14 (10%), and preschool children up to 7 years of age (4%).

Conclusions

When the media write about this phenomenon, the dominant tone of reporting is sensationalistic and with a desire to ignite compassion in the general public, rather than critically examine the phenomenon. This is corroborated by the finding that almost half of all published articles are accompanied by a photograph of the child (sometimes specific, but usually not). Likewise, the fact that 30% of the headlines of the total number of analysed releases are sensationalistic, and 7% abusive, points to this trend. Also, the analysis showed that almost half of all published articles are accompanied by a photograph of a child (sometimes specific, but usually not), which clearly indicates the

use of the character of the child as a means of attracting public attention. In order to recognise the phenomenon, as well as to improve practices in reporting about it, it is necessary to educate editors and journalists in such a way as to fully respect the parameters of professional journalism and not threaten the dignity and integrity of the child.

Based on the research results, we can conclude that the media do not sufficiently take into account the protection of the best interest, privacy, reputation and personal dignity of each child who is a victim of child labour abuse and exploitation. We can safely conclude that there would be a significant impact on public opinion if the media were more active in overcoming the populist manner of reporting and assumed a more significant educational function in the process of identifying and familiarising the public with the phenomenon of child labour abuse. In their manner of reporting the media should point to and contribute to launching issues of systematic prevention and improvement of protection. Because its importance, role and power are of paramount significance for the creation of public opinion, the media further .

In order to create future strategic documents relevant both for the realisation of child rights and protection from violence and those that define state policy in relation to the media (Petrović, M., Stevanović, I, Golić-Ružić, M., Anđelković, M., 2015: 57-71) as well as acts of self-regulation of the media, it is necessary to incorporate issues of importance for the protection of children from abuse and responsibilities of the media to report in such a way that takes into account the best interests of the child and the right (for instance, the above questions should be identified in the new National Plan of Action for Children, the Strategy for Preventing and Protecting Children from Violence, the Strategy for the Development of the Public Information System in the Republic of Serbia, the Code of Journalists of Serbia, etc.).

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Dr Ivana Stevanović*

PRAVO DETETA NA PRIVATNOST I MEDIJI U REPUBLICI SRBIJI
- U kontekstu zaštite dece od prinudnog rada i eksploatacije -

Apstrakt: *Autorka ovaj rad zasniva na analizi medija, institucionalnog i normativnog okvira u Republici Srbiji relevantnosg za zaštitu dece od prinudnog dečjeg rada i eksploatacije u kontekstu prava deteta na privatnost, imajući na umu kvantitativnu i kvalitativnu analizu medijskih napisa pod nazivom 'Medijsko izveštavanje o dečjem radu u Republici Srbiji'. Interes deteta da bude zaštićeno, uključujući i pravo na privatnost, je iznad svih drugih interesa i pretpostavljen je javnom interesu za informisanjem koji obuhvata lične informacije na osnovu kojih se dete i/ili njegova porodica može identifikovati, koje mogu narušiti njegovo dostojanstvo i psihološki integritet. U nastojanju da se ova pojava prepozna, kao i da bi se unapredila praksa izveštavanja o njoj, potrebno je edukovati urednike i novinare o tome kako da izveštavaju na takav način da u potpunosti poštuju načela novinarske profesije, bez ugrožavanja dostojanstva i integriteta deteta.*

Ključne reči: *dete, pravo na privatnost, mediji, istraživanje*

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POSEBNE ISTRAŽNE RADNJE I PRAVO NA PRIVATNOST

Apstrakt: *Rasprave o posebnim istražnim radnjama i u slučajevima njihove primjene mogućim kršenjima osnovnih ljudskih prava i sloboda su stare koliko i same posebne istražne radnje. Po njihovim zagovornicima, a posmatrajući ove radnje isključivo iz ugla postignutih rezultata prilikom otkrivanja i dokazivanja najtežih krivičnih djela, naročito organizovanog kriminaliteta, ove radnje su sasvim opravdale očekivanja. S druge strane, čini se da je dosta neistraženo polje njihovog djelovanja zasnovano na najvišim domaćim i međunarodnim dokumentima a tiče se zaštite prava na privatnost i poštovanja porodičnog života, posebno kada je praktični aspekt, odnosno konkretno, primjena određene posebne istražne radnje u pitanju, te odgovor na važno pitanje: mogu li ove radnje, ovakve kakve su danas, izdržati kontrolu i kritiku savremenika?*
U svakom slučaju, ni krivičnoprocesno zakonodavstvo u Bosni i Hercegovini nije odoljelo njihovoj širokoj primjeni, ali, po automatizmu, ni pitanjima i problemima koja se pri tom otvaraju. Ono što je karakteristično kada ih posmatramo u nekom njihovom razvojnom putu u Bosni i Hercegovini, a koji traje skoro 20 godina, čini se da se povećava broj posebnih ili prikrivenih oblika istraživanja, dok se, s druge strane, veoma često, opet pod izgovorom borbe protiv najtežih oblika kriminaliteta, posebno, primjera radi, terorizma, značajno liberalizuju uslovi za njihovu primjenu.

Ključne riječi: *posebne istražne radnje, krivični postupak, ljudska prava i slobode; pravo na privatnost.*

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1. Pojam, vrste i razlozi primjene posebnih istražnih radnji

Posebne istražne radnje predstavljaju novinu koja je u sadašnjem kapacitetu tek 2003. godine uvedena u sva četiri zakona o krivičnom postupku u Bosni i Hercegovini[216], i to odredbama koje su još uvijek u toj prvobitnoj formi manje-više na snazi. U nekim ranijim vremenima bile su fragmentarno uređene (u zakonima o krivičnom postupku Federacije BiH od 1998. godine[217], odnosno Brčko distrikta od 2000. godine), i to samo pojedine od njih. S druge strane, ne treba zaboraviti, prije donošenja navedenih zakonskih krivično-procesnih normi kojima se definišu ove radnje, ova problematika bila je regulisana određenim podzakonskim aktima kao što je to bila "Obavezna instrukcija o korištenju određenih sredstava i metoda u operativnom radu službe javne bezbjednosti". No, regulisanje ovako kompleksne materije podzakonskim aktima, a ne zakonom, često je rezultiralo kršenjem osnovnih ljudskih prava i sloboda pojedinaca iz dokumenata koje je država dužna da poštuje i ima obavezu njihove primjene.

Posebne istražne radnje (po mnogim autorima, to su tzv. specijalne istražne tehnike ili prikrivene istražne mjere) predstavljaju posebne metode koje se zasnivaju ne samo na korištenju određenih tehnika, već i u praktičnoj primjeni posebnih sredstava, radnji i mjera, što onda opet ove metode sadržajno čini specijalizovanim, dajući im posebnu operativnu dimenziju. Radi se svakako o posebnim radnjama dokazivanja izdvojenim iz standardnih ili klasičnih radnji dokazivanja, odnosno standardnih načina prikupljanja dokaza (Kržalić, 2016: 4)[218]. Posebne istražne radnje predstavljaju i istražnu djelatnost do koje se dolazi (*ultima ratio)* u slučaju istraživanja teških krivičnih djela kada na neki drugi način nije moguće pribaviti dokaze ili bi to predstavljalo nesrazmjernu teškoću.

[216] Četiri su zakona o krivičnom postupku u Bosni i Hercegovini, dva entitetska, Brčko distrikta i Bosne i Hercegovine.

[217] Prvi put u Zakonu o krivičnom postupku Federacije BiH iz 1998. godine, posebne istražne radnje se taksativno navode, a za određivanje posebnih istražnih radnji traženo je postojanje "osnovane sumnje".

[218] Važno je istaći da, kada se govori o posebnim istražnim radnjama koje se primjenjuju u krivičnom postupku od strane policijskih organa, iste treba razlikovati od sličnih mjera koje se primjenjuju zbog zaštite državnih interesa i bezbjednosti, tj. mjera koje sprovodi Obavještajno-bezbjednosna agencija Bosne i Hercegovine. U tom smislu, Zakon o Obavještajno-bezbjednosnoj agenciji Bosne i Hercegovine (OBA BiH), u glavi VII koja nosi naziv Prikupljanje informacija, sadrži odredbe koje se odnose na način na koji OBA Bosne i Hercegovine u sklopu opštih ovlaštenja prikuplja informacije (npr. mjerama fizičkog praćenja na javnim mjestima, mjerama praćenja na mjestima koja nemaju javni karakter). "OBA Bosne i Hercegovine preduzima mjere tajnog prikupljanja informacija za koje je potrebno odobrenje generalnog direktora (kada se to smatra neophodnim u cilju ispunjavanja dužnosti Agencije) i mjere tajnog prikupljanja za koje je potrebno sudsko ovlaštenje)". Zakon o Državnoj agenciji za istrage i zaštitu i Zakon o policijskim službenicima Bosne i Hercegovine ne predviđaju ovakve mjere, odnosno ono što oni preduzimaju je u okviru Zakona o krivičnom postupku Bosne i Hercegovine.

I sva četiri zakona o krivičnom postupku u Bosni i Hercegovini predviđaju posebne istražne radnje, i to kao specifične mjere kojima se za potrebe suzbijanja složenih oblika kriminaliteta privremeno ograničavaju osnovna prava i slobode čovjeka.

Koje su to radnje i čemu one služe? U čemu se ogleda njihova opravdanost, bez obzira na izraženu mogućnost njihove zloupotrebe što opet dovodi do kršenja ljudskih prava i sloboda pojedinca, odnosno građanina?

Istražne radnje iz odredbe stava 1 člana 235 Zakona o krivičnom postupku Republike Srpske (potpuno su identične ove radnje predviđene i u ostala tri zakona o krivičnom postupku, jedina je razlika u jezičkom pogledu) jesu:

a) nadzor i tehničko snimanje telekomunikacija,
b) pristup kompjuterskim sistemima i kompjutersko sravnjenje podataka,
c) nadzor i tehničko snimanje prostorija,
d) tajno praćenje i tehničko snimanje lica, transportnih sredstava i predmeta koji su u vezi sa njima,
e) korištenje prikrivenih istražilaca i korištenje informatora,
f) simulovani i kontrolisani otkup predmeta i simulovano davanje potkupnine i
g) nadzirani prevoz i isporuka predmeta.

Za najveći broj obrađivača ove teme, najmanje četiri razloga se mogu navesti u prilog njihovom uvođenju u domaći pravni sistem.

Prvo, nije sporno da svaka država koja važi za iole savremenu, demokratsku, državu zasnovanu na vladavini prava, ukoliko želi osnažiti borbu protiv društvenog zla kakav je organizovani kriminalitet (uz terorizam, kao jedan od najsloženijih oblika kriminaliteta; organizovani kriminalitet se odnosi, prije svega, na: krijumčarenje droga, trgovinu ljudskim bićima, prostituciju, krijumčarenje oružja i municije, krijumčarenje ostale vrijedne robe, ilegalno unošenje radioaktivnog otpada i ostalih opasnih materija u Bosnu i Hercegovinu, odnosno njene entitete, koruptivna krivična djela, falsifikovanje novca, pranje novca, reket i dr.) mora na normativnom planu predvidjeti i urediti i posebne istražne radnje koje bi se koristile u strategiji borbe protiv ovog društvenog zla.

Drugo, država “posmatrana u svojoj pravnoj misiji, odnosno kao kolektivitet ili oblik organizovanja društva koji ima obavezu zaštite pojedinca od drugog pojedinca” je dužna (dakle, ona ima obavezu) posebno sa stanovišta najviših domaćih, ali i

međunarodnih pravnih dokumenata, boriti se protiv danas rastućeg organizovanog kriminaliteta koji ugrožava bezbjednost građana, s jedne strane, ali i cijelo demokratsko uređenje, odnosno samu državu i njen pravni i ekonomski sistem, s druge strane.

Treće, na uvođenje prikrivenih istražnih radnji obavezuju i brojni međunarodni dokumenti, npr., Konvencija Ujedinjenih nacija o suzbijanju finansiranja terorizma iz 1999. godine, Konvencija Ujedinjenih nacija protiv nezakonitog prometa opojnih droga i psihotropnih supstanci iz 1988. godine, Konvencija Ujedinjenih nacija protiv transnacionalnog organizovanog kriminala iz 2000. godine, Konvencija Ujedninjenih nacija protiv korupcije iz 2005. godine, te više različitih dokumenata Savjeta Evrope, kao što su, npr., Konvencija o pranju, traženju, zaplijeni i konfiskaciji prihoda stečenih kriminalom iz 1990. godine, Konvencija Savjeta Evrope o pranju, traženju, zaplijeni i oduzimanju prihoda stečenih kriminalom i o finansiranju terorizma iz 2005. godine (Varšavska konvencija), Evropska konvencija o zabrani terorizma iz 1977. godine, Evropska konvencija o sprečavanju terorizma iz 2005. godine, Krivično-pravna konvencija Savjeta Evrope protiv korupcije iz 1999. godine, Konvencija o formiranju Službe Evropske policije (Konvencija EUROPOL) iz 1995. godine, Preporuka Evropske unije R (96) 8 o suzbijanju organizovanog kriminaliteta iz 1996. godine, Plan akcije za borbu protiv organizovanog kriminaliteta iz 1997. godine, Napuljska politička deklaracija i globalni akcioni plan u borbi protiv organizovanog transnacionalnog kriminaliteta iz 1994. godine, i sl.

I, konačno, četvrto, opšteprihvaćeno je mišljenje pravne teorije, ali i prakse da upravo specifičnosti savremenog organizovanog kriminaliteta zahtijevaju uvođenje posebnih istražnih mjera i radnji u otkrivanju i dokazivanju najtežih krivičnih djela organizovanog kriminala (s druge strane, poseban cilj preduzimanja posebnih istražnih radnji jeste i da se otkriju organizatori kriminalnih aktivnosti koji su veoma često i u samoj državnoj vlasti i zahvaljujući ovoj činjenici imaju značajnu političku, pa i svaku drugu moć, zbog čega je i navedena krivična djela teško otkrivati) (Barašin, Hasanspahić, 2008: 175-180).

Na kraju ovih razmatranja, može se konstatovati da se primjenom posebnih istražnih radnji nesumnjivo povećava efikasnost agencija za sprovođenje zakona u suprotstavljanju najtežim oblicima kriminaliteta, s jedne strane, dok se, s druge strane, više ili manje privremeno ograničavaju ustavna prava i slobode lica prema kojima se primjenjuju navedene mjere i radnje. Nadalje, treba imati u vidu da je striktno poštovanje međunarodno prihvaćenih standarda, uz precizno regulisanje pravnih

procedura primjene posebnih istražnih radnji, važan preduslov i za njihovo uspješno korištenje. Uz navedeno, neophodno je svakako i postojanje srazmjere između težine konkretnog krivičnog djela koje se istražuje i ljudskog prava, odnosno slobode koja se ograničava primjenom posebnih istražnih tehnika.

Uslovi za primjenu posebnih istražnih radnji

Danas, za najveći broj pravnih teoretičara, ali i praktičara u svijetu, ali i na našim prostorima, primjenom prikrivenih metoda istraživanja ozbiljno je dovedena u pitanje zaštita ljudskih prava i osnovnih sloboda u postupku otkrivanja i dokazivanja krivičnih djela (svjedoci smo i čestih zloupotreba u njihovoj primjeni što opet rezultira odgovarajućim sudskim postupcima). No, u svakom slučaju, radi se o dopuštenim, na zakonu zasnovanim zahvatima u zaštićena osnovna prava i slobode čovjeka, koji opet podrazumijevaju ispunjenje određenih uslova s tim da su ujedno i garancija protiv njihovog samovoljnog korištenja. Na ovom mjestu, a prema trenutno važećem krivično-procesnom zakonodavstvu u Bosni i Hercegovini prezentovaćemo najvažnije uslove za primjenu ovih radnji.

Prvo, taksativno navedene posebne istražne radnje mogu se primijeniti isključivo prema osumnjičenom za kojeg postoje *osnovi sumnje*[219] da je on sam kao individua izvršio krivično djelo iz zakonom izdvojene grupe krivičnih djela ili da on učestvuje u izvršenju takvog krivičnog djela, kao i protiv osumnjičenog za kojeg postoje *osnovi sumnje* da je zajedno sa drugim licima učestvovao, odnosno da učestvuje u izvršenju naprijed navedenih krivičnih djela. Dakle, ovdje se nameće zaključak da osnovi sumnje moraju da se odnose na konkretno, odnosno tačno određeno lice (kao pretpostavljenog učinioca određenog krivičnog djela), i to prije određivanja konkretnih posebnih istražnih radnji (stoga, osnovi sumnje treba da predstavljaju rezultat već preduzetih provjera određenih činjenica o osumnjičenom sprovedenih od strane organa istrage) (Sijerčić-Čolić, 2009: 687-700).

[219] “Osnovana sumnja” predstavlja viši stepen vjerovatnoće da je neko lice izvršilo krivično djelo, odnosno stepen vjerovatnoće koji je dovoljan za sprovođenje istrage. Prema Zakonu o krivičnom postupku Republike Srpske, “osnovana sumnja” jeste veći stepen sumnje zasnovan na prikupljenim dokazima koji upućuju na zaključak da je izvršeno krivično djelo. Prema Zakonu o krivičnom postupku Republike Srbije, “osnov sumnje” jeste skup činjenica koje posredno ukazuju da je učinjeno krivično djelo ili da je određeno lice učinilac krivičnog djela, dok je “osnovana sumnja” skup činjenica koje neposredno ukazuju da je određeno lice učinilac krivičnog djela. Osnovana sumnja (za razliku od osnova sumnje, koji su potrebni za donošenje naredbe o sprovođenju istrage) predstavlja viši stepen sumnje i zasnovana je na prikupljenim dokazima koji upućuju na zaključak da je krivično djelo učinjeno.

Drugi uslov za određivanje posebnih istražnih radnji tiče se nemogućnosti pribavljanja dokaza na drugi način (analogno prednjem, ukoliko bi se dokazi u konkretnom slučaju mogli pribaviti na neki drugi način, odnosno klasičnim radnjama dokazivanja, nema ni primjene ovih radnji), odnosno ove radnje se primjenjuju u onim slučajevima kada je pribavljanje odgovarajućih dokaza skopčano sa nesrazmjernim teškoćama koje bi uticale na produženje istrage ili na njeno duže trajanje. Prema slovu zakona, ove radnje se mogu primijeniti samo:

1. ako se na drugi način ne mogu pribaviti dokazi; ili,
2. ako bi pribavljanje dokaza bilo skopčano s nesrazmjernim teškoćama.

Treće, nadzor i tehničko snimanje telekomunikacija kao posebna istražna radnja može se odrediti prema licu za koje postoje osnovi sumnje da učiniocu krivičnog djela, odnosno od učinioca naprijed navedenog krivičnog djela prenosi informacije u vezi sa krivičnim djelom, odnosno da učinilac krivičnog djela koristi njegovo sredstvo telekomunikacije. Ovdje je u pitanju nadziranje i tehničko snimanje lica koje nije izvršilo krivično djelo, te stoga, zakonski uslovi da se u telekomunikacijskom smislu nadzire to lice moraju biti kumulativno postavljeni i odnose se na osnove sumnje da to lice prenosi informacije prema učiniocu krivičnog djela, odnosno od učinioca krivičnog djela, s tim da se mora raditi isključivo o informacijama vezanim za konkretno krivično djelo. Drugi razlog za prisluškivanje i nadziranje trećeg lica postoji u onim situacijama kada učinilac krivičnog djela koristi sredstvo komunikacije (primjera radi, mobilni telefon) tog trećeg lica.

Četvrti uslov je izuzetno važan za ostvarenje prava na odbranu osumnjičenog lica: istražni organi ne mogu primijeniti posebne istražne radnje na razgovore, odnosno komunikaciju između osumnjičenog i njegovog branioca.

Peti uslov odnosi se na određenost krivičnih djela za koja se mogu odrediti posebne istražne radnje isključivo zakonom. Naime, Zakon o krivičnom postupku Republike Srpske taksativno propisuje za koja krivična djela se mogu odrediti posebne istražne radnje, i to su:

a) krivična djela protiv Republike Srpske (odnosno protiv integriteta Bosne i Hercegovine),
b) krivična djela protiv čovječnosti i vrijednosti zaštićenih međunarodnim pravom,
c) krivična djela terorizma i

d) krivična djela za koja se prema krivičnom zakonu može izreći kazna zatvora od najmanje tri godine ili teža kazna.

Koliko god primjena posebnih istražnih radnji bila nedvojbena za prve tri grupe krivičnih djela, velike rasprave se vode oko ove četvrte, jer, sa ovakvim određivanjem domen posebnih istražnih radnji nije ograničen samo na krivična djela organizovanog kriminaliteta, nego su one primjenljive i na druga krivična djela koja u sebi čak i ne nose značajnije povećanu društvenu opasnost po bezbjednost građana. Prema dostupnim podacima, za preko 70% krivičnih djela iz posebnog dijela Krivičnog zakonika Republike Srpske[220] moguće je primijeniti posebne istražne radnje (ovaj procenat se penje na čak 80% krivičnih djela iz posebnog dijela Krivičnog zakona Bosne i Hercegovine). Na ovaj način i značajnim proširivanjem domena primjene ovih radnji, gubi se onaj najvažniji razlog ili motiv zakonodavca prilikom njihovog uvođenja, a to je “borba protiv najtežih oblika organizovanog kriminaliteta”. Nakon prvobitnog zakonskog određenja sasvim je jasno da se primjena posebnih istražnih radnji ne bi smjela dalje širiti i na druga krivična djela, osim pobrojanih, pri čemu bi zakonodavac zasigurno morao imati u vidu svu osjetljivost i složenost praktične primjene ovih radnji, posebno u odnosu na eventualne povrede i ograničenja osnovnih prava i sloboda građana. Dakle, radi se o najtežim oblicima krivičnih djela, poput terorizma ili tzv. međunarodnih krivičnih djela.

Šesto, posebne istražne radnje mogu se preduzeti isključivo i samo na osnovu odgovarajuće odluke suda (pisane ili usmene naredbe sudije za prethodni postupak; pravilo je pisana forma sa propisanom sadržinom, dok je usmena naredba izuzetak), kojoj prethodi inicijativa nadležnog organa (inicijativa za određivanje posebnih istražnih radnji dolazi od tužioca koji sudiji za prethodni postupak podnosi u pisanoj formi sačinjeni i obrazloženi prijedlog za njihovo određivanje). Dakle, isključivo sudija za prethodni postupak (Mitrović, Pavlović, 2016: 133-149) donosi naredbu o primjeni određene, ili određenih radnji (naredba suda sadrži, uz sve ono što sadrži prijedlog tužioca, i naznaku kome se građani mogu žaliti ukoliko smatraju da su njihova prava i slobode narušena primjenom posebnih istražnih radnji[221]), sa jasnom naznakom načina njenog (njihovog) izvršenja i vremena preduzimanja koju dostavlja na izvršenje policijskom organu (u nekim zemljama, ova nadležnost je prenesena na tužilaštvo ili

[220] Službeni glasnik Republike Srpske, broj 64/2017.

[221] Pored organa unutrašnje kontrole ili jedinica za profesionalne standarde ministarstava unutrašnjih poslova, građani je omogućeno da se žale i parlamentarnim odborima za žalbe građana, Ombudsmenu za ljudska prava Bosne i Hercegovine i višim sudskim instancama, sve do Ustavnog suda Bosne i Hercegovine i Evropskog suda za ljudska prava.

čak policijske organe). U slučaju njegovog neslaganja sa prijedlogom tužioca (prijedlog tužioca sadrži: podatke o licu, grupi ili organizaciji protiv koje se radnja preduzima, osnove sumnje za navedena lica, grupu ili organizaciju, odnosno uslovi i razlozi za primjenu radnje, naziv posebne istražne radnje i obim i vrijeme trajanja posebne istražne radnje) neće ni doći do određivanja posebne istražne radnje.

Izuzetno (problemi nastaju onog časa kada izuzetak postane pravilo), sudija za prethodni postupak može naredbu dati i usmeno u sljedeće dvije situacije: 1) ako se njegova pismena naredba ne može dobiti na vrijeme i 2) ako postoji opasnost od odgađanja. Osim toga, policijski organi moraju pisanu sudsku naredbu pribaviti u roku od 24 časa od izdavanja sudske usmene naredbe, ukoliko žele nastaviti sa preduzimanjem posebne(ih) istražne radnje.

Sedmi uslov tiče se vremenskog okvira posebnih istražnih radnji što sa praktičnog aspekta njihove upotrebe ima itekako veliku važnost. Jer, podrazumijeva se da najveći broj ovih radnji ne bi smio trajati unedogled, dakle, njihova primjena mora biti vremenski ograničena. Prema zakonu, ove radnje mogu trajati:

a) najduže do mjesec dana, a iz posebno važnih razloga mogu se, na obrazloženi prijedlog tužioca, produžiti za još mjesec dana, s tim da:
b) najduže do šest mjeseci mogu trajati mjere:
   - nadzor i tehničko snimanje telekomunikacija (prisluškivanje),
   - pristup kompjuterskim sistemima i kompjutersko sravnjenje podataka i
   - nadzor i tehničko snimanje prostorija (ozvučenje),
c) najduže do tri mjeseca mjere:
   - tajno praćenje i tehničko snimanje lica, transportnih sredstava i predmeta koji su u vezi sa njima
   - nadzirani prevoz i isporuka predmeta.
d) simulovani i kontrolisani otkup i simulovano davanje potkupnine (naredba se daje jednokratno i za svaki novi slučaj obnavlja),
e) vremenski okvir za mjeru korištenja prikrivenog istražitelja i informatora nije propisan iz razloga što vremensko ograničenje trajanja ove radnje može biti ozbiljna prepreka njenoj uspješnoj primjeni.

Ukoliko dođe do neslaganja tužioca i sudije za prethodni postupak u pogledu produženja roka trajanja mjere, odluka sudije za prethodni postupak je konačna. Sudija za prethodni postupak mora, po službenoj dužnosti, pismenom naredbom i bez

odlaganja obustaviti izvršenje preduzetih posebnih istražnih radnji u svim onim slučajevima kada više ne postoje razlozi zbog kojih su te radnje naređene.

Osmo, svakako iz razloga tajnosti, odnosno efikasnosti krivičnog postupka, naredba sudije za prethodni postupak kojom on odobrava primjenu određene (ili određenih) posebnih istražnih radnji, kao i prijedlog tužioca čuvaju se u posebnom omotu. Takođe, procesni zakoni obavezuju tužioca i sudiju za prethodni postupak da sastavljanjem ili prepisom zapisnika bez navođenja ličnih podataka prikrivenog istražioca i informatora ili na drugi odgovarajući način spriječe da neovlaštena lica, osumnjičeni i njegov branilac otkriju identitet prikrivenog istražioca ili informatora. Ukoliko se ipak ova lica moraju pojaviti na glavnom pretresu u ulozi svjedoka, dolazi u obzir primjena odredbi o zaštiti svjedoka, anonimnom svjedočenju, ispitivanju putem tehničkih uređaja za prenos slike i zvuka na način da stranke i branilac mogu postavljati pitanja bez prisustva u prostoriji gdje se svjedok nalazi (Sijerčić-Čolić, 2009: 687-700).

Deveto, policijski organi[222] koji su primjenjivali posebne istražne radnje imaju obavezu (oni to moraju), da po okončanju određene radnje (ili radnji) predaju tužiocu sve informacije, podatke i materijale (primjera radi, snimke, izvještaje, predmete) koji su nastali kao rezultat preduzimanja posebnih istražnih radnji (Gluščić, 2012: 555-573). Uz ove prikupljene materijale, ovi organi su takođe dužni da predaju tužiocu i pisani izvještaj o preduzetim radnjama (u ovom izvještaju, policijski organi su dužni navesti lice ili lica protiv kojih je radnja preduzeta, krivično djelo zbog kojeg je preduzeta posebna istražna radnja, okolnosti izvođenja radnje, trajanje radnje, rezultati koji su ostvareni primjenom radnje, te naznaku lica koje je preduzelo radnju) (Karović, 2012: 26)[223]. Na ovakav način, tužilac je u prilici da cijeni način preduzimanja tražene

[222] Sprovođenje posebnih istražnih radnji je na policiji koja se, kao i kod drugih dokaznih radnji, nalazi u položaju pomoćnog tijela suda.

[223] Shodno odredbama zakona o krivičnom postupku u Bosni i Hercegovini, nije propisan način realizacije, tj. preduzimanja posebnih istražnih radnji od strane policijskih agencija za sprovođenje zakona, i to je predmet operativnog rada. Policijske agencije konkretnije i detaljnije određuju način sprovođenja posebnih istražnih radnji, a on je sadržan u podzakonskim aktima (uputstva, pravilnici, instrukcije, smjernice itd.) koji konkretizuju aktivnosti vezane za neposrednu primjenu na operativnom, tj. izvršnom nivou. Navedenim podzakonskim aktima se konkretizuje način postupanja policijskih službenika, koje se odnosi na operativno (izvršno) djelovanje: izbor odgovarajuće posebne istražne radnje u konkretnom slučaju zavisno od same prirode krivičnog djela, način podrške svih subjekata u primjeni posebnih istražnih radnji, pripremne radnje (izbor prikrivenog istražitelja, razgovor prikrivenog istražitelja sa rukovodiocem, a po potrebi i sa psihologom, upoznavanje sa svim relevantnim informacijama i podacima koji se odnose na kriminalnu grupu), troškovi i odgovarajuće naknade, kao i posljednja faza – analiza sveukupnih preduzetih aktivnosti, s posebnim akcentom na otklanjanje određenih problema, nedostataka i sl. Posebno je značajno akcentirati ulogu prikrivenog istražitelja koji ni u kom slučaju ne smije preduzimati aktivnosti koje na bilo koji način podstrekavaju drugo lice na izvršenje krivičnog djela, odnosno on ne smije preduzeti bilo koju radnju kojom se umišljajno formira ili učvršćuje odluka da se izvrši određeno krivično djelo. Iz navedenog je evidentno da

posebne istražne radnje, a što je i najvažnije, poštovanje osnovnih prava i sloboda čovjeka, odnosno postupanje policijskih službenika (Mitrović, 2008: 5-45) po njegovom obrazloženom prijedlogu, odnosno izdatoj sudskoj naredbi. S druge strane, tužilac je u obavezi da dostavi pisani izvještaj o preduzetim radnjama sudiji za prethodni postupak kako bi se i on upoznao sa samim sprovođenjem radnje, odnosno kako bi provjerio da li je postupano po njegovoj naredbi i prema okviru koji je postavljen u njoj. Sve ovo bi bio i način da se zaštiti lice protiv kojeg je preduzeta naređena prikrivena istražna radnja.

Deseto, prema izričitoj zakonskoj odredbi, iz dva razloga dolazi do uništavanja materijala koji su prikupljeni naređenim posebnim istražnim radnjama. Prvo, ako tužilac odustane od krivičnog gonjenja. I, drugo, ako informacije, podaci, odnosno materijali pribavljeni primjenom naređenih radnji nisu potrebni za krivični postupak. Tužilac je dužan o tome obavijestiti sudiju za prethodni postupak, jer se isključivo pod njegovim nadzorom pribavljeni materijali uništavaju. S druge strane, obaveza je sudije za prethodni postupak da o tome sastavi poseban zapisnik, kao i da pismeno obavijesti lice protiv kojeg su bile naređene prikrivene istražne radnje o preduzimanju radnji, razlozima za njihovo preduzimanje, informaciji da dobijeni materijal nije bio osnov za krivično gonjenje i da je materijal uništen. Prema slovu zakona, lice protiv kojeg je posebna istražna radnja bila preduzeta ima pravo od suda zatražiti ispitivanje zakonitosti naredbe i načina na koji je sprovedena radnja (Sijerčić-Čolić, 2009: 687-700).

Jedanaesto, sudija za prethodni postupak ima obavezu da, bez odgađanja, odnosno odmah nakon preduzimanja neke od posebnih istražnih radnji, obavijesti lice protiv kojeg je radnja bila preduzeta o tome da je prema njemu preduzimana određena posebna istražna radnja (u praksi, ovo se veoma rijetko dešava, te tako okolnost, primjera radi, da je neko lice prisluškivano ili tajno praćeno određeni period ostaje nedostupna tom licu). S druge strane, podaci i informacije dobijeni preduzimanjem posebnih istražnih radnji čuvaju se dok se čuva i sudski spis.

Još je nekoliko važnih uslova za primjenu posebnih istražnih radnji krivično-procesnim zakonima propisano. Tako, prema odredbi člana 238 Zakona o krivičnom postupku Republike Srpske ne mogu se koristiti kao dokaz informacije i podaci dobijeni

se prilikom izbora prikrivenog istražitelja mora voditi računa o tome da se radi o licu koje je u stručnom smislu osposobljeno za realizaciju veoma složenih, zahtjevnih i opasnih zadataka, posebno imajući u vidu činjenicu da prodor u organizovanu kriminalnu grupu znači ulazak u kriminalnu zonu gdje se od članova očekuje vršenje krivičnih djela.

preduzimanjem posebnih istražnih radnji ako se ne odnose na krivično djelo koje je na listi krivičnih djela objavljenih u odredbama o posebnim istražnim radnjama. Isto tako, da bi se pribavljeni podaci i dokazi (tehničke snimke, isprave i predmeti) mogli koristiti u krivičnom postupku, odnosno za donošenje sudske odluke, onda oni kao rezultati primjene posebnih istražnih radnji, moraju biti pribavljeni pod uslovima i na način propisan zakonom (Mitrović, Pavlović, 2017: 1-18). Ti zakonski uslovi sadržani su u sudskoj naredbi i zbog toga je sudska naredba i njen okvir *conditio sine qua non* zakonitosti postupka i prikupljenih dokaza. I na kraju, sudska odluka se ne može zasnivati ne samo na nezakonitim dokazima, već i na dokazima za koje se saznalo primjenom tih nezakonito određenih i preduzetih posebnih istražnih radnji (Sijerčić-Čolić, 2009: 687-700).

Pravo na privatnost

Možda do sada najjednostavniju modernu definiciju prava na privatnost u pravnoj teoriji dao je u XIX vijeku američki sudija *Cooley* koji je definisao ovo pravo kao “pravo da se bude sam” - “*the right to be let alone*” (CEDEM, 2012: 1). U suštini, pravo na privatnost predstavlja zbirni pojam kojim se obuhvata više čovjekovih prava iz njegove privatne sfere. Naime, ovo pravo podrazumijeva pravo čovjeka da živi vlastiti život, uz minimalno miješanje drugog ili drugih, i tiče se privatnog, porodičnog i kućnog života, fizičkog i moralnog integriteta, časti i ugleda, izbjegavanja da se bude predstavljen u lažnom svjetlu, neotkrivanje nevažnih i sramotnih činjenica, neovlaštenog objavljivanja privatnih fotografija, zaštite od objavljivanja informacija koje pojedinac daje ili dobija u povjerenju[224]. Privatnost je jedna od nosivih vrednota zapadne pravne kulture koja je zasnovana, s jedne strane, na uvjerenju da svako ljudsko biće ima vrijednost po sebi, a s druge na iskonskoj čovjekovoj potrebi za postojanjem određenog zaštićenog prostora iz kojega bi svako drugi bio isključen psihološki i materijalno (Boban, 2012: 575- 598). No, u svakom slučaju, privatnost se ne smije doživljavati samo kao privatno dobro, već i kao vrijednost od opšteg društvenog značaja (Kovačević, 2014: 1).

Pravo na privatnost, odnosno zaštita prava na privatnost zagarantovana je mnogobrojnim međunarodnim i domaćim pravnim dokumentima, i kao takvo, ovo pravo čovjeka predstavlja ograničavajući faktor primjene mjera nadzora, odnosno posebnih istražnih radnji u borbi protiv najtežeg kriminaliteta. S druge strane, opravdanost posebnih mjera proizlazi upravo iz potrebe države da na negativne,

[224] Više u: Rezolucija broj 428 Konstitutivne skupštine, sada Parlamentarne skupštine Savjeta Evrope iz 1970. godine, usvojena na 21 redovnoj sjednici.

odnosno društveno neprihvatljive pojave odgovori i primjenom savremenih tehničkih sredstava, ali je za to, ipak, potrebno obezbijediti zakonske pretpostavke za njihovu primjenu kao i adekvatan sistem kontrole zakonitosti njihove primjene (Ninčić, 2014: 89-90). S obzirom na to, da se sa sve većim razvojem različitih informatičkih, komunikacijskih, medijskih i drugih sredstava stvaraju i mogućnosti za sve veće zalaženje u sferu čovjekove privatnosti, stalno se povećava potreba za njenom dodatnom i sigurnijom pravnom zaštitom.

Osnovni standardi zaštite privatnosti pojedinca definisani su Univerzalnom deklaracijom o ljudskim pravima Ujedinjenih nacija (u odredbi člana 12 ove Deklaracije jasno i nedvosmisleno je propisano da niko ne može biti izložen proizvoljnom miješanju u privatni život, porodicu, stan, prepisku niti napadima na čast i ugled, te da svako ima pravo na zakonitu zaštitu protiv ovakvog miješanja i napada), odnosno Evropskom konvencijom za zaštitu ljudskih prava i osnovnih sloboda i njenim protokolima (EKLJP). Ova dva dokumenta direktno se primjenjuju i u Bosni i Hercegovini i imaju prioritet nad svim ostalim zakonima.

Odredbom člana 8 stav 2 EKLJP zaštićeno je pravo na privatnost, odnosno pravo na poštovanje privatnog i porodičnog života, stana i prepiske na sljedeći način:

1. Svako ima pravo na poštovanje svog privatnog i porodičnog života, stana i prepiske.
2. Javne vlasti neće se miješati u vršenje ovog prava osim ako je takvo miješanje predviđeno zakonom i ako je to neophodna mjera u demokratskom društvu u interesu nacionalne bezbjednosti, javne bezbjednosti, ekonomske dobrobiti zemlje, radi sprečavanja nereda ili kriminala, zaštite zdravlja ljudi ili morala ili zaštite prava i sloboda drugih”.

Shodno prednjem, privremeno ograničavanje prava na privatnost, poštovanje porodičnog života, stana i prepiske može biti podvrgnuto zakonskim ograničenjima javne vlasti samo onda ako je to neophodna mjera u demokratskom društvu radi zaštite interesa nacionalne bezbjednosti, javne bezbjednosti, ekonomske dobrobiti zemlje, te radi sprečavanja nereda ili zločina, zaštite zdravlja ljudi ili morala ili zaštite prava i sloboda drugih. Takođe, svako fizičko lice ima pravo na zakonsku zaštitu navedenih prava u slučaju miješanja u ta prava ili njihove povrede (član 17 stav 2 MPGPP) (Sijerčić-Čolić i sur., 2005).

Pored navedenih, treba posebno istaći još nekoliko interesantnih međunarodnih dokumenata, i to:

1. Konvencija Savjeta Evrope za zaštitu ličnosti s obzirom na automatsku obradu ličnih podataka iz 1981. i izmjene i dopune iste Konvencije (od 15. juna 1999. godine) i Dodatni protokol uz Konvenciju (od 8. novembra 2001. godine). Bosna i Hercegovina je u julu 2004. godine ratifikovala ovu Konvenciju Savjeta Evrope.
2. Direktiva Evropske unije 95/46/EC iz 1995. o zaštiti prava o ličnosti, u vezi obrade i prometa istih predstavlja jedan od najvažnijih dokumenata koji reguliše zaštitu ovih prava u zemljama članicama Evropske unije.
3. Direktiva Evropske unije 2002/58/EC iz 2002. koja se bavi pravom na privatnost vezanom za elektronske komunikacije, odnosno, zadržavanje podataka, tzv. zadržani podaci (*retention data*).

I Evropski sud za ljudska prava u onim predmetima kada razmatra i odlučuje u odnosu na primjenu posebnih dokaznih (istražnih) radnji (svakako, u skladu sa odredbama čl. 6 i 8 EKLJP) priznaje da su posebne istražne mjere potrebne ukoliko se zaista konkretno društvo želi adekvatno uhvatiti u koštac sa najtežim oblicima kriminaliteta u svim njegovim pojavnim oblicima. Pri tome, treba imati u vidu da se poštovanjem međunarodno prihvaćenih standarda i preciznim pravnim procedurama primjene posebnih istražnih radnji omogućava i njihovo uspješno korištenje u suprotstavljanju najtežim oblicima kriminaliteta, s tim da se uvijek mora voditi računa da je nužno postojanje srazmjere između težine krivičnog djela i ljudskog prava koje se ograničava primjenom specijalnih istražnih tehnika (Antonić, Mitrović, 2012: 15).

Zaštitom prava na privatnost bave se i najvažniji domaći pravni dokumenti. Tako, odredba člana II/3f Ustava Bosne i Hercegovine, u relevantnom dijelu glasi: Sva lica na teritoriji Bosne i Hercegovine uživaju ljudska prava i slobode iz stava 2 ovog člana, što uključuje: f) Pravo na privatni i porodični život, dom i prepisku. S druge strane, i odredba člana II/A2 Ustava Federacije BiH, u svom izvornom sadržaju propisuje: Sve osobe ne teritoriji Federacije BiH uživaju prava: … g) na privatnost. I na kraju, odredba člana 13 Ustava Republike Srpske predviđa: Ljudsko dostojanstvo, tjelesni i duhovni integritet, čovjekova privatnost, lični i porodični život su nepovredivi.

Sve u svemu, zaštita prava privatnosti, odnosno ličnog i porodičnog života, stana i prepiske jedno je od osnovnih prava čije je ostvarenje preduslov za pravilno funkcionisanje svakog savremenog demokratskog društva.

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SPECIAL INVESTIGATIVE MEASURES AND THE RIGHT TO PRIVACY

Abstract: *Discussions on special investigative measures and potential violations of the fundamental human rights and freedoms due to its implementation are as old as the special investigative measures. According to those who advocate for their implementation and viewing these measures from the aspect of necessity to achieve results in detecting and finding evidence for the most serious criminal offenses, especially organized crime, it can be said that these measures totally justified the expectations. On the other hand, the implementation of these measures in light of the protection of the right to privacy and respect for family life as enshrined by the most important domestic and international documents seems to be rather unexplored. Therefore it is necessary to find the answer to the important question: Can these measures, in their current appearance, sustain the control and criticism of the contemporaries?*

In any case, even the criminal procedure law in Bosnia and Herzegovina does not restrain from its wide use, and therefore, the issues and problems that are being opened up. From the angle of development of these measures over the last 20 years in Bosnia and Herzegovina, it seems that number of special or concealed measures has increased, while on the other hand, very often, under the pretext of combating the gravest forms of crime, in particularly, for example, terrorism, significantly liberalize the conditions for their application have significantly liberalized.

Keywords: *special investigative measures, criminal proceedings, human rights and freedoms, the right to privacy*

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THE RIGHT TO PRIVACY IN THE VIEW OF ROMANIAN LEGISLATOR. LEGAL PENAL POLICY VS HAPPINESS OF THE CITIZENS

Abstract: *The right to privacy has recently become one of the most discussed issues in the field of juridical doctrine, especially in the field of criminal law and criminal procedure law doctrine. Facing an increased need of protection in its confrontations with very dangerous and/or disturbing social phenomena, the society is starting to learn its own lessons about giving, in order to receive protection. In other words there is security versus privacy.*

In this context, the legal penal policy needs to be adapted to efficiently response to some specific social perils: terrorism, organized crime, drug trafficking, human trafficking, etc. Both substantial and procedural criminal norms need to be circumcised to the request of public protection. But, while the substantial norms aim to protect the right to privacy as ratio legis, the procedural norms, especially those ruling the special investigation techniques are the opposite, tending to seriously interfere with the private life of the Romanian citizens in all its aspects.

Key words: *penal policy, the right to privacy, public security, special investigation techniques, terrorism, organized crime*

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1.Introductory aspects
Social peril. Penal policy. Right to privacy

1.1.Social peril

The concept of social peril is, maybe, one of the legal concepts that has recorded one of the greatest expansions of its semantic sphere. While 30 years ago when we heard of social peril, we instinctively thought of murder, rape, burglary, and all so called classic crimes, in the past few years the situation has changed, because new forms of criminal phenomena have developed in our society. ”The reaction of our society against any harmful acts is a necessity dictated by the need to safeguard the social order, the fundamental values protected by the Rule of Law. New social phenomena such as massive migration, refugee crisis, terrorist attacks or organized crime request proportional reactions of the State authorities, reactions which aim to protect in the first place the security of innocent population, and on the second place, that aim to ensure the proportional sanctioning for the harms against social values protected by criminal means.” (Stănilă, 2017, p.356)

In this complex social context, we can observe an increased preoccupation for new techniques and instruments to provide social control, and a dramatic trend that leads to the modification of the current criminal and criminal procedure legislation. The criminal policy of the states, both legal and judicial, is shaped by the legislator in order to provide social security and to minimize the risk of criminality of a specific nature (terrorism, organized crime etc.) The concrete way to provide such organized reactions by the special bodies with specific features in the field of criminal repression generate fierce controversy both in the doctrine, society and public perception.

In the same time, in the field of criminal procedure law, the vast majority of special methods of surveillance or investigation is ordered by the judge of rights and freedoms as a guarantee of the rights of the person under investigation but the conditions in which such measures may be imposed are likely to raise serious questions about the role of criminal law as a whole and about the limits of interference of the state bodies who may slightly commit abuses under the cosy umbrella of fighting against crime desiderate.

Is it worth it to sacrifice personal freedoms and rights for a higher purpose of general security? Or is just another failure of the human thoughts which will lead to a bigger problem? Is overprotection of the society a safe solution for our future?

1.2.Penal policy

The very notion of *penal policy* needs to be adapted and modelled to the new face of criminal phenomenon. So there are some key notions that need to be taken into account when analysing the possibility of a changing paradigm in relation with criminal policy: trust, flexibility, coordination and efficiency.

Trust underpins the debate on the ”risk society” – and an assessment of risk is now at the core of planning internal security policies. In particular, the changing nature of risk and its implications for contemporary politics and society have become important topics of debate in the social sciences. Awareness of and anxiety about risk have become ubiquituous in contemporary society and are the outcome of the processes of scientific and technological development. The notion of trust becomes essential to any policy effort intended to create security in a risk society. (Anderson, Apap, 2002, p. 16).

Flexibility enables individuals and groups (and even states) to adapt to different and changing circumstances in order to pursue the same overall objectives. It may be deliberately introduced into practices, procedures and behaviours to produce desired outcomes. But, in the same time, flexibility has unintended and quite frequently negative consequences because is in conflict with other desirable social values. It creates uncertainty, undermining in this way relations of trust, since one of the requirements of trust is predictable behaviour. (Anderson, Apap, 2002, p. 20) New techniques in information and communications technologies often result in flexibility because they provide new possibilities of data storage, analysis and transmission, an easy way to provide evidence in criminal cases.

Coordination has been defined as ”actions of separate individuals or organizations - which are not in pre-existing harmony brought into conformity with one another through negotiations” (Krasner, 1983, p.1) and has to types: political coordination and administrative/managerial coordination. Wallace uses the pendulum metaphore in order to explain the mechanisms between states and the international arena. The model proposed by her confronts two magnetic fields, a nationally oriented one and a

transnational/international oriented one. The pendulum oscillates between these two fields creating fluctuations in policy coordinations. (Wallace, 2000, p. 40)

Efficiency is an economic concept that was borrowed in the last years in the field of public policy. In general sense, the efficiency can be achieved under the conditions of maximizing the results of an action in relation to the resources used, and it is calculated by comparing the effects obtained in their efforts. Measuring the efficiency requires: a) estimating the costs (inputs); b) estimating the results (outputs); c)comparing inputs and outputs. (Palmer, Torgerson, 1999, p. 1136)

So, both of the facets of the penal policy – legislative penal policy and judiciary penal policy – need to be adapted in order to work against new forms and dimensions of crime phenomenon in accordance with these four elements/requirements – trust, flexibility, coordination, efficiency.

1.3.Right to privacy

The right to privacy is protected under art 7 and art 8 of the Charter of Fundamental Rights of the European Union (CFREU). Art 7 chooses the traditional path to put privacy in context, by linking it to private and family life. This is similar to art 12 of the United Nations Universal Declaration of Human Rights from 1948, art 17 of the International Covenant of Civil and Political Rights from 1966 and art 8 of the European Convention of Human Rights (ECHR). (Gstrein, 2017)

Art 8 CFREU is more innovative, since it refers to the abstract “protection of personal data”. The difference is fundamental, since this provision entitles the individual to a right to control personal data “concerning him or her” regardless of the context. However, both, Art 7 and 8 CFREU, must be read in connection with their limitations. Of course, it is allowed to process personal data in the EU. However, a concrete purpose and consent or some other legitimate basis must be the reason for it. Additionally, every individual is entitled to access “its” data. Furthermore, there is the right to have data rectified in cases where it is wrong, not precise or if circumstances have changed. Sometimes it is being criticized that there are two articles on privacy in the CFREU. The relationship between Art 7 and 8 seems dubious, since Art 8 does not necessarily add protection apart from an abstract and hypothetical description. However, the CJEU emphasizes that the two rights are separate. (Gstrein, 2017)

Despite critics on the way the right to privacy is regulated by international documents, it is obvious that there is an increased preoccupation on how this right is guaranteed by the member states and how these guarantees interfere with the fight against severe forms of crime.

But privacy, as a concept has been discussed by the scholars who had identify more of its components. In one opinion (Clarke, 1997), privacy has for components: privacy of personal data, privacy of the person, privacy of communications, territorial privacy:

a) a)*privacy of personal data or information privacy*, which involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;
b) b)*privacy of the person or bodily privacy*, which concerns the protection of people's physical selves against invasive procedures such as drug testing and cavity searches; has also been referred to as “bodily privacy” and is specifically related to the integrity of a person’s body. It would include protections against physical intrusions, including torture, medical treatment, the “compulsory provision of samples of body fluids and body tissue” and imperatives to submit to biometric measurement.
c) c)*Privacy of communications or privacy of personal communication*, which covers the security and privacy of mail, telephones, email and other forms of communication; refers to a restriction on monitoring telephone, e-mail and virtual communications as well as face-to-face communications through hidden microphones.
d) d)*Territorial privacy* or *privacy of personal behaviour*, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. There is a space element included within privacy of personal behavior, where people have a right to private space to carry out particular activities, as well as a right to be free from systematic monitoring in public space. (Clarke, 1997)

In another opinion (Finn, Wright, Friedewald, 2013, pp.4-6), there are no more less than seven types of privacy:

a) a)*privacy of the person* encompasses the right to keep body functions and body characteristics (such as genetic codes and biometrics) private. Privacy

of the person is thought to be conducive to individual feelings of freedom and helps to support a healthy, well-adjusted democratic society.

b) b)*privacy of behavior and action*. Refers to sensitive issues such as sexual preferences and habits, political activities and religious practices. However, the notion of privacy of personal behavior concerns activities that happen in public space, as well as private space.

c) c)*privacy of communication* aims to avoid the interception of communications, including mail interception, the use of bugs, directional microphones, telephone or wireless communication interception or recording and access to e-mail messages. This aspect of privacy benefits individuals and society because it enables and encourages a free discussion of a wide range of views and options, and enables growth in the communications sector.

d) d)*privacy of personal data* - This privacy of data and image includes concerns about making sure that individuals' data is not automatically available to other individuals and organizations and that people can exercise a substantial degree of control over that data and its use. It addresses the balance of power between the state and the person.

e) e)*privacy of thoughts and feelings* - People have a right not to share their thoughts or feelings or to have those thoughts or feeling revealed. This aspect of privacy may be coming under threat as a direct result of new and emerging technologies. Privacy of thought and feelings can be distinguished from privacy of the person, in the same way that the mind can be distinguished from the body.

f) f)*privacy of location and space* - Individuals have the right to move about in public or semi-public space without being identified, tracked or monitored. This conception of privacy also includes a right to solitude and a right to privacy in spaces such as the home, the car or the office.

g) g) *privacy of association* is concerned with people's right to associate with whomever they wish, without being monitored. This has long been recognized as desirable (necessary) for a democratic society as it fosters freedom of speech, including political speech, freedom of worship and other forms of association. (Finn, Wright, Friedewald, 2013, pp.4-6)

It is obvious that European countries have made remarkable progress in the last decades to ensure individual freedoms and shield people from undue state interference. The European system of human rights protection is today among the most advanced in the

world. However, there is little room for complacency: a number of cracks have appeared in this system and are widening. (Muižnieks, 2016)

One of the biggest ”cracks” comes from counter-terrorism measures considered or enacted across Europe, in particular those which increase mass surveillance. Many of these measures grant more intrusive powers to security services to snoop on our lives and centralize powers in the hands of the executive, thus circumventing judicial safeguards necessary in any democracy rooted in the rule of law. These are just a few of the cases that illustrate well the security trend which is spreading all over Europe on the assumption that *to guarantee our security we have to renounce some human rights.* This assumption is deeply wrong. (Muižnieks, 2016)

Surveillance measures are, by their nature and procedure, in vivid contradiction with the international system of rights and freedoms. As if it was not obvious enough, the European Court of Human Rights has ruled, in quite a few cases, that surveillance is by its very nature, an interference with the right to privacy. For example in *Case Zakharov vs Russia*[225] and before in Case *Dumitru Popescu vs Romania*[226].

However, fight against severe forms of crime (terrorism, organized crime, etc.) could not be efficient in the absence of special techniques – such as the use of private communication information. And by doing this, states can collect, use and store such information only under exceptional and precise conditions, while offering adequate legal safeguards and independent supervision. In order to prosecute terrorists, but in the same time, to safeguard the right to privacy seriously endangered by the use of special surveillance techniques, five parameters should be respected.

a) legislation must limit surveillance and the use of data in respect with the right to privacy in accordance with European data protection standards,

[225] *Case Zakharov v. Russia*, Judgement, ECHR, 4.12.2015. The Court ruled that Russia's legal provisions governing communications surveillance did not provide adequate safeguards against arbitrariness or abuse, and that therefore a violation took place of Article 8 of the European Convention of Human Rights, https://hudoc.echr.coe.int/eng#{"itemid":["001-159324"]}

[226] *Case Dumitru Popescu v. Romania*, Judgement, ECHR, 26.04.2007. In this case the European Court of Human Rights found violation of Article 8 of the Convention on the right to respect for private and family life and the non-infringement of Article 6.1 of the Convention on the right to a fair trial.

The Court has established that, in the matter of intercepting communications by intelligence services, national legislation does not provide sufficient safeguards against the interference of authorities in the right of the individual to respect for private and family life. European judges concluded that the applicant Dumitru Popescu, whose telephone conversations were intercepted by the Romanian Intelligence Service, did not enjoy the minimum degree of protection against arbitrariness. http://echr.ketse.com/doc/71525.01-en-20070426/.

ECHR and CJEU[227] decisions. These standards impose to member states the obligation to respect human rights and to protect individuals from abuses in case of surveillance.

b) surveillance, procedures and data obtained must be rigorously regulated, and persons under surveillance should be given the possibility to exercise their right to an affective remedy.
c) the activity of security agencies needs to be controlled and must be placed under judicial review and effective oversight.
d) prior authorization of the most intrusive measures and establishment of a body able to issue legally-binding decisions over complaints by individuals affected by security activities, with access to all intelligence-related information.
e) e)the judiciary must be involved in the decision-making process of highly intrusive measures and must be free to play its ex post role to ensure accountability. (Muižnieks, 2016)

Although the Court recognizes that intelligence services may legitimately exist in a democratic society it made it clear that powers of secret surveillance of citizens are tolerable under the Convention only in so far as they are strictly necessary for safeguarding the democratic institutions. In this regard, the Court has been influenced by the fact that democratic societies find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. (Kilkelly, 2003, p.47)

The Court has had to accept, therefore, that *the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.*[228]

While it is within the discretion of the State how such a system of surveillance should operate, this discretion is not unfettered. Similar to the State's covert activities in other areas, therefore, the Court must be satisfied that there are adequate and effective

[227]Court of Justice of EU.

[228] *Case Klass v. Germany*, Judgment, Judgement, ECHR, 6.09.1978, para. 48, https://hudoc.echr.coe.int/eng#{"itemid":["001-57510"]}, accessed 19.09.2017.

guarantees against abuse whatever system is adopted. According to the Court, however, this assessment has a relative character. (Kilkelly, 2003, p.48)

The Court stated that *it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and super- vise such measures, and the kind of remedy provided by the national law*[229]. In *Case Klass vs Germany* the Court had to address whether German legislation, which authorised letter- opening and wire-tapping in order to safeguard national security and prevent disorder and crime, violated the applicant's rights under Article 8 para. 1 insofar as it lacked adequate safeguards against possible abuse. In relation to what protection is necessary, the Court emphasized that, in principle, judicial control of surveillance *is desirable.* However, it went on to approve the German system even though the supervisory control was vested not in the courts but in a Parliamentary Board and a body called the G10 Commission, which the Board appointed. This was because it was satisfied that both bodies were independent of the authorities carrying out the surveillance and had been given sufficient powers to exercise an effective and continuous control. The Court concluded, therefore, that taking notice of technical advances in the means of espionage and surveillance and of the development of terrorism in Europe, the German system for controlling covert surveillance met the requirements of Article 8 of the Convention. (Kilkelly, 2003, p.48)

2.Penal policy. Penal substantial rules

2.1. General principles of penal law and other substantial penal rules

This new Era of social peril is challenging for all parties involved in the fight to preserve social security and to combat crime. That is because scholars were formed under the umbrella of a criminal law based on the punishment as the main of its institutions, and based on principles stated under the positivist school. On the other hand, the practitioners are confronted every day with the constant push of the legal boundaries while the civil society is in the middle of an eternal battle: between respect of civil rights and the increased need of protection against new forms of crime. (Stănilă, 2017, pp. 357-360)

[229] *Case Klass v. Germany*, Judgment, Judgement, ECHR, 6.09.1978, para. 50, https://hudoc.echr.coe.int/eng#{"itemid":["001-57510"]}, accessed 19.09.2017.

If they all won′t change their vision towards criminal law system, it will be as if the battle was already lost. Certain things are changing. Certain criminal institutions such as use of intelligence law against organized crime, non-conviction-based confiscation, self-regulatory compliance regimes against corporate crime are just a few of the new solutions found in the legal criminal field.

But, these institutions are limited applicable to certain forms of criminal phenomenon. *They cannot be applied in all forms of crime so, we need a different approach.* In my opinion we must start with the basics. We must rethink the principles of criminal law in order to offer this legal branch flexibility and capacity to adapt and proper react to these new criminal behaviour challenges. This doesn′t mean that we have to drop the traditional principles - such as the principle of legality – but we need to find new principles that suit the modern society. (Stănilă, 2017, p.356)

In this complex and scary social context, the criminal law needs to adapt to the new forms of crime, needs to find new proper ways to react to specific criminal deeds and needs to intervene from the very beginning of *iter criminis*, even in the phase of preparatory acts.

We need new principles - such as the principle of prevention and the principle of precaution - and rules that can create the specific frame in order to achieve the desideratum of security because the old ones proved to be insufficient or outdated.

Thus, if a certain human activity is risky or potentially harmful, and there is no certainty about the magnitude of its effects or causality, then a proactive action is needed in order to avoid injury.

But culpability for an action must be derived from a combination of both objective wrongdoing and a personal fault. So, one can argue that the statutes of preparatory criminal law are only legitimate if they are not only based on subjective intentions of the perpetrator, but also require indicative objective elements of crime. (Sieber, 2016, p. 20). All types of ”inchoate offenses” and ”abstract endangerment statutes” or other ”types of preventive criminal law” (Sieber, 2016, p.20) pay their tribute to standards of limitations needed to guarantee and protect the human rights and freedoms, and of course, the right to privacy. In order to impose criminal liability for a pre-committing criminal act there has to be proof in the sense of criminal procedure law, or, at least a reasonable suspicion. If this requirement is met, then the mechanism is starting to work.

But, as we saw before, and we shall also see in the following, there are certain questions about the compatibility of some procedural techniques with the right to privacy. And we have at least to cumulated problems: why to impose criminal liability for a preparatory act, for example, and how to manage to gain information with respect to right to privacy in order to legitimate a criminal sanction in this case? Well, the substantial criminal law doctrine has stated, not once that, in preparatory acts and attempted acts should be criminal relevant only if the social peril for de value protected by the criminalizing norm is serious enough. Then, the legislator shall expressly criminalize preparatory acts and attempted acts in order to meet the requirements of the principle of legality. But how to rule a criminal trial in this case is a different and even more tricky issue.

2.2.Criminalizing rules aiming to protect the right to privacy

Well, special part of the criminal codes abounds in criminalizing norms aiming to protect the right to privacy. This makes both citizens and judicial bodies vulnerable and potentially accountable for criminal deeds.
For example, New Romanian Criminal Code (NRCC)[230] provides crimes and offenses such as: art. 224 - Trespassing[231], art. 225 - Trespassing in professional offices[232], art. 226 – Violation of privacy[233]. Also, there are some offenses that could be committed by

[230] Law no.286/2009 published in the Official Monitor no. 510/24.07.2009.

[231] *Art. 224 - Trespassing*

(1) Unlawfully entering, in any way, a house, a room, an outbuilding or any fenced premises related to them, without the consent of the individual who uses them, or the refusal to leave them upon request shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.

(2) If the offense is committed by an individual carrying a weapon, during night time, or by using false capacities, the penalty shall be no less than 6 months and no more than 3 years of imprisonment.

[232] *Art. 225 - Trespassing in professional offices*

(1) Unlawfully entering, in any way, any of the offices where a legal entity or a natural person carries out their business or the refusal to leave them upon the request of the entitled person shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.

(2) If the offense is committed by an individual carrying a weapon, during night-time, or by using false capacities, the penalty shall be no less than 6 months and no more than 3 years of imprisonment.

(3) Criminal action shall be initiated based on a prior complaint filed by the victim.

[233] *ART. 226 - Violation of privacy*

(1) The unlawful violation of privacy, by photographing, capturing or recording images, by listening using technical means or by recording audio of an individual, in a house or room or outbuilding related to them or to a private conversation shall be punishable by no less than 1 month and no more than 6 months of imprisonment or by a fine.

(2) The unlawful disclosure, dissemination, presentation or transmission of sounds, conversations or images set out in par. (1) to another person or to the general public shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.

the judicial bodies in their activity of imposing criminal liability to a person, in case of failing to respect de legal boundaries provided in order to ensure the guarantee of the procedural rights of the suspect. For example: art. 280 – Abusive investigation[234] and art. 283 - Unlawful repression.[235]

3.Penal policy. Penal procedural rules. Special methods of surveillance or investigation

In the field of criminal procedure law, the vast majority of special methods of surveillance or investigation is ordered by the judge of rights and freedoms as a guarantee of the rights of the person under investigation but the conditions in which such measures may be imposed are likely to raise serious questions about the role of criminal law as a whole and about the limits of interference of the state bodies who may slightly commit abuses under the cosy umbrella of fighting against crime desiderate.

(3) Criminal action shall be initiated based on a prior complaint filed by the victim.

(4) The following do not constitute offenses:

a) the act committed by the individual who attended the meeting with the victim during which the sounds and conversations were recorded and photos were taken, if there is a legitimate interest;

b) if the victim has acted with the explicit intention to be seen or heard by the perpetrator;

c) if the perpetrator has records of the commission of an offense or helps prove that an offense was committed;

d) if public-interest acts are recorded, which are meaningful to the life of the community and whose disclosure has public advantages that outweigh the damage to the victim.

(5) Unlawfully installing technical means for audio or video recording, in order to commit the acts set out in par. (1) and par. (2), shall be punishable by no less than 1 and no more than 5 years of imprisonment.

[234] Art. 280 - Abusive investigation

(1) The use of promises, threats or violence against a person undergoing investigation, criminal prosecution or trial, by a criminal investigation body, a prosecutor or a judge in order to determine such person to give or to refrain from giving statements, to give false testimony or to withdraw testimony shall be punishable by no less than 2 and no more than 7 years of imprisonment and the deprivation of the right to hold a public office.

(2) The same penalty is applied to the production, counterfeiting or fabrication of false evidence by a criminal investigation body, a prosecutor or a judge.

[235] Art. 283 - Unlawful repression

(1) The act of prosecuting, of taking measures different from custodial sentences or of bringing an individual before justice, while aware that they are not guilty, shall be punishable by no less than 3 months and no more than 3 years of imprisonment and deprivation of the right to hold public office.

(2) The act of detaining or arresting or sentencing an individual, while aware that they are not guilty, shall be punishable by no less that 3 and no more than 10 years of imprisonment and the deprivation of the right to hold public office.

New Romanian Criminal Procedure Code states that the object of the criminal investigation is to collect the necessary evidence to prove the existence of criminal offenses, to identify the individuals who committed a criminal offense and to establish their criminal liability, in order to decide whether they should be prosecuted.

At the same time this procedural stage must comply, along with the others - Preliminary Chamber and judgement in front of the court – the principles of criminal procedure law enshrined in both the Romanian Criminal Procedure Code and European Convention of Human Rights. Among these principles, fairness of criminal proceedings and respect for human dignity and privacy are those which, on the one hand, interfere with the application of special surveillance or investigation methods, and on the other hand, determine the condemnations of our Romanian State by European Court of Human Rights.

The vast majority of special methods of surveillance or investigation is ordered by the judge of rights and freedoms as a guarantee of the rights of the person under investigation but the conditions in which such measures may be imposed are likely to raise serious questions about the role of law criminal as a whole and about the limits of interference of the state bodies who may slightly commit abuses under the cosy umbrella of fighting against crime desiderate.

The complex and scary social context leads to an overreaction of the criminal and criminal procedure law due to the need to intervene from the very beginning of *iter criminis*, even in the phase of preparatory acts, sacrificing personal freedoms and rights.

In the Romanian criminal procedure, the reasonable suspicion related to the preparation or commission of an offense seems to be the key to open all forbidden doors. As if it is not enough that law refers to a *reasonable suspicion* and not to *a certainty*, the procedural rules allow an early intervention of the public organs and judicial bodies even if the crime/offense is suspected to be prepared, and not committed yet. There are a lot of provisions in the Criminal Procedure Code of Romania (RCPC)[236] – art. 139 par. 1 and 4, art. 142 par. 5, art. 147 par. 1 and 2, art. 148, art. 150, art. 154, art. 170, art. 223 - all referring to the possibility of using specific technical surveillance and investigation methods or to the possibility of arresting a person (art. 223 par. 1 lett.d) in

[236] Law no. 135/2010, published in Official Monitor no. 486/15.07.2010, which entered into force on the 1st of February 2014.

case of reasonable suspicion the person prepares the commission of a crime or of an offense. (Ciopec, 2017, pp.140-141).

Also, in case of authorized participation of undercover agents in certain activities (art. 150 RCPC), the infiltration of undercover investigators is allowed up to the point where they can commit activities that are similar to the *actus reus* of a corruption offense. Then, according to lett. b, paragraph 1 of art. 150 precited, the prosecutor, using this technique, must ensure that the measure is proportional to the limitation of fundamental rights and freedoms, given the particularities of the case, the importance of the information or evidence to be obtained or the gravity of the offense. (Roibu, 2017, p. 365) So, the prosecutor could authorize the participation in certain activities, even when a simple information is needed, not necessarily an evidence. This means that the prosecutor has increased powers in the criminal procedure and little censure against the arbitrary of his/her acts. The procedural rights of the suspect are diluted while the abuse of the prosecutor in the criminal trial is an easy task.

4. Concluding ideas

Is it worth it to sacrifice personal freedoms and rights for a higher purpose of general security? Or is just another failure of the human thinking which will lead to a bigger problem? Is overprotection of the society a safe solution for our future?

Even if there is a strong opposition of ECHR in order to safeguard the right to privacy in cases of usage by the state judicial bodies of special investigation methods - including special surveillance - in criminal trials, it seems that the legal standards of limiting the intervention of the public organs in the area of rights and freedoms of the citizens had become only a declarative desiderate. Romanian legislation makes no exception. We have several convictions in the ECHR for breaching art. 7 and 8, but this does not seem to bother anyone. The common sense tells us that the dictatorship of crime and the fear of crime had generated a dictatorship of governance through crime. (Simon, 2009, p. 4) Only if we change our vision on fighting against crime and on what proactive intervention should mean, we would be able to be efficient in this task and protect in the same efficient way our citizens, their rights and freedoms. Only if we notice that the paradigm shift that we created after 9/11 had not lead to a decrease of the serious crime phenomenon, only then we will find the right path.

There is no happiness because it was sacrificed on the altar of higher values of public security and public order.

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PRAVO NA PRIVATNOST PO MIŠLJENJU RUMUNSKIH ZAKONODAVACA. ZAKONSKA KAZNENA POLITIKA NASUPROT SREĆE GRAĐANA

Apstrakt: *Pravo na privatnost je nedavno postalo jedno od pitanja o kojima se najviše raspravlja u oblasti pravosudne doktrine, posebno u oblasti krivičnog prava i zakonske doktrine krivičnog postupka. Suočavajući se sa sve većom potrebom za zaštitom u sukobu sa veoma opasnim i/ili uznemirujućim socijalnim fenomenima društvo počinje da uči prve lekcije o davanju, u svrhu dobijanja zaštite. Drugim rečima, bezbednost i privatnost su suprotstavljene jedna drugoj.*

U tom kontekstu, potrebno je prilagoditi zakonsku kaznenu politiku tako da ona može efikasno da odgovori na neke specifične opasnosti po društvo: terorizam, organizovani kriminal, trgovinu drogom, trgovinu ljudima, itd. Potrebno je obrezati i suštinske i proceduralne krivične norme prema zahtevima javne zaštite. Ali, dok suštinske norme kao ratio legis imaju za cilj da zaštite pravo na privatnost, proceduralne norme, posebno one koje regulišu posebne tehnike istrage, upravo su suprotne, one imaju tendenciju da se opasno umešaju u privatne živote građana Rumunije u svim njihovim aspektima.

Ključne reči: *kaznena politika, pravo na privatnost, javna bezbednost, posebne tehnike istrage, terorizam, organizovan kriminal*

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SECRET MONITORING OF COMMUNICATION AS A SPECIAL INVESTIGATION TECHNIQUE IN FOCUS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *This paper is focused on several important issues that deal with the secret monitoring of communication as a special investigation technique. The main perspective of the analysis is based on the ECtHR case law on this issue but also on the need to prescribe detailed rules and conditions that regulate whether is possible to secretly monitor communication of third parties in order to prevent, investigate and/or collect evidence of crime. Both perspectives are results of the two parallel processes: On the one side, intensive ICT development enables various modern techniques and methods of crime investigation but also resulted in some new types of crime that could be committed using ICT; On the other hand, expansion of the fundamental rights and their protection, especially in Europe, raised global awareness on the right on the privacy and the need to protect it. Having that in mind it seems that the main question that should be answered by legislator is: Where is the border line between the right on the privacy and the public interest to investigate or prevent crime and collect evidence. A special attention should be paid on the right of the person whose communication was monitored to be informed on the secret monitoring that had been conducted.*

Keywords: *the right on the privacy, secret monitoring of communication, special investigation techniques, ECtHR.*

1. Introduction: European and comparative law standards

European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) in the Article 8 prescribes that everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority with the exercise of this right except such as it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

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crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. There are many aspects of the Article 8, like Roma travelers' issues, termination of pregnancy, euthanasia etc. (Banović and Turanjanin, 2014; Banović, Turanjanin and Miloradović, 2017; Turanjanin and Mihajlovic, 2014) that make case-law regarding Article 8 very comprehensive (Hert, 2005: 73).

Interception of communications is very complex issue, which also falls under the Article 8.[237] As we can see, this provision is divided into four categories: private life, family life, home and correspondence (Schabas, 2015: 366). Articles 8-11 are subject to restriction for a number of "legitimate purposes" found, although not uniformly, in the second paragraphs (Greer, 2006: 257). Rights protected by Article 8 can be limited only according to the law and based on democratic society needs[238] (Jakšić, 2006: 261) and Convention organs have developed a flexible methodology for the interpretation and application of paragraph 2 (Schabas, 2015: 40).

According to the Human Rights Committee, integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto* and it should be delivered without interception and without being opened or otherwise read (Committee 1988). In addition, surveillance, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited (Committee 1988). However, in the development of the sophisticated technology, arises a need for the better fight against serious crime and many countries implemented in its legislations secret surveillance measures. The old methods of investigation in the modern time are not efficient for successful criminal prosecution (Fenyyvesi, 2006: 183). So, the challenge is how to balance the right to privacy with the need to intercept communications for the prevention and investigation of crimes (Esen, 2012: 164; Moonen, 2010: 98). Tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on law that is particularly precise (Jayawickrama, 2002: 629). This

[237] According to Weyembergh and de Biolley, there are four main reasons this is complex issue. First is that the identification of the specific subject area is far from easy. The second, which explains the complexity of the subject is the fact that the interception of telecommunications is a particularly intrusive technique and thereby extremely sensitive in the context of the protection of fundamental rights. Third, the situation is all the more complex, as the internal legal systems of the different States remain widely divergent, although a certain approximation has been carried out by different sources. And fourth, mutual legal assistance is far from the simple matter (Weyembergh and Biolley, 2007: 285-287).

[238] The Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions (Silver and Others v. the United Kingdom, 1983: § 97).

is, in addition, very sensitive area due to the protection of the data (Norris, et al, 2017). So, societies directed by the rule of law consider that governments should only gather information about us when it is useful to reach a goal more important than our personal right to be manager of what gets know about us (Moonen, 2010: 98).

From the Convention's provision itself, it's obvious that combating crime has been recognized as legitimate base to interfere with the right on privacy. More precisely, border lines for this type of interference have been defined in several Council of Europe (hereinafter: CoE) recommendations. E.g. Recommendation R(95)13[239] emphasizes, in its introductory part, the consequences that the ICT development has on the structure and types crime but also on the ICT use in crime investigation and proving. Recommendation R(96)8[240] in the Preamble underlines changes in the European economy and market arising from crushing totalitarian regimes that are also reflected in the structure of criminal and types of crime and therefore require adequate reaction of individual states but also a new European policies of crime combating. Additionally, par.1-2 insist on reaction on crime which is in line with rule of law and protection of human rights regardless of seriousness of situation regarding criminal in individual society. In the Section C, the Recommendation explains prerequisites for successful combating crime and strictly prescribes that tapping of telephone of direct communication should be regulated as mean of combating organized crime (par. 26).

Significant contribution in this field arising from the European Court of Human Rights (hereinafter: Court, ECtHR) standpoint (more than 20 years old) that legislator should clearly recognize circle of subjects who could be exposed to this measure but also the nature (types) of crime where it is applicable; time limitations of its application; conditions for taking record on the measure; methods of controlling these records and reasons for destroying collected material (Huvig v. France, 1990; Kruslin v. France, 1990). These standpoints could be seen as the steps towards the unification, which is the milestone and essential starting point of the idea to establish a united Europe (Kolaković-Bojović, 2016: 193). The Court has, from the *Leander* case onwards, always moved towards a progressive extension of the scope of Article 8 (Sicurella and Scalia, 2013: 434-435). As Lagerwall points out, the Court's case-law is relatively rich in terms

[239] Recommendation No. R (95) 13 of the Committee of Ministers to Member States Concerning Problems of Criminal Procedure Law Connected with Information Technology (Adopted by the Committee of Ministers on 11 September 1995 at the 543 meeting of the Ministers' Deputies)

[240] Recommendation Rec(1996)8 of the Committee of Ministers to Member States on Europe in a time of change: crime policy and criminal law (Adopted by the Committee of Ministers on 5 September 1996, at the 572nd meeting of the Ministers' Deputies

of its consideration of secret surveillance measures, such as signals intelligence and individual wire-tapping (Lagerwall, 2008: 19). So, when we speak on secret surveillance measures, the key article is Article 8 of the Convention. One of the points of the Article 8 is not simply protecting people from the embarrassment of external scrutiny of their personal situations but also respecting their dignity and sense of being valued (Feldman, 2002: 702; Marshall, 2009: 70).

In the first place, the Court in the famous judgment *Klass and Others v. Germany* emphasized that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (Klass and Others v. Germany, 1978: 41).[241] It was repeated in the *Malone v. The United Kingdom* (Malone v. The United Kingdom, 1984: 64).[242]

2. Secret monitoring of communication: general principles

As earlier mentioned, the Court in the numerous judgments emphasized that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (for example: Klass and Others v. Germany, 1978: § 41; Malone v. The United Kingdom, 1984: § 64; Lambert and Others v. France, 2014: § 21). Such an inerference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (Lüdi v. Switzerland, 1992: § 39; Kvasnica v. Slovakia, 2009: § 77). The phrase "in accordance with the law" implies conditions which go beyond the existence of a

[241] The Court stated: "Although telephone conversations are not expressly mentioned in paragraph 1 of Article 8, the Court considers, as did Commission, that such conversations are covered by the notions of of „private life“ and „correspondence“... Furthemore, in the mere existence of the legisaltion itself there is involved, for all those to whom the legislation could be applied, a menance of surveillance; this menace strikes at freedom of communication between users of the postal and telecommunication services and thereby consitutes an „intererence by a public authority“ with the exercise of the applicants' right to respect for private life and for correspondence (Klass and Others v. Germany, 1978,: § 41).

[242] It is interesting example of the UK where secret surveillance was traditionally used as method of discovering but not of proving organized crime. Considering this, it had not been regulated by law since 1985 with exception of post service related issues. The trigger for change was the ECtHR decision from 1984 in Malone case (Malone v. The United Kingdom 1984), where the Court concluded that the UK brakes provisions of the art. 8 of the Convention. That resulted in adoption of the Interception of Communications Act 198511 which kept existed concept of the secret surveillance as a measure for prevention and discovering crime but also in additional appeals to the ECtHR. In 1997 the Court rendered decision in the Halford case and confirmed that Interception of Communications Act does not provide for necessary guaranties in line with art. 8 of the Convention. By adoption of the Human Rights Act in 1998, the ECHR became integral part of the UK internal legal system but more precise regulations in the field were adopted as part of the Regulation of Investigatory Powers Act 2000 (RIPA, see more in (Addis and Morrow 2005, 57-60)).

legal basis in domestic law and requires that the legal basis be “accesible” and “foreseeable” (Amann v. Switzerland, 2000: § 55).

2.1 In accordance with the law

In general, the Court has defined in its practice meaning of the expression “in accordance with the law”. According to Court, that implies *that the impugned measure should have some basis in domestic law but it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned who must, moreover, be able to foresee its consequences for him, and compatible with the rule of law* (Kruslin v. France, 1990: § 27; Lambert v. France, 1998: § 23; Huvig v. France 1990: § 26; Kopp v. Switzerland, 1998: § 55; Perry v. the United Kingdom, 2003: § 45; Dumitru Popescu v. Romania[243] (No. 2), 2007: § 61; Liberty and Others v. the United Kingdom, 2008: § 59). There must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 of Article 8 (Malone v. The United Kingdom, 1984: § 67). In addition, the Court emphaseized the fact that the risks of arbirariness are evident especially where a power of the executive is exercised in secret (Klass and Others v. Germany, 1978: §§ 42, 49).

2.2 Foreseeability

The requirements of the Convention, *notably in regard to foreseeability cannot be exactly the same in the special context of interception of communications for the puroposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of the individuals* (Malone v. The United Kingdom, 1984: § 67). The Court in *Kvasnica* stated that *the requirement of legal “foreseeability” in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly* (Kvasnica v. Slovakia, 2009: § 79). This standard is, between the others,

[243] In order to comply with the rules established by the Court, the Romanian new Code of Criminal Procedure establishes and defines interception of conversations and communications; video, audio surveillance or by photographing in private areas; location or GPS tracking or by other technical surveillance means; obtaining the list of telephone conversations; retention, delivery or searches of postal correspondence; monitoring the financial transactions and the disclosure of financial data; use of undercover investigators; finding corruption offence, or the conclusion of an agreement; supervised delivery; identification of the subscriber, the owner or the user of a telecommunication system or an access point to a computer (Boroi, 2013: 58-59).

repeated in the *Weber and Saravia v. Germany* (Weber and Saravia v. Germany, 2006: § 93) or in the similarly in *Leander v. Sweeden*: *...the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields. Thus, it cannot mean that individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security* (Leander v. Sweeden, 1987: § 51). *However, the domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (to his secret and potentially dangerous inerference with the right to respect for private life and correspondence* (Kvasnica v. Slovakia, 2009: § 79; Huvig v. France, 1990: § 29; Malone v. The United Kingdom, 1984: § 67; Kopp v. Switzerland, 1998: § 64; Valenzuela Contreras v. Spain, 1998: § 46). The Court has also stressed the need for safeguards in this connection. *In its case-law on secret measures of surveillance, it has described an overview of the minimum safeguards that should be set out in statute law in order to avoid abuses of power* (Kvasnica v. Slovakia, 2009: § 79).

In the context of secret measures of surveillance or interception by public authorities it is essential to have clear, detailed rules on interceptions of telephone conversations, especially as the technology available for the use is continually becoming more sophisticated (Valenzuela Contreras v. Spain, 1998: § 67; Kopp v. Switzerland, 1998: § 72). In a case when no domestic law regulates the use of covert listening devices at the relevant time, the interference is not “in accordance with the law” (P. G. and J. H. v. the United Kingdom, 2001: § 39). Then, in the numerous judgments the Court stated that, *since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned of the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to the judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercie with sufficient clarity to give the individual adequate protection against arbitrary interference* (Weber and Saravia v. Germany, 2006: § 46; Malone v. The United Kingdom, 1984: § 68; Leander v. Sweeden, 1987: § 51; Huvig v. France, 1990: § 29; Bykov v. Russia, 2009: § 78).

In the *Weber and Saravia* the Court reminded to the minimum safeguards that should be set out in the statute in order to avoid abuses of power: a definition of categories of people liable to have their telephones tapped by judicial order; the nature of offences

which may give rise to such an order; a limit on the duration of telephone tapping; the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible interception by the judge and by the defence and the circumstances in which recording may or must be erased or the tapes destroyed, in particular where an accused has been discharged by the investigating judge or acquitted by a court (Weber and Saravia v. Germany, 2006: § 46). Deficiency in the determining the nature of offences which might give rise to such an order, fixing limits on the duration of telephone aping and specifying the procedure for drawing up summary reports containing intercepted communications lead to the violation of Article 8 (Prado Bugallo v. Spain, 2003).[244]

In the Serbian law, secret monitoring of communication is ruled as a special investigative measure (see generally: Turanjanin, Voštinić and Žarković, 2016) and Serbian legislator followed abovementioned instructions defined by ECtHR. The Court also stresses that in a case when the scope of the measures of secret surveillance could include virtually anyone, there will be violation of Article 8 (Szabó and Vissy v. Hungary, 2016: § 89). As the Court emphasized, the length of the measure is very important. So, if a law does not say anything about the length of the measure or the reasons that might warrant it, did not satisfy the requirements of the Article 8 (Domenichini v. Italy, 1996: § 30). For the existence of the violation, it is necessary that the law in force in the moment of alleged violation had shortcomings. Regardless to the legislation changes between violation and judgment, the Court will appreciate State's efforts, but also will find violation of the article 8. For example, the Court considers that, to this extent, during the relevant period of applicant's detention, the impugned surveillance measures, insofar as they may have been applied to him, did not meet the requirements of Article 8 of the Convention as elucidated in the Court's case-law (R. E. v. the United Kingdom, 2015: § 142).

2.3 Purpose and necessity of the interferences

In the *Weber and Saravia* the Court reiterates that *when balancing the interest of the respondent State in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant's right to respect for his or her private life, it has consistently recognised that the national authorities*

[244] Spanish legislator after judgments against her did not completly changed legisaltion in this sphere (Winter, 2007: 14; see additionally Ferro, 2010).

enjoy a fairly wide margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security (see also Klass and Others v. Germany, 1978: § 49). *In view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse. This assessment depends on all the circumstances of the case, such as nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law* (Weber and Saravia v. Germany, 2006: § 106). In *Dragojević v. Croatia* the Court again draws attention to the question whether an interference was "necessary in democratic society" *in pursuit of a legitimate aim, since the Court has held that powers instruct secret surveillance of citizens are only tolerated under Article 8 to the extent that they are strictly necessary for safeguarding democratic institutions* (see also Kennedy v. the United Kingdom, 2010: § 153). *In assesing the existence and extent of such necessity the Contracting States enjoy a certain margin of appeciation but this margin is subject to European supervision.* In Barfod v. Denmark the Court added here embracing both the legislation and the decision applying it, even those given by an indenpendent court (Barfod v. Denmark, 1989: § 28). Then, *the Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in democratic society". In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 paragraph 2, are not exceeded* (Dragojević v. Croatia, 2015: § 84; Lambert v. France, 1998: § 31; Kvasnica v. Slovakia, 2009: § 80).

In *Klass* and *Malone*, the Court stated that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of the secret measures, without having to allege that such measures were in fact applied to him. However, this case-law cannot be interpreted so broadly as to encompass every person who fears that the security service may have compiled information about him. It is sufficient that the existence of the practices permitting secret surveillance be established and that there is a reasonable likelihood that the security service has compiled and retained information concerning his private life (Hewitt and Harman v. the United Kingdom, 1993).

3. Order for secret surveillance

The Court have dealt with the same issues in several occasions. Firstly, one of the fundamental issues in this sphere is whether the secret surveillance was necessary. The Court in the last few years brought several judgments against the Croatia. The most important is probably Dragojević v. Croatia where the Court has also emphasised that *verification by the authority empowered to authorise the use of secret surveillance, inter alia, that the use of such measures is confined to cases in which there are factual grounds for suspecting a person of planning, commiting or having commited certain serious criminal acts and that the measures can only be ordered if there is no prospect of successfully establishing the facts by another method or this would be considerably more difficult, constitutes a guarantee of an appropriate procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration. It is therefore important that the authorising authority – the investigating judge in the instant case – determines whether there is compelling justification for authorising measures of secret surveillance. In the instant case the four secret surveillence orders issued by the investigating judge of the Zagreb County Court in respect of the applicant were essentially based only a statement referring to the existence of the OSCOC's request for the use of secret surveillance and the statutory phrase that „investigating could not be conducted by the other means or that it would be extremely difficult“. No actual details were provided based on the specific facts of the case and particular circumstances indicating a probable cause to believe that the offences had been committed and that the investigation could not be conducted by other, less intruisive, means* (Dragojević v. Croatia, 2015: §§ 94-95).

Croatian Supreme Court and Constitutional Court took a view that *in a case of a lack of the reasons in the secret surveillance orders that couls be compensated by retrospective specific reasons with regard to the relevant questions at a later stage of the proceedings by the court being requested to exclude the evidence thus obtained from the case file.* So, the Court concludes that *it follows from the foregoing that whereas the Code of Criminal Procedure expressly envisaged prior judicial scrutiny and detailed reasons when authorizing secret surveillance orders, in order for such measures to be put in place, the national courts introduced the possibility of retrospective justification of their use, even where the statutory requirement of prior judicial scrutiny and detailed reasons in the authorization was not complied with.* In an area, as sensitive as the use of secret surveillance, which is tolerable under the Convention only in so far strictly necessary for safeguarding the democratic institutions, the Court has difficulty in accepting this situation created by the national courts. It suggests that *the practice of*

administration of law, which is in itself not sufficiently clear given the two contradictory positions adopted by both the Constitutional Court and the Supreme Court, conflicts with the clear wording of the legislation limiting the exercise of the discretion conferred on the public authorities in the use of covert surveillance. Moreover, the Court considers that *in a situation where the legislature envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law. This is particularly true in cases where the only effective possibility for an individual subjected to covert surveillance in the context of criminal proceedings is to challenge the lawfulness of the use of such measures before the criminal courts during the criminal proceedings against him or her. The Court has already held that although the courts could, in the criminal proceedings, consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance with the law"; still less was it open to them to grant appropriate relief in connection with the complaint* (Dragojević v. Croatia, 2015: §§ 98-99). The similar situation can be found in *Goranova-Karaeneva v. Bulgaria* (Goranova-Karaeneva v. Bulgaria, 2011). This can accordingly be observed in the present case, where the competent criminal courts limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements concerning the allegations of arbitrary interference with the applicant's Article 8 rights (Dragojević v. Croatia, 2015: § 100).

In this case, based on the abovementioned reasons, the Court found violation of the Article 8. Simply, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the requirement of lawfulness, nor was it adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was „necessary in democratic society“. This was a basis for the next two judgments against Croatia, where existed, in this field, an identical situation (Bašić v. Croatia, 2016; Matanović v. Croatia, 2017). The Court here just recalls the previous judgment. This is especially important for the Serbian judges, because it is not a rarity that such orders lack the reasoning. However, it does not seem to problem only in the Western Balkan

countries. In the decision *Mustafa Sezgin Tanrikulu v. Turkey*, the Court observes that when the impugned decision did not include any explanation as to why and what way more lenient measures would have been ineffective for the aims sought to be achieved and when no actual details were provided based on the specific facts of the case and the particular circumstances indicating a probable cause to believe that the aims in question could not be achieved by other, less intrusive, means, there will be violation of the Article 8 (Mustafa Sezgin Tanrikulu v. Turkey, 2017: § 59).[245]

According to Serbian Code of Criminal Procedure (hereinafter: CPC) the secret surveillance is applicable if exists reasonable suspicion that someone committed the crime listed in the article 162[246] of CPC but only if collecting of evidence is impossible or hardly feasible in other way. Exceptionally, this measure is applicable to the person who is under suspicion for preparing some of offences from the article 162 but only if the circumstances of the case indicate that discovering, prevention or proving the crime and perpetuator would not be possible without this measure or it will result in disproportionate difficulties or serious danger.

According to the jurisprudence of the ECtHR, under the Convention's protection fall: listing of phone calls (Copland v. the United Kingdom, 2013) facsimile, e-mail and data communications (Leander v. Sweeden, 1987: § 42), as well as pager communications (Taylor-Sabori v. the United Kingdom, 2002: § 17). Similarly, in the sphere should fall every kind of the SMS messages. In *Van Vondel v. Netherlands* the Court took a position that a recording of private (telephone) conversations by a conversation partner and the private use of such recordings does not *per se* offend against Aricle 8 if this is done with private mehanism but that by its very nature this is to be distinguished from the covert of and for the benefit of an official inquiry – criminal or otherwise – and with the connivance and technical assistance of public investigation authorities (Van Vondel v. Netherlands, 2008: § 49).

However, the Court in the Roman *Zakharov v. Russia* emphasized the lack of the provision that provides discontinuation of secret surveillance measures when it is no longer necessary, which does not provide sufficient guarantees against arbitrary interference (Roman Zakharov v. Russia, 2015: § 302). Considering maximal length of the secret surveillance according to Serbian CPC, it is limited, depending from the type

[245] According to Serbian CPC that also needs to be assessed and reasoned by competent authority in criminal proceeding but that’s not always the case in the practice.

[246] This list is comprehensive and include more than 30 serious crimes (see art. 162 of the CPC)

of crime (general, organized crime or war crimes). For general crime maximal length of the secret surveillance is three months, with possibility for the court to extent measure for additional three months, while for the organized crime and war crimes the initial but also additional permitted length is doubled. Serbian CPC does not contain provisions on discontinuation and it's obvious that needs to be amended in this part.

The Court also took the position that is very important existence of a body or official that is either external to the services deploying the means of surveillance or at least required to have certain qualifications ensuring his independence and adherence to the rule of law (Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, 2007: § 85). The Court made improvements since *Kennedy*, because it demands *ex post* control (McIntryre, 2016: 154). Serbian CPC entitles police, Security Information Agency and Military Security Agency for application of the secret surveillance[247] while post services and other communication services are obliged to enable them surveillance and recording as well as to deliver them letters and other mails. This provision is in line with par. 13 of the Recommendation R(95)13. Daily reports on the surveillance must be delivered to the investigation judge and prosecutor upon their request.

4. Notification of surveillance measures and handling unnecessary materials

Very important issue in this field is the question of notification of surveillance measures, which is inextricably linked to the effectiveness of remedies before the court[248] and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised on the measures taken without his/her knowledge and thus able to challenge their legality retrospectively (Klass and Others v. Germany, 1978: § 57; Weber and Saravia v. Germany, 2006: § 135). The Court used *Klass* as an opportunity to stipulate basic principles balancing the state's secret surveillance powers against the rights of targeted individuals, in particular the rights to be informed on the surveillance measures and the possibility of having

[247] About the role of the police in the new Serbian Criminal procedure Code see Čvorović and Turanjanin, 2016.

[248] Effectiveness of remedies is linked with the notification. However, the issue of remedies is related to retroactive application of remedies after the surveillance, because the subject of surveillance should have a right to examine the legality of the secret measure of surveillance. The Article 13 analysis in Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria is the most complete analysis in the case-law regarding the issue of subsequent notification (Murphy, 2016: 296).

recourse to the courts after termination of such measures (Boehm, 2012: 34). In *Klass*, the Court did not directly require the notification of the person concerned, but in recent cases the Court increasingly insists on the notification duty (Boehm and Hert, 2012), started with the Association for European Integration and Human Rights and *Ekimdzhiev v. Bulgaria*.

However, the fact that persons concerned by secret surveillance are not subsequently notified once surveillance has ceased cannot by itself warrant the conclusion that the interference was not "necessary in democratic society", as it is the very absence of knowledge of surveillance which ensures the efficacy of the interference. Indeed, such notification might reveal the working methods and fields of operation. As soon as notification can be carried out without jeopardizing the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned (Klass and Others v. Germany, 1978: § 58; Weber and Saravia v. Germany, 2006: § 135; Leander v. Sweeden 1987: § 66; Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, 2007: § 90). In *Szabó and Vissy v. Hungary* there also wasn't obligation for the notification, and for that reason, between the others, the Court found violation of the Article 8. Romanian legislator implemented the provision that prosecutor would inform in writing as soon as possible every subject of the warrant on the technical surveillance measure which has been taken in his case (Boroi, 2013: 59).

The ECtHR has not dealt with issues of collecting of so called "accidental findings" but this scenario is ruled by Serbian CPC. In case that application of special investigation techniques resulted in collection of material referring to crime or offender other than this/these one(s) specified in decision on application of the special investigation techniques, this material could be used in the further procedure only if it concerns crime from the article 162 of the CPC.

Article 163 of the CPC rules cases where public prosecutor decided not to render decision on initiation of criminal proceeding within six months from receiving materials collected through application of secret surveillance or not to use this material in further procedure. In these cases, investigation judge rendering decision on destruction of the materials. In parallel, the judge may notify persons concerned by secret surveillance if his/her identity is known and notification does not put under the risk conducting further procedure.

5. Conclusion

The interception of communications is a complex subject matter worldwide. In the Serbian law, it is a special investigative measure titled secret monitoring of communications. It deeply affects fundamental human rights, which are protected, in this sense, by the Article 8 of the ECHR. The Court, in its extensive practice, took numerous standards in this sphere, and accordingly, set up many requirements. We need to emphasize the fact that misunderstanding of the requirements imposed by the Court may give rise to serious consequences for the rule of law, as Boroi pointed out (Boroi, 2013, 69). In addition, we could say that the Court makes two types of requirements, where the first are linked for the necessary changes in the legislation, while the other type is linked to the properly application of the existing legal rules. Serbian legislation mostly follows the Court's standards, but it could also be improved in some parts. However, some of the existing provisions should be applied on the better way. In this way, Serbia will avoid the negative experiences of the other countries when it comes to the violation of the human rights.

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POSEBNA DOKAZNA RADNJA TAJNI NADZOR KOMUNIKACIJA POD LUPOM EVROPSKOG SUDA ZA LJUDSKA PRAVA

Apstrakt: *Autori se u radu bave posebnom dokaznom radnjom tajni nadzor komunikacija, pri čemu je akcenat stavljen na stavove Evropskog suda za ljudska prava u pogledu predmetne materije. Aktuelizacija potrebe za preciznim regulisanjem uslova pod kojima je moguće tajno nadzirati komunikacije trećih lica u svrhu sprečavanja, otkrivanja i dokazivanja krivičnih dela, uslovljena je, u poslednjih pedesetak godina, činjenicom da su paralelno tekla dva intenzivna procesa: Najpre, ovaj period obeležen je intenzivnim tehnološkim razvojem koji je sa sobom, s jedne strane, doneo nove oblike kriminala i to naročito organizovanog, ali je paralelno otvorio i značajne mogućnosti na polju korišćenja produkata tog razvoja u svrhu sprečavanja, otkrivanja i dokazivanja krivičnih dela. Istovremeno, na globalnom planu, a naročito na području Evrope, tekla je ekspanzija u oblasti razvoja zaštite ljudskih prava, pri čemu je naročito, za ovo pitanje od značaja pravo na privatnost. U tom smislu, ključno pitanje koje determiniše sva zakonska rešenja u ovoj oblasti, jeste u kojoj meri je dozvoljeno zadiranje u privatnost komunikacija zarad prevencije i suzbijanja kriminala. Posebno značajno jeste pitanje obaveštavanja osumnjičenog lica nakon izvršene posebne dokazne radnje o radnji koja je sprovedena nad njim.*

Ključne reči: *tajni nadzor komunikacije, posebne dokazne radnje, Evropski sud, osumnjičeni, obaveštenje*

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VIOLATING PRIVACY BY COVERT INTERCEPTION OF COMMUNICATIONS

Abstract: *The paper emphasizes that respect for the right to privacy represents an important dimension of personal rights of all individuals. Based on the Constitution of the Republic of Serbia, the Criminal Procedure Code, as well as the Law on Security Information Agency and the Law on Military Security Agency and Military Intelligence Agency, provide for possibilities of violating of privacy by the implementation of special evidentiary actions that the paper focuses on. Special attention is given to covert interception of communications, a special evidentiary action that is most frequently used in practice and in respect of which there is a possibility of abuse. Therefore it represents a serious threat of violating privacy in an unlawful manner, thereby committing a srious infringment of human rights. In addition to this, even when this special evidentiary action is performed in accordance with the law, there is a possibility that in its use at the trial would unnecessarily violate privacy. The paper therefore seeks to find mechanisms that will prevent it, on the one hand, as well as ensure the full right to defence to the defendant, on the other hand. The closing part of the paper offers conclusion and presents suggestions on how to protect privacy in criminal proceedings, i.e. how to avoid violation of privacy by covert interception of communication, and points out to unconstitutional provisions for which it is suggested they should be deleted or amended for the purpose of harmonization with the Constitution of the Republic of Serbia.*

Keywords: *privacy, wiretapping, interception of communication, evidence, evidentiary actions.*

1. Introduction

Criminal offences perpetrated by members of organized criminal groups as well as serious criminal acts that can be, but do not have to be, perpetrated by members of organized criminal groups are as a rule difficult to detect and even more difficult to prove in a court of law. Economic strength and wealth, along with readiness of these criminals to resort to serious violence in order to impose their own will or to retain the acquired positions, power that derives from bribing certain state officials, in addition to

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traditional problems, such as conspiracy of silence, closed structures of the organizations, connections with certain exponents of state authorities, victims' fear of retaliation, etc., represent basic and, unfortunately, almost insolvable problems for representatives of the legal system who oppose this form of crime in the contemporary society. In an attempt to find normative possibilities for overcoming these difficulties, legislators of many contemporary states have opted for creating specific criminal procedural norms which would facilitate proving of organized criminal activities. In this respect, there are some characteristic evidentiary actions aimed at facilitated evidence gathering by using certain technical means as well as implementation of other special evidentiary methods (Škulić, 2015: 473-474). Thus the Criminal Procedure Code (CPC) of the Republic of Serbia envisages special evidentiary activities which include: 1) covert interception of communication; 2) covert surveillance and recording; 3) simulated (business) deals; 4) computer search of data; 5) controlled delivery; 6) undercover investigator. These evidentiary actions are to be applied exceptionally, when the objective cannot be achieved by 'ordinary' evidentiary actions, because their implementation significantly infringes privacy of citizens. It is therefore necessary, in addition to strictly applying legal provisions, to devise other mechanisms that will ensure that the citizens' right to privacy is violated as little as possible by the implementation of special evidentiary actions.

In addition to the Criminal Procedure Code, special measures that depart from the inviolability of confidentiality letters and other means of communication are also envisaged by the Law on Security and Information Agency (Article 13) and these include: 1) secret surveillance and recording of communications regardless of the form and technical means used for it, or surveillance of electronic or any other address; 2) secret surveillance and recording of communications in public places and places with limited access or in premises; 3) statistical electronic surveillance of communications and information systems for the purpose of obtaining data on communication or location of used mobile terminal equipment; 4) computer search of already processed personal and other data and their comparing with the data acquired through the application of measures stipulate in points 1 to 3 of this paragraph. Similar provisions are included in the Law on Military Security Agency and Military Intelligence Agency (Article 13).

2. Right to Privacy

Respect for the right to privacy and the necessity for protection of personal data represent a significant dimension of personal rights of every individual. According to a

definition in the American jurisprudence of the second half of the 19th century, the right to privacy was originally defined as a person's *right to be left alone* (Rakočević, 2012: 911).

The right to privacy in the structure of international public law holds the position of one of the basic human rights and represents one of the fundamental human freedoms. In terms of the category of generations of rights it belongs to the first generation of human rights – civil and political rights. The objective of these rights is to regulate the relation between the state and citizens, that is, to ensure protection of a person against omnipotence of the state and excessive interference of the state in the lives of individuals. In terms of values, the notion of privacy rests on the belief that all human beings are valuable in themselves and have an innate need for personal protected space in which the state must not interfere. Hence the conceptual definition basically relies on this axiological attitude and the right to privacy is most generally defined as a set of rules which ensure the peace of mind of individuals and allow them to live a life of their own free choosing (Šurlan, 2014: 47-48).

The right to private life includes a person's rights to exclude third persons from finding out facts related to the holder of the said right. This relates to the facts which individuals want to keep only for themselves. A narrower definition of the right to privacy outlines it as the absolutely subjective right of natural persons to be able to independently decide on acquainting third persons with any manifestation of their existence. A number of specific personal rights stem from this one, including: the right to private life, the right to vote, the right to writings of personal nature (Sinđelić, 2012: 8-9).

The European Convention on Human Rights (Article 8) provides that everyone has the right to respect for his private and family life, his home and correspondence (paragraph 1), and that no public authorities will interfere in the exercise of this right except in accordance with the law and when necessary in a democratic society in the interest of national security, public security or ethe conomic well-being of the state, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others (paragraph 2). In line with the Convention, the Constitution of Serbia, as part of the protection of the right to privacy stipulates (Article 41) that confidentiality of letters and other means of communication shall be inviolable (paragraph 1) and that derogation shall be allowed only for a limited period of time and based on a court decision if necessary for conducting criminal proceedings

or protecting the safety of the Republic of Serbia, in the manner stipulated by the law (paragraph 2).

3. Criminal Act of Unauthorized Wiretapping and Recording as per Article 143 of the Criminal Code

For the protection of the sphere of privacy of individuals, the Criminal Code prescribes the criminal offence of Unauthorized Wiretapping and Recording. The protected object in this criminal offence is the right of every person to liberty in unhindered expression, i.e. the personal right of everyone to be able to believe that the statement they addressed to certain persons or conversations they had shall not be available to others contrary to their will and knowledge. The criminal offence has two basic forms and an aggravated one. The first basic form is committed by whoever uses special eqeuipment for unauthorized wiretapping or recording of a conversation, statement or any address that is not intended for him, whereas the second basic form is performed by anyone who enables an unknown person to become familiar with the conversation, statement or address obtained through unauthorized wiretapping or audio recording. An essential element of the criminal offence is the fact that wiretapping or audio recording is performed without authorization, i.e. without the consent of the person who talks or gives a statement. Exceptionally, this element will not be present when there is no consent, but only in the two above mentioned cases of derogation of the principle of inviolability of secrecy of letters and other means of communication: when this is necessary for the purpose of criminal prosecution or for the protection of the state security. Even in the case of these two exceptions it has to be prescribed by the law and the wiretapping or audio recording may be performed only on the basis of a court decision (Stojanović, 2012: 470-471).

The aggravated form occurs if either of the basic forms is committed by an official in the discharge of duty. The basic forms are punishable by a fine or imprisonment of three months to three years, whereas the aggravated form is publishable by imprisonment of six months to five years.

4. Evidence in criminal proceedings and special evidentiary actions

The 2011 Criminal Procedure Code introduced significant novelties in our legislation, such as are characteristic of adversary systems. Thus the role of court in proving and establishing facts was significantly changed because its obligation to truthfully and

completely establish facts that are of importance for making a lawful decision is omitted. Instead of it, the code stipulates that the burden of proof is on the prosecution and that the court establishes the facts at the motion of the parties, with the right to intervene only exceptionally and subsidiarily. It should be borne in mind that the court is only obliged to objectively evaluate presented evidence but not to obtain evidence and to give equal attention to establishing facts which are both detrimental and beneficial to the defendant based on the evidence obtained or proposed by the parties (Delibašić, 2013: 777-787). This role of the court in criminal proceedings has its specificities in terms of special evidentiary actions. Namely, if the public prosecutor fails to initiate criminal proceedings within six months of the date of examining the materials collected by applying special evidentiary actions or if he declares that he will not use them in the proceedings or that he will not request that criminal proceedings be instituted against a suspect, the judge for the preliminary proceedings will issue a ruling on the destruction of the collected materials. The judge has to issue such a ruling and the materials must be destroyed even in the case of materials that may be beneficial for the defendant, which is not a very good solution. Within the conception of criminal proceedings in which the court determines facts, the examining judge and the trial court *ex officio* collected the evidence beneficial for the defendant. If the duty of the court to establish material truth had been retained, the materials collected through special evidentiary actions which the prosecutor will not use in the proceedings would not be destroyed by the court if they are favourable for the defendant. Such a solution would be acceptable even now, therefore judges for the preliminary proceedings should be authorized to inform defendants it there are any materials that he finds useful for them and leave a possibility for the defendants to use the materials that the prosecutor declares he would not use.

5. Covert interception of communication

If the legal requirements (Article 161 para. 1 and 2 CPC) are met, acting on a reasoned request of the public prosecutor, the court may order interception and recording of communications which is conducted by telephone or other technical means or surveillance of the electronic or other address of a suspect and the seizure of letters and other consignments. This special evidentiary action is imposed by the judge for the preliminary proceedings in a reasoned order which must contain all available data on the person against whom the covert interception of communication is being ordered, legal designation of the criminal offence, designation of a known telephone number or address of the suspect or the telephone number or the address for which there are

grounds for suspicion that the suspect is using, the reasons on which the suspicion is founded, manner of conduct, scope and duration of the special evidentiary action. Covert interception of communication may last three months and can be extended for additional three months at the most if it is necessary for collecting further evidence. In cases of criminal offences for which a special law prescribes actions by the public prosecutors office of special jurisdiction, covert interception may be subject to two more three-month extensions. The action is terminated as soon as the reasons for its implementation cease to exist.

This means that this evidentiary action can last for one year at the most, and the question arises here as to whether it may be imposed again on the same suspect and when. If the stance is taken that there is no time limitation, a situation could occur in practice in which the action is formally discontinued for a day or two (or a couple of hours) and then resumed by implementing a ‘new’ order on covert interception of communication, which would certainly represent a misuse of the legal provision. On the other hand, if the stance is taken that after the implementation of covert interception of communication which failed to produce satisfactory results, the special evidentiary action may not be used against the same suspect, it could create an absurd situation in which he would virtually be 'protected’ against this special evidentiary action, which would not be a good solution. All in all, this issue will be resolved in practice depending on the case in question, wherein special attention should be given to making decisions, taking care not to violate the right to privacy, and thereby fundamental rights and freedoms guaranteed by the Constitution and international conventions by applying this action (Delibašić, 2016: 86).

Given that the legislator has not prescribed at which stage of the proceedings the special evidentiary action of covert interception of communication can be used - although it should, as a rule, be primarily used in the preliminary inquiry - there is no obstacle, should the need and opportunity arise, to use it at other stages of the proceedings, both during the investigation and during the trial, and even during judicial proceedings related to legal remedies (Delibašić, 2016: 96). Namely, since this evidentiary action is imposed by the judge for the preliminary proceedings by a reasoned order, and the judge for the preliminary proceedings acts only in the phase of the preliminary inquiry and investigation, then this measure could be applied at these stages of the proceedings. However, if the need should arise for the implementation of covert interception of communication for another criminal offence against the defendant who is already subject to proceedings, there is no obstacle for implementing the special evidentiary

action for the ‘new’ criminal offence during the trial and appellate proceedings related to the ‘previous’ criminal offence with which he has been charged. The question that arises here is whether the materials collected in relation to the ‘new’ criminal offence could be used in the proceedings for the ‘previous’ criminal offence. When responding to this question, Article 164 of the Criminal Procedure Code should be taken as a starting point as it envisages procedures in cases of accidental findings which indicate that the material could be used.

6. Implementation of covert interception of communication

The order on covert interception of communication is carried out by a responsible state body. It can alternatively involve police, Security Information Agency or Military Security Agency. It is the matter of discretionary decision of the authority ordering this special evidentiary action, i.e. the judge for the preliminary proceedings and the public prosecutor’s office, which of the alternatively listed state agencies will be entrusted with the implementation of covert interception of communication, yet what it should be borne in mind here is the primary scope of activities of these bodies, so that, for instance, when there are grounds for suspicion that someone has perpetrated a criminal offence encompassed by the so-called classic organized crime, the implementation of the special evidentiary action should be entrusted to the police, whereas the Security Information Agency should carry out the order in cases of criminal offences against the state, such as terrorism, attacks against the constitutional order, etc., while the Military Security Agency would be engaged in cases of criminal offences against the Serbian army. On the other hand, there is no special formal regulation in the Code in this respect, so that in some situations it would be a matter of adequate tactical estimate which of the alternatively listed state bodies should be entrusted with the implementation in a specific case of covert interception of communication (Škulić, 2012: 58).

7. Unconstitutional legal provisions pertaining to covert interception of communication

If during the conduct of covert interception of communications it becomes apparent that the suspect is using another telephone number or address, the public authority in charge of the special evidentiary action shall expand the scope of covert interception of communication so as to include the said telephone number or address and immediately inform the public prosecutor thereof (Article 169 para. 1 CPC). Upon receiving the

notice on the epansion of covert interception of communications, the public prosecutor will immediately file a motion to retroactively authorize the epansion of the special evidentiary action. The judge for the preliminary proceedings decides on this motion within 48 hours of the receipt of the motion and makes a note thereof in the record (Article 169 para. 2 CPC). If the public prosecutor's motion is approved, the preliminary proceedings judge shall retroactively authorize the expansion of covert interception of communication, and if the motion to expand the interception is declined the materials collected in the expanded covert intersception are destroyed (Article 169 para. 3 CPC). The expansion of covert interception of communications may last as long as the covert interception of communications, which means that due to time limitation, and the later finding that the suspect, against whom covert interception of communication is implemented, uses telephone numbers included in the expansion, the expanded interception of telephone numbers lasts shorter than the overall duration of the covert interception of communication (Nikolić, Tomović, 2016). The Law on Security Intelligence Agency contains an almost identical provision on the extension of this action (Article 15b).

Bearing in mind that the Constitution of Serbia (Article 41) provides that the confidentiality of letters and other means of communication is inviolable and that derrogation is allowed only for a specific period of time and based on a court decision, if necessary for conducting criminal proceedings or the protection of security of the Republic of Serbia, in a manner envisaged by the law, a conclusion can be drawn that the above mentioned provisions on the extension of covert interception of communication are unconstitutional. Namely, the secrecy of communications can be violated only upon a court order, and not upon a decision made by the authority in charge of the implementation of the action (police, Security Information Agency or Military Security Agency), which will retroactively be authorized by the court. The decision has to be made by the court, and then implemented, and not, as currently prescribed, made by another authority, implemented over a certain period of time, and retroactively authorized by the court. For these reasons the mentioned provisions on the extension of this special evidentiary action should be deleted or amended for the purpose of harmonization with the Constitution of the Republic of Serbia.

8. Special evidentiary actions of covert interception of communication and undercover investigator and their interrelation

When speaking about communications a distinction should be made between the special evidentiary action of covert interception of communications which applies to communications by telephone or other technical means, i.e. communications via electronic or other address used by a suspect, and special evidentiary actions of *covert surveillance and audio and video recording* and *undercover investigator*, which, under certain circumstances can apply, among other things, to direct communications. Namely, the implementation of these evidentiary actions can be achieved through audio recording of communications between the suspect and other persons (other than the undercover investigator), and the question that arises is whether such recordings can be used in criminal proceedings. It would be more acceptable to take the stand that such recordings can be used in criminal proceedings.

The judge for the preliminary proceedings orders the special evidentiary action of engaging an undercover investigator by issuing a reason order (Article 184 para. 1). The order on engaging the undercover investigator contains certain mandatory elements, as well as an optional one. It includes compulsory data on the persons or the group related to whom it is being apllied, description of possible criminal offences, manner, scope, location and duration of the special evidentiary action, and it is may specify that the undercover investigator may use technical means for making photographs or for audio, video or electronic recording, which represents an optional measure or a possible element of the order on the engagement of the undercover investigator (Article 184 para. 2). The view that the possibility should not be ruled out for the preliminary proceedings judge to authorize entry in the apartment and premises in order to install technical means for recording (Ilić i dr, 2013: 409), could not be accepted entirely. This possibility exists for the premises but it has been ruled out for apartments. Namely, the implementation of the special evidentiary action of covert surveillance and recording that would practically be carried out within the scope of engaging the undercover investigator, is ruled out as far as apartments are concerned, that is, the court may order it for the purpose of detecting contacts or communication of the suspect in public places and places with limited access or in premises except in a dwelling (Article 171 para. 1 item 1). Thus the legislator in this provision explicitly prohibits the possibility of recording in a dwelling, which means that the judge for the preliminary proceedings could not allow the undercover investigator to enter an apartment and place the recording devices (Delibašić, 2016: 85).

In that respect, it should be pointed out that the Criminal Procedure Code does not include explicit stipulation on the evidentiary value of data collected in the conversation of the undercover investigator and the suspect or a citizen or the possibility of the undercover investigator's testifying, so that this issue will have to be resolved by judicial practice. If the stance is taken that these conversations should be equaled with the actions taken by police in order to collect information from citizens (Article 288) or questioning a suspect (Article 289), then the undercover investigator certainly could not be questioned about the contents of the conversations that he has had with the citizens or the suspect, because the records made by the police in the regular course of events when taking the said measures cannot be used as evidence in criminal proceedings (the right would certainly not be read to a suspect in a conversation with the undercover investigator as they have to be when he speaks with the police nor would he have a defence counsel). Besides, it should be noted that in this case it is not prohibited to have an undercover conversation, because such a prohibition would make the entire institute of undercover investigator absurd. Namely, in keeping with the above view, the data collected through undercover conversation could be used for the purpose of detection, prevention and resolution of criminal offences, but their contents could not be used as evidence, especially not in terms of the undercover investigator testifying about the contents of these conversations. Finally, it should be mentioned that the conversations which the undercover investigator has with suspects and citizens contain a measure of deception, consisting, in the first place, in the fact that the undercover investigator deceives the collocutor about his identity and occupation. Therefore the stance could be taken that these conversations cannot be used as evidence in criminal proceedings because they contravene Article 9 of the Criminal Procedure Code which, among other things, prohibits all use of deception which affects free will or extorts a confession or any other statement from the defendant or another party to the proceedings (Delibašić, 2016: 94-95).

The opposite view would be that the undercover investigator can be questioned as to the contents of the conversation he has had with citizens and suspects during his engagement as an undercover agent, and the argument in defence of this view would come down to the fact that the conversation was voluntary and that no pressure was exerted by the state authority, as is the case with the police who do not hide their identity when they interrogate suspects or citizens. Advantage should certainly be given to the former view, but – because of possible abuse – this vital question should be

resolved by legal provisions, so that no room is left for misinterpretation (Delibašić, 2016: 95).

It should be noted that the code does not expressly resolve the issue regarding the use of evidence obtained during the implementation of this special evidentiary action and with respect to materials originating from recorded conversations between the undercover investigator and other persons by use of technical devices for audio recording. Namely, two opposite views could also be taken here, based on the previously explained arguments. According to the first view, the recordings of those conversations involving the undercover investigator could not be used as evidence, whereas the second view would allow it. Just as in case of the previously discussed question, this issue should also be resolved in the statute in order to prevent any abuse (Delibašić, 2016: 95).

9. Problems in the implementation and risk of abuse of covert interception of communication and violation of privacy

The Code explicitly stipulates that no court decision can be based on the collected evidence if the implementation of the covert interception of communication (as well as any other special evidentiary action) has been carried out in contravention of the legal provisions or orders of the relevant authority. It is not disputable that the recordings and transcripts of telephone conversations or other forms of communication should be exempted from the records and that they cannot be used in the proceedings. However, the question arises as to the manner in which the evidence collected in a lawful way should be treated if the initial information has been obtained through the implementation of this evidentiary action, and if action has been taken contrary to the legal provisions or the order issued by the relevant authority in charge of the implementation. For instance, if it is established by illegal wiretapping that there is a substantial quantity of illegal weapons in a house, and then the house is searched in accordance with the provisions of the Criminal Procedure Code, whereupon the illegal weapons are found and seized. In such a case, neither the search nor the temporary seizure of objects can be accepted as evidence because this evidence would indirectly, according to the manner of collection, contravene the Criminal Procedure Code.

Namely, in this case the doctrine of 'fruit of a poisonous tree' - very influential in Aglo-American criminal procedural law and as of recent accepted by our national legislator - should be applied, according to which such evidence would not be lawful, although they may be legal per se, because the modality of obtaining them is illegal. Strictly speaking,

no ‘evidence’ that is inadmissible either directly (per se) or indirectly (in terms of the manner in which it has been obtained) can formally be deemed as evidence (Škulić, 2014: 192).

As regards the covert interception of communication, although this measure can be applied against a suspected offender, the problem with it is that it simultaneously restricts the right to privacy of other persons regardless of whether they are related to the person and criminal offence that are subject to the measure (Nicević, Čimburović, 2014: 354). Thus, for example, if a groundline telephone used by a suspect, who is a tenant, is wiretapped, the conversations of all occupants who are not related with the suspect (except being his landlord/landlady) and their activities will also be under surveillance. As this would result in unwarranted violations of their privacy, special attention should be paid when imposing this special evidentiary action.

Additionally, when intecepting communications, primarily telephone conversations, all conversations of the person targeted by this evidentiary action are recorded, which includes private and intimate conversations which, as a rule, have nothing to do with the criminal offence because of which the action is ordered. The materials collected in such a way are available to the public prosecutor and the court, in addition to the public authority in charge of covert interception of communications. In the course of criminal proceedings, the public prosecutor decides which part of the recorded communications can be used as evidence for the prosecution and according to his estimate requests the court to listen to a certain communication during the trial and evidentiary proceedings. This implies a possibility of presenting a part of communication (intentionally or accidentally) wrenched from the context, whereupon it may have an entirely different meaning, sometimes even contrary to the one it truly has. In order to prevent this, it is necessary to allow the defendant and his counsel to listen to and to read complete materials originating from the implementation of the special evidentiary actions, which would allow, if necessary, to request listening or reading the other materials collected through the implementation of the special evidentiary action during the trial. In this way, the part of the materials used at the public prosecutor’s request remain in the context of all other conversations and events and misinterpretation of some communication is thereby prevented.

In relation to this, there have been many problems in practice regarding certain cases in which the court would not allow the defence counsel and the defendants to examine the complete materials collected through covert interception of communications. Somewhat

later, the defence counsels won the right to examine the complete materials together with their clients but were not allowed to copy the materials, which may significantly aggravate the defence. As such conduct of the court was contrary to Articles 250 and 251 of the Criminal Procedure Code, it should be mentioned that the defendants and defence counsels have lately been allowed to see and copy all materials collected by this special evidentiary action.

Proceedings involving a larger number of defendants and thereby defence counsels may give rise to additional practical problems. Namely, all defendants and their counsels must be allowed to see and photocopy complete evidentiary materials including the ones originating from the application of covert interception of communication. In this way, the other defendants and their counsels become familiar with the materials obtained in the implementation of this measure against one of the defendants, although it should be borne in mind that it is possible that there are persons among the defendants who are not on friendly terms with the defendant against whom the measure was taken. The question arises here whether the privacy of the defendant subject to the measure is violated, but also the privacy of the persons with whom the defendant spoke or corresponded, who are not related to any criminal offence whatsoever. Since there can be no doubt that this involves a violation of privacy, an additional question that arises is whether there is a way or possibility to protect privacy. Bearing in mind that it is an inviolable right of the defendant and his counsel to be acquainted with all evidentiary materials collected during the criminal proceedings, precedence should be given to this right rather than the right to privacy, regardless of the fact that the persons whose privacy is violated in this way shall find themselves in an all but enviable position. Although the privacy of these persons is violated, they certainly have no grounds to claim damages on account of violated privacy according to the existing legislation because the evidentiary materials are collected in accordance with the law and the persons who become familiar with these contents do so only on the basis of legal authorization.

As regards violation of privacy, it should also be noted that the defence counsel may be a person who does not enjoy mutual trust of the defendant, so that the defendant may not wish the counsel to be acquainted with his intimate communication. This involves the situations with court-appointed defence counsels, particularly those in which the defendant will not accept the court-appointed defence counsel but wishes to defend himself. This certainly constitutes a violation of privacy not only of the defendant, but also of all other persons who have communicated with the defendant.

Finally, it should be mentioned that the injured party and his counsel can also read the transcripts of telephone conversations. They are fully entitled to request to hear all conversations recorded upon the implementation of this special evidentiary action although the prosecutor refers only some of the conversations because their interest, way of thinking and procedural demands do not necessarily correspond with the prosecutor's views. It is exactly in the conversations that are of little interest for the prosecutor that they may see proof for a property claim.

10. Conclusion

Combating particularly serious forms of crime requires special evidentiary actions, including covert interception of communication. The implementation of this special evidentiary action violates privacy, not only of the suspect against whom this action is taken, but also the privacy of other persons who need not be related to the criminal offence because of which this action is taken. The Constitution of the Republic of Serbia prescribes this possibility as an exception, and the Criminal Procedure Code, the Law on Security Information Agency and the Law on Military Security Agency elaborate on the conditions and modalities of implementing this action. In order to protect the basic human rights, this measure is to be taken only exceptionally, when the objective cannot be achieved through other evidentiary actions. Upon its implementation, law must be strictly observed in order to violate citizens' privacy as little and as rarely as possible.

The provisions of the Criminal Procedure Code and the Law on Security Information Agency that pertain to the extension of covert interception of communications are unconstitutional since the public authority in charge of implementing the action may not independently make decisions on incercepting communications, not even in the situation in which the court retroactively authorizes such a decision. On the contrary, according to the Constitution of the Republic of Serbia, only the court can make the decision which is a necessary prerequisite for the implementation of the measure. The said provisions pertaining to extending covert interception of communications should therefore be either deleted or amended so as to be harmonized with the Constitution of the Republic of Serbia.

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POVREDA PRIVATNOSTI PUTEM TAJNOG PRISLUŠKIVANJA RAZGOVORA

Apstrakt: *Rad naglašava da poštovanje prava na privatnost predstavlja važnu dimenziju ličnih prava svih ljudi. Na osnovu Ustava Republike Srbije, Zakonik o krivičnom postupku, kao i Zakon o bezbednosno – informativnoj agenciji, Zakon o vojno – bezbednosnoj agenciji i Zakon o vojno - obaveštajnoj agenciji, predviđaju mogućnost povrede privatnosti kroz sprovođenje posebnih dokaznih aktivnosti na koje se ovaj rad fokusirao. Posebna pažnja je posvećena tajnom prisluškivanju razgovora, specifičnoj dokaznoj aktivnosti koja se najčešće koristi u praksi i koja može da dovede do zloupotrebe. Stoga ona može ozbiljno da ugrozi privatnost na nezakonit način, te tako dovede do ozbiljne povrede ljudskih prava. Pored toga, čak i kada se ova posebna dokazna aktivnost sprovodi u skladu sa zakonom, postoji mogućnost da se prilikom njenog korišćenja tokom suđenja bespotrebno naruši privatnost. Rad, shodno tome, traga za mehanizmima kojima će se s jedne strane to sprečiti, a s druge obezbediti puno pravo na odbranu okrivljenog. U završnom delu, rad nudi zaključke i daje predloge kako se može zaštititi privatnost tokom krivičnih postupaka, tj. kako izbeći povredu privatnosti kod tajnog prisluškivanja razgovora i ukazuje na neustavne odredbe za koje predlaže da budu ukinute ili izmenjene kako bi se usaglasile sa Ustavom Republike Srbije.*

Ključne reči: *privatnost, prisluškivanje putem telekomunikacijskih linija, prisluškivanje razgovora, dokaz, dokazne aktivnosti.*

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ZAŠTITA PRAVA NA PRIVATNOST UGROŽENIH SVJEDOKA U SUDSKIM POSTUPCIMA

Apstrakt: *Zaštita svjedoka u krivičnom postupku, posebno ukoliko se radi o žrtvi, predstavlja izazov s obzirom da svjedoci imaju nepovoljniji položaj u odnosu na optuženog. Ovo često zahtjeva dodatne mjere zaštite prije, u toku i poslije krivičnog postupka, posebno ako se radi o svjedocima pod prijetnjom i/ili ugroženim svjedocima. Cilj ovog rada je da ukaže na zaštitu prava na privatnost ugroženih svjedoka u sudskim postupcima, posebno u slučaju kada su u odnosu na ugrožene svjedoke, u krivičnom postupku određene mjere zaštite. U radu je prezentiran zakonski okvir koji uređuje zaštitu ugroženih svjedoka i pravo na privatnost, a potom dat osvrt na njegovu primjenu. Analizirano je i pitanje zaštite prava na privatnost ugroženih svjedoka u postupku za naknadu štete kada je svjedoku u krivičnom postupku određena mjera zaštite identiteta.*

Ključne riječi: *ugroženi svjedok, sudski postupak, privatnost, javnost, naknada štete*

1. Položaj svjedoka u krivičnom zakonodavstvu Bosne i Hercegovine

Svjedok u sudskom postupku može da bude svaka osoba koja ima saznanja o počinjenom krivičnom djelu ili počiniocu tog djela, te drugim važnim okolnostima slučaja. U ulozi svjedoka često se pojavljuju lica koja su bila oštećena krivičnim djelom, zbog čega je pitanje položaja i statusa oštećenika u teorijskom, ali prvenstveno praktičnom smislu, često bilo predmetom različitih rasprava i istraživanja koja su zahtijevala, između ostalog, jasnu konceptualizaciju pojma i njegovo terminološko razgraničenje u odnosu na pojam žrtve. Dodatni element u pojmovnom definiranju predstavlja i uloga koju oštećenik može da ima u krivičnom postupku, kao svjedok. Ipak, kompleksnost krivično-procesnog zakonodavstva i na neki način davanje primarne uloge strankama u postupku za posljedicu je imalo kreiranje javne svijesti da je uloga oštećenika kao svjedoka sporedna, u odnosu na ulogu tužitelja i optuženog, a što se

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direktno reflektira i na zakonsko definiranje njegovog položaja u krivičnom postupku. Presumpcija, da je oštećenik trpitelj ili objekt izvršenja neke protupravne radnje, na neki način, pasivizira i njegovu ulogu u krivičnom postupku, čak i slučaju kada se oštećenik pojavljuje kao svjedok u postupku. U svakom slučaju definiranje položaja i statusa oštećenika kao svjedoka se u historijskom smislu zasnivalo na različitim polaznim vrijednostima i principa, što se najbolje može vidjeti na primjeru Bosne i Hercegovine (Dzumhur, 2009: 1). Oštećenik je istovremeno i žrtva, s tim što žrtva ima mnogo šire značenje, iz razloga što uključuje i lica koja su pretrpjela oštećena, a koja nisu nastala kao posljedica izvršenja krivičnih djela, kao što su slučajevi prirodnih katastrofa (zemljotresi, poplave i dr.).

Nažalost, zakonodavstvo Bosne i Hercegovine ne definira pojam žrtve i na ovu činjenicu ukazuju i tijela Ujedinjenih nacija[249] u svojim zaključnim razmatranjima i preporukama upućenim vlastima Bosne i Hercegovine.[250] Zakon o krivičnom postupku BiH definira oštećenika kao osobu kojoj je osobno ili imovinsko pravo krivičnim djelom povrijeđeno ili ugroženo,[251] s tim da ovaj pojam u okviru krivičnog postupka i krivično-procesnog prava ima značenje koje mu daje zakonodavac, zbog čega ovo zakonsko ili autentično tumačenje pojma oštećenika vrijedi samo u okviru pozitivnog krivično-procesnog prava i konkretnog krivičnog postupka.

Značajan uticaj na poziciju oštećenika u Bosni i Hercegovini, koji se često pojavljuje iu statusu ugroženog svjedoka je imala reforma zakonodavstva u 2003. godini koja je uključivala donošenje novih krivično-procesnih zakona[252], donošenje zakona o zaštiti

[249] Komitet protiv mučenja preporučuje da država članica usvoji nacrt Zakona o pravima žrtava mučenja i civilnim žrtvama rata, te da provodi relevantno zakonodavstvo, uključujući pružanje zaštite za svjedoke i druge aktere u postupcima, te osigura da se svjedočenja žrtava mučenja i zlostavljanja u svim fazama postupka tretiraju na fer način. (Komitet protiv mučenja, 2005.). Specijalna izvjestiteljica za trgovinu ljudima smatra da je neophodno pružiti odgovarajuću zaštitu žrtvama koje se odluče na saradnju sa tužilaštvom, kako se ne bi osjećale pod prijetnjom ili zastrašene. Specijalni izvjestitelj preporučuje da se zaštita žrtvama ne pruža samo tokom postupka, već također prije i nakon postupka. Ona treba uključivati privremeno odsustvo u cilju ostanka u zemlji tokom trajanja građanskog postupka i dozvole za rad. Sporazumi o izmještanju u treće zemlje se također trebaju nastojati ostvarivati. Potrebno je osigurati odgovarajuće alokacije za osiguravanje provedbe Zakona o zaštiti svjedoka i Programa zaštite svjedoka. Posebni izvjestitelj preporučuje da se nastoje ostvariti sporazumi sa zemljama porijekla žrtava u vezi sa programima dijeljenja troškova u cilju pružanja bolje zaštite žrtvama. (Sigma Huda, 2005., 88).

[250] Kompilacija preporuka Ujedinjenih nacija o ljudskim pravima u Bosni i Hercegovini i njihova provedba (2016) Sarajevo, Ujedinjene nacije u Bosni i Hercegovini,

251 Član 20. stav 1. tačka h) Zakona o krivičnom postupku BiH.

[252] Reforma je uključivala donošenje Zakona o krivičnom postupku Bosne i Hercegovine, Službeni glasnik Bosne i Hercegovine, br. 3/03, br. 32/03, 36/03, 26/04, br. 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, br. 58/08, br. 12/09, 16/09, 93/09, 72/13; Zakona o krivičnom postupku Federacije Bosne i Hercegovine, Službene novine Federacije Bosne I Hercegovine, br. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06,

svjedoka pod prijetnjom i ugroženih svjedoka[253] (u daljem tekstu: Zakon o zaštiti svjedoka) i Zakona o programu zaštite svjedoka[254]. Ovom reformom oštećenik je izgubio pravo da bude supsidijarni tužilac u krivičnom postupku i isključiva uloga mu je da svjedoči. Oštećenik kao svjedok, prema krivično-procesnom zakonodavstvu iz 2003. godine služi prvenstveno, kao izvor saznanja, odnosno, kao dokazno sredstvo, a ne kao samostalni subjekt. Zakon o krivičnom postupku Bosne i Hercgovine definiše da su stranke u postupku tužitelj i osumnjičeni, odnosno optuženi.[255] Ovako pozicioniranje oštećenika kao svjedoka otvorilo je pitanje da li postoji više kumulacija procesnih funkcija na strani oštećenika, s obzirom da oštećenik, prema zakonu, ima isključivo ulogu svjedoka i koji za razliku od drugih svjedoka može istaći imovinskopravni zahtjev.[256] Oštećenik u toku sudskog postupka, uživa prava i ima dužnosti koje su propisane za svakog svjedoka. Tako, saslušanju svjedoka koji je maloljetno lice, naročito ukoliko je ono oštećeno krivičnim djelom, postupit će se obazrivo, uz pomoć pedagoga ili druge stručne osobe, da saslušanje ne bi štetno utjecalo na psihičko stanje maloljetnika. Nadalje, oštećenog krivičnim djelom nije dopušteno ispitivati o njegovom seksualnom životu prije izvršenog krivičnog djela, a ako je takvo ispitivanje obavljeno - na takvom iskazu ne može se zasnivati sudska odluka. S obzirom na životnu dob, tjelesno i duševno stanje ili druge opravdane interese, svjedok se može saslušati putem tehničkih uređaja za prenos slike i zvuka na način da mu stranke i branitelj mogu postavljati pitanja bez prisustva u prostoriji gdje se svjedok nalazi. Za potrebe takvog ispitivanja može se odrediti stručno lice.[257]

Položaj oštećenika treba posmatrati i kroz prizmu uloge tužioca, posebno ako se uzme u obzir činjenica da se oštećenik kao svjedok u najvećem broju slučajeva pojavljuje na strani tužilaštva. To indirektno podiže pitanje i odgovornosti tužilaštva za prava i interese oštećenika kao svjedoka. Ustanovljenje, djelokrug rada, te unutarnja

27/07, 53/07, 9/09, 12/10, 8/13 I 59/14; Zakon o krivičnom postupku Republike Srpske, Službeni glanik Republike Srpske, br. 100/09- Prečišćeni tekst i Zakon o krivičnom postupku Brčko Distrikt Bosne i Hercegovine, Službeni glasnik Brčko Distrikt Bosne i Hercegovine, br. 33/13 – Prečišćeni tekst, 27/14. Za potrebe ovog rada referirat ćemo se na Zakon o krivičnom postupku Bosne i Hercegovine.

[253] Pored Zakona o zaštiti svjedoka pod prijetnjom i ugroženi svjedoka Bosne i Hercegovine, Službeni glasnik Bosne i Hercegovine, br. 3/03, 21/03, 61/04, 55/05; Zakon o zaštiti svjedoka pod prijetnjom i ugroženih svjedoka Brčko distrikta BiH, Službeni glasnik Brčko Distrikt Bosne i Hercegovine, br. 10/03, 08/07 i 19/07; Zakon o zaštiti svjedoka pod prijetnjom i ugroženih svjedoka Federacije Bosne i Hercegovine, Službene novine Federacije Bosne i Hercegovine, br. 36; Zakon o zaštiti svjedoka u krivičnom postupku Republike Srpske, Službeni glasnik Republike Srpske, br. 21/2003, 61/2004 i 55/2005.

[254] Službeni glasnik Bosne i Hercegovine, br. 29/04

[255] Član 20. stav 1. alineja f) Zakona o krivičnom postupku BiH

[256] Ibidem, član 86. stav 10.

[257] Ibidem, član 85. stav 4., 5. i 6.

organizacija Tužilaštva Bosne i Hercegovine je utvrđena Zakonom o tužilaštvu BiH.[258] Po novom Zakonu o krivičnom postupku Bosne i Hercegovine, tužilac, u krivičnom postupku, nastupa u dvostrukoj ulozi na način da tužilac je državni organ zadužen za otkrivanje i gonjenje učinitelja krivičnih djela i da istovremeno ima funkciju stranke u postupku što mu omogućava da ima ista ovlaštenja u postupku kao i suprotna stranka (osumnjičeni i optuženi). Uloga i obaveza tužioca u direktnoj je vezi sa primjenom načela akuzatornosti koje predviđa da se krivični postupak može pokrenuti i provesti samo po zahtjevu tužioca, čime se direktno ograničava pravo oštećenika da se pojavi kao stranka u postupku (Dzumhur, 2009). U odnosu na oštećenika značajna je i obaveza tužioca da prikupi dokaze o imovinskopravnom zahtjevu vezanom za krivično djelo.[259]

Reforma krivičnog zakonodavstva u Bosni i Hercegovini je u visokom stepenu bila usmjerena na osiguranje zaštite prava počinitelja krivičnog djela, što podiže pitanje u kojoj mjeri je favoriziran kriminološki i krivični pristup u odnosu na pristup zasnovan na ljudskim pravima koji zahtjeva zaštitu prava svih učesnika u krivičnom postupku, uključujući i oštećenika. Ujedinjene nacije su uložile određene napore da reafirmiraju vjeru u osnovna ljudska prava, u dostojanstvo i vrijednost ljudske osobe, u jednaka prava muškaraca i žena, velikih i malih naroda. U tom kontekstu je značajno razmotriti UN Deklaraciju o pravima i pomoći žrtve iz 1985. godine kojom su utvrđena osnovna prava žrtve (Dzumhur, 2009).

Shodno odredbama Zakona o krivičnom postupku, sudija je jedini pravi zaštitnik svjedoka, s obzirom na ovlasti koje su mu date, upravo u cilju zaštite svjedoka.[260] Ovo je i logično ako se uzme u obzir činjenica da žrtva najčešće ne poznaje pravni sistem, a da se tužilac ne može smatrati zastupnikom interese žrtve, posebno imajući u vidu da njegove intencije u postupku mogu biti suprotne interesima žrtve. Čak i slučaju kada žrtva ima advokata, sudija je i dalje ne samo odgovoran za postupanje prema žrtvama, već prema zakonu jedini ima ovlaštenje da djeluje u sudnici kako bi osigurao zaštitu žrtve. (Dzumhur, 2009).

[258] Službeni glasnik Bosne i Hercegovine, br. 49/09 – Prečišćeni tekst

[259] Član 197. Zakona o krivičnom postupku Bosne i Hercegovine

[260] Članom 267. propisano da je „sudija dužan zaštiti svjedoka od vrijeđanja, prijetnji i napada“. Pored toga sudija ima ovlasti: da kontroliše način i redoslijed ispitivanja svjedoka i izvođenja dokaza, vodeći računa da ispitivanje i izvođenje dokaza bude efikasno za utvrđivanje istine, da se izbjegne nepotrebno gubljenje vremena i zaštite svjedoci od uznemiravanja i zbunjivanja (član 262. stav 3.); odstupi od redovnog toka rasprave ‘zbog posebnih okolnosti’ (član 24.); te pravo da zabrani nedopuštena ili nevažna pitanja (član 263.). Istovremeno, Zakon daje mogućnost sudiji da postavlja "odgovarajuća pitanja” u bilo kojoj fazi postupka, kao i na kraju ispitivanja (član 262. stav 1. i član 261. stav 3.).

Zakon o krivičnom postupku BiH je utvrdio da se na položaj zaštićenog svjedoka u postupku pred sudom, primjenjuju odredbe posebnog zakona.[261] Ova odredba ne reguliše pitanja koja se odnose na zaštićenog svjedoka, već samo upućuje da se u postupku pred sudom u odnosu na tu kategoriju svjedoka primjenjuje poseban zakon. Zakonom o zaštiti svjedoka je propisano kada svjedok treba dobiti status zaštićenog svjedoka. Radi se o izuzetnim slučajevima, kada postoji očigledna opasnost za ličnu sigurnost svjedoka ili njegove porodice, a opasnost je toliko ozbiljna da postoje opravdani razlozi za vjerovanje da nije moguće tu opasnost umanjiti nakon što svjedok bude saslušan, ili je vjerovatno da će se opasnost zbog davanja iskaza povećati.[262] Zakon je napravio jasnu distinkciju između: svjedoka pod prijetnjom, ugroženog svjedoka i zaštićenog svjedoka, te definirao mjere kojim se osigurava zaštita svake od navedenih kategorija svjedoka. Prema članu 3. Zakona o zaštiti svjedoka, svjedok pod prijetnjom je onaj svjedok čija je lična sigurnost ili sigurnost njegove porodice je dovedena u opasnost zbog njegovog učešća u postupku, kao rezultat prijetnji, zastrašivanja ili sličnih radnji koje su vezane za njegovo svjedočenje, ili svjedok koji smatra da postoji razumna osnova za bojazan da bi takva opasnost vjerovatno proistekla kao posljedica njegovog svjedočenja. Ugroženi svjedok je svjedok koji je ozbiljno fizički ili psihički traumatizovan okolnostima pod kojima je izvršeno krivično djelo ili koji pati od ozbiljnih psihičkih poremećaja koji ga čine izuzetno osjetljivim, odnosno dijete i maloljetnik. Zaštićeni svjedok je onaj svjedok koji se saslušava prema posebnoj proceduri utvrđenoj odredbama člana 14. do 23. Zakona o zaštiti svjedoka.

Odluku o primjeni mjera zaštite svjedoka donosi sud koji u svakom pojedinačom slučaju cijeni opravdanost donošenja mjera i vodi računa da su mjere propisane Zakonom o zaštiti svjedoka. Sud je dužan voditi računa da neće odrediti primjenu teže mjere ako se ista svrha može postići primjenom blaže mjere. Tužilac, sud i drugi organi koji učestvuju u postupku, po službenoj dužnosti, upoznaju svjedoka pod prijetnjom ili ugroženog svjedoka o pravu na mjere zaštite. Svjedok pod prijetnjom i ugroženi svjedok ima pravo na pravnu pomoć i pomoć i podršku organa za socijalno staranje, u skladu sa zakonom.[263] Praksa je pokazala da i pored razvijenog zakonodavnog okvira, svjedoci ne uživaju neophodnu zaštitu i podršku. Nekoliko ugovornih tijela UN (odgovornih za praćenje implementacije osnovnih međunarodni ugovori o ljudskim pravima) su ukazali - u pogledu pristupa ekonomskim i socijalnim pravim od strane ugroženih grupa - nedostatak direktne primjene Konvencija; nedostatak programa za smanjenje

[261] Član 91.

[262] Član 14. Zakon o zaštiti svjedoka.

[263] Ibidem, član 5.

nezaposlenosti, posebno među ženama; i neadekvatnost mehanizama za praćenje i reviziju. Njihove preporuke, međutim, nisu uzete u ozbiljno razmatranje od strane BiH vlasti. Kao rezultat toga, nepravda i neadekvatnost u zaštiti i ostvarenju prava ovih grupa ostaje jedan od glavnih izazovi u tranzicionoj pravdi u BiH. Žrtvama mučenja, uključujući preživele seksualno nasilje, samo je odobrena minimalna zaštita pod kišobranom kategorije "civilnih žrtava rata" u entitetskim zakonima (Pilegaar, Dzumhur, 2015: 33).

Mjere zaštite propisane Zakonom o zaštiti svjedoka su: osiguranje psihološke, socijalne i stručne pomoći; red izvođenja dokaza na glavnom pretresu; ispitivanje; svjedočenje putem tehničkih uređaja za prijenos slike i zvuka; udaljavanje optuženog; izuzeci od direktnog izvođenja dokaza; ograničenje prava optuženog i njegovog branioca da pregleda spise i dokumentaciju, te dodatne mjere kojima se osigurava neotkrivanje identiteta svjedoka.[264] Mjere zaštite primjenjuju se samo uz saglasnost svjedoka. Sa aspekta teme ovog rada, osvrnut ćemo se na dodatne mjere kojim se osigurava neotkrivanje identiteta svedoka. U izuzetnim okolnostima, kada postoji opravdana bojazan da će se ozbiljno ugroziti lična bezbjednost svjedoka ili njegove porodice ako se neki ili svi lični podaci svjedoka objelodane i da će ta opasnost postojati i nakon davanja iskaza svjedoka, sud može po službenoj dužnosti ili po prijedlogu stranaka ili branioca odlučiti da lični podaci svjedoka ostanu povjerljivi u trajanju za koje se odredi da je potrebno, a najviše 30 godina nakon što odluka postane pravosnažna. Sud može nakon saslušanja stranaka i branioca odlučiti da identitet svjedoka ne bude otkriven tako što će se dozvoliti svjedoku da svjedoči iza paravana ili koristi elektronski uređaj za promjenu glasa ili slike svjedoka, ili i slike i glasa koristeći se tehničkim uređajima za prijenos slike i zvuka.

Vezano za sam proces saslušanja zaštićenog svjedoka, svjedok će biti informisan da se saslušava kao zaštićeni svjedok; da njegov identitet neće otkriti nikome osim članovima suda i zapisničaru suda; te u slučaju da je dobio status zaštićenog svjedoka neće se lično pojaviti pred Sudom na bilo kojem saslušanju osim na saslušanju zaštićenog svjedoka i da ne može biti prisiljen da odgovara na pitanja koja mogu ukazati na njegov identitet ili identitet članova njegove porodice.[265]

Zakon o zaštiti svjedoka propisuje da zapisnik sa saslušanja zaštićenog svjedoka ne sadržava podatke o identitetu zaštićenog svjedoka, već se u zapisniku koristi pseudonim

[264] Ibidem, članovi 6 -13.

[265] Ibidem, član 19.

za svjedoka koji određuje sud i koji se koristiti tokom krivičnog postupka i u odlukama suda. Sud osigurava povjerljivost zapisnika tako što čuva zapisnik na sigurnom mjestu i odvojeno od ostale dokumentacije krivičnog spisa, vraća zapisnik na sigurno mjesto nakon njegovog korištenja na odgovarajućem saslušanju u krivičnom postupku i kada odluka postane pravosnažna i obezbjeđuje dugoročno arhiviranje zapisnika na način koji dozvoljava pristup tom dokumentu samo predsjedniku krivičnog odjeljenja u trajanju za koje se odredi da je potrebno, a najviše 30 godina nakon što odluka postane pravosnažna.[266]

2. Zaštita prava na privatnost u odnosu na slobodu izražavanja

U Bosni i Hercegovini su učinjeni značajni napori na usvajanju zakonodavstva kojim se garantira pravo na slobodu pristupa informacijama i zaštita ličnih podataka, kao jednog od elemenata zaštite prava na privatnost. Tako je 2000. i 2001. godine doneseno zakonodavstvo[267] kojim se uređuje pitanje slobode pristupa informacija u Bosni i Hercegovini, a 2006. godine je donesen Zakon o zaštiti ličnih podataka.[268]

Pravo na slobodan pristup informacijama treba posmatrati u svjetlu činjenice da ovo pravo obezbjeđuje javnost, otvorenost i odgovornost u radu institucija na svim nivoima vlasti u zemlji. Istovremeno, omogućava fizičkim i pravnim licima da lakše dođu do informacija koje su im potrebne za ostvarenje njihovih prava i potreba, legitimiše zemlju kao naprednu, demokratsku i liberalnu, te povećava mogućnost kontrole javnosti nad radom institucija i svih nositelja javnih ovlaštenja. Na ovaj način se smanjuje prostor za nezakonito ili neodgovorno rukovođenje institucijama i u konačnici osnažuje povjerenje građana i javnosti u institucije, nosioce javnih funkcija i administraciju. Ovo pravo uključuje slobodu posjedovanja sopstvenog mišljenja, primanja i saopštavanja informacija i ideja bez mješanja javne vlasti i bez obzira na granice.[269] Pošto korišćenje ovih sloboda povlači za sobom dužnosti i odgovornosti, ono se može podvrgnuti

[266] Ibidem, član 21.

[267] Ovo zakonodavstvo uključuje: Zakon o slobodi pristupa informacijama Bosne i Hercegovine, Službeni glasnik Bosne i Hercegovine, br. 28/00, 45/06, 102/09 i 62/11; Zakon o slobodi pristupa informacijama Republike Srpske, Službeni glasnik Republike Srpske, br. 20/01, Zakon o slobodi pristupa informacijama Federacije Bosne i Hercegovine, Službene novine Federacije Bosne i Hercegovine, br. 32/2001, 48/11. U Brčko Distriktu Bosne i Hercegovine primjenjuje se Zakon oslobodi pristupa informacijama Bosne i Hercegovine.

[268] Službeni glasnik BiH, br.49/06, 76/11 i 89/11

[269] Član 10. Evropske konvencije o zaštiti ljudskih prava i osnovnim slobodama, http://www.echr.coe.int/Documents/Convention_BOS.pdfKonvencijav o zaštiti ljudskih prava i osnovnih sloboda. Rim, 4. novembra 1950. Vlade potpisnice, kao članice Savjeta Evrope,. Generalna skupština Ujedinjenih ...

formalnostima, uslovima, ograničenjima ili kaznama propisanim zakonom i neophodnim u demokratskom društvu u interesu nacionalne bezbednosti, teritorijalnog integriteta ili javne bezbednosti, radi sprečavanja nereda ili kriminala, zaštite zdravlja ili morala, zaštite ugleda ili prava drugih, sprečavanja otkrivanja obaveštenja dobijenih u poverenju, ili radi očuvanja autoriteta i nepristrasnosti sudstva. Za ovaj rad je posebno značajno ograničenje iz razloga zaštite ugleda ili prava drugih, te očuvanja autoriteta i nepristrasnosti sudstva, posebno s obzirom da svi zakoni kojim se uređuje postupak u sudu sadrže načelo javnosti.

Prema zakonu svaka fizička i pravna osoba ima pravo pristupa informacijama koje su pod kontrolom javnoga tijela, a svako javno tijelo ima odgovarajuću obavezu objaviti takve informacije. Ovo pravo pristupa podliježe samo formalnim radnjama i ograničenjima koja su kao takva utvrđena u zakonu. Dakle, nadležni organ može utvrditi izuzetke od objavljivanja tražene informacije i to na osnovu ispitivanja svakog pojedinačnog slučaja i to u vezi sa funkcijama javnih tijela, u pogledu povjerljivih komercijalnih informacija i u slučaju zaštite privatnosti, a što podrazumjeva slučaj da tražena informacija uključuje lične informacije koje se odnose na privatnost trećeg lica. Prije donošenja konačne odluke na nivou javnog organa, kada se utvrdi da neka informacija spada u kategoriju izuzetaka od slobodnog pristupa informacijama, da bi se spriječilo da se ovi izuzeci koriste i kada nije opravdano, Zakon o slobodi pristupu informacijama nalaže da se u svakom pojedinačnom slučaju, provede "test javnog interesa". U slučaju kada javni organ utvrdi da informacija može spadati u moguće izuzetke i da može nastati određena šteta njenim objavljivanjem – treba da objavi informaciju ukoliko ocijeni da bi se njenim objavljivanjem postigla veća društvena korist. Pri određivanju da li je objavljivanje opravdano javnim interesom, javni organi obavezno uzimaju u obzir činjenice i okolnosti o tome da li informacija sadrži bilo kakve dokaze koji ukazuju na nepoštivanje zakonske obaveze, neovlašteno trošenje javnih sredstava, opasnost po zdravlje ili sigurnost pojedinca, društva i čovjekove okoline, te prisustvo ovih faktora tretiraju na način da preferiraju objavljivanje takvih informacija (Dzumhur, 2015: 160).

Zakon o slobodi pristupa informacijama utvrđuje da „informacije pod kontrolom javnoga tijela predstavljaju javno dobro od vrijednosti i da javni pristup ovim informacijama promovira veću otvorenost i odgovornost tih javnih tijela, te da su ove informacije neophodne za demokratski proces“. Zakon nadalje konstatuje da „svaka osoba ima pravo pristupa informacijama u najvećoj mogućoj mjeri sukladno javnom interesu, te da javna tijela imaju odgovarajuću obavezu objavljivanja informacije“.

Zakon kao osobnu informaciju smatra „informaciju koja se odnosi na fizičku osobu koja se može izravno ili posredno identificirati činjenicama kao što su, ali nije ograničeno identifikacijski broj ili fizički, mentalni, ekonomski, etnički, vjerski, kulturni ili socijalni identitet te osobe.“ Odredbama Zakona također je propisano da *"*zakonski akti koji se usvoje nakon ovoga zakona, a čija svrha nije izmjena ovoga zakona, neće ograničiti prava i obveze koje su utvrđene ovim zakonom." (Dzumhur, 2015: 159)

Zakon o zaštiti ličnih podataka ima za cilj da svim licima na teritoriji BiH osigura zaštitu ljudskih prava i osnovnih sloboda, a naročito prava na zaštitu obrade ličnih podataka koji se na njih odnose. Zakon definira lični podatak kao bilo koju informaciju koja se odnosi na fizičko lice na osnovu koje je moguće utvrditi identitet lica, dok je nosilac podatka fizičko lice čiji se identitet može ustanoviti ili identificirati, neposredno ili posredno na osnovu jedinstvenog matičnog broja te jednog ili više faktora karakterističnih za fizički, fiziološki, mentalni, ekonomski, kulturni ili socijalni identitet tog lica (Dzumhur, 2015:161).

Pitanje zaštite ličnih podataka svjedoka u sudskim postupcima za sebe veže segment zaštite ličnih podataka u policijskim i krivičnopravnim stvarima, ali i u parničnom postupku u slučajevima ostvarivanja prava na oštetu. U sudskom postupku, obaveza nadležnih organa je da osiguraju da su svi pred sudovima jednaki, da svako ima pravo na pravično i javno suđenje od strane nadležnog, nezavisnog i nepristrasnog suda, ustanovljenog zakonom i koji će odlučivati bilo o osnovanosti ma kakve optužbe krivičnopravne prirode uperene protiv njega, bilo u sporovima o njegovim pravima i obavezama građanske prirode. Ipak javnost sudskog postupka nije apsolutno pravo i izloženo je ograničenjima. Sudija ima pravo da po službenoj dužnosti ili po prijedlogu stranaka i branioca, ali uvijek po njihovom saslušanju, isključi javnost za cio glavni pretres ili jedan njegov dio, ako je to u interesu državne bezbjednosti ili ako je to potrebno radi čuvanja državne, vojne, službene ili važne poslovne tajne, čuvanja javnog reda, zaštite morala u demokratskom društvu, osobnog i intimnog života optuženog ili oštećenog ili zaštite interesa maloljetnika ili svjedoka. Ovo se odnosi ne samo na svjedočenje svjedoka, nego na svako svjedočenje o svjedoku. Sudska odluka o isključenju javnosti ne odnosi se na stranke, branioca, oštećenog, zakonskog zastupnika i punomoćnika. Sudija može dopustiti da glavnom pretresu na kome je javnost isključena budu prisutne službene osobe, naučni i javni radnici, a na zahtjev optuženog može to dopustiti i njegovom bračnom, odnosno izvanbračnom drugu i bliskim srodnicima.[270] Međutim, svaka presuda donijeta u krivičnim ili građanskim stvarima

[270] Član 237. Zakona o krivičnom postupku Bosne i Hercegovine

biće javna, izuzev ako interes maloljetnika zahtijeva da bude drugačije, ili ako se postupak tiče bračnih sporova ili starateljstva djece.[271] Dakle u okviru ovih prava, pravosudni organi su dužni osigurati i prava oštećenih, uključujući i pravo na zaštitu njihovih ličnih podataka.

Nažalost, u praksi, a na osnovu iskustava Institucije ombudsmena za ljudska prava Bosne i Hercegovine, u određenim slučajevima, došlo je do suprotstavljanja prava ustanovljenih u ova dva zakona. Jedan od primjera je slučaj u kojem je Agencija za zaštitu ličnih podataka Bosne i Hercegovine u 2010. godini, u vezi obrade ličnih podataka optuženih i osuđenih lica na službenoj web stranici, protiv Tužilaštva BiH, vodila upravni postupak i izdala rješenje prema kojem se „Tužilaštvo BiH upozorava da se uzdrži od nezakonite obrade ličnih podataka podnositeljice prigovora na službenoj web stranici, te da blokira lične podatke svih lica čiji su lični podaci sadržani u optužnicama i presudama koje su objavljene na službenoj web stranici”. U odnosu na Sud BiH, po istom predmetu Agencija nije vodila upravni postupak, nego je dala mišljenje broj:03-1-37-1-51-6/10 od 25. marta 2010. godine (Dzumhur (2015: 159). U konkretnom slučaju osvrnut ćemo se na zakonski okvir koji je obavezivao Tužilaštvo i Sud Bosne i Hercegovine s ciljem razumjevanja da zakonodavstvo koje uređuje pitanje zaštite ličnih podataka, u praksi se ne može primjenjivati izolirano u odnosu na zakone koji uređuju sudske postupke, te zakone koji uređuju slobodu pristupa informacijama.

U članu 6. Zakona o zaštiti ličnih podataka propisano je da kontrolor (obrađivač podataka) može obrađivati podatke, bez saglasnosti nosioca podataka, uz postojanje određenih uslova. Neki od uslova su između ostalog da vrši obradu ličnih podataka u skladu sa zakonom ili je obrada neophodna da bi se ispunile nadležnosti utvrđene zakonom ili ako je obrada ličnih podataka potrebna za ispunjenje zadatka koji se izvršava u javnom interesu ili je neophodna zaštita zakonitih prava i interesa koje ostvaruje kontrolor ili korisnik, i ako ova obrada ličnih podataka nije u suprotnosti s pravom nosioca podatka da zaštiti vlastiti privatni i lični život. (Dzumhur, 2015: 162)

Tužilaštva i sudovi svoju djelatnost primarno realiziraju u skladu sa odredbama Zakona o krivičnom postupku kojim je kao jedno od načela utvrđeno načelo javnosti, gdje se prvenstveno misli na opću javnost. Javnost pretresa uključuje i mogućnost praćenja pretresa i presude putem medija. Protivzakonito isključenje javnosti sa glavnog pretresa predstavlja bitnu povredu krivičnog postupka. Tužilaštva i sudovi su prema Zakonu o

[271] Član 14.1. Pakta o građanskim i političkim pravima

slobodi pristupa informacijama javni organi koji raspolažu informacijom od javnog značaja i dužni su osigurati pristup informaciji. Istovremeno, tužilaštva i sudovi su prema Zakonu o zaštiti ličnih podataka kontrolori podataka. Član 6. Zakona o zaštiti ličnih podataka dozvoljava da kontrolor može objavljivati podatke, bez saglasnosti nosioca podataka, u slučaju kada vrši obradu ličnih podataka u skladu sa zakonom ili je obrada neophodna da bi se ispunile nadležnosti utvrđene zakonom ili je obrada ličnih podataka potrebna za ispunjenje zadatka koji se izvršava u javnom interesu, te da ova obrada ličnih podataka nije u suprotnosti s pravom nosioca podatka da zaštiti vlastiti privatni i lični život (Dzumhur, 2015: 163). Dakle, ova zakonska odredba daje ovlaštenje tužilaštvu i sudu da obrađuju osobne podatke svih učesnika u postupku, uključujući i svjedoke. Ipak, kako se ugroženi svjedoci smatraju posebnom kategorijom to nadležni organi su dužni primjeniti mjere dodatne zaštite kod obrade njihovih osobnih podataka u skladu sa Zakonom o zaštiti svjedoka.

3. Zaštita prava na privatnost ugroženih svjedoka u postupku naknade štete

U Bosni i Hercgovini, prema važećem zakonodavstvu, žrtve krivičnih djela mogu ostvariti pravo na naknadu štete na dva načina, i to: 1) od okrivljenog podnošenjem predloga za ostvarivanje imovinskopravnog zahtjeva u krivičnom postupku ili 2) podnošenjem tužbe u parničnom postupku. Zakonom o krivičnom postupku Bosne i Hercegovine[272] propisano je da će se imovinskopravni zahtjev koji je nastao usljed učinjenja krivičnog djela raspraviti, na prijedlog ovlaštene osobe u krivičnom postupku, ako se time ne bi znatno odugovlačio ovaj postupak. Imovinskopravni zahtjev može se odnositi na naknadu štete, povraćaj stvari ili poništaj određenog pravnog posla. Predlog za ostvarivanje imovinskopravnog zahtjeva podnosi se tužiocu, odnosno sudu pred kojim se vodi krivični postupak i to najkasnije do završetka glavnog pretresa pred prvostepenim sudom odnosno pretresa za izricanje krivičnopravne sankcije pred sudom. Ako ovlašćeno lice nije podnijelo prijedlog za ostvarivanje imovinskopravnog zahtjeva u krivičnom postupku do podizanja optužbe, odnosno do pretresa za izricanje krivičnopravne sankcije obavijestiće se da može taj prijedlog podnijeti do završetka glavnog pretresa. O imovinskopravnom zahtjevu odlučuje sud. U presudi kojom okrivljenog oglašava krivim sud može ovlašćenom licu dosuditi imovinskopravni zahtjev u cjelini ili djelimično, a za preostali dio uputiti na parnični postupak. Ako činjenice utvrđene u krivičnom postupku ne pružaju pouzdan osnov ni za potpuno ni za djelimično presuđenje, a njihovo utvrđivanje bi vodilo znatnom odugovlačenju

[272] Član 198.

postupka, sud će ovlašćeno lice uputiti da imovinskopravni zahtjev u cjelini može da ostvaruje u parničnom postupku. Kad sud donese presudu kojom se okrivljeni oslobađa od optužbe ili kojom se optužba odbija ili kad rješenjem obustavi krivični postupak, uputiće ovlašćeno lice da imovinskopravni zahtjev može ostvarivati u parničnom postupku. Sud može u toku krivičnog postupka ili po njegovom okončanju, bez obzira na vrstu odluke koju je donio, uputiti oštećenog, odnosno lice koje je podnijelo imovinskopravni zahtjev i okrivljenog da pokušaju da svoj sporni odnos koji je predmet tog zahtjeva riješe u postupku medijacije putem medijatora u skladu sa Zakonom, ako ocijeni da je imovinskopravni zahtjev takav da je svrsishodno uputiti ga na medijaciju. Prijedlog za upućivanja na medijaciju mogu dati i oštećeni i optuženi, odnosno branilac do završetka glavne rasprave.

Nažalost, praksa u Bosni i Hercegovini je da se oštećeni koji u toku krivičnog postupka istaknu svoj imovnskopravni zahtjev, po pravilu, upućuju da ovo pravo ostvare u parničnom postupku. Za razliku od ovakve prakse, najbolje prakse u Evropskoj uniji za rješavanje imovinskopravnog zahtjeva u krivičnim postupcima, pokazale su da sudovi u Italiji, Švedskoj i Belgiji uglavnom dosuđuju odštetu u krivičnim postupcima, čime se obezbjeđuje brzo obeštećenje osobe pogođene krivičnim djelom, te se izbjegava situacija da oštećeni ovo svoje pravo pokušava ostvariti u nerijetko dugotrajnim i skupim parnicama. U stvari, žrtvama kriminala koje, prema zakonu, imaju mogućnost naknade materijalne i nematerijalne štete u krivičnom postupku sistem bi trebao pomoći da ostvare zadovoljenje i naknadu koja je pravedna i efikasna.[273]

Nadalje, u zakonodavstvu Bosne i Hercegovine nije uređeno pravo na novčanu naknadu koju bi vlasti u Bosni i Hercegovini, radi pretrpljenih posljedica izvršenog krivičnog djel, dok krivični postupak nije okončan, davale žrtvama krivičnih djela nasilja izvršenih s umišljajem na teritoriji države, niti je uređen sistem saradnje radi olakšavanja ostvarivanja naknade štete u prekograničnim slučajevima. Naime, Bosna i Hercegovina, kao subjekt međunarodne odgovornosti, dužna je osgurati poštivanje međunarodnih standarda ljudskih prava koje je ratifikacijom ili pristupanjem preuzela. U tom smislu, Bosna i Hercegovina, uvažavajući načela Evropske konvencije o naknadi štete žrtvama krivičnih djela nasilja, treba da osigura pravo na novčanu naknadu štete žrtvama krivičnih djela nasilja učinjenih s umišljajem, uslove i postupak za ostvarivanje prava na naknadu, organe koji će voditi postupak i odlučiti o pravu na naknadu, organe i

[273] Trial, DOSUĐIVANJE NAKNADE NEMATERIJALNE ŠTETE I KRITERIJI ZA ODMJERAVANJE IZNOSA NAKNADA, Prikaz sudske prakse u krivičnim i parničnim postupcima u Bosni i Hercegovini

postupak koji će se primjenjivati u prekograničnim slučajevima, kao i kad država ima pravo regresa.

S obzirom na prezentirano, oštećeni, u praksi, ima jedinu mogućnost da naknadu za pretpljenu štetu ostvare kroz parnični postupak. Na ovaj način oštećeni, iz pasivne uloge koju imaju u krivičnom postupku, gdje se pojavljuju u ulozi svjedoka sa mogućnošću isticanja imovinskopravnog zahtjeva dobivaju aktivnu ulogu, gdje se pojavljuju kao tužioci sa tužbom u parničnom postupku za naknadu štete. Ovo otvara pitanje šta se dešava sa ugroženim svjedocima prema kojim je sud u krivičnom postupku uveo mjere zaštite i šta ukoliko je jedna od tih mjera i zaštita identiteta koja može trajati do 30 godina, nakon pravosnažnosti odluke. Dakle, zaštićeni svjedok da bi ostvario pravo na naknadu štete mora otkriti svoj identitet, jer su lični podaci o tužiocu elementi tužbe, te time prekršiti odluku suda o zaštiti identiteta ili zauvijek ostati bez obeštećenja. Očito da razvoj društvenih odnosa u ovoj oblasti traži da se zakonskim inicijativama osigura adekvatan odgovor na ovu društvenu potrebu. Rješenja u ovakvim situacijama treba tražiti u osnaživanju kapaciteta pravosuđa da u krivičnim postupcima donesu i odluku o imovinskopravnim zahtjevima, a imajui u vidu pozitivnu praksu nekih evropskih zemalja. Drugo rješenje je da se kroz izmjene zakona o parničnom postupku osigura da zaštićeni svjedok zadrži nivo zaštite koji je imao u krivičnog postupku. U konačnici, u cilju zaštite položaja žrtava krivičnih djela nasilja, donošenjem zakonodavstva o naknadi štete žrtvama krivičnih djela nasilja Bosna i Hercegovina treba da osigura sprovođenje prihvaćenih evropskih standarda. Ovo zakonodavstvo, uvažavajući načela Evropske konvencije o naknadi štete žrtvama krivičnih djela nasilja treba da uredi pravo na novčanu naknadu štete žrtvama krivičnih djela nasilja učinjenih s umišljajem, uslove i postupak za ostvarivanje prava na naknadu, organi koji vode postupak i odlučuju o pravu na naknadu, organi i postupak koji se primjenjuje u prekograničnim slučajevima, kao i kad država ima pravo regresa.

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Zakon o krivičnom postupku Bosne i Hercegovine, Službeni glasnik Bosne i Hercegovine, br. 3/03, br. 32/03, 36/03, 26/04, br. 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13.

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Jasminka Dzumhur*

PROTECTION OF THE RIGHT TO PRIVACY OF THREATENED WITNESES IN COURT PROCEEDINGS

Abstract: *The protection of witnesses in criminal proceedings, especially in the case of a victim, is a challenge given that witnesses have a disadvantage in relation to the accused. This often requires additional protection measures before, during and after the criminal proceedings, especially in the case of witnesses under threat and / or threatened witnesses. The aim of this paper is to point out the protection of the right to privacy of vulnerable witnesses in court proceedings, especially when in relation to the vulnerable witnesses, protective measures are defined in the criminal procedure. The paper presents a legal framework that regulates the protection of vulnerable witnesses and the right to privacy, and then gives a review of its application. The issue of protection of the right to privacy of vulnerable witnesses in the procedure for compensation of damage is also analyzed,when the witness in the criminal procedure is determined the measure of protection of identity.*

Keywords: *witness, threatened witness, court proceedings, privacy, publicity, compensation of damages*

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ZAŠTITA OSOBNIH PODATAKA U POSTUPCIMA MEĐUNARODNE KAZNENOPRAVNE I POLICIJSKE SURADNJE U EUROPSKOM PRAVU[274]

Apstrakt: *U radu se analizira pravno uređenje zaštite osobnih podataka u postupcima međunarodne kaznenopravne i policijske suradnje u pravu Vijeća Europe i Europske unije. S obzirom na jačanje kriminala s međunarodnim obilježjima, intenzivna suradnja između policijskih i pravosudnih tijela različitih država postaje nužnost. Jedan od najvažnijih oblika te suradnje jest razmjena informacija koje u pravilu sadrže i osobne podatke ne samo osumnjičenika i okrivljenika, već i drugih osoba. Budući da je tehnološki napredak omogućio prikupljanje, obradu i pohranu velike količine takvih osobnih podataka, što dovodi do vrlo ozbiljne prijetnje od povrede prava na privatnost i prava na zaštitu osobnih podataka, potrebno je uspostaviti pravni okvir koji će omogućiti učinkovitu razmjenu informacija između nadležnih tijela različitih država, ali uz očuvanje temeljnih prava svake osobe.*

Ključne riječi: *zaštita osobnih podataka, međunarodna pravosudna suradnja u kaznenim stvarima, međunarodna policijska suradnja.*

1. Uvod

Imajući u vidu jačanje prekograničnog kriminala, suradnja među pravosudnim i policijskim tijelima različitih država u Europi postaje imperativ. Razmjena informacija između država olakšava otkrivanje i dokazivanje kaznenih djela – bez takve suradnje bi značajan dio kriminala s međunarodnim elementom bilo znatno teže otkriti. Suvremene tehnike omogućuju prikupljanje, obradu i čuvanja ogromne količine podataka. S obzirom na takve tehničke mogućnosti i na činjenicu da obilje prikupljenih informacija

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[274] Ovaj se rad temelji na istraživanju provedenom za potrebe projekta „*"Pravosudna suradnja Hrvatske u kaznenim stvarima u EU i regiji: nasljeđe prošlosti i izazovi budućnosti / Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future (CoCoCrim)" koji financira Hrvatska zaklada za znanost.*

olakšava učinkovitu borbe protiv kriminala,[275] jasno je da istovremeno postoji i opasnost od narušavanja prava na privatnost građana,[276] odnosno prava na zaštitu osobnih podataka. Stoga je nužno pažljivo uspostavom odgovarajućeg pravnog okvira regulirati prikupljanje i obradu osobnih podataka građana općenito, a osobito kad je riječ o prikupljanju podataka za potrebe kaznenog postupka. Takvo prikupljanje i obrada, kako će u nastavku teksta biti pojašnjeno, mora biti dopušteno samo kad je to nužno potrebno opravdano s obzirom na cilj. Navedeno u još većoj mjeri vrijedi i za razmjenu podataka između država tijekom policijske i pravosudne suradnje, jer se podaci vlastitih građana daju represivnim tijelima druge države. Područje međunarodne policijske suradnje jedno je i od najpropulzivnijih zakonodavnih područja cjelokupnog zakonodavstva EU specifično po tome što svijest država o potrebi razmjene podataka neprestano jača, ali istodobno postoji oprez jer se kroz takvu razmjenu države dobrim dijelom odriču svoga suvereniteta (Rošić, 2014: 296). Razmjena podataka između policijskih i pravosudnih tijela tako s jedne strane znatno doprinosi zaštiti društva od kriminala, dok s druge strane stvara potrebu za podizanjem normativne zaštite osobnih podataka građana na međunarodnu razinu (Pajčić, 2016: 179). U pravnoj teoriji se ističe da je zaštita osobnih podataka složeno i osjetljivo pravno područje koje u kontekstu kaznenih postupaka s obzirom na pravni položaj okrivljenika dobiva dodatno na težini i važnosti te da do povrede prava na zaštitu osobnih podataka može doći u svim stadijima kaznenog postupka, ali i prije, prilikom policijske djelatnosti otkrivanja kaznenih djela te da je stoga neophodno osigurati prikladne mehanizme zaštite ovog prava (Carić, Pleić, 2016: 393).

[275] Za razliku od tradicionalne obrade pohranjenih podataka s ciljem pronalaska korisnih informacija, sve su češći glasovi o drukčijoj mogućoj uporabi navedenih podataka putem tzv. „prediktivnih algoritama“ koji prema nekim autorima imaju potencijal revolucionizirati način na koji na koji policija istražuje kriminal i način na koji se regulira djelovanje policije. Simmons tako navodi da su sudovi stoljećima kreirali pravne standarde za za policijske službenike koji su donosili kliničke prosudbe na temelju iskustva i intuicije. Nepreciznost i subjektivnost tih pravnih standarda bilo je nužno zlo - oni su bili potrebni s obzirom na subjektivne čimbenike koji su koristili policijski djelatnici, ali njihova točnost nije mogla biti testirana, učinili su sustav slabijim, i otvorili su vrata golemoj nedosljednosti i često diskriminirajućim rezultatima. Smatra da razvojem prediktivnih algoritama koji se temelji na obradi velikih količina prikupljenih i pohranjenih podataka, imamo priliku povećati točnost i transparentnost načina primjene tih standarda i samih standarda, što bi sustav učinilo učinkovitijim, pravednijim i otvorenijim (Simmons, 2016: 1016).

[276] O poteškoćama u pojmovnom određenju privatnosti, prava na privatnost i pojma privatnog prostora te nužnosti razlikovanja navedenih pojmova v. Dragičević Prtenjača, 2014: 166-170., koja tako primjerice upozorava da je privatnost pojam koji svaka država definira na svoj način te da čak svako pravno područje ima svoje definicije, dok je pravo na privatnost pravo pojedinca na ostvarivanje privatnosti i upravo se ono štiti raznim međunarodnim dokumentima i nacionalnim Ustavom i zakonima. Naravno, kazneno pravo u širem smislu riječi privatnost osoba štiti i putem niza inkriminacija kojima se ponašanja kojima se povrjeđuje privatnost osoba proglašavaju kaznenim djelima te propisuju kaznenopravne sankcije. Za opći pregled navedene tematike v.. Seling, A., (2010) Schutz der Privatsphäre durch das Strafrecht, LexisNexis Verlag ARD Orac, Wien.

Međunarodna zajednica je, svjesna navedene potrebe, u posljednjih 40 godina donijela niz dokumenata koji sadrže i pravno normiranje zaštite osobnih podataka. U Europi, najprije Vijeće Europe a potom i Europska unija sve više se posvećuju pravnom uređenju te materije, pa ćemo neke najvažnije izvore u nastavku i izložiti. Svi izvori koji će u nastavku biti izneseni se, sadržajno, mogu podijeliti na tri dijela. Prvu skupinu čine opći dokumenti o ljudskim pravima u kojima se nalaze i kratke opće odredbe o potrebi zaštite privatnosti te zaštite osobnih podataka. Drugu skupinu čine pravni izvori koji pretežnim dijelom svog sadržaja uređuju zaštitu osobnih podataka, dok su u treću kupinu svrstani oni izvori koji za predmet reguliranja imaju isključivo zaštitu osobnih podataka prilikom policijskog djelovanja i djelovanja pravosudnih tijela te međunarodne suradnje po tom pitanju (Pajčić, 2016: 179). U nastavku će radi preglednosti, najprije navesti izvori Vijeća Europe a potom Europske unije .[277]

2. Europski normativni okvir uređenja zaštite osobnih podataka

2.1. Propisi vijeća Europe

2.1.1. Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda

Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda, kao kamen temeljac sustava zaštite ljudskih prava u Europi, u svom čl. 8. jamči pravo na poštovanje privatnog i obiteljskog života, doma i dopisivanja. Pravo na zaštitu osobnih podataka se ne spominje izričito u EKLJP, no smatra se da je ono obuhvaćeno spomenutim pravom iz čl. 8. Tako se navodi da pravo na poštovanje privatnog i obiteljskog života, doma i dopisivanja uključuje zaštitu osobnih podataka, ukoliko se kao osobni podatak smatra svaki oni podatak koji nedvojbeno identificira pojedinca ili je povezan s određenim pojedincem te da bi se moglo tako posredno zaključiti kako Europska konvencija za

[277] Iako je pitanje razmjene osobnih podataka unutar Europske unije kompleksno i skopčano s nizom problema, navedeni problemi postaju još složeniji kada je riječ o prekooceanskoj suradnji između dviju različitih pravnih kultura. De Busser tako upozorava kako sporazumi o razmjeni osobnih podataka između Europske unije i Sjedinjenih Američkih Država ne bi nipošto smjeli biti uzor po kojem će se krojiti sami propisi Europske unije o zaštiti pojedinaca u vezi s obradom osobnih podataka od strane nadležnih tijela u svrhe sprečavanja, istrage, otkrivanja ili progona kaznenih djela (De Busser, 2010: 100). No, nedavno je sporazum između Sjedinjenih Američkih Država i Europske unije o zaštiti osobnih informacija u vezi sa sprečavanjem, istragom, otkrivanjem i progonom kaznenih djela potpisan 2. lipnja 2016.. (tzv. EU-U.S. Data Protection "Umbrella Agreement"). Područje primjene tog sporazuma su osobne informacije koje se prenose između nadležnih tijela jedne stranke i nadležnih tijela druge stranke ili koje se na drugi način prenose u skladu sa sporazumom sklopljenim između Sjedinjenih Američkih Država i Europske unije ili njezinih država članica, radi sprečavanja, otkrivanja, istrage i progona kaznenih djela, uključujući terorizam. No, važno je napomenuti da se, prema čl. 5. Sporazuma, ovim Sporazumom prema potrebi dopunjuju, ali ne zamjenjuju odredbe o zaštiti osobnih informacija iz međunarodnih sporazuma između stranaka ili između Sjedinjenih Američkih Država i država članica koje se odnose na pitanja obuhvaćena ovim Sporazumom.

zaštitu ljudskih prava i temeljnih sloboda načelno štiti sva temeljna ljudska prava koja uključuju pravo na privatnost pojedinca, a zaštita osobnih podataka nedvojbeno bi bila sastavni dio prava na privatnost u najširem smislu U tom smislu, Europska je unija donijela više različitih propisa kojima je nastojala urediti zaštutu osobnih podataka, uzimajući kao polazišnu osnovu, među drugim pravnim dokumentima, i Europsku konvenciju za zaštitu ljudskih prava i temeljnih sloboda. (Klarić, 2016:976).[278]

2.1.2. Konvencija (br. 108) Vijeća Europe od 28. siječnja 1981. o zaštiti pojedinaca pri automatskoj obradi osobnih podataka

Jedan od pravnih izvora Vijeća Europe koji regulira samo zaštitu osobnih podataka jest i Konvencija (br. 108) Vijeća Europe od 28. siječnja 1981. o zaštiti pojedinaca pri automatskoj obradi osobnih podataka (*Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*). Ona je iznimno značajna zato što je riječ o prvom dokumentu koji je pokušao sustavno urediti pitanje zaštite podataka prilikom njihove automatske obrade. Ova Konvencija je donesena kako bi se osiguralo na području svake države stranke Konvencije, poštivanje prava na privatnost pojedinca pri automatskoj obradi njegovih osobnih podataka. Budući da se područje njene primjene pored privatnog proteže i na javni sektor, to znači da je njome obuhvaćeno i djelovanje pravosudnih i policijskih tijela. Izmijenjena je 1999. godine kako bi se Europskoj uniji omogućilo da postane stranka (Pajčić, 2016: 181). Vrlo je značajan dodatni protokol uz ovu Konvenciju usvojen 2001., koji je uveo odredbe o prekograničnom prijenosu podataka nečlanicama, tzv. trećim zemljama, te o obveznom uspostavljanju nacionalnih tijela nadležnih za zaštitu podataka.[279] Temeljna načela koja Konvencija postavlja se u prvom redu odnose na način prikupljanja i automatske obrade podataka pohranjenih u određene legitimne svrhe, a koji mora biti pravedan i zakonit. Određuje se i da se navedeni osobni podatci ne smiju uporabiti u neke druge svrhe osim onih legitimnih i točno određenih i da se ne smiju zadržavati dulje no što je to potrebno. No, Konvencija postavlja i neke zahtjeve u pogledu kakvoće tih podataka – koji trebaju biti prikladni, relevantni, i razmjerni svrsi zbog koje se prikupljaju (Pajčić, 2016: 181).

[278] Klarić dodaje da odredbe same Konvencije ne razrađuju detaljno pitanje zaštite privatnosti pojedinca, nego se koriste opći termini kao „poštovanje privatnog i obiteljskog života“, „poštovanje (nepovredivosti) doma“ i „poštovanje prava na dopisivanje“ ali da navedeni termini ipak nesumnjivo predstavljaju kvalitetnu polazišnu osnovu temeljem koje se može razviti odgovarajući regulatorni okvir za zaštitu osobnih podataka. Klarić, 2016:976.

[279] Dodatni protokol uz Konvenciji o o zaštiti pojedinaca pri automatskoj obradi osobnih podataka u vezi nadzornih tijela i međunarodne razmjene podataka (Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows) Strasbourg, 8.XI. .2001.

2.2. Pravni izvori Europske unije

2.2.1 Pravosudna i policijska suradnja u EU nakon Lisabonskog ugovora

Bivši treći stup EU, koji je nosio naziv Pravosuđe i unutarnji poslovi, a koji je uključivao kaznenopravnu suradnju država članica, Lisabonskim je ugovorom integriran u pravni poredak Europskih zajednica. To je posljedica nastojanja za uspostavom prostora slobode, sigurnosti i pravde bez unutarnjih granica sprečavanjem i suzbijanjem kriminaliteta (čl. 2(2) UEU). Radi ostvarivanja toga cilja Lisabonskim je ugovorom uspostavljena supranacionalna nadležnost Unije u kaznenopravnom području kroz sljedeće mehanizme: 1. policijska i pravosudna suradnja u kaznenim stvarima stavljena je pod režim pravnog poretka Europske zajednice, 2. ustanovljena je podijeljena nadležnost u prostoru slobode, sigurnosti i pravde između Europske unije i država članica, 3. usvojen je novi postupak donošenja odluka u području policijske i pravosudne suradnje u kaznenim stvarima, 4. države članice dobile su ovlast zakonodavne inicijative, ovlast prekida zakonodavnog postupka te uspostave pojačane policijske i kaznenopravne suradnje u dijelu Europske unije (Đurđević, 2008: 1079). Izmjene unesene Lisabonskim ugovorom znače i da je priroda europskog zakonodavstva na području kaznenog prava promijenila svoj karakter, od međuvladinog do nadnacionalnog (iako su sačuvani neki važni međuvladini elementi) a načelo uzajamnog priznanja je odnijelo pobjedu nad načelom međuvladinih koordinacija. (Lukić, 2016: 149).

Nakon kratkog razmatranja relevantnih odredbi Povelje o temeljnim pravima Europske unije, imajući u vidu temu ovog rada, od niza važnih izvora,[280] posvetiti ćemo se onim najvažnijim pravnim izvorima EU koji reguliraju samo međunarodnu suradnju pravosudnih i policijskih tijela, odnosno zaštitu osobnih podataka prilikom razmjene informacija tijekom navedene suradnje. [281]

[280] S obzirom da je jedan od izvorih ciljeva uspostave i jačanja kaznenog prava Europske unije zaštita njenih financijskih interesa, zanimljivo je vidjeti pitanje zaštite tajnosti podataka u tom kontekstu: V. Sokanović, 2015., osobito poglavlje 3.3. gdje se obrađuje zaštita osobnih podataka u djelovanju Europola, Eurojusta i Europskog ureda za borbu protiv prijevara (OLAF), kao tijela koje imaju osobito značajnu ulogu z zaštiti financijskih interesa Europske unije.

[281] Vrlo važni izvori su i tzv. Prümska konvencija i Prümska odluka. Sedam država članica EU Njemačka, Španjolska, Francuska, Luksemburg, Nizozemska, Austrija i Belgija) potpisalo je 27. 5. 2005. Konvenciju koja je imala za cilj s ciljem razvijanje prekogranične suradnje osobito u borbi protiv terorizma, prekograničnog kriminala i nezakonitih migracija. Od više načina suradnje koje je Konvencija predviđala, izdvojit ćemo razmjenu DNK profila, otisaka prstiju, podataka o vlasnicima motornih vozila te zajedničke ophodnje na granici. Ova Konvencija, koja se naziva Prümskom po njemačkom gradu u kojem je potpisana, a koja je poznata i kao Schengen III sporazum) je postala dijelom prava Europske Unije 2008. donošenjem Odluke Vijeća 2008/615/PUP o produbljivanju prekogranične suradnje, posebno u suzbijanju terorizma i

2.2.2. Povelja o temeljnim pravima Europske unije

Povelja o temeljnim pravima Europske unije (*The Charter of Fundamental Rights of the European Union*), zaštitu osobnih podataka jamči ne samo u okviru čl. 7. (poštovanje privatnog i obiteljskog života) već i u posebnom članku 8.; koji nosi naziv „Zaštita osobnih podataka“.[282] Neki od važnijih normativnih zahtjeva su da se takvi podaci moraju obrađivati pošteno u za to utvrđene svrhe, temeljem pristanka osobe o kojoj je riječ ili na nekoj drugoj legitimnoj osnovi, utvrđenoj zakonom. Povelja također određuje da svatko ima pravo na pristup podacima koji su prikupljeni o njemu pravo na njihovo ispravljanje.

2.2.3. Okvirna odluka Vijeća 2008/977/PUP o zaštiti osobnih podataka obrađenih u okviru policijske i pravosudne suradnje u kaznenim stvarima[283]

Najvažnije izmjene koje je ova Okvirna odluka donijela tiču se svrhe prikupljanja te načela zakonitosti, i razmjernosti (Pajčić, 2016: 182-183) U pogledu prikupljanja podataka, određeno je da osobne podatke nadležna tijela mogu prikupljati samo u određene, jasne i zakonite svrhe u okviru svojih zadataka i mogu ih obrađivati samo u onu svrhu za koju su podaci prikupljeni. Načelo razmjernosti se u prvom redu očituje u zahtjevu da obrada podataka mora biti razmjerna svrsi zbog koje su podaci prikupljeni. Kad je riječ o ograničavanju svrhe korištenja prikupljenih osobnih podataka, propisano je da se osobni podaci zaprimljeni od neke druge države članice, mogu dalje obrađivati samo radi sprečavanja, istraživanja, otkrivanja ili progona kaznenih djela ili izvršavanja kaznenopravnih sankcija te ostalih sudskih i upravnih postupaka izravno vezanih za sprečavanje, istraživanje, otkrivanje ili progon kaznenih djela ili izvršavanje

prekograničnog kriminala. Za opširniji prikaz zaštite osobnih podataka u radu Eurojusta, Europola i OLAF-a, v. Gutiérrez Zarza, (Ed.) (2015), str. 57-106.

[282] To ne treba čuditi s obzirom na činjenicu da je EKLJP donesena 1950. godine, a Povelja o temeljnim pravim EU 2012. godine, kada se uslijed razvoja društvenih shvaćanja i međunarodnog prava o ljudskim pravima, pravo na zaštitu osobnih podataka već počelo smatrati posebnim temeljnim ljudskim pravom (Pajčić, 2016: 180). *Furster* upozorava da pravo na zaštitu osobnih podataka nije prije bilo priznato ni u jednm od izvora koji se spominju u preambuli Povelje, što znači da je to pravo u osnovi bilo „nevidljivo“ te da je ono u stvari stvoreno tek Poveljom. 2009. godine Lisabonski ugovor je Povelji dao pravnu snagu, pa tako i u njoj prvi put priznatom pravu na zaštitu osobnih podataka (Furster, 2014: 8). Međutim, svakako valja spomenuti da su, prema istraživanju von Lewinskog, pravne norme o potupanju s informacijama koje se odnose na neke osobe, postojale već u 17. stoljeću. von Lewinski, K., Geschichte des Datenschutzrechts von 1600 bis 1977 in: Felix Arndt, Nicole Betz, Anuscheh Farahat, Matthias Goldmann, Matthias Huber, Rainer Keil, Petra Lea Láncos, Jan Schaefer, Maja Smrkolj, Franziska Sucker, Stefanie Valta (Hrsg.) Freiheit - Sicherheit - Öffentlichkeit, Seite 196 – 220, 48. Assistententagung Öffentliches Recht, Heidelberg 2008., cit, prema: Zaremba (2014), str. 37.

[283] Council Framework Decisin 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

kaznenopravnih sankcija. Prenošenje nadležnim tijelima u trećim zemljama ili međunarodnim tijelima je moguće, ali samo pod određenim uvjetima i s određenom svrhom. Države članice dužne su osigurati da osobni podaci koje su prenijela ili stavila na raspolaganje nadležna tijela neke druge države članice mogu biti preneseni trećim zemljama ili međunarodnim tijelima samo ako: (a) je to potrebno za sprečavanje, istraživanje, otkrivanje ili progon kaznenih djela ili izvršavanje kaznenopravnih sankcija; (b) je tijelo koje je primatelj u trećoj zemlji, ili međunarodno tijelo koje je primatelj, odgovorno za sprečavanje, istraživanje, otkrivanje ili progon kaznenih djela ili izvršavanje kaznenopravnih sankcija; (c) je država članica iz koje su podaci dobiveni dala svoje odobrenje za prenošenje u skladu sa svojim nacionalnim pravom; i (d) treća zemlja ili dotično međunarodno tijelo osigurava odgovarajuću razinu zaštite za namjeravanu obradu podataka.[284]

2.2.4. Direktiva (EU) 2016/680 Europskog parlamenta i Vijeća od 27. 4. 2016. o zaštiti pojedinaca u vezi s obradom osobnih podataka od strane nadležnih tijela u svrhe sprečavanja, istrage, otkrivanja ili progona kaznenih djela ili izvršavanja kaznenih sankcija i o slobodnom kretanju takvih podataka te o stavljanju izvan snage Okvirne odluke Vijeća 2008/977/PUP

U sklopu svoje reforme prava zaštite osobnih podataka, Europska Unija je usvojila Uredbu o zaštiti podataka od 2016/679 (GDPR) kojom se ukida Direktiva o zaštiti podataka 95/46 / EC2 (DPD), koja trenutno uređuje zaštitu osobnih podataka u EU. Međutim, ova nova Uredba o zaštiti podataka ne odnosi se na aktivnosti na području pravosudne suradnje u kaznenim stvarima i policijskoj suradnji,[285] radi čega je bilo

[284] Posebno je zanimljivo pitanje prijenosa trećim državama informacija i osobnih podataka koje su prikupile privatne tvrtke. Jasno je da mnoge privatne tvrtke (npr. zrakoplovni prijevoznici i banke) prikupljaju i obrađuju informacije i osobne podatke svojih klijenata s ciljem unaprijeđenja vlastitog poslovanja. Gutiérrez Zarza ističe da je iskustvo pokazalo da takve informacije i podaci, ako ih obrade specijalizirani policijski i pravosudni eksperti, mogu biti iznimno korisni u sprječavanju kriminalnih aktivnosti (npr. terorističkih napada u zrakoplovima), identificiranju djelovanja i povezanosti kriminalnih organizacija ili transfera zarade ostvarene kriminalnim aktvinostima. Gutiérrez Zarza, (Ed.) (2015), str. 165.

[285] Uredba (EU) 2016/679 Europskog parlamenta i Vijeća od 27. 4. 2016. o zaštiti pojedinaca u vezi s obradom osobnih podataka i o slobodnom kretanju takvih podataka te o stavljanju izvan snage Direktive 95/46/EZ (Opća uredba o zaštiti podataka). Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Za prikaz sadržaja i novosti koje ova Uredba donosi, v. Albrecht, J., P., (2016) How the GDPR Will Change the World European Data Protection Law Review (EDPL), Vol. 2, br. 3 (2016), str. 287-289., Zarsky, T. Z., (2017), Incompatible: The GDPR in the Age of Big Data, Seton Hall Law Review, Vol. 47, Issue 4 str. 995-1020., Wagner, J.; Benecke, A., (2016) National Legislation within the Framework of the GDPR, European Data Protection Law Review (EDPL), Vol. 2, Issue 3 (2016), str. 353-361, te od monografskih izdanja: Voigt, P., von dem Bussche, A., (2017) The EU General Data Protection Regulation (GDPR), Springer International Publishing.

potrebno donijeti poseban propis koji će regulirati zaštitu osobnih podataka prilikom pravosudne i policijske suradnje. Stoga je donesena Direktiva (EU) 2016/680 Europskog parlamenta i Vijeća od 27. 4. 2016. o zaštiti pojedinaca u vezi s obradom osobnih podataka od strane nadležnih tijela u svrhe sprečavanja, istrage, otkrivanja ili progona kaznenih djela ili izvršavanja kaznenih sankcija i o slobodnom kretanju takvih podataka te o stavljanju izvan snage Okvirne odluke Vijeća 2008/977/PUP (u nastavku: Direktiva (EU) 2016/680)[286]. Stupila je na snagu 5. svibnja 2016., a države članice imaju rok za transponiranje njenih odredbi u nacionalna zakonodavstva do 6. svibnja 2018., kada se ona počinje primjenivati.[287] Ova nova Direktiva ima za cilj osigurati da je zaštita prava i sloboda fizičkih osoba u svim državama članicama jednaka u odnosu na obradu osobnih podataka od strane policije. Važno je istaknuti da je državama članicama omogućeno da usvoje više zaštite i propišu strože odredbe o zaštiti podataka.

U odnosu na spomenutu Opću uredbu o zaštiti podataka, Direktiva 2016/680 se razlikuje u prvom redu u pravu na informiranje i pristupu osobnim podacima. Jasno je da bi bezuvjetno pružanje tih prava u opsegu iz Uredbe moglo u velikom broju slučajeva ugroziti istraživanje u kaznenim predmetima, te je stoga potrebno predvidjeti takva rješenja koja će barem u određenoj mjeri uvažiti navedene interese kaznenog postupka. Direktiva (EU) 2016/680 nastoji dakle uravnotežiti ciljeve zaštite podataka s ciljevima učinkovite međunarodne pravosudne i policijske suradnje.[288]

[286] Directive (EU) 2016/680 of the European parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

[287] Kao što je vidljivo iz samog naziva, njome se ukida gore pojašnjenja, Okvirna odluku Vijeća 2008/977/PUP o zaštiti osobnih podataka obrađenih u okviru policijske i pravosudne suradnje u kaznenim stvarima.

[288] Pravna osnova donošenja posebnog propisa za područje pravosudne suradnje u kaznenim stvarima i policijske suradnje je sadržana u Izjavi br. 21 o zaštiti osobnih podataka u područjima pravosudne suradnje u kaznenim stvarima i policijske suradnje, priloženoj završnom aktu međuvladine konferencije na kojoj je donesen Ugovor iz Lisabona, kojom je potvrđeno da bi se određena pravila o zaštiti osobnih podataka i slobodnom kretanju osobnih podataka u područjima pravosudne suradnje u kaznenim stvarima i policijske suradnje na temelju članka 16. UFEU-a mogla pokazati neophodnima zbog specifične prirode tih područja. Stoga je primjereno da se ta područja urede posebnom direktivom kojom bi se utvrdila posebna pravila o zaštiti pojedinaca s obzirom na osobnih podataka od strane nadležnih tijela u svrhe sprečavanja, istrage, otkrivanja ili progona kaznenih djela ili izvršavanja kaznenih sankcija, uključujući zaštitu od prijetnji javnoj sigurnosti i njihovo sprečavanje, poštujući posebnu prirodu tih aktivnosti. Takva nadležna tijela mogu obuhvaćati ne samo tijela javne vlasti poput pravosudnih tijela, policije ili drugih tijela (Preambula Direktive 2016/680, čl. 10. I 11).

Već je iz imena obiju Direktiva jasno da nova Direktiva (EU) 2016/680 ima širi opseg i da bi trebala biti sveobuhvatnija od Okvirne odluke 2008/977/PUP koju zamjenjuje. To je proizlazi i iz stavka 6. preambule gdje se ispravno primjećuje da je područje primjene Okvirne odluke Vijeća 2008/977/PUP ograničeno na obradu osobnih podataka koje države članice jedna drugoj prenose ili stavljaju na raspolaganje (Salami, 2016: 3). U preambuli ove Direktive se navodi da se njeno donošenje zasniva na čl. 8. st. 1. Povelje Europske unije o temeljnim pravima te čl. 16. st. 1. Ugovora o funkcioniranju Europske unije (UFEU) gdje se utvrđuje a svatko ima pravo na zaštitu svojih osobnih podataka te da je osiguravanje dosljedne i visoke razine zaštite osobnih podataka pojedinaca te olakšavanje razmjene osobnih podataka među nadležnim tijelima država članica ključno kako bi se osigurala učinkovita pravosudna suradnja u kaznenim tvarima i policijska suradnja. U tu svrhu, razina zaštite prava i sloboda pojedinaca u vezi s obradom osobnih podataka od strane nadležnih tijela u svrhe sprečavanja, istrage, otkrivanja ili progona kaznenih djela ili izvršavanja kaznenih sankcija, uključujući zaštitu od prijetnji javnoj sigurnosti i njihovo sprečavanje, trebala bi biti jednaka u svim državama članicama. (Preambula, čl. 7).

S obzirom da bi detaljnije razmatranje sadržaja ove nove Direktive (EU) 2016/680 i svih novina koje donosi u odnosu na prethodno zakonodavstvo prelazilo opseg ovog rada, navest ćemo samo neke važne elemente. Jedna od zanimljivih novina jest i šire shvaćanje, tj. proširenje opsega pojma „osobni podatci“ koji su u čl. 3. st. 1. t. 1. definirani kao: „svi podaci koji se odnose na pojedinca čiji je identitet utvrđen ili se može utvrditi „ispitanik”; pojedinac čiji se identitet može utvrditi jest osoba koja se može identificirati izravno ili neizravno, osobito uz pomoć identifikatora kao što su ime, identifikacijski broj, podaci o lokaciji, mrežni identifikator ili uz pomoć jednog ili više čimbenika svojstvenih za fizički, fiziološki, genetski, mentalni, ekonomski, kulturni ili socijalni identitet tog pojedinca“. Iz navedenog proizlazi da su za razliku od prijašnje definicije, podaci o lokaciji, mrežni identifikator te genetski i biometrijski podaci podvedeni pod pojam osobnih podataka.[289] Objašnjenje za uključivanje genetskih podataka u okvir pojma “osobni podaci“ dobrim dijelom zasigurno proizlazi i iz judikature Europskog suda za ljudska prava, osobito odluke u predmetu S. i Marper

[289] Sukladno čl. 3. Stavku 12. Direktive (EU) 2016/680 genetski podaci su genetski podaci” su svi osobni podaci koji se odnose na naslijeđena ili stečena genetska obilježja pojedinca koja daju jedinstvenu informaciju o fiziologiji ili zdravlju tog pojedinca, i koji su dobiveni osobito analizom biološkog uzorka dotičnog pojedinca; dok su prema stavku 13. „biometrijski podaci” osobni podaci dobiveni posebnom tehničkom obradom u vezi s fizičkim obilježjima, fiziološkim obilježjima ili obilježjima ponašanja pojedinca koja omogućuju ili potvrđuju jedinstvenu identifikaciju tog pojedinca, kao što su fotografije lica ili daktiloskopski podaci.

protiv Ujedinjenog Kraljevstva gdje je Europski sud za ljudska prava u navedenom slučaju smatrao da trajno zadržavanje staničnih uzoraka, DNA profila i otisaka prstiju osoba koje nisu osuđene predstavlja miješanje u pravo na poštivanje privatnog života.[290] Neki autori smatraju da uključivanje genetskih podataka i biometrijskih podataka dodatno proširuje opseg Direktive (EU) 2016/680 i pokazuje namjeru parlamenta EU da proširuje opseg smjernice u skladu s globalnim kretanjima ljudskih prava i ravnotežom pravo na zaštitu podataka s pravom na privatnost (Salami, 2016: 6).

Novinu predstavlja i čl. 6. Direktive koji pravi razliku između različitih kategorija osoba: voditelj obrade treba raditi jasnu razliku između osobnih podataka različitih kategorija ispitanika, i to osumnjičenika, osuđenika, žrtava te trećih osoba. Vrlo je značajno ukazati na na čl. 10. koji uređuje i ograničava obradu posebnih kategorija osobnih podataka. To su podaci koji otkrivaju rasno ili etničko podrijetlo, politička mišljenja, religijska ili filozofska vjerovanja ili članstvo u sindikatu te obrada genetskih podataka, biometrijskih podataka u svrhu jedinstvene identifikacije pojedinca ili podataka koji se odnose na zdravlje ili podataka o spolnom životu ili seksualnoj orijentaciji pojedinca.

Sa stajališta očuvanja temeljnih prava, iznimno značajno je III. poglavlje koje govori o pravima ispitanika, konkretno o obavješćivanju i modalitetima ostvarivanja prava ispitanika, informacijama koje se stavljaju na raspolaganje ili daju ispitaniku,[291] pravu ispitanika na pristup, ograničenju prava pristupa, pravu na ispravak ili brisanje osobnih podataka i ograničenje obrade te ostvarivanju prava ispitanika i provjera nadzornog tijela.[292]

[290] Str. 7-8. objašnjenja u Prijedlogu Direktive 2016/680. Proposal for a Directive of the European parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data {SEC(2012) 72 final} {SEC(2012) 73 final}, dostupno na: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0010:FIN:EN:PDF, I Ustavni sud Repubiek Hrvatske se referirao na navedenu odluku ESLJP u svojoj odluci iz 2012. godine o neustavnosti nekih odredbi Zakona o kaznenom postupku. Odluka Ustavnog suda od 19. 7. 2012. t. 155.-158.4 (Odluka i rješenje br. U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-

5813/2010, U-I-2871/2011.)

[291] Države članice osiguravaju da voditelj obrade ispitaniku stavlja na raspolaganje barem sljedeće informacije: (a) identitet i kontaktne podatke voditelja obrade; (b) kontaktne podatke službenika za zaštitu podataka, ako je primjenjivo; (c) svrhe obrade za koje su ti osobni podaci namijenjeni; (d) pravo na podnošenje pritužbe nadzornom tijelu i kontaktne podatke nadzornog tijela; (e)postojanje prava da se od voditelja obrade zatraži pristup osobnim podacima, njihov ispravak ili brisanje, ili ograničavanje obrade osobnih podataka koji se odnose na ispitanika.

[292] Kad je riječ o utjecaju volje samog ispitanika na obradu njegovih podataka, nužno je spomenuti iznimno zanimljiv razvoj pravne teorije i prakse u Njemačkoj po pitanju prava na privatnost, budući da tamo postoji

Pitanje prenošenja prikupljenih osobnih podataka trećim zemljama ili međunarodnim organizacijama uređeno je u petom poglavlju.[293] Opća načela prijenosa osobnih podataka uređuje čl. 35. Direktive. Države članice osiguravaju da nadležna tijela svaki prijenos osobnih podataka koji se obrađuju ili su namijenjeni za obradu nakon prijenosa trećoj zemlji ili međunarodnoj organizaciji, uključujući daljnje prijenose još jednoj trećoj zemlji ili međunarodnoj organizaciji, obavljaju pridržavajući se nacionalnih odredaba donesenih na temelju odredaba ove Direktive, samo ako su ispunjeni sljedeći uvjeti: (a) prijenos je nužan u svrhe utvrđene u članku 1. stavku 1.; (b) osobni podaci prenose se voditelju obrade u trećoj zemlji ili međunarodnoj organizaciji koji predstavlja javno tijelo nadležno za potrebe iz članka 1. stavka 1.; (c) ako su osobni podaci preneseni ili stavljeni na raspolaganje iz druge države članice, ta je država članica dala prethodno odobrenje za prijenos u skladu sa svojim nacionalnim pravom; (d) Komisija je donijela odluku o primjerenosti na temelju članka 36. ili, u nedostatku takve odluke,odgovarajuće zaštitne mjere predviđene su ili postoje na temelju članka 37. ili se, u nedostatku odluke o primjerenosti na temelju članka 36. i odgovarajućih zaštitnih mjera u skladu s člankom 37. primjenjuju odstupanja za posebne situacije na temelju članka 38.; i (e) u slučaju daljnjeg prijenosa u još jednu treću zemlju ili međunarodnu organizaciju, nadležno tijelo koje je izvršilo prvotni prijenos ili drugo nadležno tijelo iste države članice, nakon što je uzelo u obzir sve relevantne čimbenike, uključujući ozbiljnost kaznenog djela, svrhu s kojom su osobni podaci prvotno preneseni i razinu zaštite osobnih podataka u trećoj zemlji ili međunarodnoj organizaciji kojoj su dalje preneseni osobni podaci, odobrava daljnji prijenos.

posebno temeljno ljudsko „pravo na informacijsko samoodređenje“. Naime njemački Savezni ustavni sud izveo je navedeno pravo na informacijsko samoodređenje – (Recht auf informationelle Selbstbestimmung - koje bi se moglo ukratko opisati kao pravo odrediti uporabu vlastitih osobnih podataka) iz prava na privatnost. To pravo taj je sud 1983. godine u tzv. „Volkszählungs-Urteil“ priznao kao novo temeljno pravo vezano uz zaštitu podataka; nije izričito navedeno u Ustavu, već je proizašlo iz judikature Saveznog ustavnog suda. Pajčić, M., (2009), str. 293-294. Opširnije o pravu na informacijsko određenje v. monografiju Albers, M., Informationelle Selbstbestimmung. Nomos-Verlag, Baden-Baden 2005. Drugi, za temu ovog rada vrlo važan institut njemačke pravne teorije jest tzv. „jezgra privatnog življenja“. Izraz “’jezgra privatnog življenja” prijevod je njemačkog izraza “Kernbereich privater Lebensgestaltung”. Taj izraz označuje u njemačkom pravu, odnosno judikaturi BVErfG, dio intimne i privatne sfere čovjeka koji je apsolutno zaštićen od posega države, tj. koji ni u kakvim okolnostima ne smije biti povrijeđen (Pajčić, 2009: 295). Opširnije o ograničenjima koje ovaj nepovredivi dio intimne sfere čovjeka postavlja pri primjeni tajnih istražnih mjera za potreba kaznenog postupka v. Hauck, P., (2014: 334-356). Osobito je zanimljiva Hauckova konstatacija da koncept „jezgre“ pati upravo zbog toga što je (nedopušteno prema njegovom mišljenju) utemeljen na pravu na ljudsko dostojanstvo iz čl. 1. st. 1 njemačkog Temeljnog zakona budući da se takva koncepcija susreće s nepremostivim preprekama. Hauck, 2014: 355.

[293] Takvo prenošenje je prije donošenja ove Direktive bilo uređeno Konvencijom 108, Preporukom Vijeća Europe o policijskim podacima (Rec(87)15, od 17. rujna 1987.) i Okvirnom odlukom Vijeća 2008/977 / JHA. (Pajunoja, 2017: 62).

Prijenosi bez prethodnog odobrenja druge države članice dopušteni su samo ako je prijenos osobnih podataka potreban za sprečavanje neposredne i ozbiljne prijetnje javnoj sigurnosti države članice ili treće zemlje ili bitnim interesima države članice, a prethodno se odobrenje ne može pravodobno dobiti. Prijenosi na temelju odluke o primjerenosti uređeni su u čl. 36. Države članice osiguravaju da je prijenos osobnih podataka trećoj zemlji ili međunarodnoj organizaciji moguć kada Komisija odluči da treća zemlja, područje ili jedan ili više određenih sektora unutar te treće zemlje, ili međunarodna organizacija o kojoj je riječ osigurava primjerenu razinu zaštite, pri čemu takav prijenos ne zahtijeva posebno odobrenje.[294]

Komisija u Službenom listu Europske unije i na svojoj internetskoj stranici objavljuje popis trećih zemalja, područja i posebnih sektora unutar treće zemlje i međunarodnih organizacija u pogledu kojih je donijela odluku da ne osiguravaju primjerenu razinu zaštite ili da je više ne osiguravaju.

No, unatoč navedenim pozitivnim novinama, i nova Direktiva pati od sličnih boljki kao i prijašnji propisi, a jedan od problematičnijih je svakako nedovoljna određenost nekih normi, što ostavlja prostor vrlo različitim tumačenjima.[295]

[294] Prilikom procjene primjerenosti stupnja zaštite Komisija osobito uzima u obzir sljedeće elemente: (a) vladavinu prava, poštovanje ljudskih prava i temeljnih sloboda, mjerodavno zakonodavstvo, i opće i sektorsko, što uključuje zakonodavstvo o javnoj sigurnosti, obrani, nacionalnoj sigurnosti, kaznenom pravu i pristupu tijela javne vlasti osobnim podacima, kao i provedbu takvog zakonodavstva, pravila o zaštiti podataka, pravila struke i mjere sigurnosti, što uključuje pravila za daljnji prijenos osobnih podataka još jednoj trećoj zemlji ili međunarodnoj organizaciji, koja se poštuju u toj zemlji ili međunarodnoj organizaciji, sudsku praksu te postojanje djelotvornih i provedivih prava ispitanika te djelotvorne upravne i sudske zaštite ispitanika čiji se osobni podaci prenose; (b) postojanje i djelotvorno funkcioniranje jednog neovisnog nadzornog tijela ili više njih u trećoj zemlji, ili tijela kojem podliježe međunarodna organizacija, odgovornih za osiguravanje i provođenje poštovanja pravila o zaštiti podataka, uključujući primjerene ovlasti izvršavanja zakonodavstva, za pružanje pomoći ispitanicima i njihovo savjetovanje u ostvarivanju njihovih prava te za suradnju s nadzornim tijelima država članica; i (c) međunarodne obveze koje je dotična treća zemlja ili međunarodna organizacija preuzela ili druge obveze koje proizlaze iz pravno obvezujućih konvencija ili instrumenata, kao i iz njezina sudjelovanja u multilateralnim ili regionalnim sustavima, osobito u vezi sa zaštitom osobnih podataka. Komisija nakon procjene primjerenosti stupnja zaštite može, putem provedbenog akta, odlučiti da treća zemlja, područje, ili jedan ili više određenih sektora unutar treće zemlje, ili međunarodna organizacija osigurava primjeren stupanj zaštite. U provedbenom aktu predviđa se mehanizam za periodično preispitivanje, najmanje svake četiri godine, kojim će se uzeti u obzir svi relevantni događaji u toj trećoj zemlji ili međunarodnoj organizaciji. U provedbenom aktu određuje se teritorijalna i sektorska primjena, a ako je primjenjivo, utvrđuje se i nadzorno tijelo ili nadzorna tijela. No, ako dostupne informacije naknadno otkriju da treća zemlja, područje ili jedan ili više određenih sektora unutar treće zemlje ili međunarodna organizacija više ne osigurava navedenu primjerenu razinu zaštite u mjeri u kojoj je to potrebno, Komisija stavlja izvan snage, mijenja ili suspendira odluku kojom je utvrđeno osiguravanje primjerenog stupnja zaštite putem provedbenog akta bez retroaktivnog učinka. Čl. 36. st. 2-5. Direktive 2016/680.

[295] Huhtiniemi tako upozorava da nova Direktiva omogućava zemljama članicama široke mogućnosti interpretacije odredbi. Kao primjer, on ukazuje na članak 4. Direktive (koji govori o načelima obrade osobnih

3. Zaključak

Zaštita osobnih podataka je jedno od područja prava kojem se u posljednje vrijeme posvećuje sve veća pažnja. To ne čudi imamo li u vidu razvoj svijesti o ljudskim pravima, te konkretno, u okviru Europske unije, činjenicu da je Povelja o temeljnim pravima (za razliku od prijašnjih međunarodnih i regionalnih dokumenata o ljudskim pravim) izričito zajamčila to pravo, izdvojivši ga iz okvira prava na privatnost, te je pravo na zaštitu osobnih podataka i formalno postalo temeljno ljudsko pravo. Novi pravni okvir Europske unije o zaštiti osobnih podataka, opća Uredba o zaštiti podataka od 2016/679 (GDPR) te za temu ovog rada mnogo značajnija Direktiva 2016/680 o zaštiti pojedinaca u vezi s obradom osobnih podataka od strane nadležnih tijela u svrhe sprečavanja, istrage, otkrivanja ili progona kaznenih djela ili izvršavanja kaznenih sankcija i o slobodnom kretanju takvih podataka te o stavljanju izvan snage Okvirne odluke Vijeća 2008/977/PUP**,** donesen 2016. godine**,** ubrzo će se početi primjenjivati. Iako Direktiva 2016/680 svakako predstavlja napredak i na cjelovitiji način uređuje zaštitu osobnih podataka u postupcima međunarodne pravosudne i poilicijske suradnje, to ne znači da će ti postupci u budućnosti teći bez problema. Svakako se može kazati da je u ovom trenutku prerano da u potpunosti budemo sigurni hoće li nova Direktiva osigurati odgovarajuću zaštitu privatnosti jer se još nije počela primjenjivati - kada su države članice prisiljene ujednačiti svoje zakonodavstvo koje je u velikoj mjeri obilježeno vlastitom zakonodavnom i kulturološkom tradicijom, a instrument koji vodi proces je apstraktan, nemoguće je predvidjeti ishod (Pajunoja, 2017: 84). S druge strane, jasno je da je, pored normativnog okvira, za zaštitu osobnih podataka još važnija i učinkovita provedba istog i realna mogućnost zaštite tih prava koja u velikoj mjeri proizlazi iz kvalitetnog rada nadležnih tijela.[296] No, nedvojbeno je da bi proširenje opsega pojma osobnih podataka koji se zaštićuju, zatim jasna distinkcija između prikupljanje i obrade osobnih podataka različitih kategorija osoba te općenito preciznije pravno uređenje u usporedbi s Direktivom 95/46/EC predstavljaju poboljšanje u zaštiti

podataka) i korištene pridjeve "posebne" i "eksplicitne" svrhe, (eng.: specified, explicit ...purposes) kao i "primjerene", "relevantne", "ne pretjerane" i "točne" (engl. "adequate", "relevant", "not excessive" and "accurate"). Huhtiniemi, H. Interview, 29.12.2016. Topic: Level of data protection in Finland and in EU. Interviewer: Pajunoja, L. u: Pajunoja, 2017: 84. Pored navedenog primjera Huhtiiemija, možemo daljue navesti i „odgovarajuće“ rokove za pohranu i preispitivanje iz čl. 5., „vitalni interesi ispitanika“ iz čl. 10. i brojne druge izraze.

[296] *Hijmans* tako, govoreći o općem okviru zaštite osobnih podataka izvan sustava kaznenog pravosuđa, upozorava da tijela nadležna za zaštitu osobnih podataka, kao i svaka druga javna tijelo u vrijeme štednje, imaju oskudne resurse što ilustrira izvješćem Agencije za temeljna prava Europske unije u 2010. godini, prema kojem su nedovoljna pomoć i nedostatak financijskih sredstava rezultirali su situacijom u kojoj europska tijela za zaštitu osobnih podataka nisu obavljala sve svoje zadatke. (Hijmans, 2016: 366).

osobnih podataka. S druge strane mora se primijetiti kako brojne odredbe nove Direktive ostavljaju široke mogućnosti tumačenja odredbi, te da će s obzirom na to biti iznimno važna biti uloga Europskog suda u tumačenju odredbi navedene Direktive, što će prema mišjenju autora ovog rada, kad je riječ o ovako osjetljivom području, u konačnici i odrediti smjer razvoja prava zaštite osobnih podataka u postupcima međunarodne kaznenopravne i policijske suradnje.

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doc. dr sc. Matko Pajčić[*]

PERSONAL DATA PROTECTION IN INTERNATIONAL PENAL LAW PROCEEDINGS AND POLICE COOPERATION IN EUROPEAN LAW[**]

Abstract: *Legal regulation of the protection of personal data in the proceedings of international judicial co-operation in criminal matters and police cooperation in the law of the Council of Europe and the law of European Union becomes very important topic. Given the strengthening of crime with international features, intense co-operation between the police and judicial bodies of different countries becomes necessary. One of the most important forms of this co-operation is the exchange of information, which usually includes personal information not only of suspects and defendants but also of other persons. Since technological advances have enabled the collection, processing and storage of large amounts of such personal data, leading to very serious threats to the violation of the right to privacy and the right to protection of personal data, a legal framework should be established to enable effective exchange of information between competent authorities of different countries but with the preservation of each person's fundamental rights.*

Keywords: *protection of personal data, international judicial co-operation in criminal matters, international police cooperation.*

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DNA DATABASES AND PRIVACY LAW

***Abstract**: The DNA profiling method has been applied in the world for more than thirty years, but it should be emphasized that it still does not have such a significance in our country as it has in the world. The reasons for this are numerous, for example, inadequate legal regulations, lack of established standards that should be met by DNA laboratories which do the analysis, then setting up and content of DNA databases, etc. The aim of this paper is to present a model which was used to create the method of DNA profiling with the appropriate regulations in England and which could in good part serve as the basis for the adequate regulation of this matter in Serbian legislation as well. In this paper, there is a brief review of the historical development of this method in England and some cases in which the using of this DNA profiling method has led to the discovery of the perpetrators of certain crimes will be presented. A great deal of attention will be paid to the legal position of the DNA database in England (NDNAD), which was set up in 1995, that is, the questions from which persons and under what conditions can a DNA sample be taken for analysis, what kind of samples are they, and whether the sample obtained in that way can be stored and for how long. The relevant case-law of the European Court of Human Rights will also be presented, which has ruled out certain regulations in England precisely because of the violation of the privacy law. In this way, the structure and organization of the DNA database on one side will be directly connected to the other side - the privacy law, having in mind that a DNA profile of a person is made on the basis of genetic samples containing very sensitive genetic information of individuals.*

INTRODUCTION

Discovering a DNA molecule (deoxyribonucleic acid) is one of the most important discoveries of the 20th century, and the use of the DNA profiling method, which identifies a person based on DNA analysis of the molecule in order to clarify a particular crime, has a revolutionary significance.

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DNA profiling is the latest method used for identifying individuals of the same species using only the samples of their deoxyribonucleic acids (DNA) or genetic material. In order to identify an individual, scientists scan 13 pieces of DNA that differ among individuals and use that data to create a person's DNA profile, often referred to as a DNA fingerprint. The biological clue found at the crime scene makes it possible that DNA molecule can be extracted from it and, with certain expertise, it can be compared with the genetic material taken from the suspected person. In this way the unique genetic structure of that person is determined and the person can be identified with certainty, that is, it can be determined that a certain biological clue found at the crime scene comes or does not come from that person. Such a DNA profile represents the unique identification number of each person and it is considered that there are no two persons who have an identical DNA profile with the exception of identical twins.

Otherwise, the DNA profiling method was discovered in 1984 and its founder is Professor of Genetics, Alec Jeffreys, from the University of Leicester, England.[297] However, it should be pointed out that Professor Jeffreys named this method a 'DNA fingerprint' and that in scientific and professional work, both in domestic and foreign literature, this term is often used.[298] For long time the DNA fingerprint was recognizable and the only one which was used to label this method, but recently for forensic geneticists, the name DNA profiling has become more and more popular, i.e. the creating of a DNA profile of an individual based on biological material which is considered to be more appropriate name for this method (Simonović, 2002a: 408).

This method is now considered a reliable and powerful "silent witness" during the identificationof the suspects, i.e. the elimination of non-suspected persons. However, it should be noted that the using this method in criminal justice systems is not by no means indisputable. First of all, in relation to the use of DNA technology, there are many problems of ethical nature, but it should also be pointed out that there is the

[297] Professor Alec Jeffreys has discovered that certain parts of the DNA chain (loci) have a high level of variability that makes them virtually unrepeatable for each individual. Otherwise, due to his merit in science, Professor Alec Jeffreys received the title *Sir* in 1994 from the British Queen.

[298] It should be noted that DNA profiling and DNA fingerprinting are synonymous - Simonović, B. (2002). Identifikacija lica na osnovu utvrđivanja DNK profila (1. deo) (Identification of a person based on DNA profiling (Part 1)), *Bezbednost XLIV*(3), p. 408. Otherwise, in our scientific and professional public there have published works dealing with this topic in which in most cases the term DNA fingerprinting was used. See: Obradovic, D. (2000), Veštačenje DNK u krivičnom postupku (DNA Expert in Criminal Proceedings), *Jugoslovenska revija za krivično pravo i kriminologiju 38*(3); Miljković, J. (2001), Biološko veštačenje krivičnog dela silovanja metodom DNK otiska (Biological expertise of the criminal offense of rape by the method of DNA prints), Nasilje i krivična odgovornost (Violence and criminal responsibility), Srpsko udruženje za krivično pravo (Serbian Association for Criminal Law), Kopaonik.

possibility of error, or the possibility that the use of this method leads to charging innocent persons of crime, which is otherwise less known (Selman-Ayetey, 2007: 195). Usually, DNA investigation is used in criminal matters to create, store and compare different DNA profiles and so it is called DNA profiling. By comparing DNA profiles from biological material found at the scene of crime with DNA profiles in the database, it is possible to find a link with the suspect or with the biological material that originates from another criminal offense. DNA profiles serve only for identification purposes and do not contain any information about the person from whom the DNA originates (Koops, Prinsen&Schellekens, 2006-2007: 206).

England is a country where the DNA profiling method finds its full application from the moment of its invention, and especially since 1995, when a National DNA Database (NDNAD) was set up. NDNAD contains the genetic profiles of a large number of persons classified into different categories. Considering the subject of this paper, we will not go further into the problem of the biological basis of identification as well as the method of DNA forensic evaluation from biological material,[299] but we will turn to the goal of this paper, which is to briefly introduce the legal regulation for using this method in England, and point out to some controversial issues that accompany the setting up of national DNA databases.

ON THE DEVELOPMENT OF DNA PROFILING METHOD IN ENGLISH

The beginning of the development of the DNA profiling method, or the identification of a person based on DNA profiling in England, relates to the discovery of new technology by Professor Alec Jeffreys and his colleagues at the University of Leicester, England. During the mid-eighties of the last century, they discovered that there were individual differences which were based on repeated sequences in different parts of the DNA chain, i.e. that certain parts of the DNA chain had a high level of variability which is uniquefor each individual.[300] Namely, it was concluded that samples taken from various

[299] Details: Simonović, B. (2002). *op. cit.*, p. 409-420; Friedman, A.L. (1999), Forensic DNA Profiling in the 21st Century, *International Journal of Offender Therapy and Comparative Criminology*, *43*(2), p. 168-177; Wall, W. (2002), *Genetics and DNA Technology: Legal aspects*, Cavendish Publishing Limited, London, p. 53-79.

[300] This is the oldest DNA forensic evaluation method called the RFLP (restriction fragment length polymorphism) method and the DNA analysis using this method can be done on a single locus (SLP) or multiple locus (multi-locus probe - MLP). It is now largely abandoned due to certain significant weaknesses, and besides this one, there is also the PCR (Polymerase Chain Reaction) method presented by Kary Mullis in 1985 at the American Society for Human Genetics, and in 1993 she was awarded the Nobel Prize for it. Also,

biological sources (blood, sperm, hair, skin, urine, etc.) contain in themselves a high enough DNA quality and this makes possible for profiling to be done in this way.

This new DNA method has many advantages when compared to the earlier identification method based on blood group analysis and these benefits can be seen in the following: DNA is much more persistent and less susceptible to being disturbed and destroyed by the long period of time or heat influence than protein markers; DNA can be found in all cells, and thus the scope of the biological material that can be analysed is significantly higher than in the analysis of blood groups; very small samples are needed and the most important fact is that individual diversity which is determined by DNA analysis is much greater than the one obtained by comparing protein polymorphisms (Williams, Johnson & Martin, 2004: 16).

The first investigative case of DNA profiling method by the English police was in Northamptonshire in 1986 during an investigation of the rape and murder of fifteen-year-old Dawn Ashworth. On this occasion, after analysing the semen recovered from the Ashworth's body it was found that the blood group of the perpetrator completely matched the blood group obtained by analysing the semen from the body of Lynda Mann, who had also been raped and killed in 1983. At the time of Mann's death, the recovered semen sample in the Mann's body showed it to have features common to one in ten men in the population (blood group A secretor with a strong phosphoglucomutase (PGM)1+ enzyme). This excluded the first chief suspect, Mann's stepfather. This case is known as the *Pitchfork case*[301] in which, on the basis of a DNA evidence and examination later conducted by Professor Alec Jeffreys, the suspect Colin Pitchfork, was convicted and sentenced to life imprisonment in 1988.

This case was of crucial importance for the introduction and application of DNA profiling method in England. However, there were a number of unanswered and controversial questions regarding its application, in terms of value of DNA evidence in relation to other evidence types, the collection issues raised by the extraction of samples from scene of crime and from individuals, as well as the problems associated with mass

DNA analysis uses the STRs (Short Tandem Repeats) method, the SNP (single nucleotide polymorphism) method, and the method of mitochondrial DNA mtDNA (mtDNA) synthesis. Details of all methods used in DNA analysis: Wall, W. (2002), *Genetics and DNA Technology: Legal aspects*, Cavendish Publishing Limited, London, p. 53-79.

[301] More about this case see: Bošković, A. (2011). Pravna regulativa korišćenja baza DNK profila u Ujedinjenom Kraljevstvu (Legal regulations for the use of DNA profiles in the United Kingdom), Primena forenzičkih metoda u kriminalistici (Application of forensic methods in criminalistics), Belgrade: Academy of Criminalistic and Police Studies, p. 115-126.

DNA testing (intelligence –led screening). Anyway, the main problem was how to link the genetic profile that was found at crime scenes to the individual suspects' profiles. Key answer to this problem was the national DNA database - NDNAD (Williams, Johnson & Martin, 2004: 18).

National DNA Database of England and Wales (NDNAD)[302] was set up on April 10, 1995. It should be noted that the NDNAD was not set up by a special legal act but it was established gradually, i.e. by amending the existing legislation, and above all, the Police and Criminal Evidence Act (PACE) in 1984.[303] However, the specific legal basis for setting up NDNAD was the binding instruction of the Home Office Circular (HOC) 16/1995 with later amendments HOC 47/1996, HOC 27/1997 and HOC 58/2004), and this regulated the management of all this project, then it also regulated the basic conditions that needed to be met during collecting and storage of samples, the question of access to the DNA database and the problem of data security (Semikhodskii, 2007: 79).

Since the first case of the application of the DNA profiling method was in 1986 (Pitchfork case), and since the Police and Criminal Evidence Act (PACE) was adopted two years before, the problem of proper regulation of this matter was easily seen. Namely, the PACE served only as a basis for resolving the question of which physical samples and under what conditions such samples can be taken from individuals, because the text of this law did not at all discuss the identification of a person based on the determination of DNA profiles. What is important to mention is that in this period, when it comes to the preservation of the taken samples, the PACE said that they should be destroyed if the charges were dropped against the suspect or if it was decided to stop the criminal prosecution for the criminal offense for which the physical samples had been taken. Also, a person had the right to request to attend the destruction of his sample (Bošković, 2011). The keeping of samples taken from bodies was permanent

[302] United Kingdom (United Kingdom) are England, Wales, Scotland and Northern Ireland. However, NDNAD directly stores DNA profiles only from England and Wales while Scotland has its own Scottish DNA Database, which was created in 1997, where DNA profiles created in Scotland are stored, and then these DNA profiles are sent daily to NDNAD. Also, Northern Ireland has its own Northern Ireland DNA Database, which was established in 1996. In the beginning, there was no data exchange with NDNAD, but since 2005, all new DNA profiles from Northern Ireland DNA Database have been regularly sent to NDNAD.

[303] It is interesting to note that England's criminal proceedings have been developed without the adoption of appropriate laws, i.e. was not based on legal grounds, but on precedent law, that is, on legal rules and legal principles, which was characteristic of English tradition and conservatism, which was present until 1984 when the Law on Police and Evidence in Criminal Procedure (Police and Criminal Evidence Act, abbreviated as PACE).

only for sentenced persons and if a sample was taken regarding the criminal offense for which a person was convicted.

In the next period, it is important to note that in 1994, the Criminal Justice and Public Order Act (CJPOA), was adopted, and that was an important step towards setting up national DNA database. Regarding the storing of body samples, the rule remained that only physical samples of convicted persons are permanently stored. However, it was no longer explicitly stipulated that taken samples had to be destroyed if the person had been arrested but not charged or convicted or if it was decided to stop the criminal prosecution for the criminal offense for which the physical samples had been taken, but it was said that they do not have to be destroyed, but that such samples are not allowed to be used for the purpose of investigating procedure (Boskovic, 2011). Such an imprecise legal solution led to certain abuses. Namely, after this there was a period when there was an increased number of cases where the suspects were identified on the basis of samples retained by the police in the system, although such samples had to be destroyed. While the CJPOA called for the expungement of profiles of individuals who were not ultimately convicted, periodic problems with database administration ultimately led to a number of cases in which suspects were identified by samples which were retained in the system but should have been removed. This led to a number of court cases[304] and a decision from the House of Lords addressing the legality of such identifications. Ultimately, the issue became one of discretion for the court. (Asplen, Esquire Smith Alling Lane, 2005: 5).

As a consequence of such events, in 2001, the Criminal Justice and Police Act (CJPA) was adopted, which made relevant amendments to the original PACE and in that way it introduced important novelties into this field. First of all, it granted the police to permanently retain and store data in NDNAD of the suspects who had not even been convicted or cautioned[305] in the criminal procedure. Also, biological samples and DNA

[304] One of the most famous cases of this sort is the *R v B* case where a 66-year-old woman was attacked and raped in her London apartment on January 23, 1997. On the basis of a seminal fluid sample, the authorized and accredited laboratory FSS (Forensic Science Service) on March 20, 1997, created the DNA profile of the attacker, but that DNA profile was stored in the database on 15 April of the same year. B was deprived of his liberty on 4 January 1998 on the grounds of reasonable doubt that he committed the criminal offense of serious theft, on the basis of which he was also indicted. DNA samples were taken from him on 6 January 1998, but his DNA profile was put into the national database not before September 23 of the same year, a month after the acquittal was issued on the occasion in this case. Since this decision on acquittal had been made, according to CJPOA provisions, his DNA profile was not allowed to be stored in the database. However, this was done by comparing it with other DNA profiles in the database, matching the DNA profile obtained 20 months earlier from a seminal fluid sample when the rape was performed. More on this: (Williams, Johnson & Martin, 2004: 36-37).

[305] Caution is the official warning of a policeman to a person who had admitted committing a criminal offense. This warning is most often given to a minor offender as well as to a perpetrator who for the first time

profiles of persons who have given samples voluntarily are kept permanently, with the donor's written consent even if the person is not convicted in connection with a recordable offense. Once the consent was given it can no longer be withdrawn (Simonović, 2002b: 567-568).

Thus, the CJPA provided for the permanent storage of the biological sample and DNA profile of each person who becomes a suspect during the investigation, or who is charged with any of the offenses that are from to the Recordable Offenses group[306], regardless of whether they were subsequently acquitted or the charges were dropped against this person. In this way, such a person becomes a subject of constant genetic surveillance through constant search and comparison of his DNA profiles with unknown profiles from crime scenes, as well as profiles of known persons in the NDNAD (Williams & Johnson, 2005: 549).[307]

The Criminal Justice Act (2003 CJA) in 2003, again amended the original PACE from 1984, by extending the existing police powers in relation to the collecting and storage of taken biological samples and created DNA profiles in a way that caused many discussions in scientific and professional circles. Namely, it is stipulated that a non-intimate sample could be taken without the consent from any person deprived of his/her liberty in connection with a criminal offense which is one of the Recordable Offenses (Boskovic, 2011). In fact, this means that an individual will take a non-intimate body sample for DNA analysis and create his DNA profile which will be permanently stored in the NDNAD regardless of whether he will be subsequently charged or not with the offense.

In this way, the national DNA database rapidly expanded, and the main question that arises, even today, is whether it is justified from the aspect of protecting the privacy of a person to store and permanently keep the profiles of innocent persons in the database, as they are definitely the persons who were deprived of their liberty, and later they were not even charged with a crime.[308]

committed the crime. The police gives a similar warning to the perpetrator even when they give up from criminal prosecution warning him/her that in the event of a new criminal offense all previously committed offences will be taken take into account.

[306] *Recordable Offenses* are criminal offenses for which the perpetrator may be sentenced to imprisonment as well as for those criminal offenses listed in the law.

[307] Before the implementation of this law, in the period 1999/2000. 228 228 The DNA profiles had been put in the NDNAD, while in the period 2001/2002 the number was more than double, 586 026.

[308] In the United Kingdom, 43% of persons deprived of their liberty are subsequently not indicted. During 2004 and 2005, there were 250 "hits" of samples of persons who were deprived of their liberty, but later they

Bearing in mind what has been said, and if we analyse the practice of the European Court of Human Rights, the judgment in *S. and Marper v. United Kingdom* of December 4, 2008[309] is of utmost importance. In this case, the prosecutors were S (as a minor) and Michael Marper, two British citizens who were arrested in 2001 and subsequently charged with committing a criminal offense. On that occasion, they were taken their fingerprints and biological material on the basis of which the DNA profile was created and stored in the database. However, the criminal proceedings against them were terminated by an acquittal, on the basis of which the two citizens required the fingerprints and DNA profiles to be removed from the national database and samples used to create the DNA profile to be destroyed. Their requests were rejected in all instances, so they came to the European Court of Human Rights, which in this case concluded that the right under Article 8, i.e. right to respect for private and family life was not respected. The Court considered that the comprehensive and non-selective nature of the authority to keep fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of crimes, as had been done in the case of these applicants, does not establish a fair balance between conflicting public and private interests, and that the country in this case exceeded the acceptable level of free assessment in this regard. Accordingly, the mentioned retention constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion clearly shows the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data (paragraph 125 of the judgment).

Following such a judgment, in England passed the Protection of Freedoms Act in 2012, which introduced significant changes in this field, and whose provisions began to be applied from 31 October 2013. The provisions of this law make the difference between persons arrested for and charged with a qualified offenses (qualifying offenses - certain offenses against sexual freedom, violent acts and crimes of terrorism) and those arrested for but not charged with. Both cases take into account their past convictions, and if they have criminal record, data retention is unlimited. In the first case, if the defendant has not been convicted, the data can be kept for a maximum of three years, and in the

were not charged with samples from the crime scene, including 4 murders, 3 rapes and 98 serious thefts (Carling, 2008: 496) .

[309] Available on 10/10/2017 at : https://hudoc.echr.coe.int/eng#{"tabview":["document"],"itemid":["001-117619"]}

second, where he/she is not even charged with, also for a maximum of three years, but with the approval of the Independent Commissioner for the Retention and Use of a Biometric Material. For other offenses, samples must be destroyed immediately if the procedure does not end with a conviction. Also, this legal text is regulated in detail in which situations and for which criminal acts the samples can be permanently retained, and it is especially interesting that there is a provision that prescribes the retention of samples for up to two years due to national security, in those cases where the samples should be destroyed (Turanjanin, 2015, 616).

SOME ETHICAL QUESTIONS FOR FORMING THE DNA DATABASE

The judicial system has greatly benefited from setting up DNA databases. Many older cases have been solved and perpetrators of the crimes were discovered, the innocent convicts were acquitted while simultaneously identifying the right perpetrators. The special convenience of these databases is reflected in the discovery of crimes committed by returnees. Studies show that as many as 60% of those who were in prison for violent behaviour and then released are re-arrested for crimes with elements of violence in a period of less than three years (Butler, 2012, 213).

The development of DNA analysis technology has given enormous significance to the prosecution of perpetrators of criminal offenses, but at the same time it has caused very serious disagreements regarding privacy and the possibility of abuse.

Professional and general public raise many ethical and legal issues concerning the management of these databases. The question is, whose DNA profiles should be kept in theses databases, how to protect the privacy of the profile owner, who has the access to this information, what should be done with the remaining samples after a DNA analysis. The speed of search and correct pairing between very numerous data is also controversial. The probability of error in a hypothetical database of hundreds of millions of people, and with the fact that the method of DNA profiling is discriminated around 1 in a billion, is about 1% (Mašković, 2011).

DNA profiles are made based on genetic samples stored in data banks. These samples contain the genetic information of individuals such as potential physical and mental health problems, which could ultimately be used against them (Kobilinsky, Liotti, Oeser-Sweat, 2005, 282).

If there is a partial overlap or partial matches of a person's DNA profile in prison with samples taken from a scene of crime, there is a possibility that the perpetrator is in blood ('familial') relation with the convict. In such cases it would be necessary to take a DNA sample from the relatives of the convict. However there is aquestion whether the state would have the right to take samples of DNA from the family members of the convict immediately after the conviction, and in this way make future investigations easier. Is this justification for endangering the privacy of these persons (Mašković, 2011).

There is a justified fear in the public of the retention of the genetic sample after the analysis. There is anxiety about the possibility of misusing them for various purposes. However, for this procedure there are very important reasons. One of them is a confirmation of the DNA profile of the perpetrator by re-testing the samples to eliminate the suspicion of possible errors. For this procedure it is necessary to have an original sample (Butler, 2012, 213).

In order to protect privacy and reduce possibility of discrimination, persons who are acquitted during the prosecution process often want their DNA profile to be removed from the records and their DNA sample to be destroyed. For example, in America, this procedure is rather complicated, since after the acquittal the profile will not be automatically removed. It is necessary for the person to make a request to the judicial agency and to submit the appropriate documentation for removal of the sample from the database. In America, the widespread informal databases are also a major problem. These databases are not part of the FBI network and it is not possible to apply laws that regulate the origin and quality of DNA profiles. The samples that are put into these bases were collected in an extremely suspicious way. For example, from a used bottle of water, or a cigarette butt, from a glass used during a dinner or fork served during a job interview (Murphy, 2015, 168).

Although this evidence is collected secretly, most courts in the United States accept them. When a DNA sample is taken from the accused and put into the FBI database, the defendant's privacy is protected by a number of procedures. However, protection of rights disappears in cases of secret sampling and inclusion in informal bases by the police. This procedure is very common even in less serious cases. In the bases are also put samples which turned out to be irrelevant for the case. Informal databases can be searched without any restrictions. Due to this practice, the citizens become increasingly

suspicious about DNA sampling, even for medical purposes, which can lead to the avoidance of the use of medical care and a decrease in their quality of life.

In addition to the police, which is interested in collecting DNA samples, there is still a whole list of those who could benefit from information obtained from the genetic material of certain individuals. These can be suspicious parents, owners of sports teams, owners of companies who want to learn the health status of their employees, etc. (Murphy, 2015, 173).

The use of new technologies also provides better quality information, so that by re-testing DNA samples from old cases, some new findings can be obtained when comparing results between the defendant and forensic samples.
In favour of personality protection, there are a couple of more facts. For example, information from a database can only be used for identifying individuals; or that DNA markers are in a non-coding part of the human genome and we do not know whether they can have any connection with genetic diseases or with any another genetic predisposition.

In order to respond properly to the task of maintaining databases, administrators of these should continually improve new technologies and constantly progress in this area. Also, for better protection of citizens and more precise results with as few wrong matches as possible, constant work on the education and development of employees in forensic laboratories is required, as well as continuous training for those who work out of office and collect samples from scenes of crime.

The number of citizens who have their DNA profile in one of the databases is being increased; even the number of those citizens who do not have criminal past. The number of bases is also being increased, which is why it is necessary for all DNA data to be encrypted and protected from abuse and unauthorized access (Butler, 2012, 244). Another reason for improving the process of working with samples and process automation is that laboratories lag behind in sample analysis. An example of this is the FBI Laboratory where in 2010 there were as many as 3,000 backlog cases. It is clear that this situation slows down the investigation which negatively affects the life of the participants in the process.

Incorporating other techniques to identify offenders is in some situations of great importance. Since the most common perpetrators of criminal acts are returnees, their

genetic pattern can be classified in a DNA database several times. When taking their pattern, different alias are used each time, which further complicates the situation. That's why duplicates occur and they are deleted upon the confirmation that DNA profiles belong to the same person. For complete safety, biometry is included, i.e. fingerprints that should erase any doubt that it is a case of identical twins. Identical twins do not have the same fingerprints. The correlation between these two methods has a significant impact on saving resources and time.

CONCLUSION

The importance of the DNA database is multiple, and during the setting up these databases it is necessary to be very careful, thorough and precise, because any imprecision in the provisions can potentially lead to the possibility of different interpretations and, consequently, to potential misuses. On the one hand, in order to prevent the abuse regulations regulating the DNA register must enable the protection of the privacy of a person, buton the other hand they alsomust accelerate and influence the effectiveness of criminal proceedings because DNA is a proof of great importance both for the commencement of the criminal prosecution, and also for possible conviction in the future. In any case, given the presented experience of England and the dilemmas arising from the ethical side of the point of view, it can be concluded that it is necessary to adopt adequate rules to clearly and precisely regulate the following issues, taking into account the relevant case law of the ECHR and the European Court of Justice. These regulations would, among other things, regulate the following most important issues:

- creating, content, use and maintenance of a national DNA database in order to collect data on all material traces that contain DNA which are analysed in various court procedures;
- Method of collecting, and storage of samples of biological material for the purposes of DNA analysis;
- protection of the privacy of the owner of the DNA profile, or who are the authorized entities and what are the conditions needed for accessing this information;
- the question of how long will the sample and DNA profiles be stored, i.e. how long can the taken samples be kept, and how long can the DNA profiles be kept. Currently, this issue is not regulated in Serbia, so that samples and DNA profiles can be kept for an unlimited period of time, even after the

termination of the legal consequences of conviction, which is contrary to the practice of the European Court of Human Rights;

- to critically consider the solution regarding criminal offenses for which it is allowed to take samples for DNA analysis and to make precise and clear classification in which cases it is possible to store samples and DNA profilesand for what period of time;
- in addition to the classification in terms of criminal offenses, it is necessary to specify the rules depending on the outcome of the criminal procedure and the status of the defendant, i.e. clearly delineate the categories of the arrested, accused and convicted persons. In other words, the same criteria should not be allowed for storing samples and DNA profiles for unlimited period of time of the arrested, accused or convicted persons.

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DNK BAZE PODATAKA I PRAVO NA PRIVATNOST

Apstrakt: *Metoda DNK profilisanja se u svetu primenjuje već više od trideset godina, s tim što treba istaći da na našim prostorima još uvek nema toliki značaj kao što je to u svetskim okvirima. Razlozi za to su mnogobrojni kao npr. neadekvatna zakonska regulativa, nepostojanje utvrđenih standarda koje bi laboratorije koje vrše DNK analize morale da ispune, zatim formiranje i sadržina DNK baza podataka, itd. Cilj ovog rada jeste da predstavi model po kojem je metoda DNK profilisanja odgovarajućim propisima ustanovljena u Engleskoj koji bi u dobrom delu mogao da posluži kao osnova za adekvatno uređenje ove materije i u srpskom zakonodavstvu. U radu će biti izvršen kratak osvrt na istorijski razvoj ove metode u Engleskoj, a biće predstavljeni i neki slučajevi u kojima je primena metode DNK profilisanja dovela do otkrivanja učinilaca pojedinih krivičnih dela. Posebna pažnja će biti posvećena zakonskom uređenju DNK baze podataka u Engleskoj (NDNAD) koja je ustanovljena još 1995. godine, odnosno pitanjima od kojih lica i pod kojim uslovima može biti uzet uzorak za DNK analizu, koji su ti uzorci, kao i to da li se tako pribavljen uzorak može čuvati i koliko dugo. Biće prezentirana i odgovarajuća sudska praksa Evropskog suda za ljudska prava kojom su derogirani pojedini propisi u Engleskoj upravo zbog narušavanja prava na privatnost. Na ovaj način, u neposrednu vezu će se dovesti struktura i organizacija DNK baze podataka, s jedne strane i pravo na privatnost, s druge strane, imajući u vidu da se DNK profil jedne osobe izrađuje na osnovu genetskih uzoraka koji sadrže veoma osetljive genetičke informacije pojedinaca.*

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SCHUTZ DER PRIVATSPHÄRE IM SCHWEIZERISCHEN RECHT – ÜBERBLICK UND NEUERE RECHTSPRECHUNG

Abstract: *Das schweizerische Recht schützt mit Art. 28 des Zivilgesetzbuches die Persönlichkeit anhand eines allgemeinen Tatbestandes und im Sinne einer Generalklausel, welche einen umfassenden Schutz persönlicher Güter und Interessen gewährt. Seit langem ist anerkannt, dass die Privat- und Geheimsphäre zu den geschützten Persönlichkeitsgütern gehört. Der vorliegende Beitrag soll einen kurzen Überblick über die Rechtsgrundlagen geben, welche dem Schutz der Privatsphäre dienen, und auf die Bedeutung des von der Europäischen Konvention für Menschenrechte und der Schweizerischen Bundesverfassung gewährten Grundrechtsschutzes hinweisen. Anhand einiger neueren Entscheidungen des Schweizerischen Bundesgerichts wird die Konkretisierung in der Rechtsprechung im Bereich des Privatrechts veranschaulicht. Die Praxis hat sich unter anderem mit der Überwachung und Beobachtung von Tatsachen und Vorgängen im öffentlichen Raum sowie mit der Frage befasst, inwieweit ein überwiegendes öffentliche Interessen eine Persönlichkeitsverletzung rechtfertigt. Weitere Grundsatzurteile behandeln die Ansprüche der juristischen Person sowie Aspekte in internationalen Verhältnissen.*

Keywords: *Schutz der Persönlichkeit, Privat- und Geheimsphäre, Privatrecht, Schweiz.*

1. Einleitung

"Die Persönlichkeit des Menschen bedarf als fundamentales Rechtsgut des Schutzes der Rechtsordnung." Mit dieser Formulierung in einer Entscheidung des Schweizerischen Bundesgerichts (BGE)[310] aus dem Jahre 2012 kommt zum Ausdruck, was in der Rechtsordnung der Schweiz als umfassende staatliche Aufgabe gilt und in allen Rechtsbereichen aktuell ist (BGE 138 III 322 E. 4.3.1). Das Persönlichkeitsrecht erfasst

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[310] BGE abrufbar unter <www.bger.ch>.

den Anspruch auf ungestörte Entfaltung der Persönlichkeit (BGE 113 Ia 254 E. 4b). Dazu gehört auch der Anspruch auf Privatsphäre. Der vorliegende Beitrag soll einen kurzen Überblick über die Rechtsgrundlagen geben, welche dem Schutz der Privatsphäre dienen, und anhand einiger neueren Entscheidungen des Bundesgerichts die Konkretisierung in der Rechtsprechung veranschaulichen. Im Blickpunkt steht der privatrechtliche Bereich.

2 Rechtsgrundlagen zum Schutz der Privatsphäre

2.1. Menschenrechte und Verfassungsgarantien

Für die Schweiz ist seit 1974 die Europäischen Menschenrechtskonvention (EMRK; SR 0.101)[311] unmittelbar anwendbar und daher Art. 8 EMRK massgebend. Nach dieser Bestimmung hat jede Person das Recht auf Achtung des Privat- und Familienlebens, ihrer Wohnung und ihrer Korrespondenzen. Damit wird die Privatsphäre in umfassender Weise geschützt. Die schweizerische Bundesverfassung (BV; SR 101) gewährt in Art. 13 BV in analoger Weise den Schutz der Privatsphäre und den Anspruch auf Achtung des Privat- und Familienlebens; der Datenschutz wird ausdrücklich garantiert (Häfelin/Haller/Keller/Thurnherr, 2016, S. 116, Rz. 380). Nach der Rechtsprechung enthält Art. 8 EMRK in erster Linie Abwehransprüche gegen staatliche Eingriffe in das Recht auf Privatleben, für dessen wirksamen Schutz aber auch die Ergreifung positiver Massnahmen selbst geboten sein kann. Die Schweiz ist – nach einem Grundsatzurteil aus dem Jahre 2010 – den ihr obliegenden positiven Verpflichtungen nachgekommen, weil gegen die Beeinträchtigung des Privatlebens einer Person Rechtsbehelfe in zivil- und strafrechtlicher Natur zur Verfügung stehen (BGE 136 III 410 E. 6).

2.2. Privatrecht

Im Privatrecht hat sich der Schutz der Persönlichkeit aus Art. 28 des Schweizerischen Zivilgesetzbuches von 1907/1912 (ZGB; SR 210) entwickelt, mit welchem anhand eines allgemeinen Tatbestandes und im Sinne einer Generalklausel ein umfassender Schutz persönlicher Güter und Interessen geschaffen wurde (Pedrazzini/Oberholzer, 2002, S. 113, Ziff. 6.2.2). Art. 28 Abs. 1 ZGB sieht vor, dass derjenige, der in seiner Persönlickeit widerrechtlich verletzt wird, zu seinem Schutz gegen jeden, der an der Verletzung mitwirkt, das Gericht anrufen kann. Jede Verletzung der Persönlichkeit wird

[311] Staatsverträge und Bundesgesetze abrufbar unter <www.admin.ch>.

als widerrechtlich bewertet, es sei denn, der Verletzer könne einen Rechtfertigungsgrund – Einwilligung des Verletzten, überwiegende private oder öffentliche Interessen oder Gesetz – nachweisen (Art. 28 Abs. 2 ZGB; BGE 134 III 193 E. 4.4; Pedrazzini/ Oberholzer, 2002, S. 129, Ziff. 6.4.1; Tuor/Schnyder/Schmid, 2015, S. 97, § 11 Rz. 22). Es bedeutet, dass das Opfer die Beweislast für die Persönlichkeitsverletzung trägt, währenddem der Verletzer den Rechtfertigungsgrund zu beweisen hat (Jeandin, 2010, S. 261, Art. 28 N. 72).

Das Schutzobjekt des Art. 28 ZGB ist praktisch gleich definiert wie im öffentlichrechtlichen Persönlichkeitsschutz (BGE 113 Ia 257 E. 4b; Pedrazzini/Oberholzer, 2002, S. 131, Ziff. 6.4.2.1); Art. 28 ff. ZGB stellen die zivilrechtliche Konkretisierung des von der EMRK und BV gewährten Grundrechtsschutzes dar (BGE 136 III 410 E. 6). Auch ohne ausdrückliche Erwähnung ist seit langem anerkannt, dass die Privat- und Geheimsphäre zu den geschützten Persönlichkeitsgütern gehört (Tuor/Schnyder/Schmid, 2015, S. 97, § 11 Rz. 20). Rechtsprechung und Lehre ordnen dabei Tatschen und Lebensvorgänge bestimmten Sphären zu (BGE 97 II 97 E. 3; Pedrazzini/Oberholzer, 2002, S. 138, Ziff. 6.4.2.3.2; Jeandin, 2010, S. S. 254, Art. 28 N. 39 ff.; Meili, 2014, S. 284, Art. 28 N. 23). Zur Geheimspähre („la vie intime“) gehören Tatsachen und Lebensvorgänge, die der Kenntnis aller anderen Leute grundsätzlich entzogen sein sollen, wie Angaben über die Gesundheit, des Intimlebens, die finanziellen Verhältnisse. Zur Privatsphäre („la vie privée“) gehört der übrige Bereich des Privatlebens, d.h. jene Lebensvorgänge, die der Einzelne mit einem begrenzten Personenkreis (Familienangehörige, Freunde, Bekannte) teilen will, wie das Recht am eigenen Bild oder die Zugehörigkeit zu einem privaten Verein). Was als hingegen als Tatsache von jedem ohne weiteres wahrgenommen werden kann, ist der Gemeinsphäre (Öffentlichkeitsbereich, „la vie publique“) zuzuordnen, was im Grundsatz nicht unter dem Schutz von Art. 28 ZGB steht, wie die Adresse oder die Berufstätigkeit einer Person (Hürlimann-Kaup/Schmid, 2016, S. 251 ff., Rz. 881 ff.). Ob eine Tatsache oder ein Lebensvorgang im konkreten Fall Schutz geniesst, hängt jedoch immer von den konkreten Umständen ab, die für den Umfang der jeweiligen Sphäre massgebend ist (Pedrazzini/Oberholzer, 2002, S. 139, Ziff. 6.4.2.3.2; Jeandin, 2010, S. 255, Art. 28 N. 43).

Juristische Personen sind ebenfalls Subjekte des Persönlichkeitsschutzes nach Art. 28 ZGB, sofern es sich nicht um Eigenschaften handelt, die ihrer Natur nach nur der natürlichen Person zukommen kann (Art. 53 ZGB). Das gilt für die juristischen Personen des privaten und des öffentlichen Rechts und für inländische oder

ausländische juristische Personen (Jeandin, 2010, S. 249, Art. 28 N. 20). Sie können sich auch auf den Schutz der Privat- und Geheimsphäre berufen (BGE 97 II 97 E. 2; Meili, 2014, S. 287, Art. 28 N. 33). Der Schutz wird gewährt vor der Offenbarung interner Vorgänge aus ihrem Lebensbereich, sowie von Tatsachen, deren Geheimhaltung für die Erfüllung ihrer Funktionen lebenswichtig sind (Pedrazzini/Oberholzer, 2002, S. 151, Ziff. 6.4.4.1).

Wer in seiner Persönlichkeit widerrechtlich verletzt wird, hat verschuldensunabhängige Unterlassungs-, Beseitigungs- und Feststellungsansprüche. Sodann sind verschuldensabhängige reparatorische Ansprüche auf Schadenersatz und Genugtuung sowie auf Gewinnherausgabe möglich (Art. 28a ZGB; Pedrazzini/Oberholzer, 2002, S. 154, Ziff. 6.4.4.4). Weitere Schutzmittel zugunsten des Verletzten sind Ansprüche auf Berichtigung und Urteilsveröffentlichung (Art. 28g ff. ZGB).

2.3. Datenschutzrecht

Die Anliegen des Datenschutzes werden schliesslich im Bundesgesetz über den Datenschutz vom 19. Juni 1992 (DSG; SR 235.1) eingehend geregelt. Der umfassende Schutz des Umgangs mit personenbezogenen Daten ergibt sich aus Art. 8 EMRK und Art. 13 BV (Häfelin/Haller/Keller/ Thurnherr, 2016, S. 119, Rz. 389). Das DSG baut auf dem allgemeinen Tatbestand des privatrechtlichen Persönlichkeitsschutzes auf (Pedrazzini/Oberholzer, 2002, S. 117, Ziff. 6.2.3.3). Das Datenschutzrecht ergänzt und konkretisiert den bereits durch das ZGB gewährleisteten Schutz der Persönlichkeit (BGE 138 II 346 E. 8). Die Art. 12 und Art. 13 DSG ("Persönlichkeitsverletzungen" und "Rechtfertigungsgründe") übernehmen praktisch wörtlich die Regelungen des Art. 28 ZGB.

3. Öffentlichkeitsbereich („la vie publique“) und Persönlichkeitsschutz

3.1. Observation durch Versicherung

Das Urteil Nr. 61838/10 des Europäischen Gerichtshofes für Menschenrechte (EGMR) i.S. Vukota-Bojic gegen Schweiz vom 18. Oktober 2016 hat grosse Wellen geschlagen. In dem sozialversicherungsrechtlichen Fall hält der EGMR gestützt auf seine konstante Rechtsprechung fest, dass die Überwachung durch Foto- und Videoaufnahmen einen Eingriff in das Recht auf Achtung des Privatlebens darstellt. Der Gerichtshof erinnert daran, dass jeder Eingriff in Art. 8 EMRK einer hinreichend präzisen rechtlichen

Grundlage bedarf, und kommt zum Ergebnis, dass die Schweiz die EMRK verletzt hat, weil im schweizerischen Recht eine hinreichend präzise rechtliche Grundlage für die Foto- und Videoüberwachung von Versicherten fehlt. Es wird grundsätzlich klargestellt, dass es einer gesetzlichen Grundlage bedarf, um eine Person – im besagten Fall war es ein Unfallopfer – in der Öffentlichkeit observieren zu lassen. Das Bundesgericht hat in der Folge im Grundsatzurteil 9C_806/2016 vom 14. Juli 2017 (E. 4) unmissverständlich bestätigt, dass es auch in der (öffentlichrechtlichen) Invalidenversicherung – gleich wie im (öffentlichen) Unfallversicherungsrecht, das dem Urteil Vukota-Bojic zugrunde lag – an einer genügenden gesetzlichen Grundlage fehlt, welche die verdeckte Überwachung klar und detailliert regelt. Derartige Observationen im öffentlichen Raum sind nach der aktuellen schweizerischen Rechtslage rechtswidrig. Davon unterscheidet das Bundesgericht (in E. 5 des Urteils) die Frage, ob ein widerrechtlich erlangtes Observationsergebnis beweismässig verwertbar ist. Es kommt zum Schluss, dass ein Beweismittel, das auf öffentlich einsehbarem Grund erlangt worden ist, nach Abwägung der involvierten öffentlichen (Verhinderung von Versicherungsmissbrauch) und privaten Interessen (Intensität der Observation) verwertet werden kann. Kritische Stimmen indes geben zu bedenken, dass die Interessenabwägung eine fehlende gesetzliche Grundlage nicht zu ersetzen vermag (Gächter/Meier, 2017, S. 9, Rz. 27 ff.).

Art. 28 ff. ZGB stellt nach bisheriger Auffassung die gesetzliche Grundlage dar, auf welcher der durch die EMRK und BV gewährte Grundrechtsschutz auf der zivilrechtlichen Ebene – d.h. für den Schutz vor widerrechtlicher Observation durch eine Privatversicherung – genügend konkretisiert wird (BGE 136 III 410 E. 6.2, mit Hinweis auf die Urteile Verlière gegen Schweiz vom 28. Juni 2001 und Minelli gegen Schweiz vom 14. Juni 2005). Das jüngste Urteil Vukota-Bojic führt zu einer erheblichen Unsicherheit: Der EGMR hält (in Ziff. 72 ff. des Urteils) fest, dass die Bestimmung von Art. 28 ZGB allein als gesetzliche Grundlage nicht genüge, da sie keine versicherungsspezifischen Vorschriften betreffend Bewilligung oder Beaufsichtigung der Observation umfasst. Während gewisse Autoren eine hinreichende gesetzliche Grundlage nunmehr im Privatbereich verneinen, um die Observation im Sinne von Art. 28 ZGB zu rechtfertigen (Stolkin, 2017, S. 31, Rz. 48), scheint das Bundesgericht diese Bedenken im kürzlich ergangenen, unpublizierten Urteil 4A_110/2017 vom 27. Juli 2017 (E. 5.2) zu verwerfen. Es sei nicht erkennbar, inwiefern in der Observation durch eine private Versicherungsgesellschaft in einer privatrechtlichen Streitigkeit ein dem Staat zuzurechnender Eingriff in das Recht auf Achtung des Privat- und Familienlebens liegen soll, der nicht hinreichend nach Art. 8 Abs. 2 EMRK gesetzlich vorgesehen ist. Das Bundesgericht verneint insoweit eine eigentliche Drittwirkung und erachtet die

bisherige Rechtsprechung (BGE 136 III 410 E. 2) weiterhin als massgebend. Da Art. 28 ff. ZGB die zivilrechtliche Konkretisierung des von der EMRK und BV gewährten Grundrechtsschutzes darstellt (BGE 136 III 410 E. 6; Jeandin, 2010, S. 246, Art. 28 N. 7), ist anzunehmen, dass die Diskussion um die genügende gesetzliche Grundlage noch nicht abgeschlossen ist.

Im Sachverhalt des einschlägigen BGE 136 III 410 ging es um eine (private) Haftpflichtversicherung, die einen Privatdetektiv beauftragt hat, einen Versicherten zu beobachten, der Anspruch auf Leistungen stellte. Das Bundesgericht ordnet die beobachteten Tatsachen und Lebensvorgänge (Alltagsverrichtungen, wie Einkaufen, Autowaschen, etc.) der Gemeinsphäre zu, bestätigt aber, dass die gezielte Beobachtung – d.h. das Sammeln von alltäglichen Verrichtungen in der Öffentlichkeit – die von Art. 28 ZGB geschützte Privatsphäre des Betroffenen verletzen kann. Die Haftpflichtversicherung kann sich – mit Blick auf die Prämienhöhen und der Bekämpfung von Versicherungsmissbrauch – auf überwiegende Interessen berufen. Dass es ausschliesslich um wirtschaftliche Interessen geht, schliesst hier die Rechtfertigung einer Persönlichkeitsverletzung nicht aus (Aebi-Müller, 2011, S. 437). Allerdings setzt die Zulässigkeit voraus, dass die eingesetzten Mittel der Observation (Berichte, Fotografien, Film) geeignet und notwendig sind. Dazu gehört, dass – wie im konkreten Fall – die Behauptungen des Versicherten widersprüchlich und unglaubwürdig sind, und er seiner Obliegenheit zur Mitwirkung der leistungsbegründenden Umstände nicht nachkommt (Brunner, 2010, S. 353). Was gilt für die Ehefrau des Versicherten, die von der Observation in der Öffentlichkeit miterfasst wird? Das Bundesgericht verneint die Verletzung der Persönlichkeitsrechte der Ehefrau des Observierten. Grund dafür sei, dass die Ehefrau nicht um ihrer Person willen, sondern bloss "zufällig" (als "Mitfang") in die Observation geraten ist und und die "zufällig aufgezeichneten Einzelinformationen kein systematisches Sammeln" bedeuten. In der Lehre ist allerdings auf Kritik gestossen, dass es bei der Beurteilung, ob eine Persönlichkeitsverletzung vorliegt, auf die Absicht ankomme, und die Absichtslosigkeit die Persönlichkeitsverletzung ausschliesse. Die Frage, ob eine rechtlich relevante Verletzung vorliege, soll sich nach der konkreten Interessenlage der betroffenen – zufällig abgebildeten – Person richten (Aebi-Müller, 2011, S. 352). Das schliesst nicht aus, dass ein Rechtfertigungsgrund für die Persönlichkeitsverletzung besteht.

3.2. Aufnahmen von Internet-Diensten

Die von *Google Street View* aufgenommenen Strassenbilder haben Anlass zu BGE 138 III 346 gegeben, um die Gewährleistung des – vom Datenschutz konkretisierten und ergänzten – Persönlichkeitsschutzes bei der Publikation der Aufnahmen im Internet zu klären. Das Bundesgericht hält fest, dass grundsätzlich niemand ohne seine (vorgängige oder nachträgliche) Zustimmung abgebildet werden darf (Jeandin, 2010, S. 256, Art. 28 N. 48) und im Bereich des Bildnisschutzes oftmals gerade die Privat- oder Geheimsphäre betroffen ist. Das Recht auf Achtung der Privatsphäre soll verhindern, dass jede private Lebensäusserung, die in der Öffentlichkeit stattfindet, wie zum Beispiel ein Abschiedskuss auf der Strasse oder die Beerdigung eines Menschen, der Allgemeinheit bekannt wird. Personen könnten von *Google Street View* in einer unangenehmen Situationen aufgenommen und für ein grosses Publikum veröffentlicht werden, oder Personen und Fahrzeuge könnten auf Bildern im Bereich von sensiblen Einrichtungen erscheinen; das Gleiche muss für Gärten und umfriedete Höfe gelten, welche ebenfalls von der Privatsphäre erfasst werden. Am Betrieb von *Google Street View* bestehen eigene wirtschaftliche Interessen, aber auch Interessen Dritter, die einen Nutzen durch die erleichterte Informationsbeschaffung (über eine Liegenschaft oder zur Reiseplanung) ziehen. Eine Persönlichkeitsverletzung kann indes mit hinreichender Anonymisierung der Personendaten vermieden werden. Nach Auffassung des Bundesgerichts ist akzeptabel, dass höchstens ca. 1 % der Bilder ungenügend anonymisiert ins Internet gelangen und darauf erkennbare Personen und Fahrzeugkennzeichen erst auf Anzeige der Betroffenen hin nachträglich manuell unkenntlich gemacht werden. Allerdings wird *Google Street View* zur effizienten, unbürokratischen und kostenlosen nachträglichen Anonymisierung verpflichtet. Bei sensiblen Einrichtungen (Schulen, Spitälern, Altersheimen, Frauenhäusern, Gerichten und Gefängnissen etc.) ist vor der Aufschaltung im Internet sogar die vollständige Anonymisierung von Personen und Kennzeichen vorzunehmen, und Bilder von Privatbereichen wie umfriedeten Höfen, Gärten usw., die dem Einblick eines gewöhnlichen Passanten verschlossen bleiben, dürfen ohne Zustimmung der Betroffenen grundsätzlich nicht veröffentlicht werden (soweit sie von einer Kamerahöhe von über 2 m aufgenommen wurden).

Das Urteil ist allgemein für eine Persönlichkeitsverletzung durch Aufzeichung und Weiterverbreitung von Bildern, welche "zufällig" in der Öffentlichkeit aufgenommen werden, richtungsweisend (Aebi-Müller, 2013, S. 421). Die Vorstellung, dass es einen

Gemeinbereich gibt, der vom Persönlichkeitsschutz *a priori* nicht erfasst wird, ist damit stark relativiert worden.

Informationsbeschaffung in öffentlichen Räumen ist nicht nur – wie dargestellt – für private oder staatliche Versicherungen oder Internetdienste von Bedeutung, sondern auch für die Medien. Wenn die Verhinderung von Versicherungsmissbrauch oder das Bedürfnis nach Informationen zur räumlichen Orientierung als öffentliches Interesse gilt, um einen Eingriff in die Privatsphäre zu rechtfertigen, gilt das regelmässig auch für das – nachfolgend näher zu erörternde – öffentliche Interesse an Medieninformationen.

3.3. Personen des öffentlichen Lebens

Nicht nur Beobachtungen im Gemeinbereich, sondern die Berichterstattung allgemein über berühmte Sportler oder Künstler, wichtige Politiker oder Funktionäre, aber auch "normale" Personen, die aufgrund eines ausserordentliches Ereignisses (Unglück, besondere Leistung) bekannt werden ("absolute" bzw. "relative" Personen der Zeitgeschichte; BGE 127 III 481 E. 2c/aa), stehen unter Voraussetzungen, welche die Medien beachten müssen. Eine Person des öffentlichen Lebens („personnalité publique“) muss zwar einen geringeren Teil an Privatsphäre hinnehmen (Hürlimann-Kaup/Schmid, 2016, S. 252, Rz. 884 ff.). Allerdings sind nur diejenigen Tatsachen und Lebensvorgänge nicht erfasst, welche sich auf ihre Tätigkeit in der Öffentlichkeit beziehen, oder welche Ursache ihrer Berühmtheit sind. Auch für die Medien gilt der Grundsatz: Je „privater“ eine Situation ist, desto heikler werden die Beobachtungen und umso grösser muss das nachgewiesene Informationsinteresse sein (Aebi-Müller, 2010, S. 55). Der Zeitfaktor („das Recht auf Vergessen“) ist ebenfalls zu berücksichtigen (Jeandin, 2010, S. 255 f., Art. 28 N. 44, 46). Wichtige Impulse gibt weiter das (zur amtlichen Publikation bestimmte) Urteil 5A_256/2016 des Bundesgerichts vom 9. Juni 2017, in welchem die auf Personen ("People") aus prominenten Kreisen (z.B. "Club- und Partyszene") fokussierte Berichterstattung beurteilt worden ist. Im Ergebnis wird anerkannt, dass die Beeinträchtigung der Persönlichkeit durch eine mit Internet- und sozialen Medien verknüpfte und reproduzierte Informationstätigkeit leichter eine rechtserhebliche bzw. persönlichkeitsverletzende Intensität erreicht, gerade wenn ein Medienunternehmen sich auf eine Person bzw. das Ereignis stürzt.

Was die Rechtfertigung durch das überwiegende öffentliche Interesse betrifft (Art. 28 Abs. 2 ZGB), sind die Meinungs- und Informationsfreiheit als Grundrechte bedeutsam (BGE 120 II 225 E. 3b; Bacher, 2017, Rz. 11 ff.). Überwiegend im Sinne von Art. 28

Abs. 2 ZGB ist ein öffentliches Interesse, wenn der Eingriff, den der Verletzte erdulden muss, geringfügiger erscheint als der Vorteil, den eine Mehrheit anderer Personen oder die Allgemeinheit daraus zieht (zit. Urteil 5A_256/2016, E. 6.7.3). Die Beurteilung der Widerrechtlichkeit erfordert eine Interessenabwägung (im Einzelnen Bacher, 2017, Rz. 15 ff.). Unter Berücksichtigung der konkreten Umstände ist zu untersuchen, ob die fraglichen Medienäusserungen vom Informationsauftrag der Medien abgedeckt sind (BGE 37 I 381 E. 2; Pedrazzini/Oberholzer, 2002, Ziff. 6.4.3.2.2/b/cc, S. 147). Das Bundesgericht präzisiert, dass bei der Abwägung mit den privaten Persönlichkeitsrechten des Verletzten dem "reinen Unterhaltungsbedürfnis" als öffentlichem Interesse nicht das Gewicht zukommt, welche das Informieren – als Aufgabe der Presse – für sich beanspruchen kann (zit. Urteil 5A_256/2016, E. 6.7.3). Im konkreten Fall, in dem es um eine prominente Person aus der "Party- und Clubszene" ging, hat das Medienunternehmen anlässlich der Verhaftung des Mannes eine eigentliche Medienkampagne geführt, ohne dass es ein überwiegendes öffentliches Interesse belegen konnte. Anzufügen ist, das die Publikation von Unwahrheiten – nicht bloss einer journalistischen Ungenauigkeit, Verkürzung oder Verallgemeinerung – bereits an sich widerrechtlich, d.h. nicht zu rechtfertigen ist (Jeandin, 2010, S. 259, Art. 28 N. 59; Hürlimann-Kaup/Schmid, 2016, S. 258, Rz. 906).

4. Persönlichkeitsverletzung und Genugtuungsanspruch

Die in ihrer Persönlichkeit verletzte Person hat – wie erwähnt – u.a. einen Anspruch auf Genugtuung (Art. 28a Abs. 3 ZGB). Dieser Anspruch zielt nicht auf den Ersatz des erlittenen Vermögensschadens, sondern auf Entschädigung für die erlittene seelische Unbill ("réparation du tort moral"). In BGE 138 III 337 befasst sich das Bundesgericht näher mit diesem Anspruch. Im konkreten Fall ging es um eine im Seehandel tätige Aktiengesellschaft. Der frühere Geschäftsführer gestaltete aus Rache unter einer Webseite (".com"), ganz in Anlehnung an die offizielle Webseite (".ch"), auf welche die Gesellschaft mit alten, abgenutzten Schiffen und Verwaltungsräten im Freizeit-Look zeigte. Das Bundesgericht bestätigt, dass die juristische Personen ebenfalls Subjekte des Persönlichkeitsschutzes nach Art. 28 ZGB sind. Im konkreten Fall ging es um die geschäftliche Ehre – ebenfalls Teil der Persönlichkeit der juristischen Person –, welche widerrechtlich dadurch verletzt wurde, dass ihre Schiffe und Verwaltungsräte in einem schlechten und unseriösen Licht dargestellt worden sind. Kann die juristische Person ebenfalls Genugtuung, d.h. eine Zahlung einer Geldsumme verlangen, um eine erlittene schwere immaterielle (seelische) Unbill auszugleichen? Das Bundesgericht bejaht diese Möglicheit, was in der Lehre auf grundsätzliche Kritik stösst (Aebi-Müller, 2013, S.

425). Nach dem Urteil kann jede Persönlichkeitsverletzung – also auch die Verletzung der Privat- und Geheimsphäre – der juristischen Person im Fall, dass die Organe einen seelischen Schmerz empfinden, die juristische Person selber berechtigen, in ihrem eigenen Namen Genugtuung geltend zu machen.

5. Persönlichkeitsverletzung im internationalen Verhältnis

Im Urteil 5A_963/2014 vom 9. November 2015 (teilweise publ. in BGE 141 III 513) befasst sich das Bundesgericht mit der Frage, ob der – in der Schweiz domizilierte – Vorsitzende des Aufsichtsrats einer im Öltransithandel tätigen Gesellschaft mit Sitz in Lettland eingeklagt werden kann. Die Pressestelle dieser lettischen Firma hat einer anderen Gesellschaft mit Sitz in Genf "blackmailing tactics" vorgeworfen; die Genfer Firma klagte in der Schweiz gegen den Aufsichtsratsvorsitzenden wegen Persönlichkeitsverletzung. Im – hier gegebenen – internationalen Verhältnis ist (unter Vorbehalt von Staatsverträgen) das Bundesgesetz über das Internationale Privatrecht (IPRG; SR 291) massgebend. Für Ansprüche aus Persönlichkeitsverletzungen gelten die Bestimmungen über die unerlaubte Handlung (Art. 33 Abs. 2 in Verbindung mit Art. 129 ff. IPRG; Jeandin, S. 247, Art. 28 N. 10 ff.). Für Ansprüche aus Persönlichkeitsverletzung durch Medien gilt eine besondere Regelung (Art. 139 IPRG). Was unter "Persönlichkeitsverletzung" (als Verweisungsbegriff) zu verstehen ist, richtet sich dabei nach Art. 28 ff. ZGB (Kren Kostkiewicz, 2012, S. 586, 619, Rz. 2423, 2575). Die Ansprüche aus Persönlichkeitsverletzung bzw. unerlaubter Handlung unterstehen (bei Fehlen einer Rechtswahl) nach Art. 133 Abs. 1 IPRG dem Recht des Staates, in welchem Schädiger und Geschädigter ihren gewöhnlichen Aufenthalt haben (Kren Kostkiewicz, 2012, S. 600, Rz. 2490 ff.; Levante, 1998, S. 275 ff.). Im konkreten Fall war *lex communis* das Recht der Schweiz.

Das Bundesgericht betont im Urteil (in Erwägung 5.4.2) selber den weiten Anwendungsbereich des Deliktstatuts. Nicht die *lex fori*, sondern das Deliktsstatut entscheidet sowohl über den Bestand des Persönlichkeitsrechts als auch über denjenigen der Verletzung (Kren Kostkiewicz, 2012, S. 586, Rz. 2423); nach dem Deliktsstatut beurteilen sich damit u.a. die Frage der Aktiv- und Passivlegitimation, der Widerrechtlichkeit, des Verschuldens und des Kausalzusammenhangs (Schwander, 2016, S. 543). Im konkreten Fall war die Frage umstritten, ob sich die streitigen Äusserungen überhaupt dem Aufsichtsratsvorsitzenden der lettischen Firma zuordnen lassen und diesem – nach der lex communis (dem schweizerischem Recht) die Passivlegitimation zukommt. Das Bundesgericht hält (in Erwägung 5.3) fest, dass nach

Art. 28 ZGB die "Mitwirkung" an einer Persönlichkeitsverletzung im Dulden oder Unterlassen vorliegen kann, wenn eine entsprechende Pflicht zum Handeln besteht, was in der Lehre bestätigt wird (Hrubesch-Millauer/Thommen, 2016, S. 840). Ob der Aufsichtsratsvorsitzende, der an einer Persönlichkeitsverletzung durch die Pressestelle der Gesellschaft in Lettland mitgewirkt haben soll, indes zum Handeln verpflichtet gewesen wäre, richtet sich nach den Pflichten der Verwaltungsrates. Grundsätzlich richten sich die Möglichkeiten oder gar Pflichten zum Verhindern von persönlichkeitsverletzenden Äusserungen durch Dritte nach dem Deliktsstatut, welches die allgemein geforderten Verhaltenspflichten (wie *neminem laedere*, Gefahrensatz) vorsieht. In der Teilfrage, ob das Organ der ausländischen Gesellschaft eine Einflussmöglichkeit bzw. Verfügungsgewalt hat, überschneidet sich das Deliktstatut mit dem auf die Gesellschaft anwendbaren Recht (Gesellschaftsstatut). Das Bundesgericht erblickt – im Rahmen einer richterrechtlichen Sonderanknüpfung (Schwander, 2016, S. 543) – für diese Teilfrage eine stärkere und überzeugendere Verbindung mit dem Gesellschaftsstatut. Nach dem Gesellschaftsstatut, welches dem Inkorporationsprinzip folgt (Art. 154 Abs. 1, Art. 155 lit. e IPRG), war im konkreten Fall das Recht Lettlands anwendbar.

6. Schlussbemerkungen

Die Praxis zeigt, dass das schweizerische Recht im privatrechtlichen Bereich eine grundsätzlich zeitgemässe und anpassungsfähige Grundlage zum Persönlichkeitsschutz bietet. Neue Technologien und Strategien von Unternehmen, wie Versicherungen oder Medienhäuser, stellen den Persönlichkeitsschutz des Einzelnen aber vor neue Herausforderungen. Ob in gewissen Bereichen insbesondere aufgrund des Einflusses der EMRK die gesetzlichen Grundlagen weiter zu konkretisieren sind, wird sich in der Zukunft zeigen.

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Marko Levante*

PRAVO NA PRIVATNOST U ŠVAJCARSKOJ – PREGLED I SAVREMENA SUDSKA PRAKSA

Apstrakt: *Član 28 Građanskog zakonika Švajcarske garantuje zaštitu pravnog subjektiviteta. Sve povrede prava na kontrolu korišćenja ličnih atributa u javnosti su nezakonite osim u slučajevima kada su opravdane na osnovu saglasnosti koju je dala osoba čija su prava povređena, primarnog privatnog ili javnog interesa ili zakona. Pod zaštitom na osnovu švajcarskog zakona zabranjuje se svaka vrsta ponašanja kojom se ugrožava pravo na privatnost. Ovaj članak daje kratak pregled pravila kojima se uređuje pravo na poštovanje privatnog i porodičnog života, uključujući načela Evropske konvencije o ljudskim pravima i Federalni ustav Švajcarske. U članku su sumirane neke nove odluke Federalnog vrhovnog suda Švajcarske i objašnjeni načini na koje se pravo na privatnost sprovodi u privatnom pravu. Slučajevi koji su opisani bave se nadzorom u javnosti i analizom do koje mere povreda može biti opravdana primarnim javnim interesom. Drugi slučaj ispituje pravo na privatnost pravnog lica i njegovo pravo da potražuje štetu, ali i zadovoljenje. Na kraju, ovaj članak istražuje nekoliko aspekata međunarodnog privatnog prava.*

Ključne reči*: Pravo na privatnost, privatni i intimni život, privatno pravo, Švajcarska*

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FREEDOM, SECURITY, TERRORISM AND TERRORIST FINANCING[312]

Abstract: *Terrorist act is one of the most dangerous criminal offenses. Their protected legal interest is the public interest with regard to the forceless and uninterrupted operation of states, governmental agencies, furthermore the population's uninterrupted, calm way of life that is free of fear.*

Terrorist financing is a topic that catapulted into the limelight after the tragic events of September 11, 2001. Terrorism has grown significantly since Second World War. Terrorism now takes many new forms, including nuclear terrorism, eco-terrorism, biological terrorism, and cyber-terrorism. All of these types of terrorist activity require financial resources, and all have financial consequences.

The aim of the article is to give an overview about terrorism, terrorist financing and the costs of terror attacks. The study also analyzes the Hungarian aspects of terrorist financing.

Keywords*: terrorism, terrorist financing, security policy*

General Introduction: Terrorism and Human Rights

Terrorist act is one of the most dangerous criminal offenses. Their protected legal interest is the public interest with regard to the forceless and uninterrupted operation of states, governmental agencies, furthermore the population's uninterrupted, calm way of life that is free of fear.

The basic motivation behind terrorism at the end of the past century were anarchism and nationalism; although this is the past for today's terrorism, many components of their ideals are to be seen in the justification of terrorist acts in following eras and are the motivating power behind those acts. Their set of instruments differed as well (daggers,

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[312] This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

poison, bombs), they committed a sequence of attacks against Heads of States and monarchs – from the French president Carnot at the top of the list down to Queen Elisabeth. Nevertheless, it can be stated that terrorism is distinctly a phenomenon of the 20th century and has developed into a severe problem after World War II and in three main geographic regions: Western Europe, the Middle East and Latin America.

“Terrorism is the systematic use of force or threats to use force drawing upon different ideologies, abiding by a specific logic and taking on different forms. Its aim is to achieve political endeavours by developing opportunism amongst victims, the audience, within the state and the society. The declared objective usually is of political, ideological, religious, ethnic etc. nature enforcing a radical change; a sequence of acts applied in order to achieve the objective. However, the tool used for the achievement is a common and violent criminal offense.” The most crucial challenges to be faced in the future are nuclear terrorism, ecoterrorism, biological terrorism, cyber terrorism as well as the acts of radical religious terrorist groups, which have to be seen as an increasingly serious problem. Studies addressing terrorism agree that it is mainly a political phenomenon based on both structural and psychological factors. It is considered that modernisation, democracy and tension undealt with may lead to conditions resulting in terrorism.

The danger in terrorist acts lie in their unpredictability and in their fast and mobile striking effect. The change between the terrorism of previous eras and today’s terrorism is based on quality but the main differences developed through history. 9/11 can be considered as a main turning point in the history of terrorism (and potentially in the history of mankind). The structure and the method of financing terrorist organisations have changed.

In the past 50 years, when this phenomenon started to become an unprecedented threat, many international conventions have been emerged in connection with terrorist acts, which were fully implemented into the Hungarian Criminal Code.[313]

Terrorism is such a crime, which is strongly affected to the human rights, and the policy of war on terror is also strongly affected to human rights too.[314] “In the War on Terrorism, what becomes of international human rights? It seems beyond dispute that

[313] See more: Attila Kasznár: A terrorizmus megjelenése Magyarországon az 1970-es és 1980-as években (T)ERROR & ELHÁRÍTÁS 2017:(1-2) pp. 98-101. (2017)

[314] See more: László Kőhalmi: Az önvédelmi korrupció koncepciója JURA 21:(1) pp. 65-69. (2015)

the war model poses a threat to international human rights, because honoring human rights is neither practically possible nor theoretically required during war.”[315] “Terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict. Terrorism has a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity. Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threaten social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights.”[316]

“A 2009 study conducted by the University of North Carolina concluded that the most commonly utilized counter-terrorism tactics, such as extrajudicial killings, torture, forced disappearances, and political imprisonment are, in fact, themselves acts of terror. To terrorize in the name of combating terrorism is ironically hypocritical. When counter-terrorists use the tactics of terrorists in order to counter terror, they descend to their moral level and just add more terror to the world. And if that were not enough, when counter-terrorists terrorize people, they generate more terrorists. In addition to civilian casualties, governments insidiously conspire to abuse other basic rights in the name of fighting terrorism; they tighten security to an unreasonable degree, impose petty rules and regulations, and censor the masses, hence, creating police states devoid of freedom and instilled with fear - the perfect breeding grounds for terrorism. Thus, we are faced with a vicious cycle: counter-terrorism breeds more terrorism, and then more terrorism breeds more counter-terrorism, and so on, ad infinitum.”[317]

In my paper I will examine the current legal background and law enforcement measures in the field of the fight against terrorism, keep tabs specially on the terrorist financing worldwide and in Hungary.

[315] David Luban: The War on Terrorism and the End of Human Rights (In: Philosophy & Public Policy Quarterly Vol 22. No. 3. 2002. 13. p.)

[316] http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf (17. 09. 2017.)

[317] http://www.huffingtonpost.com/lydia-canaan/fighting-terrorism-withou_b_9513034.html (17. 09. 2017.)

Terrorist Financing – an overview

Terrorist financing is a topic that catapulted into the limelight after the tragic events of September 11, 2001. Terrorism has grown significantly since Second World War. Terrorism now takes many new forms, including nuclear terrorism, eco-terrorism, biological terrorism, and cyber-terrorism. All of these types of terrorist activity require financial resources, and all have financial consequences.

Recent terrorist attacks affected both national and global economies. The economic consequences can be largely broken down into short-term direct effects; medium-term confidence effects and longer-term productivity effects. The direct economic costs of terrorism, including the destruction of life and property, emergency responses, restoration of systems and effected infrastructure, and the provision of temporary living assistance, are most pronounced in the immediate aftermath of attacks and thus matter more in the short run. Direct economic costs are likely to be proportionate to the intensity of the attacks and the size and the characteristics of the economy affected. The indirect costs of terrorism can be significant and have the potential to affect economies in the medium term by undermining consumer and investor confidence. Finally, over the longer term, there is a question of whether the attacks can have a negative impact on productivity by raising the costs of transactions through increased security measures, higher insurance premiums, and the increased costs of financial and other counterterrorism regulations.

Since the terrorist attacks of September 11, 2001, in New York and March 11, 2004, in Madrid, and the creation of international laws which started as the consequence of the attacks, terrorist financing has become a question frequently discussed together with money laundering. So the “financing of terrorism” is a rather new phenomenon that has the following characteristics compared to money laundering:

- The primary motive is violence (intimidation) rather than financial (profit-realizing). The goal of the terrorists is mainly to constrain state organs or international organizations (or convince them to take some particular action), to intimidate the population, or to change or disturb the constitutional, social or economic order of a state. Thus, the profit motive for terrorists is secondary, while money launderers are clearly “profit-oriented.”

- For the financing of terrorism, money of legal origin is used the same as money of illegal origin. The terrorists also receive financial support from legal sources such as organizations of charity, beneficial donors and firms operating legally.
- The third distinguishing characteristic is the amount of money. Even very large terrorist attacks can be organized with smaller sums. For example, the 2004 Madrid bombings are reported to have only involved expenditures of just over 46,000 USD, and the 2005 London bombings were reported to have only cost "a few hundred pounds."

For the execution of terrorist attacks financial resources are needed. *If the perpetrators do not have sufficient capital, then they have to get the missing money from an external source.* If somebody helps them in this, if somebody supports terrorists or terrorist organizations, then this behavior is already qualified as a crime in the criminal law too.

The cost of the terrorist attacks from the side of the terrorists: the financial need

All terrorist organizations are the same from one point of view: they need financial resources for the organization and the execution of the attacks. This applies as a cost to them. We can examine the costs of terrorism from two aspects: from the side of the terrorists (this is the financial need) and from the side of the society (these are the damages and victims).

Terrorist financing means the activity during which directly or indirectly financial means are submitted for the execution of terrorist attacks. *Concerning our subject the most important characteristic of terrorism is that it is not necessary to have big money to carry out the actions.*

The three main groups of the costs: the operational costs, the administrative costs and the donation given to the family members of the assassins.

I.) Some examples for the „operational costs":

- On February 26 1993 an attack was executed against the World Trade Center with a 680 kg bomb, with the cost of 18 000 USD, 6 persons died, and more than 1000 were injured,

- the total cost of the September 11 2001, the biggest terrorist attack in the world, killing 3000 persons was approximately 400-500000 USD of which 300000 USD arrived by bank transfers,
- the approximate historical cost of the blast in Bali on October 12. 2002 was 20-35000 USD, on the other side of the balance there were 190 dead and 309 injured,
- the attacks that were executed in Istanbul on November 15. and 20. 2003 cost approximately 40 000 USD and left 27 dead and 450 injured on the spot,
- On March 11. 2004 bombs were blasted in Madrid, this attack was executed with a 10000 USD budget. (60000 USD – according to the Spanish estimations.) On the other side of the balance there were 191 dead and more than 1 500 injured.
- On July 7. 2005 London was attacked, 700 were injured, 38 died. The total cost of the attack was only 15000 USD.

So it can be seen that the terrorist attacks can be executed with low budgets but the caused damages are high. Of these sums we could conclude that fighting against terrorist financing does not have sense. This is not true like this. It is a very difficult task to cut off terrorists from their financial resources but it is not impossible and the efforts towards it do make sense. I would like to show two examples for verification:

1) After the attack against the WTC in 1993, one of the captured perpetrators, Ramzi Yousef admitted that they wanted to use a bigger bomb but they did not have enough money! Furthermore one of the key-elements of the investigation was that the terrorists wanted to get back the deposit that they had paid for the car before the attempt...[318]
2) The administrative cost of the terrorist organizations is much higher than the operational cost of the separate operations.

II.) The second cost factor is the administrative, so the functional cost. For example Al-Qaeda spends approximately 10% of its incomes on operational costs, while 90% on administrative and functional costs.[319] The financial need of course depends on the

[318] Countering th Financing of Terrorism (Edited by Thomas J. Bierstecker and Sue E. Eckert) London and New York, 2008. 7. p.

[319] D. Bugg: Speech to IAP Conference 8.12.2003.
http://www.cdpp.gov.au/Media/Speeches/20030812db.aspx

organizational structure. If we also add that the terrorist cells often finance themselves, then we can have serious fears. However we have to note immediately that a terrorist organization which is operated in a virtual network structure by self-financing terrorist cannot execute a harmonized, international operation.

Despite of this – as Donald Rumsfeld said – "The cost-benefit relationship is working against us! Our costs of billions are against the costs of millions of the terrorists."[320]

III.) Terrorist attacks have an interesting, new cost-factor also, that is the financial donation – usually paid in one sum – and the life annuity paid to the families of the suicidal bombers. In case of Hamas it is estimated to be 5000 USD but for example during the reign of Saddam Hussein he offered 25000 USD to the suicidal bombers' family members.[321]

So nowadays the total cost of the execution of the terrorist attacks depends on three basic cost factors: the administrative cost of the terrorist organization, the financial donation given to the family of the suicidal bombers, and the direct operational costs of the execution of the terrorist attack.

Before September 11 the quantity of money available to the armed terrorist organizations is estimated to have been 500 billion dollars worldwide. (In this period the banknote preferred by the terrorists was the 100 USD note.) The source of this money-volume was one third legal business activity but two thirds came from crimes and other illegal activities, for example money laundering. Before 9/11 most of the laundered incomes came from one crime: drug trade.[322]

After September 11 2001 the most important step was to make up the list of terrorists (and the destruction of the Talib regime in Afghanistan and the invasion of Iraq), based on these lists financial means were frozen but their extent did not more than 200 million USD.[323] However the invasion of Iraq and Afghanistan radicalized a part of the European Muslim communities of which new jihadist cells were formed. Nowadays legal business activities become more and more important in the financing of these

[320] http://www.globalsecurity.org/military/library/policy/dod/rumsfeld-d20031016sdemo.htm

[321] Countering th Financing of Terrorism (Edited by Thomas J. Bierstecker and Sue E. Eckert) London and New York, 2008. 102. p.

[322] Sean S. Costigan – David Gold: Terronomics ASHGATE, Printed in Great Britain, 2007. 14. p.

[323] He Ping: Banking Secrecy and Money Laundering (=Journal of Money Laundering Control, Vol. 7. No 4.

European terrorist cells, furthermore the major part of the members of the cells have legal job which also mean a newer financial possibility.

The cost of the terrorist attacks for the society (damages and victims, affects to freedom and security)

The social costs can be divided into two groups: personal (dead, injured, health damage) and financial (financial extra costs generated by the reactions to terrorism). Terrorism is a complex phenomenon, one of the most serious global and national security risks. Both its financial and non-financial effects are huge and if we take in consideration the indirect effects also, then it is quite impossible to make a perfect list. In my opinion the most important cost elements are the following.

1. Dead and injured

The biggest danger of the terrorist attacks is that they want to kill people. All of the important terrorist attacks of the past demanded human victims generally of the order of tens or hundreds but there have also been bigger attacks. *Presently the most serious (and unfortunately the most realistic) fear is such an attack with a weapon of mass destruction against a big city, which city's center is located near the harbor.* In such cities lots of containers are unloaded from the commercial ships but only a very small part of these containers are checked. If in the future we should check all containers of all commercial ships, then it would make international trade more expensive in such a way that could cause damages like the worldwide economic crisis that appeared last year.

2. Direct medical effect

We also have to mention that apart from the dead and injured victims it is interesting that the terrorist attacks indirectly can have health damaging effects, even years after the attack. Transcriptionally these people are also to be considered as victims of terrorism. According to the researches of American psychiatrists the live broadcast of the terrorist attack of September 11 2001 increased the frequency of heart illnesses to its triple in the next three years.[324]

[324] http://www.stop.hu/articles/article.php?id=320646

3. Financial damages

Terrorist attacks usually cause significant financial damages too. The ratio of the effective financial damages caused by a blast can be multiple to the historical cost of the whole terrorist act.

Without doubt it was the fall of the twin towers of the World Trade Center and the neighbor buildings (adding the value of the four airplanes) was the attack that caused the most serious financial damages in the history of terrorism. According to estimations the direct costs of 27.2 billion USD caused by the September 11 attacks contributed to 0.25 % of the annual GDP of the United States of America in 2001. The loss of the private sector was 14 billion dollars, 1.5 billion dollars the expense of the local government, 0.7 billion the loss of the federal government while the rescue and the cleaning away of the ruins cost 11 billion.

4. Damaging effects on national economy (tourism, catering, stock exchange etc)

Apart from the direct financial damages, most of the attacks cause indirect damages also to the attacked city, region or country but the attack of September 11. also had economic effects on international levels.

As a consequence of the blast on Bali in 2002 the GDP of Indonesia decreased by 2%! The blasts in Istanbul set the economic growth of Turkey back and the flow-out of Western capital started. The approximately 18 billion USD income of London coming from tourism was decreased by approximately 33% by the terrorist attack in 2005.[325]

Apart from this terrorist attacks cause decreases on the financial markets of the given country but a bigger attack can have effects on the stock exchanges of the whole world.

5. Extra costs in the financial intermediate system

The continuous lookout on terrorist financing and the announcing of the suspicious cases appear as extra tasks to the institutions of the financial intermediate system

[325] Sean S. Costigan – David Gold: Terronomics ASHGATE, Printed in Great Britain, 2007. 22. p.

(banks, investment services, insurance companies etc). The costs of which are not measureable and it is even hard to estimate them. Namely because these institutions had already been using and working this system even previously in order to precede and prevent money laundering. The bigger banks for example employ several colleagues in the compliance (to comply to different laws) area, their salaries and the cost of the regular training of the employees of course mean an extra cost but these costs would arise even if they did not have the task to check on terrorist financing.[326]

6. The costs of prevention and investigation (criminal investigation, jurisdiction, secret service)

Terrorism generates extra costs in criminal investigation, jurisdiction and secret service. Of these the extra cost of the secret service is the most important. The fight against terrorism most probably raised the budget of the secret services by several billion dollars worldwide.

7. The costs of penalty execution

The closing of the Guantanamo base was first raised after the election of Barack Obama as president. Apart from having grave human right problems, the institutions for the execution of penalties that are maintained especially for terrorist-suspicious people must have high costs too.

8. The cost of military actions

The military actions that are generated directly or indirectly by terrorism form one of the most serious cost factors. However there is no agreement in the related articles if these actions were provoked by the terrorist attacks or if the terrorist attacks were just reasons for applying military means for other, underlying purposes.

[326] Elek Balázs: Economic Crimes in the Hungarian Code Penal (=Studies regarding criminality int he economic field Romanian and Hungarian legislations Debrecen, 2008. 228. p.

Sources and techniques of terrorist financing

1. Committing crimes

Terrorism is a crime, namely one of the most serious and dangerous form. Terrorists usually prefer those crime-types that result higher incomes in shorter time.

Most probably the most liked of these are *drug-related crimes.* Drug trade gives 60-90% of the income of the Columbian paramilitary organizations and the guerillas.[327] Islamic terrorist organizations are especially authorized by some fatwa to use drug-trade as a mean in the fight against the decadent West.[328]

Besides *kidnapping* is also an important income resource for terrorists. The IMU (Islamic Movement of Uzbekistan) received 5 million USD for letting free 4 Japanese geologists after kidnapping them in Kirgizstan in 1999.

Smuggling people is also a profitable activity or terrorists. Economic and political migration was called into life by the difference of the quality of life between the undeveloped and developed regions of the world, and the desire for the security afforded by the democratic states.[329] A citizen from Bangladesh or China might need to sacrify 20-25.000 US dollars to get to Western Europe.

Money laundering on one hand is a profitable activity for the terrorists, so it is also a mean for terrorist financing. On the other hand terrorist financing is nearly related to money laundering. The financing of terrorism will very likely infiltrate even in the concept of money-laundering in a wider sense as “converse money-laundering” or “money-dirtying”. However the financing of terrorism has the following characteristics compared to money-laundering:

[327] Berry LV, Curtis GE, Hudson RA, Kollars NA: A Global Overview of Narcotics-Funded Terrorist and Other Extremist Groups Library of Congress 2002. 52. p.

[328] Beers R, Taylors FX: Narco-Terror: The Worldwide Connection Between Drugs and Terror (In: Terrorsim and Goverment Information 2002. 322. oldal

[328] Napoleoni L: Modern Jihad: Tracing the Dollars Behind the Terror Networks Pluto Press, London, 2003. 89. p.

[329] Korinek László: A terrorizmus (=Kriminológia-Szakkriminológia Szerk: Gönczöl Katalin – Kerezsi Klára – Korinek László – Lévay Miklós CompLex kiadó, Budapest, 2006. 456. p.

- The motive is rather violent than financial. The goal of the terrorists is mainly to constrain state organs, international organizations to something, to intimidate the population or to change or disturb the constitutional, social or economic order of a state. These aims that have been named in international documents are contained also in the Hungarian Criminal Code in section 261 about terrorist acts. So the aim of the terrorists is to gain profit only in the minimal part of the cases, while money-launderers are clearly "profit-oriented".
- For the financing of terrorism money of legal origin is used as the same as of illegal origin. The terrorists receive the major part of the financial support from legal sources such as organizations of charity, beneficial donators and firms operating legally.
- The third diversifying characteristic is the different amount of money. Even the greater terrorist attacks can be organized with smaller sums. For example the perpetrators of the 2001 New York hijackings camouflaged as foreign students drew only moderate sums of support regularly and none of the transfers has reached the magic limit of 10.000 dollars.

Besides there are also *other* profitable crime-types that the terrorists can use for obtaining money. The itemized enumeration of these is impossible. In 2002 the IRA is said to have had an income of 11 million USD by committing different kinds of crimes. The major part of their income originated from the tobacco-smuggling from Eastern Europe to England. A big part of the European financial income of the al-Qaeda comes from credit-card fraud, according to secret service estimations this sum reaches 1 million USD monthly (!).

2. Donations

Donation is the free transmittal of cash, accounting money, stock, gold or silver, gem stones or other assets of value to terrorists or terrorist organizations. Its typical form is financial support. Terrorists otherwise prefer the form of keeping wealth with the highest liquidity degree, that is the cash.

Terrorists can be supported by individuals, organizations (other terrorist organizations too) and states. "Donation" in a wider sense can be considered as the financing of terrorism in the sense of criminal law, while from economic sense the committing of crimes and legal business activity can also be considered as the part of this activity.

In a narrower sense the regulation of the criminal law against terrorist financing focuses primarily on the donations of the individuals, if states finance terrorist purposes, that often makes for the criminal law a big problem.

3. Legal business activity

Osama bin Laden founded 30 companies in Sudan between 1991-1996, these altogether had 3 000 employees. Already in 1994-1995 western and Israeli secret service sources mentioned bin Laden as the key moneylender of terrorism.

Legal business activity is tending to play an always more important element in terrorist financing, as it can also be stated in general sense that legal sources have more important role in terrorist financing. European jihadist cells lean more and more on their legal incomes, for example on what they earn with their jobs. The attack of September 11 was the last one that was completely financed by al-Qaeda, global financing was ended in 2002! The blasts today are mostly actions by self-supporting cells. So the process called *privatization of terrorist financing* has started.[330]

In a wider sense it also can be considered as part of legal business activity, if terrorists use part of their legal income as employees for terrorist purposes. If we start from that according to the experiments of last years' terrorist attacks 8-10 000 USD can already be enough to carry out serious actions, then such our fear can be realistic that practically a terrorist cell of a 4-5 person-group in a developed or a middle-developed country can save such a sum with any legal jobs and can strike without needing any other additional source, so without terrorist financing!

A terrorist financing case of Hungary in the year of 2003

In Hungary no one has been condemned for terrorist financing. There is one legal case to instance. For the initiation of the National Security Bureau the Immigration and Citizenship Office expulsed a Syrian doctor from Hungary. The doctor, working in the intensive care unit of the clinics of Pécs, transferred his wage of a month, 105.000 Ft in February 2003 to one of the cover organizations of the Hamas. Allegedly he did not know that the appeal and the account number that he had seen in a television of

[330] Sean S. Costigan – David Gold: Terronomics ASHGATE, Printed in Great Britain, 2007. 14. p.

Lebanon were that of a terrorist organization. This protection was doubtful. Criminal procedure was not starts against the doctor because the new statement of affairs of the terrorist act at the moment of the commission had not already become operative. We had already this case (the case of the Syrian doctor) but it was impossible to prove the crime. If we look for the reasons then according to the optimistic view we still form part of the less infected area, the pessimistic explanation states the possible latency as reason. The separate institution system of the fight against terrorist financing is already developing, though mostly they are the institutions of the fight against money-laundering are those who exercise these tasks also.

Hungarian counter terrorism law enforcement practice in 2017: the Ahmed H. case

In the past 5 years (2012-2017) an average of 3 terrorist acts took place in Hungary. However, these cannot be seen as terrorist acts in "classic" criminological terms, but as criminal offenses, which have been declared as terrorist acts by the increasingly spreading scope of criminal law. Pursuant to the Hungarian criminal law the common criminal offenses listed in the section "Acts of Terrorism" of the Criminal Code have been declared as terrorist acts, when e.g. the objective of the perpetrator is to intimidate the general public, coerce a government agency, another State into doing, not doing or countenancing something; or to disrupt e.g. the operation of an international organization.

One of the cases attracting huge interest in the press has been the criminal proceeding against Ahmed H. Due to the "situation caused by mass immigration" in Hungary, the state of emergency was declared on 15 th September 2015 and on the same day new rules in asylum and criminal law became applicable. This reform on the Asylum Act obliges refugees to file their asylum requests within one of the newly established transit zones along side the Schengen external borders. The transit zones on the Hungarian-Serbian border - Röszke and Tompa - opened on 15 th September 2015, but in the beginning only hundred requests were allowed per day. The border crossing at Röszke, where thousands were previously able to enter the EU per day, was basically closed overnight. As a consequence thousands of people were trapped; not able to move forward anymore and not knowing what was happening.[331]

[331] http://no-racism.net/article/5234 (17. 09. 2017.)

After declaring the state of emergency as a consequence of mass immigration hundreds of migrants assembled on the Serbian side of the road border crossing Röszke-Horgos on the 16th of September 2015. The peaceful minded groups of people with the aim to enter Hungary became aggressive over time, trying to tear down the fence, some of them throwing stones at the policemen on the Hungarian side. Many policemen were injured during the confrontation. According to the judgement of the Court of First Instance Ahmed H. threatened with breaking down the cordon and attacking the police. The suspect has addressed the mass several times with a megaphone, threw stones at the police three times himself and has illegally entered Hungary after opening the gate closing down the crossing point. Ahmed H. then returned to the Serbian side and could only be detained 3 days later. According to prosecution this act has to be considered a terrorist act because the suspect did use force against the representative of public authority in order to force the police to let him enter the country.

On 30 th November 2016 Ahmed H. was convicted in Szeged to 10 years imprisonment on account of illegally crossing the border and a terrorist offense. In addition, he was expelled from the Hungarian state territory indefinitely. On 15 th June 2017 the appeal hearing took place in Szeged: resulting in the procedure being resubmitted to the first instance court, whilst the accused remains in pre-trial detention. Ahmed H. has been detained since September 2015 and has therefore been imprisoned for almost 2 years now. In addition to national press and 2 representatives of the international media, Amnesty International Hungary, one delegate of the Swiss Democratic Lawyers (ELDH member organization) and supporters of Ahmed H. were also present and attended the hearing.[332]

Pursuant to Hungarian criminal law what Ahmed H. committed is a terrorist act. The perpetrator of Syrian nationality was convicted of a terrorist act and of the illegal crossing of the border at first instance by the General Court of Szeged. As a consequence, he was sentenced to imprisonment of 10 years in a high secured prison and has been expelled from Hungary. The Court of Appeal of Szeged repealed the decision. The proceeding is still ongoing in the autumn of 2017.

In Hungary, the detection and prevention of terrorist acts falls within the correspondence of the Counter Terrorism Centre [Hungarian name: Terrorelhárítási Központ, TEK]. This state agency is specialized on prosecution and intelligence service.

[332] http://no-racism.net/article/5234 (17. 09. 2017.)

Pursuant to the relevant legislation (Government decree 295/2010. (XII. 22.) its main tasks are as follows:

a) It analyses and evaluates the threat of terrorism on Hungary.
b) It organises and coordinates the activity of state agencies for the prevention of and response on terrorist acts, performs preparational, implementation and administrative tasks in connection with the Counter Terrorism Centre.
c) It contributes towards developing the national program on the protection of critical infrastructure, evaluating the level of threat and the elaboration of plans on security action plans, furthermore – according to a specific contract –, it is responsible for the protection of the critical infrastructure being important in terms of terrorist threats.
d) Pursuant to the government decree on the protection of individuals and designated establishments it provides protection for the General Prosecutor and the Prime Minister, and fulfils other tasks regarding the protection of persons, which were temporarily or on case-by-case basis assigned to it by the Minister of Policing.

At intelligence level the Counter Terrorism Centre (TEK) plays an essential role. Although they can use the police powers under the Chapter 7 of the 1994 Police Act (covert operations), the TEK does not conduct investigations, but operates exclusively in the area of collecting intelligence. Their sources include human intelligence, financial intelligence, technical intelligence (telephone/wiretapping, internet and other communication surveillance) and foreign counterpart information. The information is classified until the TEK decides to file a report on suspicion of terrorism-related offences to the law enforcement authorities. Though the TEK has not yet specifically focused on financing terrorism, this aspect has come up in other intelligence actions, for instance with regard to suspicions of business activities being used to financially support terrorist organisations (which were however later not confirmed). The TEK is clearly well-informed and aware of terrorist threats, even if until now it has not found concrete indications of terrorist-related activities and considers that there is not yet need for immediate action, while at the same time recognising the importance of raising awareness for the terrorist threat.[333]

[333] http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MER-Hungary-2016.pdf (17. 09. 2017.)

One reason for why no “traditional” terrorist attack took place in Hungary that needs to be highlighted is the effective operation of the Counter Terrorism Centre. This agency is subject to the responsibility of intervention before the commitment of a terrorist act and in this case misuse of firearms will be registered within the criminal statistics, as the perpetrator has been detained before he/she could commit a criminal offense with his/her illegally obtained firearm.

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SLOBODA, BEZBEDNOST, TERORIZAM I FINANSIRANJE TERORIZMA[334]

Apstrakt: *Teroristički akt je jedan od najopasnijih krivičnih dela. Njihov zaštićeni zakonski interes je javni interes u pogledu obesnaženog i neometanog rada država, vladinih agencija, i nadalje neometanog, mirnog načina života stanovništva bez straha.*

Finansiranje terorizma je tema koja je katapultirana u centar pažnje nakon tragičnih događaja 11. septembra 2001. godine. Terorizam je značajno porastao od Drugog svetskog rata. Terorizam sada ima mnogo novih oblika, uključujući nuklearni terorizam, eko-terorizam, biološki terorizam i kiber-terorizam. Sve ove vrste terorističkih aktivnosti zahtevaju finansijska sredstva, i sve imaju finansijske posledice.

Cilj ovog članka je da se da pregled o terorizmu, finansiranju terorizma i troškovima terorističkih napada. Studija takođe analizira mađarske aspekte finansiranja terorizma.

Ključne reči: *terorizam, finansiranje terorizma, bezbednosna politika*

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POLÍTICA ANTITERRORISTA EN ESPAÑA Y PROTECCIÓN DE LOS PRINCIPIOS CONSTITUCIONALES: ESPECIAL REFERENCIA A LOS DELITOS DE ENALTECIMIENTO DEL TERRORISMO

***RESUMEN**: El presente trabajo se centrará en ofrecer una panorámica del tratamiento penal del terrorismo por la legislación española. Para ello, además de describir el marco legal resultante de las sucesivas reformas introducidas en el Código penal, se discutirá la idoneidad de éstas en relación con el respeto a los principios constitucionales. En este sentido, puede destacarse la permanente situación de excepción motivada por la asunción de los postulados del Derecho penal del enemigo (Feindstrafrecht) como criterio orientador del tratamiento penal del terrorismo en España, tanto en relación con la banda armada ETA como ante las nuevas amenazas que representa el terrorismo yihadista.*

Asimismo, para mostrar un caso concreto de lesión de los derechos fundamentales de los ciudadanos por parte de la política antiterrorista española, se introducirá una reflexión sobre la reforma introducida en los delitos de enaltecimiento del terrorismo y humillación a las víctimas mediante la reforma de la LO 2/2015. Este marco legal viene a configurar un régimen agravatorio cuando estos comportamientos sean realizados mediante el uso de redes sociales. Sobre esta cuestión, se incluirá una aproximación a la limitación de la libertad de expresión que representa la expansión de este delito a la expresión en las redes de opiniones políticas, humor negro o cualquier otra manifestación que pueda considerarse ofensiva según qué estándares morales. Esta tendencia, asumida por la Audiencia Nacional en los últimos meses, supone una criminalización en las redes sociales de opiniones que nada tienen que ver con la actividad terrorista, sino que representan una posición de disenso respecto del pensamiento político y cultural hegemónico.

***PALABRAS CLAVE**: política antiterrorista, derecho penal del enemigo, principios constitucionales, enaltecimiento del terrorismo*

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1. Introducción y contexto

La Ley Orgánica 2/2015, de 30 de marzo, supuso la introducción de una serie de reformas en el Código penal en materia de delitos de terrorismo. Estas modificaciones se vieron especialmente determinadas por las amenazas que el terrorismo internacional de carácter yihadista planteaba desde la perspectiva de la prevención y persecución de los nuevos métodos utilizados para la captación, adiestramiento y organización de grupos terroristas de alcance internacional, así como la difusión y ensalzamiento de su mensaje. En este sentido, ésta podría ser catalogada como la primera reforma antiterrorista en el ordenamiento jurídico español que, a diferencia de las anteriores, no justifica una extensión de los comportamientos tipificados o un mayor punitivismo en materia de delitos de terrorismo por la actividad armada de ETA, sino por la alarma social creada como consecuencia de los atentados yihadistas en territorio europeo. Sobre esta cuestión, puede remarcarse la influencia que el ataque a la sede parisina de la revista satírica Charlie Hebdo tuvo sobre esta reforma, en la medida en que por sus formas y la difusión dada en los medios de comunicación, además de porque ocurrió a pocos meses de la revisión del pacto antiterrorista, permitió desactivar el debate político-criminal sobre la necesidad y alcance de las modificaciones introducidas, en favor de la defensa a ultranza de la seguridad que puede aportar un punitivismo que, como veremos a continuación, termina limitando el ejercicio de los derechos y libertades de la ciudadanía.

Además de la referencia a la influencia del terrorismo yihadista en la LO 2/1015, puede destacarse la mención expresa en el preámbulo a la importancia de Internet como herramienta de difusión y expansión de las actividades o el mensaje terrorista. Como puede verse, la LO 2/2015 remite a la Decisión Marco 2008/19/JAI por la que se modifica la Decisión Marco 2002/475/JAI sobre la lucha contra el terrorismo. Concretamente, por lo que respecta a la utilización de Internet puede citarse el punto 4 del preámbulo de la Decisión Marco 2008/19/JAI:

> “Internet se utiliza para inspirar y movilizar a redes terroristas locales e individuos en Europa y también sirve de fuente de información sobre medios y métodos terroristas, funcionando por lo tanto como un *campo de entrenamiento virtual*. Por ello, las actividades de provocación a la comisión de delitos de terrorismo, la captación y el adiestramiento de terroristas se han multiplicado con un coste y unos riesgos muy bajos”.

De este modo, siguiendo las indicaciones de la Decisión Marco 2008/19/JAI, la LO 2/2015 ha introducido en el ordenamiento jurídico español referencias expresas a la realización de conductas como la figura del autoadoctrinamiento (art. 575.2 CP), mediante la utilización de "servicios de comunicación accesibles al público en línea o contenidos accesibles a través de internet", pudiendo incluirse dentro de este concepto las redes sociales de consumo masivo. Mediante esta referencia, destinada a la prevención y persecución de actos terroristas perpetrados por los llamados *lobos solitarios*, se busca un castigo del terrorismo internacional, tratando de adaptarse a un *modus operandi* distinto al propio de las organizaciones estructuradas con una jerarquía definida, teniendo éstas un carácter más disperso y autónomo, incluso desvinculado plenamente del grupo terrorista que sirve de germen para estos comportamientos.

En este contexto, la LO 2/2015 establece una serie de modificaciones en el delito de enaltecimiento y humillación a las víctimas, considerando respecto de su realización la posibilidad de incluir una modalidad agravada cuando ésta sea perpetrada mediante el uso de servicios accesibles a través de internet. En los apartados subsiguientes se analizará la nueva redacción típica del art. 578 CP, así como la casuística judicial que parece motivar la agravación introducida en dicho precepto, plenamente desconectada del terrorismo yihadista que parece inspirar la reforma. Así las cosas, conectando con estas notas preliminares, puede advertirse que se partirá de un análisis crítico del delito de enaltecimiento y humillación a las víctimas como modalidad de los llamados *delitos de opinión*, considerando que el contexto de alarma social descrito respecto de la prevención y persecución del terrorismo yihadista ha permitido una nueva vía de entrada para la expansión de un subsistema penal de un marcado carácter punitivista, hasta el punto de limitar el ejercicio de la libertad de expresión de los ciudadanos.

En este supuesto, lo que parece indicar la praxis judicial respecto de la aplicación del delito de enaltecimiento del terrorismo, previa a la entrada en vigor de la LO 2/2015, es que siguiendo estos derroteros, la agravación introducida en la reforma, motivada *ex ante* por el terrorismo internacional, puede ser utilizada para una criminalización de aquéllas opiniones que nada tienen que ver con la exaltación del yihadismo como forma de terrorismo internacional. Sobre esta cuestión, se considerará lo dispuesto por el art. 578 CP en relación con la tendencia político-criminal generalizada en lo relativo al tratamiento penal del terrorismo, caracterizada no sólo por el rigor punitivo, sino también por una neutralización o aislamiento del contenido ideológico o político que se encuentra detrás de estos delitos (MIRA, 2016: 108). Como consecuencia de esta expansión, puede observarse de qué manera el art. 578 CP termina siendo un cajón

desastre que permite la criminalización del disenso político a partir de una aplicación de la categoría de *enemigo interno* que rebasa al terrorista y termina instrumentalizando su contenido para criminalizar la conducta de aquellos colectivos que no siguen el pensamiento político y cultural dominante.

2. El delito de enaltecimiento del terrorismo y humillación a las víctimas

2.1. Antecedentes: discusión sobre la apología legítimamente punible

En un artículo escrito hace ya muchos años –en 1983- manifestaba uno de los autores la siguiente propuesta político-criminal en torno a la apología (CARBONELL, 1983: 245): “Sería conveniente la existencia de una definición legal de la apología que entendiera ésta como una especie de la provocación, exigiéndose explícitamente la presencia de un ánimo de incitar a la comisión del delito. El tratamiento debe ser lo más parecido posible al que se conceda a la provocación: por consiguiente, debe figurar en la Parte General y entre los actos preparatorios; pero castigándose tan sólo aquella que específicamente venga recogida en la Parte Especial. Por supuesto, tan sólo debe castigarse la apología llevada a cabo a través de los medios de comunicación social o la dirigida a un auditorio indiscriminado”. En ese trabajo fue defendida la consideración de la apología punible –la única que puede castigarse en un Estado democrático- como una especie de la provocación, de la que debe mantener todas sus características como acto preparatorio. Frente a quienes consideran que la asimilación a ésta hace perder el sentido a su definición expresa, y aun al propio concepto pretendidamente “ontológico” de apología (BARJA DE QUIROGA, 2004: 103 ss) resulta menester destacar lo obvio: precisamente porque tiene características concretas el legislador puede y debe dotarle de un ámbito de extensión diferente y, en cualquier caso, es preciso que se aclare su delimitación impidiendo interpretaciones extensivas que resultan claramente agresivas para la libertad de expresión; interpretación en la que han caído de manera escandalosa el propio legislador a través fundamentalmente –aunque no exclusivamente- de los artículos 510 y 578 del Código penal vigentes después de sucesivas reformas, y la Jurisprudencia que ha interpretado los aludidos preceptos dotándolos de una extensión incompatible con la democracia y que permiten asimilarlos al viejo delito de propaganda ilegal propio del régimen dictatorial (CARBONELL, 1978)

De la propuesta llegó a decirse que “pareciera que tuviéramos delante la encarnación del verdadero legislador de 1995” (BARQUIN, OLMEDO, 2004: 944), aunque, a continuación, se destacara que tal propuesta permitía la incitación indirecta mientras que

no lo hace el artículo 18, teóricamente vigente si bien, como veremos, absolutamente desnaturalizado. Es verdad que la redacción del precepto agudiza la exigencia de la incitación directa, pero tal sí se encontraba en la propuesta reproducida más arriba, en la medida en que se insistía en que tan sólo puede punirse –si se pretende respetar el contenido esencial de la libertad de expresión; vale decir, del Estado democrático- la apología que comporte una provocación al delito como acto preparatorio –y ésta ha de ser una incitación directa- (VIVES, 2005: 428 ss).

Más acogible parece el matiz crítico que introducen BARQUÍN y OLMEDO de considerar innecesaria la referencia al ánimo de incitación, siempre que se considere que el dolo ha de abarcar el conocimiento de al menos la potencialidad de la provocación para la comisión de futuros delitos. No se entrará en este momento y lugar al muy complejo debate técnico en torno a si cabe hablar propiamente de dolo al referirnos a un acto preparatorio; en todo caso, está claro que el sujeto ha de ser consciente de estar incitando.

Más importante parece afirmar sin ambages la enorme trascendencia de la libertad de expresión en la libre formación de la opinión de los ciudadanos, base sobre la que se asienta el sistema democrático. Y cómo la irrupción del Derecho penal a la hora de trazar sus límites puede resultar demoledora: la amenaza del castigo produce siempre un efecto de silencio (CUERDA ARNAU, 2013, 111 ss.); de ahí que resulte indispensable que éstos –los límites- sean los mínimos necesarios para evitar la agresión a los bienes fundamentales de los ciudadanos y nunca los que eliminan la expresión de ideas o doctrinas por deleznables que puedan parecer, recordando la vocación de la legislación antiterrorista de “intentar aislar o neutralizar el contenido político o ideológico que está detrás de este tipo de delitos, es decir, [de]tratar de criminalizar al mismo tiempo la actividad del entorno político o ideológico de los grupos terroristas” (MIRA, 2014: 108, 113-114).

Algunos autores se han manifestado expresamente en contra de cualquier tratamiento penal de la apología (MAQUEDA, 1988: 9 ss; GONZÁLEZ GUITIAN, 1983: 384 ss.). En la práctica es la solución propugnada por el artículo 18 del Código Penal de 1995: la única apología legítima –y legalmente- punible es la ahí redactada: la constitutiva de provocación. Que el artículo contenga una definición de apología punible supone un pronunciamiento claro en orden a que no se castigue ninguna otra que no sea precisamente la ahí definida que, efectivamente, habría de castigarse de todos modos por ser una provocación al delito, un acto preparatorio punible. Ese es el único sentido

de la alusión a la apología: no se castiga –la punible- por apología sino por provocación (VIVES, 2002: 35 ss.)[335]

2.2. Regulación en el Código penal español: el "nuevo" delito de enaltecimiento del terrorismo

La L.O. 7/2000, de 22 de diciembre introdujo la punición de las que vino a denominar conductas de enaltecimiento del terrorismo y actos de humillación a las víctimas que constituye un tipo alternativo que incluye una apología enormemente ampliada en relación a la definida en el artículo 18, precepto con el que entra en flagrante conflicto –razón por la que se opta por no denominarla así- y que constituye una limitación a la libertad de expresión que va mucho más allá de lo que es lícito reprimir precisamente por su conexión con el acto principal y por el riesgo que implicaría la permisividad de la provocación a la comisión de determinados delitos. Si bien se evitó la utilización del término "apología" para dar la sensación de que no existe contradicción entre los artículos 18 y 578, es obvio que ello no se consiguió (CARBONELL, 2006: 52; CANCIO, 2010: 272), siendo visible cómo la doctrina denomina al precepto "apología del terrorismo" (LLOBET, 2010: 440-441). El precepto incluía, por otra parte, la tipificación de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares, que poco o nada tiene que ver con el enaltecimiento (CANCIO, 2010: 272).

Concretamente, la redacción dada al artículo 578 preveía pena de prisión de uno a dos años para "el enaltecimiento o la justificación por cualquier medio de expresión pública o difusión de los delitos comprendidos en los artículos 571 a 577 de este Código o de quienes hayan participado en su ejecución, o la realización de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares", añadiendo la facultad del Juez para imponer en la sentencia alguna o algunas de las prohibiciones previstas en el artículo 57.

[335] Se recogió así el criterio establecido en el Informe emitido por el Consejo General del Poder Judicial al Anteproyecto de 1992, del que fue Ponente Tomas Vives. Ver la referencia en TOMAS S. VIVES ANTÓN: "Sistema democrático y concepciones del bien jurídico cit, p.35. En el Informe citado, y en referencia a la constitucionalidad del castigo de la apología se alude al planteamiento suscitado en los Estados Unidos a propósito del "libelo sedicioso" introducido por la *Sedition Act* de 1778. Sin remontarnos tan lejos, sí debe destacarse que el Informe alude a lo que denomina *standard* actualmente aplicable, que se hallaría en la Sentencia *Brandenburg vs. Ohio* de 1969. "Conforme a él, el Estado no puede prohibir o castigar la apología del uso ilegal de la fuerza a menos que se dirija a provocar o producir una acción legal inminente y sea apta para incitar o producir tal acción"

El “nuevo” delito de enaltecimiento –primera parte de la alternativa- no es otra cosa que la reintroducción de la apología del terrorismo, desprovista de los atributos propios de los actos preparatorios (CANCIO, 2010: 271); pues ya no exige incitación, ni directa ni indirecta, a la comisión de futuros delitos de terrorismo; al menos, no lo hace literalmente por más que debería haber sido objeto de una interpretación *pro libertate* que hubiese limitado los muy perversos efectos que tiene para la libertad de expresión (MIRA, 2014) y que quizá hubiera permitido una adecuación constitucional del precepto. Como inmediatamente veremos, no ha sido ese precisamente el camino escogido por los Tribunales españoles. Respecto a la segunda parte de la alternativa, estamos ante unas injurias agravadas en las que parece considerarse un cierto *plus* de injusto más allá del honor que, ante todo como ciudadanos, pero teniendo en cuenta además su tremenda experiencia vital, corresponde a las víctimas del terrorismo como derecho fundamental. Pero de nuevo caben diversas interpretaciones y la que está imponiéndose no parece la más respetuosa con la libertad. La extensión a los familiares como sujetos pasivos –sin que se delimite, por cierto, el ámbito de dicho parentesco-, podría desnaturalizar el precepto si no se exigiera una clara relación con el acto terrorista y una proximidad espacio-temporal al mismo, que viniera a considerar el daño psicológico y el incremento de dolor que pueda suponer. Si la injuria se produce sobre la víctima que murió en el acto de terrorismo, se produciría una especie de traslación de la lesión del honor a los familiares vivos en la medida que compartieran con la víctima vida y valores. Habría que preguntarse, con todo, si el precepto no va bastante más allá de la injuria y considera, por tanto, la quiebra de intereses distintos al honor. Sólo eso explicaría que estemos ante un delito perseguible de oficio y no a instancia de parte, en el que el perdón o la absoluta indiferencia del presumiblemente ofendido no juegan papel alguno.

Aquí, por cierto, todavía en mayor medida que en el puro enaltecimiento, no hay la menor exigencia de provocación a la comisión de hechos futuros. Descartados el honor y el riesgo de comisión de actos terroristas, sólo los sentimientos de repulsa ante conductas muchas veces repugnantes parecen explicar la introducción de esta variante en el artículo 578 (CANCIO, 2010: 272-273; MUÑOZ, 2010: 897). Y, si cómo parece exigible, realizamos una interpretación unitaria del precepto, descartando que estemos necesariamente ante una provocación o una injuria, resulta, al menos a mi entender, imposible desvincularlo de los sentimientos de repulsa como único bien jurídico; éste es, pues, un delito exclusivamente contra los sentimientos.

Cabría, ciertamente, hacer caso de la rúbrica de la sección donde se encuentra encuadrado, y considerar que se trata de un delito de terrorismo[336]. Si admitiéramos eso habríamos de tener en cuenta las características que para tales figuras exige el artículo 573 y, fundamentalmente, la de que la conducta ha de llevarse a cabo con cualquiera de las siguientes finalidades: 1ª:subvertir el orden constitucional, o suprimir o desestabilizar gravemente el funcionamiento de las instituciones políticas o de las estructuras económicas o sociales del Estado, u obligar a los poderes públicos a realizar un acto o abstenerse de hacerlo; 2ª: alterar gravemente la paz pública; 3ªdesestabilizar gravemente el funcionamiento de una organización internacional, y 4ª: provocar un estado de terror en la población o en parte de ella.” Sólo cuando concurriera alguna de estas finalidades podríamos considerar típicas las conductas incluidas en el 578.[337] Y ello no parece sensato.

Por eso, y frente a la pretensión del Ministerio Fiscal de recabar la competencia jurisdiccional de la Audiencia Nacional para hechos presuntamente calificables de enaltecimiento del terrorismo que habían tenido lugar fuera del territorio nacional –que le habría correspondido efectivamente de acuerdo con la Ley Orgánica del Poder Judicial, señalaba el Auto de la Sala Segunda del Tribunal Supremo de 23 de mayo de 2002 que: la apología, cuando se persigue legalmente, es un delito (de opinión) que versa sobre *otro* delito *distinto*, o delito-objeto: el de terrorismo, con el que no puede confundirse”, siguiendo así por aquella vez la Jurisprudencia mantenida por el Tribunal Constitucional, en su Sentencia 199/1987: [L]a manifestación pública, en términos de elogio o de exaltación de un apoyo o solidaridad moral o ideológica con determinadas acciones delictivas no pueden ser confundidas con tales actividades, ni entendida en todos los casos como inductora o provocadora de tales delitos (CANCIO, 2010: 282-283).

En conclusión, estamos ante delitos sólo contra los sentimientos que no pueden superar un test serio de constitucionalidad si consideramos que suponen una muy considerable

[336] Concepto que cada vez ha ido extendiéndose hasta desbordar los límites de la lógica. Es imposible en este trabajo referirnos siquiera como simple cita a la extensa Bibliografía que, no ya en general sino incluso sólo entre nosotros, se ha referido al concepto y la regulación del terrorismo. Pero resulta imprescindible recordar los más importantes además de los aludidos en este trabajo: CARMEN LAMARCA PÉREZ: *Tratamiento jurídico del terrorismo,* Madrid, Centro de Publicaciones del Ministerio de Justicia, 1985 y JUAN TERRADILLOS BASOCO: *Terrorismo y Derecho. Comentario a las leyes orgánicas 3 y 4/1988, de reforma del código penal y de la ley de enjuiciamiento criminal* Madrid, Tecnos,1988

[337] Ver específicamente sobre la finalidad en los delitos de terrorismo, ADELA ASÚA BATARRITA: “Concepto jurídico de terrorismo y elementos subjetivos de finalidad. Fines políticos últimos y fines de terror instrumental”, en *Estudios Jurídicos en Memoria de José María Lidón*, Bilbao, Universidad de Deusto, 2002, pp. 41 y ss. Especialmente interesante, YAMILA FAKHORI GÓMEZ: ¿Qué es el terrorismo? Un intento de ponerle sábana al fantasma” Bogotá, Universidad de Los Andes, Grupo Editorial Ibáñez, 2014.

limitación a la libertad de expresión no justificada por la necesidad de tutela de bienes jurídicos que comporten manifestación de las condiciones externas de los derechos fundamentales; sólo se basan en el rechazo moral que, sin duda, merecen muchas (o, al menos, algunas) de las conductas a las que se viene aplicando. Pero un rechazo moral nunca puede justificar penas de privación de libertad.

2.3. La reforma de la LO 2/2015: la agravación como norma

De acuerdo con la redacción vigente tras la reforma operada por la LO 2/2015, el artículo 578 CP dispone lo siguiente en sus tres primeros apartados:

1. El enaltecimiento o la justificación públicos de los delitos comprendidos en los artículos 572 a 577 o de quienes hayan participado en su ejecución, o la realización de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares, se castigará con la pena de prisión de uno a tres años y multa de doce a dieciocho meses. El juez también podrá acordar en la sentencia, durante el período de tiempo que él mismo señale, alguna o algunas de las prohibiciones previstas en el artículo 57.
2. Las penas previstas en el apartado anterior se impondrán en su mitad superior cuando los hechos se hubieran llevado a cabo mediante la difusión de servicios o contenidos accesibles al público a través de medios de comunicación, internet, o por medio de servicios de comunicaciones electrónicas o mediante el uso de tecnologías de la información.
3. Cuando los hechos, a la vista de sus circunstancias, resulten idóneos para alterar gravemente la paz pública o crear un grave sentimiento de inseguridad o temor a la sociedad o parte de ella se impondrá la pena en su mitad superior, que podrá elevarse hasta la superior en grado.

Si bien la redacción del apartado primero mantiene la conducta típica respecto de los actos de enaltecimiento o justificación del terrorismo, además de aquéllos que suponen un menosprecio o humillación para las víctimas de actos terroristas, la LO 2/2015 ha introducido una modificación cualitativa que debe ser tenida en cuenta respecto del análisis de este precepto. En la redacción inicial del delito de enaltecimiento del terrorismo y humillación a las víctimas, de acuerdo con la LO 7/2000 que modifica el Código penal, se entiende cometida la conducta típica de enaltecimiento correspondiente al art. 578.1 CP cuando dicha exaltación o justificación de la actividad

terrorista, así como la humillación a las víctimas sea realizada “por cualquier medio de expresión pública o difusión”. De este modo, se entendía que la modalidad genérica del delito de enaltecimiento debía cometerse utilizando medios de expresión o difusión públicos que faciliten así dicha exaltación o justificación de la actividad terrorista. Sin compartir los fundamentos ni la necesidad de introducir dicha manifestación apologética *ad hoc* para los delitos de terrorismo mediante la LO 7/2000, podía entenderse como inherente a los requisitos objetivos del tipo del art. 578.1 CP que la expresión de opiniones en que consiste el delito de enaltecimiento o humillación a las víctimas fuese realizado utilizando aquéllos medios que aseguraran la difusión pública de estas opiniones. Por lo tanto, se le atribuía al delito de enaltecimiento un necesario carácter público, para que así fuera posible reconocer los elementos objetivos del tipo genérico, esto es, la difusión exitosa en la esfera pública de un mensaje que ensalzara la actividad terrorista.

No obstante, la reforma operada mediante la LO 2/2015 ha supuesto una redefinición conceptual en la redacción típica del delito de enaltecimiento del terrorismo, la cual supone una modificación cualitativa en el tratamiento, tanto político-criminal como penológico, del art. 578.1 CP. Pese a mantener el enunciado que se castigará “el enaltecimiento o la justificación públicos” de los delitos de terrorismo, ha desaparecido de esta definición típica la referencia a que esta expresión pública deba ser llevada a cabo “por cualquier medio de expresión pública o difusión”, como quedaba recogido en la formulación original fruto de la LO 7/2000. En su lugar, el legislador penal ha optado por redactar un apartado segundo, donde se establece que la pena prevista en el art. 578.1 CP para el delito de enaltecimiento del terrorismo y humillación a las víctimas (prisión de 1 a 3 años y multa de 12 a 18 meses), se impondrá en su mitad superior “cuando los hechos se hubieran llevado a cabo mediante la difusión de servicios o contenidos accesibles al público a través de medios de comunicación, internet, o por medio de servicios de comunicaciones electrónicas o mediante el uso de tecnologías de la información”, estando la voluntad del legislador básicamente centrada en las redes sociales de consumo masivo.

De acuerdo con lo expuesto, el punto de crítica a la modificación del art. 578 CP mediante la LO 2/2015 parece claro: prácticamente ha quedado desvirtuado el contenido del art. 578.1 CP, en la medida en que difícilmente podrán hacerse públicos aquéllos actos de enaltecimiento o humillación a las víctimas que no sean expresados mediante el uso de servicios o contenidos puestos a disposición del público a través de medios de comunicación (televisión, prensa, radio), internet (redes sociales) o cualquier otro tipo

de servicio derivado de las tecnologías de la información. Así las cosas, el apartado primero quedaría limitado a la difusión de opiniones emitidas públicamente ante una concurrencia de personas o, aunque pueda sonar paradójico, a la expresión pública de una opinión en un ámbito privado. Por lo demás, el tipo agravado del art. 578.2 CP pasaría a convertirse *de facto* en la modalidad genérica del delito de enaltecimiento del terrorismo y humillación a las víctimas, tanto por la necesaria proyección pública establecida en los requisitos objetivos del tipo, como teniendo en cuenta que el contexto socio-comunicativo resultante de la revolución digital facilita que puedan apreciarse los delitos de enaltecimiento o humillación a las víctimas a través de la expresión de opiniones mediante las redes sociales. En consecuencia, el tratamiento jurídico-penal de este delito supondría llegar a una situación tal de absurdo que para reconocer los elementos objetivos del tipo genérico fuera necesario aplicar la modalidad agravada del delito. Una muestra más de la incoherencia del legislador penal español, como también lo es que en aplicación de este tipo agravado se impone la pena prevista para el art. 578.1 CP (prisión de 1 a 3 años) en su mitad superior, lo que podría suponer la entrada en prisión sin siquiera existir antecedentes penales por parte del ciudadano que comete este delito de opinión.

La agravación contenida en dicho apartado segundo no hace sino reforzar las propias dudas razonables expresadas por la doctrina respecto de la aceptación del enaltecimiento del terrorismo como conducta delictiva en los términos del art. 578.1 CP. En primer lugar, por los problemas que plantea su compatibilidad con la apología recogida en el art. 18 CP como acto preparatorio genérico, siendo el art. 578.1 CP una extensión *ad hoc* para la actividad terrorista, pero desprovista de los requisitos que establecen una aplicación judicial en términos estrictos de los comportamientos apologéticos, en tanto que para su apreciación es necesario reconocer una alabanza del delito o de la figura del delincuente que supusiera la creación de un contexto donde fueran promovidos deseos de emular este comportamiento, cuestión que no puede afirmarse respecto del art. 578.1 CP (ALONSO, 2010: 36; CUERDA ARNAU, 2007: 105 ss.). En segundo lugar, atendiendo a los problemas que representa limitar el bien jurídico protegido en dichas conductas al daño o la indignación social que puede causar la expresión de una opinión que apoye la actividad terrorista u ofenda el sentir de las víctimas. En este sentido, la necesidad del castigo debe ser considerada a partir de una interpretación estricta de la preeminencia del principio de prohibición de exceso como marco de referencia de un concepto de Derecho penal limitado por los principios constitucionales (CARBONELL, 1999; VIVES, 2011). Esto debe ser así porque de lo contrario, si se permitiera una extensión del bien jurídico protegido en los delitos de

enaltecimiento a cláusulas generales del tipo “daño social”, o incluso a la propia supresión del concepto de bien jurídico, se terminaría legitimando el castigo del propio contenido político o ideológico que pudiera ser coincidente con el que remotamente pudiera orientar una actividad terrorista (MIRA, 2016: 105). Sería esta una propuesta próxima a los postulados del neofuncionalismo sistémico, a partir de una suerte de *autolegitimación normativa* que posibilita la asunción de unos presupuestos técnicos donde subyacen, desde su fundamentación ontológica, una serie de intereses ligados a la consideración de la norma como *expectativa de conducta institucionalizada* (PORTILLA, 2000: 2).

Sobre esta cuestión, podría mantenerse la referencia al principio de prohibición de exceso para analizar la redacción típica del art. 578 CP en relación con la llamada *función dogmática del efecto de desaliento* (CUERDA ARNAU, 2007), esto es, considerando las limitaciones en los derechos y libertades fundamentales, libertad de expresión en este caso, que derivan de la sanción desproporcionada de comportamiento conectados con la expresión de opiniones en que consiste en última instancia el delito de enaltecimiento del terrorismo y humillación a las víctimas. De este modo, considerando la crítica a la indeterminación del art. 578 CP como forma apologética específica, desconectada de lo dispuesto en el art. 18.1 CP para la modalidad genérica de la apología, el delito de enaltecimiento y humillación a las víctimas experimenta una flexibilización favorecida por su desconexión con la categoría del bien jurídico. Así las cosas, esta extensión permite incluir dentro del tipo del art. 578 CP la mera adhesión política o ideológica a los objetivos perseguidos por la actividad terrorista (PÉREZ CEPEDA, 2016: 18). Los límites a la libertad de expresión que impone la interpretación extensiva del delito de enaltecimiento pueden ser analizados desde la desproporción y la indeterminación del precepto, circunstancias que pueden favorecer este efecto de desaliento, a sabiendas de la posible sanción que podría acarrear una expresión de opiniones que pudiera ser interpretada como una justificación de actos terroristas. De acuerdo con lo expuesto, puede recordarse la integración realizada por la STC 136/1999, de 20 de julio[338], respecto del efecto de desaliento como parte del juicio de proporcionalidad en sentido amplio, cuestión que como indica CUERDA ARNAU “no

[338] STC 136/1999, de 20 de julio, FFJJ 20 y 29: “Precisamente por ello, una reacción penal excesiva frente a este ejercicio ilícito de esas actividades puede producir efectos disuasorios o de desaliento sobre el ejercicio legítimo de los referidos derechos, ya que sus titulares, sobre todo si los límites penales están imprecisamente establecidos, pueden no ejercerlos libremente ante el temor de que cualquier extralimitación sea severamente sancionada” (…) “es indudable que las conductas incriminadas son actividades de expresión de ideas e informaciones y constituyen una forma de participación política y, en consecuencia, una sanción penal desproporcionada puede producir efectos de desaliento respecto del ejercicio lícito de esos derechos”.

persigue privar a las normas penales de su eficacia intimidatoria. Lo que prohíbe es que dicha eficacia intimidatoria se extienda a conductas que son limítrofes con el legítimo ejercicio de la libertad de expresión o que sancione éstas con desproporción manifiesta" (2007: 22). En este sentido la *vis expansiva* representada por el delito de enaltecimiento y humillación a las víctimas supone una colisión con la protección de la libertad de expresión reconocida en el art. 20 CE, tanto por la desproporción en la tipificación de las conductas, como por la coacción a la libre expresión de opiniones que representa el propio precepto desde la perspectiva del efecto de desaliento, integrado como se ha dicho en la estructura argumental de la prohibición de exceso. Dicha extensión se ve favorecida por la practica omisión de un criterio estable para la determinación del bien jurídico en el art. 578 CP, así como por la redacción típica del precepto.

Siguiendo con la indeterminación del bien jurídico protegido en los delitos de enaltecimiento del terrorismo y humillación a las víctimas, puede hacerse una última referencia al art. 578.3 CP, donde se establece que, cuando los hechos "resulten idóneos para alterar gravemente la paz pública o crear un grave sentimiento de inseguridad o temor a la sociedad o parte de ella se impondrá la pena en su mitad superior, que podrá elevarse hasta la superior en grado". De nuevo recurre el legislador a clausulas generales del tipo *paz pública*, *sentimiento de inseguridad o temor a la sociedad* para determinar una nueva agravación de la pena imponible, siendo la utilización de estas clausulas debatibles por diversas razones. En primer lugar, porque parecen regirse de forma casi exclusiva por una orientación político-criminal que deposita en la prevención general positiva una función de ordenación social donde la norma penal, representada aquí por el art. 578.3 CP, es considerada como un instrumento para conseguir la estabilización de las expectativas normativas del medio social, prescindiendo así del criterio del bien jurídico, puesto que no son estos los intereses que las normas penales protegen para esta propuesta, sino la preeminencia del propio sistema social a partir de la coacción que supone la pena[339]. De acuerdo con lo expuesto, la referencia a la protección de la *paz pública* y el resto de enunciados utilizados en el art. 578.3 CP permite una sobrecriminalización en los supuestos de enaltecimiento del terrorismo o humillación a las víctimas que, pese a las complicaciones de elaborar criterios o

[339] Sobre la funcionalidad de la pena como coacción, a partir de una realidad fáctica consistente en la existencia de un comportamiento contrario a la norma, JAKOBS señala que "está la coacción como portadora de un significado, portadora de la respuesta al hecho; el hecho, como hecho de una persona racional, significa algo, significa una desautorización de la norma, un ataque a su vigencia, y la pena también significa algo, significa que la afirmación del auto es irrelevante y que la norma sigue vigente sin modificaciones, manteniéndose, por lo tanto, la configuración de la sociedad. En esta medida, tanto el hecho como la coacción penal son medios de interacción simbólica". Cfr. *Derecho penal del enemigo*, Civitas, Navarra, 2006, pp. 24-25.

pronósticos para determinar qué expresiones pueden crear este grave riesgo para la *paz pública*, terminarán repercutiendo en una lesión de los derechos y libertades de los ciudadanos, viéndose limitado en este caso el ejercicio de la libertad de expresión.
En segundo lugar, la utilización de cláusulas generales para determinar esta agravación entraría en conflicto con el mandato de determinación como integrante del principio de legalidad penal. De acuerdo con la caracterización elaborada por NAUCKE (1973:1) las cláusulas generales presentan un grado de indeterminación que no permite discernir su finalidad; una amplia generalidad que desvía el verdadero objeto de regulación y unos criterios vagos de determinación que impiden un procedimiento transparente para su concreción por los tribunales. En suma, permiten relativizar el contenido del mandato de determinación, como ha sido puesto de manifiesto por la jurisprudencia constitucional (STC 105/1998, de 8 de junio, FJ 2) al reconocer la contrariedad respecto del derecho a la legalidad penal de aquéllas "formulaciones tan abiertas por su amplitud, vaguedad o indefinición, que la efectividad depende de una decisión prácticamente libre y arbitraria del intérprete". Sobre esta cuestión, podría hacerse de nuevo referencia al efecto de desaliento, pero en referencia al incumplimiento del mandato de determinación respecto de los tipos penales. En este sentido, si bien la conexión no puede apreciarse de forma tan clara como respecto de la estructura argumental del principio de proporcionalidad, puede sin duda aportar, en palabras de CUERDA ARNAU, una "exigencia adicional de justificación frente a tipos que, pese a su relativa indeterminación, superan el filtro de legalidad" (2007:26). En consecuencia, puede concluirse que la modalidad doblemente agravada del art. 578.3 CP presenta una redacción donde parece abandonarse no sólo el criterio del bien jurídico, tónica reconocida en el marco legal del delito de enaltecimiento y humillación a las víctimas, sino donde también son desatendidas las exigencias derivadas del principio de legalidad penal.

En este apartado ha sido analizado el régimen jurídico del delito de enaltecimiento del terrorismo y humillación a las víctimas posterior a la reforma operada por la LO 2/2015. Como se ha puesto de manifiesto, las modificaciones han venido a introducir un mayor rigor punitivo, como muestra la agravación contenida en el art. 578.2 CP, que prácticamente deviene en la modalidad genérica para apreciar la comisión de este hecho delictivo. Igualmente la modalidad doblemente agravada del art. 578.3 CP cierra un régimen jurídico donde se abandona la protección de la libertad de expresión a la interpretación judicial resultante de clausulas generales tan peligrosas como *paz pública* o *sentimiento de inseguridad*.

2.4. ¿Los sentimientos como bien jurídico-penal?

La afección a la libertad que produce el tratamiento penal de cualquier conducta obliga a fundamentar éste justamente en su trascendencia para la propia Libertad; en otros términos, si nos tomamos en serio el principio general de libertad; es decir, que ésta es el valor superior del Ordenamiento jurídico de acuerdo con el artículo primero de la Constitución, su limitación ha de estar fundamentada. Y esa es la función que la denominada "concepción procedimental" del bien jurídico atribuye a éste: no puede ser concebido como un objeto, sino en términos de justificación, lo que debe ser considerado también desde el principio de proporcionalidad o de prohibición de exceso, en virtud del que ha de reputare inadmisible cualquier límite a la libertad derivado de una intervención estatal –y la norma penal constituye el principal- que no esté suficientemente justificado en virtud de su necesidad para la tutela de la propia libertad (MIR, 2012: 75).

Recientemente se ha subrayado que todo esto debe traducirse en una doble exigencia –además de la de su simple existencia- en las cualidades que debe reunir un bien jurídico para fundamentar, junto con otros requisitos, la intervención penal: debe pertenecer al sistema de valores constitucional y ser expresión del libre desarrollo de la personalidad o, si se prefiere, constituir una condición externa para el ejercicio de la libertad (CARBONELL MATEU, 2017) Se trata, en definitiva, de considerar que el legislador democrático no es libre para hacer uso –y abuso- del Derecho penal, sino que necesita fundamentar su decisión política de prohibir una conducta y amenazar su verificación culpable con una pena; es decir, con la privación o al menos reducción de derechos fundamentales. Y ello debe dejar por fuera de la legitimación a unas cuantas figuras incluidas en el Código Penal.

En este punto, revisten especial importancia los delitos contra los sentimientos; es decir, aquéllos que se pretenden justificar en la medida en que las conductas que prohíben causarían daño a los sentimientos legítimos de los ciudadanos, produciendo su desagrado, indignación o repugnancia e incluso generando odio. Por supuesto, que para que nos cuestionemos su validez es necesario subrayar que los sentimientos constituyan su único fundamento, no afectando a derechos o valores que aparezcan como los auténticos centros de ataque: un atentado terrorista que ocasione decenas de muertos y centenares de heridos, como el que acaba de producirse en Barcelona, genera una grave lesión a los sentimientos generales pero, obviamente, ésta no es sino consecuencia de la gravísima lesión de los derechos fundamentales: vida, integridad, libertad, etc. Así,

distingue HÖRNLE entre delitos que afectan a derechos de terceros y delitos exclusivamente contra los sentimientos, si bien éstos pueden aparecer encubiertos con el ropaje de un bien jurídico ambiguo e instrumental como la “paz pública” (2007: 383 ss.).[340]

Por su parte GIMBERNAT distingue entre sentimientos que coliden con “otro interés preponderante constitucionalmente protegido: el de que cualquier persona tiene derecho a la libertad ideológica, al libre desarrollo de la personalidad y a no ser discriminada por su condición o circunstancias personales (arts. 10.1, 14 y 16 CE), lo que sucede, por ejemplo, con el rechazo a las conductas sexuales libres entre adultos (GIMBERNAT, 2013: 139 ss.) y los sentimientos legítimos, sobre los que no prevalece derecho alguno del autor, como sucede, en su opinión, con el maltrato de animales ya que no existe “ningún derecho del maltratador a desarrollar libremente su personalidad haciendo sufrir a los animales” (GIMBERNAT, 2013: 139 ss.). La distinción es aparentemente evidente: en el primer caso, estaríamos ante una invasión injustificada de la libertad, pues prohibiríamos conductas constitutivas del ejercicio de derechos fundamentales que sólo afectan a los sentimientos de una minoría, o de la mayoría que eso resulta indiferente, en su pretensión de imponer una moral dominante (“ética social dominante” en la terminología del primer WELZEL), mientras que en el segundo caso la imposición de los sentimientos “legítimos” prevalecería sobre una conducta sobre la que no se reconoce derecho alguno. Con independencia, de momento, del reconocimiento internacional del rechazo al maltrato animal, recogido por Gimbernat, y que puede proporcionar argumentos a favor de la prohibición de la por otra parte tan deleznable conducta, es preciso volver sobre la idea básica de que el bien jurídico-penal ha de ser expresión del libre desarrollo de la personalidad: no se trata, por tanto, de hallar un derecho que prevalezca sobre la prohibición, sino de fundamentar ésta en que lesiona o, al menos, pone en riesgo el ejercicio del libre desarrollo de la personalidad: el problema no es si la decisión política de prohibir ha de ceder ante un derecho fundamental que prevalece sino si existe un derecho fundamental cuya necesidad de tutela justifica la decisión política de prohibir. Y, por tanto, continúa la duda de si los sentimientos constituyen o no un derecho fundamental digno, susceptible y necesitado de tutela penal. La respuesta penal al maltrato animal sólo puede justificarse si entendemos que sí

[340] Por supuesto pueden intentarse acepciones más concretas de la paz pública. Pero entonces este concepto aparece fuertemente ligado a los derechos fundamentales, lo que no es el caso de las figuras a las que se refiere la profesora de la berlinesa Humboldt Universität y bajo cuya rúbrica recoge el Código penal alemán.

o si consideramos que en este caso hay “algo más” que sentimientos, porque como diría Tatjana HÖRNLE, hay derechos de terceros.[341]

Porque ningún uso del Derecho penal puede considerarse inocuo para la Libertad ni, por tanto, para los derechos. Por eso debe justificarse y no puede bastar con el no reconocimiento de un derecho específico que se vea dañado por la prohibición y que deba prevalecer sobre ésta. Se trata de justificar la restricción a la libertad precisamente en razón de que la conducta prohibida, de llevarse a cabo, afectaría a derechos de las personas. Por eso no parece aceptable la diferenciación propuesta por GIMBERNAT, sencillamente porque todo recurso al Derecho penal afecta a derechos y para que sea legítimo ha de prevalecer sobre éstos en virtud de que proporcione un mayor beneficio. Los sentimientos son, casi siempre, legítimos; pero eso no es suficiente para que se convierten en bienes jurídicos dignos de tutela penal. Por el contrario, sólo si el tipo tutela “algo más” que los puros sentimientos podrá, siempre que ese “algo más” pertenezca al sistema de valores constitucional y sea expresión del libre desarrollo de la personalidad de los ciudadanos, justificarse.

Otros supuestos en los que se ha planteado una objeción doctrinal seria a su consideración como delitos porque carecen de mayor significación que la de un ataque a los sentimientos revestidos de “paz pública”, falsa libertad sexual o ética social dominante son los llamados “delitos de odio”, como la negación del Holocausto o “mentira de Auschwitz,”[342] , el de incesto entre consanguíneos o los ultrajes a difuntos (HÖRLE, 2007: 390; CARBONELL, 2017). Pero en lo que ahora queremos detenernos es en aquellas figuras delictivas que afectan a la libertad de expresión, auténtico derecho fundamental en una Democracia, y que no encuentran una fundamentación adecuada más allá de que afecten a los sentimientos generales, la “paz pública” mal entendida o, simplemente, el discurso ético y, sobre todo político, dominante. Lo que sucede con la desmedida extensión –cada vez mayor- que en el Código Penal español ha adquirido el

[341] Que no podrían ser los propios animales, como parece pretender ROXIN, al referirse a nuestros “hermanos lejanos” (fremde Br üder), CLAUS ROXIN, *Strafrecht,* 4. Aufl.München, Verlag Beck.,
&2,VI,nm.21, p.18

[342] De la que ha dicho ROXIN: “La negación total o parcial de hechos históricos que no supone una aprobación del delito no perjudica la vida en común de las personas vivas, sobre todo porque estos hechos se han probado y su realidad histórica es generalmente reconocida. El auténtico sentido del precepto es mostrar que hoy en día Alemania es un estado purificado que no silencia u oculta los delitos de la época de Hitler. Tal finalidad es digna de encomio. Sin embargo, su persecución no sirva a la protección de bienes jurídicos, y por ese motivo es ilegítimo usar el Derecho penal para su obtención.” CLAUS ROXIN, ;“¿Es la protección de bienes jurídicos una finalidad del Derecho penal?”, en R.Hefendehl (ed) *La teoría del bien jurídico ¿Fundamento de legitimación del Derecho penal o juego de abalorios dogmático,* cit., p. 451

enaltecimiento del terrorismo, al que se añade el menosprecio a las víctimas, figuras que van desde luego “más allá de la provocación y la injuria”, desbordando el ámbito de lo que GIMBERNAT denomina “sentimientos legítimos” para invadir la zona de las prohibiciones penales que atentan “sólo contra los sentimientos”. Si a eso añadimos, como vamos a ver, una interpretación jurisprudencial sumamente extensiva, corremos el riesgo de estar penetrando en el terreno del delito de opinión o, si se prefiere, del delito político (CUERDA ARNAU, 2007; MIRA, 2014; CORRECHER, 2015).

3. Redes sociales y enaltecimiento del terrorismo

En la actualidad, no cabe la menor duda de que la revolución digital acontecida en el s. XXI ha supuesto una modificación en los usos sociales propios de una ciudadanía que adapta a esta nueva realidad su forma de comunicarse y expresarse en el medio social. En este sentido, puede afirmarse que la dependencia de las redes sociales, así como la exacerbación del individualismo que representan, supone un paso más en las nuevas formas de control social derivadas de la denominada como *sociedad de la transparencia*[343]. En este contexto, la vida social pasa a ser una mercancía más, viéndose esta revolución tecnológica potenciada por la hegemonía del pensamiento neoliberal presente en las sociedades occidentales.

De este modo, la dependencia de los ciudadanos por encontrarse conectados a la red supone una muestra palpable de cómo puede desnaturalizarse algo tan cotidiano como expresar una opinión o un sentimiento, como consecuencia de una malentendida transparencia que lleva a banalizar el alcance de una noción tan básica como la libertad de expresión. Esta postura no viene a criticar *per se* la expresión de opiniones mediante la utilización de las redes sociales, sino más bien fundamentar una reflexión sobre los riesgos que supone la asunción, ahora mismo indiscutible, de las aplicaciones resultantes de la revolución digital como forma preeminente de comunicación y expresión. Esto no obsta para reconocer que, en determinados aspectos, la utilización de las redes sociales ha supuesto un avance indudable en la democratización de cuestiones tales como los medios de comunicación o el discurso político, así como para la fiscalización por la ciudadanía de la actividad de los poderes públicos.

[343] Sobre esta cuestión, pueden apuntarse algunas ideas del filosofo germano-coreano BYUNG-CHUL HAN, donde establece una crítica al capitalismo y la sociedad del trabajo de acuerdo con su estudio de los procesos de desarrollo tecnológico y su relación con la transparencia, incluyendo en su propuesta las nuevas formas de vigilancia y control social derivadas de la revolución digital. Vid., entre otros, *La sociedad de la transparencia*, Herder, Barcelona, 2013.

Conectando esta realidad social con el estudio de los delitos de enaltecimiento del terrorismo y humillación a las víctimas, puede criticarse el activismo judicial desarrollado en los últimos meses por la Audiencia Nacional para la apertura de procedimientos por enaltecimiento del terrorismo o humillación a las víctimas en las redes sociales. En estos procedimientos se estudia el comportamiento en relación con el art. 578.1 CP, dado que todavía no sería aplicable la agravación del art. 578.2 CP por no encontrarse en vigor en el momento en que se sucedieron los hechos.

En los casos que se plantearán a continuación como muestra de esta tendencia, parece relativizarse el significado del delito de enaltecimiento del terrorismo y humillación a las víctimas, especialmente por la relevancia mediática que han tenido estos procedimientos. Efectivamente, la interpretación realizada por los órganos jurisdiccionales parece seguir una línea político-criminal dirigida, más que al tratamiento preventivo-penal de la actividad terrorista, a la criminalización de determinadas opciones políticas o ideológicas que pudieran haber servido históricamente como justificación de la actividad terrorista. Además, la función expansiva del delito estudiado termina afectando a opciones políticas alternativas, desconectadas del relato terrorista propio del siglo XX en España, como lo son el movimiento político surgido a partir del 15-M y sus posteriores ramificaciones en la sociedad civil.

Sobre esta cuestión, puede citarse el caso de Guillermo Zapata, uno de los supuestos mediáticos que a buen seguro hicieron reflexionar al legislador español sobre la introducción del nuevo régimen agravatorio del art. 578 CP. En este caso, el concejal del Ayuntamiento de Madrid fue absuelto por la Sentencia de la Audiencia Nacional (SAN) 35/2016, de 15 de noviembre de 2016, después de ser investigado por un delito de humillación a las víctimas a causa de una serie de comentarios en la red social Twitter[344]. En su resolución, la Audiencia Nacional considera que no se cumple el elemento objetivo del tipo dado que “*no se percibe el ánimo injurioso, o maltratador, ante la falta de continuidad, que nos situaría en el marco de un debate, que elimina el enfoque renovado de agravio que exige el tipo penal ‘realización de actos’, dado que el comentario siguiente nos sitúa antes las víctimas del holocausto. Es por ello, que si se analiza la frase en el contexto cercano, se aprecia que el otro mensaje resulta ajeno a la temática, se utiliza también en una similar clave de humor hacia todas las víctimas*

[344] Por ejemplo, en un debate sobre los límites del humor, escribió los siguiente mensajes en Twitter: “han tenido que cerrar el cementerio de las niñas de Alcasser para que no vaya Irene Villa a por repuestos (…) ¿cómo meterías a cinco millones de judíos en un 600? en el cenicero”.

en ambos comentarios, lo que es objetivamente una derivación de humor macabro que se sustenta sobre toda clase de ofendidos por hechos delictivos sean o no de naturaleza terrorista. Existe un parangón entre todas ellas, y no específicamente por ser una de las ofendidas directamente perjudicada por hecho de la banda terrorista ETA"[345]. Así las cosas, se valora la falta de conexión de los mensajes para apreciar la inexistencia de un delito de humillación a las víctimas, siendo además de especial importancia la consideración de que estas expresiones fueron proferidas en el contexto de un debate sobre los límites del humor. Asimismo, debe considerarse que en el momento de realizar dicho comentario éste no tuvo ninguna repercusión, sino que fue su nombramiento como concejal de cultura del Ayuntamiento de Madrid la causa de que se desatara la polémica por sus comentarios.

También dictó sentencia absolutoria la Audiencia Nacional (SAN 20/2016, 18 de julio de 2016) en el procedimiento por delito de enaltecimiento del terrorismo y humillación a las víctimas dirigido contra Cesar Montaña, más conocido como Cesar Strawberry, cantante del grupo Def Con Dos[346]. No obstante, ante dicha sentencia presentó recurso de casación el Ministerio Fiscal, dando como resultado la posterior condena a Strawberry en la Sentencia del Tribunal Supremo (STS) 4/2017, de 18 de enero. Esta resolución comienza reconociendo la crítica realizada previamente a las redes sociales como nuevo escenario de control social, al considerar de qué manera "*la extensión actual de las nuevas tecnologías al servicio de la comunicación intensifica de forma exponencial el daño de afirmaciones o mensajes que, en otro momento, podían haber limitado sus perniciosos efectos a un reducido y seleccionado grupo de destinatarios. Quien hoy incita a la violencia en una red social sabe que su mensaje se incorpora a las redes telemáticas con vocación de perpetuidad. Además, carece de control sobre su zigzagueante difusión, pues desde que ese mensaje llega a manos de su destinatario éste puede multiplicar su impacto mediante sucesivos y renovados actos de transmisión*"[347]. Así las cosas, la STS 4/2017 parece reconocer en los medios resultantes de la revolución digital un mayor impacto por lo que respecta a la extensión de aquélla expresión de opiniones que pueda incardinarse dentro del delito de enaltecimiento del terrorismo y humillación a las víctimas.

[345] SAN 35/2016, de 15 de noviembre de 2016, FJ 2.

[346] Utilizando la red social Twitter emitió, entre otros, los siguientes mensajes: "el fascismo sin complejos de Aguirre me hace añorar hasta los GRAPO"; "Street Fighter, edición post ETA: Ortega Lara versus Eduardo Madina"; "Cuántos deberían seguir el vuelo de Carrero Blanco".

[347] STS 4/2017, 18 de enero, FJ 2.

Por lo que respecta al reconocimiento de los elementos del tipo, la STS 4/2017 los considera probados por la "*plena conciencia y voluntad de que se está difundiendo un mensaje en el que se contiene una evocación nostálgica de las acciones violentas de un grupo terrorista que se menciona con sus siglas de forma expresa y en el que se invita a otro grupo terrorista, fácilmente identificable por la identidad de algunas de sus víctimas, a repetir el secuestro más prolongado de nuestra reciente historia. Es así como queda colmada la tipicidad subjetiva del delito por el que el Fiscal formula acusación. La afirmación de que César Montaña no perseguía la defensa de los postulados de una organización terrorista y de que tampoco buscaba despreciar a las víctimas, es absolutamente irrelevante en términos de tipicidad. La estructura típica del delito previsto en el art. 578 del CP no precisa la acreditación de con qué finalidad se ejecutan los actos de enaltecimiento o humillación*"[348]. Este razonamiento no hace más que confirmar la posición del delito de enaltecimiento del terrorismo en el ordenamiento jurídico-penal español, completamente desvinculado del entendimiento tradicional dado a las formas apologéticas como actos preparatorios, en la medida en que termina siendo un precepto de difusa concreción, introducido en el sistema penal español para la persecución penal de aquéllas opiniones que pudieran tener una mínima conexión con la justificación política de los actos terroristas.

Sobre esta cuestión, no se valora el peligro potencial para la comisión de futuros delitos derivado del mensaje en que se concreta el enaltecimiento, sino la mera expresión de opinión o adhesión ideológica, desafortunada y debatible sin duda, pero libertad de expresión al fin y al cabo. En este sentido, puede destacarse el voto particular a la STS 4/2017 del magistrado Perfecto Andrés Ibáñez, al encuadrar las frases de Strawberry como "*expresivas de la subcultura de algunos grupos sociales, integrados preferentemente por sujetos jóvenes, duramente maltratados, en sus expectativas de trabajo y vitales en general, por las crueles políticas económicas en curso. Forman parte de una manera difusa de reaccionar, de contestar, aquí exclusivamente en el plano del lenguaje, la cultura de un establishment del que, no sin razón, se consideran excluidos*". Así las cosas, puede considerarse la necesidad de contextualizar este tipo de comentarios, en primer lugar a la propia realidad derivada del uso masivo de las redes sociales, pero también a las prácticas propias de toda una generación que, ante la existencia de una situación social de conflicto y precariedad, canalizan su emergencia mediante esta forma agresiva, también desafortunada, de responder mediante la utilización del lenguaje en el que se mueven con mayor comodidad. En este sentido,

[348] *Ibid*, FJ 3.

puede reconocerse en el debate sobre los casos de enaltecimiento del terrorismo mediante el uso de redes sociales una muestra de lo que se ha venido a denominar como *guerra cultural*, entendida como disenso respecto del pensamiento y usos sociales hegemónicos derivados de la transición española, siendo los límites de la libertad de expresión uno de los muchos campos de discusión que pueden apreciarse en el estado de cosas actual. De acuerdo con lo expuesto, el error cometido por los órganos jurisdiccionales es tratar de desarrollar mediante la aplicación extensiva de los tipos penales una suerte de reeducación que termina siendo, no sólo contraproducente, sino también contraria al disfrute de los derechos y libertades de la ciudadanía.

Para cerrar la crítica a este activismo judicial asumido por la Audiencia Nacional, puede citarse la SAN 9/17, de 29 de marzo de 2017, donde se castiga a la tuitera Cassandra por un delito de humillación a las víctimas[349]. En esta resolución la Audiencia Nacional considera probado el dolo requerido por el art. 578 CP, en tanto que consideran que la investigada tenía conocimiento de los elementos que definen el tipo objetivo, teniendo plena conciencia y voluntad de que se está difundiendo un mensaje en el que se contiene una merma de la dignidad de las víctimas del terrorismo y sus familiares. Sobre esta cuestión, la SAN 9/17 considera que esto "*ocurre cuando el mensaje de burla llega a la víctima en su integridad, sin matices aclaratorios de la verdadera intención del autor que lo suscribe. La memoria de su propia tragedia no adquiere otra tonalidad cuando el agente alega que ha sido expresado con sátira o que es fruto de la crítica ácida. En aquellos casos, los mensajes de burla y afrenta difundidos alimentan el discurso de odio, legitiman el terrorismo como fórmula de solución de los conflictos sociales y, lo que es más importante, obligan a la víctima al recuerdo de la lacerante vivencia del asesinato de un familiar cercano*"[350]. Como puede apreciarse en este argumento, asume la Audiencia Nacional una posición de defensa de las víctimas, entendiendo éstas desde una perspectiva extensiva, aceptando que una ofensa al sentir de éstas como colectivo justifica la apreciación del delito de humillación a las víctimas del art. 578 CP. Sobre esta cuestión, resulta especialmente paradójico que la SAN 9/17 busque proteger el interés de las víctimas, en primer lugar cuando los hechos sobre los que versan los chistes acontecieron en 1973, y teniendo además en cuenta que una de las potenciales víctimas directas, nieta de Carrero Blanco, criticó públicamente este proceso en un

[349] Entre los años 2013 y 2016, Cassandra publicó en su perfil de Twitter una serie de chistes de humor negro sobre el atentado que terminó con la vida de Carrero Blanco en 1973: "ETA impulsó una política contra los coches oficiales combinada con un programa especial"; "Kissinger le regaló a Carrero Blanco un trozo de la luna, ETA le pagó el viaje a ella"; "¿Carrero Blanco también regresó al futuro con su coche?. Además de los comentarios, aparecían en su perfil una serie de montajes satíricos sobre dicho atentado.

[350] SAN 9/17, de 29 de marzo de 2017, FJ 1.

artículo de opinión[351]. En consecuencia, resulta de nuevo preocupante la posición asumida por la Audiencia Nacional, donde su defensa a ultranza de cualquier comentario que pudiera resultar ofensivo a las víctimas como colectivo en abstracto venga a justificar el castigo por el delito de enaltecimiento del terrorismo y humillación a las víctimas.

4. Conclusiones

La reforma operada por la LO 2/2015 sobre delitos de terrorismo ha supuesto una modificación cualitativa en el delito de enaltecimiento del terrorismo y humillación a las víctimas del art. 578 CP. En este sentido, los cambios en la redacción típica del art. 578 CP, donde se castigan los actos públicos de enaltecimiento pero se trasladan los realizados mediante difusión pública de servicios o contenidos accesibles al públicos a través de medios de comunicación o internet a la modalidad agravada del art. 578.2 CP, ha supuesto *de facto* que esta agravación pase a ser la modalidad genérica del delito de enaltecimiento del terrorismo y humillación a las víctimas. Sobre esta cuestión, se ha criticado no sólo el rigor punitivo que representa, sino también la falta de proporcionalidad de la medida desde el punto de vista del efecto dogmático del efecto de desaliento en el ejercicio de los derechos y libertades por la ciudadanía. En este caso, la libertad de expresión se ve también claramente afectada por la propia indeterminación del art. 578 CP desde la perspectiva del mandato de determinación como integrante del principio de legalidad penal. Así ha quedado especialmente probado respecto del art. 578.3 CP, donde la remisión a cláusulas generales del tipo *paz pública* o *sentimiento de inseguridad* refuerza esta quiebra de la seguridad jurídica. Como ha podido argumentarse en este trabajo, es difícilmente argumentable la protección de los sentimientos como bien jurídico-penal, al menos en los términos en que éstos son utilizados por el legislador penal, si pretende también respetarse el principio general de libertad. Estamos, pues, ante un delito contra los sentimientos, que pretende fundamentar el reproche penal en el rechazo moral ante afirmaciones que producen indignación, y profundo malestar social, pero que no suponen riesgo alguno para la perpetración de delitos de terrorismo, ni en numerosas ocasiones llegan a lesionar el honor de personas vivas.

Asimismo, la remisión a estos términos, en conexión con el efectivo abandono del criterio del bien jurídico, muestra la preeminencia en las recientes reformas penales de

[351] http://politica.elpais.com/politica/2017/01/18/actualidad/1484767780_556799.html

la prevención general positiva en los términos del funcionalismo sistémico. Como consecuencia, esta limitación de la libertad de expresión parece confirmar la deriva autoritaria del ordenamiento jurídico español, propio de una *democracia autoritaria* o *democracia de carácter formal*.

Así las cosas, las recientes condenas por enaltecimiento del terrorismo y humillación a las víctimas mediante el uso de redes sociales dictadas por la Audiencia Nacional, también por el Tribunal Supremo en el caso Strawberry, muestran de qué manera, más que proteger al Estado contra la actividad terrorista, el art. 578 CP sirve como instrumento de control de la discrepancia política e ideológica, así como del necesario disenso en un Estado democrático de aquéllas opiniones que no pueden enmarcarse en el pensamiento político y cultural dominante. Por lo tanto, esta criminalización de los delitos de opinión no puede justificarse por el indudable mal gusto de ciertos comentarios proferidos en las redes sociales, ni tampoco por la repulsa que pueda causar en las víctimas entendidas como colectivo, en la medida en que supone una limitación de la libertad de expresión inasumible por un Estado democrático de derecho.

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PRAVNI OKVIR BORBE PROTIV TERORIZMA U ŠPANIJI I ZAŠTITA USTAVNIH PRINCIPA: POSEBNI OSVRT NA ZLOČINE PODSTAKNUTE TERORIZMOM

Apstrakt: *Ovaj rad daje pregled u pogledu kriminalne politike borbe protiv terorizma u španskom pravnom sistemu. U tom smislu, pored opisivanja pravnog okvira u skladu sa zakonskim reformama uvedenim u Krivičnom zakoniku, govori se o adekvatnosti i koherentnosti njegovih odredaba, u skladu s njihovim odnosom sa ustavnim principima. Shodno tome, moguće je naglasiti stav izuzetnosti španskog krivičnog sistema, koji je jasno određen prihvatanjem Krivičnog zakona o neprijateljskoj doktrini (Feindstrafrecht) kao vodećeg kriterijuma kriminalnih politika za borbu protiv terorizma u Španiji. Ovo je bio trend zakonskih okvira usvojenih u španskim kaznenim reformama kako bi se kontrolisale terorističke aktivnosti ETA-e, takođe i protiv novih pretnji bezbednosti koje predstavlja džihadistički terorizam*

Dalje, kako bi se objasnili konkretni slučajevi gde kriminalne politike borbe protiv terorizma predstavljaju sukob sa zaštitom ustavnih principa, govoriće se o razmatranju reforme navedene u zločinima podstaknutim terorizmom i ponižavanju žrtve, putem Zakona 2/2015 o terorističkim zločinima. U tu svrhu, razmatraju se propusti u zakonskom okviru, uzimajući u obzir stvaranje niza pravila gde je kažnjavanje smernica jer pokazuje mogućnost oštre kazne kada se ova ponašanja vrše putem društvenih mreža. U tom smislu, ovaj rad predstavlja pristup ograničenjima koja su nametnuta slobodi govora proširivanjem zločina na izjave na društvenim mrežama u vezi s političkim izborima ili izrazima crnog humora koji bi prema moralnim procenama mogli da se smatraju uvredljivim. Ovaj trend, koji je poslednjih meseci prihvatio Nacionalni sud, pretpostavlja mišljenja na društvenim mrežama koja nisu u vezi s terorizmom, ali se mogu smatrati neslaganjem u pogledu političke i kulturne hegemonističke ideologije, i kao takva biti predmet inkriminisanja.

Ključne reči: *borba protiv terorizma, kriminalne politike, Feindstrafrecht, ustavni principi, zločini podstaknuti terorizmom*

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ЗАЩИТА КЛАССИФИЦИРОВАННОЙ ИНФОРМАЦИИ В НАЛОГОВОЙ ПРОЦЕДУРЕ

Аннотация: *должностных лиц и всех других лиц, участвующих в налоговой процедуре, обязаны хранить информацию в качестве конфиденциальной любого документа, информации, данных или других фактов о налогоплательщике, а также информации о технических изобретений и патентов, а также вся другая информация о технологических процессах, используемый налогоплательщиком, и они получили в налоговом, проступке, предварительное следствие или судебном разбирательстве. В данной статье анализируется принцип государственной тайны в налоговой процедуре, который установлен в налоговом законодательстве Республики Сербии. Определяется как секретной информации в порядке, налоговой и подчеркивает обязанность их хранения. Отмечает ситуации, когда обязательство по защите секретной информации, не нарушенные.*

Ключевые слова: *налогоплательщик, официальный орган, налог процедуры, классифицированные данные.*

1. ВВЕДЕНИЕ

Налоговая процедура является специальной административной процедурой. Его дело - решение налоговых вопросов, как своего рода административный вопрос. Налоги включают в себя индивидуальную вещь, т.е. объект, который решается путем применения материально-правовых положений, связанных с налогами, к конкретному делу. Налоговая процедура включает в себя создание, сбор и контроль всех государственных доходов, взимаемых налоговыми органами.

Деятельность налоговых органов и других лиц, участвующих в процедуре отслеживания в реальном времени, в основном сводится к установлению фактов, которые делают содержание налогового материала. Важность определения фактов в налоговой процедуре отражается в том, что предмет этого разбирательства является налоговым вопросом, и его задача состоит в том, чтобы прояснить и

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решить этот вопрос, его фактической и правовой формулировки. В частности, задача участников налоговой процедуры заключается в том, что в ее инициированном и проведенном разбирательстве все юридически релевантные факты, которые имеют отношение к правильному применению налоговых правил к конкретному делу, что послужило поводом для начала разбирательства, определяются их деятельностью.

В Республике Сербия система налогообложения состоит из всех форм государственных доходов и доходов. Государственные доходы и доходы в Сербии вводятся законом или по решению местного собрания в соответствии с законом. Государственные доходы Сербии: 1) налоги, 2) взносы на обязательное социальное страхование, 3) неналоговые доходы - сборы, сборы, штрафы, доходы от использования государственных средств, 4) самопомощь и 5) пожертвования, переводы и финансовая помощь от Европейского союза. Общая характеристика системы государственных доходов современных государств заключается в том, что налоги являются наиболее важной формой государственных доходов. Государственные доходы: доходы от продажи нефинансовых активов; дебиторская задолженность по займам и поступлениям от продажи финансовых активов.

Во время налоговой процедуры может отображаться документ, информация, данные или другой факт о налогоплательщике или информация о технических заключениях или патентах или о технологических процедурах, применяемых налогоплательщиком, которые являются секретной информацией. Должностные лица и все другие лица, участвующие в налоговой процедуре, хранят такую информацию как служебную тайну.

Хотя это очень живой вопрос, который все еще строится в наших условиях, всегда должны быть гармоничные отношения между налоговыми органами с одной стороны и налогоплательщиком с другой стороны во время реализации налоговой процедуры.[352]

[352] Г. Милошевић, (2010), Јавне и монетарне финансије, Београд, стр. 122.

2. ПРОЦЕДУРА ЛЕЧЕНИЯ КАК СПЕЦИАЛЬНАЯ АДМИНИСТРАТИВНАЯ ПРОЦЕДУРА

Права и обязанности физических и юридических лиц в связи с определенными налоговыми и правовыми отношениями и налоговыми ситуациями регулируются материально-правовыми нормами, связанными с налогами, или материально-правовыми нормами, связанными с налогами. Налоговое законодательство охватывает правовые нормы, определяющие основные элементы налогообложения: налоговый должник, субъект налогообложения, налоговую базу, налоговую ставку и налоговые льготы. Эти нормы содержатся в налоговых правилах. Материальные и правовые нормы содержат абстрактные правовые нормы, которые необходимо применять в действительности, для чего необходимо применять применительно к конкретным делам налоговые материально-правовые нормы и определенные физические или юридические лица. Для правильного применения норм налогового законодательства к конкретным случаям применяются юридические правила, за которыми должны следовать налоговые органы и физические и юридические лица при применении налогового законодательства и других налоговых материалов и правовых норм к конкретным случаям. Правовые нормы, регулирующие порядок действий и действия налоговых органов, а также физических и юридических лиц в применении налоговых материалов и правовых норм к конкретным делам, называются налоговыми процедурами или налоговыми процедурами.[353] Правила налоговой процедуры также содержатся в налоговых правилах и называются налоговыми формальными правовыми нормами или налоговыми процессуальными и правовыми нормами или правилами налоговой процедуры. Таким образом, налоговая процедура означает правила, определяющие порядок действий и действия налоговых органов, а также физических и юридических лиц при применении налоговых требований к конкретным случаям.

Поскольку применение налоговых материальных и правовых норм к конкретным случаям осуществляется через налоговое законодательство, в основном посредством налоговых административных актов, правила налоговой процедуры определяют компетенцию налоговых органов, которые уполномочены применять налоговые правила к конкретным случаям, а также конкретные способы действий, т.е. действия, которые должны выполнять налоговые органы при принятии

[353]Г. Милошевић, М. Кулић, (2015), Пореско право, Нови Сад, стр. 143.

налогового акта.[354] Эти правила должны позволять собирать все факты, на основе которых должен быть принят налоговый административный акт. Правила налоговой процедуры определяют права и обязанности налоговых дебиторов и других лиц, участвующих в налоговой процедуре. Соответственно, налоговые формальные правовые нормы направлены на обеспечение правильного применения налогового материального законодательства. Без предписанных правил налоговой процедуры может возникнуть произвол и произвол налоговых органов, что может привести к неправильному применению налогового материального законодательства.

Существенная налоговая процедура включает в себя несколько взаимосвязанных и обусловленных действий: создание, сбор и контроль государственных доходов. Определение государственных доходов следует понимать как часть налоговой процедуры, которая представляет собой ее первый этап. Налоговая оценка - это деятельность налогового органа и налогового дебитора, которая необходима в каждом налоговом отношении, с целью определения наличия налогового обязательства и оценки как объективных, так и субъективных элементов юридического описания налогового бюллетеня с целью конкретного определения налоговой задолженности.[355] В соответствии с процедурой определения государственных доходов соблюдается порядок сбора государственных доходов, а затем процедура контроля, которая осуществляется в порядке и порядке, установленных законом.

2. Отношения между налоговой процедурой и общей административной процедурой - это отношения, характерные для общего. Налоговая процедура регулируется Законом о налоговой процедуре и налоговой администрации[356]. Если по другому закону вопрос в области налоговой процедуры регулируется иным образом, применяются положения этого закона. Если законом о налоговой процедуре и налоговой администрации не предусмотрено иное, налоговая процедура проводится в соответствии с принципами и в соответствии с положениями Закона об общей административной процедуре. Это означает, что Закон об общей административной процедуре служит дополнительным

[354]Г. Милошевић, М. Кулић, (2015), Пореско право, Нови Сад, стр. 181.

[355]Г. Милошевић, М. Кулић, (2015), Пореско право, Нови Сад, стр. 182.

[356]„Службени гласник РС“, број 80/02, 84/02 - испр., 23/03 –испр., 70/03, 55/04, 61/05, 85/05 - др. закон, 62/06 - др. закон, 63/06 - испр. др. закона, 61/07, 20/09, 72/09 - др. закон, 53/10, 101/11, 2/12 - испр., 93/12, 47/13, 108/13, 68/14, 105/14, 91/15 –аутентично тумачење, 112/15, 15/16 и 108/16.

(дополнительным) законом в применении Закона о налоговой процедуре и налоговой администрации.

В налоговой процедуре применяются правовые нормы, регулирующие отношения между налоговыми органами и налогоплательщиками и другими налоговыми дебиторами. Особенность налоговой процедуры в отношении общей административной процедуры отражается в том, что практическая цель отношений налогового права - обеспечить государство достаточным доходом, необходимым для выполнения его функций - достигается за счет обязанности уплаты налогов. Хотя налоговые отношения также содержат официальный (административный) компонент, можно сделать вывод, что элемент собственности (материала) преобладает в налоговых отношениях.

3. Закон о налоговой процедуре и налоговой администрации применяется ко всем государственным доходам, взимаемым налоговой администрацией, если иное не регулируется другим налоговым законодательством. Термин «налог» используется в Законе в более широком смысле, т. е. он определяет все государственные доходы, взимаемые налоговой администрацией. Поэтому при определении формы государственных доходов, к которым применяется настоящий закон, необходимо определить, предусматривает ли другое налоговое законодательство, что налоговые органы не взимают какую-либо форму государственных доходов.

Закон о налоговой процедуре и налоговой администрации применяется к так называемому субординированные налоговые льготы, которые включают: 1) проценты, основанные на зрелых и неоплаченных налогах, и 2) расходы на процедуру принудительного взыскания.

Закон о налоговой процедуре и налоговой администрации также применяется к первоначальным государственным доходам органов местного самоуправления, которые определяются, взимаются и контролируются подразделениями в публичных правовых отношениях, а также от дополнительных налоговых льгот по этим основаниям.

3. УЧАСТНИКИ В НАЛОГОВОЙ ПРОЦЕДУРЕ

Некоторые субъекты фигурируют в налоговой процедуре, участие которой необходимо для выполнения задачи этой процедуры, т. е. освещение и решения налоговых вопросов. Эти субъекты являются держателями определенного фонда прав и обязанностей, реализация которого является задачей налоговой процедуры. Их деятельность проявляется в виде различных процессов.

Права и обязанности отдельных участников налоговой процедуры не совпадают, поэтому их позиция в налоговой процедуре различна, и поэтому их вклад в решение налоговых вопросов также различен. А именно, существуют организации, которые несут основные виды деятельности в налоговой процедуре и без которых налоговая процедура не может быть начата, а затем и ее собственный курс. Однако в дополнение к основным видам деятельности и владельцам этих видов деятельности существуют другие менее важные виды деятельности в налоговой процедуре, которые в меньшей степени способствуют реализации основной задачи и цели налоговой процедуры. Владельцы этих видов деятельности являются субъектами, роль которых является второстепенной. Эти организации, участвуя в налоговой процедуре, помогают и в первую очередь содействуют истинному определению фактов в налоговой сфере. Начиная с роли участников налоговой процедуры, их можно разделить на: 1) основных или обязательных участников налоговой процедуры и 2) возможных участников.

Основным, то есть обязательными участниками являются основные виды деятельности в налоговой процедуре. В качестве обязательных участников налоговой процедуры появляются: (1) налоговый орган, уполномоченный на проведение налогового разбирательства, и (2) налоговые дебиторы - в качестве сторон, которым проводится налоговая процедура. Налоговая процедура разрешается управлять налоговой администрацией и компетентными органами органов местного самоуправления. Бывают случаи, когда взносы определяются принудительной организацией социального обеспечения. При ввозе товаров, налога на добавленную стоимость и акциза в таможенной процедуре рассчитываются и собираются таможенной администрацией. Помимо налоговых дебиторов, налогоплательщики также участвуют в налоговой процедуре.

В качестве потенциальных участников налоговой процедуры могут быть: (1) свидетели; (2) эксперты и (3) переводчики.

4. ОТНОШЕНИЯ КОРРЕСПОНДЕНТА

1. Деятельность обязательных участников налоговой процедуры ведет к их взаимным налоговым отношениям. Налоговое право относится к отношениям публичного права, в которых орган, ответственный за проведение налоговой процедуры, и физическое или юридическое лицо в связи с урегулированием налогового вопроса выходят на поле. Соответственно, сторонами налоговых отношений являются орган, ответственный за проведение налоговых процедур, с одной стороны, и физического или юридического лица-с другой. Содержание налоговых отношений представляет собой права и обязанности в налоговой процедуре указанных сторон.

2. Отношения налогового законодательства имеют определенные характеристики. Его особенности и юридические особенности: 1) предметы; 2) метод установления; 3) условия формирования; 4) причина установления и 5) способ разрешения споров.

а) Субъектами налогового законодательства являются органы, ответственные за администрирование налоговой процедуры, а также физические или юридические лица. Поэтому одна сторона этих отношений всегда должна быть органом, ответственным за администрирование налоговой процедуры.

б) Налоговые отношения являются публично-правовыми отношениями и, по самой своей природе, являются административными отношениями. Это означает, что инициирование и исход налоговой процедуры не зависят от воли сторон, т. е. налогового органа и налогового дебитора, но из императивных норм, требующих возбуждения разбирательства, когда есть основание для сбора какого-либо налога. Правовые отношения не основаны на соглашении субъектов, входящих в нее, а на основе односторонней более сильной воли органа, ответственного за проведение налоговой процедуры, в качестве одного из обязательных участников всех налоговых отношений. Более сильная воля налогового органа в этом отношении проявляется также в принятии налогового административного акта по просьбе физического или юридического лица, поскольку налоговый орган в соответствии с налоговым законодательством независимо определяет, будет ли претензия

соблюдаться и если она будет импортирована - в какой степени признать это требование.

в) Наложение налоговых отношений на основании акта органа, ответственного за проведение налоговой процедуры, не зависит от его нахождения. Налоговый орган обязан установить налоговые отношения, если в соответствии с налоговыми правилами установлены определенные конкретные факты и условия. Так, например, когда налоговый орган определяет, что налоговый дебитор не подал налоговую декларацию, которую он обязал, он обязан принять меры для определения налогового обязательства в конкретном случае. Одним из условий для действия налогового органа в отношении характера налогового административного акта является то, что он, применяя налоговые правила, генерирует, изменяет или отменяет налоговые отношения, т. е. создавать, изменять или отменять права и обязанности налоговых дебиторов, к которым применяется данный акт. Соответственно, налоговый должник, который был участником налоговой процедуры, обязан действовать на увеличение, содержащееся в акте. Кроме того, налоговый административный акт имеет определенные юридические последствия в отношении налогового органа. Это означает, что налоговый административный акт является обязательным как для налогового дебитора - стороны в налоговой процедуре, так и для налогового органа.

g) Налоговое законодательство основано на урегулировании налоговых вопросов.

d) Споры, возникающие из налоговых отношений, урегулируются в административной процедуре; в административном споре.

3. Налоговое отношение имеет два компонента: 1) собственность (материал) и 2) процесс.

Имущественный (материальный) компонент налоговых отношений также называется отношением налоговой собственности. Этот компонент состоит из прав и обязанностей имущественного характера, которые включают в себя: обязательство по уплате налогов, обязательство по обеспечению налогового обязательства и обязательство выплачивать бок о бок физические льготы физическим или юридическим лицам и право налогового органа требовать выполнения этих обязательств. Объектом отношения налоговой собственности является то, что указаны права и обязательства, и это обязательство предоставить.

Процессуальная составляющая отношений между налогом и правом - это отношения, связанные с налоговыми отношениями, суть которых заключается в правах и обязанностях процесса. Права и обязанности определяются на основе норм, которые служат для решения налоговых вопросов. Объектом отношения налоговых отношений является то, что указаны в отношении прав и обязательств. Это обязательства совершения, упущения или страдания, которые включают: обязательство физического или юридического лица определять в соответствии с законом налог или, после вычета, взимать налог с лица налогоплательщика, вести предписанный учет, подавать налоговые декларации и для предоставления налоговым органам необходимой документации и данных обязательство не производить платежи иным образом, чем предписанное, разрешает пересмотр своих операций официальному лицу налогового органа и другим юридически установленным обязанностям совершать, упускать или страдать с целью своевременного и правильного налоговое мошенничество, а также право налогового органа требовать выполнения этих обязательств.

Хотя два компонента (свойство и процесс) отличаются налоговым законодательством, это соотношение представляет собой уникальное целое. Уникальность налогового законодательства связана с тем, что все его институты обращаются к одной цели - платить налоги[357].

5. ДОКАЗАТЕЛЬСТВО В НАЛОГОВОЙ ПРОЦЕДУРЕ

1. В налоговой процедуре определяются юридически релевантные факты или решающие факты. Их называют юридически релевантными фактами, поскольку на этих фактах право связано с определенными правовыми последствиями. Поскольку налоговое материальное право и процессуальные и правовые нормы применяются в налоговой процедуре, это факт, связанный с юридическими последствиями этих правил. В налоговой процедуре в основном определяются существенные юридически значимые факты. Вот факты, по которым связанные с налогом материальные и правовые нормы касаются применения этих правил. А именно, если на основании установленного материала юридически значимые факты создают условия для налогообложения, налоговый орган выдает налоговое решение, в котором оно будет определять налоговое обязательство в конкретном

[357]Д. Поповић, (1997),Наука о порезима и пореско право, стр. 20-21.

случае. Однако, поскольку материальные юридически значимые факты установлены в налоговой процедуре, они имеют равную стоимость и тот факт, что налоговые процессуальные и правовые нормы связаны с определенными последствиями. Важность этих фактов отражается в том факте, что при определении существенных юридически значимых фактов необходимо учитывать процессуальную форму участников налоговой процедуры. Факты, относящиеся к форме проведения процессуальных действий, а также наличие процессуальных предпосылок для проведения налоговой процедуры, называются процессуальными юридически значимыми фактами.

Все факты-материальные, юридически релевантные и процессуальные-юридически релевантны, которые определяются в налоговой процедуре по конкретному налоговому вопросу, вместе составляют юридически значимую фактическую ситуацию. Для установленной фактической ситуации налоговый орган применяет налоговое материальное право и процессуальное право, т. е. определяет, какие юридические последствия возникают из-за существования или отсутствия определенных фактов.

Факты, на основании которых решается налог, определяются путем доказательства или путем предоставления индивидуальных доказательств. Факты, которые установлены в налоговой процедуре и которые составляют содержание налоговых вопросов и, следовательно, составляют основу налоговых административных актов, являются более важными, чем доказательства, которые являются лишь средством определения этих фактов.

2. Доказательство в налоговой процедуре подразумевает действия, предпринятые налоговым органом в ходе разбирательства с целью установления наличия юридически значимых фактов, которые в соответствии с налоговыми правилами имеют значение для решения конкретной налоговой позиции[358]. Убедившись в том, что налоговый орган должен определить истинное положение дел, которое он должен выполнять для принятия налогового административного акта. Факты в налоговой процедуре определяются на основании доказательств. Свидетельством в налоговой процедуре является процессуальное средство, посредством которого налоговый орган, то есть должностное лицо, проводящее разбирательство, проверяет, являются ли действительными юридические факты для принятия налогового административного акта.

[358]Г. Милошевић, М. Кулић, (2015), Пореско право, Нови Сад, стр. 187.

В качестве доказательства в налоговой процедуре муж может использовать все, что подходит для определения фактической налоговой ситуации, на основании которой налоговый орган может принять законный налоговый акт. В качестве доказательства в налоговой процедуре используются налоговые доказательства, налоговый баланс, книги и записи, бухгалтерская отчетность, деловая документация и другие документы и информация, доступная для налоговой администрации, взимаемая с налогоплательщиков или третьих лиц, свидетельские показания, заключения экспертов-свидетелей, опросы и любые другие средства, с помощью которых можно установить факты.

Налоговая администрация может потребовать от налогоплательщиков и третьих лиц в установленный ими срок для проверки и проверки книг и записей, бухгалтерской отчетности, деловых документов и других документов и доказательств с целью определения фактов. Налогоплательщик и другие лица обязаны по требованию налогового органа и в срок, установленный налоговым органом, предоставить всю имеющуюся информацию, необходимую для определения фактов, относящихся к налогообложению. Запрос на информацию раскрывает, кто они и с чем они связаны, а также предупреждение о последствиях отказа в предоставлении информации или предоставлении ложной информации[359].

3. Следует ли определять факт или нет, должно быть определено официальное лицо, которое администрирует налоговую процедуру, в зависимости от того, может ли этот факт повлиять на решение налоговой статьи. Доказательства, как правило, выполняются при определении того, что спорные факты, или что должно быть доказано. Поэтому предмет доказательства в налоговой процедуре оспаривается юридически значимыми фактами. Юридически релевантные факты определяются на основе закона о налоговых материалах, который применяется в конкретном случае и на основании которого должен быть разрешен налоговый вопрос. Другими словами, налоговый орган узнает из основного налогового законодательства факты, которые должны быть определены, и, следовательно, факты, которые должны быть доказаны. Налоговая администрация не обязана

[359] Информације о чињеницама од значаја за опорезивање могу ускратити:чланови породице пореског обвезника, у смислу закона којим се уређује порез на доходак грађана;свештеник, адвокат, порески саветник, ревизор и лекар, о ономе што им је порески обвезник поверио или су у том својству сазнали, а односи се на пореску обавезу пореског обвезника.

определять факты, которые вызвала сторона, если они не влияют на решение конкретной налоговой позиции. Нет необходимости доказывать общеизвестные факты. Нет необходимости доказывать факты, существование которых предполагает закон, но разрешено доказывать отсутствие этих фактов, если иное не предусмотрено законом.

Официальное лицо налогового органа не ограничивается только доказательством, представленным какой-либо стороной, но оно также должно иметь юридически соответствующие факты, которые должны быть установлены ex officio, и в зависимости от каждого случая.

Поскольку представление доказательств-это принятие процессуальных действий, которые предусмотрены и регулируются налоговым процессуальным законодательством, налоговый орган обязан учитывать порядок и форму проведения этих действий.

6. ЮРИСДИКЦИЯ НАЛОГОВОГО АДМИНИСТРАЦИИ В РАЗЛИЧНОЙ И СОХРАНЕННОЙ ПРОЦЕДУРЕ

1. Налоговое управление имеет право издавать приказы о проступке или компетентный проступок суда подает просьбы о возбуждении уголовного дела за совершение налогового правонарушения, проступки, предусмотренные законодательством, регулирующим кассовый аппарат, нарушения в области обменных операций отделений и других видов деятельности в соответствии с законодательством, регулирующим валютные операции, а также правонарушения в области азартных игри[360]. Налоговыми нарушениями являются нарушения положений, содержащихся в налоговом законодательстве. Налоговое управление выдает распоряжения о проступках в соответствии с законом, применимым к нарушениям.

2. Налоговая администрация имеет право раскрывать налоговые правонарушения и их исполнителей и принимать соответствующие меры[361]. Налоговые преступления являются преступлениями, определенных законом, которые в качестве возможного результата в полной или частичном уклонении от уплаты налогов, составление и представления поддельных документов, относящихся к

[360]Члан 160 став 1 тачка 6 Закона о пореском поступку и пореској администрацији.

[361]Члан 160 став 1 тачка 5 Закона о пореском поступку и пореској администрацији.

налогообложению, ставя под угрозой сбор налогов и налоговый контроль, незаконный оборот подакцизных товаров и других незаконных действий, связанных с избегая и помогая избежать налогов.

Для выполнения операции по обнаружению и отчетности налоговых преступлений, а виновных должны установить налоговую полицию, в качестве отдельного структурного подразделения налоговой администрации. Налоговая полиция планирует, организует и выполняет эти задачи в соответствии с законом. Управление налоговой полицией осуществляет главный инспектор налоговой полиции, который по предложению министра финансов по финансам назначается правительством. Официальному знаку и удостоверению уполномоченного официального лица выдается инспектору налоговой полиции. Инспектор налоговой полиции при исполнении своих обязанностей должен иметь официальный знак и легитимность. Инспектор налоговой полиции должен иметь защитное оборудование с отметками налоговой полиции, внешний вид которых и случаи, в которых он используется, предписывается министром[362].

Для выявления налоговых преступлений и совершивших их лиц налоговой полиции в предварительного расследования выступает в качестве органа внутренних дел и имеет право, в соответствии с законом, принимать все меры ищется, за исключением ограничений на передвижение, за исключением. Налоговая полиция, в соответствии с положениями закона, регулирующих уголовный процессом, может приглашать и заслушивать подозреваемый, в том числе его задержания свидетеля до возбуждения уголовного дела, чтобы выполнить жилище, бизнес или другие помещения, транспортные средства и лицо, где Есть веские основания полагать, что он совершил налог совершить уголовное преступление и сделать временный захват объектов, которые могут служить доказательством в уголовном судопроизводстве за налоговые правонарушения. Поиск квартиры и других помещений может осуществляться только на основании постановления суда и в присутствии двух свидетелей. Налоговая полиция осуществляет эти полномочия самостоятельно или в сотрудничестве с Министерством внутренних дел. В Министерстве внутренних дел налоговая полиция также реализует другие формы сотрудничества. Форма и способ осуществления такого сотрудничества должны согласовываться с их актом, который более тесно регулируется министром финансов и министром по

[362]Члан 161 и 182 Закона о пореском поступку и пореској администрацији.

внутренним делам. Налоговая полиция обязана сотрудничать с судом и прокуратурой в уголовном судопроизводстве.

Если налоговый инспектор в порядке налогового контроля определяет, что факты и обстоятельства, свидетельствующие о существовании оснований для подозрений, что он совершил уголовное налоговое правонарушение, обязан составить отчет об этом, и что он, вместе с доказательства, полученные, менеджер немедленно компетентному налоговой администрации. Компетентный менеджер налоговой администрации в течение 24 часов с момента получения отчета направляет этот отчет доказательствам главе налоговой полиции.

Если налоговый инспектор в порядке налогового контроля определяет, что факты и обстоятельства, свидетельствующие о существовании оснований для подозрений, что является уголовным преступлением и в других областях, или правонарушение, в отношении которого налоговая администрация не имеет юрисдикции, налоговая администрация возбудила уголовное или проступка обвинения в компетентный государственный орган.

На основании собранной информации налоговая полиция составляет уголовный отчет с указанием доказательств, которые он узнал при сборе уведомления и представлении его прокурору. В дополнение к уголовным обвинениям, представлены документы, отчеты, заявления и другие материалы, имеющие отношение к успешному проведению разбирательства. Если налоговая полиция, после подачи уголовного обвинения, новые фактов, доказательства или улик в совершении уголовного преступления, собирает необходимую информацию и сообщать об этом, в качестве дополнения к уголовной жалобе, произнесенное в прокуратуру. Если он считает, что действия лиц, не имеют налоговые элементы преступления, но они представляют собой другие наказуемые преступления, инспектор налоговой полиции представит соответствующее заявление в компетентный орган.

7. СУДЕБНЫЙ КОНТРОЛЬ НАЛОГОВОЙ ПРОЦЕДУРЫ

Закон о налоговой процедуре и налоговое администрирование также предусматривает судебное рассмотрение налоговой процедуры, которая заключается в передаче компетентному суду полномочий для разрешения определенных споров, возникающих в налоговой процедуре. Предписывается, что

административный спор может быть возбужден против окончательного налогового административного акта, если законом не предусмотрено иное[363]. В административном споре по налоговым вопросам спорные ситуации возникают в связи с налоговыми отношениями. Спорные правовые ситуации в налоговых отношениях возникают, когда налоговая администрация, представляющая одну сторону в налоговых отношениях, передает такой налоговый административный акт, который противоречит закону. Одним из основных принципов работы налоговой администрации является принцип законности, провозглашенный Законом о налоговой процедуре и налоговой администрации. Однако, несмотря на правовое положение на принципе законности в работе налоговой администрации, факт заключается в том, что налоговая администрация кадастра принимает налоговые административные акты, противоречащие закону, что наносит ущерб налогоплательщикам в налоговой процедуре, или они признают, какую выгоду они не имеют права на , Из того факта, что незаконный налоговый административный акт наносит ущерб налоговому должнику или государству, необходимо устранить нарушение закона, наложенного актом налоговой администрации. Ликвидация таких нарушений закона осуществляется путем проведения специальной судебной процедуры - административного спора. Таким образом, административный спор в налоговых вопросах принимает решение о законности налогового административного акта налоговой администрации, который был принят в процессе определения, сбора и контроля государственных доходов.

Закон о налоговой процедуре и налоговой администрации не содержит более подробных положений об инициировании и управлении административным спором в качестве отдельного института контроля за налоговой процедурой. Поэтому при управлении административным спором в налоговых вопросах применяются положения Закона об административных спорах[364].

Предметом административного спора в налоговых вопросах является налоговый административный акт. Налоговый административный акт является актом налоговой администрации, в соответствии с которым он принимает решение об индивидуальных правах и обязанностях налогового дебитора из налоговых отношений. Административные налоговые акты налоговой администрации включают налоговое решение и заключение налоговой администрации.

[363]Члан 140 став 3 Закона о пореском поступку и пореској администрацији.

[364]„Службени гласник РС“, број 111/09.

Налоговый административный акт, против которого может быть начат административный спор, т.е. которые могут быть предметом административного спора, должны быть окончательными в налоговой процедуре. Окончательный налоговый административный акт в налоговой процедуре является налоговым административным актом второй инстанции. Это означает, что административный спор может быть возбужден только в отношении налогового административного акта, принятого во второй инстанции. Из этого следует, что лицо, которое могло подать апелляцию в отношении налогового административного акта, которого нет вовсе, или не сделало это в свое время, не имеет права оспаривать действие по иску. Поскольку апелляция разрешена в отношении любого налогового решения, принятого в налоговой процедуре первой инстанции, это означает, что во всех случаях, когда уполномоченное лицо применяло право на апелляцию, это лицо может инициировать административный спор против налогового решения второй инстанции, возбужденного по этой апелляции. Однако, когда дело доходит до заключения, издаваемого налоговой администрацией, ситуация несколько отличается. А именно, против заключения, сделанного в налоговой процедуре, апелляция разрешена, если законом не предусмотрено иное. Соответственно, административный спор не может быть вынесен против выводов, по которым призыв не допускается.

Из правила, согласно которому предметом административного спора в налоговых вопросах может быть только налоговый административный акт, т. Е. действие, которое решает право или обязанность налогового дебитора, есть еще одно заключение о том, что субъект административного спора не может быть актами налоговой администрации, которые не могут обеспечить юридическую силу или имеют прямые юридические последствия для налоговых должников. К таким действиям и операциям, которые не могут быть непосредственно применены к налоговым дебиторам, относятся мнения и инструкции (профессиональные инструкции)[365].

8. ПРОВЕДЕНИЕ СЕКРЕТНЫХ ДАННЫХ В НАЛОГОВОЙ ПРОЦЕДУРЕ

1. Количество, разнообразие и сложность действий, совершаемых должностными лицами и всеми другими лицами, участвующими в налоговой процедуре, требуют

[365] Види опширније: С. Поповић, М. Кулић (1998), *Управно право*, Београд, стр. 262.

защиты конфиденциальности данных. Статья 7. Закона о налоговой процедуре и налоговой администрации предусматривает принцип сохранения служебных секретов в налоговой процедуре. Налоговый должник обязан представить налоговые декларации в налоговой процедуре и представить в налоговый орган иным образом полную и точную информацию о своем бизнесе, то есть его доход и имущество, с тем чтобы определить налоговое обязательство на их основе. Несанкционированное использование или раскрытие таких данных может поставить под угрозу интересы налогового должника, а также общественные интересы. Поэтому предполагается, что определенные данные считаются официальной тайной. Официальная тайна в налоговой процедуре рассматривается и хранится как служебная тайна:

1) любой документ, информация, данные или другой факт о налогоплательщике, в отношении которого должностные лица и все другие лица, участвующие в налоговой процедуре, поступают в виде налогов, проступков, предварительных или судебных разбирательств и
2) данные о технических изобретениях или патентах, а также все другие данные о технологических процедурах, применяемых налогоплательщиком, к которым должностные лица и все другие лица, участвующие в налоговой процедуре, пришли в налоговые, проступки, досудебные или судебные разбирательства[366]. Нарушение секретной информации ставит под угрозу интересы налогоплательщиков и общественные интересы Республики, которые перевешивают интерес к доступу к информации, имеющей общественное значение, которая является секретной информацией, и в связи с которой раскрытие может иметь серьезные юридические или иные последствия для интересов, охраняемых законом. Секретная информация хранится всеми должностными лицами и другими лицами, участвующими в налоговых, простудных, досудебных и судебных разбирательствах. Обязательство хранить секретную информацию относится к этим лицам и когда они прекращают свое трудоустройство или имущество, в котором они узнали о документах, фактах или данных, которые представляют собой секретную информацию. Обязательство хранить секретную информацию нарушается, если указанные документы, факты или данные несанкционированно используются или публикуются.

[366] Члан 7 став 1 Закона о пореском поступку и пореској администрацији.

2. Считается, что обязательство хранить секретную информацию не нарушается:
   1) операция, с которой налогоплательщик соглашается письменно;
   2) если конкретный документ, факт или информация не могут быть связаны с конкретным налогоплательщиком;
   3) если какой-либо документ, факт или информация делаются во время налогового, правонарушения, досудебного или судебного разбирательства;
   4) если это налоговый идентификационный номер налогоплательщика;
   5) если конкретный документ, факт или данные используются компетентным органом в процессе обнаружения уголовных преступлений или правонарушений;
   6) если определенный документ, факт или информация в соответствии с законом представляется уполномоченному лицу налогового органа иностранного государства в процессе обмена информацией и оказания юридической помощи;
   7) если налогоплательщику разрешено проверять данные налогоплательщика, имеющие отношение к регулированию обязательств, вытекающих из его отношений с налогоплательщиком, и
   8) если есть определенный документ, факт или информация, связанные с существованием налоговой задолженности[367].

Налоговая администрация, дважды в год, с кратким балансом в последний день этого полугодия, публикует на своем веб-сайте имя, имя фамилию, идентификационный номер налога и сумму налоговой задолженности налоговых должников, а именно юридических лиц с налоговой задолженностью в размере 20 000 000 динаром и выше, а предприниматели с налоговой задолженностью в размере 5 000 000 динаром, тем самым сохраняя обязательство хранить секретную информацию, не нарушаемую[368].

Что касается защиты секретной информации, то во всем, что не предусмотрено законом о налоговой процедуре и налоговой администрации, налоговая администрация обязана действовать в соответствии с законом, регулирующим секретность данных, то есть законом, регулирующим защиту персональных данных.

[367] Члан 7 став 6 Закона о пореском поступку и пореској администрацији.

[368] Члан 7 став 7 Закона о пореском поступку и пореској администрацији

9. ЗАКЛЮЧЕНИЕ

В случае налогового, правонарушения, досудебного или судебного разбирательства, которое проводится в связи с налоговой проблемой, может быть представлен документ, информация, данные или другой факт о налогоплательщике или информация о технических изобретениях или патентах или о технологических процедурах, применяемых налогоплательщиком; которые представляют собой секретную информацию. Должностные лица и все другие лица, участвующие в таком разбирательстве, обязаны хранить такую информацию как служебную тайну.

В Законе о налоговой процедуре и налоговой администрации законодатель налагал обязанность официальных лиц и всех других лиц, участвующих в налоге, проступке, досудебном или судебном разбирательстве, чтобы хранить секретную информацию, к которой они пришли, участвуя в этих разбирательствах.

Обязательство хранить официальную тайну в налоговой процедуре относится к налоговым должностным лицам, прокурорам, судьям, адвокатам, доверенным лицам налогоплательщиков, регистраторам, экспертам, переводчикам, бухгалтерам, налоговым консультантам, а также ко всем другим лицам, участвующим в налоговом, временном и досудебном производстве, они придумывают секретную информацию, относящуюся к налогоплательщику.

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Законы

Закона о пореском поступку и пореској администрацији, „Службени гласник РС“, број 80/02, 84/02 - испр., 23/03 – испр., 70/03, 55/04, 61/05, 85/05 - др. закон, 62/06 - др. закон, 63/06 - испр. др. закона, 61/07, 20/09, 72/09 - др. закон, 53/10,

101/11, 2/12 - испр., 93/12, 47/13, 108/13, 68/14, 105/14, 91/15 – аутентично тумачење, 112/15, 15/16 и 108/16.

ЗЗакона о управним споровима, „Службени гласник РС“, број 111/09.

Prof. dr Mirko Kulić
Prof. dr Goran Milošević

ZAŠTITA TAJNIH PODATAKA U PORESKOM POSTUPKU

Apstrakt: *Službena lica i sva druga lica koja učestvuju u poreskom postupku dužna su da čuvaju kao tajne podatke svaki dokument, informaciju, podatak ili druge činjenice o poreskom obvezniku, kao i podatke o tehničkim pronalascima ili patentima, kao i sve druge podatke o tehnološkim postupcima koje primenjuje poreski obveznik, a do kojih su došla u poreskom, prekršajnom, predistražnom ili sudskom postupku. U radu se analizira načelo čuvanja službene tajne u poreskom postupku, koje je propisano u poreskom zakonodavstvu Republike Srbije. Definisani su tajni podaci u poreskom postupku i ukazano je na obavezu njihovog čuvanja. Ukazuje se i na situacije kada obaveza čuvanja tajnog podatka nije povređena*

Ključne reči: *poreski obveznik, poreski organ, službeno lice, poreski postupak, tajni podatak.*

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SURVEILLANCE OR INVESTIGATION SPECIAL METHODS IN THE NEW CODE OF CRIMINAL PROCEDURE OF ROMANIA AND THEIR POSSIBLE NEGATIVE INFLUENCE ON THE BASIC HUMAN RIGHTS AND FREEDOMS

Abstract: *The analysis of criminological and criminal results in practice has indicated that the traditional methods of fighting crime are not efficient enough in suppressing organized and/or other forms of major crimes. Faced with an increase of organized crime, terrorism and corruption, as well as their consequences that are far more severe than the consequences of "classic" crimes, modern democratic countries were forced to pass new legal regulations in order to suppress these extremely dangerous social phenomena. In this way, the existing measures in the field of discovering criminal offenses and their perpetrators, as well as in terms of obtaining evidence, have been replaced with new methods and modern means. The basic aim was to suppress major criminal offenses and enable a more efficient gathering of credible evidence necessary to issue indictment acts and make court decisions in procedures against the perpetrators.*

However, the very application of these measures can frequently be dangerous to the individual human rights and freedoms guaranteed by the documents of the international community and national regulations.

In Art. 138 – 153 of Chapter IV, Title IV of the General Section, the New Criminal Procedure Code of Romania, applied from February 1 of 2014, proscribes a total of eleven, precisely termed, "surveillance or investigation special methods" that can be applied in special cases, primarily when it comes to the criminal offenses of organized crime.

This paper provides a concise analysis of the aforementioned special methods prescribed in the New Criminal Procedure Code of Romania, with a special focus placed on the evaluation of their possible negative influence of the basic human rights and freedoms.

Keywords*: surveillance and investigation special methods, New Criminal Procedure Code of Romania, basic human rights and freedoms.*

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1. Introductory notes

Generally speaking, in order to discover and solve criminal offenses, the state bodies carrying this authority must inevitably employ suitable measures and actions. Considering that the forms of criminal activities are constantly changing and modernizing, the counter-measures must, of course, be in accordance with this process.

“It become more evident that existing penal solutions are not enough anymore, neither complete nor efficient for solving this problem.“ (Rakitovan, in Journal of Eastern-European Criminal Law no. 2, 2016, p. 79). For this reason, the existing measures in the field of discovering the criminal offenses and their perpetrators, as well as in regards to obtaining evidence, have been replaced with new methods and modern means. The basic aim is to “repress major criminal offenses and enable a more efficient obtaining of credible evidence in order to issue indictment acts and make court decisions in procedures against the perpetrators” (Rakitovan, in Probleme actuale în dreptul penal european 2017, p. 147).

In previous period, Romania has also taken significant steps in this direction. Numerous legislations and delegated legislations have been incorporated in the legal system, which are in accordance with international regulations and the European Union regulations, considering that Romania is a member country from January 1, 2007 (See: Rakitovan, Mitovski 2016, p. 269-288), as well as with The Convention for the Protection of Human rights and Fundamental Freedoms signed by this country on the day of entering the European Council, October 7, 1993, and ratified by the Law no. 30/1994[369].

“2014 was the reform year in the domain of the criminal law in Romania. This was the year when, on the 1st of February, the new Criminal Code[370] and a new Code of Criminal Procedure[371] came into force.“ (Berar, Rakitovan 2017, p. 394).

One of the novelties introduced into the Romanian criminal procedural legislature by the New Criminal Procedure Code (in continuation: NCPC) is that this Code consolidates and systematizes all the “surveillance and investigation special methods”, previously found in several special laws regarding the prevention and repression of particularly severe forms of crime.

[369] The Official Gazette of Romania, no. 135, from May 31, 1994.

[370] The Official Gazette of Romania, no. 510, from July 24, 2008, being applied from February 1, 2014.

[371] The Official Gazette of Romania, no. 486, from June 15, 2010.

In this way, the provisions of Art. 138, para.1 Chapter IV, Title IV of General Section of NCPC of Romania, proscribe the following special surveillance and investigation methods:

a) wiretapping of communications or of any type of remote communication;
b) accessing a computer system;
c) video, audio or photo surveillance;
d) tracking a tracing with the use of technical devices;
e) obtaining data regarding the financial transactions of individuals;
f) withholding, delivery or search of mail deliveries;
g) use of undercover investigators and informants;
h) authorized participation in specific activities;
i) controlled delivery;
j) obtaining data generated or processed by providers of public electronic communication networks or by providers of electronic communication services intended for the public, other than the content of communications, stored by these under the special law on storing data generated or processed by providers of public electronic communication networks and by providers of electronic communication services intended for the public.

As the tittle itself shows, special measures are divided into two categories (See more: Volonciu, *et al*. 2014, p. 302-352), which are:

1) surveillance methods – the methods provided in Art. 138, para.1, item. a), b), c), d), e) of NCPC;
2) investigation methods – the methods provided in Art. 138, para.1, item. f), g), h), i), j) of NCPC, as well as the special method *obtaining data regarding the financial status of a person*, that for some reason was not included in Art. 138, para.1 of NCPC[372], but has been done so in a special Article 153 of this Code.

The basic difference between these two categories is that the first two measures are realized in real time, i.e. while the authorized bodies are gathering information from the surveillance taking place precisely *as the suspicious activities are taking place*, while

[372] See more: 3.6. Obtaining data regarding the financial situation of a person.

the second group includes those proven activities used by the investigative bodies to obtain information regarding suspicious persons *after they have actually taken place*. Furthermore, due to the different level of intrusion upon the personal life of the citizens, the investigation and surveillance methods differ according to which state body is authorized to approve them. So, the application of special surveillance methods, which pose a bigger threat to the privacy of people, can be ordered only by *the Judge for Rights and Liberties*[373], while special investigation methods are authorized by the public prosecutor, with or without previous consent of the Judge for Rights and Liberties, depending on the type of measure being ordered.

2. Special surveillance methods (“Electronic surveillance”)

The provisions of Ar. 138 para. 13 of NCPC of Romania stipulate that the phrase “electronic surveillance” (!) actually includes *the use of any of the methods listed under para. 1, item a) – e),* which in fact means that already in the first article, the legislator does not use the title “surveillance special methods”, thus replacing it with term “electronic surveillance”. Why the legislator would opt for such a solution remains unclear, but we are of the opinion that such normative technique is complicated at the least.

Therefore, the legal term “electronic surveillance” defines a group of all special surveillance methods, which are:

a) wiretapping of communications or of any type of remote communication;
b) accessing a computer system;
c) video, audio or photo surveillance;
d) tracking a tracing with the use of technical devices; and
e) obtaining data regarding the financial transactions of individuals.

[373] As stipulated by Art. 53 of NCPC, A Judge for Rights and Liberties is a judge who, in court, according to its jurisdiction, during the course of the criminal investigation, decides upon applications, proposals, complaints, challenges or any other motions referring to: a) preventive measures; b) asset freezing; c) temporary safety measures; d) acts performed by prosecutors, in cases explicitly stipulated by law; e) approval of searches, of the use of special surveillance or investigation methods and techniques or of other methods of proof, under the law; f) anticipated hearing procedures; g) other situations explicitly stipulated by law.

Wiretapping of communications or of any other type of remote communication includes wiretapping, accessing, monitoring, gathering or recording communication over the phone, computer systems or any other means of communication[374].

Accessing a computer system designates the penetration of a computer system or of other data storage device either directly or from a distance, through specialized programs or through a network, for the purpose of identifying evidence[375]. *A computer system* is any device or combination of devices interconnected between them or in a functional relationship, one or more of which provide the automatic data processing by means of a computer program[376]. The term *computer data* includes any representation of facts, information or concepts in a form appropriated for processing in a computer system, including a program able to determine the performance of a function by a computer system[377].

The term *video, audio or photo surveillance* includes photographing people, monitoring or recording conversations, movements or other activities.[378]

The term *tracking or tracing with the use of technical devices* includes the use of devices that determine where a person or an object associated with a person is located.[379]

The term *obtaining data regarding the financial transactions of an individual* includes operations used to obtain information regarding the content of financial transactions and other operations performed, or operations that are yet to be performed through a credit institution or other financial entity, as well as obtaining documents or information from a credit institution or other financial entity held by it and that refer to transactions or operations of a certain person.[380]

By grouping all special surveillance methods under one term (“electronic surveillance”), one of the shortcomings of Romanian NCPC has been partially corrected. Namely, even

[374] Art. 138, para. 2 of NCPC.
[375] Art. 138, para. 3 of NCPC.
[376] Art. 138, para. 4 of NCPC.
[377] Art. 138, para. 5 of NCPC.
[378] Art. 138, para. 6 of NCPC.
[379] Art. 138, para. 7 of NCPC.
[380] Art. 138, para. 9 of NCPC.

though all the special measures that share several similar elements are grouped in a special section, there are no common provisions referring to all the proscribed surveillance and investigation methods in the Code. Although, Art. 138 of NCPC of Romania is titled “general provisions”, they do not proscribe common conditions for determining the criminal offenses for which they can be authorized, rules of conduct regarding the obtained material and “accidental finding” and other similar issues, but they are only individually listed and defined, which is not enough for the purpose and the meaning of “general provisions”.

Therefore, it must be emphasized that this is not the case with special surveillance methods (but only with these methods), considering that Art. 139 - 146 of NCPC regulate the conditions regarding the application of “electronic surveillance” methods in a unique way.

In accordance with the provisions of Art. 139, para. 1, and Art. 140 of NCPC, electronic surveillance can be *ordered* by a Judge for Rights and Liberties (and exceptionally, in accordance with the provisions of Art. 141 of NCPC, electronic surveillance lasting up to 48 hours can be *authorized* by a public prosecutor).

Electronic surveillance can be ordered (or authorized) only during a pre-criminal procedure, and for the Judge for Rights and Liberties to be able to order it, according to Art. 138 para.1, the following conditions must be cumulatively met:

a) there is a reasonable suspicion in relation to the preparation or commission of one of the offenses listed under par. (2);
b) such measure is proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offense;
c) evidence could not be obtained in any other way or its obtaining implies special difficulties that would harm the investigation, or there is a threat for the safety of persons or of valuable goods.

In accordance with the provisions of Art. 138 para. 9 of NCPC, electronic surveillance can be ordered for criminal offenses against national security included in the Criminal Code and individual laws, as well as for drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of

currency or securities, counterfeiting electronic payment instruments, offenses against property, blackmail, rape, deprivation of freedom, tax evasion, corruption offenses and offenses assimilated to corruption, offenses against the European Union's financial interests, offenses committed by means of computer systems or electronic communication devices, or in case of other offenses in respect of which the law sets forth a penalty of no less than 5 years of imprisonment.

It can be noticed that the legislator applied the method of itemizing criminal offenses for which electronic surveillance can be ordered, but at the same tame has left the possibility for other, unlisted criminal offenses to be investigated using the measures of electronic surveillance due to their severity and social danger, so, all other criminal offenses that carry a sentence of five years of imprisonment or a heavier sentence are included into this group. There is also the fact that the New Criminal Code of Romania significantly increases the number of criminal offenses that carry the maximum sentence of five years of imprisonment, and so, measures of electronic surveillance can be ordered for these criminal offenses as well. We are of the opinion that, in this way, the possibility of using the special measures is unfoundedly expanded, which, due to the danger of them being used in such a way that would jeopardize guaranteed basic human rights and liberties, should only be applied in special circumstances. What is troubling is that they also refer to a large number of criminal offenses from the group of so called "classic" or less dangerous crimes. This brings into question the very *ratio legis* of the special criminal procedural norms in this matter. In essence, the purpose of applying these measures in practice is to encompass all criminal forms believed to be particularly dangerous, and for which the procedure of discovery and proof is significantly more difficult. For this reason, we believe that the legal formulation "offenses in respect of which the law sets forth a penalty of 5 year of imprisonment or more" is inadequate, and, in our opinion, a more adequate phrasing would be "offenses in respect of which the law sets forth a penalty of no less than 5 years of imprisonment."

Therefore, the provisions of Art. 139, para. 4 of NCPC of Romania stipulate the category of relationships that cannot be the subject of electronic surveillance measures. In this way, the communication between the counsel and a person represented by them, i.e. the defender, cannot be the subject of electronic surveillance, except in cases when there is evidence that the counsel has committed or is preparing to commit one of the aforementioned criminal offenses. In case that during or after conducting electronic surveillance it is determined that the measures included the conversation between the counsel and the defendant, i.e. the accused person being defended, evidence obtained in

this way cannot be used in any criminal procedure and must be destroyed without further ado.

The procedure of issuing the order for using electronic surveillance measures is regulated by provisions of Art. 140 of NCPC. Para. 2 of this article proscribes the elements that the application of the public prosecutor must contain, it is filed to the Judge for Rights and Liberties in order to determine ordering the measures of electronic surveillance, and para. 5 of this article lists the mandatory elements that the court order must contain. There is no legal remedy allowed against the order of electronic surveillance[381].

After electronic surveillance is ordered by the judge, the public prosecutor initiates the procedure to conduct the electronic surveillance, personally or through investigative bodies or specialized employees of the police, or other specialized state bodies.

Electronic surveillance can last for the maximum of 30 days[382], however, for important reasons and upon the well-argued request of the public prosecutor that meets the aforementioned requirements proscribed in article 139 of NCPC, a Judge for Rights and Liberties can extend the duration of the measures for another 30 days. The maximum duration of electronic surveillance conducted against a specific person in a specific matter cannot exceed 6 months. The exception of this rule is in the case of video measures, audio or photo surveillance of *private spaces*, the limitation for which is 120 days[383].

The public prosecutor is obliged to cease electronic surveillance measure even before the expiry of the warrant term if the reasons that would justify such a measure no longer exist, and the prosecutor is obliged to immediately notify the judge having issued the warrant[384].

NCPC also proscribes the obligation of all the electronic communication network providers or electronic communication services or any other communication and financial services to cooperate with the criminal investigation bodies within the limits of their authority and for the enforcement of electronic surveillance. In accordance with

[381] Art. 140, para. 7 of NCPC.

[382] Art. 140, para. 1 of NCPC.

[383] Art. 140 of NCPC.

[384] Art. 142, para. 4 of NCPC.

the Code, all persons that participate in conducting electronic surveillance are obliged to keep secrecy in respect of the performed operation, under penalties set by the criminal law.

Earlier, we have mentioned that in accordance with the provisions of Art. 141 of NCPC, electronic surveillance in the duration of 48 hours can be exceptionally authorized by the public prosecutor.
The public prosecutor can do so when the following two conditions are met cumulatively:

a) there is an emergency situation, and obtaining an electronic surveillance warrant under the terms of Art. 140 would lead to a substantial delay investigation, loss, alternation or destruction of evidence, or would jeopardize the safety of the victim, witnesses or the members of their family; and
b) the requirements set in Art. 139 para.1 and 2 of NCPC are met.[385]

In this case, within a maximum of 24 hours following expiry of a measure, the prosecutor is under an obligation to notify the Judge for Rights and Liberties of the court having the competence of jurisdiction to examine the case in first instance or of the court corresponding to its level under whose territorial jurisdiction the premises of the prosecutors' office to which the prosecutor who issued the order belongs are located, in order for them to confirm the measure and, at the same time, shall forward a report presenting a summary of the electronic surveillance activities performed and the case file[386].

In the case that the Judge for Rights and Liberties determines that the conditions from Art. 141, para. 1 of NCPC are not met, they are nullify the measure taken by the prosecutor and are to order the destruction of the evidence obtained in such a way[387].

The evidence gathered by applying the electronic surveillance measure can be used in other criminal proceedings if they contain relevant information or data regarding the preparation or commission of any other crime set forth by Art. 139, para.2 of NCPC[388].

[385] Art. 141, para.1 of NCPC.
[386] Art. 141, para. 3 of NCPC.
[387] Art. 141, para. 6 of NCPC.
[388] Art. 142, para. 5 of NCPC.

The data obtained by applying electronic surveillance measures, and that are not related to a criminal offense that was a subject of an investigation, or that do not contribute to identification or locating a person, if they are not being used in other criminal cases as stipulated by provisions of Art. 142, para. 5, are archived in the premises of the prosecutors' office, in special places, separated from other documents. In case that the data or their portion are relevant to a case, by official duty or upon the request by the parties, the judge or judicial panel can request the delivery of the such sealed data.

After termination of surveillance measure, the public prosecutor will notify the Judge for Rights and Liberties on the performed activities[389], and is obliged to notify any person towards which this surveillance measure was ordered within 10 days after the completed surveillance, in written form.

After receiving the notification, all persons have the right to be informed about the content of the minute record regarding the electronic surveillance. Upon the request of these persons, the public prosecutor is obliged to enable them to listen to the recorded communications and conversations, or to look at the photographs resulting from the electronic surveillance. The deadline for submitting the request is 20 days from the day of receiving the written notification by the public prosecutor.

The public prosecutor may, until the termination of the investigation or case closure, to postpone notifying the persons that they have been a subject of electronic surveillance, or they can postpone presenting minutes, recordings, or photographs if this could lead to:

a) disruption or jeopardizing the investigation;
b) jeopardizing of the safety of the victim, eyewitnesses or members of their families; or
c) difficulties in conducting electronic surveillance of other persons involved in the case.[390]

3. Special investigation methods

[389] Art. 143, para. 5 of NCPC.
[390] Art. 145, para. 4 of NCPC.

Apart from the special surveillance methods, the so called “electronic surveillance” that has been dealt with in the previous subtitle, the NCPC of Romania also contains six special investigation methods, which are:

1. withholding, surrender and search of postal deliveries;
2. use of undercover investigators and of informants;
3. authorized participation in specific activities;
4. controlled delivery,
5. obtaining data generated or processed by providers of public electronic communications networks or providers of electronic communication services, other than the content of communications, that were obtained based on a special law regarding obtaining generated or processed data by providers of public electronic communication networks or other providers of electronic communication services; and
6. obtaining data regarding the financial status of a person.

Unlike the special surveillance methods, special investigation methods were not regulated in a unified and wholesome manner, therefore, some of them have been regulated superficially, or it could be even said – imprecisely, while others, such as for example *use of undercover investigators and informants*, or *controlled delivery*, have been regulated in a far better and extensive way. For some of the special investigation methods, the procedural rules for handling the obtained material and procedural rules for their ordering have not been written. On the other hand, as the conditions for their authorization are mutually very similar, we are of the opinion that these shortcomings could be very easily removed by introducing suitable “common provisions” that would deal with all special investigation methods, and that would regulate in a unified and precise manner all the issues regarding their authorization and conducting. Without this, such, in our opinion, inadequate legal regulation as can be found now in NCPC of Romania can lead to additional problems in interpretation and application of these methods in practice.

3.1. Withholding, surrender and search of postal deliveries

Article 147 of NCPC of Romania stipules the application of the *withholding, surrender and search of postal deliveries* investigation method.

Similarly to the other special methods, this special investigation method can be ordered without notifying the person against whom it was authorized.

Postal deliveries can be intercepted while they are in the possession of the post office and can be examined, inspected and withheld.

Art. 138, para. 8 of NCPC specifies the meaning of the phrase *search of mail deliveries* as a "inspection, through physical or technical methods, of letters or other mail deliveries or objects transmitted through any other means." From this definition, we can conclude that the term *postal delivery* signifies "letters and other mail deliveries, or any other objects transmitted through any other means".

The term *withholding postal deliveries* includes preventing the transcription or other items to reach the recipient, under the condition that they are surrendered to investigative bodies, while under the term *surrender*, as far as the content of this method is concerned, includes delivering previously retained postal deliveries to investigative bodies.

The Judge for Rights and Liberties can order withholding, surrender and search of mail sent or received by the perpetrator of a criminal offense, a suspect or a defendant, or of any other person suspected to receive or send deliveries, by any means, from or for the suspect or a defendant:

a) if there is a reasonable suspicion related to the preparation or commission of an offense;
b) such step is necessary and proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offense;
c) evidence could not be obtained in other way, or obtaining it would imply extreme difficulties that would harm the investigation or there is a threat against the safety of persons or of high value goods.[391]

Some similarities are noticeable between the proscribed conditions for ordering this measure and the conditions for ordering electronic surveillance. The difference between

[391] Art. 147, para. 1 of NCPC.

them is that, in order to order the measure of withholding, surrendering or searching a postal delivery, it is not required for the committed criminal offense or a criminal offense being prepared to be of certain severity. Therefore, unlike the electronic surveillance, to order this special investigation method it is not necessary for the criminal offenses to carry a proscribed punishment of five years of imprisonment, or a more severe punishment, nor does the Law list the activities for which it can be ordered. In other words, special investigation method of withholding, surrender and search of mail can be ordered for any criminal offense, conditioned that the other legal conditions are met.

The procedure of ordering this method by the Judge for Rights and Liberties, as well as the procedure of approving this measure by the public prosecutor is the same as for ordering or authorizing electronic surveillance.

Similarly as with the measures of electronic surveillance, postal correspondence between the client and their attorney is protected, and it cannot be withheld or inspected, unless there is evidence that the attorney had committed or is preparing to commit one of the criminal offenses stipulated in Art. 139 para 2 of NCPC.

Postal or delivery services, as well as other natural or legal entities that perform transportation services or information transfer activities are obliged to keep and immediately surrender to the prosecutor letters, postal deliveries or items referred to in the warrant ordered by the judge or authorized by the prosecutor.[392]

The delivery withheld that is not of importance to the procedure is *to be returned* (legal phrasing) to the recipient, meaning it is released back into the postal traffic as it was initially labeled by the sender.

Provisions regarding the duration and extension of the electronic surveillances are accordingly applied to this measure as well, as are the provisions regarding notifying the persons involved in this measure.

[392] Art. 147, para. 5 of NCPC.

3.2. Use of undercover or real-identity investigators and of informants

The institution of undercover investigator has been present in Romanian legislature since the year 2000. It was mentioned for the first time in the Law no. 78/2000 regarding prevention, discovery and sanctioning of corruption[393], and in the Law no. 143/2000 regarding suppression of illegal trade and use of drugs[394], and then introduced into the "old" Criminal Procedure Code through the Law no. 281/2003. Throughout all these years, the measure of undercover investigator has shown to be efficient in suppressing crime, and it has justified the expectations of the criminological-expert and other social public.

The provisions of Art. 138 para. 10 of NCPC stipulate that the use of undercover investigators and informants designates the use of a person with an identity other than their real one in order to obtain data and information regarding the commission of an offense[395].

According to the provision of Art. 148 of NCPC, within this special measure, it is possible to use:

1. undercover investigator;
2. investigator; and/or
3. informant.

In accordance with the provisions of Art. 148, para 4 of NCPC, an *undercover investigator* is an operative employee of the police, or in the cases of criminal offense against national security and of terrorism offenses, intelligence employee of the national security-information agency. In order for these operatives to become undercover investigators, they are given a false identity in order to infiltrate the criminal environment from which data and evidence are to be collected.

An *investigator* is also a person authorized by internal affairs, but they are not given a secret identity, but instead they use their real name. This would be, for example, a

[393] *Legea nr. 78/2000 privind prevenirea, descoperirea şi sancţionarea faptelor de corupţie*, The Official Gazette of Romania, no. 218, from May 18, 2000.

[394] *Legea nr. 143/2000 privind prevenirea şi combaterea traficului şi consumului ilicit de droguri*, The Official Gazette of Romania, no. 362, from August 3, 2000.

[395] Art. 138, para. 10 of NCPC.

police employee purchasing narcotics from an individual in order to obtain the necessary evidence in this way.

An *informant* is not a police employee, but they are any person that can contribute to the success of the action in any way. They can act under their real name, or they can be assigned other identity. According to the provisions of Art. 148, para. 10 of NCPC, the public prosecutor can hire an informant only in exceptional cases, and only when the use of an undercover investigator is not possible or is insufficient to collect te necessary information and data.

The task of the (undercover) investigator and an informant is to infiltrate into the organization being suspected in dealing with criminal activities, and to provide information to the investigative bodies regarding its activities and intentions, as well as to gather evidence to be used in future criminal procedures. As stipulated by Art. 148, para. 5 of NCPC, all the data and evidence collected by the undercover investigator must be provided by them to the prosecutor conducting or surveilling the criminal investigation. The investigator must not take any action that could lead to their criminal responsibility, apart from those authorized by the public prosecutor, as stipulated by Art. 150 of NCPC[396]. Furthermore, undercover investigators and informants must not encourage other persons to conduct criminal offenses, or in that case they are also held criminally responsible.

Article 149 of NCPC proscribes the protection measures of undercover investigators and informants with false identity:

“The real identity of undercover investigators and of informants having an identity other than their real one may not be disclosed.

The prosecutor, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the court have the right to know the real identity of undercover investigators and informants, subject to the observance of professional secrecy.

Undercover investigators, collaborators, informants, as well as their family members or other persons subject to threats, intimidation or violence acts in connection with the

[396] See more: 3.3. Authorized participation in specific activities

activity performed by undercover investigators, informants or collaborators, can receive specific witness protection measures, under the law.”

Undercover investigator can be interrogated in criminal proceedings under the conditions set for sworn witnesses.[397]

The authorization to use undercover investigator can be ordered by the prosecutor supervising or conducting the criminal investigation on official duty or per a request of the investigative bodies if:

a) there is a reasonable suspicion related to the preparation or commission of an offense against national security set forth by the Criminal Code and by other special laws, as well as in case of offenses of drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism or acts assimilated to those, terrorism financing, money laundering, counterfeiting of currency or other securities, counterfeiting of electronic payment instruments, blackmail, deprivation of freedom, tax evasion, corruption offenses, offenses assimilated to corruption offenses, offenses against the European Union’s financial interests, of offenses committed by means of a computer systems or electronic communication devices, or in case of other offenses in respect of which the law requires a penalty of no less than 7 years of imprisonment, or when there is a reasonable suspicion that a person is involved in criminal activities that are related to the above-mentioned offenses;
b) such measure is necessary and proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offense;
c) evidence or the offender’s, the suspect’s or defendant’s localization or identity could not be obtained in other way or obtaining it would imply extreme difficulties that would harm the investigation, or there is a threat to the safety of persons or of high value goods.[398]

[397] Art. 148, para. 8 of NCPC.

[398] Art. 148, para. 1 of NCPC.

Apart from the elements that any order of the public prosecutor must contain according to the provisions of Art. 286, para. 2 of NCPC, in order to make the order more precise, three additional elements are necessary:

a) the activities an undercover investigator is authorized to perform;
b) the time interval for which the measure was authorized;
c) the identity awarded to the undercover investigator.

If it is deemed that the undercover investigator should use technical devices for photographic, creating audio or video recordings, the public prosecutor must request an electronic surveillance warrant from the Judge for Rights and Liberties.[399] The provisions of Art. 141 of NCPC regarding approval of electronic surveillance in the duration of 48 hours by the public prosecutor are applied for this measure accordingly.

By comparing the conditions for ordering this special investigation measure and the measures of electronic surveillance, several significant differences can be noted.

The first important difference is in that the measure of using undercover investigator or informant is approved by the order of the public prosecutor according to official duty or per request of other investigation bodies – which means that this measure is not authorized by the Judge for Rights and Liberties, as is the case with electronic surveillance.

Then, this measure can also be ordered (apart from the listed criminal offenses) for criminal offenses carrying the punishment of imprisonment of seven or more years as proscribed by the law, which we deem to be a good solution considering that the application of this measure can lead to a serious infringement of basic human rights. However, Article 148, para.1, item a) of NCPC does significantly expand the scope of activities for which undercover investigator can be used, as it is proscribed that this measure can be ordered for all “criminal activities related to the aforementioned criminal offenses”, which in fact means that it is expanded to all other activities suspected by the investigation bodies of being connected with the criminal offenses for which the law allows the use of undercover investigator. This we believe to be a too “broad” of a solution.

[399] Art. 148, para. 3 of NCPC.

The following difference is that using an undercover investigator or an informant does not need to be employed exclusively to obtain evidence, as is the case with electronic surveillance measures, but its role is expanded to the finding the criminalistics solution of a particular case. Namely, in Art. 148, para. 1, item c) of the NCPC, apart from the condition to order this measure – for it to be ordered when evidence cannot be obtained in any other way, or their obtaining would be made significantly difficult, which would harm criminal prosecution or would pose a threat to the safety of people and property, the legislator has proscribed an alternative condition – for the undercover investigator to be used in the case that their location or the identity of the perpetrator, suspect or the defendant cannot be revealed, or their discovery would be made significantly difficult, which would be harmful for the criminal proceedings or would pose a threat to the safety of people and property.

This special method can be authorized for the period of up to 60 days, with a possible 60 day extension, as stipulated by Art. 148, para. 9 of NCPC, for the maximum period of up to a year. In cases when the method of using an undercover investigator and associate is ordered for criminal offenses against life, criminal offenses against national security, drug trafficking, weapons trafficking, human trafficking, criminal offense of terrorism, money laundering, as well as criminal offenses against the financial interests of the European Union, the law does not proscribe any limitations in regards to its total duration.

3.3. Authorized participation in specific activities

The term *authorized participation in specific activities* means commission of specific activities that contain objective features of the criminal offense of corruption, the performance of transactions, operations or any other agreements related to an asset or a person presumed missing, a victims of human trafficking or kidnapping, the performance of operations related to narcotics, as well as providing other services based on the authorization from the judicial bodies of competent jurisdiction for the purpose of obtaining evidence[400]. Therefore, if any of these activities are approved by competent judicial body conditioned that the other legal regulations are met, it will not be a criminal offense or violation.

[400] Art. 138, para. 11 of NCPC.

In order for the public prosecutor (in accordance with official duty or per request of other investigation bodies) to be able to authorize this special investigation method, it is necessary for all the conditions proscribed for the measure of the use of undercover investigator or informant to be met.

As stipulated by the provisions of Art. 150, para. 3 of NCPC, apart from the undercover investigator, investigator, or an informant, this measure can be performed by other investigation bodies.

The warrant ordering this measure must predict as detailed activities as possible that the public officials could perform. After ordering the measure, the public prosecutor creates a report that must include: the date of initiation and termination of the measure, information regarding the persons participating in certain activities, the description of electronic devices being used (conditioned that their use is approved by the Judge for Rights and Liberties), and personal information of the persons for whom the measure was ordered.

The persons participating in certain activities based on authorization could be interviewed in the criminal proceedings under the same conditions applied to witnesses if the court decides that their interrogation is necessary.
As well as the previous measure, this special method can be ordered for the period of 60 days, and can be extended every 60 days, with the maximum duration of one year.

3.4. Controlled delivery

The term *controlled delivery* designates a investigation technique allowing for the entry, transit or exit from the territory of the country of goods in respect of which there is a suspicion related to the illicit nature of their possession or obtaining, under the surveillance of or based on an authorization from the competent authorities, for the purpose of investigating an offense or of identifying the persons involved in its commission.[401]

Upon the request of the competent instructions and bodies, a controlled delivery can be authorized by the public prosecutor only in the case that suitable measures have been

[401] Art. 138, para. 12 of NCPC.

taken and they have made sure that the competent bodies of other countries, through the territories of which a delivery is transiting, have:

a) agree with the entry of the illegal or suspicious transport on their territory and with its exit from their territory;
b) guarantee that the illegal or suspicious transport is permanently monitored by the competent authorities;
c) guarantee that the public prosecutor, law enforcement bodies or other competent government authorities have been informed regarding the outcome of the criminal proceedings.

In accordance with the provisions of Art. 151, para. 2 of NCPC, this measure can be authorized in two alternative cases, which are:

a) if persons involved in illegal transport of drugs, weapons, stolen items, explosive or nuclear materials, radioactive materials, money amounts and other proceeds resulting from illegal activities or of items used for the purpose of perpetrating offenses could not be discovered or arrested in other ways or if this implies extreme difficulties that would harm the investigation or would be a threat against the safety of persons or of high value goods;
b) if the discovery or proving of offenses committed in relation to the delivery of illegal or suspicious transports is impossible or extremely difficult in other way.

The measures of controlled delivery are performed by the police or other competent body, with the coordination and under the supervision of the public prosecutor.

3.5. Obtaining data generated or processed by providers of public electronic communications networks or providers of electronic communication services intended for the public, other than the content of communications, and stored by these

Based on a prior authorization from the Judge for Rights and Liberties, criminal investigation bodies, may request a provider of public electronic communication networks or a provider of electronic communication services intended for the public to transmit the data stored by it, based on the special law on storage of data generated or processed by providers of public electronic communication networks and providers of electronic communication services intended for the public, other than the content of

communications, in the event that there is a reasonable suspicion related to the commission of an offense and there are grounds to believe that the requested data represent evidence for the categories of offenses set forth by the law on the storage of data generated or processed by providers of public electronic communication networks and by providers of electronic communication services intended for the public[402].

The Judge for Rights and Liberties must make a declaration regarding the request for the authorization of the measure within 48 hours, and the public communication network operators or other providers of electronic communication services that have been invited to cooperate with the investigation bodies, are obliged to provide information regarding the performing of this measure as an official secret.

Of all the special investigation and surveillance methods, this special investigation method was regulated in the least precise way, in a total of several sentences, which we deem to be insufficient. In this sense, the most severe shortcoming is that the legislator failed to regulate the procedure of *authorizing* this measure, which introduces certain confusion considering that the article regulating this special method mentions that the measure is *authorized* by the Judge for Rights and Liberties, and not as other measures that are *ordered* by the judge.

Article 152 of NCPC indicates a special law, Law no. 82/2012 regarding the retention of data generated or processed by electronic communications public networks providers and by the electronic communication services for the public [403], however, that law does not predict procedural regulations regarding ordering and performing of this measure.

It is our opinion that, due to a lack of specific legal provisions, the rules regarding electronic surveillance should be applied to this measure, considering that both of these measures refer to activities taking place during communication supervision, and that in both cases the Judge for Rights and Liberties is to decide upon their performance.

3.6. Obtaining data regarding the financial status of a person

Perhaps the biggest “enigma” from the Chapter “Surveillance and investigation special methods” of NCPC of Romania is the *obtaining data regarding the financial status of a person* special investigation method.

[402] Art. 152, para. 1 of NCPC.

[403] The Official Gazette of Romania, no. 406, from June 18, 2012.

As we previously mentioned, the provisions of Art. 138 of NCPC stipulate that there are 10 surveillance and investigation special methods, divided into two categories, which are:

1) Surveillance methods – methods proscribed in Art. 138, para.1, item a)-e) of NCPC, or: a) wiretapping of communications or of any type of remote communication; b) accessing a computer system; c) video, audio or photo surveillance; d) tracking or tracing with the use of technical devices; and e) obtaining data regarding the financial transactions of individuals; and
2) Investigation methods – including the methods proscribed in Art. 138, para.1, item f)-j) of NCPC, or: f) withholding, delivery or search of mail deliveries; g) use of undercover investigators and informants; h) authorized participation in specific activities; i) controlled delivery; and j) obtaining data generated or processed by providers of public electronic communication networks or by providers of electronic communication services intended for the pubic, other than the content of communications, stored by these under the special law on storing data generated or processed by the providers of public electronic communication networks and by providers of electronic communication services intended for the public.

Even though Art. 138 of NCPC lists a total of ten surveillance or investigation special methods, Art. 153 of NCPC introduces the eleventh – *obtaining data regarding the financial status of a person*. For what reason this measure is omitted from the article in which they are listed, remains unclear. We are of the opinion that this it just an omission of the legislator.

This special investigative method differs from the method of electronic surveillance that carries a similar name – *obtaining data regarding the financial transactions of individuals.* The basic difference between them is the manner and the content of the data that can be obtained by using these methods. Provisions of Art. 138, para. 9 of NCPC refer to accessing the information regarding the financial *transactions* of a person, while Art. 153 of NCPC refers to only the data regarding the *existence* of bank accounts and their balance, i.e. regarding the financial status of a person.

As far as the procedure to obtain data regarding the financial status of a person is concerned, provisions of Art. 153, para. 1 of NCPC proscribe that the public prosecutor may, with previous consent of the Judge for Rights and Liberties, demand from a credit institution or any other institution holding data regarding the financial status of a person

to communicate data referring to the existence and content of accounts and other financial statements of a person, if there are indications that a criminal offense has been committed and probable cause that the requested information can represent evidence in criminal proceedings.

It can be noticed that there are almost no limitations for the application of this special method, which could significantly violate the privacy of any person. The only two conditions that must be met – existence of indication that (any) criminal offense has been committed, and probable cause that the requested information can be used as evidence in criminal proceedings – can barely be considered conditions in the true sense, which makes this specific measure even more controversial and less clear regarding the manner of its regulation.

4. Conclusion

The expansion of terrorism, organized crime, and other forms of severe crime posed a significantly more difficult and complex challenges to the international community than ever before. For these reasons, “modern countries were forced to focus their legislative activity in the direction of finding and applying new legal instruments and mechanisms“ (Rakitovan, in „Dani Arčibalda Rajsa” 2016, p. 306), which would prevent the expansion of this extremely dangerous phenomenon. Efficient combat would surely be impossible without making new legislative solutions in order to give broader authorizations to the state and judicial bodies in performing activities. In this sense, proscribing and the application of new special measures, technical methods and means to reveal and prove criminal offenses is of great importance for the efforts to combat all forms of major crime. They are also of great importance for the prevention of all forms of crime. “In the field of prevention of organized crime are important because they can be ordered against a person for whom there are reasonable grounds to believe that that person prepare any of the criminal acts of organized crime and is therefore possible to prevent it, and to prevent commission, while in the field of combating it is significant because it can be determined when there are grounds for suspicion that a person has committed a criminal act of organized crime and in this way you act repressively.“(Bošković, Pavlović, 2015, p. 44).

However, the very application of these measures can be perilous for individual human rights and freedoms guaranteed by the documents of the international community and national legislation. International law prohibits the states to arbitrarily limit basic human

rights and liberties, and digressions from the adopted general principles are only allowed in the cases stipulated by law. For this reason, the regulations used to determine the authority of government bodies and the procedural issues regarding the authorization, performance and control of special measures must be very precise and clear, and their application as restrictive as possible.

When it comes the special measures titled “surveillance or investigation special measures”, the New Criminal Procedure Code of Romania contains a certain number of good and innovative solutions, but, at the same time, some shortcomings can also be found.

We deem one of the good solutions to be that – depending on the time of realization (before or during the performance of illegal activities for which the measures have been authorized), and the degree of infringing upon the private lives of the citizens – the special methods have been divided into two groups: *surveillance and investigation*.

Also, we must point out the material condition that must be met in order for the special methods to be used, as explicitly required by the NCPC of Romania. Namely, in order for the special method to be used, apart from the two conditions that must be cumulatively met: 1*) there is reasonable doubt that a criminal offense provided by the Code is being prepared or performed; 2) that there is no other means of obtaining evidence for criminal prosecution or their obtaining would be made significantly more difficult*, the NCPC of Romania provides a *third material condition* that must be cumulatively met in each specific case in order for certain special measures to be used. Namely, it is necessary for the *measure to be proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the severity of the offense*.

Explicit fulfilment of this condition in the text of the Code provides additional “support” to the principle of proportionality, mandatory principle for special evidence methods, and at the same time it protects basic human rights. This material condition obliges the Judge for Rights and Liberties to examine the proportionality between the proposed measure and the basic human rights and freedoms that could be infringed upon by the use of this measure in each individual case, and that in the case that the proportionality is lacking in certain volume, does not authorize the use of the proposed measure. The Judge will evaluate the existence of proportionality in relation to one of

the following alternative criteria: a) specificity of the case; b) importance of the information to be obtained; c) the importance of the evidence that must be obtained; or d) the severity of the criminal offense.

On the other hand, however, there are certain oversights in this section of the Romanian NCPC. This primarily refers exactly to the insufficient precision of the legal provisions used to regulate the special methods and activities, as well as the insufficient restrictiveness of the cases for which they can be applied.

Following the model of other European countries, Romania has systematized all the investigation and special measures in its Criminal Procedure Code. It is certainly a good solution to group all the special methods in one place, i.e. in one law. However, by categorizing them amongst the general provisions regarding evidence, there is now the possibility that these activities – which would, due to the danger of being used to infringe upon the guaranteed basic human rights and freedoms, be applied only in exceptional circumstances – become a part of the regular activities employed to obtain evidence in general criminal proceedings and would be also applied to the large remainder of the criminal offenses from the group of "classic" crime.

It is a fact that the use of special methods significantly increases the effectiveness of state bodies in fighting crime, however, as previously noted, they also present a kind of threat to other social values, primarily to the basic human rights. For this reason, their use must be approached with special caution, as these two interests are of equal social importance and must not be in mutual opposition, but on the contrary, they must be balanced so as not to enforce the realization of one at the expense of the other, even in the cases of the most severe offenses. "The classic procedure of obtaining evidence is swamped with surveillance or investigation special measures, so the basic human rights and freedoms are inevitably impacted by the imbalance between the investigation and the defense." (Paşca Ioana-Celina 2015, p. 113). "Only where there is a balance between the means utilized in order to bring charges and those utilized in the defense, where there is a free evaluation of the evidence by an impartial and independent court, there we can talk about a truly democratic legal state." (Paşca Viorel 2011, p. 209).

Apart from that, as far as the special measures are concerned, we must pay attention not to define "major crime" too broadly, which can, in a way, bring to question the *ratio legis* of the special criminal-procedural norms that should include only those forms of

crime believed to be particularly dangerous and for which the procedure of discovering and providing proof would be made significantly difficult.

According to our opinion, the solution proposed by the Romanian legislator is not adequate.

In this sense, we must particularly point out that the Romanian legislator stipulates that some of the special methods, for example, *withholding, surrender and search of postal deliveries* from Art. 147 of NCPC and *obtaining data regarding the financial status of a person* from Art. 153 of NCPC, could be used to reveal any criminal offense, while for others, such as the *use of undercover investigator or informant* special method from Art. 148 of NCPC and *authorized participation in specific activities* from Art. 150 of NCPC, it is proscribed that, apart from the severe criminal offenses regulated by law, it can be ordered for all "criminal activities related to those criminal offenses."

We deem such broad legal solution to be unacceptable, not only due to *ratio legis*, as mentioned before, but also due to the proportionality principle, i.e. the balance between maintaining the basic rights and freedoms, and the severity of the criminal offense that can be investigated by using these measures. Due to the severity of the criminal offenses being investigated and proven by using special investigation methods and the violation of basic human rights and liberties that could result through their application, equality must be reached. We believe that such "equality" is difficult to achieve if the special activities in order to obtain evidence are authorized in cases of minor criminal offenses.

Similarly, when deciding upon the conditions that must be met for the special measures to be ordered, the legislator uses the method of itemization of criminal offenses for which the special method can be ordered (in the case of: electronic surveillance, use of undercover investigator and informant, and authorized participation in specific activities), but at the same time leaves the possibility for other criminal offenses, not listed, due to their severity or social danger, to be investigated using these measures. So, other criminal offenses that carry a punishment of five years of imprisonment[404] (or seven years of imprisonment[405]), or a more severe punishment are included in this group.

[404] For "Electronic surveillance".

[405] For special investigation methods: Use of undercover investigator or informant, and Authorized participation in specific activities.

We believe that in this manner the possibility of using special measures, which, due to the danger of infringing upon guaranteed human rights and liberties are to be used only in exceptional cases, is expended and therefore, they also refer to a large number of criminal offenses from the group of so called “classic”, i.e. less dangerous crime, particularly due to the fact that the New Criminal Code of Romania significantly expanded the number of criminal offenses for which the proscribed maximum punishment of imprisonment is 5 years.

We repeat, in practice, these measures should only include those forms of crime believed to be particularly dangerous or for which the procedure of revealing and providing proof is made significantly difficult.

For this reason, we deem that the legal phrasing “criminal offenses for which the law prescribes a prison sentence of five years or more” is inadequate, and in our opinion a more adequate phrasing would be: *criminal offenses for which the law does not proscribe a prison sentence of less than five years*.

However, in this context, we must not forget that the NCPC or Romania explicitly prescribes that in order for certain special measures to be ordered[406], a cumulative material condition must be met in each specific case, which proscribes that the measure is *proportional to the restrictions of the basic human rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offense*. Of course, in practice, this decreases the possibility of “superficial” use of special methods, as in any case, the Judge for Rights and Liberties examines the existence of this condition and will not approve a measure if this condition is not met.

However, due to the aforementioned reasons, we believe it to be necessary to decrease the number of criminal offenses that can be investigated and proven by applying the special measures in the very text of the Code, in relation to this normative solution.

As far as the insufficient precision of the normative provisions is concerned, the most significant shortcoming of this section of NCPC is most definitely the lack of

[406] “Electronic surveillance”, Art. 138, para.1, it. b) of NCPC; Withholding, surrender and search of postal deliverers, Art. 147, para. 1, it. b) of NCPC, Use of undercover investigator or informant, Art. 148, para.1, it. b); and Authorized participation in specific activities, Art. 150, para. 1, it. b) of NCPC.

standardization of regulations dealing with the conditions that must be met for these special measures to be ordered.

Even though these measures have been included by the Romanian legislator in the chapter dealing with the common provisions regarding evidence, surveillance and investigation measures are still separated from other evidential activities (expertise, investigation, reconstruction, etc.). The justification for such a solution and normative technique can be found in the fact that by their use some basic human rights and liberties can be infringed upon, and that, unlike for the "regular" evidential activities, surveillance or investigation special measures are ordered and conducted without notifying the persons against whom they are being applied. We believe this to be, in essence, a good solution.

However, even though they are grouped in a special section and they have many common elements, there are no common provisions in the Code that would refer to all special methods, which we deem to be a significant shortcoming of Romanian NCPC. It is correct that the Art. 138 of NCPC is titled "general provisions", however, it contains only a list and individual definitions of the surveillance and investigation special methods, which we believe to be insufficient for a normative content of "general provisions". Moreover, it is our opinion that individual definition of special methods should not be included in general-common provisions, but the definition of each should be given at the beginning of the article which it regulates. Although we do support the idea regarding individual terminological definition of all special measures, we consider the concept of "general provisions" regarding surveillance or investigation special methods in a manner done in NCPC or Romania to be inadequate.

We are of the opinion that there should be conditions specifically determined to be necessary in order to use special methods written into the common regulations, as well as the criminal offenses against which they can be applied, the procedure regarding obtained material and "accidental finding", etc., as it is (partially) done in section of NCPC regarding electronic surveillance. This would ensure that no situation occurs where some measures are regulated rather imprecisely, and, at the same time, other are regulated significantly better, which could create certain problems with interpretation and their application in practice. In our opinion, this is the situation of the current criminal procedural legislation of Romania.

In this context, we would like to again point out the lack of a standardized list of criminal offenses for which special investigation methods can be ordered. Practically, for almost any activity (apart from *the use of undercover investigator and informant*, and *authorized participation in specific activities,* which can be ordered for the same criminal offenses), the list of criminal offenses is different.

For this reason, we propose that the NCPC of Romania is modified in terms of special *investigation* methods, and that standardized regulations for their use are implemented.
Apart from the listed shortcomings, there are other imprecisions in this chapter, as well as oversights, or even certain illogicalities. This primarily refers to the fact that the special investigation method *obtaining data regarding the financial status of a person* from Art. 153 of NCPC is left out of Art. 138 of NCPC that contains an itemized list of "all" surveillance and investigation special methods, as well as that in the first article titled "Surveillance or investigation special methods" (Art. 138, para. 13 of NCPC) the legislator dismissed the title of "special investigation methods", thus replacing it with the phrasing "electronic surveillance".

"The theoretical knowledge always precedes legislative solutions, that subsequently, scientific theory is the one that should provide the necessary supplementary explanations for the formulations contained in the law, giving the impression of being simple at first glance, and as such eliminates or reduces the unclarities and problems that one could encounter while applying the law into practice, as well as at the same time positively influencing and improving the legislative, the importance of theoretical studies and analyses prove to be incontestable." (Rakitovan, in Security concepts and policies – new generation of risks and threats 2017, p. 346). Guided by this idea, and taking into consideration all that was mentioned in the paper, we conclude that it is necessary to revise the provisions of Chapter IV, Title IV of General Section of the Criminal Procedure Code of Romania, in the sense of correcting and removing noted shortcomings and other shortcomings, and retaining and possible improvement of the existing good solutions. This will, without a doubt, have a positive impact, both on the suppression of organized and other forms of major crime, and the protection of basic human rights and freedoms.

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Darian Rakitovan*

POSEBNE METODE NADZORA ILI ISTRAGE U NOVOM ZAKONU O KRIVIČNOM POSTUPKU RUMUNIJE I NJIHOV MOGUĆI NEGATIVNI UTICAJ NA OSNOVNA LJUDSKA PRAVA I SLOBODE

Apstrakt: *Analiza kriminoloških i krivičnih rezultata u praksi pokazala je da tradicionalne metode borbe protiv kriminala nisu dovoljno efikasne u suzbijanju organizovanog i/ili drugih oblika velikih zločina. Suočene sa povećanjem organizovanog kriminala, terorizma i korupcije, kao i njihovih posledica koje su mnogo ozbiljnije nego posledice „klasičnog“ kriminala, moderne demokratske zemlje primorane su da usvoje nove zakonske propise kako bi suzbile ove ekstremno opasne društvene pojave. Tako, postojeće mere u polju otkrivanja krivičnih dela i njihovih počinilaca, kao i u pogledu pribavljanja dokaza, zamenjene su novim metodama i modernim sredstvima. Osnovni cilj je suzbijanje glavnih krivičnih dela i omogućavanje efikasnijeg prikupljanja verodostojnih dokaza neophodnih za donošenje optužnica i donošenje sudskih presuda u postupcima protiv počinilaca.*

Međutim, sama primena ovih mera često može biti opasna po pojedinačna ljudska prava i slobode zagarantovane dokumentima međunarodne zajednice i državnim propisima.

U čl. 138-153 Poglavlja IV, Naslova IV Opšteg dela, Novi Zakon o krivičnom postupku Rumunije, koji se primenjuje od 1. februara 2014. godine, propisuje ukupno jedanaest, precizno naznačenih, „posebnih metoda nadzora ili istrage“ koje se mogu primeniti u posebnim slučajevima, pre svega kada su u pitanju krivična dela organizovanog kriminala.

Ovaj rad daje jednu konciznu analizu pomenutih posebnih metoda propisanih u Novom zakonu o krivičnom postupku Rumunije, sa posebnim osvrtom na procenu njihovog mogućeg negativnog uticaja na osnovna ljudska prava i slobode.

Ključne reči*: posebne metode nadzora i istrage, Novi zakon o krivičnom postupku Rumunije, osnovna ljudska prava i slobode.*

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CRIMINAL ACTIVITIES MURDER AND AGGRAVATED MURDER IN MONTENEGRO LEGISLATION

Abstract: *In this paper, a criminal analysis of all the essential elements of the most serious crimes against the life of a person has been carried out, and this is undoubtedly murder and severe murder. The accent was placed on an explanation of the act, the consequences, the causal relationship, the victim, the qualified forms, the acquisition and other subtle elements of concretization. The empirical part of the research shows the state and the movement of crime in this area.*

Keywords*: murder, aggravated murder, action, consequences, trends of crime.*

Introduction

The right to life is the highest civilizational value and the supreme human right. Therefore, human life is in the first place of the scale of values. All the modern states by their highest legal acts protect the right to life which cannot be limited and thereby this most important human right receives a planetary significance. The murder is general criminal act that endangers mostly the foundations of every society although criminal legal protection of human life did not exist for all members of the human species in the earlier socio-economic formations. In the sense of criminal law the protection of life represents the fundamental dimension of criminal law protection. This form of protection completely denies fragmented, additional and subsidiary character of criminal law and puts the integral, primary and sovereign criminal law protection of life in the first place. The object of protection within criminal acts against life is the life of man and could be committed only against another person. The main form of murder and all forms of heavy murder could be committed only with intent. The life and body of man are protected by other chapters the Criminal Code which protect primarily some other values along with concomitant protection of these values. Such is the case with

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criminal acts against constitutional order and the security of state, criminal acts against humanity and other goods protected by international law, criminal acts against human health, criminal acts against environment and space order and criminal acts against general safety of people and property, criminal acts against public transport and so on. Qualified forms of criminal acts from the previously mentioned groups mostly comprise death or bodily injury of one or more persons. Criminal acts against life and body are divided into criminal acts of life destruction, criminal acts of offspring destruction, criminal acts such as of body injury, criminal acts of life and body endangerment during fight or quarrel and criminal acts of rejection (Jovanovic Lj, Jovasevic D., 2002:111).

The Murder

(article 143 of the Criminal Code of Montenegro)[408]

Unlawful deprivation of life of another person by human action is manifested in a very differentiated forms. It can be carried out in many ways and can be executed by various means and under different circumstances, but in the essence of every criminal act of murder the following common characteristics exist 1) action, activity aimed at deprivation of other person`s life 2) the occurrence of death as a result of action of commission 3) the unlawful killing of another person 4) living human being as the object of criminal act.The main form of murder comprises intentional deprivation of life of another person. The action of commission of the basic form is not determined precisely in criminal Code, having in mind numerous opportunities of deprivation of life of the man. Therefore, it is common view that the action of commission can be any activity suitable for causing death of another person. The action may comprise the commission or inaction, that is the omission if there is no obligation of the commission.

The object of action as the crucial element of this criminal act is man alive, due to the fact that life begins from the moment of birth until the moment of death occurrence and in that period the criminal act from paragraph 143. Of the Criminal Code of Montenegro can be performed. Regarding dilemmas when the life begins and when death occurs different opinions exist in criminal law science and its praxis. Montenegrin legislature has accepted the view according to which criminal law protection starts from the

[408] The code has heen published in »Official gazette of the Pepublic of Montenegro« no. 70/2003,13/2004,47/2006, to: Official gazette of the republic of Montenegro no. 40/2008, 25/2010,32/2001,40/2013, 56/2013.

beginning of birth, in other words from the beginning of the process of child birth or its separation from mother.

The child should be born alive if the birth process is completed or if the birth process is underway it is necessary that child is born alive. From the criminal law aspect the child ability to live as well as his appearance are not important. Criminal law protection must exist for all the persons especially for children even if it is about expressed deformities or small chances for life. This opinion is compatible with the with the provisions of Article 146 of the Criminal Code (the murder of child during birth) bearing in mind that criminal act is committed by mother who deprives her child of life during birth or directly after the birth. Some authors consider that independent life of a child begins with full or partial exit of a child from mother`s body or the beginning of lung breathing which is according to criminal law irrelevant. If the premature birth occurred due to the interruption of pregnancy and on that occasion the child death occurred, the problems of demarcation of murder and illegal interruption of pregnancy are solved in the way that it is considered that is about criminal act of murder if the child is born alive and after that has been deprived of life (3). As the moment of death the cerebral death is meant and it includes the suffocation of all brain functions. The brain death represents the absolute biological death as the irreversible process. From that moment on the criminal law protection of life stops. The determination of the moment of death is carried out by the application of the so called “Harvard criterion”, according to which electroencephalograph must show at least ten minutes the stoppage of electric activity of the brain not including any other reaction during that period.The consequence of criminal act of murder comprises the occurrence of death of a person against which incriminated activity has initiated. It could be manifested even in missing the duty to prevent the emergence of deadly consequence regarding the person at risk. The murder could be accompanied by other traits that can relate to the motives out of which the delict is carried out , the manner of commission, the circumstances under which the murder is committed, the psychological state of the perpetrator, the characteristic of the subject on which the action is performed etc. The aggressiveness of man comes to the fore in realization of all the forms of delicts of violence and represents the connection between the phenomenological and etiological content. Certain criminologist believe that it is typical of man and it is more or less normal driving force while restrained, while according to other authors aggressiveness reflects mental disorder - the state in which the most monstrous crime could be committed in the history of human civilization, due to which it is in the focus of research of not only of criminal law studies, but of all sciences dealing with man and society. The phenomenology of

violence delict within criminology is but one segment of global anthropological and philosophical problem of human destructiveness. Different motives of the murders exist out of which the most frequent are self-interest, hatred, revenge etc. From the murder out of compassion at the special request of the victim in order to reduce or stop the sufferings of incurable patients to mass murders, wide is the range of phenomenological variables of attacks on human life (Rakočević V., 2007:181).

The most frequent forms of the murder as an affective-impulsive act are the consequence of the frustration and culminated affects of the persons with low level of tolerance. The perpetrators of the criminal acts do not have criminal career, while in such cases the personal conflicts between perpetrator and the victim occur and they have known each other previously. The murders as the result of psychotic state is committed by psychotic, schizophrenic and paranoid persons as well as person in the state of pathological jealousy. In the structure of execution of such criminal acts the perpetrators of contract killings are increasingly appearing which is characterized by brutality, ruthlessness and harshness. The causes of the murder are in exogenous (socio-economic) and endogenous (biopsychological) factors. There is no criminal act which cause lies in the personality only or in social environment. The search for causes of the murder must be multidisciplinary because only in that way the study of etiology and the phenomenology of such crime could be carried out. Social disorders cause individual and collective frustrations, the feeling of fear and helplessness, and result in awakening of atavistic instincts and the wish for destruction but not for the creation. The violence present accumulates social tensions which is caused by the change in the way of communication among people. The delict becomes the manner of behavior which due to its frequency becomes more socially acceptable which is typical of the periods of armed conflict. But, the causes of murders are not exogenous but endogenous factors as well. In that sense each man must control his feelings that must not direct its behavior, regarding the fact that the causes of violence are in the affects of man (4). Based on the Cluster analysis it has been established that five types of psychological profiles of murderers exist conditionally: neurotic, paranoid, simulative, depressive and normal. For neurotic types is characteristic that the most of them are obsessed with suicidal ideas, with negative experiences in childhood. Among them, the alcoholics domineer. The paranoid type comprises socially oversensitive persons with expressed problem of interpersonal relation and latent aggressiveness. They explain the behavior of the environment wrongly, they have the sense of persecution, they are prone to insults and are intolerant. Simulative types stems from the families with disturbed structure and relationships with expressed aggressiveness and very low education level. Socially-

isolated persons belong to depressive people, reticent and with introvert character with low level of general and emotional energy, not possessing self-confidence, they feel the void and inutility.

To the normal type belong the persons from families of socially troublesome relationships, whose victims are mostly acquaintances, friends and kindred. For all profiles is typical the belonging to the category of molested children in childhood by parents, neighbor or other persons.

The determination of casual relationship in murders is one of the fundamental tasks of criminal law and of criminology. When it comes to the causality of this delict, it is necessary to determine the objective causal relationship. The cause (lat. Causa) is determined as objective, real change that necessarily and most directly leads to other real change (the consequence) which in further hierarchy of the movement in the nature and society leads to the next change. Every objective change in the causal queue is at the same time the cause of some other consequence and every consequence is the cause of new objective change. The specified sequence of ceaseless activity is described as the causal chain or causal sequence very complex, in which some causes act gradually in time sequence, while other act at the same time or momentarily (Rakočević V., 2011:56).

The relationship in which a specific action causes the consequence is named the causal relationship, while the action that causes consequence is named the cause. The notion of causal relationship determined in this manner is the subject of the science of criminal law. Specific criminal legislations predict the causality as the condition for criminal act existence. No one can be punished for the deed predicted in the law as the criminal act if detrimental and dangerous consequence on which depends the existence of criminal act is not the consequence of its action or inaction. That refers to the conclusion that every change in the outside world that is not tied to the behavior of the specific person cannot be attributed to that person which lead to the conclusion that it cannot be considered to be the consequence of criminal act. Take for instance the criminal act of heavy bodily injury qualified with death. The death can be the consequence of the sole activity committed by one person. But, it can occur as the consequence of the activity of many persons. Besides, the death can occur due to some other circumstances such as inappropriate medical help or the sickness of the victim. In such cases the following question arises: which of the action specified or the phenomenon is the cause of the

consequence. From the criminal law aspect the specific action that appears as human behavior is of specific importance.

There are a number of theories in connection with causality in criminal law. Their common characteristic is to find that specific condition that represents the cause in the sense of the criminal law between all the conditions that participate in the causing of the consequence. The theory of equivalence holds that all human activities that in any way have had impact on the emergence of the consequence are causative. It uses natural-scientific criterion, that is during the determination of the causes do not resort to any selection of the causes according to their law meaning, nor they are in any other sense evaluated. The theory takes into account that every consequence usually has many causes so it is sufficient that action of the perpetrator is one of the causes or co-causes.

The theory is usually associated with formula *condicio sine qua non* (necessary condition-the condition without which we cannot do without) so the behavior of the perpetrator is considered the cause if without it there would be no consequences. That means that practical method of hypothetical procedure of elimination is introduced. The Causality will not be excluded if during the action of the perpetrator some other factor acted at the same time, then in the cases of subsequent operation of other causes, subsequent action of third parties and subsequent action of victim. The interruption of causality exists in cases in which the third party or the victim himself independently of the previous action of the perpetrator opens up a new causal series by which the effect of previous action is abolished. The formula *condicio sine qua non* does not give the answer to many cases, especially in cumulative causality in those cases in which the consequence is caused by multiple simultaneous actions which are caused by many concomitant actions of which each one is self-sufficient to cause the consequence, than in hypothetical causality that comprises the happening that objectively did not affect the consequence but would cause the same consequence if the same did not emerge due to another cause, as well as the premise about causality as the reflective process although it is about real that is empirical activities.

In hypothetical causality this formula leads to unacceptable results. That was attempted to neutralize by broadening the formula in the way that the causality would be excluded only if , even though there was not the action of perpetrator, the consequence would be absent in its concrete form so that for the existence of the causality is necessary that the consequence is modified by the action of the perpetrator. The difficulties with specified formula lead lately to the acceptance of the formula for the legal condition. That

implies that about causal relationship could be spoken only when certain changes in the outside world by a well-known natural law are connected necessarily with the previous action. The advantage of the theory reflects in the fact that it is based on the causality as the real thing while the main disadvantage lies in the fact that there is no help in cases where the causality is not known. Besides, it contains very broad range of causes, what is more it considers the remote human actions to be the cause and takes into account untypical random causes.

According to the theory of adequate causality it is necessary that the change in the outside world be adequate or typical consequence of certain activity that is according to general human experience the probability that the certain action will cause certain consequence exists. The theory requires additional putting in position of objective observer who before committing the act evaluates the probability of emergence of the consequence and who has the knowledge of the rational being from the circle to which belongs the perpetrator and has the special knowledge that the delinquent possesses. For the sake of illustration, the perpetrator does not know that the person is haemophiliac and it is not probable that someone could be deprived of life by light injury caused by material that cannot cause the deadly injuries .In that case the causality does not exists. In another situation the perpetrator knows that the victim is haemophiliac and knows what is typical of that illness. In that case the causality exists indisputably. This theory can be understood as addition to the theory of equivalence, having in mind that it resolves some cases in which the theory of equivalence leads to too broad responsibility. But, it is not still sufficient because it cannot encompass all the cases determining the responsibility (Lazarević Lj, Vučković, B, Vučković V., 2004:346).

The theory of objective inclusion answers the question under which circumstances the consequence will be ascribed objectively to the perpetrator as his deed. If such ascription is not possible, the essence of the criminal act it is not accomplished. The objectivity of inclusion means the exclusion of the criteria relevant to the guilt (subjective inclusion) as subjective relationship of the perpetrator to the act. To the naturalistically, that is empirically understood causality the theory of equivalence supplements normative, evaluation assessment. The normative aspect of objective inclusion consists in a demand that that by action of the perpetrator there must be created unlawful danger for the action object and that such a danger must be realized in the consequence predicted by law as the characteristic of criminal act. Both of the conditions must be realized having in mind that if one of them is not realized there is no causality. Those are such cases in which the action of perpetrator did not create

unlawful danger for the action object, actions irrelevant by law as well as all the cases of inadequate causality because in such cases the danger is not newly created but the existing danger is increased insignificantly. In that context exist the cases in which the perpetrator by action creates the danger but in the consequence such danger had not been but another danger had been materialized that is the actor does not act with due carefulness but the consequences would emerge even if he had acted. The consequence will not be ascribed to the perpetrator as his act even when he out of protected area of the violated norm. Such danger that was created due to violation of due diligence must be realized in the consequence.According to the theory of causal distinction of the conditions by the nature of its consequences and the time when they were accomplished which author is T. Živanovic there are direct and and indirect conditions of the consequence brought about. The direct conditions are always considered to be the causes of the emerging consequence. The indirect conditions can be considered the cause of the connsequence in two cases. According to the first, the direct condition is considered to be the cause of consequence if it had as a consequence the condition that caused its emergence. In the second case the indirect condition could be considered the cause of the consequence of criminal act if it had as a consequence causal relationship under the condition that its effect is simultaneous with effect of the conditions whose causal relationship is its consequence.

The rules for determination of the causal relationship in criminal acts of commision are considered suitable cannot be applied to criminal acts of inaction. The perpetrator is not punished because he caused the consequence but becuse he did not remove it. According to the theory about another action the cause of consequence is not inaction but another activity of the perpetrator that was initiated instead of the one he should have been intitated. The cause of the criminal act of inaction lies in that another action. According to the theory about the previous action, the cause of criminal act of inaction lies in action that was initiated by perpetrator before inaction, that is in action that preceded inaction. The theory is unacceptable due to the fact that the guilt must exist in the moment of the initiation of the action relevant by criminal law. The theory of interference equates inaction with active action because by quitting the voluntary action, the condition that could prevent the consequence anulls. At the moment of occurence of the consequence of criminal act in perpetrator exist two insticts : the instinct to prevent the emergence of the consequence that makes the perpetrator take appropriate action and the instinct that suppresses the action instinct that leads to inaction of approporiate action that would prevent the emergence of the consequence.

In such interference of instincts the inaction instinct prevails, which makes possible the emergence of the consequence of criminal act, and inaction is the psychological cause of the consequence. The deficiency of the theory lies in fact that there is no responsibility for psychic acts and the theory cannot be applied to criminal acts of inaction comitted by negligence. In pseudo-causality the problem is solved within the notion of objective inclusion so the sole name `` the cause`` is avoided. According to the theory of law causality to determine if the inaction is the cause of the emerging consequence of criminal act it is necessary to determine : 1) if the duty of perpetrator to initiate certain activity had existed 2) if the perpetrator could at all initiate the action by which the emergence of the consequence will be prevented 3) if in such action the emergence of the consequence could be prevented realistically. In the case of positive answer to the previous question inaction of the persons obliged to action is the cause of the consequence in criminal law.

As objective elemet of the notion of criminal act of causality the relationship is the relationship between the action and the consequence of criminal act having in mind the fact that it is about the behavior that causes certain consequence. This objective relationship must be differentiated from subjective inclusion between the action and the consequence that must exist in the perpetrator of the criminal act in order to make the delict exists. The psychological relationship to the action and the consequence in the perpetrator of criminal acts must exist in order to make criminal act psychologically attributable to him. Previously, the objective existence of criminal act must be determined, that is the objective causality. Afterwards , the determination of psychic causality follows. In criminal law the causality proves itself only in relation to the action of criminal act. Therefore, the system of general rules has been established that represents the help in demarcation of the conditions that could be considered to be the cause of the criminal act consequence. The first rule considers the cause to be the direct condition that leads to emergence of criminal act consequence. The second rule starts with the fact that the indirect conditions could be considered the cause of the consequence only when they had as their direct consequence the conditions that had led to the consequence of criminal act. The third rule starts with the hypothesis that the action of commisoin is considered the cause of the consequence even when it accelerates the emergence of the consequence that would emerge without it. Fourth rule establishes the thesis that emergence of one later condition does not necessarily always breaks the causal relationship under the condition that later relationship was not caused by or outside the course of causal relationship. The delusion about causal relationship exists if the incriminalted action is focused on deprivation of life of one person but the

deprivation of life of another person occurred. In this case the murder in attempt exists committed with intent and deprivation of life by negligence. The main form of the murder is finished by emergence of death of another person. The attempt is punishable and it exists when the consequence did not emerge althoug the action committed is aimed at deprivation of life. For the basic form of murder the direct and likely purpose is possible. The delusion about the person does not have criminal law importance in this criminal act. The only exception is in the case of existance of delusion about characteristic of passive subject as special trait of criminal act, that is, so far as the perpetrator, for instance ,was not aware of deprivation of life of representatives of the highest bodies, the basic forms of murder will exist.

Aggravated murder

(article 144 of Criminal Code of Montengro)

The aggravated murder is unlawful deprivation of life of another person that is accompanied by qualifying circumstance that makes it heavier and most of the legislations knows of it. In certain legislatures the difference between the murder and aggravated murder is made based on the existence of premeditation in perpetrator. If the mruder is committed with premeditation the heavy murder exists and if it is committed with purpose the ordinary murder exists prescribed by French and Anglo-Saxon law. Montenegrin legislature predicts many forms of heavy murder according to the following qualifying elemets : a) the manner of execution b) the motives of the perpetrator c) the circumstances of the execution and the consequences d) the specifics of the passive subject and so on. Aggravated murders by the manner of execution are divided into the murder committed in a cruel manner and murder committed in an insidious way . Heavy murders by the motives of execution are divided into : the murder of self-interest, the murder in order to execute or conceal another criminal act, the murder from impertinet revenge and the murder out of base motives. Aggravated murders regarding the circumstances of execution and the consequence are divided into : the murder with impertinent violent behavior, the murder that puts the life of one or more person in danger by purpose and the murder of many persons and it is not about the privileged murder. Aggravated murders regarding the specifics of passive subject are : the murder of official or soldier in fullfilment of duty, the murder of a child or pregnant woman or the murder of a family member or the family community that was previously molested.

The Criminal Code of Montenegro prescribes the following forms of aggravated murder:

1) The murder in brutal and peerfidios manner;
2) The murder by impertinent and violent behavior;
3) The murder with endangerment of life of one more person;
4) The murder out of greed (self-interest);
5) The murder in order to commit or conceal another criminal act;
6) The murder out of reckless revenge;
7) The murder out of base motives;
8) The murder of official or soldier in the exercise of or in connection with the exercise of official duties
9) The murder of a child or pregnant woman,
10) The murder of family member or family communion that was previously molested;
11) The deprivation of life of many persons and it is not about the murder by strokes, the murder of a child during birth or deprivation of life out of compassion.

The murder in cruel manner (the brutal murder) contains objectively subjective characteristics. The objective dimension of cruelty manifest itself in the way and in the manner ofexecution. The victim is torturing during the committment of this murder form before the occurence of death by inflicting heavy sufferings that generate psychophisical pains of highest intensity which the victim feels. The brutal murder does not exist if the momentary death of the victim emerged that is if the victim was not in the conscious state. The subjective dimension of cruelty reflects itself in impertinence and insensibility of the perpetrator who is aware that he inflicts superfluous and great sufferings on the victim. It is about persons without compassion and pity.

The murder in an insidous (perfidious) way contains as well objective-subjective elemts. The objective dimension reflects in hidden way of action, the use of specific means of execution and special protective measures. The subjective side comprises adroitness, astuteness an cauitiousness of the perpetrator in high degree (6). The murder in impertinent violent behavior is deprivation of the passive subject of life without special reason or motive. The qualifying elemets of this form of heavy murder are : a) violent behavior by the perpetrator, b) violent behavior must have the elements of impertinence, c) the deprivation of life of certain person with imertinent violent behavior. The murder with endangerment of life of another person comprises the basic

form of the murder and premeditated endangerment of life of another person which represents qualifying circumstance which gives the murder a heavy form. The danger must be concrete and may refer to one or more persons. Regarding edangerment of many persons the perpetrator acts with possible purpose. The murder out of self-interest (greed) comprises deprivation of life of some person with the intention to gain some material advantage for yourself or for someone else such as the the murder for the award, the murder of creditor with intention to avoid paying the obligations, the murder in order to gain heirdom etc. The difference between this form of heavy murder adn severe forms of robbery and the armed roberry is in that in this case the purpose is focused on depriving of life of another person , and in both froms of property delicts the subjective elemet comprises supression of resistance regarding deprivation of removambles or keeping confiscated removables. These criminal acts overlap if the subject of criminal act is money or other values such as golden jewelry etc. Accorpding to the principle of speciality these cases can be qualified as severe forms of banditry or banditry theft (armed robbery). The murder in order to commit another criminal act comprises the deprivation of life of another person in order to enable or alleviate the committment of another criminal act. If the another act has been committed or attempted there is acquisition between the murder and another act. The murder in order to conceal another criminal act comprises the deprivation of life of another person with the aim to conceal previously committed act. There is similarity of this act wtih severe form of brigandage theft(armed robbery) if the deprivation of life of passive subject is committed in order to conceal the theft. The murder out of impertinent revenge comprises the deprivation of life of another person in order to avenge that must be ruthless and its typical trait is the existance of great disproportion between one or another good. The murder out of blood revenge the legislator has assorted in murder out of impertinet revenge although there are significant differences between these two forms of murder.The murder out of base motives comprises the deprivation of life of another person out of motives such as greed, despite, intolerance, hatred, envy, malevolence, etc. Envy represents the low motive only if it resulted in low motives such as hatred or revenge.The murder of official or a soldier in the exercise of or in connection with the exercise of official duties contains qulifying circumstances that relate to the characteristic of passive subject and the circumstances under which the deprivation of life of the passive subject is being committed(Stojanović Z., 2010:336).

The passive subjec is the official and the murder of the official should be achieved during the exercise of duty or regarding the exercise of official duty. The murder of a child or pregnant woman is qualified with the characteristic of passive subject and with

subjective element that comprises insensibility and impertinence of the perpetrator *toward* the passive subject. The murder of a family member or family communion who was previously molested comprises the deprivation of life of the persons that are in close kinship or exists in the same family communion with the perpetrator in which ocassion the molestation preceded the deprivation of life.The deprivation of life of many persons is the form of heavy murder that comprises purposed deprivation of life of two or mere persons excluding the privileged forms of the murder.

Research

Overview of the state of and trends in crime for the period 2000–2015

The data regarding the state of and trends in crime over a 15-year period have been obtained from the Ministry of Internal Affairs, the State Prosecutor, the Criminal Courts, the Institution for the Enforcement of Criminal Sanctions and the Statistical Office of Montenegro (www.gov.me).

Table 2. Reported adult offenders in the period 2000–2015.

Year	Known	Female	Male	Total	Crime Rate
2000	3961	275	3686	6637	10.70
2001	3824	278	3546	6326	10.20
2002	3521	275	3246	5453	8.79
2003	3710	228	3482	6094	9.82
2004	4240	309	3931	7297	11.76
2005	5955	407	5548	9081	14.64
2006	4967	378	4589	7654	12.34
2007	4755	374	4381	7167	11.55
2008	5652	529	5123	7508	12.10
2009	5985	553	5432	7699	12.41
2010	5847	646	5201	7288	11.75
2011	5061	590	4471	6706	10.80
2012	5610	759	4851	7913	12.76
2013	4613	577	4036	6197	9.99
2014	5059	636	4423	7157	11.54
2015	4531	513	4018	6709	10.82

During the analysis of this fifteen-year period, 113,188 crimes (7074.25 per year) were recorded. The lowest number of crimes were recorded in 2002 (5453), and the highest in 2005 (9081). According to the crime structure, property crimes were most prevalent at 40%, followed by crimes against human health (25%), life and limb (20%), crimes with elements of corruption (5%), etc. The crime rate index was close to the average for the countries of the former Yugoslavia.

Professional killings

For the purpose of this paper, recent analysis of all murders in the past 25-year period has been conducted. The research analysis's results found that between 1990 and 2015 there were at least 522 aggravated murders, and 105 (20.11%) of them were professional killings (Report on the Work of the Supreme State Prosecutor of Montenegro for the period 1990–2015, www.tuzilastvocg.me). Of these, 36 (34.28%) murders were resolved, while there were 69 (65.71%) unresolved murders.
It is shown that the low percentage of resolved murders is caused by a lack of traces of identification, a high level of organisation and professionalism in the commission of the crimes by the destruction of the devices used, etc. The factors that contributed to the unsuccessful identification of the perpetrators are the numerous shortcomings in the operations of the responsible organs, which would not be the case if modern methods and techniques of detecting and solving professional murders were applied. The conclusion is that the successful and effective detection and prevention of professional murders can be achieved, as long as a scientific and practical basis for the research and prevention of these crimes is appropriately created and developed. (Rakočević V, 2014: 211).

Table 1. Overview of recorded murders committed by unidentified perpetrators in the period from 1990 to 2015.

Year	Number of aggravated murders	Number of professionally executed murders	Number of unsolved professionally executed murders
1990	25	2	2
1991	25	1	1
1992	30	3	3
1993	31	2	1
1994	32	2	2
1995	28	3	2

1996	28	2	2
1997	26	3	1
1998	29	3	2
1999	28	4	2
2000	21	4	3
2001	22	4	3
2002	27	5	4
2003	20	5	3
2004	14	4	3
2005	22	5	4
2006	12	4	3
2007	17	6	2
2008	14	5	3
2009	13	6	4
2010	11	6	4
2011	14	6	5
2012	9	7	4
2013	12	7	3
2014	15	7	4
Total	522	105 (20.11%)	69 (65.71%)

Based on an analysis of unresolved cases of professionally executed murders (source: Cases of the Criminal Police Authority of the Ministry of Internal Affairs of Montenegro analysed for the purposes of this paper, www.mup.gov.me), it was found that there were numerous circumstances significantly affecting the ability to resolve these cases, among which are the following:

1) The absence of any physical evidence that could identify the perpetrator at the crime scene;
2) A high level of organisation in the commission of the crime;
3) Very strong support for the perpetrators of the crime before, while and after the crime was committed;
4) Detailed planning of the crime that includes several days training for carrying out the crime;
5) Crimes were committed by perpetrators usually for personal gain or for a specific reward or other benefit;

6) The murders were committed with a high degree of professionalism, i.e. the perpetrators had extensive training;
7) The devices used for the murder were reliable and of high quality (automatic rifles, pistols, explosive devices, stolen motor vehicle licence plates, etc.);
8) The devices used for the murder were destroyed after the crime was carried out, mostly by fire, etc;
9) The perpetrators left the country quickly after committing the murder;
10) The attack on the victim, who is most often from the criminal sphere, was committed at a moment when he showed least signs of being ready to resist;
11) The perpetrators very often used forged travel documents;
12) The perpetrators, in some murder cases, used mobile telephones with pre-paid SIM cards for only one conversation, and then destroyed both the telephone and the card, in order to prevent identification by secret surveillance measures;
13) Regarding the form of execution, these were usually very brutal murders of opponents;
14) The competent authorities used outdated methods in the process of solving the crime, such as diphenylamine or paraffin tests on sleeves, etc. (Rakočević V., 2016: 348).

Conclusion

In this paper the state of and trends in crime in Montenegro are presented. Organised crime represents a major security problem for this country. This problem is primarily reflected in the large number of unresolved murders committed in an organised manner, the large number of crimes related to drug abuse, the large number of crimes with elements of corruption, etc. The state can resolve the problem of crime if it invests in the development of prevention and establishes closer international cooperation in the field of crime fighting.

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Velimir Rakočević*

KRIMINALNE AKTIVNOSTI UBISTVO I TEŠKO UBISTVO U ZAKONODAVSTVU CRNE GORE

Apstrakt: *Ovaj rad se bavi krivičnom analizom svih osnovnih elemenata najozbiljnijih zločina nad životom nekog lica, a to su bez sumnje ubistva i teška ubistva. Akcenat je stavljen na objašnjenje samog čina, posledica , uzročnih odnosa, žrtve, kvalifikovanih oblika, sakupljanja informacija i drugih suptilnih elemenata konkretizacije. Iskustveni deo istraživanja prikazuje oblik i trend zločina u ovoj oblasti.*

Ključne reči*: ubistvo, teško ubistvo, delovanje, posledice, trend zločina.*

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DOES THE POLICE WORK IN THE PUBLIC INTEREST?
An international comparison between France and England

Abstract: *This paper deals with an international comparison of the relationship between the police and the public in France and in England. Questioning includes: Do the police work in the public interest? How this institution responsible for security value, serve and interact with the public? We argue that the opposite socio-historical construct of the police in France and in England has led to distinctive police priorities, attitudes and occupational cultures that all impact the "interest" of the public, its freedom and security.*

We will use extensive ethnographic data collected during several years within the French national police and several British police forces studying police learning of the police job, police socialisation process and police culture. We will argue that the British model of policing with people greatly contrast with the French model of policing against people.

Keywords: *French police, British police, international comparison, police socialisation, police culture, police models, relationship police / public*

Introduction

This paper deals with an international comparison of the police and the public interest in France and in England. Key questions are twofold: On the one hand, do the Police work in the public interest? In other words, how this institution responsible for security value, serve and interact with the public? On the other hand, How do the French police and the British police compare? What is interesting about this specific comparison? How can we explain such differences?

To address these questions I will use extensive ethnographic data that I have collected during several years within the French national police and several British police forces during my PhD in sociology. My PhD dealt with an international comparison of police

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apprenticeship of the job and police socialisation to the police occupational culture in France and in Britain (Cassan, 2005). I have observed and studied the police recruitment process, initial training in police school, on the job training or learning of the job with more experienced police officers and the socialisation to the police occupational culture. The research focuses on the French national police (excluding the gendarmerie or city polices) and four different British police forces. It also concentrates on the grass-roots police officers, also sometimes called the patrol officers, the ones patrolling everyday in direct contact with the population (thus excluding plain clothes investigators or other specialist departments).

I will argue that the British model of policing *with* people greatly contrast with the French policing model *against* the people, and that the opposite socio-historical construct of the police in France and in England has led to distinctive police priorities, attitudes and occupational cultures that largely impact the public, its freedom and security.

The outline of the paper is the following: I will first discuss police recruitment and initial training in France and in England, and I will then look into the apprenticeship (on the job learning) of police work and the socialisation process to a distinctive police culture in Britain (section 2-1) and France (section 2-2), and finally I will discuss and attempt to explain these differences in conclusion.

1. Police recruitment and initial training

It is striking to note the huge differences in terms of recruitment in the French and British police. First, the French national police recruit nationwide rather than the 43 British police forces that are independent and all undertake their own recruitment process locally. It results in one case in recruits who are familiar with the territory and its population (in Britain), and in the other case where most new comers do not know much about the territory and its population (in France). In France, recruits generally do not want to work where they get their first post (usually in Paris poor suburbs), which is problematic in terms of serving the public.

In terms of selection criteria, British police forces are looking for mature candidates with life experience and life skills who have had various backgrounds and work experiences, and who may have some family life experience already. In other words, the older and the more mature, the better. Communication and listening skills are

paramount to be successful. Recruitment officers explained that when they need to deal with some domestic incident or conflicts within the neighbourhood, these life experience skills and communication skills are essential. Moreover, in Britain, there is a willingness to recruit diverse candidates, notably from the BAME (*Black, Asian and Minority Ethnic*[409]*).* British police forces try to reflect the community they serve in order to gain legitimacy and to better serve the local communities. The police usually fall a bit short in terms of BAME representation within its rank (compared to their local population) but at least this is a constant debated issue and shows its importance and relevance.

By contrast, the French national police recruit presents a younger profile with limited life experience (work and family alike) and no particular communication skills ; there is an emphasis on fitness instead, on Republican values and ethics, and an ability to "take on the challenge".

As far as initial training is concerned, the French police initial training is much more disciplined, hierarchical and authoritarian: in one word more "military". Police trainees need to salute each trainer or member of the police school staff who is of a higher rank (so basically everyone!), that can lead to a bit of paranoia where they even salute a secretary in plain clothes not knowing exactly who is who. Police trainers threaten them with all sorts of sanctions to make sure they comply with the large set of rules and regulations of police school life. A key element is uniformity and an emphasis is put on the group rather than the individual. Students need to move within the school with the whole class together in line and walk in a military / drill style. I remember in winter one trainee had forgotten his gloves, thus everybody had to take his gloves off! Other French specificities are firearm training, the learning by the book all the law / codes / regulations inputs with written exams, and a one way teaching style with trainers who talk and trainees who listen and take notes.

I observed nothing of that nature in the British police schools. The whole learning environment was more relax, trainees coming to school in different outfits (especially since many simulations / role plays required some trainees to be in police uniforms and

[409] For more on recruitment of BAME (*Black, Asian and Minority Ethnics*) in the British police, see Cassan, D. (2001), "Le recrutement ethnique policier : Une vieille préoccupation anglaise" *("Ethnic minority recruitment: An old English concern"),* Les Cahiers de la sécurité intérieure, n°45 "Le temps des minorités", 3è trimestre 2001, pp. 139-159, and Bhugowandeen, B. (2013). "Diversity in the British police : adapting to a multicultural society", *Mémoire(s), identité(s), marginalité(s) dans le monde occidental contemporain* [on line], 10|2013. URL: http://mimmoc.revues.org/1340; DOI: 10.4000/mimmoc.1340.

some in civil ones). Various kinds of beards, tattoos and pins are allowed contrary to the French police. The class setting is usually a circle in which they all sit including the trainer and the teaching style is very much a two-ways traffic with lots of discussions, debriefs and feedbacks where everyone seem to exchange on the same level. As an observer I was sometimes confused at first: who is the trainer? Other English specificities of initial training are first the emphasis on "reflexivity": trainees were encouraged to be self-critical and to think and challenge their own practices and thoughts including prejudices (to avoid turning them into discrimination). Second, the curriculum encompasses inputs on ethnic minorities and sexual / gender minorities including some meeting with these communities to break the ice, get to know each other better, and for the police to understand their needs (and sometimes fears) better.

As a conclusive note on police recruitment and police initial training, and although police recruits are not in daily interaction with the police yet, I would argue that these striking differences provide already some elements on how the police might serve, value and interact with the public. Next parts on police learning of the job and police socialisation will develop this point further.

2. Police learning of the job and police socialisation

A major difference between France and England in terms of the learning process of the job is that the English police student (used to be called the "police probationer" for a long time) is tutored for ten weeks by an experienced and trained-for-the-purpose police tutor. Following that stage, if successful, he will then be able to do independent patrol. There is nothing of that nature for the French *gardien de la paix* intern who need to get by and more or less learn the job by himself, that is in observing the more experienced officers and hoping to get some support / assistance. He usually has to take a back seat until he is progressively trusted to contribute to the patrol work. Police patrolling in France always takes place in group of two or more ; considering the relationship between the police and the public in France it would be considered too dangerous for a single police officer to patrol on his/her own.
So what does each police recruit learn? I will focus only on specificities here, on the significant differences I have observed during my fieldwork between the French and the British police.

2.1 Specificities of British police socialisation

Before going into more details I shall specify what I mean by police socialisation. Organisational socialisation is a process through which a novice learns the skills, knowledge, and values necessary to become a competent member of an organisation or occupation[410]. I will develop in this section several features of British police culture that are characteristic of the British policing model[411].

2.1.1 Empathy for victims

After some observation within training schools, I can remember my first day in ride along with a patrol composed of a police probationer and his tutor. After literally 5 minutes we arrived at a roundabout where a (minor) accident involving a car and a cyclist had just taken place. The tutor went to talk with the driver whereas the probationer went to the cyclist who had fallen and was still shocked. It ended up the cyclist crying and the probationer giving her a hug to support her (this was all the more possible as they were both female). This was quite an interesting as well as surprising observation for a French social scientist. This would hardly be possible in France where the police and the public keep a good distance from one another. Overall this episode was confirmed in the next months of observation, and in interviews British police officers (and probationers) would stress the importance to listen, assist and support victims and that this was at the core of their job. This empathic approach (often involving welcoming victims at the police station with the traditional tea) is also considered as facilitating the testimony to proceed the case further.

2-1-2 On the importance of dialogue

Empathy for victimes and the importance of dialogue are linked. I will start this section with an excerpt from an interview with a police probationer that exemplifies well the importance of dialogue that I have observed throughout my ethnographic fieldwork.

« I've seen the way my tutor speaks to people, and I've learnt a lot from that. I've seen the way a lot of people talk to people (...) It's the sort of things you talked to people

[410] Chan, J., Devery, C., Doran, S. (2003), *Fair cop: Learning the art of policing*, Toronto: University of Toronto Press, 342p. These authors actually took the definition from Van Maanen, J. and Schein, E.H. (1979), "Toward a theory of organizational socialization", *Research in Organizational Behavior*, 1: 209-64.

[411] For more on police socialisation in Britain, see Cassan (2017).

about : if you got somebody who's very upset, and you need to calm him down, the last thing you want to do is to talk to them about something that will upset them. And I made mistake doing that one, so it's just learning things like that, that you avoid subjects that might upset them, that might be a bit emotive, that... really you talked about nothing, and you don't care what they're telling you as long as they telling you something, and you get them talking, and you get them calm down, and then you're taking from there really »

Communication is used to desescalade conflicting situation and it is clear from that excerpt that this essential skill is passed on and encouraged by police tutors. When asked during interviews about the main qualities to be a competent police officer, the number one response from British police officers (including tutees) is: "communication and listening", and I could add "with the public" of course. This is a very interesting result for the purpose of that chapter.

2-1-3 The use of force as repellent

The frequency and intensisity of the use of force by the police is of great interest as an indicator of how the police serve, value and interact with the public. On that particular topic it has to be noted that the use of an ethnographic type of fieldwork (especially prolonged direct observation) was decisive. Indeed, when asked during interviews about the use of force by both French and British police officers, they have all answered it was used as "the last resource". But actually, following long periods of observation within police patrols I have noted striking difference of what it actually means for each set of police officers.

The use of force for British police officers was almost repellent, something they would do anything to avoid. I remember this episode when many patrols were called successively to try to convince a middle-aged woman to go to a psychiatric hospital (as an official medical statement stipulated). It was remarkable that they never use force to take her to that hospital, even after attempting to convince her for many hours (and involving many different police officers). At the end they called the patrol I was in, with a female probationer (that they had initially preserved from getting involved into that complicated case), and she finally succeeded to convince the lady to follow them thanks to a kind and very communicative approach. She even helped the lady to pack her stuff and tidy the house a little bit before going. For sure, similar situations in France would not involve so many patrols for so long (which could be considered as a waste of

resources) and the lady would be taken by force (not violently though) to the hospital earlier. Interviews with police officers involved afterward confirmed that they called on several patrols one after the other (and finally the one with the female probationer) to postpone the use of force as much as they could, and that "new faces" could potentially trigger something positive (which it did eventually).

2-2 Characteristics of French police socialisation

2-2-1 Police and the public at a distance

The public and the French police are distant from each other. In French police officers' mind, serving the public does not come as an evidence or a priority. For instance, French police officers see basic service as answering information requests from the public either on the street or on the phone as a loss of time and as an unwelcome distraction from "real" police work (which is about fighting crime and catching the bad guys). I have witnessed occasions where police tutees at the front desk of the police station would completely fail in their task to address the public's calls. They obviously did not take it seriously and would even sometimes turned it into a joke, making fun or being rude with citizens on the phone. Let's clarify here: tutees were assigned at the front desk cause nobody wants to be there. That tells something about the discredit associated to this task that is however essential for good Police / Public relationships.

Asked during an interview about the police / public relationships, a French police tutee who had just completed his first internship has this to say:

"The relationships with the public? They were non-existent, I mean... yes, older cops they like to make fun of people, yes they are good at that. Apart from that I have not seen much relationship. This makes me feel terrible, I was so embarrassed! I mean the public is expecting something from us, when they call us they expect something from us, there is a problem there! Sometimes we get there and they are distressed, if we get there and we start laughing at them or make an inappropriate comment for example on an overweight woman, well... this is definitely a bad start to engage!"

During our fieldwork we have observed numerous situations where victims were made "invisible". Within the French police culture, assisting or supporting victims is considered as uninteresting, of little value, and not part of ‘real police work’. The

‘social’ element of their job is looked upon with contempt and is very often denied although it is actually very present.

Some attempts to implement a reform of community policing have always failed, notably due to the resistance of the profession[412]. A common perception within the ranks was that a "community policing" (*police de proximité* in French) should mean that patrols would be able to intervene as quickly as possible to calls from the public, rather than a vague social work talking to them. In that sense, "proximity" would be the time (very quick response) rather than in terms of close relationships with the public. Principles of community policing were largely depreciated, and the reform was somehow diverted from its original ideas by the police occupational group (and the police occupational culture).

2-2-2 A dangerous job

Skolnick famously showed that facing danger is part of the “policeman’s working personality”[413]. French police officers have a perception of their work as a dangerous one. They distrust the public generally speaking (even decent people who have done nothing wrong) and this is reciprocal. Thus the police are always suspicious and focus on their own safety first when they are called on a job. For example, in interviews, it is interesting to note how police officers consider the firearm: it is absolutely essential to carry one (to feel more secure), although a very large majority of them have never used it!

The perception of a dangerous job could also be seen during new recruits' on the job learning of police work. Experienced police officers would teach new comers some precise safety tips in order to deal with that unfriendly environment (to an extent I have not observed in Britain). For example, when the patrol is called for a domestic incident in a poor neighbourhood (*banlieues*) which is a fairly common intervention the patrol would first make sure they park their car strategically (to avoid being blocked and in order to rush away if needed). Veteran police officers would share their "war stories", when a television or machine washine was thrown at them from the 12th floor, so you should always keep an eye above your head, move bas quickly as possible, always stay under shelter when you can... Similarly, when you knock on a door you do not wait behind, you'd better stay off to the side (in case there is a psycho on the other side). And

[412] Cassan, 2004.

[413] Skolnick, 1974.

when the patrol is called for a domestic in a flat let say on the 7th floor they will not take the lift to the 7th floor nor will they climb the stairs to get there, they will take the lift to the 8th floor and take the stairs down to the 7th, again in case a psycho is waiting for them with all the wrong intention.

During interviews when asked about the main qualities to be a good police officer (that the new recruit should learn / develop), "to observe better" would come in good position on top of the list. Unlike in Britain, communication or listening skills have never been mentioned. French police cultural attitudes are more marked with a dangerous perception of the job and a suspicion towards people; this is in line with the *policing against people* model of policing.

Conclusion: Comparison of French and British policing models

As I have shown in the core part of that chapter, French and British polices hold major differences in the relationship with the public. The emphasis with French policing is more on catching criminals and the glorification of action. The notion of service to the public and the idea of prevention (in building trustful relationships) are neglected by the French policing model (*policing against people*)[414]. The public is seen as something that should be "controlled", hence the public order or riot police squads (CRS: *Compagnies Républicaines de Sécurité*) being a major figure of French policing. Likewise, there is an ongoing French controversy relating to identity checks (*contrôle d'identité*) with the burning issue of discrimination[415]. This policing model (sometimes coined the "continental model") is characterised by a centralised, militaristic police to a large extent unaccountable to the public[416]. The police are more accountable to central institutions and the government with traditional focus on surveillance (of any potential threat to the power in place). The lack of accountability to the public is best exemplified with the traditional impossibility to identify individual police officers in case the public may want to report them for malpractice (despite recent regulations[417], but that are not correctly implemented[418]). I can relate to an observation of a scene involving veteran

[414] For more on policing models see Mawby (2003).

[415] See Jobard, F. Levy, R. (2009), Police et minorités visibles. Les contrôles d'identité à Paris", Open Society Justice Initiative, 80p.

[416] Mawby (2003), p.18.

[417] Ministère de l'Intérieur (3014), *Code de déontologie de la police nationale et de la gendarmerie nationale*.

[418] See http://www.lemonde.fr/les-decodeurs/article/2016/06/03/oui-le-port-du-matricule-estobligatoire-pour-les-policiers-et-les-gendarmes_4933714_4355770.html.

police officers and two young men from proviledged social background. The bored police officers want to control them and the interaction turned sour. Obviously veteran police officers do not want to lose face before police tutees and the oberver. It escalades, they stop and search the two young men who do not cooperate and ask instead the police officers identification with the idea to probably report them later on. One of the veteran police officer does not take them seriously and answer: "I am superman!" which tells a lot on how French police (poorly) value and serve the public[419]. In the light of this policing model, the recruitment process and the profile of French police recruits (with limited communication skills) make more sense, together with the type of initial and on the job training (learn to distrust the police qnd to deal with an unfriendly environment).

On the contrary the British policing model (*policing with people*) is best exemplified by the traditional figure of the bobby, coined after Robert Peel and the creation of the Metropolitan Police in London in 1829, a friendly non-armed police officer who keep a watchful eye on the public. Considering this specific international comparison, it is fascinating to read through the English parliament minutes of that epoch to realise how much the French policing model (of a centralised and armed police accountable to the central gouvernment) was very much debated and refered to as the detested counter-example, everything they despised and absolutely did not want. Thus from the onset of modern British policing, things have developed in the opposite direction from France[420].

In terms of governance, the community is represented through the figure of the Police Crime Commissioner (PCC), an elected official for each Police force (except London and Manchester where the responsibility lies with the mayor). PCC represent the voice of the public and ensure community needs are met. They appoint Chief Police Constables, hold them to account, set a police and crime plan for the area and set the force budget and determine the precept[421]. All this gives a clear idea that the public needs are taken seriously indeed. It seems both police do not hold the same mandate from their society: a mandate to listen to, serve and value the public en Britain, and a mandate to respond to, serve and value the central institutions in France.

[419] For more development on the subject, see Cassan (2005).

[420] Emsley, C. (2014) The English police: A political and social history, Routledge, 304p.

[421] See more on https://www.gov.uk/government/collections/police-and-crime-commissionerspublications.

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Prof. dr Damijan Kasan*

DA LI POLICIJA RADI U JAVNOM INTERESU?
Međunarodno poređenje - Francuska i Engleska

Apstrakt: *Rad se bavi međunarodnim poređenjem odnosa između policije i javnosti u Francuskoj i Engleskoj. Pitanja koja se postavljaju su sledeća: da li policija radi u javnom interesu? Na koji način ova institucija, odgovorna za kvalitet bezbednosti, služi javnosti i komunicira sa njom? Zastupa se stanovište da je suprotan socio-istorijski konstrukt policije u Francuskoj i Engleskoj doveo do različitih prioriteta policije, stavova i poslovnih kultura koje utiču na 'interes' javnosti, njenu slobodu i bezbednost. U radu se koriste ekstenzivni etnografski podaci prikupljeni tokom nekoliko godina u francuskoj državnoj policiji i nekoliko britanskih jedinica policije koje se bave proučavanjem procesa učenja u policiji i obavljanja poslova policije, njene socijalizacije i policijske kulture. Diskusija ide u prilog tome da britanski model vršenja policijske službe sa građanima predstavlja veliki kontrast u odnosu na francuski model vršenja policijske službe protiv građana.*

Ključne reči: *francuska policija, britanska policija, međunarodno poređenje, socijalizacija policije, policijska kultura, modeli policije, odnos policije i javnosti*

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