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SADRŽAJ

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BLASFEMIJA I KRIVIČNO PRAVO – UPOREDNO ZAKONODAVSTVO I JUDIKATURA

Apstrakt: Iako se dostojanstvo božanstva u uporednom zakonodavstvu više uglavnom ne smatra podobnim objektom krivičnopravne zaštite, u savremenim pravnim sistemima se i danas sreću krivična dela kojima se štite verska osećanja građana. Međutim, nalik drugim krivičnim delima koja povređuju čast i ugled, protivpravnost takvih ponašanja često se dovodi u pitanje ako je uvredljivo izlaganje imalo kritičku notu, naročito ukoliko je bilo izneto u okviru nekog književnog ili umetničkog dela. U radu se prikazuje vrlo bogata uporedna sudska praksa nacionalnih sudova i Evropskog suda za ljudska prava koja se odnosi na blasfemno izražavanje, kao i relevantni međunarodni dokumenti.

Ključne reči: Blasfemija, sloboda izražavanja, Evropski sud za ljudska prava.

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BLASPHEMY AND CRIMINAL LAW – COMPARATIVE LEGISLATION AND JUDICIARY

SUMMARY

Although the dignity of the deity is in comparative legislation no longer considered as an adequate object of criminal law protection, contemporary legal systems still contain crimes that protect the religious feelings of citizens. However, like other offenses that violate honor and reputation, the unlawfulness of such behavior is often called into question if offensive exposure has had a critical note, especially if it was revealed in a literary or artistic work. The paper presents a very rich comparative case law of the national courts and the European Court of Human Rights concerning blasphemous expression, as well as relevant international documents. Despite the strong efforts to promote the absolute inviolability of freedom of expression, at the cost of offending the religious feelings of citizens, existing international documents and current case-law show some caution in defining the limits of this freedom. If the European Convention on Human Rights already allows a number of restrictions on the freedom of expression, including the interests of public security, the prevention of disorder, protection of morals or the protection of reputation, it would be completely unreasonable if legislative bodies in one society, often multiconfessional and vulnerable to incidents that shake religious feelings and the fragile stability of the community, would completely ignore the mockery of the essential content of a religious belief. On the other hand, one can not argue that the need for criminal justice protection of such values is less and less felt in modern irreligious European societies, where possible incriminations are more related to the potential consequences to the public order and peace. An extreme approach, which would ignore the existing normative framework, advocating for unlimited freedom of expression, would certainly not be a good starting point.

Key words: Blasphemy, freedom of expression, European Court of Human Rights.

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ANALIZA PREDVIDLJIVOSTI POSTUPANJA SUDIJA – POVRATAK MEHANIČKOJ JURISPRUDENCIJI?**

Apstrakt: U radu su analizirani koreni ideja o kompjuterskoj prediktivnoj analizi postupanja sudija, problemi sa kojima je suočena ideja prediktivne analize danas, perspektive prediktivne analize, kao i dobre strane ovog tipa analize. Autor stoji na stanovištu da je glavno ograničenje zbog koga nije moguće za sada postići stopostotnu preciznost kompjuterskog predviđanja postupanja sudija emotivni deficit veštačke inteligencije. U skladu sa idejama pravnog realizma, autor izvodi zaključak da nepredvidljivost postupanja sudija (zbog specifičnosti njihove ličnost) čini pravni ishod neizvesnim. U tom delu sada ne mogu biti od velike pomoći ni kompjuterski algoritmi za predviđanje sudskog ishoda. Algoritmi su danas uglavnom na nivou mehaničke jurisprudencije i silogističkog načina zaključivanja, jer kompjutere podacima i dalje „hrani" čovek. Sa razvojem tehnologije i razvijanjem mogućnosti samostalnog učenja veštačke inteligencije, možda bi u ne tako dalekoj budućnosti mašine mogle zameniti sudije ili makar predviđati odluke sa skoro potpunim stepenom pouzdanosti. No, ako je pravo veština jednakog i dobrog (*ars boni et aequi*), a taj antički rimski postulat još uvek nije osporen, onda su dometi mehaničke jurisprudencije ipak ograničeni. Jer, možda mašina može obezbeđivati jednakost kao izvorno matematički princip, ali teško da može dosezati do poimanja onog drugog, podjednako važnog, ako ne i važnijeg fundamentalnog pravnog principa – dobrog postupanja. Dobro je vrednosna kategorija, koja u svakom konkretnom slučaju ima svoje specifičnosti, a nju mašina ne može uvek valjano prepoznavati i meriti.

Ključne reči: Prediktivna analiza, mehanička jurisprudencija, jurimetrika, pravni realizam, veštačka inteligencija.

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PREDICTIVE ANALYSIS OF JUDICIAL BEHAVIOR – RETURN TO MECHANICAL JURISPRUDENCE?

SUMMARY

This paper is about the roots of computerized predictive analysis of judge's behavior, and it investigates problems which predictive analysis is facing today, its prospects, as well as advantages and limits of that method. The author is of opinion that major limitation in predicting behavior of a judge with broad precision is emotional shortage of artificial intelligence. Following the line of legal realism the author concludes that unpredictability of judge's behavior, namely specific and unique feature of their personalities, makes legal outcome not completely certain. Algorithms are today based mostly upon mechanical jurisprudence and syllogistic reasoning as computers are "fed" by man. In the future it might become possible, due to dynamic development of technology and with possibility of developing self-learned artificial intelligence, that machines could once replace judges or at least predict rulings with a very high percentage of probability. But, if the law is *ars boni et aequi*, and that ancient Roman postulate is not yet validly contested, then the range of mechanical jurisprudence is still limited. Machine may be able to gain equality, as it is basically and originally a mathematical principle and operation. But it cannot reach sensitivity of the second, correspondingly important, or even more fundamental legal principle – what is good in general and in concrete case. Good is a value, having its specific loading and feature in every single case. This is something that the machine cannot properly recognize and measure.

Key words: Predictive analysis, mechanical jurisprudence, jurimetrics, legal realism, artificial intelligence.

PREGLEDNI ČLANCI

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ABERRATIO ICTUS U KRIVIČNOM PRAVU

Apstrakt: Nepredviđena promena toka odvijanja radnje izvršenja krivičnog dela, umišljajno upravljene ka tačno određenom objektu, otvara pitanje krivične odgovornosti učinioca za posledicu koja, pod tim uslovima, nastupi na drugom objektu, neobuhvaćenim umišljajem. U ovom radu, analiziraće se višestrani pristupi rešavanju spornog pitanja, oličeni u pravnom fenomenu *aberratio ictus*-a, prvenstveno kroz razmatranje argumenata suprotstavljenih teorijskih gledišta. U gomili jednostranih i nedorečenih pristupa, izlaz treba tražiti, pre svega, u jasnom fenomenološkom razgraničavanju slučajeva obuhvaćenih figurom *aberratio ictus*, u odnosu na srodne pravne koncepte. Nakon ovog koraka, sledi opredeljenje za model krivične odgovornosti, koji na najadekvatniji način odgovara smislu i suštini datog fenomena.

Ključne reči: *Aberratio ictus,* model pokušaja, model umišljajnog dela, teorija ekvivalencije, teorija konkretizacije.

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1 To je slučaj sa važećim Krivičnim zakonikom R. Italije, koji navedeno pitanje izričito reguliše u čl. 82 i 83. Vid. *infra*, 17–18.

2 C. Roxin /1997/: *Derecho penal, Parte General, Tomo I. Fundamentos. La estructura de la teoría del delito,* „Civitas", Madrid. (Prevod dela: Roxin C. /1997/: *Strafrecht. Allgemeiner Teil, Band I:*

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ABERRATIO ICTUS IN CRIMINAL LAW

SUMMARY

This article discusses different legal solutions to situations referred to as „*aberratio ictus*", in terms of its particular manifestation in criminal law. The concept of *aberratio ictus*, that can be translated as „attack gone astray" is used to determine criminal responsibility of the offender, when his actions, directed to committing a specific offence, abberate from the expected course of events, resulting in harming an unintended object. Doctrinal solutions

in this area variate between the theory of equivalence and the theory of concretisation, both of which impose exclusive arguments regarding the object of the intent. Thus, the first one emphasises the protection of abstract values, that results in punishing the offender for the completed, intentional offence, despite the aberration. On the other hand, the reasoning behind the theory of concretisation takes into account the relevance of the specific identification regarding the object of intent. According to this view, the offender is liable for the attempt towards the first object, accompanied with negligence liability for the result. It can be noticed that the legal nature of the protected objects appears as a decisive circumstance for determining criminal responsibility. Unlike the situations when the mentioned objects are not of equal values, where there is no doubt that aberratio ictus involves the responsibility consisting of the attempted offence, in addition to negligence towards the actual result, the equivalence of the attacked and harmed object, causes divergent opinions among different authors in legal theory. This affects not only the legal solutions in positive criminal law, which are mainly based on general rules, but also the judicial practice in this area, that is evidently not unique. Also, it can not be negated that these solutions are based on valuative criteria, giving the advantage to one value versus the other. After analyzing the application of suggested theories in practice and comparative legal solutions, the author pleads in favour of the attempt model, based on the theory of concretisation, suggesting the possiblity of its legal regulation in serbian criminal law. Its advantages are therefore attached to better concordance with practical demands and main principles of criminal law in general.

Key words: *Aberratio ictus*, attempt model, intent model, theory of equivalence, theory of concretisation.

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Osnovni sud u Podgorici

IMOVINSKOPRAVNI ZAHTJEV U SUDSKOJ PRAKSI**

Apstrakt: U radu koji je pred nama pažnju ćemo posvetiti imovinskopravnom zahtjevu i njegovom tretmanu u sudskoj praksi. Ne može se reći ni da je zakonsko uređenje ovog instituta idealno – i ono svakako trpi kritike – međutim, praksa sudova je utoliko važna što predstavlja svakodnevnu primjenu i ne tako sjajnog zakonskog rješenja, a i ta primjena je, kada se podrobnije analizira, podložna kritici. S tim u vezi, cijenimo da odnos koji je ovom pravnom institutu dat u Zakoniku o krivičnom postupku, nije srazmjeran mjeri koju mu sudovi posvećuju, što se (možda) može i pripisati činjenici da o ovom građanskom zahtjevu, odlučuju sudije krivičari. Pritom, ni praksa viših sudova nije pokazala trend ka „afirmaciji" ovog instituta, vjerovatno svoj stav racionalizujući činjenicom da je krivični postupak samo jedan od dva konteksta u kojem se takav zahtjev može iznijeti, pri čemu je građanski sud pozvaniji da o njemu odluči. U vezi sa iznijetim, naš zadatak u ovom radu jeste da pokažemo da ova racionalizacija nije pravilna i na zakonu zasnovana i da se radi o jednom institutu koji zaslužuje da ima više prostora na pozornici judikature, nego što to trenutno ima. Međutim, ne smije se zanemariti činjenica da je najprije u praksi Evropskog suda za ljudska prava, a zatim i u nacionalnim okvirima, priznato pravo oštećenom na suđenje u razumnom roku u situaciji kada je postavio imovinskopravni zahtjev u krivičnom postupku, što je nemali doprinos ka afirmaciji ovog instituta u praksi.

Ključne riječi: imovinskopravni zahtjev, šteta, žrtva, oštećeni, ovlašćeno lice, krivični postupak.

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** Ovaj članak predstavlja u osnovi djelimično izmijenjen i skraćen pristupni rad koji je, u okviru doktorskih studija na Pravnom fakultetu Univerziteta u Beogradu, odbranjen dana 03.10.2017. godine pred komisijom koju su činili profesori dr Đorđe Ignjatović i dr Goran P. Ilić.

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RESTITUTION CLAIM IN JUDICAL PRACTICE

SUMMARY

In criminal proceedings restitution claims could be considered as a sui generis institute. However, this institute have not experienced its full affirmation in judicial practice yet. We have brought to attention some of the major problems integrated into practice while criticizing certain attitudes imposed by theoreticians. Due to limited scope, we have been observing the most obvious problems but we should be aware of the fact that we are far away from it's end. Thus while presenting our opinion which we have been trying to support with arguments presented below. Some of the following problems have been pointed out: firstly, we emphasized misused trend adopted by courts to always direct injured party when they partially decide on the request to obtain their excess approaching to the civil proceedings, furthermore we have pointed out problem which arise here in the form of violation of the rule "ne bis in idem". However, this domain needs better regulation in the legal framework; also, we haven't excluded widely adopted occurrence to allow the injured party to change their request during the process, thus meanwhile presenting one our major concerns which brings to increase of the ratio for submitted request without a valid reason, referring to the relevant provisions of the Law on Civil Procedure in solving this problem; Besides all above mentioned, we have also discussed widely distributed trend of insufficient definition of the request, in terms of its precise defining in all elements (what damage and what should be the amount for all sorts of damage required by the injured party) and finally we have specified mistakes that courts have been making in situations when they decide not to decide on submitted application, or on contradictory argumentation applied in that certain occasion.

Keywords: Restitution claim, damage, victim, injured party, authorized person, criminal proceedings.

ZAKONODAVSTVO I PRAKSA

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MEĐUNARODNI IZVORI PRAVA IZVRŠENJA KRIVIČNIH SANKCIJA PREMA MALOLETNICIMA – DOKUMENTI UJEDINJENIH NACIJA

Apstrakt: Ujedinjene nacije razvile su poslednjih decenija živu legislativnu aktivnost u nameri da usmere i postave standarde u izvršenju krivičnih sankcija prema maloletnicima. U radu je ukazano na odredbe kako onih od tih instrumenata čije odredbe se u celini primenjuju na izvršenje krivičnih sankcija prema ovoj kategoriji lica („primarni izvori"), kao i onih koji samo uzgred dodiruju ovu problematiku („sekundarni izvori") Kao sekundarni izvori navedeni su Konvencija o prvima deteta, Standardna minimalna pravila za maloletničko pravosuđe, Smernice UN za prevenciju maloletničke delinkvencije, Svetski akcioni program za mlade u XXI veku i Standardna minimalna pravila o postupanju sa zatvorenicima (Nelson Mandela pravila); primarni izvori su Pravila UN o zaštiti maloletnika lišenih slobode i Standardna minimalna pravila UN za mere alternativne institucionalnom tretmanu. Njihovim donošenjem, Svetska organizacija snažno je uticala na razvoj onoga što bismo mogli nazvati „Krivično izvršno pravo za maloletnike".

Ključne reči: Maloletnici, krivične sankcije, izvršenje, Ujedinjene nacije, rezolucije, konvencije.

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1 *UN World Programme of Action for Youth to the Year 2000 na Beyond* (A/RES/50/80), 14 December 1995. Njeno donošenje inicirano je nekoliko godina ranije Rezolucijom 45/103 od 14. decembra 1990.

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INTERNATIONAL SOURCES OF PENAL EXECUTION LAW FOR MINORS – UNITED NATIONS DOCUMENTS

SUMMARY

The United Nations has developed live legislative activity in recent decades in order to impose standards in the enforcement of criminal sanctions against juveniles. The paper pointed to the provisions of those instruments whose provisions are applied in their entirety to the enforcement of criminal sanctions against this category of persons ("primary sources"), and those instruments that only partially touch on this issue ("secondary sources"). Secondary sources in paper are listed as follows: *Convention on the Rights on the Child, Standard Minimum Rules for the Administration of Juvenile Justice*, *Guidelines for the Prevention of Juvenile Delinquency*, *World Programme of Action for Youth to the Year 2000 na Beyond* and *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*; while the following documents were listed as primary sources: *Rules for the Protection of Juveniles Deprived of their Liberty* and *Standard Minimum Rules for Non-custodial Measures*. By their adoption, the World Organization strongly influenced the development of what could be called the "Penal Executive Law for Juveniles". These documents, irrespective of the fact that they do not have the same commitment to the members of the World Organization, have done but still have a strong impact on the legislation of all countries in the part relating to the enforcement of criminal sanctions against this category of perpetrators of crimes.

In this paper, we have pointed out the basic content of these international instruments, although some of their provisions are partially aligned. This is done not only in order to find the relevant legislation of the World Organization in one place (and this will be of benefit to those who will be familiar with this matter), but also because it will enable researchers to compare how much the provisions of the criminal executive rights in Serbia are in line with the United Nations standards and recommendations.

Key words: Juveniles, criminal sanctions, executive, United Nations, resolutions, conventions.