SOCIETAS ET IVRISPRVDENTIA

SOCIETAS ET IURISPRUDENTIA

Medzinárodný internetový vedecký časopis zameraný na právne otázky v interdisciplinárnych súvislostiach

International Scientific Online Journal for the Study of Legal Issues in the Interdisciplinary Context

Vydáva Právnická fakulta Trnavská univerzita v Trnave

Issued by Faculty of Law Trnava University in Trnava

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Editoriál k jarnej edícii SOCIETAS ET IURISPRUDENTIA 2022

Ctení čitatelia, vážení priatelia,

dovoľte, aby som Vám predstavila prvé číslo desiateho ročníka SOCIETAS ET IURISPRUDENTIA, medzinárodného internetového vedeckého časopisu zameraného na právne otázky v interdisciplinárnych súvislostiach.

Časopis SOCIETAS ET IURISPRUDENTIA vychádza pod záštitou Právnickej fakulty Trnavskej univerzity v Trnave a tematicky sa zameriava najmä na spoločensky významné prierezové súvislosti otázok verejného práva a súkromného práva na národnej, nadnárodnej, ako aj medzinárodnej úrovni, pričom prijíma a publikuje výhradne pôvodné, doposiaľ nepublikované príspevky.

Časopis vychádza v elektronickej on-line podobe pravidelne štyrikrát ročne, a to v termínoch 31. marec, 30. jún, 30. september a 31. december, pričom ponúka priestor pre publikáciu príspevkov v podobe samostatných vedeckých štúdií, ako aj cyklov vedeckých štúdií, esejí zamýšľajúcich sa nad aktuálnou spoločenskou témou alebo dianím, recenzií publikácií vzťahujúcich sa na hlavné zameranie časopisu, a taktiež informácií, ako aj správ súvisiacich so základným poslaním časopisu.

Webová stránka časopisu SOCIETAS ET IURISPRUDENTIA ponúka čitateľskej verejnosti informácie v bežnom grafickom rozhraní, a súbežne aj v grafickom rozhraní Blind Friendly pre zrakovo hendikepovaných čitateľov paralelne v slovenskom a anglickom jazyku. V oboch jazykoch zabezpečuje redakcia časopisu i spätnú komunikáciu prostredníctvom svojej osobitnej e-mailovej adresy. Zároveň webová stránka časopisu ponúka čitateľom vďaka uplatneniu dynamického responzívneho webdizajnu možnosť pristúpenia a prehliadania z akéhokoľvek zariadenia umožňujúceho prenos informácií prostredníctvom globálnej siete internet.

Aktuálne, prvé číslo desiateho ročníka časopisu SOCIETAS ET IURISPRUDENTIA ponúka celkovo štyri samostatné vedecké štúdie napísané v dvoch rôznych jazykoch – v angličtine a slovenčine. V poradí prvá štúdia ponúka čitateľom veľmi komplexný a podrobný pohľad na určujúce občianskoprávne ustanovenia a praktické otázky súvisiace s problematikou zavedenia inštitútu „rodinnej nadácie“ do poľského právneho poriadku. Nasledujúca štúdia dôkladne analyzuje, sprehľadňuje a príkladne vysvetľuje problematiku procesov rozhodovania v trestnom konaní

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v rámci všeobecnej teórie forenznej vedy v Rumunsku. V poradí ďalšia štúdia predstavuje systematické a hĺbkové vymedzenie a objasnenie kľúčových otázok spájajúcich sa s charakterizovaním vplyvu rímskeho práva na trestanie v súčasnom právnom ponímaní. Posledná, štvrtá štúdia ponúka čitateľovi rozsiahly hĺbkový výklad spätý s právnymi otázkami súvisiacimi s pojmom zmluvnej pokuty v pracovnom práve, ako aj krátke zamyslenie sa nad dohodou o peňažnej náhrade v § 62 ods. 8 a § 83a ods. 5 slovenského Zákonníka práce.

V súvislosti s vydaním prvého čísla desiateho ročníka časopisu SOCIETAS ET IURISPRUDENTIA by sme veľmi radi informovali všetkých jeho čitateľov, prispievateľov aj priaznivcov, že časopis je registrovaný v medzinárodných vedeckých databázach Crossref, ERIH PLUS a Index Copernicus International a požiadal o registráciu v ďalších medzinárodných vedeckých databázach. Súčasne by sme veľmi radi informovali aj o tom, že do okamihu vydania nového čísla časopisu zaznamenali jeho webové stránky celkom 145 krajín návštev (v abecednom poradí):

1. Afganistan
2. Albánsko
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5. Argentína
6. Arménsko
7. Austrália
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13. Benin
14. Bielorusko
15. Bolívia
16. Bosna a Hercegovina
17. Brazília
18. Bulharsko
19. Burkina Faso
20. Burundi
21. Curaçao
22. Cyprus
23. Česká republika
50. Island
51. Izrael
52. Írsko
53. Jamajka
54. Japonsko
55. Jemen
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64. Kolumbia
65. Kongo – Kinshasa
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67. Kostarika
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70. Laos
71. Libanon
72. Litva
99. Palestína
100. Panama
101. Paraguaj
102. Peru
103. Pobrežie slonoviny
104. Poľsko
105. Portoriko
106. Portugalsko
107. Rakúsko
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117. Slovensko
118. Slovinsko
119. Spojené arabské emiráty
120. Spojené kráľovstvo
121. Spojené štáty americké

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25. Čína
26. Dánsko
27. Dominika
28. Dominikánska republika
29. Egypt
30. Ekvádor
31. Estónsko
32. Etiópia
33. Fidži
34. Filipíny
35. Fínsko
36. Francúzsko
37. Ghana
38. Grécko
39. Gruzínsko
40. Guatemala
41. Guinea
42. Holandsko
43. Honduras
44. Hongkong
45. Chorvátsko
46. India
47. Indonézia
48. Irak
49. Irán
73. Líbya
74. Lotyšsko
75. Luxembursko
76. Macedónsko
77. Madagaskar
78. Maďarsko
79. Malajzia
80. Malawi
81. Malta
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83. Maurícius
84. Mexiko
85. Mjanmarsko
86. Moldavsko
87. Mongolsko
88. Mozambik
89. Namíbia
90. Nemecko
91. Nepál
92. Nigéria
93. Nikaragua
94. Nórsko
95. Nová Kaledónia
96. Nový Zéland
97. Omán
98. Pakistan
122. Srbsko
123. Srí Lanka
124. Sudán
125. Sýria
126. Španielsko
127. Švajčiarsko
128. Švédsko
129. Tadžikistan
130. Taiwan
131. Taliansko
132. Tanzánia
133. Thajsko
134. Togo
135. Trinidad a Tobago
136. Tunisko
137. Turecko
138. Uganda
139. Ukrajina
140. Uruguaj
141. Uzbekistan
142. Venezuela
143. Vietnam
144. Zambia
145. Zimbabwe

Pri príležitosti vydania prvého čísla desiateho ročníka časopisu by som sa veľmi rada úprimne poďakovala všetkým prispievateľom, ktorí doň aktívne prispeli a podelili sa tak s čitateľmi o svoje vedomosti, skúsenosti či nevšedné pohľady na problematiku právnych otázok, a rovnako tiež vedeniu Právnickej fakulty Trnavskej univerzity v Trnave, všetkým priateľom, kolegom, zamestnancom Právnickej fakulty i rektorátu Trnavskej univerzity v Trnave za ich podporu a podnetné rady, a napokon tiež členom redakčnej rady časopisu a redakčnému tímu.

Verím, že časopis SOCIETAS ET IURISPRUDENTIA poskytne podnetnú a inšpiratívnu platformu pre komunikáciu na úrovni odbornej aj občianskej verejnosti, a rovnako tiež pre vedecké a celospoločensky prínosné riešenia aktuálnych právnych otázok v kontexte ich najširších in-

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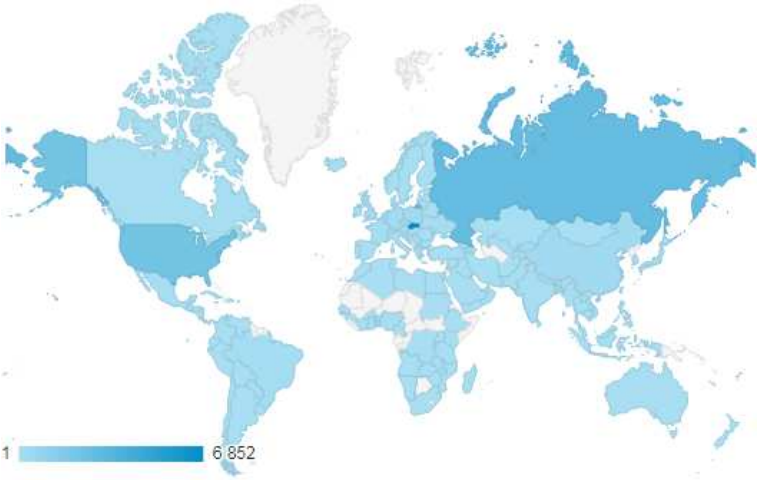
terdisciplinárnych spoločenských súvislostí, a to nielen na národnej, ale aj na regionálnej a medzinárodnej úrovni.

Obrázok 1 Teritoriálny prehľad krajín návštev webových stránok časopisu SOCIETAS ET IURISPRUDENTIA do okamihu vydania prvého čísla desiateho ročníka



Prameň: Nástroje Google Analytics uplatnené na webových stránkach časopisu SOCIETAS ET IURISPRUDENTIA. Dostupné na internete: http://www.google.com/analytics/. © Google Analytics.

V mene celej redakčnej rady a redakcie časopisu SOCIETAS ET IURISPRUDENTIA

s úctou,

Jana Koprlová

Trnava 31. marec 2022

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Editorial for Spring Edition of the SOCIETAS ET IURISPRUDENTIA 2022

Dear readers and friends,

let me introduce the first issue of the tenth volume of SOCIETAS ET IURISPRUDENTIA, an international scientific online journal for the study of legal issues in the interdisciplinary context.

The journal SOCIETAS ET IURISPRUDENTIA is issued under the auspices of the Faculty of Law of the Trnava University in Trnava, Slovakia, and it thematically focuses mainly on socially relevant interdisciplinary relations connected with issues of public law and private law at the national, transnational and international levels, while accepting and publishing exclusively original, hitherto unpublished contributions.

The journal is issued in an electronic on-line version four times a year, regularly on March 31st, June 30th, September 30th and December 31st, and it offers a platform for publication of contributions in the form of separate papers and scientific studies as well as scientific studies in cycles, essays on current social topics or events, reviews on publications related to the main orientation of the journal and also information or reports connected with the inherent mission of the journal.

The website of the journal SOCIETAS ET IURISPRUDENTIA offers the reading public information in the common graphical user interface as well as in the blind-friendly interface designed for visually handicapped readers, both parallel in the Slovak as well as English languages. In both languages the journal's editorial office provides also feedback communication through its own e-mail address. At the same time, the website of the journal offers readers due to the use of dynamic responsive web design accession and browsing by using any equipment that allows transmission of information via the global Internet network.

The current, first issue of the tenth volume of the journal SOCIETAS ET IURISPRUDENTIA offers a total of four separate scientific studies written in two different languages – in the English and Slovak languages. The very first study offers readers a very complex and detailed view of the determining civil law provisions and practical issues related to the issue of introducing the institute of a "family foundation" into the Polish law. The following study thoroughly analyses, clarifies and exemplarily explains the questions of the processes of making decisions in the crimi-

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nal proceedings within a general theory of forensic science in Romania. The next study presents systematic and thorough qualifying and clarifying of the key questions related to characterisation of the effects of the Roman law on punishment in the current legal sense. The final, fourth study offers the reader an extensive in-depth commentary on the legal questions related to the concept of contractual penalty in the labour law as well a brief reflection on the agreement on monetary compensation in paragraph 62(8) and paragraph 83a(5) of the Slovak Labour Code.

In relation to the release of the first issue of the tenth volume of the journal SOCIETAS ET IURISPRUDENTIA we are pleased to inform all its readers, contributors as well as fans that the journal has been registered in the international scientific databases Crossref, ERIH PLUS and Index Copernicus International and applied for registration in other international scientific databases. At the same time, we would like to inform that till the date of the new issue, the journal's websites had recorded a total of 145 countries of visits (in alphabetical order):

1. Afghanistan
2. Albania
3. Algeria
4. Angola
5. Argentina
6. Armenia
7. Australia
8. Austria
9. Azerbaijan
10. Bahrain
11. Bangladesh
12. Barbados
13. Belarus
14. Belgium
15. Benin
16. Bolivia
17. Bosnia and Herzegovina
18. Brazil
19. Bulgaria
20. Burkina Faso
21. Burundi
22. Cambodia
23. Cameroon
50. Greece
51. Guatemala
52. Guinea
53. Honduras
54. Hong Kong
55. Hungary
56. Iceland
57. India
58. Indonesia
59. Iran
60. Iraq
61. Ireland
62. Israel
63. Italy
64. Jamaica
65. Japan
66. Kazakhstan
67. Kenya
68. Kosovo
69. Kuwait
70. Kyrgyzstan
71. Laos
72. Latvia
99. Panama
100. Paraguay
101. Peru
102. Philippines
103. Poland
104. Portugal
105. Puerto Rico
106. Romania
107. Russia
108. Rwanda
109. Saudi Arabia
110. Senegal
111. Serbia
112. Seychelles
113. Singapore
114. Sint Maarten
115. Slovakia
116. Slovenia
117. South Africa
118. South Korea
119. Spain
120. Sri Lanka
121. Sudan

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25. Chile
26. China
27. Colombia
28. Congo – Kinshasa
29. Costa Rica
30. Côte d'Ivoire
31. Croatia
32. Cuba
33. Curaçao
34. Cyprus
35. Czech Republic
36. Denmark
37. Dominica
38. Dominican Republic
39. Ecuador
40. Egypt
41. El Salvador
42. Estonia
43. Ethiopia
44. Fiji
45. Finland
46. France
47. Georgia
48. Germany
49. Ghana
73. Lebanon
74. Libya
75. Lithuania
76. Luxembourg
77. Macedonia
78. Madagascar
79. Malawi
80. Malaysia
81. Malta
82. Mauritius
83. Mexico
84. Moldova
85. Mongolia
86. Morocco
87. Mozambique
88. Myanmar
89. Namibia
90. Nepal
91. New Caledonia
92. New Zealand
93. Nicaragua
94. Nigeria
95. Norway
96. Oman
97. Pakistan
98. Palestine
122. Sweden
123. Switzerland
124. Syria
125. Taiwan
126. Tajikistan
127. Tanzania
128. Thailand
129. The Netherlands
130. Togo
131. Trinidad and Tobago
132. Tunisia
133. Turkey
134. Uganda
135. Ukraine
136. United Arab Emirates
137. United Kingdom
138. United States of America
139. Uruguay
140. Uzbekistan
141. Venezuela
142. Vietnam
143. Yemen
144. Zambia
145. Zimbabwe

On the occasion of launching the first issue of the tenth volume of the journal, I would be delighted to sincerely thank all the contributors who have contributed in it actively and have shared with the readers their knowledge, experience or extraordinary views on legal issues as well as the top management of the Faculty of Law of the Trnava University in Trnava, all friends, colleagues, employees of the Faculty of Law, the rector's administration at the Trnava University in Trnava for all support and suggestive advices and, finally, also the members of journal's editorial board and the editorial team.

I believe that the journal SOCIETAS ET IURISPRUDENTIA provides a stimulating and inspirational platform for communication both on the professional level and the level of the civic society as well as for scientific and society-wide beneficial solutions to current legal issues in context of

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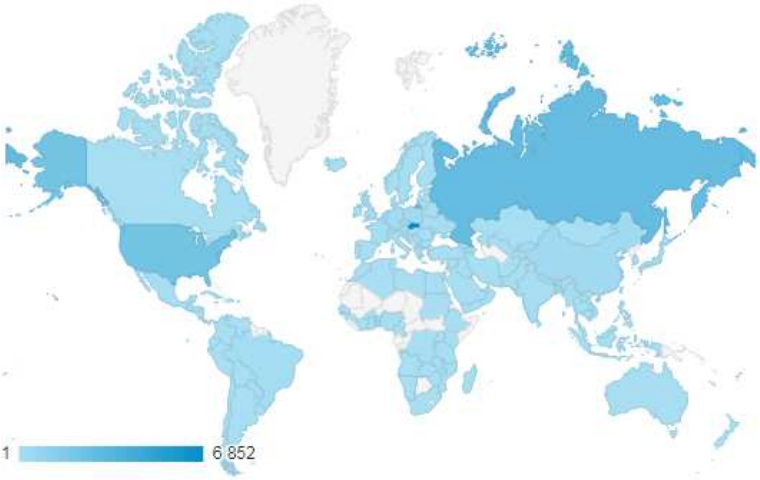
their broadest interdisciplinary social relations, in like manner at national, regional and international levels.

Figure 1 Territorial View of Visitors' Countries in Relation to the Websites of the Journal SOCIETAS ET IURISPRUDENTIA before Issuing the First Issue of the Tenth Volume



Source: Tools of Google Analytics in Relation to Websites of the Journal SOCIETAS ET IURISPRUDENTIA. Available at: http://www.google.com/analytics/. © Google Analytics.

On behalf of the entire editorial board and editorial office of the journal SOCIETAS ET IURISPRUDENTIA

Yours faithfully,

Jana Koprlová

Trnava, Slovakia, March 31st, 2022

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Polish Draft Law on "Family Foundations"

Rafał Adamus

Abstract: *This study concerns on the Draft Act on Family Foundations. This draft law is still in the course of legislative works, but it constitutes the basis for a lively discussion in Poland on its final structure. This paper presents the general concept of regulating family foundations in Poland with the most important aspects of the private-legal structure. The model relating to tax solutions remains beyond the scope of this text. The Bill on Family Foundations has a symbolic dimension, because if the legislator intends to implement it, it means that the development of economic relations in Poland has reached an appropriate high level.*

Key Words: *Civil Law; Family Foundation; Beneficiary; Founder; Estate; Poland.*

Preliminary issues

A draft law on "family foundations" (in Polish "fundacje rodzinne", in German *Privatstiftung*, *Familienstiftung*, in Swedish *Stiftelse*) has been just prepared in Poland.[1] Similar regulation has been in force in many European countries: in Austria, the Netherlands, Switzerland, Liechtenstein, Sweden, etc.[2]

The Polish Bill on Family Foundations regulates the creation, organization, operation, dissolution and liquidation of a family foundation as well as the rights and obligations of the founder and the beneficiary. The Act on Family Foundations, in line with the legislative assumption, is a way to accumulate and to preserve family heritage over many genera-

[1] See *Raport z konsultacji Zielonej księgi fundacji rodzinnej* [online]. 1. wyd. Warszawa: Ministerstwo Rozwoju, 2019. 30 p. [cit. 2022-02-18]. Available at: https://www.gov.pl/attachment/f3aea4fb-f835-44f1-a00c-db50f243163d.

[2] See MARIAŃSKI, A. Sukcesja przedsiębiorstw prowadzonych przez osoby fizyczne na gruncie ustawodawstw wybranych jurysdykcji. *Monitor Prawniczy*. 2019, nr 23, pp. 1263-1268. ISSN 1230-6509; and TIM, A. Fundacje prywatne jako element liberalizacji polskich przepisów o spadkach. Refleksje na gruncie stanu prawnego Republiki Austrii i Księstwa Liechtenstein. *Studia Prawno-Ekonomiczne* [online]. 2018, vol. 109, pp. 145-157 [cit. 2022-02-18]. ISSN 2450-8179. Available at: https://doi.org/10.26485/spe/2018/109/9.

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tions. Unfortunately, the difficult history of the Republic of Poland, conditioned by geopolitical circumstances, has not yet provided a basis for the development and preservation of multi-generational family fortunes. Former large magnate estates of the First Republic of Poland (finally liquidated in year 1795 by Russia, Prussia and Austria) significantly lost their economic importance during the lack of the Polish statehood. The years of independence 1918 – 1939 were too short to build a large number of multi-generational enterprises. After year 1945, Poland was a non-sovereign country, dependent on the USSR, dominated by "socialized property". The war damage, changes in the State borders, confiscations and nationalization of private property prevented the building of stable estates. It seems that year 1989, or even the Act of December 28, 1988 (known as the "Wilczek Act"), which introduced the principle of economic freedom, opened the fundamental change. Later, the direction of these changes was sealed by the Poland's membership in an elite club – the European Union. Thus, only the first generation of the Polish business, which started in the 90's of the Twentieth Century, is now successive to the hands of the second generation.

In many European countries, special legislation has been introduced to facilitate the collection and administration of family assets. Nevertheless, it should be assessed that stable multi-generational properties are still rare in the Polish economic landscape.

Functions of family foundations

In the long period of time, family foundation may become an instrument of capital accumulation in the Republic of Poland. Preventing the outflow of capital abroad is undoubtedly a favourable phenomenon for the domestic economy. It may compete with other foreign institutions, in particular through tax facilitations – provided that such facilities are introduced and maintained by the legislator, or through the accessibility (flexibility) of normative regulation.

The family foundation can prevent the fragmentation of accumulated property among numerous heirs. A large estate can be managed more efficiently than an estate divided into multiple portions.

Natural persons running a business can use the family foundation instrument as a method of "parking" their own property, in order to protect their life achievements against future economic risks.

The Act on Family Foundations introduces a very easy way for a living founder to dissolve a family foundation. The founder may dissolve the family foundation without giving any reason. As a rule, the living founder has priority to take over the assets of a liquidated family foundation (unless the statute provides otherwise). On the other hand, the introduction of the property of a natural person to a family foundation makes it impossible to seize it in the enforcement proceedings against the founder or to cover this property with the founder's bankruptcy estate. The trustee in bankruptcy of the founder's bankruptcy may not submit a declaration on dissolution of the family foundation. Moreover, the enforcement body cannot submit a declaration on dissolution of the family foundation. However, it is possible to investigate – within the statutory deadlines – the ineffectiveness of contributing assets to the foundation or donations made for it.

A family foundation may, for the same reasons, be used as a kind of pension fund. Importantly, the founder does not have to hand over the power to the family foundation into "foreign hands". He/she can become a board member himself/herself. The statute of a family foundation does not have to indicate a specific beneficiary; the founder may at any time make changes to the beneficiaries to which he/she is entitled or the property after the liquidation of the family foundation. A family foundation may be an instrument constructed in a specific case for the needs of the founder himself/herself.

Thanks to the instrument of a family foundation, a natural person running a business may separate his/her consumption assets (for the needs of his/her own family members) from commercial assets used for running a business.

The family foundation has been subjected to a number of restrictions as to the possibility of running a business and thus the economic risk to the property deposited in this legal entity is limited.

A family foundation can serve various economic purposes. It is possible to use the property of a family foundation to exhaust it. It is also possible to multiply the assets of a family foundation.

The scope of the law on family foundations

A family foundation is a legal person separate from the founder and the beneficiary, having its own property and being responsible for its obligations. The Act on Family Foundations is, therefore, to specify: (1) estab-

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lishing a family foundation, including entities authorized to establish a family foundation, the method of its creation, property requirements, entry of the foundation in the register; (2) organization of a family foundation, including the structure and competences of the foundation's bodies; (3) the functioning of a family foundation, including the permissible scope of activity (limitation in the scope of running a business), representing the foundation *pro foro externo*, managing the foundation's affairs *pro foro interno*, rules of managing the foundation's assets, rules of liability for obligations, changes in the foundation's statute; (4) dissolving the family foundation, including the grounds for dissolving the foundation; (5) liquidation of the family foundation, including the rules for dealing with the property of the family foundation; (6) the founder's rights and obligations; (7) the rights and obligations of the beneficiary.

Due to the fact that (1) assets are contributed to the family foundation, (2) the family foundation generates revenues, (3) payments of benefits are paid to the beneficiaries, and (4) the liquidating dividend is shared, the legal and tax regulation is of key importance from the point of view of the popularity of this institution. It will surely determine the attractiveness of this legal structure for legal transactions in practice.[3]

When creating the structure of a family foundation, the legislator repeatedly referred to the previous legislative solutions that had been functioning for years in the Polish civil law and the Polish company law. As a consequence, the draft legal regulation of family foundations is very similar to many well-known institutions of civil law and commercial law (which is a specialized branch of civil law in Poland). The regulation of family foundations is deeply embedded in the existing legal tradition.

A family foundation is a legal person, subject to civil law. Of course, this is not a new type of company, although it shows some similarity to the structure of commercial companies. The Bill on Family Foundations

[3] See MARIAŃSKI, A. Polska fundacja rodzinna – postulaty legislacyjne. *Monitor Prawniczy*. 2022, nr 3, pp. 129-134. ISSN 1230-6509; MARIAŃSKI, A. and A. ŻĄDŁO. Opodatkowanie fundacji prywatnych. *Przegląd Podatkowy*. 2018, nr 8, pp. 21-29. ISSN 0867-7514; MARIAŃSKI, A. Opodatkowanie fundacji rodzinnych, czyli dokąd zmierza tzw. uszczelnianie systemu podatkowego. *Przegląd Podatkowy*. 2020, nr 4, pp. 32-39. ISSN 0867-7514; RUSEK, J. Wykorzystanie fundacji prywatnej (rodzinnej) w procesie planowania podatkowego. *Monitor Podatkowy*. 2011, vol. 18, nr 11, pp. 25-30. ISSN 1231-1855; BETIUK, M. Fundacje rodzinne a podatki. *Doradztwo Podatkowe*. 2021, nr 7, pp. 67-69. ISSN 1427-2008; and HILL, D. L. and T. KARDACH. Trust i prywatna fundacja jako narzędzia planowania podatkowego – wybrane zagadnienia: Część II. *Przegląd Podatkowy*. 2007, nr 7, pp. 14-20. ISSN 0867-7514.

does not regulate all issues relating to a family foundation. The reference to the application of the Polish Civil Code[4] is a copy of the provisions of the Article 2 of the Polish Commercial Companies Code.[5] Therefore, to a family foundation in the scope not regulated in the Act on Family Foundations (1) the provisions of the Civil Code are directly applicable; (2) the provisions of the Civil Code shall apply accordingly if required by the nature of the legal relationship of the family foundation; appropriate application of a legal provision means the possibility of its modification, omission of certain elements, or even omission in its entirety; (3) the provisions of the existing Act on Foundations[6] do not apply.

The provisions of the Polish Commercial Companies Code do not apply to a family foundation. Nevertheless, the use of analogy method in specific cases is possible. It is possible to refer to the "business judgment rule" in relation to decisions made by the management board of a family foundation when investing assets belonging to a family foundation.

The statute of a family foundation as a source of the legal relationship

In the case of a family foundation, significant importance – in terms of shaping the content of the legal relationship of a family foundation – should be assigned to the statute of the family foundation. The statute is subject to the freedom of contract pursuant to the Article 353(1) of the Polish Civil Code. The legislator strived to create a flexible framework to fill it with any content accepted by the founder within the framework of the general competence model. The obligatory matter of the statute is to define: name, seat, goals, duration (if limited) of the family foundation. The statute specifies the method of designating the beneficiary and the scope of the beneficiary's rights (including the beneficiary's renunciation of rights). The statute determines the amount of the founding fund and the property contributed to cover it, and, finally, the method of allocating the property in connection with the liquidation of the family foundation. The statute defines the rules for the appointment of bodies and their competences. The statute should contain rules for its amendment. How-

[4] See *Act of April 23, 1964 – Civil Code, consolidated text* [1964]. Journal of Laws of Poland, 2020, item 1740, 2320; 2021, item 1509, 2459.

[5] See *Act of September 15, 2000 – Code of Commercial Companies, consolidated text* [2000]. Journal of Laws of Poland, 2020, item 1526, 2320; 2021, item 2052.

[6] See *Act of April 6, 1984, on Foundations, consolidated text* [1984]. Journal of Laws of Poland, 2020, item 2167.

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ever, if the founder is the creator of the statute, the power to amend the statute may be granted to someone else, for example to an assembly of beneficiaries. Optional provisions of the statute may include, *inter alia*, defining the rules for liquidating a family foundation, directions and guidelines for additional investment in the assets of a family foundation.

The founder and the beneficiary may address a letter of intent to the governing bodies of the family foundation, in which there are recommendations as to the specific actions. A letter of intent may indicate a paradigm of conduct in managing the assets of a family foundation, creating benefits for beneficiaries, etc. The letter of intent is not binding on the bodies of a family foundation.

The Bill on Family Foundations allows for a relatively flexible shaping of the internal structure of the family foundation. Many legal norms are of a supplementary nature, e.g. with regard to the possibility of transferring the rights and obligations of the founder, the manner of exercising the rights and obligations by the founders. The mandatory provisions are the legal norms regarding the principles of representation and relationship to the third parties, including the civil liability for obligations.

Aims of a family foundation

Pursuant to the proposed regulation, the family foundation manages its property and ensures its protection and provides benefits to the beneficiary, in particular, it covers the costs of its maintenance or education, or, in the case of the beneficiary being a non-governmental organization conducting public benefit activities, supports the implementation of socially or economically useful goals.

A family foundation has two basic tasks: managing the assets into which it was contributed as well as paying out benefits to the beneficiaries. The legislator adopted a very broad formula of a family foundation. A family foundation may have an entirely "private" purpose. In such a case, the beneficiaries of the family foundation may be people close to the founder, his/her spouse and relatives. A family foundation may also have a general social purpose. In this case, the beneficiaries will be non-governmental organizations. The beneficiary of a family foundation may be an "ordinary" foundation. Finally, it can be a diversified goal: private and general.

Legal personality of a family foundation

A family foundation is a legal person. It acquires legal personality upon entry in the register of family foundations. Entry in the register is of a constitutive nature. Like any legal entity, a family foundation may have several stage forms. The legislator decided to create a special register of family foundations which fulfils both creative and informative function.

A family foundation should be reported to the registry court within 6 months from the date of drawing up the founding act of the foundation or from the date of opening the will establishing the family foundation. Failure to comply with this obligation results in the termination of the family foundation in the organization by virtue of the law itself.

Until the entry into the register of family foundations, and from the moment of the notarial deed being the founding act of the family foundation or the opening of the will establishing the family foundation, there is a family foundation "in the organization". A family foundation in the organization has the status of the so-called "statutory person" (an organizational unit that does not have legal personality, but has the legal capacity provided for by the law – Article 33 of the Civil Code). A family foundation in the organization may manage property on its own behalf as well as acquire property rights, incur liabilities, etc.

A family foundation may be established for a specified or indefinite period of time. Noteworthy is the very wide possibility of dissolving the family foundation. A family foundation can be structured in such a way that all its assets are to be used for the payment of benefits to the beneficiaries. Thus, once this property is exhausted economically, the further legal existence of the family foundation will be of no great importance.

A family foundation as a legal person operates through its bodies (Article 38 of the Civil Code). The structure of the governing bodies of a family foundation can be two- or threefold: (1) an obligatory management board that runs the family foundation's affairs and represents it outside; (2) a board of protectors, which is a non-obligatory body (except in the case where the number of beneficiaries exceeds 25), exercising supervisory functions over the management board; (3) an obligatory meeting of beneficiaries, the tasks of which include, *inter alia*, determining the composition of the management board (if it is not the competence of other bodies), adopting a resolution to dissolve the family foundation.

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The legislator provides for the possibility of minutes of paid function in the bodies of a family foundation, besides, the administrative costs of a family foundation may be much minimized in some cases. Family foundations are not subject to the processes of merger, division or transformation. However, the draft clearly lacks the mode of merging family foundations and the mode of dividing family foundations.

Name of the family foundation

The name of the family foundation can be chosen freely and contains the additional designation "Fundacja Rodzinna" (in Polish "Family Foundation"). For additional designation, it is permissible to use the abbreviation "F.R." in the trade.

The semantic form of the legal form of this institution has met with serious criticism. It has been argued that the use of the term "foundation" for a legal person that may pursue very selfish family interests may lead to damage to the image of the foundation pursuing only public goals.

A family foundation should not take a false name, in particular suggesting assistance in the public interest, when it aims to satisfy mainly the private (family) interests of the beneficiaries.

The legislator assumed that the name of the foundation may be chosen freely. The name of the family foundation does not have to include the founder's name or his/her recognizable nickname. The name of the family foundation can be completely fancy. The name of the family foundation may be the same as the company of the entrepreneur related to the founder. The obligatory addition of the name of a family foundation is the designation of its legal form. The name of the family foundation is subject to legal protection.

Family foundation's assets

The property of a family foundation is separate from the property of the founder and the beneficiaries. A family foundation is entitled to ownership of the property it has been equipped with or developed in the course of its operation. Limited property rights may be established for the foundation, for example easement, usufruct.

The property of a family foundation may be ownership and other property rights. The property of a family foundation may be any items

admitted to legal trading (*res in commercio*). The family foundation's assets may include possession and, therefore, a certain factual state.

The property of a family foundation may include intellectual property rights, industrial property rights and debts. In terms of the subject matter (Article 55(1) of the Civil Code), an enterprise may also constitute the property of a foundation, without colliding with restrictions as to running a business. First, it is possible to rent or to lease the enterprise. Second, the enterprise may be of such a type that, in order to exploit it, an economic activity authorized for the family foundation may be carried out.

A family foundation may accumulate property from several sources: through property contributed to the family foundation by the founder or founders; through donations made by donors; as a result of own activity leading to the generation of revenues. A family foundation may take over the property of a natural person on a trust basis. The statute of a family foundation should provide for the allocation of the property of the family foundation after its liquidation.

The founder contributes to the family foundation a founding fund which includes property intended for the implementation of its goals, worth at least 100,000 PLN. If, as a result of the loss suffered by the family foundation, the value of the founding fund amounts to less than 100,000 PLN, the profit shall first be allocated to supplementing the founding fund. The founding fund is an entry on the liabilities side of the balance sheet of the family foundation. The minimum founding fund is 100,000 PLN. To cover the founding fund, the founders contribute property: in cash and in kind; only in cash; only in a non-monetary form. The value of the contributed property should be estimated according to the market valuation criteria. The legislator does not prohibit the payments from the family foundation's assets necessary to cover the founding fund. The family foundation's assets may be exhausted during its operation. If, as a result of the loss suffered by the family foundation, the value of the founding fund is less than 100,000 PLN, the profit is allocated in the first place to supplementing the founding fund.

The family foundation's assets change over time. Its value may change. It can be multiplied. It may be reduced as a result of the benefits provided to the beneficiaries. The Bill on Family Foundations stipulates that the family foundation is jointly and severally liable with the founder for his/her obligations arising before the family foundation was estab-

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lished. This liability is limited to the value of the property contributed by the founder at the time of purchase and at prices as at the time the creditor is satisfied. The intention of this provision is to protect the founder's creditors if the founder wanted to use the institution of a family foundation as an escape from creditors.

The Draft Act on Family Foundations lays down the rules for the performance of obligations financed from the property of a family foundation. In the first instance, the claims of persons against whom the founders had a maintenance obligation are to be satisfied. Fulfilment of the benefit to the beneficiary, despite the fact that it threatens the solvency of the family foundation towards creditors who are not beneficiaries of the family foundation. A similar rule applies during the liquidation of a family foundation. If all the beneficiaries cannot be satisfied, the benefits are reduced.

Family foundation as a hybrid entrepreneur

The legislator assumes that a family foundation, as a rule, cannot perform economic activity within the meaning of the Polish Entrepreneurs' Law,[7] except for the areas of activity clearly indicated in the Bill on Family Foundations. The economic activity that can be performed by a family foundation is covered by the so-called *numerus clausus* (closed list) of business activities. According to the legislator's intention, a family foundation may not directly conduct industrial, production, construction, service and commercial activities. A family foundation should act as a rentier, an investor. A family foundation may, therefore, acquire shares and stocks in commercial companies engaged in industrial, manufacturing, construction and commercial activities. In this way, the legislator limits the economic risk incurred by the family foundation. As a consequence, a separation of the family foundation from business activity subject to market risk theoretically allows for the safety of the family property. However, this does not mean complete economic security. Investing activities also involve economic risk. In addition, a family foundation may run a farm, which may also be associated with serious economic risk. The statutory catalogue of permissible economic activities of a family foundation means that undertaking any of them corresponds to the entrepreneur's activity within the meaning of the Article 43(1) of the Civil Code.

[7] See *Act of March 6, 2018 – Entrepreneurs' Law, consolidated text* [2018]. Journal of Laws of Poland, 2021, item 162, 2105; 2022, item 24.

A family foundation may perform the following economic activities: (1) dispose of property, unless such property was acquired solely for the purpose of further disposal; (2) rent, lease or otherwise make available property in which it is the owner; (3) join and participate in commercial companies, investment funds, cooperatives and similar entities with their registered offices in the home country or abroad; (4) buy and sell securities, derivatives and similar rights; (5) grant loans to: a) capital companies in which the family foundation has shares or stocks, b) partnerships in which the family foundation participates as a partner, c) beneficiaries; (6) deal with foreign means of payment belonging to the family foundation, in order to make payments related to the activities of the family foundation; (7) run a farm.

In the event that the family foundation has performed a legal act in the scope of illegal economic activity, this act will be valid. The legislator does not introduce the construction of special legal capacity for legal actions of legal persons. The aim of this legal regulation is to limit the activity of the family foundation to the activity with the lowest possible economic risk. In the event of a legal transaction performed as part of unacceptable business activity, this will be the basis for liability of the members of the family foundation's governing bodies. This may be the reason for the dissolution of the family foundation.

Civil liability of a family foundation

The family foundation, as a legal entity, is responsible for its own obligations. The founder is not liable under the law for the obligations of the family foundation.

According to the draft, the family foundation is jointly and severally liable with the founder for its obligations arising before its creation. This liability may not be excluded or limited without the consent of the creditor. By the law, a family foundation is liable under the law for the founder's obligations that arose prior to the establishment of the family foundation, that is, for obligations that arose prior to its entry in the register of family foundations. If the founder contributes his/her property to the family foundation, then the donor's creditors may have a reduced prospect of satisfying. Establishing a family foundation should not be the founder's escape from obligations. For this reason, the legislator maintained the statutory guarantee liability of the family foundation for the obligations of the founder. The liability of the family foundation is limited to the value of the property contributed to the family foundation by the

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founder. It is about the property actually brought in. In order to determine the limit of civil liability of a family foundation, the decisive factor is the condition of the property at the time of its transfer to the family foundation. However, when it comes to the specific value of the property, it is determined according to the prices at the time the creditor is satisfied. It is not an isolated legal structure in the Polish civil law. The Civil Code introduces a similar legal regulation as regards the liability of the acquirer of the enterprise for the obligations of the seller of the enterprise (Article 55(4) of the Civil Code), liability towards the creditors of the seller of the enterprise (founder), according to the general rules concerning the liability of the buyer of the enterprise.

A family foundation bears civil liability also if there were more than one founder. In such a case, the family foundation is responsible for the obligations of each of the founders up to the amount of property contributed individually by each of the founders.

Establishing a family foundation should not diminish the rights of the maintenance creditor towards the founder. The family foundation is responsible under the law for the performance of the maintenance obligation by the founder established after the creation of the family foundation. This responsibility is joint and subsidiary. This regulation resembles the structure of the Articles 22 and 31 of the Commercial Companies Code (liability of a partner in a general partnership for the obligations of a general partnership). The subsidiarity of the liability of a family foundation is expressed in the fact that enforcement against the assets of the family foundation may be carried out as long as enforcement against the property of the founder proves ineffective. This does not constitute an obstacle to bringing an action against the family foundation before the execution of the founder's property proves ineffective. Nevertheless, the creditor may obtain an enforcement clause for the previously obtained enforcement title, provided that the enforcement against the founder's property proves ineffective due to lack of property.

It seems that the principle of joint and several guarantee and civil liability of a family foundation for the founder's obligations does not exclude the family foundation's liability pursuant to the Article 527 of the Civil Code or the Article 127 et seq. of the Polish Bankruptcy Law.[8] In

[8] See *Act of February 28, 2003 – Bankruptcy Law, consolidated text* [2003]. Journal of Laws of Poland, 2020, item 1228, 2320; 2021, item 1080, 1177, 1598, 2140.

other words, an alternative to the creditor of the family foundation may be to institute *actio pauliana*.

Founder of the family foundation

As a rule, the founder is the founder of the family foundation. Establishing a family foundation mainly includes submitting a declaration of establishing the family foundation and establishing its statute as well as contributing a founding fund. Based on the provisions of the Act on Family Foundations, the following entity structure can be indicated on the founder's side: the founder, founders, the so-called co-founders, donors who do not become founders.

Only a natural person may be the founder of a family foundation. A necessary requirement is to have the attribute of full legal capacity. The nationality or citizenship of the founder does not matter. A family foundation can be created by many founders. Nevertheless, each of them should have full legal capacity. The exception is a family foundation established in a will. The founders may be strangers to each other; there is no requirement of marriage, kinship, affinity, etc.

In the case of a family foundation established in a will, if the statute so provides, the founder of the family foundation may become the spouse of the founder, the founder's initial or descendant, who at the time of opening the inheritance was a co-owner of the property contributed to the family foundation under the will.

The family foundation may be supported by donors. A person who makes a donation to the family foundation does not become its founder.

The founder is necessary at the stage of creating a family foundation. The founder is not necessary for the further, assuming a multi-generational existence of a family foundation. The statute granted by the founder may be amended in a different manner by other persons, in the manner specified in the statute.

The family foundation may be created in a will. Only the opening of the will would result in the establishment of a family foundation in the organization. Then the family foundation should be entered into the court register of family foundations. Establishing a family foundation in a will requires the form of a notarial deed. Establishing a family foundation by means of a holographic will would be invalid.

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It is possible to adopt various models of a family foundation. The source of regulation should be the statute of a family foundation. First, the founder's rights and obligations may not be transferable. If the founder's rights and obligations are inalienable, they shall expire upon his/her death. It is a model established by the legislator. However, it is possible to adopt a model in which rights and obligations may be negotiable. The transfer of the rights and obligations of the founder may take place within the framework of singular succession as well as by way of universal succession.

The question is whether it is possible to split the rights and obligations of the founder. In general, the Polish company law adopts the theory of non-separation of rights in a commercial company. In fact, it should be recreated on the basis of the regulations of the family foundation.

The question arises whether the founder's legal successor (if such a change is permissible) may be a legal entity other than a natural person? We are closer to the view that only the original founder must be a natural person. A legal person may acquire the rights and obligations of the founder. Nevertheless, the *ratio legis* of the Bill on Family Foundations is the syntax for the formulation of a different view.

If there are many founders, they exercise the rights and obligations of the founder jointly. The statute may provide otherwise, indicating that the rights held jointly should be exercised by a joint representative.

The founder is not responsible for the obligations of the family foundation which is a legal person. A similar regulation applies to other legal persons, e.g. capital companies. In the internal relationship, the founder is liable to the family foundation in the scope of the assumed obligation to contribute assets.

Beneficiaries of the family foundation

The Bill on Family Foundations indicates two categories of entities that may be beneficiaries of a family foundation. These are natural persons and non-governmental organizations conducting public benefit activities. As it seems, one can defend the view that *nasciturus* may also be a beneficiary of a family foundation. During the prenatal life, for example, there may be a need to finance fetal surgery, etc.

The beneficiaries of the family foundation may be people unknown to the founder, for example his/her future descendants and the descend-

ants' spouses. The beneficiaries do not need to have equal rights within the family foundation. They may be entitled to various benefits. Benefits may include: (1) receiving benefits from a family foundation, in money or in nature (for example in plots of land, easily convertible into money in gold bars or gold bullion coins); (2) a share in the liquidation assets of a family foundation. At the same time, it is not a closed list of benefits. Benefits for beneficiaries may also include granting loans, lending real estate belonging to a family foundation, lending for use movable items (luxury cars, yachts, airplanes). The possibility of a partial division of the property of a family foundation should be allowed. It is possible to grant benefits depending on a condition or a term.

Conclusions

The Polish Bill on Family Foundations is expected to be on the legislative path very soon. Nevertheless, it is already the subject of keen interest on the part of the legal science.[9] Thanks to this legislation, Poland will symbolically join the ranks of rich European countries.

As mentioned above, a family foundation is not a company, but it has its own legal entity. The institution of the family foundation will be a specific and original legal institution in the Polish legal system. There is a need for the introduction of this institution. A special feature of a family foundation is the group of its beneficiaries. The beneficiaries are to receive certain benefits from the family foundation's assets. The beneficiaries are counterbalanced by the founders or the founder. The family foundation is established as a part of *inter vivos* work, but it can also be covered by an inheritance disposition.

The Act on Family Foundations limits the possibilities of the family foundation in carrying out economic activities. This is due to the endowment of the family with assets that should not be used for any purpose other than that provided for by the law.

Tax considerations will largely determine the popularity of this legal structure in Poland.

[9] See DURBAS, M. Zapis na sąd polubowny w statucie fundacji rodzinnej – uwagi de lege ferenda. *ADR. Arbitraż i Mediacja*. 2021, nr 2, pp. 5-15. ISSN 1898-942X; and WIDZ, M. Fundacja rodzinna i trust rodzinny jako instrumenty kontynuacji niepodzielnego majątku. In: A. LEWANDOWSKA, P. ANDRZEJCZAK and M. STRADOMSKI, red. *Narodziny firmy rodzinnej: Jak mądrze zaplanować sukcesję i przekazać biznes następcom*. 1. wyd. Poznań: Instytut Biznesu Rodzinnego, 2017, pp. 371-378. ISBN 978-83-937759-3-4.

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Making Decision in Criminal Proceedings within a General Theory of Forensic Science in Romania

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Abstract: *The judicial process of making decision in criminal cases is, generally speaking, increasingly analysed within a complex framework, one of these being harmonized with principles, and concepts organized along with the forensic activities of investigation. To this regard, the Romanian judicial activity in criminal cases is not away from these values of respecting standards in criminal proceedings. This situation is particularly viewed during the judgment phase of criminal proceedings at the stage of making decision. Taking into consideration all these aspects, the current paper is focused on the best practices of the activity of decision making in criminal cases in Romania, particular attention being paid to the forensic science and the way in which it influences the process of achieving decision in the framework of administering and assessing evidence based on forensic activity of investigation. An in-depth analysis of both the doctrine trends and the case-law presentation on the topic of decision making in criminal proceedings within the forensic framework in Romania will be presented, as well as the case-law remarks and comments of this topic. The idea of this paper was conducted by the fact that several criminal cases are usually solved by taking into account the involvement of forensic investigation records of gathering evidence which help judicial bodies in making decision in criminal proceedings.*

Key Words: *Criminal Law; Criminal Procedure Law; Criminal Matters; Court of Law; Making Decision; Criminal Proceedings; Criminal Cases; Judgment Phase; Forensic Investigation; Judicial Evidence; Scientific Evidence; Romania.*

General overview

The issue of how the doctrine in criminal matters in Romania meets the practical achievements of solving criminal cases by means provided by the forensic science concluded in a real general theory of criminal procedure law, with particular view upon the forensic science.

The literature review is currently stated at a level which involves a multidisciplinary framework, part of this being organized around the forensic science, as well as its particular application in the field of criminal justice. It begins with the school of law of Bucharest, whose prominent figure in the area of forensic science is Professor Emilian Stancu, high-respected representative of the forensic science in Romania. His lectures and studies have created a specific trend in the forensic issues in criminal proceedings, promoting opinions based on substantive elements of forensic science, within a complex environment.[1] Other discussions have also been submitted for the legal literature of criminal matters in Romania by other famous professors of criminal procedure law, who have researched in this field with particular approach in the forensic science.[2]

Discussing about the involvement of the forensic science in the process of decision making in criminal cases, the main point of view could be viewed upon the basic principles which balance between the investigation and prosecution, conviction and sentencing, pre-trial realize and detention, appeals and probation.[3] All these institutions of criminal procedure law are concepts which lead to ruling solutions in criminal matters both legally and substantially.

Analysing the current situation of the doctrine presentations and the jurisprudence aspects in criminal cases in which the forensic investigation achievements are involved makes both practitioners and theorists rethink the idea of achieving activity of the judiciary. It is more discussed as a comprehensive and well-structured activity, organized around the complex approach of making judicial decision with the help of the other sciences, such as the forensic one, viewed in a multidisciplinary framework.

In deepening such framework, there are several principles and concepts arisen from the forensic activity, whose results consist in gathering evidence, scientific ones, with a high level of involvement in solving cri-

[1] See STANCU, E. *Tratat de criminalistică*. 6-a ed. Bucureşti: Universul Juridic, 2015. 847 p. ISBN 978-606-673-673-2.

[2] See VOLONCIU, N. *Tratat de procedură penală: Parte generală: Vol. I*. 2-a ed. Bucureşti: Paideia, 1996. 511 p. ISBN 973-9131-01-8.

[3] See DONGOROZ, V., S. KAHANE, G. ANTONIU, C. BULAI, N. ILIESCU and R. STĂNOIU. *Explicaţii teoretice ale Codului de procedură penală român: Partea specială: Vol. VI*. 2-a ed. Bucureşti: All Beck, 2003. 443 p. ISBN 973-655-357-4.

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minal cases. All these aspects are structured within a complex framework, featured, among others, by:

- gathering evidence during the investigation and judgment activities;
- finding the truth in criminal cases;
- solving criminal cases legally and pertinently;
- making judicial decision in criminal cases based on evidence.

It is true that the judicial activity in criminal cases is always featured by the involvement of the other sciences, but, despite this argument, the forensic activity of the judicial bodies is provided by respecting the *principles of gathering pertinent, conclusive and legal evidence*, on the one hand, and the activity of administering and assessing it during the judgment phase of the criminal proceedings, on the other hand. Thus, the process of gathering evidence is situated in close collaboration with the activity of administering it and, more particularly, with the activity of assessing it at the stage of decision making in criminal cases in which such evidence is useful for finding the truth.

These issues have been discussed by the doctrine within criminal matters in Romania in different manners, taking into consideration that the case studies conducted on this topic have created several points of view and opened many ways of assessing, being argued differently. This is because, in practice, there are several criminal cases whose decisions are based on the forensic investigation records of gathering evidence in cases, such as road accidents, homicides, financial crimes, corruption, counterfeiting, cybercrimes and so on.[4] For this reason, it could be stated that there are no unitary opinions expressed by the doctrine on the same activity of forensic investigation that generated the same solutions in practice.[5]

The involvement of forensic activity is prevalently disposed during the investigation phase of criminal proceedings, while the judicial body is entitled to find more items related to the crime committed. Equally, during the judgment phase of criminal proceedings the courts of law may

[4] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 431/RC/2021* [2021-10-14]; *Decision of the High Court of Cassation and Justice of Romania Ref. No. 140/A/2021* [2021-05-06]; and *Decision of the High Court of Cassation and Justice of Romania Ref. No. 168/A/2021* [2021-06-22].

[5] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 193/RC/2021* [2021-05-05]; and *Decision of the High Court of Cassation and Justice of Romania Ref. No. 22/RC/2021* [2021-01-21].

order one or more forensic expertises[6] that could provide them with evidence on the crime committed. These regulations of criminal procedure create a dual feature of criminal investigation by stages of criminal proceedings the cases could be investigated of.

Having regard to these aspects, the issue of solving criminal cases arises the idea of a forensic framework within the judicial activity, particular attention being paid to the process of decision making in a more comprehensive area of criminal cases. The doctrine has also emphasized that, in spite of its legal activity, the judiciary is well-structured and organized by the other sciences, as the forensic science is, which influences it directly.[7]

Rules and principles of forensic science in the decision making

As a general rule of criminal proceedings, the activity of gathering evidence necessary for the judicial bodies in making decision in criminal cases they are invested with is based on the independence of the forensic experts appointed by the judicial bodies. Nevertheless, they are connected to the judiciary and work in close cooperation with the judicial bodies for the purpose of the criminal case.

In achieving its purpose, the forensic expertise is featured by general rules, as guiding principles, which differ from an expertise to another one, due to the fact that there is no common forensic expertise ordered by the judicial bodies in different cases. Moreover, there are different stages of the forensic expertise which converge to the investigation of the crime scene, on the one hand, and the activity from within the laboratory, on the other hand.

The doctrine in criminal matters has pointed out that these rules should be viewed in a particular manner, because of the differences that exist in the two activities mentioned above. In this respect, one opinion focuses on the idea that the forensic experts are organized within complex teams of investigation during the crime scene investigation.[8] This

[6] According to the Article 172(2) of the Code of Criminal Procedure of Romania, adopted by *Law No. 135 of July 1, 2010, on the Code of Criminal Procedure* [2010-07-01]. Official Journal of Romania, 2010, No. 486.

[7] See STANCU, E. *Tratat de criminalistică*. 1-a ed. Bucureşti: Actami, 2001. 736 p. ISBN 973-9300-31-6.

[8] See MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. Bucureşti: Hamangiu, 2021, p. 181. ISBN 978-606-27-1804-6.

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means that the forensic experts work with other specialists in the judicial field, or even with legal-medicine experts. A particular attention might be paid to the cases of homicide, where, along with the forensic experts, the activity of investigation requires other specialists, such as prosecutors, judicial police officers and legal-medicine experts as well. They have the main role in gathering human body samples, in order to be examined in laboratory. The same procedure is applied in cases of unidentified corpses, due to the fact that in such cases the forensic experts do not have competences to transport them to laboratories for examination.

A special case is created in cases of serious homicide, when only parts of corpse are located within the crime scene or cinders resulted as a consequence of the corpse burning process. The above-stated situation is featured by the rule of discovering as many evidence as the judicial bodies need in purpose to find the truth in the criminal cases they are called upon. The same is applicable in the situation of finding the rules of evidence regarding the crime committed, the circumstances the crime was committed in, as well as the identification of the perpetrator. From this point of view, the *forensic evidence – scientific one* – has a high level of probative value within the judicial activity of criminal proceedings, which will be evaluated by the court of law as long as it is corroborated with all the rules of evidence administered in criminal case. The main principle of interpreting forensic evidence is that it does not have *ex ante* an established judicial value. This means that, in case of contrary opinions submitted by different experts, the rule converges to the idea that the court of law will establish the value for any evidence administered in criminal case through a forensic expertise report, in order to state the legal decision.

A particular situation arises in cases in which the court of law orders a forensic expertise and the parties involved call for their own experts under the Article 172 paragraph 8 of the Romanian Criminal Procedure Code, which provides that *"In carrying out expertise, authorized independent experts could participate, called by the parties or by the main process parties."* This provision must undoubtedly be corroborated with the Article 173 paragraph 4 of the Romanian Criminal Procedure Code, which states that *"The parties and main process parties are entitled to call for an expert to participate at the expertise on behalf of themselves."*

Related to this issue, the court of law stated that the appeal submitted by the defendant on the sentence ruled over the merits of the case

without taking into consideration the independent expert's opinion represents an issue of assessing evidence, instead of its legality,[9] and the contrary opinions provided by the independent experts called by the parties have the same judicial value at the moment of the examination of the case. In this matter, the court of law has observed that the defendant's rights during the criminal proceedings were fully respected, including the manner of calling for an independent expert that may submit objections to the expert's conclusions exclusively, but not to the other aspects relevant for the criminal case.[10]

Generally speaking, it is obviously that during the criminal proceedings the means of evidence through the forensic expertise reports drawn up by the experts have the role to direct the courts of law to create them a different perspective over the signification of expertise report results, as well as to facilitate them the process of evaluation of the appointed experts' conclusions.[11]

Admitting the role of forensic evidence in criminal cases means that another rule of forensic activity is applied. It refers to the principle of opportunity of the criminal proceedings related to the activity of carrying out forensic expertises in criminal cases with a complex feature, like the cases mentioned earlier of serious homicides. Although there are several unknown aspects related to the investigated case, the forensic experts have to begin their activity of finding the evidence from the hypotheses advanced by themselves, which face relevant issues of the criminal case.

The legal doctrine has expressed several opinions regarding the activity of forensic science and its influence over the judicial activity, in particular regarding the process of making decision by means of evidence gathered from the forensic activities.

Taking into account all these aspects, at the moment of judiciary some issues will be arisen. They refer to the following elements:

- how the judiciary meets the forensic framework;
- the connection between the two concepts of criminal proceedings;

[9] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 62/A/2020* [2020-02-27].
[10] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 62/A/2020* [2020-02-27].
[11] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 62/A/2020* [2020-02-27].

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- the solutions the forensic methods and scientific techniques provide for the judiciary;
- the involvement of forensic tactics applied as the main principle of hearing the participants in criminal proceedings.

Analysing these topics and exemplifying their specific character created a general theory of the forensic science, with a special involvement in criminal cases and its process of making decisions.[12] Despite its specific character, a standardization of proof cannot be advanced because of the entire principles of criminal proceedings, especially those applied during the judgment phase, which require an emphasized examination and analysis of the entire evidence administered in criminal cases. A unique standard applied in this field would generate a 'standardized' solution in practice, the fact that is not in accordance with the purpose of criminal trial entirely. The same is true in the matter of making solution in criminal cases when some methods and scientific techniques which belong to the forensic science are useful for the courts of law and provide guarantee for the solution which is the only one applied legally for the criminal case judged.

Consequently, the procedure of appointing forensic experts in criminal cases has as main scope establishing completely the circumstances in which the crimes were committed in. This principle is regulated by the Article 8 of the Romanian Criminal Procedure Code, which states that the scope of criminal proceedings is to establish completely and within a reasonable time the crimes committed, in such a manner that any innocent person would not be charged unfairly and all persons who committed crimes should be punished according to their guilt, stated by the court of law, with the respect of all judicial guarantees of due process.

Achievements in the case-law solutions

In the field of making decision in criminal cases, the discussion arises on many directions. These follow the rules of criminal proceedings on proposing, ordering, assessing, administering forensic evidence and pronouncing judicial decision. For the current paper, the last two issues present a particular interest for the process of decision making in criminal cases. This means that only the procedure of administering evidence by

[12] See MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. Bucureşti: Hamangiu, 2021, pp. 249-272. ISBN 978-606-27-1804-6.

means of forensic science, as well as pronouncing decision in criminal cases will be taken into consideration.

First of all, the judicial activity of administering evidence by forensic science methods and techniques follows the same procedure as stated by the Article 100 of the Romanian Criminal Procedure Code, which regulates for the judgment that during this stage of criminal proceedings the court of law is entitled to administer evidence either at the prosecutor's, victim's and parties' request or *ex officio* any time it considers necessary to accustom itself with the *de facto* elements of the crime committed. As a general rule, the Romanian Criminal Procedure Code states that the proposals for administering evidence may be admitted or rejected motivated by the courts of law, under the respect of special feature of evidence – pertinent, conclusive and useful.

The main legislator's argument for this provision is related to the fact that forensic expertise reports do not meet in some cases the three above-stated conditions, as well as other conditions referring to their legality.

From the jurisprudence point of view, taking into account the general trend drawn up by the High Court of Cassation and Justice of Romania, the evidence administered in criminal cases should be analysed under the umbrella of its admissibility.[13] In this respect, the doctrine has admitted that the activity of finding the truth in criminal cases depends on the legal conditions of administering evidence during the criminal proceedings.

Moreover, according to the Article 5 of the Romanian Criminal Procedure Code, reported to the Article 6 of the European Convention on Human Rights, the court of law has the duty to clarify cases entirely, under all aspects *de iure* and *de facto*, based on evidence stated by legal rules of evidence, gathered by the judicial bodies according to the Article 100 and the Article 101 of the Romanian Criminal Procedure Code, otherwise the latter might be rejected by the court of law.[14]

As a matter of fact, it is highlighted that the report of forensic expertise ordered in criminal case should be administered on the issue of es-

[13] See VOLONCIU, N. *Tratat de procedură penală: Parte generală: Vol. I.* 2-a ed. București: Paideia, 1996. 511 p. ISBN 973-9131-01-8.
[14] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 168/A/2021* [2021-06-22].

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tablishing the authenticity of signatures issued from the parties involved. The jurisprudence has stated that the signatures on the statement of 2011 and the other documents disputed by the victim were not carried out by that person and the forensic expertise could not establish the person to whom the signatures belong.[15] Equally, the jurisprudence has admitted that the admissibility of the forensic means of evidence would contribute to the proof of the witnesses' unfair testimony, also combated by the burden of proof through different forensic expertises, ordered by the court of law.[16]

Moreover, the court of law has the main duty of assessing conclusions provided by the forensic evidence report on the contradictory issues. In fact, the conclusions of such report stated that "According to the 2016 expertise report, the signatures applied on behalf of the victim on the two documents rewritten were not carried out by that person, but they were made through free imitation of the authentic signatures which belong to civil party."[17]

Thus, the condition of admissibility of evidence is rightly observed by the court of law in cases in which there is evidence administrated which combats the allegations submitted by the parties. Taking into account this solution provided by the forensic science in criminal cases, it could be concluded that if the evidence administered result that the defendant is the person who committed the offense, then the court of law should admit the defendant's request on carrying out specific forensic expertise, in order to combat the other parties' statements.

Another jurisprudence practice emphasized by the doctrine in criminal matters is that in criminal cases in which the means of evidence conclude to probative elements, any request of administering the other means of evidence could be rejected by the court of law as unlawful ones.[18] This is because the court of law assures the respect of the princi-

[15] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 126/A/2021* [2021-04-23].

[16] See also a similar point of view in *Decision of the High Court of Cassation and Justice of Romania Ref. No. 20/A/2020* [2020-01-22], and in MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. Bucureşti: Hamangiu, 2021, pp. 257-258. ISBN 978-606-27-1804-6.

[17] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 126/A/2021* [2021-04-23].

[18] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 312/A/2018* [2018-11-27], and also in MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. Bucureşti: Hamangiu, 2021, p. 258. ISBN 978-606-27-1804-6.

ple of solving criminal cases in reasonable time, an imperative condition of criminal proceedings[19] stated by the Article 6 paragraph 1 of the European Convention on Human Rights.[20]

The value of due process should be viewed in accordance with the provisions regulated by the Romanian Criminal Procedure Code, which state that "The judicial bodies are obliged to carry out the investigation and judgment activities in accordance with the proceedings guarantees and parties' and main process parties' rights, in such a manner so that the offences committed would be discovered in time and completely, no innocent person to be charged illegally and any person who committed an offence to be punished according to the criminal law in reasonable time."[21]

Finally, ruling a decision based on forensic expertise reports submitted in criminal cases emphasizes another aspect of the judiciary that arises a particular interest for the current section. At the stage of decision making in criminal cases, the court of law has the main role of assessing expertise reports, on the one hand, and the conclusions stated by the experts, on the other hand. Both activities are connected to each other in a common unit that the judicial decision pronounced will provide. From this consideration, the court of law may rule its decision based either on the expertise reports exclusively, or through corroborating them with the other rules of evidence, also administered in criminal case.[22]

On the one hand, specific for the judicial activity during the judgment phase of criminal proceedings is the corroboration of the forensic exper-

[19] See PERGAMI, F. Next Generation EU and the Reform of Statutes of Limitation: Old and New Problems Regarding the Reasonable Length of Proceedings. *KOINONIA*. 2021, vol. 45, pp. 341-358. ISSN 0393-2230; and SMITH, A. and S. MADDAN. Misdemeanor Courts, due Process, and Case Outcomes. *Criminal Justice Policy Review* [online]. 2020, vol. 31, no. 9, pp. 1312-1339 [cit. 2022-02-16]. ISSN 1552-3586. Available at: https://doi.org/10.1177/0887403420901759.

[20] See the European Convention on Human Rights, adopted by the Council of Europe on 4 November 1950, into force from 1953; see also TELEKI, C. Applicability of Article 6(1) ECHR. In: C. TELEKI. *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* [online]. 1st ed. Leiden; Boston: Brill Nijhoff, 2021, pp. 101-128 [cit. 2022-02-16]. Nijhoff Studies in European Union Law, vol. 18. ISBN 978-90-04-44749-3. Available at: https://doi.org/10.1163/9789004447493_008.

[21] In accordance with the Article 8 of the Romanian Criminal Procedure Code, corroborated with the Article 6 of the European Convention on Human Rights.

[22] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 174/A/2021* [2021-06-24].

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tise reports with the witnesses' testimony,[23] as it has already provided earlier. In the activity of assessing evidence administered in criminal cases, the court of law will appreciate the forensic expertise report which corresponds to the questions requested by the judicial bodies, also thoroughgoing studies from a scientific point of view and very difficult to be combated by the other means of evidence.

On the other hand, the opinions expressed by the experts may be a key element of assessing other evidence administered in criminal cases which does not have pre-established judicial value.[24] More particularly, the issue involved is subordinated to the general process of assessing evidence proceeded by the court of law at the stage of deliberation in criminal cases and constitutes a serious criticism of basic principles, but not those of legality of decision pronounced.

For this consideration, the doctrine has also focused its attention on the aspects of legality and basic principles of law in the procedure of assessing expertise reports. Both aspects are relevant in the process of making decision in criminal matters, in purpose to find the truth in criminal cases beyond any reasonable doubt.[25] Moreover, a judicial decision in criminal cases should imperatively be pronounced in accordance with the principles of due process and fair trial as well.

Conclusions

Analysing the doctrine in criminal matters along with the case-law presentation of the jurisprudence in Romania, it could be highlighted that the main rules and principles of criminal forensic science are useful for the courts of law in the process of decision making, particularly in cases of serious homicides, road accidents, corruption, counterfeiting and so on. Respecting it (i.e. the rules and principles) has consequences

[23] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 140/A/2021* [2021-05-06]; and *Decision of the High Court of Cassation and Justice of Romania Ref. No. 174/A/2021* [2021-06-24].

[24] See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 174/A/2021* [2021-06-24].

[25] See JELLEMA, H. The Reasonable Doubt Standard as Inference to the Best Explanation. *Synthese* [online]. 2021, vol. 199, no. 1-2, pp. 949-973 [cit. 2022-02-16]. ISSN 1573-0964. Available at: https://doi.org/10.1007/s11229-020-02743-8; and MULÁK, J. The Principle of the Public of Criminal Proceedings as an Attribute of the Right to a Fair Trial. *The Lawyer Quarterly*. 2021, vol. 11, no. 3, pp. 518-533. ISSN 1805-8396.

throughout the entire activity of criminal proceedings, especially in the area of gathering evidence by means of forensic science.

The legality of carrying out forensic activity of expertise is regulated by the Articles 172 – 181 of the Romanian Criminal Procedure Code, as well as by other specific provisions in the matter.[26] The results of forensic expertise reports should ground the conclusions the experts have achieved during their examination activity. This procedure is also of an important value due to the fact that the judicial decisions made in criminal cases by the courts of law will be based on the conclusions reported by experts. This means that referring to erroneous opinions stated by the experts, the courts of law will pronounce illegal decision. Otherwise, a forensic report which respects entirely the principles and rules of gathering evidence within a forensic framework will provide the courts of law with legal conclusions and opinions and, consequently, will generate a right solution made at the end of criminal proceedings, based on conclusive, pertinent and legal forensic evidence.

For these reasons, the principle of legality should imperatively characterize the forensic activity of the judicial experts, on the one hand, and the criminal proceedings activity, on the other hand.

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[26] See *Government Decision No. 368 of July 3, 1998, on Establishing the National Institute of Forensic Expertises* [1998-07-03]. Official Journal of Romania, 1998, No. 248, modified subsequently by *Government Decision No. 458 of April 15, 2009, on Modifying the Government Decision No. 368 of July 3, 1998, on Establishing the National Institute of Forensic Expertises* [2009-04-15]. Official Journal of Romania, 2009, No. 276.

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The Effect of the Roman Law on Punishment[1]

Michal Aláč

Abstract: *The laws of advanced democracies are often inspired by the Roman law. The Slovak Republic is no exception. In the area of punishment, it is even one of the most important institutes. The institute of necessary defence is based on the principle of vim vi repellere licet and creates conditions for the protection of life, health and property in cases where these are not capable of being ensured by the state authorities. The principle of ne bis in idem provides protection against repeated punishment of the offender for the same act and is one of the greatest guarantees of maintaining legal certainty.*

Key Words: *Roman Law; Administrative Punishment; Punishment; Principles; Necessary Defence; Presumption of Innocence; the Slovak Republic.*

Introduction

The Roman system of punishment of an unlawful conduct can be easily summed up into two key words: punishment and deterrence. To render someone liable through litigation was very fast and the enforcement of the punishment even faster. Punishments were often public and cruel in order to fulfil their deterrent effects, although this was not a general rule and did not apply to everyone. In some cases, upper class members were allowed to commit suicide, instead of public punishment.

In the Roman system, punishment of individual crime depended on civil status and social class of the offender. During the era of Republic and at the early beginnings of Empire, punishment for a citizen (civic) was less severe than for a foreigner (peregrinus). Moreover, citizens had the right to appeal, whereas foreigners did not. Punishments were most severe for slaves.

[1] The presented paper was carried out within the Project of the Slovak Research and Development Agency entitled *"The Roman-canonical Influences on the Slovak Public Law"*, in the Slovak original *"Rímsko-kánonické vplyvy na slovenské verejné právo"*, project No. APVV-17-0022, responsible researcher prof. JUDr. Mgr. Vojtech Vladár, PhD.

Modern laws regulating criminal liability and administrative liability departed from the Roman methods, mainly in differentiation of sentences based on social status of offender; however, even today it is possible to find some institutes or principles which have origins in the Roman law and still apply nowadays.

1 Criminality of conduct and *vim vi repellere licet*

The purpose of the state apparatus is, besides others, to maintain internal order of a state in order to ensure protection of society as a whole. Objectively speaking, it has never been possible to ensure protection of an individual and that is why every individual is forced to protect his/her life, health and property of himself/herself as well as the life, health and property of his/her relatives. However, in the case of prevention of one's own life, health and property or the life, health and property of his/her relatives from being harmed, it is highly possible that life, health and property of someone else will be harmed. In such scenario, this person hypothetically gets himself/herself into very inconvenient position in the eyes of the law; such conduct has merits to be specified as a certain type of an offence or a crime. For instance, if there is a physical attack present where one person – an aggressor attacks other person – a defender and the defender would in the effort to protect his/her life, health or property head off the attack by harming health of the aggressor by several fist punches into the face area causing injuries and, therefore, harming his/her health. By this conduct, both parties could commit a battery under the Article 156 of the Act of the National Council of the Slovak Republic No. 300/2005 Coll. Criminal Code, as amended (hereinafter referred to as the "Criminal Code"), which states that a person commits a tort of battery if this person intentionally harms the health of other person. The aim of an aggressor to harm health of a defender is in this case obvious and foreseeable. The aim of a defender is to head off the possible or continuous attack and so protect his/her health or life; the defender does not intend to harm the aggressor. However, we may take into consideration provisions of the Article 157 of the Criminal Code, according to which a person can commit a crime if by a negligent conduct this person seriously harms one's health. In the case of less severe harm of health this may be specified as the tort of battery. According to the Article 49 paragraph 1b) or 1d) of the Act of the Slovak National Council No. 372/1990 Coll. Code of Offences, as amended (hereinafter referred to as the "Code of Offences"), a person commits an offence if by a negligent act this per-

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son harms health of others or intentionally disturbs coexistence of citizens by making threats of bodily harm or battery, false accusations, spite-like actions or other disrespectful behaviour.

Based on the abovementioned description of factual and legal situation, it can be concluded that defender's effort to protect his/her life, health or property may be treated as an unlawful conduct which can be specified as a tort or a crime. By such legislation, the state may press on people to tolerate violence against them from the part of other citizens with the aim to harm their life, health or property and forces them to refrain from whatever kind of self-defence, yet the state did not ensure protection of such victim either. This situation may play very convenient role for the aggressor, because the only protection for the defender is the deterrent factor of possible criminal or administrative sanctions for the aggressor.

In the eyes of law, this situation is very inconvenient for the defender, so that legislature had to develop legal conditions allowing the defender – potential injured party to protect his/her life, health and property efficiently. The Roman law is a proper place for legislature to look for the inspiration. *Vim vi repellere licet* is the principle which allowed immediate defence in cases when life, health or property of the attacked person were endangered. It is the principle which laid basis for the modern legal arrangement of the institute of necessary defence, which is not considered as a criminal act.

According to the Code of Offences, the use of reasonable defensive force to head off a possible attack for purposes protected by law is not treated as an offensive conduct.

According to the Article 13 of the former Act No. 140/1961 Coll. Criminal Code, a conduct which is under usual circumstances considered as a delict is not categorised as a delict if its purpose was to head off possible or continuous attack, as specified by this law. We cannot categorise an act as a necessary defence unless it is adequate to the nature and severity of an attack. The criminal law laid provision that conduct which is under usual circumstances considered as a delict by which person tried to head off attack to democratic people's republic, its socialist nature, best interests of working public or an individual is not a delict if there was a risk of an immediate or continuous attack and defence was adequate to the severity of such attack.

From these quotations of the provision, it implies that legislation takes into account the necessity of the right to defend one's life, health and property. The legislation also takes into account the fact that person who is the subject of the possible attack and person who will eliminate the attack does not have to be one and the same person. Let us picture a situation where after the first hit the injured party loses consciousness and a random passer-by becomes the defender. The same applies if the injured party is not objectively able to eliminate the attack by himself/herself due to the obvious outnumber of attackers. Due to this fact, any person who is a witness of the attack or possible attack is entitled to act in necessary defence under the protection of law.

To prevent a misuse of this right, legislation has to set regulations under which a criminal conduct is not categorised as criminal. First condition is that act is really an attack, which means a conduct with the intention to cause harm or jeopardy. The attack must be happening or be highly possible to happen at the time of defender's effort to eliminate it. At this very moment, a rationally thinking person can, based on current circumstances, conclude that offender is about to cause harm or jeopardy. Risk must be at such a high level that the defender has grounds to assume that the attacker will finish this harmful act.

It is also necessary to make an objective assessment of the duration of the attack. A person cannot be acquitted if the act of defence happens in the time when the attack was not happening or there was not continuing risk of the attack, for example when the aggressor has already left the defendant. In such case, this can be categorised as an attack from the side of the defender and so that the defender can be held liable. If the offender gets hold of injured party's possessions, the attack continues, until the offender keeps possessions. The attack also continues if the aggressor stops violence for a short period of time due to the lack of energy. The attack continues, until the offender keeps infringing the interest protected by law.

The Code of Offences does not expressly state that there could be an elimination of a continuous attack, but, through logical argumentation or rules of law interpretation, it can be concluded that a concerned person does not fulfil conditions for a criminal offence by such conduct if this person defends oneself in adequate manner from an attack which is continuing, which means defending from a continuous attack. It arises from the very nature of the necessary defence and the extreme urgency law

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that legislation intended to create such conditions which allow a person to provide protection of interest protected by law and that is the reason for necessity to interpret the quoted regulations of offences in a broader sense, in respect of factual development of the attack and to apply them not only on a risk of possible attack, but also on a continuing attack.

To prevent a misuse of the right to necessary defence, the intensity of defence has to be clearly set out, so that the conduct of a defender can be categorised as a necessary defence. Under the Article 25 paragraph 2 of the Criminal Code, a conduct cannot be considered as a necessary defence if the defence was not adequate to the severity of the attack and mainly to its manner, place, time and circumstances concerning both the aggressor and the defender. The Code of Offences provides that the act of necessary defence has to be carried out in an adequate manner. Notwithstanding that the Code of Offences does not clearly set out what is the appropriate and adequate manner, *per analogiam* it is possible to apply the rule of interpretation under the Article 25 paragraph 2 of the Criminal Code and so to regard the adequacy in relation to the manner of the attack, place and time, circumstances concerning the aggressor or the defender. It is necessary to point out the fact that in majority of cases, the only way to make the defence effective is if it is of greater intensity than the attack and that is why it is not possible to *a priori* assume that it can be categorised as a delict if the conduct of the defender is of greater intensity than the conduct of the aggressor. On the contrary, the defending conduct is usually of greater intensity than the conduct of the aggressor, because the purpose of a defence is to head off or to eliminate the intention of the aggressor to carry on in the act of attack or to repeat it.

Over the time, application of the theory into practice proved that the act of necessary defence evokes excessive actions caused by emotional distress of the person who protects one's rights guaranteed by law, which causes that this person is not able to estimate the adequate level of intensity of the defensive act and protects one's rights inadequately. Legislation governs under the Article 25 paragraph 3 of the Criminal Code that the person who heads off an attack in an inadequate manner will not be guilty if the act happened under the pressure and emotional distress caused by the attack, especially due to the disorientation, fear or fright. These are the circumstances under which a person is acting within the law if the defender was facing strong emotional distress during the attack, which made him/her react inadequately to the threat or attack itself. Legislation also takes into account the so-called putative necessary

defence, which means supposed defence or defence against supposed attack. Under the Article 25 paragraph 4 of the Criminal Code, if somebody's presumption of an attack is false, the possibility of a criminal liability for the act of negligence is not excluded if the incorrect presumption has its basis in the act of negligence.

In relation to the institute of necessary defence, it is important to state that provision of legislation concerning offences is very brief, so that it is necessary to *per analogiam* also apply provision of criminal law relating to excessive necessary defence, which means, it is necessary to perceive the intensity of an attack and defence, and provision concerning putative defence. Private defence is a right which enables defence against an attack or threat of one's best interests without the risk of a legal liability. However, there is no possibility to assess whether the conduct will be classified as a crime or an offence at the time when the attack is happening and, for this reason, the person acting in defence should have uniform rules how to act in private defence, regardless the later legal qualification of that conduct.

Finally, it is important to highlight the fact that in the case of subsuming the conduct under the law of necessary defence, this conduct lacks one of the aspects of criminal liability or administrative liability and that is the illegality of the conduct.

2 *Ne bis in idem*

The first historical basis of the doctrine *ne bis in idem* is to protect an individual from arbitrariness of judging the individual several times for the same act, based on different qualifications. The first mention of this doctrine comes from the Roman era where Praetor's prohibition created this definite form – *"bis de eadem re ne sit actio"*. There is no possibility to cast doubt that this doctrine is one of the basic citizen's rights towards jurisdiction. It became the fundamental principle of criminal law.[2]

In private law, this procedure is known under the term *res iudicata*, as a reflection of a decision which is relatively unchangeable, understood

[2] See the proposal of Advocate General Yves Bot in *Criminal Proceedings against Piotr Kossowski* [2016-06-29]. Judgement of the Court of Justice of the European Union, 2016, C-486/14.

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in a broader sense as reassurance through an act of predictability of a decision, in terms of pre-existing settled case-law.[3]

Ne bis in idem and *res iudicata* are in their essentials instruments to maintain legal certainty for the party to the proceedings in the case that the legal matter has been already judged. Obviously, these principles in their essentials also pose a barrier in procedure to other involved authorities. In this case, we can talk about barrier of *lis pendens*.

The aim of the above-mentioned principle is to prevent government to prosecute someone more than once for the same crime, which means that a person cannot be sentenced for a conduct which he/she has already been convicted for, or sanctioned for, or presumed innocent or authorities has already judged differently in the given case. To decide whether the principle *ne bis in idem* was not breached, the relevant authority has to examine, whether the conduct is identical from the factual point of view (development of action), the circumstances of the case were the same, and usually also the personal aspects (the same persons or legal entities involved).

The procedural regulations state several alternatives for how should authorities act to respect the *ne bis in idem* principle.

According to the Article 9 paragraph 1e) of the Act of the National Council of the Slovak Republic No. 301/2005 Coll. Criminal Procedure Code, as amended (hereinafter referred to as the "Criminal Procedure Code"), prosecution cannot be initiated if it has already started, cannot be carried on and has to be stopped, if it concerns person who has already been prosecuted for the same conduct and prosecution was completed with a legally valid judgement, or if it was legally discontinued, suspended on condition and the defendant proved himself/herself, or if prosecution was settled, if the judgement was not set aside.

Under the Article 215 paragraph 1d) of the Criminal Procedure Code, the prosecutor drops proceedings if prosecution is inadmissible under the Article 9 of the Criminal Procedure Code. The court will stay off proceedings on the same grounds.[4]

[3] See MACH, P. Ne bis in idem – aktuálne variácie starej zásady. In: V. VLADÁR, ed. *Verejné právo na Slovensku a v Európe: Aktuálne problémy a rímsko-kánonické súvislosti*. 1. vyd. Praha: Leges, 2019, p. 158. ISBN 978-80-7502-424-4.

[4] See the Article 281 paragraph 1 of the Criminal Procedure Code.

Similar provision reflecting the principle *ne bis in idem* is contained in the Code of Offences. Under the Article 76 paragraph 1g) of the cited Act, an administrative body will terminate proceedings if it is found out that the conduct has been validly judged by an administrative body or a competent law enforcement authority.

The law concerning administrative proceedings (administrative law) in the Article 30 paragraph 1, as amended, lays down that administrative authority terminates proceedings if it establishes that different administrative authority has already started proceedings of the case, unless both authorities decided otherwise, or if proceedings have already begun at the court, if separate law does not lay down differently or if the valid judgement has been already given and the factual situation did not change significantly.

Diction of the quoted provisions implies that the acting authority is obliged to terminate proceedings if the case has been lawfully closed or if proceedings of the mentioned case have already started. In this case, it is a mandatory obligation to terminate proceedings. It implies from the imperative form "shall terminate".

In practice, an apparent collision is common in which case competent authorities hold legal proceedings with the aim to held criminal liability or administrative liability and on many occasions parties claim alleged breach of the *ne bis in idem* principle, which means the legal certainty of the party is also breached. The first one is proclaimed collision of disciplinary action and dismissal from service under the Article 192 paragraph 1e) of the Act No. 73/1998 Coll., as amended, concerning civil service of members of the Police Forces, the Slovak Information Service, members of the Judiciary Guards and Prison Wardens Corp and the Railway Police. The second collision is criminal penalty and dismissal from service under the Article 192 paragraph 1e) of the cited Act.

The doctrine *ne bis in idem* is expressed in the Constitution of the Slovak Republic under the Article 59 of the Act No. 73/1998 Coll. laying down that disciplinary measure cannot be imposed if member of civil service has been already convicted. In the case that disciplinary measure has been already imposed before, it will be cancelled coming into force by the day of imposition. At the same time, provision *expressis verbis* states that imposition of disciplinary measure for disciplinary misconduct or for conduct which has features of an offence does not exclude the possibility of dismissal from service for such conduct if after imposing

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disciplinary measure new circumstances have been revealed, reasoning the dismissal of a member from civil service. The Article 59 in connection with the Article 192 paragraph 1e) was a subject of many disputes when applied into practice.

The Regional Court in Bratislava during proceedings under file number 5 Sž 110/2002 stated: *"Based on defendant's objection that he has been already disciplinary sanctioned, the Court states that imposition of disciplinary measure itself does not exclude a possibility for his superior to also take personnel action under the Article 192 paragraph 1e) of the Act No. 73/1998 Coll."*[5]

It is important to also point out another legal opinion of the Regional Court in Bratislava which stated during proceedings under file number 1 S/2/2007: *"The Court identifies with opinions of defendant that legal action concerning his dismissal from civil service under the Article 192 paragraph 1e) of the Act No. 73/1998 Coll. cannot be artificially associated with criminal proceedings themselves or disciplinary action itself. The aim of criminal proceedings or infringement procedure is to establish if facts of the case comply with the definition of criminal conduct or law of offences. Competent superior decides, whether member of civil service should be dismissed from the service or not, based on his/her own opinion in compliance with law, and decides in a separate personnel action independently from result of criminal proceedings or offence proceedings. Aforementioned procedure complies with the Article 238 paragraph 4 of the Act* […] *Law contains the competence to act in personnel matters separately, without obligation to wait for the result of criminal proceedings or offence proceedings. Only decision of competent authorities whether criminal conduct or offence or other type of delict was committed is legally binding for competent superior. However, even not guilty verdict does not mean that member of civil service did not breach oath of office* […] *Conduct of applicant in separate personnel procedure was not categorised as an offence but as a breach of the oath of office and as such was also proved in personnel procedure* […] *The Court states that the question of guilt of criminal conduct and also offence is not a preliminary question to which answer does not affect dismissal of applicant under the Article 192 paragraph 1e) and that is why simultaneous criminal proceedings or offence proceedings against applicant do not affect personnel action. Therefore, the defendant is not*

[5] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 5 Sž 110/2002*.

obliged to terminate action and to wait for the final judgement of competent authorities."[6]

In the context of the second collision, it is necessary to state that these are two separate independent proceedings. Question of guilt does not have characteristics of preliminary question and does not condition the final result of personnel action. The Supreme Court of the Slovak Republic came to the same conclusion as abovementioned in proceedings under file number 1 Sž-o-NS 24/2004: *"The Court of Appeal identifies with legal opinion of the defendant that question of quilt of criminal conduct is not a preliminary question and dismissal of applicant under the Article 192 paragraph 1e) of the Act No. 73/1998 Coll. does not depend on the answer to the question of guilt. That is the reason why simultaneous criminal proceedings against applicant do not affect personnel action. Therefore, defendant was not obliged to terminate action and to wait for the final judgement of competent authorities acting in this case."*[7] There is also stated in proceedings under file number 7 Sž 63/2003: *"If defendant acted against applicant without regards to result of legal proceedings, the correct procedure was followed, because legal proceedings do not affect dismissal from civil service in relation of the claimant and the defendant."*[8]

The principle *ne bis in idem*, however, does not apply absolutely. It can be overruled by retrial. It is a special correctional procedure included in both the Criminal Procedure Code and the Administrative Procedure Code. Due to the fact that this is a significant interference with concerning persons, the Criminal Procedure Code and the Administrative Procedure Code set strict regulations when to allow retrial.

It often happens that police officer dismissed from civil service due to the breach of oath of office or duty appeals for retrial and termination of judgement based on acquit and so new circumstances and evidence were established in addition, which neither police officer nor his/her superior were aware of at the time of proceedings and so could not have been applied, but which could have had major effect in the decision making process.

In the abovementioned case, we cannot come to conclusion that criteria for retrial are automatically met, as there are different circumstances considered at legal proceedings than at the personnel action concern-

[6] See *Judgement of the Regional Court in Bratislava Ref. No. 1 S/2/2007*.
[7] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 1 Sž-o-NS 24/2004*.
[8] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 7 Sž 63/2003*.

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ing dismissal. Verdict of acquittal cannot automatically result in presumption that police officer did not seriously violate service discipline or oath of office either and that he/she did not breach law regarding relevant legal provisions. The above-stated legal opinion has been agreed upon also by the Supreme Court of the Slovak Republic under proceedings file number 1 Sž-o-NS 152/2005.[9]

In proceedings under file number 8 Sžo 48/2013, the Supreme Court of the Slovak Republic stated that *"Question of criminal liability does not have to be identical with circumstances which create basis for personnel action. The serious breach of oath of office or duty cannot be conditioned by committing a crime. Due to these reasons, verdict of acquittal submitted by claimant itself is not evidence that claimant did not commit criminal conduct in the examined decision of defendant."*[10]

Verdict of acquittal in the subject matter can pose a reason for retrial, but it is not guaranteed. It is a duty of competent authority to examine if circumstances which led to the acquittal lay legal basis for retrial.

3 *Praesumptio boni viri* and *in dubio pro reo*

Presumption of innocence is one of the most important rights guaranteeing suspect of criminal conduct that a person is innocent, until competent authorities do not declare his/her guilt in accordance with law.

It is one of the basic guarantees for an accused or convicted individual that authorities will act in compliance with law and rights. This right is recognised by many international conventions, as for instance by the Universal Declaration of Human Rights, the Charter of Fundamental Rights and Freedoms (Article 40 paragraph 2), Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 paragraph 2).[11]

Presumption of innocence is guaranteed by the Constitution of the Slovak Republic which states in the Article 50 paragraph 2 that every person against which are brought proceedings is considered innocent,

[9] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 1 Sž-o-NS 152/2005* [2006-04-27].
[10] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 8 Sžo 48/2013* [2014-09-18].
[11] See *Universal Declaration of Human Rights* [1948-12-10]; and *Convention for the Protection of Human Rights and Fundamental Freedoms* [1950-11-04].

until the court finds this person guilty. The Code of Offences and the Criminal Procedure Code follow up the constitutional law.

The Code of Offences in the Article 73 paragraph 1 constitutes that citizen is accused of an offence after competent authorities start first procedural act against him/her. This citizen is considered innocent, until the court finds this person guilty. The Criminal Procedure Code in the Article 2 paragraph 4 states that any individual subject to proceedings is considered innocent, until the court finds this person guilty.

Following the abovementioned information, it is necessary to note that proceedings concerning offences and criminal proceedings are based on same principles, because their substance is the same, to clarify circumstances of unlawful conduct, to subsume them under respective elements of an offence, to establish identity of perpetrator, to assess the relevant legal regulations and to held perpetrator accountable for criminal conduct. The Constitutional Court of the Slovak Republic came to the same conclusion that in important characteristics these proceedings are the same, as stated in proceedings under file number II. ÚS 133/2013: *"From the point of view of the Constitutional Court, the Court agrees with complainant who pointed out during both the administration proceedings and the court proceedings that proceedings concerning offence should be, in fact, considered as criminal proceedings with application of rules indispensable for criminal proceedings. The main factor is presumption of innocence and the right of tried person to decide freely about the manner of defence during respective stage of proceedings. Part of this right is also a free decision if and to what extent will defendant comment on accusations which he/she is facing. Decision of defendant in these matters is also part of procedural rules and defendant is liable for the result of proceedings. That is to say, it is responsibility of defendant to decide what defence will be the most convenient and efficient, but, at the same time, defendant is responsible for these decisions even if they show to be inefficient."*[12]

Person accused of an offence or a crime is considered innocent if his/her guilt is not proved in compliance with law, which means final decision of one of the competent authorities or the court that defendant is guilty. Not proved guilt has equal legal value and effect as proved innocence, which means that it is not defendant's duty to prove his/her inno-

[12] See *Decision of the Constitutional Court of the Slovak Republic Ref. No. II. ÚS 133/2013* [2013-02-14].

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cence, because burden of proof is on the competent authority or the court.[13]

The Supreme Court of the Slovak Republic in proceedings under file number 10 Sžd 23/2011 stated that *"The Code of Offences under the Article 73 paragraph 2 provides basic procedural rights and duties of accused individual. In comparison with administrative proceedings which is provided in administrative body of law, it gives defendant broader scale of procedural rights. Realisation of presumption of innocence means that competent authority has legal obligation to prove guilt of defendant beyond any doubt, otherwise authority has to issue judgement in favour of plaintiff."*[14] In another proceedings under file number 6 Sžo 34/2007 (R 11/2014), the Supreme Court of the Slovak Republic also stated that *"Realisation of presumption of innocence in proceedings means that competent authority is legally obliged to prove that defendant is guilty beyond reasonable doubt, otherwise authority has to issue judgement in favour of plaintiff (in dubio pro reo)."*[15]

In the context of the quoted opinion of the Supreme Court of the Slovak Republic, it is necessary to point at the fact that presumption of innocence is closely connected with the principle *in dubio pro reo*, meaning "when in doubt, for the accused". This formulation has been known since the medieval period, although the principle is based on ideas of the Roman law, appearing mainly in works of Ulpian, but in different formulations. Substance of this principle is obligation of authorities or the court to decide in favour of defendant if circumstances of conduct and identity of culprit were not clearly established beyond any doubt. The Supreme Court of the Slovak Republic stated in proceedings under file number 3 Sžo 35/2011 that *"... Merits of an offence are characterised by four obligatory features which are subject, subjective side, object and objective side. For clarification of an offence and sanctioning, these have to be compulsorily fulfilled and established cumulatively. If even one aspect of merits has not been clarified, it cannot be classified as offence. If existence of any*

[13] See SPIŠIAKOVÁ, H. *Zákon o priestupkoch: Komentár*. 1. vyd. Bratislava: Wolters Kluwer, 2015, p. 447. ISBN 978-80-8168-187-5.
[14] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 10 Sžd 23/2011* [2012-04-25].
[15] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 6 Sžo 34/2007* [2007-11-27]. R 11/2014.

part of merits is doubtful and was not clearly proved beyond any doubt, the principle in dubio pro reo is applied (when in doubt, for the accused).”[16]

Summary

From the above-stated analysis of the mentioned principles applied in proceedings, for the imposition of a sanction for an infringement shows the important role the Roman law playing in the creation and application of modern legal codes. Although the individual legal norms that incorporate the Roman law principles into the legal order of the Slovak Republic underwent a development that reflected the needs of application practice, the essence of these principles always forms an immanent part of the legal regulation of punishment. Some of the institutes are so important for preserving the rule of law that they are enshrined directly in the Constitution of the Slovak Republic. When drafting legislation, the legislator and the relevant state body must take into account the constitutional norms in question when applying the law, which guarantees the persons concerned protection against abuse of the law.

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[16] See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 3 Sžo 35/2011* [2012-01-17].

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Zmluvná pokuta v pracovnom práve? Krátke zamyslenie sa nad dohodou o peňažnej náhrade v § 62 ods. 8 a § 83a ods. 5 Zákonníka práce[1]

Contractual Penalty in Labour Law? A Brief Reflection on the Agreement on Monetary Compensation in Paragraph 62(8) and Paragraph 83a(5) of the Labour Code

Veronika Zoričáková

Abstract: *In the paper, the author deals with the issue of a contractual penalty in labour relations, while the reason for reopening this issue was the ongoing unclear nature of the agreement on monetary compensation in the provision of § 62 paragraph 8 and § 83a paragraph 5 of the Slovak Labour Code. After a theoretical introduction to the contractual penalty, its nature, functions and relationship to liability for damage under civil law and commercial law, she concludes that monetary compensation agreements, in fact, are contractual penalty agreements. However, they are characterized by peculiarities that affect the potential relationship of the general civilian regulation of the contractual penalty, especially in terms of the relationship of monetary compensation and liability for damage caused by violation of the same obligation and the moderating right of the court. In conclusions, she briefly formulates possible future relation between the Slovak Civil Code and the Slovak Commercial Code and she agrees with the need to set up full subsidiarity of the Civil Code to the Labour Code.*

Key Words: *Labour Law; Contractual Penalty; Damages; Sanction; Damage Compensation; the Slovak Republic.*

Abstrakt: *Autorka sa v príspevku zaoberá problematikou zmluvnej pokuty v pracovnoprávnych vzťahoch, pričom podnetom pre znovuotvorenie tejto otázky bol nevyjasnený charakter dohody o peňažnej náhrade v ustanove-*

[1] Príspevok je súčasťou riešenia výskumného projektu financovaného Agentúrou na podporu výskumu a vývoja č. APVV-18-0443 s názvom *„Prieniky pracovného práva do iných odvetví súkromného práva (a vice versa)“*, zodpovedný riešiteľ prof. JUDr. Mgr. Andrea Olšovská, PhD.

niach § 62 ods. 8 a § 83a ods. 5 slovenského Zákonníka práce. Po teoretickom úvode o zmluvnej pokute, jej povahe, funkciách a vzťahu k zodpovednosti za škodu podľa občianskeho práva a obchodného práva tak dospieva k záveru, že dohody o peňažnej náhrade sú dohodami o zmluvnej pokute. Vyznačujú sa však osobitosťami, ktoré majú vplyv na potenciálny vzťah všeobecnej civilistickej úpravy zmluvnej pokuty, najmä čo do prevzatia riešenia vzťahu peňažnej náhrady a spôsobenej škody porušením tej istej povinnosti, ako aj moderačného práva súdu. V závere v krátkosti formuluje možné budúce nastavenie slovenského Občianskeho zákonníka a slovenského Obchodného zákonníka a prikláňa sa k názoru o potrebe ukotvenia plnej subsidiarity Občianskeho zákonníka k Zákonníku práce.

Kľúčové slová: *Pracovné právo; zmluvná pokuta; náhrada škody; sankcia; kompenzácia ujmy; Slovenská republika.*

Úvod

Uzavretý výpočet zabezpečovacích prostriedkov v Zákonníku práce[2] v pracovnoprávnych vzťahoch nedovoľuje využiť stranám pracovnej zmluvy alebo dohody niektorý zo zabezpečovacích mechanizmov civilného práva, ak ho Zákonník práce v § 20 priamo nepredpokladá. Strany pracovnej zmluvy alebo dohody tak na zabezpečenie nárokov plynúcich z ich vzájomného vzťahu môžu využiť len pomerne obmedzený okruh prostriedkov zabezpečenia a vybrať si medzi ručením, dohodou o zrážkach zo mzdy alebo zriadením záložného práva (§ 20 ods. 1 Zákonníka práce). Tiež vzhľadom na podstatne viac rigidné nastavenie podmienok, za ktorých môžu strany zabezpečenie nároku dohodnúť (narýchlo spomeňme iba jednostrannú možnosť zriadenia záložného práva, keď podľa súčasného stavu záložným právom nie je možné zabezpečiť nárok zamestnanca voči zamestnávateľovi, obmedzený druh zálohu iba na nehnuteľnosť, ktorú vlastní zamestnanec, či úzko vymedzený okruh pohľadávok, ktoré sú spôsobilé zabezpečenia), je súčasné nastavenie pracovnoprávneho východiska veľmi málo plastické.

Hoci § 20 Zákonníka práce nedovoľuje stranám pracovnoprávnych zmlúv a dohôd dohodnúť si zmluvnú pokutu (z dôvodov, ktoré budeme podrobnejšie rozoberať nižšie), Zákonník práce predsa len na dvoch miestach počíta s možnosťou dohodnúť si so zamestnancom peňažnú

[2] Bližšie pozri *Zákon č. 311/2001 Z.z. Zákonník práce v znení neskorších predpisov* (ďalej len „Zákonník práce").

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náhradu v prípade, ak z jeho strany dôjde k porušeniu v dohode vymedzenej povinnosti. Prvým prípadom je úprava v § 62 ods. 8 Zákonníka práce, kde Zákonník práce predpokladá dohodu medzi zamestnancom a zamestnávateľom o peňažnej náhrade, ktorú musí zamestnanec zaplatiť v prípade, ak u zamestnávateľa nezotrvá počas plynutia celej výpovednej doby. Druhou situáciou, kedy sa môže zamestnávateľ so zamestnancom na takejto peňažnej náhrade dohodnúť, je prípad predpokladaný v § 83a ods. 5 Zákonníka práce. Zamestnávateľ môže od zamestnanca vyžadovať zaplatenie peňažnej sumy, ak zamestnanec poruší záväzok plynúci pre neho z konkurenčnej doložky a v rozpore s ňou v dohodnutej dobe vykonáva konkurenčnú činnosť vo vzťahu k činnosti svojho, už bývalého zamestnávateľa. Aj keď ani v jednom z uvedených dvoch prípadov Zákonník práce nehovorí o zmluvnej pokute, už pri letmom pohľade do zákona a konštrukcie tohto záhadného inštitútu sa nedá prehliadnuť jeho nápadná podobnosť so zmluvnou pokutou občianskeho práva a obchodného práva. Cieľom nášho príspevku bude po krátkom úvode o zmluvnej pokute všeobecne, jej funkciách a špecifikách zamyslieť sa nad vzťahom všeobecnej úpravy zmluvnej pokuty a dohody o peňažnej náhrade v Zákonníku práce. Následne porovnáme súčasný právny stav s rekodifikovanou úpravou českého súkromného práva a pozrieme sa na to, či nový český Občanský zákoník[3] priniesol materiálnu zmenu pre vzťah tamojšieho civilného práva a pracovného práva, s dôrazom na zabezpečovacie prostriedky, a osobitne zmluvnú pokutu. Na podklade týchto zistení sa v závere pokúsime formulovať návrhy pre budúcu rekodifikáciu slovenského súkromného práva a vzťahu občianskeho práva a pracovného práva.

1 K zmluvnej pokute všeobecne

Zmluvnou pokutou ako jedným zo zabezpečovacích prostriedkov občianskeho práva a aj obchodného práva sa veriteľova pohľadávka zabezpečuje tým spôsobom, že sa s dlžníkom písomne dohodne na zaplatení určitej čiastky v prípade, ak dôjde k porušeniu primárnej – zabezpečovanej povinnosti. Právnym základom pre zriadenie zmluvnej pokuty je preto – podobne, ako pri ostatných zabezpečovacích prostriedkoch – dohoda medzi veriteľom a dlžníkom.

[3] Bližšie pozri *Zákon č. 89/2012 Sb. Občanský zákoník, ve znění pozdějších předpisů* (ďalej len „Občanský zákoník").

Občianskym zákonníkom[4] ani Obchodným zákonníkom[5] nie je nijakým spôsobom obmedzené či limitované, aký druh povinnosti môže byť zmluvnou pokutou zabezpečený; formulácia a konštrukcia je ponechaná na voľnej úvahe zmluvných strán. Zabezpečenou môže byť povinnosť k peňažnému alebo nepeňažnému plneniu, zabezpečovanou môže byť jedna alebo niekoľko povinností plynúcich zo zmluvy medzi nimi (vzhľadom na konsenzuálny charakter dohody o zmluvnej pokute je málo pravdepodobné, že si veriteľ a dlžník zabezpečia splnenie takej povinnosti, ktorá by mala zákonný, a nie zmluvný charakter; vylúčené to však nie je a v teoretickej rovine tak možno počítať aj s variantom, v ktorom dôjde k dohode aj vo vzťahu k splneniu niektorej zo zákonných povinností – muselo by ísť však o takú povinnosť, ktorá nie je súčasťou ich zmluvného záväzku).

Okrem toho, že je zmluvná pokuta zo svojej povahy akcesorickou, tak, ako väčšina ostatných foriem zabezpečenia (povinnosť uhradiť zmluvnú pokutu je naviazaná na existenciu a trvanie zabezpečovanej povinnosti; ak hlavná povinnosť zanikne napríklad splnením, neostáva aplikačný priestor pre uplatnenie zmluvnej pokuty a potenciálna povinnosť uhradiť ju tým zaniká spolu s hlavnou povinnosťou), jej špecifikom a súčasne odlišujúcim kritériom od ostatných prostriedkov je skutočnosť, že splnením záväzku zo zmluvnej pokuty nedochádza k uspokojeniu hlavnej pohľadávky veriteľa. Práve kvôli tomuto charakteru zmluvnej pokuty, ktorá nespôsobuje zánik – a tým uspokojenie hlavnej zabezpečovanej pohľadávky (ak nie je dohodnuté niečo iné), ale dlžník musí nad splnenie hlavnej povinnosti uhradiť veriteľovi ešte sumu zodpovedajúcu zmluvnej pokute (zmluvná pokuta však môže byť dohodnutá aj ako nepeňažné plnenie; dispozitívna právna úprava takémuto dojednaniu nebráni),[6] sa pri zmluvnej pokute zdôrazňuje jej penalizačná, inými slovami, sankčná funkcia.[7] Pravdepodobne z tohto dôvodu má zmluvná pokuta v pracovnom páve, povedané s určitým nadsadením, pomerne zlú povesť, lebo sa potenciálne uplatňovanie inštitútu vníma primárne a izolovane ako mož-

[4] Bližšie pozri *Zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov* (ďalej len „Občiansky zákonník").

[5] Bližšie pozri *Zákon č. 513/1991 Zb. Obchodný zákonník v znení neskorších predpisov* (ďalej len „Obchodný zákonník").

[6] Ten istý záver sa uplatní v obchodnom práve, ako aj v občianskom práve. Bližšie pozri OVEČKOVÁ, O. et al. *Obchodný zákonník: Veľký komentár: Zväzok I: (§ 1 až 260)*. 1. vyd. Bratislava: Wolters Kluwer, 2017, s. 190. ISBN 978-80-8168-573-6.

[7] Bližšie pozri OVEČKOVÁ, O. *Zmluvná pokuta*. 2. preprac. a dopln. vyd. Bratislava: Iura Edition, 2011, s. 47. ISBN 978-80-8078-386-0.

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ný nástroj pokutovania zamestnanca, čo by otváralo cestu k zastrašovaniu zamestnanca jeho zamestnávateľom.[8] Obávaná hrozba pokutovania zamestnanca zmluvnými pokutami, chtiac-nechtiac, evokuje nazeranie na inštitút ako predovšetkým na prostriedok sankcionovania, podobne, ako to robí trestné právo či administratívne právo formou pokút. Ak by však zmluvná pokuta skutočne sledovala primárne cieľ trestať jeden zo subjektov, len ťažko by sa dala jej existencia v súkromnoprávnych odvetviach zdôvodniť, a najmä obhájiť, a nájsť si tak cestu do Občianskeho zákonníka a Obchodného zákonníka, keďže trestajúca funkcia v zásade akéhokoľvek inštitútu je súkromnému právu cudzia.[9] Hoci sa zmluvná pokuta zvykne uvádzať ako výnimka z uvedeného pravidla, skúsime sa v najbližších častiach podrobnejšie pozrieť na jej funkcie a spraviť čiastkový záver k tomu, či je trestanie za nesplnenie povinnosti skutočne hlavnou funkciou zmluvnej pokuty, alebo jej podstatu tvorí dosiahnutie primárne iných cieľov.

1.1 Funkcie zmluvnej pokuty

Dohoda medzi veriteľom a dlžníkom o dodatočnom plnení (či už peňažnom alebo nepeňažnom) v prípade porušenia jeho povinnosti v prvom rade motivuje dlžníka k včasnému, úplnému a riadnemu splneniu svojej povinnosti. *Motivačná funkcia* zmluvnej pokuty v skratke spočíva v tom, že dlžníka odrádza od porušenia zmluvy,[10] vďaka čomu sa šance veriteľa na riadne zmluvné plnenie zvyšujú. V tejto súvislosti sa v zásade v rovnakom význame spomína *preventívna funkcia* zmluvnej pokuty spočívajúca v skutočnosti, že dlžníka „preventívne núti“ k splneniu zabezpečovanej povinnosti.[11] Motivačná funkcia a preventívna funkcia svojím účinkom tak splývajú do jednej; pre účely nášho textu budeme ďalej pracovať s motivačným účinkom pokuty.

[8] Pozri napríklad DOLOBÁČ, M. *Hranice zmluvnej slobody v pracovnom práve*. 1. vyd. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta, 2017, s. 160. ISBN 978-80-8152-574-2.

[9] Bližšie pozri LUBY, Š. *Prevencia a zodpovednosť v občianskom práve: Zväzok I*. 1. vyd. Bratislava: Vydavateľstvo Slovenskej akadémie vied, 1958, s. 48.

[10] Bližšie pozri J. Šilhán v BEJČEK, J., J. ŠILHÁN, et al. *Obchodní smlouvy: Závazky v podnikání*. 1. vyd. Praha: C. H. Beck, 2015, s. 156. ISBN 978-80-7400-574-9.

[11] Bližšie pozri OVEČKOVÁ, O. *Zmluvná pokuta*. 2. preprac. a dopln. vyd. Bratislava: Iura Edition, 2011, s. 45. ISBN 978-80-8078-386-0.

O *zabezpečovacej funkcii* zmluvnej pokuty sa prirodzene hovorí preto, lebo pokuta je zaradená do systému prostriedkov zabezpečenia.[12] Bez diskusie platí, že sa dohodou o zmluvnej pokute postavenie veriteľa o poznanie zlepšuje tým, že mu v prípade nesplnenia zmluvy nielenže naďalej patrí právo na riadne zmluvné plnenie, ale má nad to právo ešte na ďalšie dohodnuté peňažné plnenie, respektíve nepeňažné plnenie. Čo sa však typicky so zabezpečovacou funkciou spája a pri zmluvnej pokute *absentuje*, je jej *uhradzovacia funkcia*. Pri v zásade akomkoľvek inom type zabezpečenia (okrem uznania dlhu) je najväčšou výhodou a súčasne dôvodom, prečo veritelia po zabezpečení siahajú, možnosť dospieť k náhradnému uspokojeniu pohľadávky alebo jej časti alternatívnym spôsobom (speňažením zálohu, zrážkami zo mzdy, úhradou plnenia ručiteľom alebo prostredníctvom bankovej záruky, a tak ďalej). Uvedenú výhodu však zmluvná pokuta veriteľovi neposkytuje (kvôli absencii uhradzovacej funkcie sa, koniec koncov, ani v novom českom súkromnom práve zmluvná pokuta neuvádza ako prostriedok zabezpečenia, ale ako spôsob „utvrdenia dlhu"), a tak sa možno oprávnene pýtať, v čom – okrem už spomenutej motivačnej funkcie a jej posilnenej pozície vďaka novému právu na ďalšie plnenie – je vlastne zmluvná pokuta vo vzťahu k zabezpečovanej povinnosti výhodná.

Hlavná výhoda zmluvnej pokuty spočíva v skutočnosti, že vďaka východiskovému nastaveniu dispozitívnej úpravy tak v Občianskom zákonníku, ako aj Obchodnom zákonníku plní funkciu tzv. *paušalizovanej náhrady škody*. Paušalizovanej preto, lebo dohodnutá čiastka v sebe konzumuje právo na náhradu škody spôsobenej porušením zabezpečenej povinnosti. Pre veriteľa to znamená, že pre uplatnenie náhrady škody nemusí preukazovať, v akej výške mu škoda vznikla, ani v čom spočívala, čím sa vyhne prípadnej dôkaznej núdzi (nemusí nákladným a často zdĺhavým a procesne náročným spôsobom preukazovať, v čom všetkom mu bola škoda spôsobená tým, že dlžník porušil svoju povinnosť, napríklad dodať objednaný tovar načas – od zistenia omeškania, po náklady na urgovanie a výzvy dlžníkovi až po alternatívne zabezpečenie splnenia povinnosti, často s väčšími ťažkosťami a za vyšších vstupných nákladov) a komplikáciám spojeným s preukazovaním ostatných predpokladov a prvkov vzniku zodpovednosti dlžníka za škodu (kauzalita, prípadná mitigácia veriteľa, a tak ďalej; k zavineniu viac nižšie), čím sa významne

[12] Bližšie pozri OVEČKOVÁ, O. *Zmluvná pokuta*. 2. preprac. a dopln. vyd. Bratislava: Iura Edition, 2011, s. 46. ISBN 978-80-8078-386-0.

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zjednoduší vymáhateľnosť kompenzácie.[13] Nazdávame sa, že práve zmienená *reparačná funkcia*, respektíve *kompenzačná funkcia* zmluvnej pokuty je tou hybnou silou, ktorá veriteľa najviac motivuje k využitiu tohto zabezpečovacieho prostriedku. Ak sa na inštitút pozrieme optikou už uvedeného a s určitou mierou odstupu, zistíme, že zmluvná pokuta *de facto* zabezpečuje viac potenciálny nárok na náhradu škody, ktorý môže porušením hlavnej zabezpečovanej povinnosti vzniknúť, než samotnú hlavnú povinnosť zo zmluvy.

V súvislosti so škodou je potrebné zmieniť aj jej potenciálnu *limitačnú funkciu*. Ak sa totiž veriteľ s dlžníkom nedohodne na inom, platí, že si nemôže uplatniť nárok na náhradu tej škody, ktorá nie je pokrytá sumou zmluvnej pokuty (§ 545 ods. 2 Občianskeho zákonníka). Vo výsledku tak veriteľ prichádza o časť nároku na náhradu spôsobenej škody, ak škoda prevýši dohodnutú zmluvnú pokutu, avšak výmenou za významne uľahčenú dôkaznú pozíciu voči dlžníkovi.

Konečne sa dostávame k pre zmluvnú pokutu príznačnej *sankčnej funkcii*. Označenie inštitútu, ako aj tradícia jeho výkladu v civilistickej, a je potrebné doplniť, že aj v pracovnej doktríne evokuje, že sankčná funkcia je jej primárnou funkciou. Žiada sa však zdôrazniť, že za východiskového zákonného nastavenia, kde sa zmluvná pokuta započítava na náhradu škody, sankčný prvok buď úplne absentuje (zmluvná pokuta nemusí, a často ani nebude pokrývať celú vzniknutú škodu), alebo je, popri reparačnej funkcii, druhoradá (dlžník musí uhradiť sumu zodpovedajúcu dohodnutej zmluvnej pokute, ktorá v sebe konzumuje celý nárok na náhradu vzniknutej škody, a ešte „niečo navyše“). Veriteľ pri dojednávaní výšky zmluvnej pokuty častokrát nemusí mať ambíciu a sledovať cieľ uplatňovať si touto cestou sumu nad rámec spôsobenej škody, a to z jednoduchého dôvodu – v čase dojednania nevie vopred s presnosťou odhadnúť, škoda akého rozsahu vznikne a v čom všetkom bude spočívať. Navyše platí, že neprimerane vysokú zmluvnú pokutu môže stále dlžník žalobou napadnúť na súde (§ 545a Občianskeho zákonníka; § 301 Obchodného zákonníka) a žiadať jej zníženie (k tomu viac v ďalších častiach nášho príspevku). Rýdzo trestajúcu povahu má zmluvná pokuta len vtedy, ak sa v dohode veriteľ s dlžníkom odchýlia od dispozitívnej úpravy a veriteľ si bude môcť zmluvnú pokutu uplatňovať popri nároku na náhradu ško-

[13] Bližšie pozri ŠILHÁN, J. *Náhrada škody v obchodních vztazích a možnosti její smluvní limitace*. 2. dopln. a přeprac. vyd. Praha: C. H. Beck, 2011, s. 125. ISBN 978-80-7400-393-6.

dy.[14] Ani Občiansky zákonník, ani Obchodný zákonník však s primárne sankčnou pokutou v dispozitívnej východzej rovine nerátajú, iba stranám, rešpektujúc šírku zmluvnej autonómie, odchýlne dojednanie nezakazujú. Vzhľadom na oveľa viac prítomnú reparačnú funkciu než sankčnú funkciu sa žiada zdôrazniť jej zodpovednostný charakter[15] a užší vzťah k zodpovednosti za škodu, než k pokutám v zmysle, v akom ich chápe verejné právo.

Nakoniec, zmluvná pokuta môže plniť tzv. terminačnú funkciu, ak sa strany dohodnú na variante, podľa ktorého uhradením sumy zmluvnej pokuty dôjde k zániku zabezpečenej povinnosti, a tým súčasne častokrát k celému záväzkovému vzťahu. Dlžník sa zaplatením vie fakticky vykúpiť z povinnosti plniť zabezpečovanú povinnosť;[16] zmluvná pokuta tu vlastne plní funkciu odstupného (§ 497 Občianskeho zákonníka).[17]

1.2 Vzťah k náhrade škody, prostriedky ochrany dlžníka pred zmluvnou pokutou a jej neprimeranou výškou

Zhrňme, že hlavným cieľom použitia zmluvnej pokuty v zmluvných vzťahoch je jej reparačná funkcia vo vzťahu ku škode. Veriteľ a dlžník v dohode prostredníctvom jej výšky v podstate odhadujú predpokladanú výšku možnej škody vzniknutej v budúcnosti (hoci si to v čase dojednania ani nemusia uvedomovať), a zároveň – ak si nedohodnú inak – náhradu škody touto sumou limitujú. Zopakujme, že vďaka tomuto dojednaniu nebude uľahčená veriteľova pozícia primárne vo vzťahu k splneniu zabezpečenej hlavnej povinnosti, ale najmä vo vzťahu k spôsobenej škode, ktorej vznik, a ani výšku preukazovať nemusí. Čo však zo zodpovednostných predpokladov a pri zmluvnej pokute preukazovať musí, je, prirodzene, porušenie zabezpečenej povinnosti, a v občianskom práve tiež zavinenie (§ 545 ods. 3 Občianskeho zákonníka). Obchodnoprávna úprava

[14] Bližšie pozri J. Šilhán v BEJČEK, J., J. ŠILHÁN, et al. *Obchodní smlouvy: Závazky v podnikání*. 1. vyd. Praha: C. H. Beck, 2015, s. 156-157. ISBN 978-80-7400-574-9.

[15] Bližšie pozri OVEČKOVÁ, O. Zmluvná pokuta v procese rekodifikácie súkromného práva (návrh novely Občianskeho zákonníka). *Právny obzor*. 2019, roč. 102, č. 2, s. 169. ISSN 0032-6984.

[16] Bližšie pozri ŠILHÁN, J. *Právní následky porušení smlouvy v novém občanském zákoníku*. 1. vyd. Praha: C. H. Beck, 2015, s. 392. ISBN 978-80-7400-544-2.

[17] V teoretickej rovine vieme nájsť aj ďalšie, tu bližšie nespomenuté funkcie, no vzhľadom na skutočnosť, že tvoria viac-menej iba podkategóriu niektorej z hlavných funkcií zmluvnej pokuty, pre účely nášho príspevku ich nebudeme podrobnejšie rozoberať. K ostatným funkciám podrobnejšie pozri ŠILHÁN, J. *Právní následky porušení smlouvy v novém občanském zákoníku*. 1. vyd. Praha: C. H. Beck, 2015, s. 391-393. ISBN 978-80-7400-544-2.

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je v tomto ohľade nastavená inak; nielenže je zodpovednosť založená objektívne bez ohľadu na zavinenie, ale je dokonca nastavená prísnejšie než zodpovednosť za škodu tým, že sa povinnosti uhradiť zmluvnú pokutu dlžník nezbaví, ani keď budú naplnené okolnosti vylučujúce zodpovednosť (§ 300 Obchodného zákonníka).

Uvedený rozdiel sa zvykne zdôvodňovať tým, že prísnejšie nastavenie vzniku povinnosti uhradiť zmluvnú pokutu v obchodnom práve korešponduje s prísnejším nastavením vzťahov v podnikateľskom prostredí v porovnaní s občianskoprávnymi vzťahmi.[18] Skôr sa však nazdávame, že rozdiel spočíva v rýdzo historických súvislostiach vzniku oboch zákonníkov; jednoducho nadväzujú na to (ako už bolo naznačené), ako je v nich nastavená zodpovednosť za škodu spôsobenú porušením zmluvnej povinnosti. Subjektívny princíp zodpovednosti za zmluvnú škodu (a tým nepriamo platiaci princíp tiež pre zmluvnú pokutu) je však v súčasnej dobe kritizovaný, pričom sa poukazuje na neudržateľnosť jednotnej úpravy zmluvných a mimozmluvných vzťahov čo do predpokladov vzniku zodpovednosti, a aj pre zmluvné občianskoprávne vzťahy je oveľa vhodnejším konceptom objektívna zodpovednosť za porušenie zmluvnej zodpovednosti.[19] Koniec koncov, aj recentný návrh rekodifikácie záväzkov jednotne pre občianske vzťahy i obchodné vzťahy počítal s objektívnym princípom vzniku povinnosti uhradiť zmluvnú pokutu, čím kopíroval zodpovednosť za škodu spôsobenú porušením zmluvnej povinnosti.[20]

Právna úprava však počíta aj so skutočnosťou, že veriteľ môže využiť svoju prípadnú silnejšiu negociačnú pozíciu alebo inú formu vplyvu na dlžníka či jeho nepozornosť a do zmluvy si presadí zmluvnú pokutu v neprimeranej výške. Neprimerane vysoká zmluvná pokuta však automaticky nespôsobuje neplatnosť dojednania, ale súd má v obchodnom práve

[18] Bližšie pozri OVEČKOVÁ, O. Zmluvná pokuta v procese rekodifikácie súkromného práva (návrh novely Občianskeho zákonníka). *Právny obzor*. 2019, roč. 102, č. 2, s. 173. ISSN 0032-6984.

[19] Bližšie pozri NOVOTNÁ, M. Jednotný civilný delikt alebo oddelené režimy zmluvnej a mimozmluvnej náhrady škody?. *Súkromné právo*. 2021, roč. 7, č. 6, s. 215-222. ISSN 1339-8652.

[20] Bližšie pozri OVEČKOVÁ, O. Zmluvná pokuta v procese rekodifikácie súkromného práva (návrh novely Občianskeho zákonníka). *Právny obzor*. 2019, roč. 102, č. 2, s. 171-175. ISSN 0032-6984. V poslednom znení rekodifikačného návrhu však zmluvná sankcia (ako nový prepracovaný inštitút vzniknutý na báze terajšieho chápania zmluvnej pokuty) nemala mať limitačný účinok vo vzťahu k spôsobenej škode. K tomu podrobnejšie pozri K. Csach v JURČOVÁ, M. et al. *Jednotný systém nesplnenia a prostriedkov nápravy: Návrh koncepcie a pravidiel (ustanovení) budúcej právnej úpravy*. 1. vyd. Praha: Leges, 2018, s. 93. ISBN 978-80-7502-327-8.

na návrh, v občianskom práve i bez návrhu,[21] možnosť tzv. zmoderovať výšku zmluvnej pokuty na pre daný prípad spravodlivejšiu hranicu. Naskytá sa však otázka, čo vlastne znamená neprimerane vysoká zmluvná pokuta na to, aby mohol súd k moderácii vôbec pristúpiť. Pri prispôsobovaní výšky a hľadania jej primeranosti súd nahliada na hodnotu a význam zabezpečovanej povinnosti (§ 545a Občianskeho zákonníka; § 301 Obchodného zákonníka), pričom aj tu je vzťah k spôsobenej škode veľmi výrazný. V civilnom spore súd musí prihliadnuť na výšku skutočne utrpenej škody, ktorá porušením povinnosti vznikla, a na to, o koľko vlastne výška pokuty presahuje spôsobenú škodu. V obchodnom spore je spojitosť so spôsobenou škodou nastavená trochu odlišne; súd v konaní *ex lege* nemôže znížiť výšku zmluvnej pokuty pod hranicu skutočne vzniknutej škody až do súdneho rozhodnutia o zmluvnej pokute (§ 301 prvá veta Obchodného zákonníka). I tu je primárne kompenzačná funkcia zmluvnej pokuty jasne viditeľná; skutočne utrpená škoda veriteľom pôsobí ako pomyselný mantinel pre moderačné oprávnenie. Zákonodarca úpravou v podstate hovorí – ak zmluvnú pokutu zmoderovať, tak len jej „sankčnú zložku", respektíve jej časť, ktorá veriteľovi nebude pokrývať utrpenú škodu. Spor o zníženie neprimerane vysokej zmluvnej pokuty však pre veriteľa znamená určitú stratu výhody, ktorá mu na začiatku z dojednania o pokute plynula a ktorá spočívala v jej spôsobilosti kompenzovať vzniknutú škodu aj bez potreby preukazovania. Ani v takomto spore, prirodzene, veriteľ preukazovať škodu a kvantifikovať jej presnú výšku nemusí, vystaví sa tým však riziku, že mu súd môže zmluvnú pokutu zmoderovať optikou záujmov veriteľa až neprimerane nízko, keďže jedinými kritériami moderácie budú len už spomenutá hodnota a význam hlavnej zabezpečovanej povinnosti.

Moderácia výšky zmluvnej pokuty súdom nevyhnutne vyvoláva otázku, aký má vzťah tento špeciálny prostriedok ochrany záujmov dlžníka s inými zákonnými prostriedkami ochrany. Môže byť dojednanie o zmluvnej pokute neplatné pre rozpor s dobrými mravmi, pre zneužitie práva či pre rozpor so zásadou poctivého obchodného styku? V minulosti sa dôvodilo, že vzťah osobitnej úpravy moderácie privysokej zmluvnej pokuty predstavuje *lex specialis* k všeobecnej úprave iných následkov (najmä neplatnosti), a ak dôvod pomyselnej neplatnosti spočíval práve

[21] Moderácia zmluvnej pokuty súdom aj bez návrhu, podľa nášho názoru, nekorešponduje s koncepciou civilného procesu v rýdzo sporových veciach; táto úvaha však presahuje nastolený rámec príspevku, a nebudeme sa téme preto na tomto mieste venovať.

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v jej výške, neplatnosť mala ustúpiť moderácii.[22] Neskôr sa však ustálilo – a so záverom sa, podľa našej mienky, dá súhlasiť – že niektoré, hoci skôr výnimočné prípady svojou extrémnou premrštenosťou výšky pokuty[23] súčasne môžu spôsobiť rozpor s dobrými mravmi či iným spravodlivostným korektívom a vo výsledku môže byť celé dojednanie o zmluvnej pokute súdom prehlásené za neplatné. Prirodzene, ak sa nesúlad s právnymi mantinelmi vyskytuje v inom aspekte než vo výške dojednanej pokuty, napríklad je celé dojednanie zneužívajúce alebo nebolo kryté zhodnou vôľou oboch strán, či je neurčité alebo nebola dodržaná predpísaná písomná forma, vada dojednania spôsobuje zákonom predvídaný následok, najčastejšie v podobe už spomínanej neplatnosti dojednania o zmluvnej pokute.

2 Dohody o peňažnej náhrade v Zákonníku práce a ich vzťah k zmluvnej pokute

Po úvode o zmluvnej pokute v iných odvetviach súkromného práva sa dostávame späť k dohodám o peňažnej náhrade v Zákonníku práce. Uviedli sme vyššie, že Zákonník práce na dvoch rôznych miestach predpokladá, že sa zamestnávateľ môže so zamestnancom dohodnúť na peňažnej náhrade v prípade, ak zamestnanec nesplní svoju povinnosť, v prvom prípade ak u zamestnávateľa nezotrvá a prácu nevykonáva počas plynutia výpovednej doby (§ 62 ods. 8 Zákonníka práce), v druhom prípade ak zamestnanec poruší povinnosť plynúcu z konkurenčnej doložky a v rozpore s ňou vykonáva konkurenčnú činnosť vo vzťahu k činnosti svojho zamestnávateľa (§ 83a ods. 5 Zákonníka práce). Poďme sa pozrieť na to, či majú uvedené dohody so zmluvnou pokutou niečo spoločné, a ak áno, aký je ich vzťah so zmluvnou pokutou v Občianskom zákonníku.

Prvým zjavným spoločným znakom je konsenzuálny charakter pracovnoprávnej dohody o peňažnej náhrade a dojednania o zmluvnej pokute. Tak právo na peňažnú náhradu, ako aj právo na zmluvnú pokutu vznikne len vtedy, ak sa na tom veriteľ s dlžníkom písomne dohodnú. V oboch prípadoch má, pochopiteľne, veriteľ právo na plnenie; osobitosťou pracovnoprávnych dojednaní je však ich rýdzo peňažný charakter. Otázne je, či je aj pracovnoprávna úprava v tomto ohľade, podobne, ako

[22] K prehľadu staršej judikatúry pozri bližšie ŠILHÁN, J. *Právní následky porušení smlouvy v novém občanském zákoníku*. 1. vyd. Praha: C. H. Beck, 2015, s. 409. ISBN 978-80-7400-544-2.

[23] Bližšie pozri ŠILHÁN, J. *Právní následky porušení smlouvy v novém občanském zákoníku*. 1. vyd. Praha: C. H. Beck, 2015, s. 410. ISBN 978-80-7400-544-2.

je tomu v občianskom práve a obchodnom práve, dispozitívna a zamestnávateľ sa môže so zamestnancom dohodnúť na nepeňažnom plnení. Jednostranná kogentnosť pracovnej úpravy nám v danom ohľade, podľa našej mienky, na situácie nedopadá, keďže sa ani jedna z dohôd nevmestí do hypotézy § 1 ods. 6 Zákonníka práce (ani v jednej z dvoch situácií, podľa nášho názoru, nejde o podmienky zamestnania, ani o pracovné podmienky zamestnanca). Zdá sa, že niet pracovnoprávneho limitu, ktorý by dohodu o nepeňažnej náhrade zakazoval; vzhľadom však na funkciu predmetných dohôd, o ktorých budeme písať nižšie, sa javí tento variant dohody pre prax málo zaujímavým a zamestnávateľ bude preferovať peňažné plnenie.

V obidvoch prípadoch je peňažná náhrada dôsledkom porušenia povinnosti dlžníkom, ktorá preň vyplýva zo zmluvy (zákaz konkurencie vyplýva z konkurenčnej doložky obsiahnutej v pracovnej zmluve, povinnosť vykonávať prácu počas výpovednej doby plynie z ešte trvajúceho pracovného pomeru založeného pracovnou zmluvou). Pri oboch pracovnoprávnych dojednaniach preto možno dospieť k čiastkovému záveru, že zamestnanca existencia hrozby peňažnej náhrady, podobne, ako zmluvná pokuta, motivuje k splneniu jeho zmluvnej povinnosti.

Poďme sa však zamyslieť nad účelom, ktorý, okrem motivácie k splneniu povinnosti, má pracovnoprávna dohoda o náhrade naplniť. Je peňažná náhrada výnimočnou sankciou, ktorou môže zamestnávateľ, slovami pracovnoprávnej doktríny, zamestnanca pokutovať? Podľa § 62 ods. 8 Zákonníka práce má zamestnávateľ právo na peňažné plnenie najviac vo výške rovnajúcej sa súčinu priemerného mesačného zárobku zamestnanca a dĺžky výpovednej doby. Nedá sa prehliadnuť, že spôsob výpočtu tejto náhrady ako súčin priemerného zárobku zamestnanca a dĺžky výpovednej doby, počas ktorej mal vykonávať pre zamestnávateľa prácu, ktorú však v skutočnosti nevykonával, naznačuje, ako by bolo účelom zabezpečiť zamestnávateľovi vrátenie neprávom vyplatenej sumy peňazí ako odmeny za prácu, ktorú však zamestnanec v skutočnosti nevykonal. Aj keď na vrátenie neprávom vyplatených súm vo všeobecnosti slúži inštitút bezdôvodného obohatenia (§ 222 Zákonníka práce), nedá sa prehliadnuť, že v načrtnutej situácii sa výplata za mzdu poskytuje za existencie trvajúceho právneho základu (pracovnej zmluvy); dožadovať sa vydania bezdôvodného obohatenia len preto, lebo si druhá zmluvná strana neplní svoj zmluvný záväzok, preto nie je možné. V tomto ohľade sa ukazuje slabé miesto pracovnoprávnej úpravy, kde pre nedostatočné previazanie na Občiansky zákonník zamestnávateľ nemôže uplatniť na-

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príklad právo odoprieť plnenie plynúce zo synalagmy až do doby, kým druhá strana svoje plnenie poskytne alebo ho zabezpečí (§ 560 Občianskeho zákonníka).

Zdá sa, že i vzhľadom na nápadnú podobnosť tejto dohody s dohodou o zmluvnej pokute bolo primárne jej účelom kompenzovať neprávom vyplatenú sumu, a tiež paušalizovať potenciálnu náhradu škody vzniknutej zamestnávateľovi tým, že zamestnanec pre neho prácu počas výpovednej doby nevykonáva. Zamestnávateľ, rátajúc s výkonom práce odchádzajúcim zamestnancom, tak musí v pomerne krátkom čase zariadiť neplánovaný výpadok, a buď zabezpečiť výkon práce niekým iným, alebo prerozdeliť prácu medzi ostatných zamestnancov, čo bude spravidla spojené s nákladmi navyše kvôli práci nadčas. Domnievame sa, že účelom peňažnej náhrady v tomto ustanovení bolo práve paušálne nahradiť zvýšené náklady spojené s nečakaným výpadkom pracovnej sily, a teoreticky sa nedá vylúčiť tiež náhrada prípadnej nemajetkovej ujmy, ktorá mohla zamestnávateľovi vzniknúť práve pre nečakané komplikácie spojené s protiprávnou absenciou a ktorá by bola nielenže náročne kvantifikovateľná, ale bez adekvátneho právneho základu je zásadne nenahraditeľná. Zamestnávateľ tak vďaka predmetnej náhrade nemusí častokrát prácne a náročne preukazovať vzniknutú škodu a všetky ostatné predpoklady, ale od zamestnanca dostane paušálnu čiastku na pokrytie vzniknutých nákladov.

Podobné zdôvodnenie sa ponúka tiež pri uvažovaní nad peňažnou náhradou v § 83a ods. 5 Zákonníka práce. Počas doby, v ktorej zamestnanec v zmysle uzavretej konkurenčnej doložky nemôže vykonávať konkurenčnú činnosť, dostáva od zamestnávateľa protihodnotu vo výške najmenej 50 % jeho priemerného mesačného zárobku za každý mesiac plnenia povinnosti z konkurenčnej doložky. Ak však danú povinnosť poruší, podľa vyššie uvedeného odseku 5 má zamestnávateľ právo (ak si to tak dohodne) na náhradu, ktorá však nesmie presiahnuť výšku už vyplatených súm zamestnávateľom za plnenie povinnosti z konkurenčnej doložky. Aj tu sa na prvý pohľad zdá, že zákonodarca chcel zabezpečiť vrátenie neoprávnene vyplatených súm zamestnávateľovi, ktorý zamestnancovi pravidelne vyplácal dohodnutú odmenu, adekvátnu protihodnotu však od zamestnanca nedostal, ak ten v rozpore s doložkou predsa len konkurenčnú činnosť vykonával. V načrtnutej situácii je otázne, či by sa aj bez uzavretej dohody mohol zamestnávateľ dožadovať vrátenia vyplatených súm cestou vydania bezdôvodného obohatenia. Tu však rovnako platí, že zamestnávateľ plnil zamestnancovi určitú čiastku na základe

platného právneho dôvodu (konkurenčnej doložky), dožadovať sa vydania plnenia z titulu bezdôvodného obohatenia by preto bolo veľmi problematické. Iné prostriedky nápravy, ktoré by v občianskom práve boli veriteľovi k dispozícii, v pracovnom práve absentujú (napríklad všeobecné zákonné právo odstúpenia v prípade porušenia povinnosti spojené s právom vrátenia poskytnutých plnení; všeobecné právo odstúpiť od zmluvy je pritom v pracovnom práve trvajúci a málo vyjasnený problém),[24] zamestnávateľovi by tak ostalo uplatniť si iba právo na náhradu škody, kde by okrem ostatných predpokladov vzniku práva musel vedieť vyčísliť vzniknutú škodu (pri porušení zákazu konkurencie mimoriadne problematicky preukázateľnú škodu spočívajúcu v ušlom zisku; neprávom vyplatená odmena za plnenie povinnosti z konkurenčnej doložky by sa za škodu, podľa nášho názoru, nemohla považovať). I v tomto prípade preto zákonodarca zasahuje a umožňuje zamestnávateľovi uplatniť si po predchádzajúcej dohode paušalizovanú čiastku, ktorá by mu kompenzovala utrpené straty spojené s protiprávnym konaním bývalého zamestnanca. S ohľadom na opätovné zastropovanie maximálnej možnej výšky uplatňovanej peňažnej náhrady a jej priamej závislosti od skutočne a neoprávnene vyplatených súm zamestnancovi sa možno domnievať, že peňažná náhrada má rýdzo kompenzačný, a istotne nie primárne sankčný charakter. Hlavným cieľom je, podobne, ako pri zmluvnej pokute, uľahčiť zamestnávateľovi dôkaznú pozíciu a vymáhateľnosť kompenzačných nárokov.

Ak sa budeme snažiť zovšeobecniť vzťah pracovnoprávnej dohody o náhrade a dojednaní o zmluvnej pokute, zistíme, že ide o totožne konštruované inštitúty s rovnakým účelom, ktorý primárne nespočíva v trestaní za porušenie povinnosti, ale spočíva v motivácii dlžníka k riadnemu plneniu svojich povinností a v prípade ich nesplnenia paušalizovane kompenzujú straty a ujmy veriteľom, čím zvýhodňujú ich postavenie a vymáhateľnosť plnení.

[24] K návrhu riešenia pozri bližšie OLŠOVSKÁ, A. a V. TROJČÁKOVÁ. Odstúpenie a vypovedanie kolektívnej zmluvy a dohôd uzatváraných s príslušným odborovým orgánom, odvolanie súhlasu príslušným odborovým orgánom. In: M. ŠVEC, et al. *Odborová organizácia: Postavenie a pracovnoprávne nároky*. 2. dopln. a preprac. vyd. Bratislava: Wolters Kluwer, 2021, s. 251-258. ISBN 978-80-571-0374-5.

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2.1 Zmluvná pokuta sui generis v pracovnom práve a jej vzťah k všeobecnej úprave v Občianskom zákonníku

Neprehliadnuteľná previazanosť pracovnoprávnych dohôd o peňažnej náhrade na dvoch miestach v Zákonníku práce so zmluvnou pokutou v Občianskom zákonníku postupne núti domácu právnu vedu pripúšťať, že pracovné právo predsa len má vlastnú verziu zmluvnej pokuty[25] a vzniká potreba vyriešiť vzťah pracovnoprávnej úpravy a občianskej právnej úpravy. Súčasná pracovnoprávna doktrína sa buď nad povahou peňažnej náhrady nezamýšľa vôbec,[26] alebo sa odvoláva na *nepriamu* aplikáciu zmluvnej pokuty na tieto typy dohôd,[27] pravdepodobne s obavou, aby sa nevytvorila taká väzba medzi dohodami a zmluvnou pokutou, ktorá by viedla k priamej aplikovateľnosti zmluvných pokút v pracovnoprávnych vzťahoch. Nižšie budeme rozoberať, prečo takéto riziko nehrozí; nateraz sa javí dôležitejšie vyjasniť si dve základné roviny vzťahu uvedených inštitútov: vzťah peňažnej náhrady k náhrade škody vzniknutej z toho istého porušenia a možnosť moderácie náhrady súdom v pracovnoprávnych vzťahoch. Tak trochu enigmatický záver o nepriamej aplikácii totiž nijako zvlášť nepomáha pri zodpovedaní konkrétnych otázok.

Vzhľadom na kompenzačnú funkciu peňažnej náhrady, ktorá, podľa nášho názoru, má hlavne kompenzovať spôsobenú škodu porušením povinnosti zamestnanca, dáva zmysel, aby sa východisková právna úprava zmluvnej pokuty vo vzťahu k zodpovednosti za škodu aplikovala aj v tomto prípade. Zamestnávateľ by preto nemal mať možnosť uplatňovať si spôsobenú škodu popri peňažnej náhrade, lebo by sa tým dvakrát kompenzovala tá istá ujma (§ 545 ods. 2 Občianskeho zákonníka). Sporným

[25] Bližšie pozri TOMAN, J. *Individuálne pracovné právo IV.: Zodpovednosť za škodu a bezdôvodné obohatenie: I. diel: Prevencia: Zodpovednosť za škodu: Všeobecná zodpovednosť zamestnanca za škodu*. 1. vyd. Bratislava: Friedrich Ebert Stiftung, 2019, s. 27. ISBN 978-80-89149-69-8, alebo DOLOBÁČ, M. *Hranice zmluvnej slobody v pracovnom práve*. 1. vyd. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta, 2017, s. 160. ISBN 978-80-8152-574-2.

[26] Pozri napríklad A. Olšovská a H. Barancová v BARANCOVÁ, H. et al. *Zákonník práce: Komentár*. 2. vyd. Bratislava: C. H. Beck, 2019, s. 648-649. ISBN 978-80-89603-78-7, tiež H. Barancová v BARANCOVÁ, H. et al. *Zákonník práce: Komentár*. 2. vyd. Bratislava: C. H. Beck, 2019, s. 813. ISBN 978-80-89603-78-7, alebo J. Toman v ŠVEC, M., J. TOMAN, et al. *Zákonník práce: Zákon o kolektívnom vyjednávaní: Komentár: Zväzok I.* 1. vyd. Bratislava: Wolters Kluwer, 2019, s. 750-751. ISBN 978-80-571-0105-5.

[27] Bližšie pozri TOMAN, J. *Individuálne pracovné právo IV.: Zodpovednosť za škodu a bezdôvodné obohatenie: I. diel: Prevencia: Zodpovednosť za škodu: Všeobecná zodpovednosť zamestnanca za škodu*. 1. vyd. Bratislava: Friedrich Ebert Stiftung, 2019, s. 27. ISBN 978-80-89149-69-8.

však je, ako nahliadať na tú škodu, ktorá prevyšuje sumu zákonom limitovanej peňažnej náhrady. Vzhľadom k blízkemu previazaniu peňažnej náhrady a zmluvnej pokuty sa núka riešenie analogickej aplikácie ustanovenia, ktoré nepripúšťa uplatnenie škody nad rámec sumy zmluvnej pokuty (§ 545 ods. 2 druhá veta Občianskeho zákonníka). Na druhej strane nemožno prehliadnuť podstatný rozdiel medzi inštitútmi v skutočnosti, že pracovné právo limituje hornú hranicu náhrady, ktorú zamestnávateľ so zamestnancom môže dohodnúť. Zamestnávateľ preto nemá rovnakú mieru voľnosti vopred odhadnúť možnú škodu a premietnuť ju do výšky pokuty, podobne, ako je tomu v občianskom práve alebo obchodnom práve. Nazdávame sa, že účelom peňažnej náhrady v pracovnom práve bolo do určitej miery kompenzovať zamestnávateľovi neprávom vyplatené sumy zamestnancovi a prípadné ďalšie ujmy, no pre nemožnosť zamestnávateľa dopredu zahrnúť do výšky peňažnej náhrady všetku škodu, ktorá mu môže potenciálne vzniknúť, podľa nášho názoru, peňažná náhrada nemá limitujúce účinky vo vzťahu k ďalšej škode nekrytej peňažnou náhradou.

Moderačné právo súdu je pomerne silným zásahovým oprávnením súdu voči neprimerane vysokej zmluvnej pokute, zákonodarca ním ohraničuje inak širokú zmluvnú voľnosť pri dojednávaní zmluvnej pokuty. Ak ale Zákonník práce priamo normuje maximálnu výšku peňažnej náhrady na obidvoch miestach, môže byť táto pokuta neprimerane vysoká? Domnievame sa, že *ex lege* horná hranica, ktorá dohodou nemôže byť prekročená, je špeciálnou úpravou vo vzťahu k moderačnému právu súdu a bola by súčasne úpravou nadbytočnou. Ak v situácii normuje maximálnu možnú hranicu pokuty sám zákon, nie je potrebné, aby sa nad ňou ešte raz zamýšľal súd a preveroval ju testom primeranosti. Moderačné právo súdu by sa tak nemalo uplatniť na pracovnoprávnu zmluvnú pokutu.

Na druhej strane, vo vzťahu k ostatným prostriedkom nápravy teoreticky nie je vylúčené, aby sa vo vzťahu k dojednaniu o peňažnej náhrade uplatnili všeobecné korektívy dobrých mravov či zákazu zneužívania práva. Nedá sa však prehliadať vysoko kazuistický charakter pracovnoprávnej úpravy, ktorá výslovne normuje nielen maximálnu možnú hranicu pre sumu náhrady, ale tiež konkrétnu situáciu, v ktorej je možné náhradu dojednať. Vysoká miera konkrétnosti právnej úpravy bude skôr obmedzovať spôsoby, akými by mohol zamestnávateľ svoje postavenie či právo zneužiť alebo ktorými by mohlo byť dojednanie v rozpore s dobrými mravmi, a tým neplatné. Samozrejme, dojednanie môže byť neplatné, respektíve obsolentné aj z iných dôvodov, napríklad preto, lebo bude

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neplatná celá konkurenčná doložka alebo nebude dodržaná povinná písomná forma, minimálna požiadavka pre určitosť právneho úkonu a podobne.

2.2 Česká skúsenosť po rekodifikácii súkromného práva a návrh pre budúcu rekodifikáciu slovenského súkromného práva

Český Občanský zákoník je aj po rekodifikácii tamojšieho súkromného práva v postavení subsidiarity vo vzťahu k českému Zákoníku práce.[28, 29] Týmto sa otvára možnosť oveľa väčšieho presahu všeobecnej úpravy záväzkových vzťahov do pracovného práva, čo významne ovplyvňuje systém zabezpečovacích prostriedkov. Na rozdiel od slovenského Zákonníka práce, český Zákoník práce výslovne počíta so zmluvnou pokutou, robí to však podobne ako slovenský normotvorca – zmluvnú pokutu možno dohodnúť len tam, kde to zákon výslovne predpokladá (v tomto okamihu len na jedinom mieste – pri porušení povinnosti zamestnancom z konkurenčnej doložky).[30]

Česká skúsenosť ukazuje, že nie je dôvod zmluvnú pokutu násilne premenovávať na iný inštitút, len aby sa predišlo dohodám o zmluvnej pokute aj tam, kde si to normotvorca neželá. Uvedený problém vie zákonodarca vyriešiť obrátením civilnoprávneho opt-out režimu na systém opt-in, a teda neumožniť veriteľovi dohodnúť si pokutu pre prípad zabezpečenia akejkoľvek povinnosti, ale len takej, kde to bude zákon výslovne predpokladať. V intenciách slovenského pracovného práva možno uvažovať o rozšírení pokuty na najzávažnejšie prípady porušenia povinností, napríklad na prípad hrubého porušenia pracovnej disciplíny neospravedlnenou neprítomnosťou na pracovisku za súčasnej limitácie pokuty hornou hranicou maximálnej výšky vypočítanej napríklad ako časť mzdy pripadajúcej na jeden odpracovaný deň konkrétneho zamestnanca. V konečnom dôsledku sa žiada zdôrazniť, že časť pracovnoprávnej doktríny sa, naopak, prikláňa k výraznejšiemu včleneniu zmluvnej pokuty do pracovného práva a zefektívneniu systému prostriedkov zabezpečenia.[31]

[28] Bližšie pozri *Zákon č. 262/2006 Sb. Zákoník práce, ve znění pozdějších předpisů* (ďalej len „Zákoník práce").
[29] Bližšie pozri L. Drápal v BĚLINA, M., J. PICHRT, et al. *Pracovní právo*. 7. dopln. a podstat. přeprac. vyd. Praha: C. H. Beck, 2017, s. 33. ISBN 978-80-7400-667-8.
[30] Bližšie pozri BĚLINA, M., J. PICHRT, et al. *Pracovní právo*. 7. dopln. a podstat. přeprac. vyd. Praha: C. H. Beck, 2017, s. 92-93. ISBN 978-80-7400-667-8.
[31] Bližšie pozri BARANCOVÁ, H. Zabezpečenie záväzkov v pracovnom práve Slovenskej republiky. In: J. LAZAR, ed. *Zabezpečenie pohľadávok a ich uspokojenie: VII. Lubyho právnické dni*. 1. vyd. Bratislava: Iura Edition, 2002, s. 394. ISBN 80-89047-54-8, tiež HODÁLOVÁ,

Záver

Bez ohľadu na to, ako zákonodarca dohodu o peňažnej náhrade pomenoval, skúmaním jej obsahu dospievame k názoru, že ide o dojednanie o zmluvnej pokute, a nie o samostatný inštitút, ako tvrdia niektorí autori.[32] Týmto súčasne dospievame k záveru, že § 20 Zákonníka práce v skutočnosti nevymenúva všetky zabezpečovacie prostriedky, ako sa v domácich podmienkach traduje,[33] ale Zákonník práce predsa len počíta so zmluvnou pokutou, a dokonca s uznaním dlhu (§ 35 Zákonníka práce alebo § 191 ods. 3 Zákonníka práce), aj keď uznanie dlhu je témou zasluhujúcou si samostatné spracovanie. Obava zo zmluvnej pokuty pravdepodobne vyviera z nesprávneho pochopenia inštitútu zmluvnej pokuty a jej stotožňovania s pokutou vo verejnoprávnom zmysle ako prostriedkom trestania zodpovedného subjektu. V skutočnosti však pokuta v súkromnom práve plní prioritne úlohu paušalizovanej náhrady ujmy, prípadne kompenzácie neprávom vyplatených plnení tam, kde nemožno uplatňovať právo na vrátenie cestou bezdôvodného obohatenia pre existujúci titul. Hroziaci a obávaný sankčný prvok zmluvnej pokuty vie byť ešte viac potlačený limitáciou maximálnej možnej výšky pokuty tak, ako to v súčasnosti robí Zákonník práce.

Problém nevyjasneného vzťahu pracovnoprávnej peňažnej náhrady a zmluvnej pokuty je len špičkou ľadovca predstavujúceho oveľa markantnejší problém nízkej previazanosti Občianskeho zákonníka a Obchodného zákonníka. Plná subsidiarita sa pritom zdá byť jediným vhodným a možným riešením. Nevyriešilo by to len na tomto mieste rozoberaný problém nedostatočného zabezpečenia pracovnoprávnych nárokov, ale tiež už zmienenú absenciu normovania odstúpenia od dohôd v pracovnom práve, chýbajúcu úpravu synalagmy a s tým spojených námietok a práva odoprieť plnenie, či problémy spojené so zastúpením. Ak vznikne potreba odchýlnej úpravy plynúca zo špecifickej povahy pracovnoprávneho vzťahu, zákonodarcovi nič nebráni v tom, aby v Zákonníku práce

I. Zmluvný systém a systém zmluvných zabezpečovacích prostriedkov v pracovnom práve. *Justičná revue*. 2006, roč. 58, č. 12, s. 1872. ISSN 1335-6461.

[32] Pozri napríklad DOLOBÁČ, M. *Hranice zmluvnej slobody v pracovnom práve*. 1. vyd. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta, 2017, s. 160. ISBN 978-80-8152-574-2.

[33] Pozri napríklad PETRÍKOVÁ, L. Zabezpečovacie inštitúty v zmluvnom pracovnom práve. In: A. OLŠOVSKÁ, ed. *Zmluvná autonómia v súkromnom/pracovnom práve* [online]. 1. vyd. Bratislava: Wolters Kluwer, 2020, s. 142 [cit. 2022-01-12]. ISBN 978-80-571-0309-7. Dostupné na: http://publikacie.iuridica.truni.sk/wp-content/uploads/2020/12/Zbornik-Pravna-politika_FINAL-1.pdf.

špeciálnou úpravou normoval a nastavil jednotlivosti zodpovedajúce požiadavkám pre reguláciu pracovnoprávnych vzťahov.[34]

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[34] Bližšie pozri CASTRO GUIZA, O. E. La reconceptualización del derecho del trabajo en el siglo xxi [The Reconceptualization of Labor Law in the 21st Century]. *Justicia* [online]. 2020, vol. 25, nº 38, s. 53-75 [cit. 2022-01-12]. ISSN 2590-4566. Dostupné na: https://doi.org/10.17081/just.25.38.4400; a SIPKA, P. a M. L. ZACCARIA. Dilemmas at the Architect's Table in Labour Law – Labour Rights as Prisoners in the Light of the Extensive Core of Legal Protection of Employees. *The Lawyer Quarterly*. 2019, vol. 9, no. 4, s. 274-282. ISSN 1805-8396.

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Zápis o výsledkoch recenzného konania sa vykonáva a archivuje na štandardizovaných formulároch.

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- autor príspevku preukázateľne nemá ukončené úplné vysokoškolské vzdelanie, t.j. vysokoškolské vzdelanie druhého stupňa;
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Časopis v plnej miere uplatňuje a dodržiava kódexy a zásady publikačnej etiky Komisie pre publikačnú etiku (Committee on Publication Ethics COPE) zverejnené na webovej stránke Komisie pre publikačnú etiku https://publicationethics.org/. Uvedené zásady a pravidlá publikačnej etiky sú záväzné pre autorov príspevkov, redakčnú radu časopisu, redaktorov a redakciu časopisu, recenzentov príspevkov, ako aj vydavateľa časopisu.

Článok V. Nezávislosť a nestrannosť

Časopis je nezávislým a nestranným medzinárodným vedeckým internetovým periodikom.

Článok VI. Rozhodný právny poriadok

Časopis a všetky s ním súvisiace právne skutočnosti a právne úkony sa riadia právnym poriadkom Slovenskej republiky.

Trnava 31. december 2013

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Code of Ethics

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International scientific online journal SOCIETAS ET IURISPRUDENTIA (hereinafter only "journal") is published by the Faculty of Law at Trnava University in Trnava, and it thematically focuses mainly on social relevant interdisciplinary relations on the issues of public law and private law at the national, transnational and international levels. The journal's editorial office resides in premises of the Faculty of Law in Kollárova Street No. 10 in Trnava, Slovakia.

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The journal provides a stimulating and inspirational platform for communication both on the professional level and the level of the civic society, as well as for scientific and society-wide beneficial solutions to current issues mainly in the areas of public law and private law.

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well-founded cases also by recognized experts working in corresponding areas.

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Trnava, Slovakia, December 31st, 2013

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