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*Dragana Milovanović**
Student doktorskih studija na Pravnom fakultetu Univerziteta u Nišu
ORCid: 0000-0002-5100-0583

KRIVIČNO DELO NADRILEKARSTVO**

SAŽETAK: Sticanje odgovarajuće stručne spreme omogućava preduzimanje određenih radnji koje predstavljaju lečenje ili pružanje drugih medicinskih usluga. Kako je sticanje imovinske koristi često pokretač vršenja brojnih krivičnih dela, predviđenih Krivičnim zakonikom Republike Srbije, to često biva i sa krivičnim delom nadrilekarstvo iz člana 254. KZ-a. Razlog propisivanja ovog dela i sankcionisanja učinioca jeste taj što nestručno preduzimanje radnji za koje je neophodno posebno obrazovanje iz oblasti medicine, može izazvati oštećenje zdravlja drugog lica, koje može biti manjih ili većih razmera. Međutim, do sankcionisanja dolazi bez obzira na to da li je u konkretnom slučaju nastupila posledica u vidu oštećenja ili pogoršanja zdravlja drugog lica, kao i u slučaju kad izvršilac krivičnog dela nije pribavio imovinsku korist preduzimanjem konkretnih radnji bez odgovarajuće stručne spreme. Uprkos činjenici da smo svedoci brojnog oglašavanja žrtava putem medija, koji su iz neznanja odlučili da svoje zdravlje povere nestručnim licima, praksa pokazuje da je mali broj podnetih krivičnih prijava koje pristižu nadležnim tužilaštvima na nivou Srbije, te da se vodi mali broj sudskih postupaka radi dokazivanja krivice i postojanja krivičnog dela.

Ključne reči: nadrilekarstvo, stručna sprema, Krivični zakonik, krivični postupak

* draganaammm@gmail.com

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UVOD

Preduzimanje određenih radnji čija je svrha lečenje ili pružanje drugih medicinskih usluga bez odgovarajuće stručne spreme, predviđeno je kao krivično delo domaćim zakonodavstvom. Prve tragove nadrilekarstva pronalazimo u Evropi i Sjedinjenim Američkim Državama u XVII i XVIII veku, dok je prva organizacija za borbu protiv nadrilekara osnovana 1881. godine u Holandiji, pod nazivom Društvo za borbu protiv nadrilekarstva.[1]

Lečenje i pružanje drugih medicinskih usluga od strane nestručnih lica može da rezultira oštećenjem zdravlja, sa trenutnim ili trajnim posledicama. Sami nadrilekari često postupaju s umišljajem, svesni da za radnje koje preduzimaju ne poseduju odgovarajuću stručnu spremu. Danas, kad je estetska medicina dostigla svoj vrhunac, nadrilekarstvo biva sve češća pojava, gde interes za vršenje krivičnih dela jeste sticanje imovinske koristi. Iako krivičnim zakonodavstvom sticanje imovinske koristi ne predstavlja element bića ovog krivičnog dela, pravnosnažna odluka da je okrivljeni učinio krivično delo nadrilekarstva iz čl. 254. Krivičnog zakonika Republike Srbije (u daljem tekstu: KZ RS), povlači sa sobom i sticaj, imajući u vidu činjenicu da bavljenje aktivnostima bez odgovarajuće stručne spreme uzročno-posledično dovodi do povrede i drugih zakonskih odredaba (usled neplaćanja poreza, prijave lažne delatnosti u slučaju upisa poslovanja pred nadležnim APR-om i slično).

Iako je krivičnim zakonodavstvima pojedinih drugih zemalja predviđeno da nadrilekar, preduzimanjem navedenih radnji, zapravo čini krivično delo prevara (o čemu će detaljnije biti reči u redovima koji slede), to nije slučaj sa našim zakonodavstvom. Međutim, ranije se u našoj zemlji postavljalo pitanje da li se preduzimanjem radnji, na način kako je to danas opisano čl. 254. KZ RS, vrši krivično delo prevara ili nadrilekarstvo. Iako je postojala grupa teoretičara koji su zastupali stav da je u pitanju krivično delo prevara, tvrdeći da okrivljeni krivično delo vrši na taj način što drugo lice dovede u zabludu ili održava u zabludi ili lažno prikazuje činjenice, koje oštećenog navedu da svoje zdravlje prepusti licu za koje smatra da je stručno, Vrhovni kasacioni sud je u odluci Kž. br. 478/86 istakao da

> „...učinilac koji bez završenog fakulteta u dužem vremenskom periodu obavlja posao lekara i za taj rad prima odgovarajuću novačnu naknadu, čini krivično delo nadrilekarstvo, a ne krivično delo prevara".[2]

[1] Preuzeto dana 20. 9. 2021. godine sa: https://sr.wikipedia.org/wiki/Nadrilekarstvo.

[2] Odluka Vrhovnog kasacionog suda, Kž. br. 478/86.

Na osnovu ovakvog stava, koji je objavljen još 1986. godine, iskorenjeno je mišljenje o prevari, te ovakvi elementi krivičnog dela nesporno ukazuju da je izvršeno krivično delo nadrilekarstvo.

Propisivanje krivičnog dela nadrilekarstvo, kako u Evropi tako i širom sveta, uprkos nekim razlikama, u biti ima isti cilj, a to je zaštita zdravlja i života ljudi od nesavesnog postupanja lica prilikom pružanja lekarske pomoći bez odgovarajuće stručne spreme iz predmetne oblasti.

EVROPSKA KONVENCIJA ZA ZAŠTITU LJUDSKIH PRAVA I OSNOVNIH SLOBODA

Pravo na poštovanje privatnog i porodičnog života, doma i prepiske zagarantovano je čl. 8. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (u daljem tekstu: Konvencija).[3] Nesporno je da se zdravlje i život lica razmatra kroz čl. 8. Konvencije, što je potvrdio i Evropski sud za ljudska prava (u daljem tekstu: Evropski sud) prilikom razmatranja predstavki aplikanata.

Prilikom podnošenja predstavke Evropskom sudu, u slučaju *Kosaitė-Čypienė and Others v. Lithuania*, aplikanti su isticali da je država, shodno važećem litvanskom zakonu, povredila čl. 8. Konvencije na taj način što je zakonom propisana zabrana zdravstvenim radnicima da pomognu trudnici da se, na njen zahtev, porođaj sprovede u njenom domu. Bez obzira na navode države povodom litvanskog zakona, Evropski sud je zauzeo stav da, iako nije precizno propisano Konvencijom, nesporno je da je pravo žene na izbor da se porođaj sprovede u njenom domu povezano sa njenim privatnim životom, te da shodno tome spada u opseg čl. 8. Konvencije. Razmatrajući tada važeći litvanski zakon, Evropski sud je utvrdio da žena ima pravo da se porodi u svom domu, ali da nema pravo da takvom porođaju prisustvuju babice, niti bilo koje drugo medicinsko osoblje. Shodno zakonu, svako suprotno postupanje bilo kog zdravstvenog radnika, uključujući pedijatre, babice, akušere-ginekologe, predstavljalo bi krivično delo nadrilekarstvo. U konkretnom slučaju, Evropski sud je konstatovao da je na nacionalnom nivou vođen i okončan krivični postupak protiv lica bez licence, koje je preduzimalo profesionalne radnje asistenta prilikom porođaja. Naime, u prvostepenom postupku je dokazano da je okrivljena u periodu od 1999. godine do 2011. godine 36 puta pomogla trudnicama

[3] Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda sa dodatnim protokolima br. 4, 6, 7, 11, 12 i 13 od 1950. god., *Službeni list SCG – Međunarodni ugovori* br. 5/2005. i 7/2005, čl. 8.

da se porode kod kuće, pri čemu nije prošla nikakvu medicinsku obuku za sprovođenje ovakvih radnji. Radnje koje je preduzimala su bile raznolike – od samih pregleda do samog porođaja žena. Međutim, uprkos navedenim činjenicama, doneta je oslobađajuća presuda, jer je nacionalni sud zauzeo stav da okrivljena ne može biti odgovorna za krivično delo nadrilekarstvo prema, tada važećem, čl. 202. st. 2. Krivičnog zakonika, jer se isti mogao primeniti samo prema medicinskim odnosno zdravstvenim radnicima koji su suprotno zakonu vršili porođaj žena u njihovom domu – ali ne i prema onima koji nisu imali licencu za rad. Apelacioni sud preinačio je prvostepenu presudu, ističući da je okrivljena učinila krivično delo nadrilekarstvo, imajući u vidu da nije imala medicinsko obrazovanje niti dozvolu za pružanje medicinskih usluga koje je pružala u navedenom periodu. Međutim, Vrhovni kasacioni sud je doneo odluku da ne postoji odgovornost okrivljene, uprkos svim nespornim dokazima o preduzetim radnjama, imajući u vidu činjenicu da, osim što nije imala licencu za rad, nije dokazan ni tačan iznos prihoda koji je ostvarila na ovaj način, što je shodno domaćem zakonu neophodan element kako bi se utvrdila krivična odgovornost.[4]

Evropski sud je konstatovao, u presudi *Pojatina v. Croatia*, da je ranije važećim zakonima Hrvatske postojala obaveza da se porođaji sprovode isključivo u medicinskim ustanovama, te da se pružanje medicinske pomoći u kućnim uslovima smatra nadrilekarstvom. Lekar koji obavlja prvi pregled deteta koje je rođeno van zdravstvene ustanove, dužan je da konstatuje odsustvo medicinske dokumentacije o porođaju od strane lekara u bolnici. Kako su aplikanti isticali da su njihova prava povređena, jer nemaju pravo izbora o mestu gde će se izvršiti porođaj, te da su uskraćeni za neophodnu medicinsku pomoć i negu što je u suprotnosti sa odredbama člana 183. Krivičnog zakonika Hrvatske, država je istakla da su ovakvi navodi neosnovani, imajući u vidu činjenicu da u konkretnom slučaju babica koja je prisustvovala porođaju van zdravstvene ustanove nije krivično gonjena niti sankcionisana na drugi način, shodno tome da krivično delo nadrilekarstvo postoji jedino u slučaju kad se medicinska pomoć pruža bez odgovarajuće stručne spreme.[5]

[4] *Kosaitė-Čypienė and Others v. Lithuania*, App. no. 69489/12, 4. 6. 2019, paras. 31–35, 50, 51, 66.

[5] *Pojatina v. Croatia*, App. no. 18568/12, 4. 10. 2018, paras. 12, 55, 61, 84.

Pozitivno pravo

Ustavom Republike Srbije zagarantovano je da „svako lice ima pravo na zaštitu svog fizičkog i psihičkog zdravlja".[6] Kako bi se omogućila ovakva zaštita, zakonodavac je u glavi 23. KZ RS grupisao krivična dela protiv zdravlja ljudi, te predvideo sankcije u slučaju povrede zaštitnog objekta. Kao jedno od krivičnih dela gde se kao objekt zaštite javlja zdravlje ljudi, zakonodavac je propisao nadrilekarstvo čl. 254. st. 1, te utvrdio sledeće:

> „...svako ko se bez odgovarajuće stručne spreme bavi lečenjem ili pružanjem drugih medicinskih usluga, kazniće se novčanom kaznom ili zatvorom do tri godine"[7].

Na osnovu ovakvog određenja, možemo zaključiti da je za postojanje krivičnog dela nadrilekarstvo neophodno ispunjenje dva kumulativno postavljena uslova:

1) da se jedno lice *bavi* lečenjem ili drugim medicinskim uslugama, odnosno da je reč o kontinuiranoj delatnosti i

2) da takve radnje preduzima lice bez odgovarajuće stručne spreme.

Za postojanje ovog krivičnog dela irelevantno je da li je za izvršene usluge lice pribavilo imovinsku korist ili ne. *Bavljenje* je višekratna delatnost, odnosno ponavljanje povezanih delatnosti u dužem vremenskom periodu, kojom prilikom učinilac pokazuje težnju da i dalje preduzima ovakve delatnosti.[8] Ukoliko okrivljeni samo jednom izvrši predmetnu radnju, te ne postoje dokazi o kontinuiranoj delatnosti, sud će doneti oslobađajuću presudu.[9]

Prilikom izvršenja krivičnog dela posledica može da se javi i kao apstraktna i kao konkretna. Naime, apstraktna opasnost je mogućnost za nastupanja konkretne opasnosti i ona se javlja u slučaju kad lice bez odgovarajuće stručne spreme postupa suprotno čl. 254. st. 1. KZ RS, ali u konkretnom slučaju nije došlo do oštećenja zdravlja drugog lice dok, s druge strane, konkretna opasnost postoji u slučaju kad se kao posledica izvršenog krivičnog dela javi oštećenje zdravlja drugog lica.

Krivično delo je izvršeno iako ne dođe do oštećenja ili pogoršanja zdravlja lica nad kojim su preduzete predmetne radnje. Kao sankcija, propisana je novčana kazna ili kazna zatvora do tri godine. Međutim, čl. 259. st. 2. propisano je da:

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[6] Ustav RS (*Službeni glasnik RS* br. 98/2006), čl. 68.

[7] Krivični zakonik RS (*Službeni glasnik RS*, br. 85/2005, 88/2005. – ispr., 107/2005. – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016. i 35/2019), čl. 254. st. 1.

[8] Jovašević, D. (2017). *Krivično pravo posebni deo*. Beograd: Dosije studio, 192.

[9] Presuda Osnovnog suda u Užicu K. br. 42/18 od dana 24. 4. 2018. godine; presuda Višeg suda u Užicu Kž. br. 124/18 od dana 11. 7. 2018. godine.

„...ukoliko usled postupanja na način kako je to opisano čl. 254. st. 1. KZ RS, neko lice bude teško telesno povređeno ili mu zdravlje bude teško narušeno, kazniće se zatvorom od jedne do osam godina"[10].

Ukoliko je pak

„...preduzimanjem navedenih radnji nastupila smrt oštećenog, učinilac će se kazniti zatvorom od dve do dvanaest godina"[11].

Tokom 2005. godine stupio je na snagu Zakon o zdravstvenoj zaštiti, koji je uveo u naš sistem alternativnu odnosno komplementarnu medicinu, što je detaljnije propisano čl. 217–218. zakona. St. 2. čl. 218. je propisano da:

"...metode i postupke komplementarne medicine može preduzimati zdravstveni radnik ukoliko je ministar rešenjem doneo dozvolu za rad"[12].

Osim propisivanja Zakonom o zdravstvenoj zaštiti, da pravo na preduzimanje metoda komplementarne medicine ima isključivo zdravstveni radnik, Pravilnikom o bližim uslovima i načinu obavljanja metoda i postupaka komplementarne medicine specijalno su uređeni uslovi koje zdravstveni radnik mora da ispuni, kako bi preduzimanje radnji bilo u skladu sa zakonom i to da:

„...ima završene odgovarajuće integrisane akademske studije zdravstvene struke, odnosno odgovarajuću visoku ili srednju školu zdravstvene struke; poseduje odobrenje nadležne komore zdravstvenih radnika za samostalni rad – licencu i ima rešenje ministra nadležnog za zdravlje za obavljanje određene metode komplementarne medicine."[13]

Kontradiktorno donošenje Presude, shodno navedenoj odredbi Zakona o zdravstvenoj zaštiti i odredbi Pravilnika o bližim uslovima i načinu obavljanja metoda i postupaka komplementarne medicine, možemo videti u odluci Apelacinog suda u Beogradu iz 2018. godine, kojom je potvrđena presuda Osnovnog suda u Beogradu, te je oslobođen optužbi okrivljeni Nenad Brkić, poznatiji kao Nenad Roso, kao i preostala tri okrivljena lica. Naime, navedenim licima se stavljalo na teret da su u periodu od 2007. do 2009. godine dovodili građane u zabludu povodom „rajf generatora", na taj način što su tvrdili da isti u kombinaciji sa određenom vrstom lekova leči karcinom i leukemiju. Prodavanjem svojih usluga pribavili su imovinsku korist u ukupnom iznosu od petnaest

[10] Krivični zakonik RS (*Službeni glasnik RS*, br. 85/2005, 88/2005. – ispr., 107/2005. – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016. i 35/2019), čl. 259. st. 1.

[11] Krivični zakonik RS (*Službeni glasnik RS*, br. 85/2005, 88/2005. – ispr., 107/2005. – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016. i 35/2019), čl. 259. st. 2.

[12] Zakon o zdravstvenoj zaštiti (*Službeni glasnik RS*, br. 25/2019), čl. 218. st. 2.

[13] Pravilnik o bližim uslovima i načinu obavljanja metoda i postupaka komplementarne medicine (*Službeni glasnik RS* br. 1/2020), čl. 5.

miliona dinara. Kontradiktornost se ogleda u činjenici da, uprkos jasnom stavu zakonodavca o tome ko se može baviti alternativnom medicinom, Apelacioni sud potvrdio je oslobađajuću presudu, uprkos tvrdnjama tužilaštva da okrivljeni ne poseduje sertifikat o stručnosti. Ovakav stav sud je opravdao, ističući da na samom uputstvu „rajf generatora" stoji da je to uređaj koji rešava uzrok onog poremećaja koji je zapravo izazvao bolest, te da ne predstavlja medicinski priznat uređaj, već da se koristi jedino u svrhu testiranja. Primenom načela *in dubio pro reo*, Apelacioni sud je presudio u korist okrivljenih.[14]

Međutim, dodatna konfuzija usled ovakvog obrazloženja presude javlja se i iz razloga što samo ovakvo postupanje okrivljenih jasno spada u domen alternativne medicine, iz razloga što alternativna medicina obuhvata one metode i postupke koji nisu prošli neophodna ispitivanja, na osnovu kojih bi se uključili u primenu konvencionalne medicine. Alternativna medicina upravo obuhvata one postupke koji nemaju dovoljno dokaza koji bi potkrepili tvrdnje praktikanta da isti dovode do poboljšanja zdravstvenog stanja ljudi, već se sprovodi kao vid testiranja. Bitan aspekt je da primenom alternativne medicine ne treba da dođe do oštećenja zdravlja, jer bi u tom slučaju morao da se okonča i sam čin testiranja. Kao drugo, tokom postupka je utvrđeno da se okrivljeni bave drugim zanimanjima, odnosno da nisu zdravstveni radnici. Za kraj, ali ne i manje bitno, okrivljeni svoje usluge nisu pružali na mestu koje je predviđeno zakonom, a imajući u vidu činjenicu da se metodi alternativne medicine mogu sprovoditi u:

> „...zdravstvenoj ustanovi, drugom pravnom licu, odnosno privatnoj praksi koja ima dozvolu za proširenje delatnosti na određeni metod komplementarne medicine"[15].

Tokom 2020–2021. godine postali smo svedoci raznih senzacionalističkih naslova u novinama – kojima se predstavlja enorman broj žrtava čije je zdravlje teško narušeno kao posledica lažnog predstavljanja nadrilekara – najčešće putem društvenih mreža, koji su nudili i izvodili određene hirurške i estetske procedure, suprotno zakonu. U skladu sa navedenim, neophodno je spomenuti da je Ministar zdravlja doneo Stručno metodološko uputstvo za obavljanje metoda „antiage" medicine 2018. godine. Uputstvom je navedeno da se posebno označene estetske i ostale „antiage" procedure mogu izvoditi u zdravstvenim ustanovama i privatnim praksama, pod uslovom da:

> „...u pogledu kadra ima najmanje jednog zdravstvenog radnika koji ima potrebnu edukaciju u skladu sa ovim stručno metodološkim uputstvom."

[14] Presuda Apelacionog suda u Beogradu.

[15] Pravilnik o bližim uslovima i načinu obavljanja metoda i postupaka komplementarne medicine (*Službeni glasnik RS* br. 1/2020), čl. 5. st. 2.

Nakon ispunjenja svih precizno određenih uslova, dobija se Dozvola za rad od strane Ministarstva zdravlja. Kako je Uputstvom jasno i nedvosmisleno propisano da je za dalje usavršavanje u okviru „antiage" medicine prvenstveno neophodno zvanje doktor medicine ili doktor stomatologije,[16] možemo zaključiti da je svako suprotno ponašanje protivno zakonu i podleže sankcionisanju.

Shodno svim prethodnim navodima, neophodno je istaći da isti ne predstavljaju novinu, a sve to imajući u vidu činjenicu da je još Okružni sud u Beogradu doneo Presudu Kž. br. 608/03 od dana 20. 3. 2003. godine, gde je u obrazloženju navedeno da je sud okrivljenu oglasio krivom, jer je nesporno utvrđeno da se bez odgovarajuće stručne spreme bavila lečenjem i to na taj način što je oštećeni video oglas okrivljene u novinama da leči psorijazu, usled čega joj se obratio za pomoć. Okrivljena je po zanimanju kozmetičar, a oštećeni je po zakazanom terminu otišao kod okrivljene, misleći da ista pruža usluge u lekarskoj ordijaciji, nakon čega mu je okrivljena nanela kremu na rane i dala kapi za nos, a zatim tvrdila da će simptomi nestati u roku od 24 sata, te je svoju uslugu naplatila.[17] Imajući u vidu ovakve činjenice slučaja, sud je utvrdio da je okrivljena izvršila krivično delo nadrilekarstvo.

Statistički podaci za period 2016–2021. godine – Osnovno javno tužilaštvo u Nišu

U periodu od januara 2016. do 15. septembra 2021. godine, Osnovnom javnom tužilaštvu u Nišu (u daljem tekstu: OJT Niš) podnete su četiri krivične prijave zbog krivičnog dela nadrilekarstva i nadriapotekarstva iz čl. 254. KZ RS, od kojih je jedna usled mesne nenadležnosti prosleđena Osnovnom javnom tužilaštvu u Beogradu. Preostale tri krivične prijave su odbačene.

Obrazloženjem Rešenja o odbačaju krivične prijave od dana 19. 12. 2017. godine, KT br. 2544/18 od dana 15. 6. 2020. godine utvrđeno je sledeće. Naime, prilikom podnošenja krivične prijave podnosilac je isticao da je osumnjičena kriva za krivično delo nadrilekarstvo iz razloga što mu je pružila medicinsku pomoć na način da je preko rane od kurjeg oka oštećenog premazala određenu mast, za koju se kasnije ispostavilo da je propolis, te da je ovakva usluga naplaćena. Podnosilac krivične prijave navodi da je u toku razgovora osumnjičena istakla da ovakve probleme leči više od dvadeset godina. Nakon nekoliko dana rana oštećenog se inficirala, te se usled bolova i vidno nezadovoljan uslugom uputio na ambulantno i bolničko lečenje, nakon

[16] Stručno metodološko uputstvo za obavljanje metoda „antiage" medicine, broj: 500-01-1246/2018-02, 19. 9. 2018. godine.

[17] Presuda Okružnog suda u Beogradu, Kž. br. 608/03, od dana 20. 3. 2003. godine.

čega je podneo krivičnu prijavu OJT Niš. Nakon izvedenih dokaza, nadležni javni tužilac utvrdio je da nema osnova za podnošenje optužnog predloga, iz sledećih razloga. Zakonodavac je jasno i nedvosmisleno predvideo da je za postojanje krivičnog dela nadrilekarstvo neophodno da je radnja izvršenja *bavljenje* lečenjem i pružanjem medicinskih usluga. Postupajući nadležni tužilac je istakao da se pod lečenjem podrazumevaju zdravstvene mere koje u zdravstvenim ustanovama preduzimaju lica koja su završila medicinski ili stomatološki fakultet, odnosno postavljanje dijagnoze i terapije u skladu sa tim, davanje lekova ili drugih terapija, preduzimanje određenih zahvata, savetovanje, određivanje režima ishrane i sl., dok se pod pružanjem medicinskih usluga smatraju sve ostale zdravstvene mere koje se ne mogu smatrati lečenjem, gde se svrstavaju mazanje i previjanje rane i sl. Nesporno je utvrđeno da osumnjičena jeste pružila medicinsku uslugu na taj način što je preko rane podnosioca krivične prijave namazala propolis, zalepila flaster i dala savet da se isti ne skida nedelju dana, međutim, za postojanje dela nedostaje neizostavni element bića krivičnog dela, a to je *bavljenje* kao kontinuirana delatnost. Nesporno je da osumnjičena ne poseduje odgovarajuću stručnu spremu za pružanje navedene medicinske usluge, ali je za odluku tužilaštva odlučna činjenica u konkretnom slučaju bila da li je predmetna radnja učinjena samo jednom ili je ista preduzimana u dužem vremenskom periodu, kao i da li je na strani osumnjičene egzistirala spremnost da se ta radnja ponovi. Kako je osumnjičena dala objašnjenje da se ne bavi navedenom delatnošću, dok je sa druge strane oštećeni iznosio samo paušalne navode koji jedino predstavljaju indiciju koja nije bila potkrepljena niti jednim dokazom, Rešenjem OJT Niš je doneta odluka da nema elemenata za izvođenje krivičnopravnog zaključka da se osumnjičena bavila lečenjem ili pružanjem drugih medicinskih usluga bez odgovarajuće stručne spreme, čime bi izvršila krivično delo iz čl. 254. KZ RS.[18]

Postupajući po krivičnoj prijavi u predmetu KT br. 133/18. od dana 20. 6. 2018. godine, nadležni javni tužilac utvrdio je da ne postoje osnovi sumnje da je prijavljeni izvršio krivično delo nadrilekarstvo i apotekarstvo iz čl. 254. KZ RS. Bez dostavljanja bilo kakvih dokaza, podnosilac krivične prijave je izjavio da sa osumnjičenim živi u istoj kući na različitim spratovima, da se osumnjičenom javljaju lica sa narušenim zdravstvenim stanjem, poput polomljenih udova i sl., te da iz prostorija njegovog doma dopiru strahoviti krici, usled čega podnosilac prijave sumnja da osumnjičeni u toj kući vrši operacije. Na osnovu saslušanja osumnjičenog i podnosioca krivične prijave, utvrđeni su poremećeni porodični odnosi između ova dva lica, te da je prijava podneta isključivo iz osvete, imajući u vidu činjenicu da je osumnjičeni u prethodnom

[18] Rešenje OJT Niš, KT br. 2544/18, od dana 15. 6. 2018. godine.

periodu sedam puta podneo prijavu zbog krađe struje protiv ovde podnosioca prijave. Kako nije postojao niti jedan dokaz u prilog navodima iz krivične prijave, ista je odbačena.[19]

Na osnovu izvedenih dokaza, OJT Niš donelo je Rešenje o odbačaju krivične prijave u predmetu KT br. 2320/19 od dana 12. 10. 2020. godine, jer nije utvrđeno da se osumnjičeni bavi lečenjem ili pružanjem drugih medicinskih usluga bez odgovarajuće stručne spreme. Nesporno je dokazano da osumnjičeni pruža savete u pogledu vežbi i zdravog načina života, za šta je završio određene kurseve i priložio zvanične sertifikate na uvid. Utvrđeno je da osumnjičeni ne postavlja dijagnoze, ne izdaje lekove, niti vrši bilo koje druge radnje koje su van njegovog domena, već da isključivo posluje preko Udruženja građana koje je registrovano i da ima statut, te da svoje usluge ne naplaćuje.[20]

SLUČAJEVI IZ PRAKSE U DRUGIM DRŽAVAMA SA OSVRTOM NA UPOREDNOPRAVNI PRIKAZ

Iako se, između zemalja međusobno razlikuju elementi bića krivičnog dela nadrilekarstvo, ono što je nesporno zajednično je to da zemlje širom sveta propisuju zabranu pružanja bilo kakvog vida lekarske pomoći od strane lica koje ne poseduje odgovarajuću stručnu spremu. Različito postavljanje neophodnih elemenata, koji se moraju kumulativno ispuniti, nakon čega se utvrđuje odgovornost okrivljenog lica i propisuje sankcija za izvršeno delo, imaju isti cilj, a to je da se obezbedi zaštita zdravlja ljudi od nestručnih lica.

Sjedinjene Američke Države

Kao jedan od dobitnika Pigasus Award[21] nagrade 2013. godine proglašen je lekar Stanislav Burzinski,[22] iz razloga što je utvrđeno da prodaje skupe lekove, uz navode da isti leče rak primenom „antineoplastona“ za enormne

[19] Rešenje OJT Niš, KT br. 133/18, od dana 20. 6. 2018. godine.

[20] Rešenje OJT Niš, KT br. 2320/19, od dana 12. 10. 2020. godine.

[21] Pigasus Award je pokret „nagrađivanja” osmišljen od strane lica James Randi, usled čega se svakog prvog aprila proglašava pet „dobitnika nagrada” iz grupe ljudi koji su okarakterisani kao prestupnici koji namerno ili nenamerno trguju paranormalnim ili pseudonaučnim besmislicama.

[22] Stanislaw Burzynski rođen je 1943. godine u Poljskoj, gde je završio medicinski fakultet, a nakon toga se seli u Sjedinjene Američke Države 1970. godine. Nakon rada na Medicinskom koledžu, osnovao je Istraživačku laboratoriju pod nazivom Burzynski.

novčane iznose i za koje se nikada kroz zakonska ispitivanja nije pokazalo da su efikasni. „Antineoplaston" je naziv koji je smislio Burzinski za grupu peptida, derivata peptida i smeša koje koristi kao alternativno lečenje raka.[23] Terapije koje je prodavao i primenjivao nisu odobrene od strane FDA (FDA).[24]

Pored brojnih korisnika njegovih usluga, Burzinski nikada nije objavio konačne rezultate svojih kliničkih ispitivanja.[25] Uprkos obrazovanju koje je posedovao Burzinski, nakon dužeg razmatranja celokupnog predmeta slučaja, FDA je obavestila javnost da nema dokaza da su, antineoplastoni koje je koristio Burzinski, efikasni i da pomažu u izlečenju najtežih bolesti. Burzinski niti jednom prilikom nije podneo prijavu za lek koji je koristio i terapije koje je sprovodio prilikom „lečenja" ljudi, niti je dostavio dokaze o obustavljenoj istrazi koja je pokrenuta protiv njega. Shodno navedenom, utvrđeno je da je svaki transport i primena ovih lekova i terapija u cilju lečenja ljudi – ilegalna. [26]

Usled nepoštovanja propisa, podnete su brojne optužbe zbog nadrilekarstva protiv Burzinskog, usled neetičkog ponašanja i prodavanja tzv. lažne nade ljudima obolelim od teških, neizlečivih bolesti. Naime, uprkos obrazovanju koje poseduje, tokom postupka je utvrđeno da Burzinski protivzakonito sporovodi lečenje, te da studije koje je objavljivao niti jednom prilikom nisu potvrđene. U Teksasu, gde su i vođeni postupci protiv okrivljenog, za krivično delo nadrilekarstvo kao takvo, u Krivičnom zakoniku se koristi izraz *Health care fraud* gde spadaju zapravo sve prevare u vezi sa zdravstvom, promovisanjem lažnih i/ili neukih medicinskih istraživanja.[27] Tumačenjem odredbe dela Sec. 35A.01. koji se odnosi na određivanje pojmova Krivičnog zakonika Teksasa, nesporno je da Burzinski jeste lekar, shodno st. 7. koji glasi da je lekar ono lice koje poseduje licencu za praktikovanje medicine u toj državi. Međutim, njegov rad se u potpunosti kosi sa odredbama Sec. 35A.02, gde je predviđeno šta se sve smatra krivičnim delom prevara u okviru zdravstva.[28]

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[23] I. Block, K. (2004). *Antineoplastons and the Challenges of Research in Integrative Care*. Integrative Cancer Therapies.

[24] FDA (Food and Drug Administration) – Uprava za hranu i lekove Sjedinjenih Američkih Država jeste savezna agencija Ministarstva zdravlja i ljudskih usluga.

[25] James Randi Educational Foundation, JREF's Pigasus Awards "Honors" Dubious Peddlers of "Woo", preuzeto dana 1. 4. 2013. godine sa: "JREF's Pigasus Awards "Honors" Dubious Peddlers of "Woo".

[26] CA: A Cancer journal for clinicians (1983), *Unproven Methods of Cancer Management – Antineoplaston*, 58–59.

[27] Teksas spada u red država koje preduzimanje radnji od nestručnih lica u oblasti zdravstva smatraju krivičnim delom prevara, uz obrazloženje da su preduzete od strane nadrilekara.

[28] Preuzeto dana 23. 9. 2021. godine sa: https://statutes.capitol.texas.gov/docs/PE/htm/PE.35A.htm.

Usled brojnih propusta i predloga Teksaškog medicinskog odbora da je neophodno oduzimanje licence Burzinskom zbog brojnih nepravilnosti u radu i kršenja zakona,[29] te uprkos izricanju sankcija zbog utvrđenih čak 130 prekršaja, Burzinski je zadržao licencu.[30]

Osim navedenog, FDA je 2009. godine obavestila Istraživački centar „Burzinski" da je nakon sprovedene istrage utvrđeno da doktor Burzinski nije postupao u skladu sa važećim zakonskim odredbama. Takođe, dokazano je da je od strane Istraživačkog etičkog odbora odobreno istraživanje Burzinskog, bez osiguranja da je rizik za pacijente sveden na minimum, te da nedostaje neophodna dokumentacija i stalna kontrola studija, u skladu sa svim propisima države. Kao poslednje, ali ne i manje važno, utvrđeno je postupanje suprotno zakonu FDA, iz razloga što je vršena promocija istraživačkog leka, što je strogo zabranjeno.[31]

Imajući u vidu sve navedeno, možemo zaključiti da države na drugačiji način imenuju, regulišu i kažnjavaju nadrilekarstvo, te da u pojedinim državama, kao što je to u Teksasu, nije dovoljno posedovanje određene stručne spreme da bi lekar mogao da obavlja sve aktivnosti u oblasti medicine, već su potrebna dodatna, stručna, usavršavanja. Cilj ovakvog regulisanja je svakako zaštita zdravlja ljudi, jer nije etički niti moralno dozvoliti sporovođenje eksperimentalnih istraživanja na ljudima, upotrebom lekova i/ili tretmana koji nisu ispunili sve neophodne zahteve kojima se dokazuje da konkretna primena neće prouzrokovati veću štetu nego korist.

Hrvatska

Članom 184. Krivičnog zakonika Hrvatske predviđeno je krivično delo nadrilekarstvo, te je propisano sledeće:

> „...kaznom zatvora do godinu dana kazniće se onaj ko se bez odgovarajuće stručne spreme bavi lečenjem ili pružanjem druge mediciske pomoći",

dok je za kvalifikovane oblike izvršenja ovog krivičnog dela predviđena stroža kazna, koja se može izreći i u trajanju do petnaest godina zatvora.[32] Hrvatskim

[29] Preuzeto dana 23. 9. 2021. godine sa: https://www.houstonpress.com/news/unortho dox-doc-stanislaw-burzynski-faces-360-000-fine-and-probation-9206755.

[30] *Skeptical Inquirer,* 41 (4). (2017). *Burzynski Sanctioned by Texas Medical Board*, Committee for Skeptical Inquiry Center for Inquiry, 7–8.

[31] Preuzeto dana 23. 9. 2021. godine sa: https://en.wikipedia.org/wiki/Burzynski _ Cli nic#cite_note-60.

[32] Kazneni zakon Hrvatske (*Narodne novine*, br. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21), na snazi od 31. 7. 2021. godine, čl. 184.

zakonodavstvom su propisani isti elementi koji čine biće ovog krivičnog dela, nalik našem zakonodavstvu, ali su sankcije rigoroznije nego u KZ RS.

Kako je već objašnjeno u prethodnom delu ovog rada, alternativna medicina predstavlja postupke koji se preduzimaju zbog lečenja i očuvanja zdravlja, ali za koje ne postoji dovoljan broj dokaza kako bi se svrstali u konvencionalnu medicinu. Alternativna medicina je naširoko prihvaćena u celom svetu, pa samim tim i u Hrvatskoj. Upravo iz ovog razloga, pacijentima koji prihvataju alternativnu medicinu upućen je apel da ujedno sarađuju i sa lekarima, kao i da svoje zdravlje povere stručnjacima iz oblasti alternativne medicine.[33] U Hrvatskoj postoji „Registar kvalifikovanih iscelitelja i terapeuta", gde se razlikuju kategorije prirodna medicina, energetska medicina, duhovna medicina i alternativne savetodavne delatnosti, gde na osnovu imena i prezimena svako može saznati da li je konkretno lice stručno za delovanje u datoj oblasti. Naime, na osnovu potvrde o edukaciji ili nakon testiranja sposobnosti, dobija se licenca, na osnovu koje se vrši upis u Registar.[34]

Imajući u vidu ove navode, možemo zaključiti da je Hrvatska obezbedila dodatnu zaštitu korisnicima alternativnih usluga na taj način što se pretragom kroz otvorenu, javnu bazu podataka, mogu dobiti sve neophodne informacije kome se prepušta briga o zdravlju ljudi i u ovoj oblasti lečenja. Ukoliko putem brze pretrage pojedinac ne pronađe lice koje pruža navedene usluge, jasno je da isto zapravo nije obrazovano za pružanje ovakvog vida pomoći, te da je nephodno obratiti se drugom, stručnom licu. U Srbiji se ovakva pretraga može izvršiti na zvaničnom sajtu Lekarske komore Srbije.[35] Na osnovu imena i prezimena, može se uočiti da li lice koje pruža medicinske usluge ima završen medicinski odnosno stomatološki fakultet, te da li poseduje licencu za rad. Ukoliko pretragom ne budu dobijeni rezultati, nedvosmisleno se izvodi zaključak o protivzakonitom radu odnosno da je reč o nadrilekaru. Kako je reč o Lekarskoj komori, podaci obuhvataju isključivo lekare, odnosno lica koja su završila medicinski ili stomatološki fakultet.

[33] Grundler Bencarić, A. (2017). *Komplementarna vs. Alternativna medicina*, Adiva Savjetom do zdravlja.

[34] EU Registar kvalificiranih iscjelitelja i terapeuta. Preuzeto dana 24. 9. 2021. godine sa: https://www.huped.hr/hr/hrvatski-registar-kvalificiranih-iscjelitelja-i-terapeuta-2.

[35] Lekarska komora Srbije. Preuzeto dana 29. 9. 2021. godine sa: http://www.lks.org.rs/clanovi-lks/cid182-672/zbirka-podataka-evidencija-lekara-sa-vazecom-licencom-avgust-2021.

Kina

Tokom izdržavanja kazne zatvora, Hu Vanlin (Hu Wanlin) doneo je odluku da nakon izdržane kazne pokrene sopstveni biznis u vidu pružanja medinskih usluga, što je i učinio 1997. godine. Prilikom protivzakonitog pružanja usluga tvrdio je da pacijentima može da postavi dijagnozu bez da ih detaljno pregleda, usled čega je sebe prozvao čudesnim radnikom. Nakon što je postao javna ličnost, nakon čega je prilikom svakog pojavljivanja u javnosti govorio o čudu koje čini prilikom „lečenja", postao je predmet interesovanja među naučnicima koji su vremenom i razotkrili njegovu prevaru. Naime, naučnici su utvrdili da je Hu Vanlin zapravo prodavao biljni lek koji je sam pravio, gde su supstance koje su ga činile dovele do toga da pacijenti u svoj organizam unose ogromne količine natrijum sulfata, što je dovodilo i do smrtnih ishoda. Uhapšen je 1999. godine te je utvrđeno da je pružanjem medicinskih usluga bez odgovarajuće stručne spreme (pri čemu je neznanje posledica izostanka obrazovanja u predmetnoj oblasti) trovanjem izazvao smrt kod skoro 150 osoba.

Slučaj Hu Vanlin je najznačajniji za Kinu iz razloga što je, tek nakon njegovog hapšenja i izricanja kazne, stupio na snagu novi zakon u Kini kojim je uređen medicinski sistem i kojim je propisano da medicinske usluge mogu da pružaju jedino lekari koji poseduju licencu za rad u toj oblasti.[36]

ZAKLJUČAK

Posedovanje odgovarajuće stručne spreme je neophodan uslov za pružanje lekarske ili bilo kakve druge medicinske pomoći. Ovako strogo postavljen uslov neophodan je jer bilo kakvo nestručno postupanje, makar se isto ogledalo samo u savetovanju, može dovesti do oštećenja ili pogoršanja zdravstvenog stanja čoveka, što može u krajnjem izazvati i smrtni ishod. Bez obzira na činjenicu da li oštećeni zna da pomoć dobija od nadrilekara, izvršioca krivičnog dela ne oslobađa odgovornosti, shodno čl. 254. KZ RS. Svako protivzakonito postupanje mora biti kažnjeno.

Problem koji se javlja nakon izvršenja krivičnog dela je najčešće taj da se oštećeni ne odluči uvek za podnošenje krivične prijave, pogotovo ne u situacijama kad zdravlje nije teže narušeno. Na ovaj način nadležni organi, a zatim i javnost, nemaju saznanja o licima koja svoje usluge pružaju protivno

[36] Ramsland, K. (2007). *Inside the minds of healthcare serial killers: why they kill*, Praeger Publishers, 112.

domaćem zakonodavstvu, što s jedne strane dovodi do toga da se druga lica i dalje obraćaju nadrilekarima, dok s druge strane država ne postupa usled izostanka informacija oštećenih građana.

Drugi problem jeste odugovlačenje postupka, kao i nepostupanje samih nadležnih organa u konkretnom slučaju, što dovodi do zastarelosti postupka, imajući u vidu činjenicu da je za osnovni oblik dela propisana kazna zatvora do tri godine.

Za kraj, ali ne manje važno, oštećeni se često obraćaju nadležnim organima retroaktivno, bez posedovanja bilo kakvih dokaza, gde se kao najbitniji svakako izdvaja medicinska dokumentacija koja je dobijena nakon pružanja lekarske pomoći od strane stručnog lica, pri čemu je ta pomoć bila neophodna radi saniranja posledica koje je prouzrokovao nadrilekar. Iz tog razloga, često krivične prijave bivaju odbačene, a oštećeni uskraćeni za dokazivanje istine pred državnim organima.

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I. Block, K. (2004). *Antineoplastons and the Challenges of Research in Integrative Care*. Integrative Cancer Therapies.

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*Dragana Milovanović**
Ph.D. student Faculty of Law, University of Niš
ORCid: 0000-0002-5100-0583

QUACKERY AS A CRIMINAL OFFENCE**

ABSTRACT: Acquiring appropriate professional qualifications enables one to provide certain medical treatments or other medical services. As the acquisition of material gain is often the motive for committing numerous criminal offenses as prescribed by the Criminal Code of the Republic of Serbia, it is often so with the criminal offense of quackery found in Article 254 of the Criminal Code. The reason for prescribing this act and sanctioning the perpetrator is that undertaking actions that require special education in the field of medicine without having it can cause damage to the health of another person, to a higher or lower degree. However, the sanctions occur regardless of whether in the specific case there was a consequence in the form of damage to or deterioration of the health of another person, as well as in the case when the perpetrator did not obtain material gain by taking specific actions without proper professional qualifications. Despite the fact that are witness to numerous testimonies of victims through the media, who out of ignorance decided to entrust their health to persons without proper qualifications, practice shows that a small number of criminal complaints is received by competent prosecutor's offices in Serbia and that a small number

* draganaammm@gmail.com

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of court proceedings are conducted to prove guilt and the existence of a criminal offense.

Keywords: quackery, professional qualification, Criminal Code, criminal proceeding

INTRODUCTION

Undertaking certain actions, the purpose of which is health treatment or provision of other medical services without appropriate professional qualifications, is envisaged as a criminal offense within domestic law. The first traces of quackery can be found in Europe and the United States in the 17th and 18th centuries, while the first anti-quackery organization was founded in 1881 in the Netherlands, called the Association Against Quackery.[1]

Health treatment and provision of other medical services by non-professionals may result in the impairment of health, with immediate or lasting consequences. The quack doctors themselves often act with intent, aware that they do not have the appropriate professional qualifications for the actions they take. Today, when aesthetic medicine has reached peak popularity, quackery is becoming more and more common, where the motivation for committing crimes is acquiring material gain. Although according to criminal law acquiring material gain does not constitute a necessary element of this criminal offense, the final judgement that a defendant committed the criminal offense of quackery from Article 254 of the Criminal Code of the Republic of Serbia (hereinafter: the CCRS), entails acquisition, bearing in mind the fact that engaging in the activities without appropriate professional qualifications causes and consequently leads to violations of other legal provisions (due to not paying taxes, reporting false activities when registering the business before the competent state agency, etc.).

Although criminal laws of some other countries stipulate that a quack doctor, by taking the above actions, actually commits the criminal act of fraud (which will be discussed in more detail in the following lines), this is not the case with Serbian law. However, earlier in Serbia, the question was asked whether taking actions that are now described in Article 254 of the CCRS constitutes the crime of fraud or quackery. Although there was a group of theorists who argued that the crime in question was fraud, claiming that the defendant committed the crime by misleading another person or falsely presenting

[1] Retrieved on September 20, 2021. Available at: https://sr.wikipedia.org/wiki/Nadrilekarstvo.

facts that lead the victim to entruest his health to the person which he considers to be a professional, the Supreme Court of Cassation in decision Kž. no. 478/86 pointed out that "a perpetrator who, without graduating from a relevant college, performs the job of a doctor for a long period of time and receives appropriate financial compensation for that work, commits the criminal offense of quackery, and not the criminal offense of fraud."[2] On the basis of this position, which was published in 1986, the opinion that the offense in question is fraud was eradicated, thus such elements of the criminal offense indisputably indicate that the criminal offense of quackery was committed.

Regulating the crime of quackery, both in Europe and around the world, despite some differences, has essentially the same goal, which is to protect the health and lives of people from negligent treatment in cases of medical care without relevant professional qualifications being provided.

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The right to respect for private and family life, home and correspondence is guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention).[3] It is undisputed that the health and life of persons are considered through Article 8 of the Convention, as confirmed by the European Court of Human Rights (hereinafter: the European Court) when considering certain applicants' petitions.

When filing a petition to the European Court, in the case of *Kosaitė-Čypienė and Others v. Lithuania*, the applicants alleged that the State had violated Article 8 of the Convention under current Lithuanian law by legally prohibiting health workers from assisting a pregnant woman to deliver a child in her home at her request. Notwithstanding the state's claims concerning Lithuanian law, the European Court held that, although not precisely prescribed by the Convention, it is indisputable that a woman's right to choose to have a child in her home is linked to her private life and therefore falls within the scope of Article 8 of the Convention. Considering the then-valid Lithuanian law, the European Court determined that a woman has the right to give birth

[2] Decision of the Supreme Court of Cassation, Kž. no. 478/86.

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms with Additional Protocols no. 4, 6, 7, 11, 12, and 13 from 1950, *Official Gazette of Serbia and Montenegro* – International Agreements no. 5/2005 and 7/2005, Article 8.

in her home, but that she does not have the right to be attended by midwives or any other medical staff. According to the law, any contrary actions by any health worker, including paediatricians, midwives, obstetricians and gynaecologists, would constitute the crime of quackery. In the specific case, the European Court found that criminal proceedings were conducted and completed at the national level against a person without a license, who undertook the professional actions of an assistant during childbirth. Namely, in the first-instance proceedings, it was proven that the defendant helped pregnant women to give birth at home 36 times in the period from 1999 to 2011, and did not undergo any medical training to perform such actions. The actions she undertook were varied - from certain medical examinations to delivering children. However, despite the stated facts, an acquittal was passed, because the national court took the position that the defendant could not be held responsible for the criminal offense of quackery under the then-valid Article 202, paragraph 2 of the Criminal Code, because it could be applied only to medical or health workers who illegally assisted women while giving birth in their homes - but not to those who did not have a work license. The Court of Appeals reversed the first-instance verdict, emphasizing that the defendant committed the criminal offense of quackery, having in mind that she did not have a medical education or a license to provide the medical services that she provided during that period. However, the Supreme Court of Cassation ruled that there was no liability of the defendant, despite all the indisputable evidence of the actions taken, bearing in mind the fact that, in addition to not having a license, the exact amount of income earned in this way was not proven, which was a necessary element for establishing criminal responsibility under the law.[4]

The European Court stated in the verdict of *Pojatin v. Croatia* that according to previously valid laws of Croatia, giving birth had to be done in medical institutions, and that providing medical care during childbirth at home is considered quackery. The doctor who performs the first examination of a child born outside of a health institution is obliged to state the absence of the relevant medical documentation that would be given at a medical institution if the child was born in one. As the applicants pointed out that their rights were violated because they did not have the right to choose the place where the birth would take place, and that they were denied the necessary medical assistance and care, which is contrary to the provisions of Article 183 of the Croatian Criminal Code, the state pointed out that such allegations were unfounded, having in mind the fact that in the specific case the midwife who attended the birth outside a health institution was not prosecuted or sanctioned in any other

[4] *Kosaitė-Čypienė and Others v. Lithuania*, App. no. 69489/12, 4. 6. 2019, Paras. 31–35, 50, 51, 66.

way, since the criminal offense of quackery exists only when medical care is provided by a person without proper professional qualifications.[5]

Positive law

The Constitution of the Republic of Serbia guarantees that "every person has the right to protection of his physical and mental health".[6] In order to enable such protection, the legislator has grouped criminal acts against human health in Chapter 23 of the CCRS, and provided for sanctions in case of violating the object of protection. As one of the criminal offenses where human health appears as an object of protection, the legislator prescribed quackery in Article 254, paragraph 1, and determined the following:

> "Anyone who engages in health treatment or provision of other medical services without appropriate professional qualifications shall be punished by a fine or by up to three years of imprisonment."[7]

Based on this determination, we can conclude that the existence of the criminal offense of quackery requires the fulfilment of two cumulative conditions:

1) that one person *practices* providing health care treatment or other medical services, i.e. that it is a continuous activity and

2) that such actions are undertaken by a person who does not have appropriate professional qualifications.

For the existence of this criminal offense, it is irrelevant whether or not the person obtained material gain for the provided services. *Practicing* means doing it more than once, i.e. repeating related activities over a longer period of time, during which the perpetrator shows a tendency to continue undertaking such activities.[8] If the defendant performs the action in question only once, and there is no evidence of continuous activity, the court will issue a verdict of acquittal.[9]

When committing a crime, the consequence can appear both as abstract and as actual. Namely, abstract danger refers to the possible occurrence of an

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[5] *Pojatina v. Croatia*, App. no. 18568/12, 04.10.2018, Paras. 12, 55, 61, 84.

[6] Constitution of the RS (*Official Gazette of the RS*, no. 98/2006), Article 68.

[7] Criminal Code of the RS (*Official Gazette of the RS*, no. 85/2005, 88/2005 – amended, 107/2005 – amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 , 94/2016 and 35/2019), Article 254, paragraph 1.

[8] Jovašević, D. (2017). *Krivično pravo – posebni deo*. Belgrade: Dosije studio, 192.

[9] Verdict of the Basic Court in Užice K. no. 42/18 from 24 April, 2018; Verdict of the High Court in Užice Kž. no. 124/18 from 11 July, 2018.

actual danger and it occurs when a person without proper professional qualifications acts contrary to Article 254, paragraph 1 of the CCRS, but in this case there is no damage to the health of another person; on the other hand, actual danger is when the health of another person is damaged as a consequence of the committed criminal offense.

The criminal offense was committed even if there was no damage or deterioration in the health of the person against whom the actions in question were taken. As a sanction, a fine or imprisonment for up to three years is prescribed. However, Article 259, paragraph 2 provides that:

> "If, as a result of acting in the manner described in Article 254, paragraph 1 of the CCRS, a person is seriously injured or his health is severely impaired, the perpetrator shall be punished by one to eight years of imprisonment".[10]

If, on the other hand,

> "...by undertaking the above-mentioned actions the death of the injured party occurred, the perpetrator shall be punished by imprisonment lasting between two and twelve years".[11]

The Law on Health Care came into force in 2005, which introduced alternative or complementary medicine into our system, which is prescribed in more detail in Articles 217–218 of the Law. Paragraph 2 of Article 218 stipulates that:

> "Methods and procedures of complementary medicine may be undertaken by a health worker if the Minister has issued a work permit."[12]

In addition to stipulating in the Law on Health Care that only a healthcare worker is allowed to undertake complementary medicine methods, the Rulebook on the Detailed Conditions and the Manner of Performing the Methods and Procedures of Complementary Medicine specifically regulates the conditions that a healthcare worker must meet in order to take action in accordance with law:

> "...the person has completed appropriate integrated academic studies of the health profession, i.e. an appropriate college or high school of the health profession;

[10] CCRS (*Official Gazette of the RS*, no. 85/2005, 88/2005 – amended, 107/2005 – amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019), Article 259, paragraph 1.

[11] CCRS (*Official Gazette of the RS*, no. 85/2005, 88/2005 – amended, 107/2005 – amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94 / 2016, and 35/2019), Article 259, paragraph 2.

[12] Law on Health Care (*Official Gazette of the RS*, no. 25/2019), Article 218, paragraph 2.

> has the approval of the competent chamber of health workers for working independently – a license and has the decision by the Minister responsible for health that he is allowed to perform a certain method of complementary medicine."[13]

A contradictory verdict, when compared to the aforementioned provision of the Law on Health Care and the provision of the Rulebook on the Detailed Conditions and the Manner of Performing the Methods and Procedures of Complementary Medicine, can be seen in the decision of the Court of Appeals in Belgrade from 2018 by which the defendant Nenad Brkić, better known as Nenad Rosso, was acquitted, as were the other three defendants. Namely, the mentioned persons were accused of misleading citizens in the period from 2007 to 2009 regarding the "Rife Generator", by claiming that it, in combination with a certain type of medicine, cures cancer and leukemia. By selling their services, they had monetary gain amounting fifteen million dinars in value. The contradiction is reflected in the fact that despite the clear position of the legislator on who is allowed to practice alternative medicine, the Court of Appeals upheld the acquittal, despite the prosecution's claims that the defendant does not have a certificate of expertise. The court justified this position by pointing out that the instructions of the "Rife Generator" state that it is a device that solves the cause of the disorder that actually caused the disease, and that it is not a medically recognized device, but used only for testing purposes. Applying the principle in dubio pro reo, the Court of Appeals ruled in favour of the defendants.[14]

However, additional confusion due to this reasoning of the verdict arises because the very conduct of the defendants clearly falls into the domain of alternative medicine, since alternative medicine includes those methods and procedures that have not passed the necessary tests that would make them a part of conventional medicine. Alternative medicine includes those procedures for which there is not enough evidence to support the practitioner's claims that they lead to the improvement of people's health, but are conducted as a form of a test. An important aspect is the fact that the application of alternative medicine should not lead to the damage of health, because in that case the act of testing itself would have to end. Secondly, during the proceedings, it was determined that the defendants had other occupations, i.e. that they were not health workers. Last but not least, the defendants did not provide their services

[13] Rulebook on the Detailed Conditions and the Manner of Performing the Methods and Procedures of Complementary Medicine (*Official Gazette of the RS*, no. 1/2020), Article 5.

[14] Verdict of the Court of Appeals in Belgrade.

in the place provided by law, and the methods of alternative medicine can be conducted in:

> "health institution, another legal entity, or private practice that has a license to expand its activities to a particular method of complementary medicine."[15]

During 2020 and 2021, we have witnessed various sensationalist headlines in newspapers, which presented an enormous number of victims whose health had been severely damaged as a result of false representation by quack doctors, mostly through social networks, who offered and performed certain surgical and aesthetic procedures, contrary to law. In accordance with the above, it is necessary to mention that the Minister of Health issued the Professional Methodological Guidelines for Practicing "Anti-Aging" Medical Procedures in 2018. The instruction stipulates that specially marked aesthetic and other "anti-aging" procedures can be performed in health care institutions and private practices, provided that:

> "in terms of staff, there is at least one health worker who has the necessary education in accordance with this expert methodological instruction."

After fulfilling all precisely determined conditions, a work permit is obtained from the Ministry of Health. As the Guidelines clearly and unambiguously stipulate that for further training in the area of the "anti-aging" medicine, the title of doctor of medicine or dentist is necessary,[16] we can conclude that any contrary behaviour is against the law and is subject to sanctions.

In accordance with what was previously stated, it is necessary to point out these conditions are a novelty, having in mind that the District Court in Belgrade passed the Verdict Kž. no. 608/03 from March 20, 2003, in the explanation of which it was stated that the court found the defendant guilty, because it was indisputably determined that she was engaged in treatment without proper professional qualifications after the injured party had seen the defendant's ad in the newspaper that said that she treated psoriasis, which resulted in the injured party turning to the defendant for help. The defendant is a beautician by profession, and the injured party went to the defendant upon making an appointment, thinking that she provided services in a doctor's office, after which the defendant applied cream to his wounds and gave him nasal drops, then claimed that the symptoms would disappear within 24 hours, and charged

[15] Rulebook on detailed conditions and manner of performing methods and procedures of complementary medicine (*Official Gazette of the RS*, no. 1/2020), Article 5, paragraph 2.

[16] Professional Methodological Guidelines for Practicing "Anti-Aging" Medical Procedures, no: 500-01-1246/2018-02, 19 September, 2018.

for her service.[17] Having in mind these facts, the court found that the defendant committed the offense of quackery.

Statistical data for the 2016–2021 period – Basic Public Prosecutor's Office in Niš

In the period from January 2016, to September 15, 2021, four criminal complaints were filed with the Basic Public Prosecutor's Office in Niš (hereinafter: BPP Niš) for the offense of quackery and quack pharmacy from Article 254 of the CCRS, one of which was forwarded to the Basic Public Prosecutor's Office in Belgrade, since the case was under its jurisdiction. The remaining three criminal complaints were dismissed.

In the annotation of the Decision on the dismissal of the criminal complaint from December 19, 2017, KT no. 2544/18 from June 15, 2020, the following was determined. Namely, when filing the criminal complaint, the applicant pointed out that the suspect was guilty of the criminal offense of quackery, due to the fact that she provided him with medical assistance by coating a certain ointment, which later turned out to be propolis, over his bunion and that she charged him for that service. The applicant stated that the suspect pointed out to him that she had been treating such problems for more than twenty years. After a few days, the injured party's wound got infected, and due to the pain and dissatisfaction with the service, he went for outpatient and hospital treatment, after which he filed a criminal complaint with the BPP Niš. After the evidence had been presented, the competent public prosecutor determined that there were no grounds for filing an indictment, for the following reasons. The legislation clearly and unequivocally states that that for the criminal offence of quackery to exist, it is necessary that one *practices* providing health care treatments and other medical services. The acting competent prosecutor pointed out that health care treatment refers to health measures taken in health institutions by persons who have graduated from medical or dental faculties, that is, to determining a diagnosis and therapy, giving drugs or other therapies, undertaking certain procedures, counselling, prescribing diets, etc., while providing medical services includes all other health measures that cannot be considered treatments, which includes dressing wounds, applying topical medications to them, etc. It had been indisputably established that the suspect did provide medical services by smearing propolis over the applicant's wound, applying a patch, and advising him not to remove it for a week, however, the essential element of the crime, which is *practicing providing health*

[17] Verdict of the District Court in Belgrade, Kž. no. 608/03, from March 20, 2003.

care as a continual activity, is missing. It is indisputable that the suspect did not have the appropriate professional qualifications to provide said medical service, but the decisive fact for the prosecution's decision in this case was whether the action in question was done only once or undertaken over a long period of time, as well as whether there was a willingness on the part of the suspect to repeat the action. As the suspect explained that she was not practicing the said activity, while on the other hand the injured party presented only allegations that represent an indication and were not supported by any evidence, the BPP Niš made the decision according to which there were no elements for concluding that the suspect practiced providing health care or was engaged in providing other medical services without appropriate professional qualifications, which would constitute a criminal offense under Article 254 of the CCRS.[18]

Acting on the criminal complaint in the case KT no. 133/18 from June 20, 2018, the competent public prosecutor determined that there are no grounds for the suspicion that the defendant committed the crime of quackery and quack pharmacy under Article 254 of the CCRS. Without submitting any evidence, the applicant stated that he lived with the suspect in the same house on different floors, that the suspect was visited by persons with impaired health, such as broken limbs, etc., and that terrible screams were coming from the premises of his home, which made the applicant suspect that the defendant was carrying out surgeries in that house. Based on the interrogation of the suspect and the applicant, it was established that the family relations between these two persons were disturbed, and that the criminal complaint was filed only out of revenge, having in mind the fact that the defendant filed a complaint for stealing electricity against the applicant seven times in the previous period. As there was no evidence in support of the allegations in the criminal complaint, it was rejected.[19]

Based on the presented evidence, the BPP Niš issued a Decision on the rejection of the criminal complaint in the case KT no. 2320/19 from October 12, .2020, since it has not been determined that the suspect practiced providing health care or provided other medical services without the appropriate professional qualifications. It was indisputably proven that the suspect provided advice regarding exercises and a healthy lifestyle, for which he completed certain courses and submitted relevant official certificates for inspection. It was determined that the suspect does not diagnose, does not provide medicine, or perform any other activities that do not belong to his domain, but that he

[18] Decision of the BPP Niš, KT no. 2544/18, from June 15, 2018.

[19] Decision of the BPP Niš KT no. 133/18, from June 20, 2018.

operates exclusively through the Association of Citizens, which is registered and has a statute, as well as that he does not charge for his services.[20]

EXAMPLES FROM THE CASE LAW OF OTHER COUNTRIES, WITH REFERENCE TO THE COMPARATIVE REVIEW

Although the elements of the criminal offense of quackery differ from one country to another, what is indisputably common is that countries around the world prohibit providing any kind of medical care by persons who do not have the appropriate professional qualifications. The different foundational elements, which must be fulfilled cumulatively, based upon which the responsibility of the accused person is determined and a sanction for the committed act is prescribed, all have the same goal, and that is to ensure the protection of human health from unprofessional persons.

The United States of America

One of the winners of the Pigasus Award[21] in 2013 was doctor Stanislaw Burzynski,[22] because it had been determined that he was selling expensive drugs for enormous sums of money, claiming that they cure cancer by using "antineoplaston", although it has never been proven through legal research that they are effective. "Antineoplaston" is a name coined by Burzinski for a group of peptides, peptide derivatives, and mixtures used as alternative cancer treatments.[23] The therapies he sold and administered were not approved by the FDA.[24]

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[20] Decision of the BPP Niš KT no. 2320/19, from October 12, 2020.

[21] The Pigasus Award is a "reward " movement designed by James Randi, which announces five "award winners" every April 1, from a group of people who are characterized as criminals who intentionally or unintentionally trade in paranormal or pseudoscientific nonsense.

[22] Stanislaw Burzynski was born in 1943 in Poland, where he graduated from medical school, and then moved to the United States in 1970. After working at a medical college, he founded a research laboratory called Burzynski.

[23] I. Block, K. (2004). *Antineoplastons and the Challenges of Research in Integrative Care*. Integrative Cancer Therapies.

[24] FDA (Food and Drug Administration) – The Food and Drug Administration of the United States is a federal agency of the Department of Health and Human Services.

Despite numerous users of his services, Burzynski has never published the final results of his clinical trials.[25] Despite the education that Burzynski had, after a long consideration of the entire case, the FDA informed the public that there was no evidence that the antineoplastons used by Burzynski were effective and helped cure the most serious diseases. Burzynski never filed for a registration of the medicine he used and the therapies he carried out while "treating" people, nor did he submit evidence of the suspended investigation initiated against him. Accordingly, it has been established that any transport and use of these drugs and therapies for the purpose of treating people is illegal.[26]

Numerous accusations were filed for quackery against Burzynski due to non-compliance with regulations, unethical behaviour and selling so-called false hope to people suffering from severe, incurable diseases. Namely, despite the education he has, it was established during the proceedings that Burzynski was illegally conducting treatments, and that the studies he published had never been confirmed. In Texas, where proceedings were conducted against the defendant, for the criminal offense of quackery as such, the Criminal Code uses the term *health care fraud*, which includes all frauds related to health, promoting false and / or medical research not supported by science.[27] By interpreting the provision of Sec. 35A.01. relating to the definition of the Texas Penal Code, it is undisputed that Burzynski is a doctor, pursuant to paragraph 7, which states that a doctor is a person who holds a license to practice medicine in a relevant state. However, his work completely contradicts the provisions of the Sec. 35A.02, which stipulates what is considered a criminal offense of health fraud.[28] Due to him making numerous omissions and the proposal of the Texas Medical Board that it is necessary to revoke his license,[29] and despite the imposition of sanctions for as many as 130 violations, Burzynski retained his license.[30]

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[25] James Randi Educational Foundation, JREF's Pigasus Awards "Honors" Dubious Peddlers of "Woo", retrieved on April 1, 2013. Available at: "JREF's Pigasus Awards "Honors" Dubious Peddlers of "Woo".

[26] CA: A Cancer journal for clinicians (1983), *Unproven Methods of Cancer Management – Antineoplaston*, 58–59.

[27] Texas is one of the states that consider taking actions by non-professionals in the field of health a criminal act of fraud, with the explanation that the actions are undertaken by quacks.

[28] Retrieved on September 23, 2021. Available at: https://statutes.capitol.texas.gov/docs/PE/htm/PE.35A.html

[29] Retrieved on September 23, 2021. Available at: https://www.houstonpress.com/news/unorthodox-doc-stanislaw-burzynski-faces-360-000-fine-and-probation-9206755

[30] Skeptical Inquirer 41 (4). (2017). *"Burzynski Sanctioned by Texas Medical Board"*, Committee for Skeptical Inquiry Center for Inquiry, 7–8.

In addition to the above, in 2009 the FDA informed the Burzynski Research Center that after the investigation, it was determined that Dr Burzynski did not act in accordance with the applicable legal provisions. It was proven that Burzynski's research was approved by the Research Ethics Committee without ensuring that the risk for patients was minimal, as well as that the necessary documentation and constant control of studies in accordance with all state regulations are lacking. Last but not least, it was found that actions contrary to the FDA law were taken, namely promoting a research drug, which is strictly prohibited.[31]

Having in mind all the above, we can conclude that countries name, regulate, and punish quackery differently, and that in some countries, such as Texas, it is not enough for a doctor to have a certain professional qualification in order to be allowed to perform all activities in different areas of medicine, but that additional, professional, training is needed. The aim of such regulations is certainly to protect human health, because it is not ethical or moral to allow experimental research on humans, using drugs and / or treatments that do not meet all the necessary requirements to prove that their specific application would not cause more harm than good.

Croatia

Article 184 of the Criminal Code of Croatia provides for the criminal offense of quackery, and prescribes the following:

> "A person who practices providing health care or provides other medical services without appropriate professional qualifications will be sentenced to imprisonment for up to one year",

while for qualified forms of committing this crime, a more severe punishment is envisaged, which can be imprisonment for up to fifteen years.[32] Croatian legislation prescribes the same necessary elements for this crime similar to Serbian legislation, but the sanctions are more rigorous than those found in the CCRS.

As was already explained in the previous part of this paper, alternative medicine refers to procedures that are undertaken for the purpose of treatment and preservation of health, but for which there is not enough evidence that would classify it as conventional medicine. Alternative medicine is

[31] Retrieved on September 23, 2021. Available at: https://en.wikipedia.org/wiki/Burzynski_Clinic#cite_note-60

[32] Croatian Criminal Code (OG 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21), in force since July 31, 2021, Article 184.

widely accepted all over the world, including in Croatia. Having this in mind, an appeal was made to patients who accept alternative medicine to cooperate with doctors, as well as to entrust their health to experts in the field of alternative medicine.[33] In Croatia, there is a "Register of Qualified Healers and Therapists", which distinguishes between natural medicine, energy medicine, spiritual medicine, and alternative counselling activities, where based on a name and surname, everyone can find out if a particular person is a professional in a relevant field. Namely, on the basis of the certificate of education or after the aptitude test, a license is obtained, on the basis of which the entry in the Register is made.[34]

Having this in mind, we can conclude that Croatia has provided additional protection to users of alternative services, so that by searching through an open, public database, they can get all the necessary information on who is allowed to take care of human health in this area of treatment. If an individual does not find a person who provides these services through a quick search, it is clear that the person in question is not actually qualified to provide this type of assistance, and that it is necessary to turn to another, professional person. In Serbia, such a search can be performed on the official website of the Medical Chamber of Serbia.[35] Based on a name and surname, it can be determined whether the person providing medical services has graduated from a Faculty of Medicine or Dentistry, and whether they have a license to work. If the search does not yield results, an unambiguous conclusion is drawn about illegal work, i.e. that the person in question is a quack doctor. As for the medical chamber, the data includes only doctors, i.e. persons who graduated from a Faculty of Medicine or Dentistry.

China

While serving his prison sentence, Hu Wanlin decided to start his own medical services business after serving his sentence, which he did in 1997. During the illegal provision of services, he claimed that he could diagnose patients without examining them in detail, as a result of which he called

[33] Grundler Bencarić, A. (2017). *Komplementarna vs. Alternativna medicina*, Adiva Savjetom do zdravlja.

[34] EU Register of Qualified Healers and Therapists. Retrieved on September 24, 2021. Available at: https://www.huped.hr/hr/hrvatski-registar-kvalificiranih-iscjelitelja-i-terapeuta-2

[35] The Serbian Medical Chamber. Retrieved on September 29, 2021. Available at: http://www.lks.org.rs/clanovi-lks/cid182-672/zbirka-podataka-evidencija-lekara-sa-vazecom-licencom-avgust-2021.

himself a miracle worker. After he became a public figure, which was followed by him speaking about the miracles performed during "healing" every time he appeared in public, he became the subject of interest among scientists, who eventually exposed his deception. Namely, scientists have determined that Hu Wanlin actually sold herbal medicine that he made himself, where the substances that made it led to patients intaking huge amounts of sodium sulfate into their bodies, which led to fatalities. He was arrested in 1999, and it was determined that by providing medical services without the appropriate professional qualifications (where ignorance is a consequence of the lack of education in the subject area), he caused death by poisoning in almost 150 people.

Hu Wanlin's case is the most important one for China, since only after his arrest and sentencing, a new law came into force in China, which regulates the medical system and which stipulates that medical services can be provided only by doctors licensed in that area.[36]

CONCLUSION

Having the appropriate professional qualifications is a necessary condition for providing any sort of medical assistance. Thus, a strictly set condition is necessary, because any unprofessional treatment, even if it is reflected only in counselling, can lead to damage or deterioration of human health, which can ultimately cause death. Regardless of whether the injured party knows that he received help from a quack doctor or not, the perpetrator cannot be released from responsibility, according to Article 254 of the CCRS. Any illegal action must be punished.

The problem that occurs after the commission of a criminal offense is, most often, that the injured party does not always decide to file a criminal complaint, especially in situations when his health is not seriously impaired. Because of this, the competent authorities, and then the public, have no knowledge of persons who provide their services contrary to domestic law, which on the one hand leads to other persons still turning to quacks, while on the other hand the state does not act due to lack of information from injured citizens.

Another problem is the delay of the proceedings, as well as the failure of the competent authorities to act in a particular case, which leads to the obsolescence of the proceedings, having in mind the fact that the punishment for the basic form of the crime is imprisonment for up to three years.

[36] Ramsland, K. (2007). *Inside the minds of healthcare serial killers: why they kill*. Praeger Publishers, 112.

Last but not least, victims often turn to the competent authorities retroactively, without any evidence, where the most important is certainly the medical documentation obtained after the provision of medical assistance by a professional, where this assistance was necessary to remediate the consequences caused by quackery. For this reason, criminal charges are often dismissed and the injured party cannot prove the truth before state authorities.

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