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Is Misconception Possible in the Criminal Offense of Unlawful Sexual Activity under Article 182 of the Criminal Code of Serbia?

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The aim of this paper is a detailed analysis of the criminal offense of unlawful sexual activity (Article 182 of the Criminal Code of Serbia) and the possibility of the existence of mistake of fact and mistake of law in this criminal offense. The criminal offense of unlawful sexual activity does not have an independent existence, so it is interpreted in the context of other criminal offenses to which the legal norm refers. In this sense, a parallel is drawn between unlawful sexual acts and the following criminal offenses: rape, sexual intercourse with a helpless person, sexual intercourse with a child and sexual intercourse by abuse of position. Alongside the presentation of these criminal offenses, the question arises as to whether mistake of fact or mistake of law can occur in these offenses. In this context, the concept and classification of misconception in criminal law are explained. Thus, the relationship between the criminal offense of unlawful sexual activity and the criminal offense of sexual harassment is examined. Finally, conclusions are drawn regarding the existence of misconception in the criminal offense of unlawful sexual activity.

KEYWORDS: unlawful sexual acts, sexual intercourse, mistake of fact, mistake of law.

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Introductory notes

Criminal law is just one of the means through which society influences sexual relations. Family law also intervenes in these relations, but such intervention is nowhere as sharp and drastic as in criminal law, which is a consequence of the very nature of criminal sanctions. The extent to which criminal law is used for this purpose depends on the general social and political climate and the attitude toward sexuality in a given society. It also depends on the actual recognition of socially dangerous sexual behaviors and sexual social relations endangered by such behaviors, which cannot be protected in any other way except through criminal law. (Stojanović, 1981, p. 145) Human sexuality is part of human nature. It is not merely an act of sexual intercourse and satisfaction of sexual desire, but also a biological and psychological need conditioned by certain social patterns—culture, customs, morality, etc. (Bošković, 2009, p. 121) The significance of criminal offenses against sexual freedom is evident in the fact that, since 2016, all criminal offenses against sexual freedom, except for the basic form of sexual harassment, are prosecuted ex officio, regardless of the victim's stance, even if such offenses were committed against a spouse. (Škulić, 2020, p. 119)

The possibility of the existence of mistake of fact and mistake of law in the criminal offense of unlawful sexual activity is an interesting question. For example, the perpetrator may invoke mistake of fact regarding the age of the child, which constitutes a mistake of fact about the elements of the offense. Additionally, the perpetrator may invoke mistake of fact about the factual circumstances of the act's permissibility, where the perpetrator has a mistaken belief about a factual circumstance that, had it existed, would have made the act permissible. On the other hand, there is the possibility of mistake of law in the criminal offense of unlawful sexual activity, where the perpetrator claims not to have known that their actions were prohibited.

Analysis of the elements of the Criminal Offense of Unlawful Sexual Activity (Article 182 of the Criminal Code)

Basic Form of the Criminal Offense of Unlawful Sexual Activity and Its Relationship with Relevant Criminal Offenses

The criminal offense of unlawful sexual activity has a subsidiary character in relation to other criminal offenses against sexual freedom, which consist of sexual intercourse or acts equated with sexual intercourse. The subsidiary nature of unlawful sexual acts is also evident in the way the essential elements of this criminal offense are normatively constructed in the Criminal Code (hereinafter: CC, *Krivični zakonik RS,* 2005), where reference is made to the essential elements of other criminal offenses against sexual freedom, whose acts consist of sexual intercourse or acts equated with sexual intercourse. Consequently, it is necessary that sexual intercourse or an act equated with it did not

occur. Thus, the primary criminal offenses against sexual freedom are rape, sexual intercourse with a helpless person, sexual intercourse with a child, and sexual intercourse by abuse of position, while unlawful sexual acts are subsidiary and secondary in relation to them. (Škulić, 2019, p. 392)

According to the legal text, the act of execution of the criminal offense of unlawful sexual activity is any other sexual act, which excludes sexual intercourse or an act equated with sexual intercourse. The criminal offense of unlawful sexual activity exists if the elements of any of the relevant criminal offenses against sexual freedom are fulfilled (rape - use of force, qualified threats, threats to reveal something harmful to the victim's honor or reputation, or to a person close to them, or threats of other serious harm; sexual intercourse with a helpless person - the act is committed by exploiting the victim's state of helplessness; sexual intercourse with a child - the act is committed against a child; and sexual intercourse by abuse of position - the act is committed by abuse of position in relation to an adult or by abuse of position or authority in relation to a minor entrusted to the perpetrator for education, upbringing, care, or nursing). (Delić, 2024, p. 126)

Like most foreign legislations, the CC does not define the concept of unlawful sexual acts, leaving open the question of what constitutes the act of execution of this criminal offense. It is undisputed that it cannot be sexual intercourse or an act equated with it, but it remains unclear whether any other act committed in a situation described in Articles 178 - 181 qualifies as an unlawful sexual act. (Stojanović, 2020, p. 605) For example, in one case, the defense counsel, challenging the legality of the conviction, argued that the act of execution of the criminal offense of unlawful sexual activity was not fully defined, nor was the concept of unlawful sexual acts in the CC. However, the Supreme Court of Cassation concluded that sexual acts existed when the accused "grabbed the victim by the right hand and began shaking her, then grabbed her by the shoulders and pushed her to the ground, sat on her, began tearing her shirt, put his hand under her shirt and touched her breasts, covered her mouth with his hand, lay on top of her, pressed her legs with his, removed her shirt, and completely exposed her upper body, touching and squeezing her breasts with one hand."(Judgment of the Supreme Court of Cassation, Kzz 433/2015 dated 05/26/2015)

Thus, the act of execution of the criminal offense of unlawful sexual activity is not precisely defined, so judicial practice has established criteria for determining the concept of lewd acts (a term previously used in our legislation) - one subjective and one objective criterion. The subjective criterion consists of the intent to satisfy or arouse sexual desire, and the objective criterion consists of violating existing norms of sexual morality. In an older ruling, which remains relevant in judicial practice today, it was stated that lewd acts are "those acts that are not sexual intercourse or unlawful fornication but are aimed at satisfying sexual desire and are indecent, improper, or perverse and exceed the boundaries accepted by normal standards." Interpreting the objective criterion is problematic because there are no reliable parameters to distinguish acts prohibited by sexual morality from those that morality does not prohibit. A wide range of acts can be considered, from forcing the victim to undress to acts that represent the beginning of sexual

intercourse in a broader sense or acts bordering on anal or oral coitus, which themselves cannot constitute the act of execution of this criminal offense. These are acts that generally do not achieve sexual satisfaction but rather arouse sexual desire or satisfy it to a lesser degree than sexual intercourse or acts equated with it - for example, hugging, kissing, touching various parts of the body, especially the genital area, etc. (Stojanović, 2020, p. 606) In judicial practice, it has been argued in an appeal that the verdict was unclear because it did not state that the accused committed the acts to satisfy or stimulate sexual desire. However, the appellate court held that these circumstances do not constitute a legal element of the criminal offense of unlawful sexual activity. (Judgment of the High Court in Užice, Kž 141/2020 dated 13.10.2020.)

Whether a particular act constitutes an unlawful sexual act sometimes depends on the objective nature of the act and the circumstances under which it was committed. For example, physical contact does not always have to be aimed at satisfying sexual lust but can be a sign of friendship, joy, or some other close feeling toward a person not based on sexual grounds. Everything depends on the prior relationship between the parties, so some acts that might objectively be characterized as lewd may not be assessed as such if the prior relationship between the parties was so close that such acts are considered "normal" between them. On the other hand, some acts that may not objectively be considered lewd may be qualified as such if they are committed suddenly against a completely unfamiliar person. (Atanacković, 1978, p. 186)

It is debatable whether the criminal offense of unlawful sexual activity includes cases where the victim is forced or induced to perform an act that serves to satisfy the perpetrator's sexual desire, such as the victim performing an act on themselves, the perpetrator, or a third party. In such cases, the perpetrator does not perform any act except coercion or inducement. In some of these situations, the perpetrator arouses or satisfies their sexual desire without any physical contact with the victim. The legal provision stipulates that the perpetrator is the one who performs the sexual act and if it were to include the victim performing such acts on themselves, on the perpetrator, or on a third party, this would constitute an extensive interpretation of the incrimination. (Stojanović, 2020, p. 607) Thus, the criminal offense of unlawful sexual activity covers only the active form of sexual acts, meaning the perpetrator performs the sexual act on the victim's body. Therefore, this criminal offense does not exist in cases such as the following, which may instead constitute a misdemeanor against public order and peace: "The accused unfastened his pants, exposed his genitals to the victim, then showed her the genitals of a lamb, and afterward demanded that she remove her underwear and show him her 'pee-pee,' which she refused to do." (Judgment of the Court of Appeal in Belgrade, Kž2. 4806/2012 dated 17.10.2012.) Exhibitionism does not fall under the criminal offense of unlawful sexual activity, not even in situations where the accused, to satisfy his sexual desire, removed his underwear on the street in front of two unfamiliar minors, exposing his genitals, which caused them fear. As the court noted: "There is no criminal offense of unlawful sexual activity because this criminal offense presupposes only the active form of sexual acts." (Judgment of the Appellate Court in Kragujevac, Kž1 1254/2016 dated 07.09.2016.)

The question arises as to when the criminal offense of unlawful sexual activity is completed. According to judicial practice: "The criminal offense is completed by the execution of the unlawful sexual act, bearing in mind that this criminal offense often represents a prelude to the commission of other criminal offenses against sexual freedom. The distinction is then made based on the intent of the perpetrator, meaning it is necessary to determine whether the perpetrator's intent was directed solely at performing an unlawful sexual act or at sexual intercourse or an act equated with it.» (Delić, 2024, p. 119)

The subjective element of the criminal offense includes direct intent and the corresponding purpose, which is not explicitly provided for in the text of the norm but arises from the nature of the criminal offense, i.e., the nature of the act of execution. This is the intent to satisfy or arouse sexual desire. The act of execution is undertaken so that the perpetrator can satisfy or arouse their sexual desire through it. (Delić, 2024, p. 127)

Since the legislator refers to relevant criminal offenses, it is necessary to determine the relationship with these offenses to define the criminal offense of unlawful sexual activity.

Criminal Offense under Article 182 and Criminal Offense under Article 178, Paragraphs 1 and 2, and the Existence of Misconception

All sexual offenses, as punishable behaviors that infringe on freedom of decision in the sexual sphere or pathological phenomena in human sexuality, have undergone significant changes over time. Criminal law in the past largely criminalized human behaviors in this area, but today it focuses only on extremely dangerous or socially unacceptable sexual behaviors. Criminal legislation has seen either decriminalization in this area, the emergence of new criminalizations, or entirely new understandings of criminalization—such as rape. (Cetinić, 1995, p. 200)

The criminal offense of rape in its basic form consists of coercing another into sexual intercourse or an act equated with sexual intercourse by using force or threatening to immediately attack the life or body of that person or a person close to them. Rape essentially constitutes forced sexual intercourse or a forced act equated with sexual intercourse. (Lazarević, Škulić, 2017, p. 129) As mentioned earlier, sexual intercourse or an act equated with it does not constitute the act of execution of the criminal offense of unlawful sexual activity, but we must define it to know what cannot be considered "any other sexual act."

In criminal law, the term "sexual intercourse" refers to the penetration of the male genital organ into the female genital organ. Sexual intercourse does not have to be completed in a physiological sense; partial penetration is sufficient. On the other hand, mere contact between the genital organs is not enough to constitute sexual intercourse. However, in practice, it is sometimes difficult to determine whether there is even partial penetration or merely contact between the male and female genital organs. In some court rulings, it is held that sexual intercourse exists even when the male organ has not penetrated the victim's vaginal canal, while in other rulings, it is held that even the beginning

of penetration into the victim's vaginal canal does not constitute sexual intercourse. The act of execution of rape, in addition to sexual intercourse, may consist of another act equated with sexual intercourse. A major problem here is determining which acts are equivalent in significance to sexual intercourse and which are other sexual acts that, if undertaken using coercion, would constitute the criminal offense of unlawful sexual activity. This concept can be interpreted restrictively or extensively. A restrictive interpretation would consider "another act equated with sexual intercourse" to include only the penetration of the male genital organ into the anal or oral orifice of the passive subject, while an extensive interpretation would also include other types of penetration. The decisive criterion would be whether such acts, based on a comprehensive assessment of their overall effect, manner of manifestation, and accompanying phenomena, can be compared to sexual intercourse, i.e., vaginal coitus—a criterion accepted, for example, in Austrian judicial practice. However, this would blur the clear boundary with the criminal offense of unlawful sexual activity. For example, inserting a finger, fist, or object into the vagina or anal orifice of the passive subject is considered an act equated with sexual intercourse in the judicial practice of countries that accept the aforementioned criterion. On the other hand, according to judicial practice, merely partial insertion of a finger lasting very briefly is insufficient to equate it with sexual intercourse. (Stojanović, 2020, p. 587) We believe that caution is needed when defining the concept of "another act equated with sexual intercourse" and that it should not be expanded, as this would encompass the majority of acts, raising the question of what would then be considered an unlawful sexual act.

For the criminal offense of rape to exist, it is necessary for the perpetrator to use force or threats against the passive subject. Force involves the use of physical strength to overcome serious or expected resistance. Judicial practice holds that the existence of force must be assessed based on the overall situation in the criminal offense of unlawful sexual activity. (Aksentijević, 2018, p. 15)

A contentious issue concerns the resistance of the passive subject. Resistance is "only a means to prove that force was used," meaning "the existence of resistance proves force, but not vice versa - the absence of resistance does not necessarily mean that force was not used." (Škulić, 2016, p. 107) However, judicial practice has concluded that the absence of resistance of a certain intensity indicates that force was not used. There is no criminal offense of rape, nor of unlawful sexual activity, if the person consents or merely expresses opposition to sexual intercourse/another sexual act but their behavior indicates consent. (Aksentijević, 2018, p. 16)

A particular problem is distinguishing the criminal offense of unlawful sexual activity from the attempt to commit criminal offenses under Articles 178 to 181. The perpetrator's intent is accepted as the criterion for this distinction, meaning if the perpetrator's intent was directed at committing one of the criminal offenses under Articles 178 to 181, there will be an attempt to commit those offenses. If not, but there was still an intent to arouse or satisfy sexual desire, there will be unlawful sexual activity. Additionally, the objective nature of the acts undertaken must be considered—whether the acts

objectively, by their nature, are related to sexual intercourse or an act equated with it and are directed toward them as preceding acts. (Stojanović, 2020, p. 608) Thus, there is a criminal offense of unlawful sexual acts, not an attempt at sexual intercourse, when the "accused held the minor victim with one hand in the area of her back while with the other hand, over the pants she was wearing, touched and squeezed her, trying to remove her pants and lie on top of her." (Judgment of the Appellate Court in Niš, Kž1 259/2016 dated 27.05.2016.) On the other hand, there is an attempted criminal offense of rape, not unlawful sexual activity, when the "accused first began kissing the victim on the neck, then put his hand under her blouse and grabbed her breasts, then pushed his fingers into her genital organ, and finally, after failing to achieve an erection, pulled her hand to his genital organ, asking her to stimulate him; the accused intentionally began undertaking acts of coercion using force to commit rape against the victim but did not complete the criminal offense due to the victim's persistent and consistent resistance, as she resisted, moved, pulled up her pants and panties, and begged him to stop." (Judgment of the Supreme Court of Cassation, Kzz 886/2018 dated 04.12.2019.)

Regarding misconception in unlawful sexual acts, the following should be noted: in our legal system, until the adoption of the 2006 Criminal Code, a material-formal concept of criminal offense and psychological theories of guilt were accepted, so guilt was reduced to the perpetrator's mental attitude toward the act and was determined based on their awareness and will. At that time, mistake of law as a consequence of this understanding, did not affect the existence of guilt or the criminal offense, but represented a facultative basis for mitigating or exempting from punishment. The Criminal Code adopted a formal concept of criminal offense and guilt, according to mixed psychological-normative theories, represents the perpetrator's mental attitude toward the act for which they can be reproached. (Delić, 2008a, p. 161) The normative concept of guilt is based on the idea that guilt cannot be understood solely as the perpetrator's set of mental contents regarding the act but rather signifies society's value judgment about such content—its condemnation, reproach. (Vuković, 2017, p. 501) In other words, one cannot be reproached and subjected to criminal sanctions for violating a certain norm if they could not have known that norm under the circumstances of the specific case. (Stojanović, 2005, p. 24) According to mixed theories, the psychological content is always the starting point, supplemented by normative elements, so guilt is the unity of the real, material, subjective, psychological substrate and the objective, value-based, legal judgment about it, which has a socio-ethical dimension and whose content is determined by the dominant social morality. In short, guilt represents the unity of the ontological and the normative. (Delić, 2009a, p. 240) Thus, guilt is a complex category consisting of imputability, intent and negligence, and awareness of unlawfulness. According to the legal provision, guilt exists if the perpetrator, at the time of committing the criminal offense, was imputable and acted with intent, and was aware or should and could have been aware that their act was prohibited. Just as the perpetrator must have preserved the capacity for reasoning and decision-making and the appropriate mental attitude toward their act, the condition of guilt also includes their belief that they are doing something legally

impermissible. While intent is directed toward the elements of the offense, awareness of unlawfulness is examined independently of it, so even in the case of unreasonable mistake of law, the perpetrator could be held liable for an intentional offense. Awareness of unlawfulness and mistake of law are complementary concepts, so mistake of law is possible only if the perpetrator lacks such awareness. (Vuković, 2024, p. 256)

According to the legal provision, awareness of unlawfulness exists if the perpetrator was aware that their act was prohibited. Although there are differing opinions in theory about what this specifically entails, it should be understood that awareness of unlawfulness exists if the perpetrator is aware of the legal prohibition of the act, i.e., they have the awareness that they are committing behavior prohibited by law, meaning the perpetrator is aware, in a layperson's terms, that they are committing a wrong. The existence of awareness of unlawfulness does not mean that the perpetrator must know the legal norm in its specific form, i.e., they must know the text of the law prohibiting or prescribing certain behavior, as only a lawyer—and not every lawyer—could then be guilty. (Delić, 2008b, p. 187) For the perpetrator's awareness of the unlawfulness of their behavior, it is not sufficient to be aware of the social harmfulness of the behavior they are undertaking or that it violates moral norms, but it is also not necessary to be aware that the behavior is prescribed as a specific criminal offense. On the one hand, being satisfied with the perpetrator's knowledge that some behavior is socially harmful is too little, and on the other hand, requiring awareness that some behavior, in addition to being prohibited by law, is prescribed as a specific criminal offense is too much. The prevailing view adopts a compromise solution: awareness that some behavior is contrary to law in general, i.e., prohibited by law in general, without necessarily encompassing awareness that the behavior is prescribed as a criminal offense. It is sufficient for the perpetrator to believe that some behavior constitutes a misdemeanor. (Stojanović, 2006, p. 11)

It is not enough that the perpetrator's conscience tells them that their act contradicts moral and social norms, as it is possible for the perpetrator to be troubled by their conscience regarding the act, but still believe that their behavior is legally permissible. The idea that behavior violates elementary social norms or the inner voice that rules (e.g., sexual) morality are being transgressed will indicate that, in the specific case, the misconception, if it existed at all, was at least unreasonable, and the perpetrator does not deserve mitigation of punishment. (Vuković, 2024, p. 257)

There are different views on the nature of the concept of misconception. According to one opinion, in misconception, there is a mistaken belief about some circumstance, whereas in ignorance, there is a lack of belief about some circumstance. Thus, ignorance represents a negative state of consciousness, a lack of knowledge, while misconception represents a positive state of consciousness, albeit based on a mistaken belief, erroneous knowledge. According to another, more acceptable view, the term misconception in the narrow sense denotes erroneous knowledge, while in the broad sense, it denotes ignorance, so in criminal law, the term misconception should be used in the broad sense, i.e., as ignorance, because in the criminal law sense, misconception includes both those who have a mistaken belief/awareness and those who have no belief at all. (Delić, 2009b,

p. 753) Misconception is any lack of awareness, and it is irrelevant whether it appears as the absence of any belief about some actual circumstance, as ignorance, or merely as a mistaken belief about some actual circumstance. Some consider the latter case as «true» misconception, i.e., misconception in the «strict» sense. (Živanović, 1937, p. 61) Misconception should be distinguished from doubt, which is characterized by a conflict of beliefs and judgments, preventing conviction. As long as there is doubt, there is no true misconception, as misconception requires conviction in the accuracy of the belief. (Tahović, 1961, p. 191)

Unlike mistake of fact, where the perpetrator is not aware of what they are doing, in mistake of law, they are aware of it but do not know that what they are doing is legally impermissible, i.e., prescribed as a criminal offense. For example, if the perpetrator of incest is not aware of the kinship relationship, there is mistake of fact, whereas if such awareness exists but the perpetrator believes it is not prohibited, then it is mistake of law. (Babić, Marković, 2008, p. 314)

A judge of the Federal Court in Germany, Thomas Fischer, noted that behind the few lines of two provisions on mistake of fact about the elements of the offense and mistake of law in the German Criminal Code lies a legal-dogmatic, historical, and factual-scientific cosmos, which one could easily spend half a lifetime studying. Mršević states that this is an institute that is neither less applied nor more disputed in terms of its application. (Vuković, 2019, p. 94) Thus, although mistake of law is addressed in only one article of the Criminal Code, it is clear that this is a complex topic with many contentious issues.

Types of mistake of law are direct and collateral. The perpetrator is in direct mistake of law if they do not know that the act they are undertaking constitutes a criminal offense, i.e., they do not know that their behavior is contrary to the requirements of the legal order. The perpetrator is aware of the actual circumstances of their act, but lacks awareness of its unlawfulness. (Đokić, 2008, p. 232) This is a type of mistake of law directed at the element of the act's foreseeability in the law. It may happen that the prohibition is entirely unknown to the perpetrator, as they do not know that blackmailing the victim, even without coercion, by threatening to reveal a family secret unless they consent to sexual relations, is punishable, or the perpetrator is unaware of the provision that supplements the blanket disposition. (Vuković, 2024, p. 266) Collateral mistake of law exists when the perpetrator knows that certain behavior is a criminal offense, but mistakenly believes that an existing circumstance constitutes a ground for excluding unlawfulness or misjudges the existence of legal conditions for applying such a ground. The perpetrator has taken something as a ground for excluding unlawfulness that does not have such meaning, i.e., is not recognized by the legal order as a ground for excluding unlawfulness. (Đokić, 2008, p. 233) Misconception is collateral because the mistaken belief about the prohibition of behavior arises through imagined grounds for justification, not directly. Direct mistake of law is unlikely in the case of well-known criminal offenses, while collateral mistake of law is very possible—as in the case of murder committed under orders. (Đokić, 2008, p. 266)

There are criminal offenses (*mala in se*) that encompass behaviors impermissible in almost all societies and historical stages, such as murder, rape, robbery and similar criminal offenses, where the possibility of mistake of law is excluded. On the other hand, mistake of law may appear in *mala prohibita*, which are offenses whose unacceptability is not so obvious, and this includes the criminal offense of unlawful sexual activity. For these criminal offenses, the social harmfulness and criminality are not as pronounced and are not easily recognizable, as the recognition of their wrongfulness does not stem from the contradiction of the act with elementary moral norms. Therefore, in such situations, a series of circumstances are considered, such as the special characteristics of the perpetrator, their profession and occupation, the perpetrator's attitude toward the act, and similar. In this regard, it can be said that misconception would be reasonable if the perpetrator's behavior was conscientious, i.e., if every reasonable and conscientious person would have fallen into such misconception under the same circumstances. Misconception is unreasonable if it concerns a perpetrator who, considering all the circumstances of the case and their own characteristics, did not show the necessary degree of caution to recognize the prohibition of their act. (Babić, Marković, 2008, p. 316) Thus, in the criminal offense of rape, the perpetrator could not invoke the institute of mistake of law, given that it is a classic criminal offense prescribed everywhere as such. On the other hand, in the criminal offense of unlawful sexual activity, we believe that mistake of law is possible. It is generally known that rape is punishable, but it is not known that other sexual acts are also punishable, provided the other mentioned conditions are met. In the context of playful behavior, the perpetrator may claim that they could not have known that what they were doing was not permitted, especially at the moment when a new criminal offense is introduced. The perpetrator could argue that they did not know that what they were doing was prohibited because it seemed socially acceptable to them. However, if the perpetrator was aware of the legal norm but unclear about what exactly constitutes unlawful sexual acts, so they did not know what was punishable, there would be no mistake of law, given that the perpetrator had doubts about what they were doing. It is unlikely that the perpetrator could invoke reasonable mistake of law, given the development of technology and the availability of information; only someone completely "cut off" from the world, illiterate, etc., could invoke reasonable mistake of law, in which case they certainly could not have avoided that misconception. On the other hand, foreign nationals may invoke that in the legislation of their country of origin, such acts are not punishable, so they did not know that according to the Criminal Code, this constitutes the criminal offense of unlawful sexual activity. This is possible because unlawful sexual acts are not classic criminal offenses like, for example, rape, murder, i.e., they are not criminalized everywhere. Cases of unreasonable mistake of law will be more common, as the perpetrator could have inquired with anyone, not just professors, judges, lawyers, etc., i.e., they could have found out in multiple ways that what they were doing was punishable.

Criminal Offense under Article 182 and Criminal Offense under Article 180, Paragraph 1, and the Existence of Misconception

One of the elements of the criminal offense of sexual intercourse with a child and unlawful sexual acts is the characteristic of the passive subject—a child. In these criminal offenses, there is no form of coercion, but the criminal offense is committed with the "consent" of the passive subject. Although this is not consent in the true sense, there must be no force or qualified threat, as this would constitute the most severe form of the criminal offense of rape. (Stojanović, 2020, p. 600) In other words, the use of force or threats against a minor victim is not a necessary condition for the existence of the extended criminal offense of unlawful sexual activity or sexual intercourse with a child. Thus, in a court ruling: "the use of force or threats is not necessary, given that the act of execution of this criminal offense consists of performing a sexual act with a child, i.e., a person under the age of 14, and since the victim was under 10 years old at the time of the criminal offense, all the essential elements of the extended criminal offense of unlawful sexual activity under Article 182, paragraph 2, in relation to Article 180, paragraph 1, are present." (Judgment of the Supreme Court of Cassation, Kzz 1136/2021 dated 03.11.2021.) Also, if the act is committed against a helpless person under the age of 14, it will constitute the most severe form of the criminal offense of sexual intercourse with a helpless person. (Stojanović, 2020, p. 600)

The criminal offense of unlawful sexual activity with a child exists even when the accused kisses and caresses the victim's hair with the intent to satisfy their sexual desire. Judicial practice states that the accused committed unlawful sexual activity with a child when he: "invited the victim to go upstairs to try on his children's jeans, asking her to do so in his presence, which the minor victim refused and tried to leave the room, but he prevented her by standing in the doorway and holding her hands, and then, with the intent to satisfy his sexual desire, kissed the victim on the cheek several times and stroked her hair multiple times, telling her he loved her, that he had dreamed of her the night before, even though he was aware that he was committing unlawful sexual acts with a child, and wanted to do so, and was aware that his act was prohibited." (Judgment of the Supreme Court of Cassation, Kzz 349/2017 dated 11.05.2017.)

The criminal offense of sexual intercourse with a child must be distinguished from the criminal offense of unlawful sexual activity. For example, the accused who, to satisfy his sexual desire, removed the underwear of a male child and placed the child's genital organ in his mouth committed the criminal offense of sexual intercourse with a child, not unlawful sexual activity; as stated in the court ruling: "the accused took the victim to the basement, removed his shorts and underwear, knelt down, took out the genital organ and placed it in his mouth, moving his mouth around the minor victim's genital organ, then unfastened his zipper, took out his own genital organ, and showed it to him; the accused could not have been in mistake of fact regarding the child's age, given that the child's appearance, height, voice, speech, and physique clearly indicated that it was a child." (Judgment of the Court of Appeal in Kragujevac, Kž1 846/2018 dated 13.09.2018.)

A problem that arises in the criminal offense of unlawful sexual activity and the criminal offense of sexual intercourse with a child is the existence of mistake of fact regarding the age of the passive subject. This is possible especially in cases where the passive subject was not significantly below the age limit and physically appeared to be at least 14 years old. Considering that unreasonable mistake of fact here excludes guilt, for the existence of the criminal offense, it is not sufficient that the perpetrator could have ascertained the passive subject's age in a certain way, and the question arises whether there is a duty to determine the age before engaging in sexual relations with another person. (Stojanović, 2020, p. 600) The answer was provided by judicial practice, which states: "for the existence of the criminal offense of sexual intercourse with a child, it is not sufficient that the perpetrator could have ascertained the passive subject's age in a certain way, nor was the accused obliged in the specific case, considering all the circumstances, to determine the victim's age before engaging in voluntary sexual relations with her." (Judgment of the Court of Appeal in Kragujevac, Kž1. from 27.03.2014)

In Serbian and former Yugoslav criminal law theory, mistake of fact is distinguished in the broad and narrow sense, and so is the Criminal Code, which speaks of mistake of fact regarding some factual circumstance that constitutes an element of the criminal offense and mistake of fact regarding some factual circumstance that, had it existed, would have made the act permissible. (Vuković, 2013, p. 17) Mistake of fact about the elements of the criminal offense, like mistake of law about the grounds for excluding unlawfulness, can be reasonable or unreasonable. In unreasonable mistake of fact, the perpetrator in the specific situation could not have had a correct belief about the relevant factual circumstance. If, according to the circumstances of the specific case and the perpetrator's personal characteristics, the perpetrator could and should have had a correct belief about the relevant factual circumstances that constitute the elements of the criminal offense, there will be unreasonable mistake of fact or mistake of fact due to negligence. (Stojanović, 2020, p. 163) unreasonable mistake of fact excludes intent, but not negligence. This is possible only if the legislator has provided liability for negligence and the conditions for negligence are fulfilled in the specific case. Given that liability for negligence is not provided for the majority of offenses, the court's conclusion that the perpetrator acted in factual misconception will usually exclude the existence of the criminal offense. In the case of reasonable mistake of fact, unreasonable mistake of fact is not presumed but must also be proven. (Vuković, 2024, p. 250) It can be said that mistake of fact is the negation of intent, as a perpetrator who commits a criminal offense in mistake of fact can never be the perpetrator of a criminal offense with intent. (Srzentić, Stajić, Lazarević, 1996, p. 277)

In criminal legislation and theory, it has generally been uncontroversial that mistake of fact affects guilt, i.e., excludes both intent and negligence if it is reasonable and establishes liability only for negligentia if it is unreasonable. The effect of mistake of law is contentious. Some argue that *error vel ignorantia iuris non excusat*, while others believe that it is unjust to punish those who, for justified reasons, were unable to know about the prohibition of the act, given that the impossible cannot oblige anyone. (Atanacković,

1977, p. 57) For mistake of law to exclude guilt, and thus the criminal offense, it must be established that the perpetrator could not have avoided the misconception about the prohibition of the act, i.e., they were not obliged and could not have known about the prohibition of the act. Unreasonable mistake of law does not exclude guilt and exists if the perpetrator did not know that the act was prohibited, but should and could have known. The perpetrator is in misconception due to negligentia. Given that there is potential awareness of unlawfulness here, guilt is not excluded, but unreasonable mistake of law represents a facultative basis for mitigating punishment (Đokić, 2008, p. 239). In short, mistake of law would be the negative side of awareness of unlawfulness as an element of guilt, while mistake of fact would be the negative side of intent, more precisely its intellectual component, and the division of mistake of law into unreasonable and reasonable would be the other side of the division of awareness of unlawfulness into actual and potential. (Delić, 2008b, p. 188) In one case, the defense counsel invoked reasonable mistake of law regarding the victim's age, arguing, among other things, that both the accused and the victim belonged to the Roma national minority and had different cultural characteristics, and that the victim had said she was 17 years old when she was actually 13 years, 11 months, and 27 days old. The court in that case concluded that: «the accused, who was 22 years old at the time of the criminal offense, and whose emotional and social maturity, according to the expert's findings, was consistent with his calendar age, must have known, due to close family relations with the victim, that he was engaging in sexual relations with a minor, and therefore was not in mistake of law that was reasonable; the fact that the accused belongs to the Roma community with all its customs and life habits is irrelevant since it was unquestionably concluded that the accused could and should have known that his act was prohibited, and therefore did not act in reasonable mistake of law." (Judgment of the Appellate Court in Kragujevac, Kž1 403/2021 dated 22.07.2021.) On the other hand, in a similar case, the Appellate Court in Belgrade took the following position: "considering the circumstances under which the act was committed and the personal characteristics of the accused related to his level of education, personal situation, his family circumstances and environment, the accused could not have known that engaging in sexual relations with a person under the age of 14 was a criminal offense; attention is also drawn to the fact that due to the hyper-criminalization of behavior in modern society, insisting on the principle that ignorance of the law excuses no one is unsustainable, and considering the peculiarities of the Roma national minority (the environment from which the accused comes), which relate to early engagement in sexual relations and early establishment of life partnerships, the accused was not obliged and could not have known that engaging in sexual relations with a person under the age of 14 was prescribed as a criminal offense." (Judgment of the Court of Appeal in Belgrade Kž1 392/2019 dated 10.06.2019.) However, the Supreme Court of Cassation, regarding that ruling, concluded: "the accused has a third-grade secondary education—unlike many members of his ethnic community, lived abroad, and used a computer; even if the accused, due to his socio-cultural background, did not know about the prohibition of sexual relations with children, information about the inadmissibility

of sexual relations with children is easily accessible through the media and indicates that the accused should and could have known." (Judgment of the Supreme Court of Cassation, Kzz 1345/2019)

Criminal Offense under Article 182 and Criminal Offenses under Article 179, Paragraph 1, and Article 181, Paragraphs 1, 2, and 3, and the Existence of Misconception

One of the elements of the criminal offense of sexual intercourse with a helpless person and unlawful sexual acts is the characteristic of the passive subject—a helpless person. The passive subject does not accept sexual intercourse of their own free will; they are either unaware of the sexual act or are in such a state that they cannot actively resist the person performing the sexual intercourse. The essential characteristic of the criminal offense of sexual intercourse with a helpless person is that the sexual intercourse must be committed by exploiting a certain state in which the passive subject finds themselves. (Lazarević, 1981, p. 381) These states are: mental illness, retarded mental development, other mental disorders, helplessness, or any other state rendering the person incapable of resistance. Thus, the criminal offense of unlawful sexual activity exists when the perpetrator performs any other sexual act on a helpless person. The perpetrator could invoke mistake of fact in the sense that they did not know that the person was helpless, as well as legal misconception regarding the fact that they did not know that their behavior constituted another sexual act, which is punishable.

The central characteristic of the criminal offense of sexual intercourse by abuse of position and the criminal offense of unlawful sexual activity is the relationship of subordination or dependence. The relationship of subordination implies the subordination of two persons, in which the superior, based on some regulation or contract, is authorized to issue certain orders and instructions to the subordinate, who is obliged to carry them out. On the other hand, in a relationship of dependence, it does not necessarily involve persons with different positions in the hierarchy, but includes all other situations where one person factually depends on another, for example, the relationship between medical staff and a patient. Given that the law does not define when a state of subordination or dependence exists, this is a factual question decided by the court. (Vuković, Đokić, 2015, p. 890) The abuse of position and the relationship of dependence and subordination of the passive subject is an essential element of the criminal offense of unlawful sexual activity, and in the absence of this essential element, the accused's improper sexual behavior is legally qualified as sexual harassment. Judicial practice states that it is sexual harassment when: "it has not been proven beyond a reasonable doubt that the accused abused his position in relation to the victims; it is necessary that it involves a more serious form of abuse of position and a significant degree of dependence or subordination; the victims were not in a relationship of dependence and subordination in relation to the accused, as they voluntarily chose to undergo gynecological examinations in the accused's private practice, and such examinations were financed according to their choice of doctor, and

it cannot be concluded beyond a reasonable doubt that the accused abused his position." (Judgment of the High Court in Užice, Kž 194/2021 dated 11.01.2022.) As stated in judicial practice: "the use of force and the accused's disturbance in the sexual sphere as a teacher are not essential elements of the criminal offense of unlawful sexual activity in relation to Article 181." (Judgment of the Court of Appeal in Kragujevac, Kž1 5066/2013 dated 26.11.2013.)

Thus, the criminal offense of unlawful sexual activity exists when the perpetrator, by abusing their position, induces another sexual act from a person who is in a relationship of subordination or dependence with them. Consent here is not based on coercion or an undisputed lack of the other's will, as in the case of relations with a child or a mentally ill person. Here, it is often not about exploiting a state of necessity of the victim, but about an exchange of services, where the victim consents to the relationship expecting to receive some favor or privilege in return from the perpetrator. (Vuković, Đokić, 2015, p. 889) In one ruling, the first-instance court stated that the accused: "performed a sexual act with the intent to satisfy his sexual desire, and was the minor victim's homeroom teacher, who was entrusted to him for education, by meeting the victim near her apartment, touching her multiple times with his hand in the apartment, and then kissing her on the forehead," (Judgment of the Supreme Court of Cassation, Kzz 226/2018 of 21.02.2018.) while the Supreme Court of Cassation issued an acquittal, as it was not explicitly stated that the act was committed by abuse of position, which is a legal element of the offense. Referring to the above, in the case of sexual intercourse by abuse of position and the criminal offense of unlawful sexual activity, it is difficult to imagine the existence of misconception, as it is impossible that the perpetrator did not know that the person was entrusted to them.

Aggravated and Most Severe Forms of the Criminal Offense under Article 182

The aggravated form of the criminal offense exists if, as a result of the acts under paragraphs 1 and 2 of Article 182, the passive subject suffers serious bodily injury - a criminal offense qualified by a more severe consequence, or if the act is committed by multiple persons - a qualifying circumstance, or if the act is committed in a particularly cruel or particularly humiliating manner - a qualifying circumstance. When a more severe consequence results from the criminal offense, for which the law prescribes a more severe penalty, that penalty may be imposed if the perpetrator acted with negligence in relation to that consequence and exceptionally with intent if this does not fulfill the elements of another criminal offense. (Vuković, 2024, p. 271) Thus, if serious bodily injury is covered by negligence, the aggravated form of this criminal offense will exist. On the other hand, if there is intent in relation to serious bodily injury, there will be a concurrence of the criminal offense of unlawful sexual activity and the criminal offense of serious bodily injury. Multiple persons mean at least two persons - this is a qualifying circumstance that must be covered by intent. There is an opinion that in this case, two or more persons in the same situation independently fully fulfill the elements of the criminal offense, i.e., each of them intentionally applies coercion and another sexual act. Accordingly,

each person is the perpetrator of the criminal offense, which excludes the possibility of co-perpetration. (Delić, 2024, p. 102) The most severe form of the criminal offense exists if, as a result of the acts under paragraphs 1 and 2 of Article 182, the death of the person against whom the act was committed occurs—a criminal offense qualified by a more severe consequence. In relation to the death of the passive subject, there must be negligence. If the death of the passive subject is covered by intent, there will be a concurrence of the criminal offense of unlawful sexual activity and the criminal offense of murder.

According to judicial practice, the qualified form of the criminal offense of unlawful sexual activity does not exist when: "the accused put his hand over the victim's mouth, put his other hand under her underwear and inserted a finger into her genital organ, and the victim managed to remove his hand from her mouth and began to scream, after which the person removed his hand from her genital organ, and when she broke free from him, that person hit her in the area of her left eye, which was closed; but these injuries occurred after the accused had satisfied his sexual desire, and according to the intensity of the force, it cannot be said that there was physical torture of the victim, in which case it would have been the qualified form of the criminal offense in question." (Judgment of the Court of Appeal in Kragujevac, Kž1 588/2014 dated 05/26/2014.)

Criminal Offense under Article 182 and Criminal Offense under Article 182a

The criminal offense under Article 182a is defined as sexual harassment of another person. Here, the legislator, as in the case of the criminal offense of stalking, uses a specific normative technique of "subsequent definition" of the act of execution of the criminal offense, which is first stated in the basic and aggravated forms as a general clause, and then a definition of sexual harassment is provided in the third paragraph. (Škulić, 2016, p. 119) Sexual harassment is defined as any verbal, nonverbal, or physical behavior that aims to or represents a violation of the dignity of a person in the sphere of sexual life and causes fear or creates a hostile, humiliating, or offensive environment. In relation to acts involving physical contact with the passive subject, it is contentious to distinguish them from the criminal offense of unlawful sexual activity, given that the most common acts constituting unlawful sexual acts are cited as "hugging, kissing, touching various parts of the body, especially the genital area, etc." Considering that for unlawful sexual acts the commission is prescribed to be undertaken under the same conditions set out in the articles prescribing other criminal offenses against sexual freedom, meaning the use of force or threats, exploitation of the passive subject's state of helplessness, or abuse of position, sexual harassment would exist if a sexual act is undertaken on the passive subject's body outside these situations. Thus, the use of force and overcoming resistance so that the perpetrator can kiss the passive subject would constitute the criminal offense of unlawful sexual activity due to the use of coercion, while the same act would constitute sexual harassment if the perpetrator took advantage of the passive subject's surprise and undertook the act without using coercion. (Đokić, 2017, p. 552) We can conclude that sexual harassment represents a kind of lighter form of unlawful sexual acts, and therefore a concurrence between these two criminal offenses is not possible. (Stojanović, 2020, p. 609)

Conclusion

The presentation and analysis of the legal description of the criminal offense of unlawful sexual activity, as well as the criminal offenses to which the legal norm refers, show that the existence of mistake of fact and mistake of law is possible in these offenses. Based on everything stated above, we can conclude that our legislator, regarding mistake of law, has adopted a modern and, above all, humane solution by providing that reasonable mistake of law excludes guilt. Criminal law, like judicial practice, must follow progressive approach and trends. In this sense, criminal law must valorize and revalorize its institutes, and when justified, undertake radical qualitative and quantitative interventions. The legislator has proven with this solution that it is justified to abandon some traditional institutes, especially when it can reasonably be considered that the newly adopted concepts are more humane, fairer and more effective. (Delić, 2008b, p. 189)

Our judicial practice has so far interpreted and applied the institute of misconception very restrictively. Basically, it should be determined whether the perpetrator was in misconception (mistake of fact or mistake of law) and afterwards whether they were in it for justified reasons. Consequently, it should be determined whether it is justified to mitigate the perpetrator's punishment or exempt them from punishment. Unfortunately, it is often claimed without sufficient arguments that the perpetrator was not in misconception, and thus it is not discussed whether they were in misconception for justified reasons. (Stojanović, 2006, p. 17) It is very important to determine the existence of misconception, especially reasonable misconception, which excludes the existence of the criminal offense. Also, unreasonable mistake of fact can exclude the existence of the criminal offense if the legislator has not prescribed a negligent form, as in the case of the criminal offense of unlawful sexual activity.

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