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Review Paper

THE ABILITY TO UNDERTAKE AN ACTION THAT CONSTITUTES A CRIMINAL OFFENCE; MENTAL CAPACITY AND GUILT

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Abstract. *From the standpoint of legal theory, the paper provides an analysis of the correlation between the ability to undertake an action that constitutes a criminal offence and mental capacity (on the one hand), and the correlation between mental capacity and guilt (on the other hand). In the first part of the paper, the author points to the significance of the conduct that constitutes a criminal offence and analyzes the minimal requirements pertaining to the existence of such conduct as an important element of the general concept of a criminal offence. In the second part of the paper, the author correlates the ability to undertake a criminal action and the offender's mental capacity. In the final part of the paper, the author discusses the interrelation between the offender's mental capacity and other integral parts of guilt (culpability) as well as the correlation between mental capacity and guilt as a higher theoretical notion. The author's position on these issues in presented in two main conclusions. Firstly, the author concludes that free will, as a subjective element of the concept of criminal act, is immanent to every human being, whereas the subjective element of the concept of mental capacity is only possessed by mentally sound and mature persons. Secondly, given the fact that mental capacity implies the ability to be guilty, the author concludes that guilt is a relationship between the psychological being and the value judgment based on the presumption of the existence of mental capacity.*

Key words: *ability to take action that constitutes a criminal offence, guilt, criminal law.*

1. INTRODUCTION

In modern criminal law literature as well as in the majority of contemporary criminal codes, attempts have been made to formally distinguish between elements that comprise a general notion of a criminal offence. Despite this fact, we should not overlook that these

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elements are interconnected to an extent that the lines between them cannot be clearly drawn. Due to intertwining and partial overlapping of these elements, they are difficult to distinguish, contrast and compare.

The above stated can apply to criminal conduct as the first element of the general definition of the criminal offence that initiates application of criminal law to a particular situation. Firstly, conduct crosses the line and moves into the terrain of the second element – definition of an offence in the penal code, since the legal definition of each criminal offence provided for in the penal code describes a specific conduct constituting an individual criminal offence. Because of this, we could claim that criminal action, as an element of the criminal offence, represents a concretization of a higher theoretical notion of conduct as a first element of the general notion of a criminal offence. Further, the action in criminal law sense must necessarily possess a subjective content, as without such content we could not speak of a conduct (or action) that can only be undertaken by a human being. Hence, the criminal action, to a lesser extent than in the previous case, crosses into culpability or guilt.

In the pages to follow, we shall try to shed some light on the last mentioned relationship, being aware of the fact that this very complex issue received very little attention in the criminal law literature and leaving us dangerously exposed to possible mistakes. However, the significance of this issue is a reason enough for us to embark upon this journey. For that purpose, in this part of the paper, we shall point out to the significance of the notion of a criminal conduct and later analyze minimal requirement for the existence of such conduct, in order to examine a subjective substratum which is common for all criminal conduct, regardless of a theoretical approach we chose. This subjective substratum will provide us with an answer to the question who is capable of undertaking action described as criminal action. After that, we shall examine the correlation between the ability to undertake criminal action and mental capacity. This discussion would remain incomplete if we were not to correlate the issue of the mental capacity with other elements of culpability (guilt), as well as with guilt as a more theoretical notion. This relationship is discussed in detail in the final portion of this paper. Our aim was to prove that an ability to undertake certain action is fundamental to the existence of capacity, while the capacity is located at the center of the guilt. Each of these elements, to a smaller extent, crosses into the next. In any case, it is undisputed that, if a certain conduct does not fulfill minimal requirements to be declared as criminal conduct, then the issue of capability of the person engaged in such conduct is not considered. Similarly, the person's mental criminal incapacity automatically eliminates the need to examine that person's culpability.

2. THE NOTION OF CRIMINAL CONDUCT

According to a majority opinion, conduct or action is the first element in the general notion of the criminal offence that is the first step in the application of criminal law, although there are opposing views on this issue in the modern criminal law literature (Stojanović, 2013: 98). It is a starting point for assessment of incrimination. If a certain human action does not meet requirements to be declared as a criminal action, there is no need to go further into examining whether other elements in the general notion of the criminal action exist, such as definition of an offence in the penal code, illegality and guilt. The action is a necessary element for the existence of a criminal offence and for the

penalty to be imposed. Even when criminal law looks into the future and wants to prevent future criminal offences from taking place by imposing security measures against perpetrators who are dangerous to the society, the illegality of an offence and the action are still requirements that must be met. In other words, at this point of application of the penal code, we are not interested in the psychical relationship of the perpetrator towards the undertaken action; rather, we are only interested in his external behavior, attack on important interests protected by the law. Therefore, we take into consideration some human behavior (an action) that should possess certain, although minimal qualities; yet, we still do no analyze psychical aspects of the personality of the person undertaking the action although we may oppose internal state of mind of such person and reprehend him for his socio-ethical inclinations that we find unacceptable. Consequently, the mere contemplation about a crime is still not a conduct, which makes it irrelevant from the point of view of criminal law as long as such thoughts do not take material form in the outer world and result in negative social behavior. This is because the legal system may be jeopardized only an action and not by a contemplation of such action, regardless of how immoral and socially unacceptable it may be. Surely, criminal law is not interested in socially useful or socially neutral conduct; in fact, it is only interested in conduct that violates or jeopardizes important interests protected by the law.

The task of criminal law theory is to determine the general definition of the action or conduct, a definition that would be common to all criminal conduct, regardless of a particular criminal offence. Further, we are interested in the legal definition of conduct, rather than something that could be defined as a conduct in accordance with natural, philosophical, medical or psychological understandings. Moreover, this definition should only cover a concrete incident and should not contain any value judgment, except for general belief that a particular action is socially unacceptable, which is a prerequisite for person's behavior to be examined from the criminal law standpoint. Whether a certain incident that constitutes a human conduct is a violation of a criminal code shall be determined at a later stage when illegality of an action shall be determined in accordance with the law (Baumann, Weber, Mitsch, 2003: 203). Finally, the issue whether the offender shall be punished for his actions shall be settled when deciding upon his culpability.

2.1. Minimal requirements for conduct

The notion of conduct is primarily aimed at taking certain incidents out of reach of criminal law. Further selection is made in the area that remains after the elimination of incidents that are irrelevant from the standpoint of criminal law. A question to be asked is the following: what are the key features that a certain conduct or action must possess in order to be regarded as an action within the meaning of criminal law (Ebert, 2001: 21). In order words, it is mostly uncontested in the criminal law theory that there are certain minimal requirements that each criminal conduct must possess. What is contested is whether the conduct should possess some other requirements, apart from the minimal requirements. The crux of the problem boils down to the following question: what is the significance of intent for the definition of conduct? Various answers to this question have impact on the system of criminal offences,[1] for which reason this question is of great

[1] There are several theories on this issue, the most significant being those that support causal, final and social interpretation of the notion of the action. For more details see: Stojanović (2013: 99-100).

theoretical and practical significance. However, in the pages that follow we shall not engage in trying to provide answers to this question as such endeavor should be examined independently in a separate paper. In this article, we shall try to shed more light on the relationship between the ability to undertake certain conduct or action and offender's mental capacity (on the one hand), and we shall examine the relationship between mental capacity and the guilt (on the other hand). After providing an analysis of the minimal requirements for conduct, we shall obtain a clear picture on the above mentioned relations. Hence, we shall continue with the aforementioned analysis.

In that regard, conduct may be defined as a human action carried out by free will.

First of all, it must be an action of a human being. In contrast to past criminal codes that allowed criminal proceedings against animals and provided sanctions for the punishment of animals, modern criminal law systems limit their scope of application to the punishment of human actions, i.e. the punishment of human behavior (Baumann, Weber, Mitsch, 2003: 201). Incidents not caused by a man, such as natural processes, are of no significance for criminal law. Hence, if a person should lose their life to avalanche, strike of lightning, or to being bit by a wild animal, those actions are not considered as criminal conduct. Only human action may be regulated by the norms of criminal law. Only the human can be required to harmonize his behavior with the principles of life in a community (Baumann, Weber, Mitsch, 2003: 201). We also noted that a certain action of an individual, that constitutes socially striking, negative behavior of the individual demonstrated to the outside world, has to take place. What is not presented to the outside world is not to be assessed in terms of criminal law. We also noted that plans, intentions, contemplations (regardless of their quality or content), are irrelevant from the criminal law standpoint, unless they are transformed in an action in the outside world (*Cogitationis poenam nemo patitur*). Notably, when we speak of conduct, we do not only mean committed actions but also omission to take legally required actions. Such failure to take action exists, for example, when a mother fails to give food to her toddler as a result of which he dies of starvation. Such omission is to be examined from the standpoint of criminal law.

Secondly, the concept of conduct would be too broad if it were to refer to any action by a human being that can be detected in the outer world. For this reason, the conduct must be limited only to actions that are caused by the will of a human being or, at least, where the the will should have an effect on such conduct. This is evident from the notion of a criminal offence because we do not speak of the offence in the case of involuntary conduct that is not carried out by our will (Baumann, Weber, Mitsch, 2003: 203). For this reason, conduct that has characteristics of a criminal offence "in criminal law is considered only in the event the action undertaken by a person was conditioned by a will of that person that does not fulfill the requirements set by the law" (Merkel, 1912: 80). Only in such circumstances can an action (relevant from the criminal law standpoint) be attributed to the person that committed that action. Therefore, conduct or action is a human behavior carried out by human will that can be undertaken either by explicit action or omission to take action.

Those human activities that are not the result of the human will, those that are taken unconsciously or those that cannot be placed under control by appropriate control mechanisms are not considered to be criminal actions.

In that regard, actions undertaken under the influence of force that could not be deterred by the offender (*vis absoluta*) are not considered to be actions of criminal conduct. For example, a man that has been pushed against a window glass or onto another person is not

considered to have undertaken a criminal action of destruction of another person's property or inflicting bodily harm because he has been used as a mechanical instrument to commit an offence by another person. He was a tool in the hands of another person and he was not in a position to confront that other person. The same can be said when someone's hand is physically forced to forge a document. However, a situation is quite different when a person uses a weapon as a means of coercion, or when he/she uses physical strength in order to force another person to forge a document (*vis compulsive*). In this example, that other person undertook the action within the meaning of criminal law, regardless of the fact that this action was not in accordance with his will, i.e. that the actions was extorted.

Also, physical movements undertaken during sleep or in the state of full lack of consciousness (unconsciousness, epileptic seizure, delirium) are not to be considered as criminal conduct. For example, if a mother smothers her own child in sleep, or kills him in a state of epileptic seizure, in such instances we usually do not speak of manslaughter.[2]

Further, reflex movements, where external stimuli cause bodily movement without interference of consciousness or free will, are also not considered to be criminal conduct. An example for this is when a physician is testing knee reflexes of a military recruit that kicks him in return. Reflex moves also cover examples of sudden movement caused by lightning or closing one's eyes as a result of painful insect bite (Kühl, 2002: 14), which can all cause certain negative consequences. Spontaneous reactions should be distinguished from reflex movements, although such distinction is sometimes hard to make in real life. The spontaneous reaction is when a person operating a motor vehicle suddenly losses control over the vehicle and causes a traffic accident because of a jerk defense movement caused in turn by insects flying around his head. Likewise, fast ('instinctive') avoiding maneuvers in traffic, as reactions to obstacles that suddenly came about, are normally covered by the definition of conduct (Jähnke, 2003: 14). There is a well-known example from the German case-law where a person that was operating a vehicle in order to escape an animal that suddenly appear in front of him, turned and hit a post located along the road. In the accident, the passenger died (Kühl, 2002: 14-15). In this case, the defense movement did not occur involuntarily; rather, it was intentional although it happened very quickly and defense mechanisms did not have time to kick in (Kühl, 2002: 14-15). Therefore, in case of spontaneous willful reaction, the conduct is not entirely eliminated but the impulse is generated very fast and it switches to reaction; in that situation, there is usually not enough time to form counter motivation. For this reasons, such conduct is regularly considered as an action in the criminal law sense. The so-called panic reactions, where bodily harm may be inflicted upon another individual, are harder to evaluate. Namely, in the first phase they may represent a pure reflex response to external stimulus that does not represent the actions within the meaning of the criminal law, but that could transform into 'behavioral reaction' that has a character of the action.[3]

[2] However, if a mother knew that she has a restless sleep or she had previously had epileptic seizures and nevertheless placed a child in bed next to her, criminal law punishment may be associated with the prior action she undertook. The action is the fact that the mother placed the child in her bed, which implies negligence on her part. We believe that this possibility of associating punishment with an earlier action should be interpreted restrictively and used only when necessary because it deviates from the rule that capacity and guilt are attached to the moment when the criminal offence is undertaken. Further, the conduct in these cases is considered to be an action that is so distant from the prohibited consequence that it did not attribute to its occurrence in any way.

[3] For more, see: Kühl, 2002: 14, 15. Contrary to that, there are authors who claim that the so-called panic reactions are always actions in the criminal sense of the word. See: Ebert, 2001: 21.

Finally, we shall look into the quality of actions that are often called automatic behavior, which implies the behavior that has transformed into a habit, such as actions when operating a motor vehicle. In that case, it is necessary to assess in each individual case whether certain behavior is automatic or semiautomatic. Namely, semiautomatic behavior (as the one suggested in the previous paragraph) falls within the meaning of criminal conduct. This is uncontested and justifiable because "when walking there is a semiautomatic control of individual body movements" (Baumann, Weber, Mitsch, 2003: 210). When discussing entirely automatic reactions, there are authors that consider that such actions occur without any conscious control and, for that reason, they are considered to be criminal actions within the meaning of criminal law (Lackner, Kühl, 2001: 122). We are of the opinion that automatic movements are conducted under a clandestine personal control or, to put it differently, they belong to the person. However, most such reactions elude restrains imposed by consciousness. For this reason, we may say that such actions are the result of the will and, thus, they fall within the meaning of action as defined by the criminal law (Jähnke, 2003: 14). Affective and instinctive actions should be distinguished from automatic actions because the former are impulsive and characterized by the lack of wisdom because their restrains or protective mechanisms are unjustifiably set aside. For this reason, such actions possess the quality of the in the criminal law action. The same may be said of actions undertaken during the moon-walking episode, although this is somewhat contested (Lackner, Kühl, 2001: 122).

3. Ability to Undertake Action and Mental Capacity

As for actions within the criminal law meaning (human behavior based on the will), such actions may be undertaken by any natural person. Therefore, even the children and mentally impaired persons may undertake such actions. The ability to undertake a criminal action should be distinguished from the mental capacity. The question that needs to be asked concerning the ability to undertake a criminal action is whether a person is capable of willful action; on the other hand, when discussing the mental capacity, the key questions is whether the person committing the offence was capable of understanding the restriction imposed by the criminal law provision and acting accordingly. The capacity largely depends on the state of psychical functions and the quality of psychical features of the offender at the time of the criminal offence, and these features have no major influence over the fulfillment of minimal requirements necessary for the existence of the action within the meaning of criminal law. It can be said that the will, as a subjective element of the notion of criminal action, is immanent to every human being, whereas the subjective element of the notion of mental capacity is only possessed by mentally sound and mature persons. Therefore, before testing the mental capacity, it is essential to determine whether the will exists; it is the first step of criminal law attribution. If a certain behavior of a man does not fulfill the minimum requirements necessary for the action to exist, the question of mental capacity will not be put forward. The question of culpability is raised only after it has been determined that certain behavior qualifies as a criminal action, provided that all other elements that constitute the criminal offence are fulfilled and provided there are no circumstances excluding unlawfulness.[4] The presumption of the guilt is the offender's

[4] On circumstances excluding unlawfulness see, for example, Pihler, 1994.

mental capacity, which implies "mental soundness and free will on the part of the offender that enable him to understand the criminal norm and to be in position to abide by it" (Baumann,Weber, Mitsch, 2003:448). It can be concluded that undertaking the conduct that (within the meaning of criminal law) represents an unlawful offence in the criminal system does not depend on mental capacity. The action may be undertaken even by a person lacking mental capacity. Conditionally speaking, for the notion of the action, it is sufficient to say that it was undertaken by a man, while for the mental capacity, it should be said that he "acted as a man" and that his actions, on that particular occasion, were the product of 'normal' mental disposition and 'average' psychological state of mind. In reference to that point, a theologian Bruno Schüller stated that: "he who acts in an outburst of madness, he is a man, but he does not act as a man, he does not act consciously and freely, but under the impulse of pure natural instinctive mechanisms" (Schild, 1979: 129). Therefore, the notion of action is a characteristic of a man, where the notion of mental capacity is the notion of a 'free' man. We could describe it more vividly by stating that a person undertaking the action may be 'confirmed as being a man', while by confirming his mental capacity he is 'ordained' as a 'free' and responsible man. For this reason, some authors state that "mental capacity, from substantial point of view, is the foundation of the criminal offence, as a responsible human behavior, it is the most important feature of the notion of the criminal offence" (Schild, 1979: 129) despite the fact that it does not take the most prominent place, but is rather determined only when discussing guilt. If we were to accept the offender that undertook the criminal action as a man, then the exclusion of mental capacity must stand as an exception that is associated not with the offence (man) but with the circumstances relating to the motivation of the offender; therefore, they must represent circumstances excluding the guilt (Schild, 1979: 129). On the contrary, if we were to negate the possibility that grave mental patient may undertake the action that meets legal description of a criminal offence, then we would concurrently and indirectly negate his human nature.

4. Mental Capacity and Guilt

In the previous section, we have touched upon the issue of relationship between capacity and guilt. However, since the two are fundamental characteristics of the criminal law, which are mutually interconnected and dependent upon each other, we are obliged to examine this relationship in more detail.[5]

In older criminal law teachings, there was an understanding that mental capacity is the first prerequisite for determining the criminal character of certain behavior. Consequently, every criminal law study commenced with examining mental capacity. Today, it has been generally accepted that mental capacity is only relevant for determining guilt (Baumann,Weber, Mitsch, 2003: 448). Accordingly, the possibility of committing an illegal action that fits

[5] This relationship is difficult to determine since guilt and mental capacity are not defined as such in any criminal code. Even today, there is no predominant teaching in the criminal law about the content of guilt and mental capability. Thus, a description of the criminal law guilt may include: failure to fulfill moral duties of a man (opting to act contrary to law despite the possibility to undertake different action); possibility to charge someone with an offence and to initiate a legally negative conviction contained within such offence; a lack of connection with some interest protected by the law; an internal attitude of the offender towards the action he could be charged with; a pure functional notion of guilt. For more details, see: Witter, 1989: 40. It is rather similar to the definition of capacity. Hence, we shall be very cautious when discussing the relationship between guilt and capacity in general, given that it may be interpreted differently.

the legal definition of an offence is granted even to a serious mental patient. Therefore, it is no longer associated with the offender's capacity.

Mental capacity is directly and very closely connected to guilt. The question of mental capacity is the question of being capable of guilt. The function of capacity is precisely to determine the ability of the offender to be guilty, *doli et culpae capacitas*. In order for a man to be guilty and to be punished, he must possess certain psychological characteristics (mental capacities). He must have normal mental disposition that would enable him to understand the legal norm and to abide by it. Only a person that has achieved a certain degree of maturity and who is free from grave mental illness can be capable of this. Therefore, the mental capacity is the first feature upon which the guilty judgment is based upon (Jescheck, 1988: 390). By determining the mental capacity, we determine the circle of people that may be held liable and punished (Bačić, 1998: 220). Our Criminal Code honors this in Article 22 where it states that: an offender is guilty if he was mentally competent and acting with premeditation at the time of committing the criminal offence, and was aware or should or could have been aware that his action was prohibited. An offender is also guilty when acting in negligence, if so explicitly provided by the law."[6]

From the above, it follows that we can observe the relationship between mental capacity and guilt in general. While the concept of mental capacity relates to the quality of psychical structure of a person (in relation to a certain action), the concept of guilt covers socio-ethical evaluation of the psychological relationship and the attitude of the offender towards the offence. Accordingly, when dealing with mental capacity, we need to determine whether a person was psychologically capable of guilt, as a category based on socio-ethics; on the other hand, when dealing with guilt, we need to determine the precise psychological composition of that person in relation to the offence, which tells us whether he/she committed the offence willingly or involuntarily, or by acting with grave negligence for the law and interests of others that are protected by the law. This assessment should demonstrate whether the mental capacity provides legal grounds to punish the offender for the offence. Guilt covers the entire psychological state (capacity) and determines the psychological relationship of the offender towards the offence (*mens rea* or negligence). As such, the concept of guilt is wider than the concept of mental capacity (because it includes the latter). On the other hand, guilt is at the same time narrower than mental capacity because mental capacity is the ability to be guilty, while guilt itself is only a concretization of that ability. Therefore, we can say that the notion of guilt is at the same time wider and narrower than the notion of mental capacity, depending on the paradigm from which you observe their mutual relationship. This relationship is best, and most precisely, described by one of definitions of guilt accepted in the criminal law theory. According to this definition, guilt is 'a relationship between the psychological being and the value judgment based on the presumption of the existence of mental capacity'.[7] This definition fully corresponds to our view of guilt.

Mental capacity is presumed because we believe that 'an average' criminal offender in the course of committing a criminal offence had usual psychological qualities of a person with normal mental personality structure, that enabled him to understand his actions and

[6] See: Article 22 of the Criminal Code of the Republic of Serbia.
[7] Schmidt. Cit.: Mergen, (1955) Zum Begriff der verminderten Zurechnungs-fähigkeit im Sinne des § 51 Abs.2 StGB, *Goltdammer´s Archiv für Strafrecht,* p. 193.

the consequences thereof. Naturally, this presumption may be eliminated; so, it may be proven that the offender, due to mental illness or grave mental disorder or retardation, was not capable of understanding the natural and social significance of his actions, and could not control them at the time of committing the offence. If no suspicion is raised concerning someone's mental capacity, according to the structure of our criminal law, we move to determining whether the offender acted with intent or with negligence at the time of the offence and concerning that specific offence, provided that the law prescribes penalty for acting with negligence for that particular criminal offence. Finally, if and when this is proven, we move to the last, the so-called normative element of guilt: to determine the awareness i.e. the likelihood of being aware of the unlawfulness of the offence. Just as it is the case with the mental capacity, the awareness of the unlawfulness of the offence does not have to be supported by evidence in criminal proceedings. We start from the presumption that the offender who was aware of the entire factual aspect of the offence was, concurrently, aware of the unlawfulness of his actions. However, there is a possibility that, under specific circumstances, some offenders were not aware of the illicit nature of their acts. In such situation, it is necessary to prove that at the time of the offence the offender was either not aware or was not obliged to be aware or could not have been aware of the unlawfulness of his actions, or that the offender was not aware of the unlawfulness of what he had done but that he was obliged to have been aware and could have been aware.[8]

Therefore, instead of proving mental capacity it is essential to prove mental incapacity or (substantially) diminished mental capacity; similarly, instead of proving the awareness of the unlawfulness of the offence, it is essential to prove the lack of (present or potential) awareness. Yet, the element whose existence must always be proven is the specific intent or negligence of a particular offender for committing a specific criminal offence.

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[8] Such distinction is reflected on different criminal law consequences within the interpretation of legal error.

SPOSOBNOST ZA PREDUZIMANJE RADNJE KRIVIČNOG DELA, URAČUNLJIVOST I KRIVICA

U radu autor se bavi teorijskopravnim razmatranjem, s jedne strane, sposobnosti za preduzimanje radnje u krivičnopravnom smislu i uračunljivosti, a s druge, uračunljivosti i krivice. U prvom delu rada autor je ukazao na značaj pojma radnje, a zatim je odredio njene minimalne pretpostavke bez čije ispunjenosti ne postoji radnja kao elemenat opšteg pojma krivičnog dela. U drugom delu svog rada autor dovodi u vezu sposobnost za preduzimanje radnje i podobnost učinioca krivičnog dela za uračunljivost. Poslednji deo rada govori o razgraničenju instituta uračunljivosti i ostalih sastavnih delova instituta krivice, ali i o odnosu uračunljivosti i instituta krivice kao višeg teorijskog pojma.

Izlaganje u radu moglo bi se svesti na dva najvažnija zaključka. Kao prvo, autor zaključuje da je volja kao subjektivni elemenat pojma radnje imanentna svakom ljudskom biću, dok subjektivni elemenat pojma uračunljivosti poseduju po pravilu samo duševno zdrave i duševno zrele osobe. Kao drugo, s obzirom na to da je uračunljivost sposobnost za krivicu, autor izvodi zaključak da je krivica – na pretpostavci uračunljivosti zasnovani odnos između psihičkog bića i vrednosne ocene.

Ključne reči: *sposobnost za preduzimanje radnje, uračunljivost, krivica, krivično pravo*.