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HORIZONTAL AND VERTICAL AGREEMENTS: DIFFERENCES BETWEEN THE EUROPEAN UNION AND THE UNITED STATES

This article compares the European Union and the United States with respect to competition law and enforcement practices as it pertains to agreements among competitors in a market (horizontal) and agreements among firms in a supply chain (vertical). Regarding horizontal agreements, the primary difference in the law is the ability of the competition authority to bring a criminal case in the U.S. and a more subtle difference is the presence of concerted practices in the EU. Enforcement differs in the far more active role of private litigation in the U.S. The differences are greater when one turns to vertical agreements. Though the EU provides safe harbors for vertical agreements, something which is absent in the U.S., it is abundantly clear that the U.S.is more lenient in the law and in enforcement. Also provided is a discussion of some recent departures between the U.S. and EU.

Key words: *Competition Law. − Horizontal Agreements. − Vertical Agreements. − European Union. − The United States.*

1. HORIZONTAL AGREEMENTS

1.1. Introduction

The relevant U.S. legislation pertaining to horizontal agreements is Section 1 of the Sherman Act[1] and Section 5 of the Federal Trade

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[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Commission Act.[2] The jurisprudence that has come out of these acts has provided a reasonably well-defined, though incomplete, statement regarding what types of arrangements between competitors in a market are in violation of the law.[3] Complementing this dicta are guidelines provided by the Antitrust Division of the U.S. Department of Justice (DOJ) and U.S. Federal Trade Commission (FTC).[4]

With one exception, it is my opinion that there are not any fundamental differences between the European Union (EU) and the United States (U.S.) with regards to competition law as it pertains to horizontal agreements. There are, however, subtle differences which could impact which cases are brought and how they are resolved.

That one fundamental difference is that the DOJ can bring either a civil case or a criminal case under Section 1, while criminal cases cannot be pursued under Article 101. For those countries with criminal liability for violating their national competition laws (such as Germany and Ireland), the U.S. is unusual in that the competition authority (specifically, the DOJ) has the capacity to criminally prosecuted, while that capacity resides elsewhere in the government for these other countries, such as with the Federal Prosecutor's office. As a result, the DOJ can decide to bring either a civil case or a criminal case, while most competition authorities are restricted to the former. A criminal case brings with it a higher standard for proving liability but also a more severe individual penalty in the form of incarceration. It is also worth noting that, contrary to almost all other countries that have criminalized collusion, the U.S. routinely penalizes those individuals involved with prison sentences.

This review of the differences between the EU and the U.S. regarding horizontal agreements will first address some issues of liability and then turn to evidentiary rules.

1.2. Agreement

Though the word "agreement" does not appear in Section 1 of the Sherman Act, jurisprudence has established that it is an *agreement* which is in violation of the law. Subsequent competition laws, such as

[2] "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

[3] It is incomplete in that certain practices have been prohibited through a consent decree between the government and firms but the Court has not yet ruled on their illegality. A consent decree is an agreement or settlement between two parties that does not involve an admission of guilt or liability. A consent decree appears similar to a European Commission's commitment.

[4] In particular, "Antitrust Guidelines for Collaborations Among Competitors," Federal Trade Commission, U.S. Department of Justice 2000.

Article 101 of the TFEU, have gone on to use the term "agreement". The U.S. Supreme Court has developed the doctrine that an agreement to restrain trade is unlawful and has defined an agreement as or as requiring a "unity of purpose or a common design and understanding, or a meeting of minds" (*American Tobacco Co. v. United States*, 1946), "a conscious commitment to a common scheme designed to achieve an unlawful objective" (*Monsanto Co. v. Spray-Rite Serv. Corp.*, 1984), and "mutual consent" (*Esco Corp. v. United States*, 1965). Similarly, the EU General Court has defined an agreement as or as requiring "joint intention" (*ACF Chemiefarma*, 1970) and a "concurrence of wills" (*Bayer v. Commission*, 2000). All of these phrases refer to the same state of the world: Competitors have reached a state of mutual understanding to restrain competition. By my reading, there is no difference between the EU and the U.S. regarding what is an unlawful agreement. As discussed below, there can be differences in practices (due to evidentiary rules) and then there is the matter of "concerted practices" which exists in the EU and, at least in that form, does not exist in the U.S.

For firms to have an unlawful agreement in the U.S., there must be some exchange of assurances. This could mean one firm expressly inviting another firm to raise price to some common level and the other firm expressly accepting that invitation. However, the exchange need not be so explicit: "[Firms] need not have exchanged promises of assurances of their actions; it is enough that they have communicated their intent to act and their reliance on others to do so." (Page 2009, 451). For example, acceptance of an invitation by a firm could take the form of raising price to the proposed common level without any verbal or written communication. Or a firm announces its plan to raise price in a trade meeting with competitors and subsequently all firms raise price to the same level. Thus, an exchange of assurances can be inferred from subtle messages and actions.

U.S. courts have recognized three forms of collusive conduct, not all of which are illegal. An explicit or express agreement involves direct communication between firms which, without the parties having to draw any inferences, involves an exchange of assurances to restrain competition. A tacit agreement involves non-express communication but where there is a distinct, identifiable action that facilitates achieving mutual understanding. For example, this could mean one firm announcing a price increase at a private gathering with competitors. Explicit agreements are per se illegal in that it is sufficient to establish that the firms engaged in the activity. (Though we will later explain that there are exceptions.) Tacit agreements may be per se illegal or may only be illegal after balancing the procompetitive and anticompetitive implications of the agreement (referred to as the rule of reason). The third category of collusive conduct is conscious parallelism whereby firms are coordinating their conduct and

have done so without any communication (or at least there is no evidence of communication). The most common instance of conscious parallelism is where firms price in a parallel manner and there is no evidence that they agreed to coordinate their conduct. Conscious parallelism is a process

> not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests.[5]

The European Commission recognizes the same three forms of collusive conduct. Though no agreement is per se illegal under Article 101, explicit agreements are, for practical purposes, as per se illegal in the EU as they are in the U.S. Jurisdictions will vary in terms of what it takes to conclude that there is an unlawful tacit agreement (just as much as U.S. courts will differ on the matter) but both the EU and U.S. recognize this category of agreement. (There will be more on this topic later when we discuss concerted practices.) As in the U.S., parallel pricing (and other forms of conscious parallelism) is not unlawful in the EU.

1.3. Concerted Practices

A possible point of departure between the EU and U.S. is on the matter of *concerted practices*. In the EU, concerted practices refer to

> co-ordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.[6]

My own view is that the distinction is largely semantic. The U.S. has a more expansive view of "agreement" which to a significant (if not complete) extent accommodates those practices that are classified as concerted in the EU. For example, advance price announcements can be viewed as a concerted practice. Though there is no "proper agreement" between firms, their sharing of those price intentions allows them to coordinate and thus is a concerted practice. In the U.S., advance price announcements could be viewed as an agreement in that the firm that initially proposes to raise its prices by 10% come the first of the next month is inviting the other firms to coordinate their prices, and the other

[5] U.S. Supreme Court, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*, 509 U.S. 209 (1993).

[6] CJEU, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73, Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, ECLI:EU:C:1975:174, para. 173.

firms are accepting that invitation when they respond with the same announcement.[7]

A case which suggests that there may be some subtle distinctions between the EU and U.S. is corrugated containers.[8] In this case, a firm would contact a rival firm to learn its most recent price charged or quoted. It was typical for a firm to match that price and, as evidenced by their pricing conduct, there was an understanding not to undercut another firm's price. The Court inferred there was direct evidence of an agreement to share information but not direct evidence of an agreement to coordinate prices. Such information sharing was determined not to be per se illegal, but a violation was nevertheless found because it was shown that it had the effect of raising price. The U.S. Supreme Court concluded that the practices violated the Sherman Act:

> [T]he exchange of prices made it possible for individual defendants confidently to name a price equal to that which their competitors were asking. The obvious effect was to stabilize prices by joint arrangement ... I cannot see that we would be justified in reaching any conclusion other than that defendants' tacit agreement to exchange information about current prices to specific customers did in fact substantially limit the amount of price competition.

It is possible that the information sharing practice, without any evidence of effect, might be sufficient to establish it as a concerted practice. In this case, the Court used evidence of effect and left somewhat open the question of whether that was necessary.

In sum, many concerted practices could, in principle, be viewed as agreements under U.S. law. While concerted practices may result in Article 101 being more expansive than Section 1, the differences appear to be minor.

1.4. Invitations to Collude

Under Section 5 of the Federal Trade Commission Act, the FTC has brought a number of actions against companies for inviting competitors to collude. As there was no evidence that the invitation was accepted, these cases are not prosecuted under Section 1 of the Sherman Act on the grounds that there is no agreement (though such cases have

[7] Though there has not yet been a judicial decision to clarify whether advance price announcements are an illegal agreement under Section 1 of the Sherman Act, the DOJ did enter into a consent decree with multiple airlines to prohibit such a practice. See Borenstein (1994).

[8] U.S. Supreme Court, *U.S. v. Container Corporation of America*, 393 U.S. 333 (1969).

been prosecuted under Section 2 of the Sherman Act as an attempt to monopolize).

These "invitation to collude" cases range from an express invitation made in private by one firm to a rival firm[9] (which, had it been accepted by the rival firm, would have been a per se violation) to public announcements that tacitly solicit coordination. An example of the latter is an executive during an earnings call announcing that it will stop an industry price war by raising prices but will continue it should competitors not follow.[10] These cases have typically resulted in a settlement whereby the firm agrees to discontinue the conduct. Thus far, they have not been tested in court. It is unclear to what extent this type of legal action exists in the EU. It is not an agreement under the more expansive U.S. interpretation – and thus would not seem to be an agreement in the EU – and it is not clear that it is a concerted practice because there is no "practical coordination."

1.5. No Poaching Agreements

In concluding this comparison of liability for horizontal agreements in the EU and U.S., let me mention a recent enforcement direction by the DOJ. It has been prosecuting agreements between companies to restrain competition in the labor market. Those firms may or may not be competitors in the product market. These agreements often take the form of "no poaching" which means that each company agrees not to try to hire ("poach") the employees of another company. For example, a case with leading high-tech companies as defendants (including Apple, Google, and Intuit) involved an express agreement not to try to hire each other's software engineers as well as other employees.

These cases do not involve a new interpretation of the law but just a wider application of existing jurisprudence. For if one were to replace "worker" with "consumer," the "no poaching agreement" would be a customer allocation scheme whereby each company agrees not to compete for another company's customers. That agreement is per se illegal in the U.S. and illegal by object in the EU. The DOJ has increased its activity in this area and I suspect there will be a steady stream of cases. It has also put out guidance for companies so that they are well informed of the

[9] Examples occurred in the markets for stretcher bars (*In the Matter of Precision Moulding Co. Inc.*, FTC, September 10, 1996) and zippers (*In the Matter of YKK (U.S.A.) Inc.*, FTC, July 1, 1993).

[10] Examples occurred in the markets for truck rental (*U-Haul International, Inc.*, FTC, July 14, 2010) and print advertising (*In the Matter of Valassis Communications*, FTC, April 28, 2006).

law.[11] I am unaware of any such cases in the EU though "no poaching" agreements would seem to be illegal by object under Article 101.

1.6. Evidentary Rules

In the U.S., there are three standards for determining whether some conduct is a violation of antitrust law: 1) per se rule: 2) rule of reason; and 3) quick look rule. These rules differ in terms of where the initial burden lies – with the plaintiffs or the defendants – and to what extent there is a balancing of benefits and costs in coming to a judicial decision.

The rule of reason assesses whether or not, on net, the conduct is harmful to consumers. With the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited."[12] The plaintiffs carry the initial burden of proving that the practice is anticompetitive. Only if the plaintiffs succeed in doing so, does the burden shift to the defendants to establish procompetitive benefits. The Court must balance the two effects in deciding whether to prohibit the conduct.

The per se rule only requires that plaintiffs show the prohibited conduct is present; there is no need to prove that it has a harmful effect. Thus, there is no balancing by the Court. The per se standard recognizes that "some classes of restraints have redeeming competitive benefits so rarely that their condemnation does not require application of the full-fledged rule of reason."[13] Firms expressly communicating to raise their prices or allocate markets are per se offenses because they clearly facilitate coordination on a supracompetitive outcome and there is almost never a competitive rationale for such communications.

It is often said that there is no defense for conduct subject to the per se rule. That is not exactly right. The Court has recognized justifications for firms to expressly coordinate their prices or allocate markets. For example, "an agreement is per se illegal as price fixing only if it affects the price at which the parties will sell something, which they could have sold individually."[14] If the market did not exist but for collusion then collusion is not unlawful. In the sulfuric acid market, there was an express agreement between Canadian suppliers and American suppliers whereby the former would enter the U.S. market (and supply the latter) as long as

[11] "Antitrust Guidance for Human Resource Professionals," U.S. Department of Justice – Antitrust Division. Federal Trade. Commission. 2016.

[12] U.S. Court of Appeals for the Third Circuit, *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300 (3rd Cir. 2010).

[13] *Ibid*.

[14] U.S. Supreme Court, *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

the American suppliers agreed to stop supplying the U.S. market.[15] Judge Richard Posner found it defensible because the Canadian suppliers were lower cost and arguably would not have entered the U.S. market but for the agreement ensuring that the American suppliers would shut down. These cases are consistent with the perspective that the Court has not really identified per se offenses but rather per se unacceptable defenses (Krattenmaker 1988, 165–180). For example, an unacceptable defense for price-fixing is that the agreed-upon price was fair and reasonable.

The "quick look" rule applies when "per se condemnation is inappropriate, but at the same time, the inherently suspect nature of the restraint obviates the sort of elaborate industry analysis required the traditional rule-of-reason standard."[16] While it may be possible to identify procompetitive benefits, the presumption is that anticompetitive benefits are present so the initial burden is on the defendants to offer a competitive justification for the conduct.

Summing up, practices for which the presumption is one of anticompetitive effects and for which procompetitive effects are exceedingly unlikely are subject to the per se rule. Practices for which the presumption is one of anticompetitive effects but it is not implausible that there are procompetitive effects are subject to the quick look rule. And practices for which both anticompetitive and procompetitive effects are plausible are subject to the rule of reason.Turning to Article 101(1), an agreement can be unlawful by object or effect. Should it be found to restrain competition by object or effect, the conduct can be determined to be legal when it satisfies a set of conditions listed under Article 101(3). In brief, these conditions are that the conduct benefits consumers (in that it produces efficiencies, some of which are passed on to consumers) and competition is not significantly harmed. The burden of proof is on the firms to defend their conduct under Article 101(3).

In principle, no practice is per se illegal in the EU as, under Article 101(3), it could always be justified if one can show offsetting benefits to any competitive harm. For example, consider two firms engaging in express communication to coordinate their prices to maximize joint profits. It is possible that price collusion could sufficiently intensify non-price competition (such as with regards to product quality) that consumers are actually better off (Fersthman, Pakes 2000, 207–236). However, in reality, there is a set of practices that are effectively treated as per se illegal and these practices largely coincide with those that are per se illegal in the U.S. With regards to succeeding with an Article 101(3)

[15] U. S. Court of Appeals for the Seventh Circuit, *In re Sulfuric Acid Antitrust Litig.*, (7th Cir. 2012).

[16] U.S. Court of Appeals for the Third Circuit, *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300 (3rd Cir. 2010).

justification for such practices, "there is very little existing jurisprudence which provides comfort to suggest that the presumption of illegality can ever be overcome." (Jones, Kovacic 2017, 281).

As discussed above, there are defenses in the U.S. for even the most egregious horizontal agreements. Many of those defenses could satisfy Article 101(3) and thus deliver similar exemptions in the EU. In practice, there does not seem to be much difference between the EU and the U.S. with regards to explicit agreements that constrain competition. Those that are per se illegal in the U.S. (which means the Court does not consider effect and only whether an acceptable defense applies) would be illegal by object in the EU, and Article 101(3) is unlikely to change the outcome.

For those practices that fall under the rule of reason in the U.S., they would probably be evaluated under Article 101(1) by effect and, depending on the case, Article 101(3) would result in an evaluation along the lines of the rule of reason. Thus, cases in which Article 101(3) is relevant are likely to look like cases considered under the rule of reason in the U.S. (though there might be exceptions). However, there may not be a counterpart to the quick look rule in the EU. Recall that the quick look rule puts the initial burden on the firms to establish pro-competitive benefits. With Article 101, the European Commission must first argue a violation by object or effect and, only then, does the burden shift to the firms to argue an exemption under Article 101(3).

1.7. Twombly

An important judicial ruling in 2007 raised the bar for civil cases to proceed in U.S. courts. Standard protocol is for a plaintiff to submit a complaint which a court may choose to dismiss for failure to state a legitimate claim (i.e., according to the plaintiff's own complaint, there is not an apparent violation of the law). If it is not dismissed then the plaintiff is allowed to engage in discovery which means collecting relevant documentary evidence from the defendants. Prior to 2007, it was sufficient to use economic evidence – such as parallel pricing – to effectively state a claim and move to discovery. While such economic evidence is insufficient for proving that firms have an illegal agreement, the hope of a plaintiff and the expectation of a court is that discovery might yield the required evidence.

With its decision in *Bell Atlantic Corp. v. Twombly* 550 U.S. 544 (2007), the U.S. Supreme Court erected a plausibility standard in order for a claim not to be dismissed. In pleading an antitrust claim, "an allegation

of parallel conduct and a bare assertion of conspiracy will not suffice."[17] The plaintiff must present "enough facts to state a claim to relief that is plausible on its face."[18]

Some Section 1 cases have been dismissed for failure to state a claim (under the Twombly ruling). Firms engaged in an unlawful agreement may avoid prosecution if the only trace that they leave in the public domain – and thus is accessible by plaintiffs prior to discovery – are the higher prices that the agreement delivers. There are then cases that would be dismissed in the U.S. which could survive and ultimately lead to a conviction in the EU.

1.8. Private Enforcement

The largest gap in enforcement between the EU and the U.S. is with regards to private enforcement. Private litigation related to Section 1 of the Sherman Act has been very active for a long time, and performs two key enforcement roles. First, some cases are brought by private litigants prior to any DOJ action (and, with some cases, the DOJ never brings an action). Thus, private litigants add to enforcement by expanding the set of cartels that are shut down. Second, private litigants impose corporate penalties through customer damages. For a publicly prosecuted case, these damages augment government fines (and jail sentences) and, for those cases not publicly prosecuted, damages (and also legal fees) are the only penalties imposed on firms.

The EU has recently encouraged customer damage suits and the recommended approach differs from the U.S. in terms of the magnitude of the damages and who can claim damages. In the U.S., customers are entitled to treble damages. That is, if firms are convicted then they must pay damages equal to triple the amount of harm imposed on customers (where harm is measured by the additional payments made for the units purchased). The norm in the EU is that firms are liable for single damages. In the U.S., only direct purchasers can sue in federal court (though in many states, indirect purchasers are allowed to sue). For example, if a cartel of manufacturers raised their wholesale prices to retailers then retailers can sue but final consumers cannot, even though they are likely to have been harmed due to the pass through of higher wholesale prices. In the EU, both direct and indirect purchasers have standing to sue.

In rationalizing these differences, the EU's policy is motivated by properly compensating those who were harmed. While compensation is also a consideration in the U.S., its system is also justified by deterrence. By allowing for treble damages, the penalty is higher and thus is more

[17] U.S. Supreme Court. *Bell Atlantic Corp. v. Twombly* 550 U.S. 544 (2007).

[18] *Ibid*.

likely to deter collusion. By only allowing direct purchasers to sue, it is more likely that colluding firms will be prosecuted and convicted because those with the best information (direct purchasers) are highly incentivized to sue and, from a practical perspective, one avoids the challenge of allocating damages across different purchasers in the vertical chain.

In comparison to many EU countries, the U.S. legal environment makes it easier to engage in private litigation. Private litigants can engage in discovery which allows them to acquire crucial evidence towards obtaining a conviction (or a profitable settlement). In addition, it is relatively easy to pursue class action suits which means that cartels for which customers are large in aggregate but individually small will be prosecuted.

While private litigation is growing in the EU, it is still minor in terms of the additional penalties it levies and, to my knowledge, it is rare if not totally absent for any private litigation to occur without first achieving a conviction by a competition authority.

1.9. Concluding Remarks

While there are differences between the treatment of horizontal agreements in the EU and the U.S., those differences are minor. For the most part, what is illegal in the U.S. is illegal in the EU and vice versa. There may be some practices that are illegal in the EU as a concerted practice but are legal under the more expansive concept of agreement in the U.S., but they appear to be rare. Evidentiary rules do differ because of the hurdle erected in the U.S. from the Twombly ruling but, once a case surmounts that hurdle, it does not appear that there are substantive differences regarding the resolution of those cases. The most substantive distinctions are that the U.S. actively engages in criminal prosecution (and regularly incarcerates cartelists) and the much more active role of private enforcement.

2. VERTICAL AGREEMENTS

2.1. Types of Vertical Restraints

Vertical restraints are agreements between firms that operate at different levels of the production and distribution chain. For example, a manufacturer that produces goods and a retailer that distributes those goods. There are many legitimate reasons for such firms to enter into an agreement and it is the challenge of competition law and enforcement to identify those agreements that have anticompetitive effects and then prohibit them. As opposed to horizontal agreements, for which the most

egregious are kept private to the parties (for, once discovered, they are sure to be prosecuted), vertical restraints are generally out in the open for all to see. The challenge is not detecting them but rather determining whether they are harmful. That task has proven difficult in principle (as attested to by the challenges faced by economic research) and in practice (as attested to by the challenges faced by courts and competition agencies).

The EU and U.S. are common in the types of vertical restraints that can be found in violation of competition law. These vertical restraints are: 1) resale price maintenance; 2) territorial and customer restraints; 3) exclusive dealing; and 4) tying. As we will discuss later, differences lie in what it takes to violate the law (or for there to be a determination that there has been a violation) and the intensity with which enforcement occurs.

Resale price maintenance involves an upstream firm (typically, a manufacturer) restricting, in some manner, the prices that can be charged by downstream distributors (typically, retailers). Resale price maintenance can involve limiting the maximum price that retailers can charge, but the more serious concern is with specifying a minimum price for retailers. With minimum resale price maintenance, the risk is that it will lead to supracompetitive prices that can harm consumers, and it can possibly facilitate collusion among upstream firms. But it can also generate efficiencies by promoting non-price competition. (From hereon, RPM will refer to minimum resale price maintenance.)

The other three restraints draw the attention of competition law because they can exclude competitors from serving consumers and this can (but need not) harm consumers. Given that competition is about a firm trying to sell to more consumers and thereby "exclude" rivals from doing so, there is an intrinsic challenge to identifying when such exclusion is harmful and when it is competition as ought to occur.

A customer or territorial restraint is an agreement between a supplier and a retailer that constrains to whom a retailer can sell or to whom a supplier can supply. A common territorial constraint gives a retailer the sole right to sell in a particular geographic area and with that sole right often comes the limitation that the retailer cannot sell outside of its designated area.

Exclusive dealing is a contract between an upstream supplier and a downstream buyer which specifies the latter will buy all of its supplies from that supplier. An exclusive dealing contract is a special case of a "contract that references rivals" (CRR) which can be exclusionary (see Scott Morton 2013, 72–79). The defining feature of a CRR is that the terms of a contract between a buyer and a seller depend on the buyer's transactions with another seller. It could require that a buyer purchase a certain percentage of its inputs from a supplier (which is exclusive dealing

when the percentage is 100) or just make it costlier to buy from another seller but not outright prohibit it.

Tying refers to the practice of a supplier agreeing to sell its customer one product (the tying good) only if the customer agrees to purchase all of its requirements for another product (the tied good) from that same supplier. A traditional concern with tying is that it can be a way to leverage market power in one product market to another product market. Whether that is a cogent argument depends on the particular situation.

The competition law challenge associated with vertical restraints is that there are possible efficiencies from such practices but also possible anticompetitive effects through reduced price competition or foreclosure of rival firms.

> There is no simple conclusions as to whereby any particular type of restraint – territorial restrictions, tie-ins, vertical price restraints, etc. – always improves economic efficiency or reduces it. All types of vertical restraints, including both price and nonprice restrictions, may either increase or decrease efficiency, and they have different economic effects in different contexts. Thus, exclusive territories, resale price maintenance and exclusive dealing can all be used to solve free-riding problems in the provision of retail services. The same restraints can also be used to provide manufacturers with better incentives to invest in product quality. However, all of these restraints can also reduce interbrand competition (Comanor, Rey 1997, 38).

Given this reality, competition law should neither make these vertical restraints always lawful or always unlawful. Each instance of a vertical restraint is to be judged as to whether the procompetitive benefits exceed the anticompetitive costs and thus should be allowed, or the contrary is true and thus should be prohibited. While such an approach is appropriate in principle, implementation of it can be difficult and costly. As a consequence, competition law on paper may be quite distinct from what it is in practice. That point will be relevant when assessing the competition policies of the EU and U.S.

2.2. U.S. Law and Enforcement regarding Vertical Restraints

The relevant laws under which these practices are most commonly prosecuted in the U.S. are the Sherman Act's Section 1 (which prohibits unreasonable restraints of trade) and Section 2 (which prohibits monopolization and is relevant when vertical agreements are used to advance the market power of a dominant firm). However, some of these restraints have also been prosecuted under Section 3 of the Clayton Act (which makes it unlawful to sell goods while requiring that the buyer

not purchase a competitor's goods when it would substantially lessen competition) and Section 5 of the Federal Trade Commission Act (which prohibits unfair methods of competition). In all cases, a plaintiff must establish that the vertical agreement is likely to deleteriously affect the competitive process in such a manner as to harm consumers.

The perspective of U.S. courts and the Antitrust Division of the U.S. Department of Justice (and the U.S. Federal Trade Commission) has changed radically over the last half century, and this change is generally attributed to the research and writings of economists. The traditional view in economics was that many of these vertical restraints were inherently anticompetitive because they foreclosed rivals from markets or restrained price competition. That view was tenuous because it neither had grounding in economic theory or supportive empirical evidence. The Chicago School of the 1950s and '60s provided a systematic theoretical examination of many of these practices and arrived at the conclusion that they are procompetitive. They first provided models of firm conduct which showed that practices like exclusive dealing and tying would not lead to more profits for a firm with market power. That analysis undercut the claims of anticompetitive effects. This left them with the challenge of explaining why firms would adopt those practices if they are not helping augment their market power. That led to the second contribution, which was to identify procompetitive justifications for these vertical restraints.

The views of the Chicago School proved highly persuasive to courts. Indeed, rarely has economic reasoning been so influential in the area of competition law. However, economic analysis proved to be subtler than revealed by the Chicago School. Starting in the 1980s with the use of game theory, these practices were re-examined with more sophisticated and more realistic models. It was found that there are conditions under which all of these vertical restraints are anticompetitive. The Chicago School had identified a special set of market conditions whereby these vertical agreements were procompetitive but there are other market conditions for which they are indeed anticompetitive.

Returning to our discussion of U.S. law, many of these vertical restraints were per se illegal until the 1970s (and prior to the intellectual impact of the Chicago School). That is, it was sufficient to establish that the vertical restraint was in place; there was no need to show harm. As stated above, there were no theoretical or empirical bases for such a legal approach. Abiding by the contributions of the Chicago School, one might have shifted to making many of these vertical restraints per se legal in that they showed them not to be harmful and that they could be beneficial. That did not happen but the courts were persuaded enough by the Chicago School to shift from per se illegality to the rule of reason. Fortunately, they did not go to per se legality because the later

game-theoretic contributions showed that there are plausible conditions whereby these restraints do harm consumers but also plausible conditions whereby they benefit consumers. In such a situation, the rule of reason is appropriate.

With *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977), the U.S. Supreme Court ruled that all vertical restraints, except those that restrained prices, are to be judged by the rule of reason. In *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the U.S. Supreme Court ruled that maximum resale price maintenance was to be judged under the rule of reason. The final restraint subject to the per se rule fell ten years later. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007), the U.S. Supreme Court decided that minimum resale price maintenance was not per se illegal because the "per se illegal" category is reserved for those practices, such as horizontal price fixing among competitors, that rarely have any procompetitive benefits to offset anticompetitive harm. However, in the case of RPM, many economic studies had established ways in which consumers can benefit from restraining intrabrand price competition among retailers through inducing more intense non-price competition. While forsaking per se illegality, the Court made clear that RPM was not per se legal and was to be judged by the rule of reason.

With the possible exception of tying (which, under certain conditions, is claimed to be per se illegal),[19] all vertical restraints in the U.S. are judged by the rule of reason. With the rule of reason, the burden is initially on the plaintiff to establish that the restraint harms consumers. If it succeeds in doing so, the burden shifts to the defendants to show that there are countervailing benefits to consumers. For the defendants to avoid the restraint being prohibited, it is not enough for the procompetitive benefits to exceed the anticompetitive harm. There must not be another practice that is better in the sense that it delivers those same benefits but with less harm.

2.3. Comparison of Competition Law and Enforcement between the EU and U.S.

Our comparison of the treatment of vertical restraints in the EU and the U.S. will focus on four dimensions: 1) safe harbors and exemptions; 2)

[19] "Although courts have been recently inclined to consider the business justifications for tie-ins and have analysed the economic effects of the tying arrangement, hallmarks of a rule-of-reason analysis, a tying arrangement may be treated as per se illegal (i.e., irrefutably presumed to be illegal without the need to prove anticompetitive effects) if the following elements are satisfied: 1) two separate products or services are involved; 2) the sale or agreement to sell one product/ or service is conditioned on the purchase of another; 3) the seller has sufficient market power in the tying product market to enable it to restrain trade in the tied product market; and 4) a substantial amount of interstate commerce in the tied product is affected." (Kazmerzak, Sandrock 2019, 10–11).

evidentiary standards; 3) dominant firms; and 4) intensity of enforcement. There are substantive differences though they are of a smaller order of magnitude then the differences between the U.S. today and the U.S. fifty years ago.

2.4. Safe Harbors and Exemptions

The EU's Block Exemption Regulation (BER) provides a safe harbor for firms regarding vertical restraints. If neither the upstream firm nor the downstream firm has a market share exceeding 30% then a vertical agreement is lawful. However, there are "hardcore" restrictions (such as RPM and certain territorial and customer restraints) that lack this safe harbor. U.S. competition law provides no safe harbor though, in practice, enforcement effectively provides it. There is little or no chance of a vertical agreement being prosecuted by the DOJ or FTC if the upstream and downstream firms are sufficiently small. Though it is not codified as in the EU, I believe that a market share not exceeding 30% would be small enough. Thus, the presence of safe harbors in EU law but not U.S. law belies the reality that the U.S. is more tolerant than the EU when it comes to vertical restraints.

2.5. Evidentiary Standards

In its near-universal use of the rule of reason, the U.S. makes a vertical restraint lawful if consumers benefit after considering all implications of the restraint. For example, RPM can raise prices to consumers but still be lawful if defendants can show there are non-price benefits to consumers (such as retailers providing better service) that, on net, means consumers are not harmed. Even if exclusive dealing is shown to significantly foreclose rivals, plaintiffs must go further and establish that it is detrimental to consumers such as through higher prices or reduced product variety. With regards to customer and territorial restraints, anticompetitive concerns are raised in the U.S. only if those restraints impair interbrand competition (as opposed to competition among retailers of the same brand) and it is then shown that consumers are worse off. Unfailingly, U.S. competition law requires that a vertical restraint is shown to harm consumers regardless of how much it might foreclose the market to competitors or raise prices to consumers. Turning to the EU, the European Commission (EC) must establish under Article 101(1) that the vertical agreement has as its "object or effect, the prevention, restriction or distortion of competition within the common market." If it establishes that claim, the defendants can turn to justifying that it is procompetitive by drawing on Article 101(3), and showing that there are efficiencies to offset the anticompetitive effects and that consumers receive their "fair

share" so as not to be harmed. Despite its apparent similarity to the U.S.'s rule of reason, there is a difference.

> This framework would approximate the US rule of reason if the Commission's burden ... were to show likely adverse effects on consumer welfare. This, however, does not appear to be the case. The Commission's burden does not require an analysis of competitive effects of the sort undertaken in the US. Rather, EU case law suggests that it is enough for the Commission to show that the agreement in question restricted the "economic freedom" of either a party to the agreement or a third party, without regard to a likely effect on prices, output, or consumer welfare generally (Cooper, Froeb, O'Brien, Vita 2005, 298).

The U.S. religiously abides by the consumer welfare standard which means the plaintiff must show that consumers are harmed (e.g., showing foreclosure is insufficient) and the defendants can avoid a guilty verdict by establishing that there are benefits to consumers which exceed the harm identified by plaintiffs. In contrast, it appears that a vertical restraint can be found unlawful in the EU without establishing a harmful effect on consumers.

For a defendant to appeal to Article 101(3) in justifying a vertical restraint, it is necessary that the restraint not eliminate competition, either actual or potential. There is no parallel condition in U.S. competition law. A strict application of the rule of reason would imply that a vertical restraint could eliminate all competition and not be prohibited if the efficiencies it generated were able to offset any harm to consumers from the loss of competition. For example, if exclusive dealing were to eliminate all rival companies but, due to scale economies, result in lower prices to consumers so as to make them better off, that could be lawful in the U.S. However, the set of instances in which competition is entirely eliminated and consumers benefit is likely to be sufficiently sparse as to make this difference not meaningful.

2.6. Dominant Firms

A substantive point of departure between the EU and U.S. is with regards to market dominance. To begin, the EC seems more inclined to pursue Article 102 cases than the DOJ is to pursue Section 2 cases (which have been exceedingly rare for quite some time). In the context of vertical restraints, the BER does not apply to dominant firms. Furthermore, vertical restraints can be prohibited without showing effect; it is enough for a dominant firm to foreclose and exclude rivals.

Exemplifying the different approaches to market dominance in the context of vertical restraints, Virgin Atlantic brought a case against

British Airways for agreements that the latter made with travel agents. These agreements provided higher commissions if a travel agency exceeded its previous year's sales of tickets on British Airways flights. Virgin Atlantic claimed that this was an abuse of dominance in that it encouraged travel agencies to put more of their business with British Airways. The EC concluded that it was a violation of Article 82 and its decision was affirmed by the Court of First Instance. [20] In contrast, the case failed in U.S. courts with the Second Circuit commenting that "even with monopoly power, a business entity is not guilty of predatory conduct through excluding its competitors from the market when it is simply exploiting competitive advantages legitimately available to it."[21]

2.7. Intensity of Enforcement

More generally, enforcement with regards to vertical restraints is distinctly more aggressive in the EU than the U.S. One can point to cases in which the EC prosecuted parties and the DOJ chose not to bring a case. Already mentioned is the British Airways-Virgin Atlantic case. As another example, the EC pursued a case against Coca-Cola for placing restrictions on downstream customers (such as restaurants and bars) regarding the extent to which they could carry competing brands.[22] Coca-Cola settled by agreeing not to enter into such vertical restraints. In contrast, such vertical agreements have had no problems in U.S. courts.

More recently, the EU has been active in pursuing cases involving vertical agreements in the form of most favored nation clauses and minimum advertising price agreements, while such practices have not been prosecuted in the U.S.

A most-favored nation clause (MFN) is a vertical agreement requiring a party to give a buyer (or a supplier) the same or a better deal as offered to other buyers (or suppliers). A class of MFNs have been relevant in recent years are price parity clauses associated with online booking sites. An online platform, such as Booking.com, would require that the prices offered by a hotel on its site are as low as it offers elsewhere. A narrow price parity clause pertains only to prices offered at direct booking channels, while a broad price parity clause pertains to all online listings including competing platforms and direct booking channels.

[20] Court of First Instance of the EC, case T-219/99, British Airways plc v Commission of the European Communities, ECLI:EU:T:2003:343..

[21] U.S. Court of Appeals, Second Circuit, *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 266 (2d Cir. 2001).

[22] Commission Decision of 22 June 2005 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A.39.116/B2 – Coca-Cola).

This has been a growing area of activity by the EC and national competition authorities in the EU (see cases cited in Verge 2018). While no consensus has yet emerged regarding when price parity clauses are anticompetitive, the most common view in the EU is that narrow price parity clauses are not anticompetitive by object, though they could be viewed as anticompetitive without having to prove harm to consumers (Schaeffer, Rinne, Coombs 2016). Regarding broad price parity clauses, there may be an emerging consensus that they "restrict competition between platforms on commission rates and may also prevent entry by innovative low-cost platforms." (Verge 2018, 6). In comparison, MFNs and price parity clauses are generally viewed as benign or procompetitive in the U.S. In particular, we have not seen cases based on price parity clauses adopted by online booking platforms in the U.S.

When a manufacturer has a minimum advertised price agreement (MAP) with retailers, there is a floor placed on the price which a retailer can advertise a good though a retailer is allowed to sell the good at a price below that floor. In principle, a MAP is distinct from RPM. The DOJ and FTC have not pursued cases against MAPs and, even prior to the adoption of the rule of reason for RPM in 2007, the pro-competitive benefits of MAP were recognized.

It has been quite a different story in the EU. There seems to be more concern with MAPs and, consequently, there have been some cases. Reflective of this view: "Restrictions on advertising prices below a certain level have been found to lead to *de facto* RPM in certain past cases on the basis that these restrict the ability of the reseller to determine its sales prices."[23] Like RPM, there seems to be an approach to MAP rooted in them being anticompetitive by object.

2.8. Concluding Remarks

In reading the law, one might infer that the EU is more tolerant of vertical restraints than the U.S. There are safe harbors encoded in the Block Exemption Regulation in the EU, while the U.S. has no such counterpart. In principle, Article 101(3) could provide as much opportunity for firms to defend a vertical restraint as being procompetitive as the rule of reason in the U.S. Jurisprudence and the conduct of competition authorities tell a different story. Vertical restraints that meet the safe harbor conditions under the BER are, in practice, extremely unlikely to be prosecuted in the U.S. In effect, there are non-codified safe harbors in the U.S. that are just as "safe" as those in the EU. Historically, U.S. courts have moved

[23] Decision of the UK Competition and Markets Authority – "Online resale price maintenance in the commercial refrigeration sector," Case CE/9856/14, 24 May 2016, para. 6.42.7.

from some vertical restraints being subject to the per se rule to where now all (or almost all) vertical restraints come under the rule of reason. Furthermore, there have been so few cases involving vertical restraints pursued by the DOJ or FTC in recent years that one might be inclined to infer that there is de facto per se legality for some vertical restraints. I do not yet subscribe to that view but the evidence in support of it is mounting.

The disparity in law and its enforcement between the EU and the U.S. is exemplified by the treatment of minimum resale price maintenance (RPM). Since 2007, it has been evaluated under the rule of reason in the U.S. but what that means is unclear for there has not been a single case brought by the DOJ or FTC. In contrast, RPM continues to be a concern to the European Commission and is treated as anticompetitive by object. Though RPM can be defended by putting forth efficiencies under Article 101(3), this seems to be a more challenging task than with the U.S.'s rule of reason. As another example of the greater intensify of enforcement in the EU, minimum advertised price agreements have been viewed as "de facto RPM," and thus subject to scrutiny, while such agreements have not drawn the attention of the DOJ or FTC.

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GIFT OF PROFESSIONAL INCOME GENERATED BY A SPOUSE TO A THIRD PERSON IN MAURITIAN CIVIL LAW

For historical reasons, Mauritian civil law has been influenced by French civil law. However, despite the differences between Mauritian civil law and French civil law and the indisputable autonomy of the Mauritian civil law, it is impossible to deny that the latter is strongly inspired by the French civil law and that the Mauritian judge will in most cases refer to the decisions rendered by French courts – and in particular by the Court of Cassation – as well as to the French doctrine. This statement is applicable to Mauritian Law on Matrimonial Property Regimes which is inspired by French civil law. In this article we will first provide a brief overview of the Mauritian Law on Matrimonial Property Regimes, followed by an analysis of the validity of a gift of professional income generated by a married person to his concubine.

Key words: *Mauritius. – Law. – Gift. – Spouse. – Concubine. – Income. –Obligations.*

1. INTRODUCTION

For historical reasons, Mauritian civil law has been influenced by French civil law (Law Reform Commission, 2010; Domingue 2002, 62; Agostini 1992, 21; Venchard 1982, 31; Angelo 1970, 237; Bogdan 1989, 28; Burgeat 1975, 315; Marrier d'unienville 1969, 96; Moolan 1969, 137; Mixed Jurisdictions Worldwide 2012, 629). The French Civil Code, which came into force in 1804 and has been revised many times,

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has influenced the Civil Code of the Republic of Mauritius. The original text of the French Civil Code of 1804, was incorporated into the positive law of Mauritius. This is due to the fact that at the early 19th century, Mauritius was a French colony, before the English took possession of the Island. Article 8 of the *Act of Surrender*, signed in 1810, provided that the People of the Island would maintain their religion, *laws* and customs. In addition, "the Treaty of Paris of 1814, which officially transfers the legal possession of Mauritius to the Englishmen, does not have the effect of fundamentally overturning French laws considered in certain respects as the personal legislation of the inhabitants" (Venchard 1982, 31). Consequently, Mauritian civil law and, in particular, the Mauritian Civil Code, was modeled on French civil law and the French Civil Code of the time.

Despite the great resemblance between Mauritian civil law and French civil law, the former has managed to preserve an indisputable autonomy *vis-à-vis* the latter. This has been possible not only because of the reforms of the French Civil Code that took place over the years, but also thanks to the reforms of the Mauritian Civil Code that occurred during the 19th and 20th centuries. For example, the Act of 1980[1], which became Article 476 and following of the Mauritian Civil Code, stipulates that the only case of emancipation of a minor in Mauritius is emancipation by marriage.[2] On the other hand, in French civil law, in addition to marriage, the emancipation of a minor is possible through a court decision (Article 413–2 of the French Civil Code).[3] Moreover, Article 478 of the Mauritian Civil Code prohibits an emancipated minor from being a merchant.[4] On the other hand, Article L. 121–2 of the French Code of Commerce (Law n ° 2010–658, 15 June, 2010) makes it possible, provided that it is authorized by a court's decision, during the procedure of emancipation or after the emancipation has been completed.[5] Another example of the autonomy of

[1] Act n° 8/1980

[2] "The minor is automatically emancipated by marriage". – It has to be noted that there is a Children's Bill recently introduced in the National Assembly of Mauritius, which proposes to modify the conditions for the marriage of minors. – See: *http://www.mauritiustimes.com/mt/the-childrens-bill* (last visited 24 February 2020). – *https://www.lemauricien.com/article/childrens-bill-un-projet-de-loi-qui-autorise-le-mariage-des-enfants* (last visited 24 February 2020).

[3] "Minors, even unmarried, can be emancipated when they reach the age of sixteen. After hearing the minor, this emancipation will be pronounced, if there are just reasons, by the guardianship judge, at the request of the father and mother or one of them."

[4] "A minor emancipated by marriage cannot be a merchant."

[5] "The emancipated minor may be a merchant with the authorization of the guardianship judge given at the time of the decision of emancipation or on the decision of the president of the tribunal of "*grande instance*" if he makes this request after being emancipated.".

Mauritian civil law is provided by Article 887. The latter stipulates that in case of lesion in a sharing agreement, the party to the contract having suffered a loss will be allowed to ask for the cancellation thereof.[6] On the other hand, in France, a legislative reform removed this sanction from the Civil Code. Henceforth, the party to a sharing agreement having suffered a lesion has only the right to request a supplement from the other party to this agreement having benefited from that lesion. The former is not entitled to request the cancellation of the sharing agreement. This legal rule is stipulated in Article 889 of the French Civil Code.

It has to be underlined that in Mauritius, the decisions of the French Court of Cassation are a persuasive and not a binding authority.[7] Thus, a Mauritian judge will only cite and follow the reasoning developed in a judgement of the French Court of Cassation if the judge considers them appropriate to the context. On the other hand, no formal obligation lies upon the Mauritian judge to follow the decisions of the Court of Cassation relating to the issue treated. This rule has been, for instance, clearly confirmed with regard to the issue of reparation for indirect damage suffered by an unmarried partner in the event of the death of the other partner.[8]

Despite all the differences between Mauritian civil law and French civil law which have been pointed out previously and despite the indisputable autonomy of the Mauritian civil law, it is impossible to deny that the latter is strongly inspired by French civil law and that the Mauritian judge will refer most of the time to the decisions rendered by French courts, – and especially by the Court of Cassation – as well as to French doctrine. This statement is applicable to Mauritian Law on Matrimonial Property Regimes which is inspired by French civil law.

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[6] "There may also be rescission (cancellation), when one of the co-heirs establishes that he has suffered a lesion of more than a quarter."

[7] In the judgement of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* 2017 SCJ 411 we can read: *"It is appropriate to recall the practice that when it comes to the interpretation of a law borrowed from French law we stand guided for its interpretation by French doctrine and case law. One can quote in that respect the following passage from L'Etendry v The Queen [1953 MR 15]: "the normal rule of construction laid down time and again by this court (...) is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French doctrine and case law." But, it has to be pointed out that the practice of relying on French authorities has always been for guidance and not in application of the stare decisis principle."(highlighted by author)*

[8] On that issue see the judgements of the Mauritian Supreme Court in *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & Anor* 2007 SCJ 106 and *Naikoo v. Société Héritiers Bhogun* 1972 MR 66 1972, as well as the judgements of the French Court of Cassation Cass. ch. mixte, 27 February 1970 n° of pourvoi: 68–10276 and Cass. crim. 17 March 1970 n° of pourvoi: 69–91040.

In this article we will first provide a brief overview of the Mauritian Law on Matrimonial Property Regimes and then analyze the validity of a gift of professional income generated by a married person to his concubine.

2. BRIEF OVERVIEW OF THE MAURITIAN LAW ON MATRIMONIAL PROPERTY REGIMES

In Mauritius, Matrimonial Property Regimes are regulated in articles 1387 through 1480 of the Civil Code, which is written in French. Few rules can be found here and there in special laws written in English, such as the *Civil Status Act*[9] or the *Borrower Protection Act*.[10] Matrimonial property regimes can be defined as the set of general legal rules enshrined in the Mauritian Civil Code which govern (which apply to) the property of the spouses during the marriage and after its dissolution (comp. with Terre, Simler 2019, 1; Revel 2018, 1; Peterka 2018, 3). It has to be noted that in Mauritius cohabitation of unmarried partners is not placed on an equal footing with marriage, from the legal point of view. This means that the Matrimonial Property Regimes Law does not apply to cohabiting partners; the financial issues pertaining to cohabitation of unmarried partners are resolved by application of the Law of Obligations (for example, unjust enrichment).[11]

The Mauritian Law of Matrimonial Property Regimes can be divided into two parts. On one hand, there are the rules in the Civil Code (Articles 212 through 226) called the *primary matrimonial property regime* (Terre, Simler 2019, 29; Revel 2018, 19; Peterka 2018, 51). The rules of primary matrimonial regime are applicable to all marriages, i.-e. to all married couples in Mauritius regardless of the matrimonial regime chosen. On the other hand, there exist also rules on specific matrimonial regimes, such as community of goods (articles 1400 through 1474), separation of goods

[9] Thus, according to section 20 (1) of the Act "where an application is made to an officer for the publication of a proposed civil marriage, the officer shall – (...) (b) inform the applicant that – (i) different matrimonial regimes are provided for under the Code Napoleon and give the applicant a printed explanatory note to that effect; and (ii) the intending spouses should consider under which matrimonial regime they wish to be married." Moreover, Section 24 (2) of the Act provides that "the officer shall – (...) (b) enquire from the parties the matrimonial regime under which they wish to be married and whether any marriage settlement has been made between them and if so, the name of the notary with whom it is deposited."

[10] See section 12 of the Act.

[11] Thus, if one of the unmarried partners does not have a job, but does the housework on a regular basis and the other partner has a job, works outside the house and saves money because they do not have to employ someone to perform the chores, the former will be able to receive compensation based on the *"enrichissement sans cause"* (unjust enrichment) from the latter.

(Articles 1475 through 1478), and contractual regimes (articles 1478 and 1479).

2.1. Primary Matrimonial Property Regime in Mauritius

The primary matrimonial regime is applicable to couples married under the regime of community of property, to couples married under the regime of separation of property, and to married couples having opted for a contractual matrimonial regime, i.-e. to couples who made a matrimonial contract (*contrat de mariage*) prior to the celebration of their marriage (Terre, Simler 2019, 29; Revel 2018, 19; Peterka 2018, 51). Those rules are considered to be of public interest, which means that the spouses cannot insert in their matrimonial contract clauses that would derogate from them.[12] This principal is known in Mauritian Law as *minimum matrimonial public order*. Matrimonial contract derogating from Articles 212 and following of the Mauritian Civil Code would be contrary to Articles 6,[13] 1131[14] and 1133[15] of the Mauritian Civil Code, and would not produce any legal effect. In other words, such a contract would be null and void.[16]

The primary matrimonial regime in Mauritius is comprised of the professional freedom of spouses, the domestic equality of spouses, the autonomy of spouses and protection of third persons, the protection of the matrimonial home, as well as the protection of the spouse in need provided by a judge in chambers. Thus, Article 223 of the Mauritian Civil Code provides that every spouse, male or female, can freely exercise a profession. The freedom of each spouse to exercise their profession is supported by *an important power granted to each spouse over their professional income*. Thus, in Mauritius, whatever the matrimonial regime chosen by the spouses could be,[17] *each spouse can freely collect*

[12] However, Article 226 of the Mauritian Civil Code does not exclude the possibility of contractual agreements in the field of primary matrimonial property regime. Regarding certain issues that can be described as secondary, the parties can enter into contractual agreements (for example, the spouses can determine by agreement the *quantum* or the form of the contribution to the expenses of marriage (Article 214)).

[13] "One cannot derogate by specific contracts from laws that are of interest to public order and morality."

[14] "The obligation without cause, or on a false cause, or on a unlawful cause, can have no effect."

[15] "The cause is unlawful when it is prohibited by law, when it is contrary to morality or public order."

[16] See articles 1479 and 1480 of the Mauritian Civil Code. – Cass. 1st ch. 28 June 2006, *Revue trimestrielle de droit civil,* 2006, comment Vareille B. 819; *AJ Famille*, 2006, comment Hilt P. 331.

[17] The rule is applicable even to the regime of the community of property, even though professional revenues of each spouse are considered as common property ("bien commun").

their earnings and wages[18] *and dispose of them freely* (Terre, Simler 2019, 83, Revel 2018, 24; Peterka 2018, 53).[19] The only limit to this freedom, provided in article 223 of the Mauritian Civil Code, is payment of the matrimonial charges mentioned in Article 214 of the Code. In other words, a spouse's professional income is a common property in Mauritian Civil Law, it belongs to both spouses, but the spouse who generated the income has the exclusive power to collect and dispose of this professional income.[20] According to Article 214 of the Mauritian Civil Code, the spouses are equal regarding the contribution to the expenses of the marriage (matrimonial charges). This article imposes upon them an obligation to contribute to the expenses of marriage (Chaffois 2020, 60)[21], in conformity with their respective faculties (Terre, Simler 2019, 31; Revel 2018, 31).[22] The equality of spouses exists also in regard to the power to contract household debts. According to Article 221 of the Mauritian Civil Code, each spouse has the power to enter contracts, without the consent of the other, with the aim of maintenance of the household or education of the children. The obligation contracted by a spouse alone will bind the two spouses jointly and severally (Terre, Simler 2019, 58; Revel 2018, 35).[23] It should be noted that in Mauritian Law on Matrimonial Property Regimes, the responsibility of the spouses for the household debt will not be joint and several in some cases, despite of the fact that a debt is contracted by one spouse alone for the maintenance of the household or for the education of the children. First, the responsibility of the spouses for the household debt will not be joint and several where the debt is manifestly excessive (Terre, Simler 2019, 62; Revel 2018, 39). According to the Mauritian Civil Code the judge will take into account

[18] Earnings and wages mentioned in Article 223 of the Mauritian Civil Code, i.-e. professional income, are all incomes generated by the work of a spouse (e. g. salary of a state officer or of an officer of a parastatal body, remuneration of a worker hired to do work under the contract of construction, etc.).

[19] Cass. 1st ch., 14 November 2007, *AJ Famille* 2008, comment Hilt 86.

[20] For instance, the husband who generated the earnings and wages can spend them at the race track, in a restaurant, or save them in a bank account, after having contributed to the expenses of the marriage (food expenses, payment of television, electrical and water bills, etc.).

[21] The contribution in money is not the only form of the contribution to the expenses of the marriage, it can also be made in kind, and especially by the work of the stay-at-home spouse, or by the supply of food products. See: Cass, 1st ch. 3 October 2019, comment Casey J., *Revue trimestrielle de droit civil,* 2019, 913; Cass. 1st ch. 16 January 2019, *Revue trimestrielle de droit civil,* 2019, 638.

[22] In other words, the spouse who earns more money will have to contribute more to food expenses, payment of bills, etc., proportionally to the earnings and wages.

[23] Obligations are covered by the solidarity of the household debts, the debts pertaining to the food costs (bread, milk, flour, etc.), to the family accommodation (rent, for example) the healthcare costs (medical consultation, costs of hospital stay, etc.), children's education costs (private school costs), as well as the family leisure costs. See: Cass. 1st ch. 17 May 2017, *AJ Famille*, 2017, comment Casey J., 422.

the couple's lifestyle (financial situation), the usefulness or uselessness of the operation and the good or bad faith of the creditor. Second, in cases where one spouse alone has used credit by means of a loan or an installment purchase, the responsibility of the spouses for the household debt will not be joint and several (Terre, Simler 2019, 63; Revel 2019, 39; Bremond 2003, 1863; Simler, Lasserre Capdeville 2016, 2507).[24] Article 222 of the Mauritian Civil Code provides that a spouse may alone make any act of administration,[25] act of enjoyment[26] or act of disposal[27] regarding movable property that a spouse detains individually, including common property.[28] Moreover, according to Article 222 of the Mauritian Civil Code, from the point of view of a third party (for instance, the purchaser of the movable property), the spouse who individually detains the movable property is supposed to have the power to perform one of the three types of the above-mentioned acts (Revel 2018, 42; Terre, Simler 2019, 74). If the act is performed, i.-e. if the contract is entered with a third party in good faith,[29] the act will therefore be considered valid (Revel 2018, 43; Terre, Simler 2019, 80). Finally, the Mauritian Civil Code, as well as the *Borrower Protection Act* of 2007, provide protection of the matrimonial home against the arbitrary acts of disposition that one of the spouses might be tempted to make. Thus, according to Article 216 of the Mauritian Civil Code, one spouse may not dispose of the rights on the matrimonial home (the family's main residence[30]) nor of the furniture with which it is furnished, without the consent of the other. As long as the spouses are married, under the legal regime of community of property this protection is absolute. In other words, the protection provided in article 216 of the Civil Code applies to a house or a flat belonging exclusively to one of the spouses (personal property) and to a house or a flat belonging to both spouses (common property). It also applies to premises rented by one or both spouses as well as to premises for which usufruct rights been bestowed upon one or both spouses. The

[24] However, there is an exception to this rule: when a loan has been taken out by one spouse alone, the responsibility of the two spouses for its repayment will nevertheless be joint and several, provided that the loan relates to modest sums and that these sums are necessary for the needs of everyday life.

[25] For example, a spouse can rent out a car that is the common property, for a year.

[26] Thus, a spouse can alone collect the income generated by car rental.

[27] For instance, a spouse can sell a lawn mower or a TV set that is common property.

[28] An exception is made for the furniture that falls within the scope of Article 216 of the Mauritian Civil Code (protection of the matrimonial home).

[29] The third party is in good faith if they did not know the real situation, i.-e. the opposition of the other spouse to the act. – See: *P. Khulpateea v. Banque Nationale de Paris Internationale* 1996 SCJ 379.

[30] Only the main residence qualify as the matrimonial home; the secondary residence, a bungalow, for example, where the family spends a few days or weeks per year, for vacation, is not specially protected by the law.

act of disposition of the matrimonial home, for which Article 216 of the Mauritian Civil Code requires the consent of both spouses, may be in the form of a sale agreement, an exchange agreement, a gift, the constitution of a mortgage, a floating charge or of a fixed charge, etc. As previously mentioned, the protection of the matrimonial home provided for in Article 216 of the Mauritian Civil Code concerns only spouses married under the legal regime of community of property, whether the premises are their personal property[31] or a common property. Article 216 of the Code affords no protection to spouses married under the legal regime of separation of property regime (Article 216 (3) of the Code).[32]

2.2. Legal Regime of Community of Property

In Mauritian civil law, spouses choose their matrimonial regime freely. This freedom is provided in articles 1393 and 1479 of the Mauritian Civil Code. The only limit to this freedom is the need to respect public order and good morals (Article 1479 of the Code). There are two legal regimes in the Mauritian Law on Matrimonial Property Regimes, i.-e. the community of property and the separation of property. When entering into the marriage, the spouses may opt for the application of one or the other legal regime, as provided in section 24 (2) of the *Civil Status Act*. If they remain silent, the regime of community of property is applied (Article 1393 of the Mauritian Civil Code). Finally, the spouses may also adapt the legal rules to their needs, through a marriage contract, as long as this contract is not contrary to public order or to the accepted principles of morality (Articles 1387 and 1393 of the Mauritian Civil Code).

The most frequent regime is the regime of community of property (Terre, Simler 2019, 197). According to Article 1401 of the Mauritian

[31] In the judgement of the Supreme Court of Mauritius in *Sondhoo v. Hong Kong and Shangai Banking Corporation Ltd & Anor* 1999 MR 160, and *Aubeelock v. Aubeelock & Ors* 1999 MR 199, the Court was of the opinion that the consent of both spouses is necessary under Article 216 of the Mauritian Civil Code, when the spouses are married under the regime of community of property, even though the premises which serve as the matrimonial home are the exclusive property of one of the spouses. Thus, the contract of security or the sale made by one spouse alone, without the consent of the other, will be subject to relative nullity. The spouse who has not given his or her consent to it will be able to invoke the nullity of the contract.

[32] In the judgment of the Supreme Court of Mauritius in *Marc Alain Bouton vs The Mauritius Commercial Bank Limited* 2005 SCJ 60,the applicant (husband) asserted that his wife had created, on their matrimonial home, a security, for the benefit of a bank, and without the husband's consent. Consequently, he ask for the cancellation of this security. The Supreme Court of Mauritius nevertheless decided that the wife did not have to ask for her husband's consent as the couple were married under the regime of separation of property and Article 216 of the Mauritian Civil Code did not apply. – However, the matrimonial home of the spouses married under the regime of separation of property has been protected to a certain extent (against the creation of a mortgage, a fixed charge and a floating charge) by Section 12 of the *Borrower Protection Act*.

Civil Code the community of property of the spouses consists of any property acquired by the spouses for consideration (*à titre onéreux*) during the marriage (Terre, Simler 2019, 198).

First of all, the professional income of each spouse, mentioned in Article 223 of the Mauritian Civil Code, is the common property of the spouses,[33] despite the fact that each spouse can collect it alone and dispose of it alone. Moreover, the income generated by the personal property of each spouse is also considered common property (Monteiro 1998, 28; Terre, Simler 2019, 220; Nicod 2007, 1578). For example, the rent from a house owned by one spouse is considered common property. Finally, all the property that the spouses have acquired for consideration during the marriage is common property[34] and the acquisition for consideration is to be understood in a very broad sense (Aubry 2019, 833).[35] The origin of the funds used to acquire the property is irrelevant. For example, the purchase of land or a house financed by the personal money of one of the spouses will be considered the property common to both spouses. On the other hand, it does not matter whether, from the formal point of view, only one spouse is a party to the contract for purchase or both spouses are (Bremond., Nicod, Revel 2014, 1905). The spirit of common property will prevail and the acquisition of a property for consideration, during the marriage, is considered more important than the fact that the name of only one spouse is mentioned in the contract for purchase. Thus, even if only one spouse is designated as the purchaser of the house in the contract made before the public notary, both spouses are the owners of the house. The construction of a family house (matrimonial home) on land that is the common property of the spouses is also considered an acquisition for consideration.[36] Thus, the house will become common property of the spouses. The rule is based not only on Article 552 of the Mauritian Civil Code (the accession rule), but stems also from the spirit of the regime of community of goods. It is considered that a property made by one spouse

[33] Cass. 1st ch. 17 April 2019, *Recueil Dalloz*, 2019, 665; *Revue trimestrielle de droit civil*, 2019, comment Nicod M., 643.

[34] It should be noted that gifts that the spouses receive during the marriage may, under certain exceptional conditions, also become common property: 1) when a gift is explicitly made for the benefit of both spouses, in other words, the gift is made to both spouses as recipients of the donated property; 2) when a gift was made for the benefit of only one spouse, but the gifter's desire to make it a common property for both spouses was clearly expressed in the gift contract. See: *Mrs. Shrutee Bissoo v. Mr Subash Mohunlall Bissoo* 2000 SJC 269.

[35] See: CA Paris, 3rd February 2010, *Revue trimestrielle de droit commercial*, 2011, comment Pollaud-Dulian F., 108; Cass. 1st ch. 9 March 2011, *Revue trimestrielle de droit civil*, 2011, 577; Cass. 1st ch. 12 May 2011, *Recueil Dalloz*, comment Marrocchella J. 2011, 1413.

[36] This is the case even if the construction was entirely financed with the personal money of the husband or the wife.

alone during the marriage is common property (Terre, Simler 2019, 201), because it results from the common effort of the spouses. This rule is laid down in the judgement of the Supreme Court of Mauritius *Ramanjooloo G. N. v. Vyapooree M.* of 2014.[37]

In Mauritian Law on Matrimonial Property Regimes, spouses married under the legal regime of community of goods have three types of power. First, there are the powers that are said to be competing, which means that each spouse can perform alone conservatory acts,[38] acts of administration[39] and acts of disposition[40] of any property that is not subject to the co-management regime or the regime of exclusive power. In Mauritian Civil Law, the competing powers of the spouses exist for most movable property and each spouse can *a priori* sell a piece of furniture that is common property without the consent of the other spouse. Second, the immovable property (buildings, land, right to construct, etc.) are subject to co-management, which means that the acts of disposition on such property (for example sale, gift, exchange, creation of a mortgage, of a fixed charge and of a floating charge) require the consent of both spouses.[41] If both spouses have not consented to an act of disposition of an immovable property, the act will be void. The nullity is a relative one and may be invoked only by the spouse who has not given his or her consent to the act.[42] It is to be noted that *the gift of any common*

[37] 2014 SCJ 178 – In this judgement the Supreme Court of Mauritius stated that the case falls within the scope of Article 1401 of the Mauritian Civil Code. The Court placed particular emphasis on the fact that an acquisition, in the sense of community of property, is all the property acquired for consideration by one spouse alone or by both of them during the application of the regime of community of property (during the marriage) but also all the goods produced during the marriage by one spouse alone by his or her manual or intellectual activity. The Court also stated that despite the fact that the land was purchased with the husband's personal means and the house was built thanks to the loans that he had taken out, the land and the house are his personal property. Even if one spouse alone created or acquired a property during marriage this property will become part of the common property of the spouses: "However, despite the unrebutted evidence that the plaintiff purchased the land and put up the building from his own personal funds the property in lite does not constitute a *bien propre* of the plaintiff this in view (...) of Article 1401 to the effect that les *acquêts* during the subsistence of the *communauté* between the spouses be it from the sole contribution of one spouse, form part of the *communauté légale.*"

[38] These acts are necessary, essential, because of the urgency of the situation.

[39] These acts are necessary for the proper management of the spouses' common property.

[40] The acts of disposition pertain to the essence of the spouses' common property, and their effect is to bring out of the common property some of the common goods. For example, contracts such as sale, exchange, gift, etc. of a common goods are the acts of disposition.

[41] Article 1424 of the Mauritian Civil Code.

[42] Article 1427 of the Mauritian Civil Code.

property, i.-e. the immovable property, as well as the movable property is subject to the co-management regime. In other terms, Article 1422 of the Mauritian Civil Code[43] requires the consent of both spouses for a valid gift of the spouses' common property. Third, certain powers bestowed on the spouses married under the legal regime of common property are exclusive. Firstly, each spouse has exclusive powers over their personal property.[44] Secondly, the professional income of each spouse, which is a common property of the spouses, is subject to the exclusive power of the spouse who earned it. Thus, Article 223 of the Mauritian Civil Code states that each spouse is free to spend as they wish their professional income, but after having contributed to the expenses of the marriage, in accordance with the law (Article 214 of the Code).

3. INTERPRETATION OF ARTICLES 223, 1131, 1133 AND 1422 OF THE MAURITIAN CIVIL CODE

The short overview of the Mauritian Law on Matrimonial Property Regimes leads us to the particularly interesting issue of the gift of earnings and wages made by one spouse, alone, for the benefit of a third person, and especially for the benefit of a concubine. We will try to show that this type of gift is not necessarily invalid from the point of view of the Mauritian Law on Matrimonial Property Regimes as well as from the point of view of Mauritian Law of Obligations.

3.1. Validity of the Gift of the Professional Income Made by Spouse for the Benefit of a Concubine, from the Point of View of Mauritian Law on Matrimonial Property Regimes

According to Article 1422 of the Mauritian Civil Code, the consent of both spouses is always required for any gift of common property. Thus, both spouses have to give their consent for the gift of a common immovable or movable property, otherwise the gift will not be valid. On the other hand, earnings and wages of a spouse, i.-e. the professional

[43] "The spouses cannot, one without the consent of the other, make a gift of their common property".

[44] For example, a spouse who owns a car as the exclusive owner can sell or exchange it alone, without the consent of the other spouse. Moreover, a spouse who is a welder can sell their own welding machine, without the consent of the other spouse. In order to protect the equality of the spouses and their dignity as human beings, it is considered that the spouses cannot enter into a marriage contract that would derogate from this rule by providing, for example, that the sale of a wife's personal (excusive) property will be subject to the consent of her husband. The rule is of public interest (*ordre public*). See articles 6, 1479 and 1480 of the Mauritian Civil Code. On the other hand, one spouse can grant the other a proxy for the sale of their exclusive property.

income, are a common property and Article 223 of the Mauritian Civil Code stipulates that the spouse who earned the income has the right to dispose of it unilaterally and freely.[45] It may happen that a married person makes a gift of those earnings and wages to a third person and particularly to a concubine.[46] Thus, the issue arises of the rule that should prevail in this type of situation; Article 223 or Article 1422 of the Mauritian Civil Code. It is our opinion that the rule on the free disposition of earnings and wages, provided in Article 223 of the Code should prevail. This legal rule forms part of the primary matrimonial regime in Mauritius (articles 212 through 226 of the Code) which is of public order (*d'ordre public*) and applicable to all matrimonial regimes. On the other hand, Article 1422 of the Civil Code is the part of a specific matrimonial regime (community of property) and is not common to all matrimonial regimes.[47] This is why when a spouse make a gift of a sum of money, derived from his or her professional income, to a concubine, the gift will be valid from the point of view of the Mauritian Law on Matrimonial Property Regimes. In other words, Article 223 of the Code allows a spouse to make a gift of their professional income to a concubine. However, Article 223 of the Mauritian Civil Code does not suffice in order to make such a gift valid. The other issue raised by this type of gift is the issue of the validity from the point of view of Mauritian Law of Obligations.

The technical instrument that the Mauritian judge will use in order to assess the validity of a gift of the professional income made by a spouse to his concubine is the cause of contract (*cause du contrat*). As long as the cause of the gift made by a spouse to his concubine is lawful, this spouse, in spite of the fact that he is married, can freely dispose of his earnings and wages for the benefit of the concubine, provided he has contributed to marriage expenses. This statement needs to be elaborated.

3.2. Validity of the Gift of the Professional Income Made by Spouse for the Benefit of a Concubine, from the Point of View of Mauritian Law of Obligations

The cause of contract (on the suppression of this term in the French Civil Code in 2016 see: Chenede 2018, 67; Tranchant, Egea 2018; Cabrillac 2018, 81; Aubert, Collart-Dutilleuil 2017, 89; Albiges, Dumont-Lefrand

[45] The only limit to this freedom is the fulfilment of the legal obligation stipulated in Article 214, to contribute to the matrimonial charges.

[46] In Mauritian Law, the *concubinage* is be defined as the community of life, stable and enduring between a man and a woman. *Vide*, Cass. crim. 8 January 1985, *La Semaine Juridique, Ed. G*, 1986, comm. Endréo G., n° 20, II 20588; Cass. crim. 4 June 1985, Responsabilité civile, *La Semaine Juridique, Ed. G*, 1985, n° 41, 102392; Cass. crim., 5 October 2010, *Droit de la famille*, 2011, comm. Larribau-Terneyre n° 1, comm. 1.

[47] Cass. 1ère, 14 November 2007, *AJ Famille* 2008, comment Hilt P., p. 86

2019, 71; Mekki 2016, 494; Terre, Simler, Lequette, Chenede 2019, 165; Wicker 2015, 107; Ansault 2014, 22; 26; Ferrier 2015, 74; Houtcieff 2009, 198), also known as subjective cause, may be defined in Mauritian civil law as the personal reasons that are at the origin of the act of will. In other words this cause consists of the motives having determined a party to make a contract (Chenede 2016, dossier 4; Latina 2009, 131; Belanger 2007, 82; Baraké, 2007, 117; Josserand 1984, 24). Articles 1131 and 1133 of the Mauritian Civil Code provide that this cause has to be in conformity with the law, public policy and good morals; otherwise the contract will be void. The cause of contract is applicable to contracts without consideration, such as gift. As mentioned before, the judgements of the French Court of Cassation are the persuasive authority in Mauritius. It should be noted that a spectacular reversal, relating to the cause of the acts of disposition without consideration (such as gift) made by a spouse for the benefit of a concubine, occurred in two judgments of the French Court of Cassation, delivered respectively in 1999 and 2004.[48] For many years, in France, a gift was declared void when its author intended to form, continue, resume or remunerate cohabitation relationships with the beneficiary of the gift, i.-e. his concubine (Mazeaud 2004, 467; Lambert 2006, 288).[49] On the other hand, when the decisive motive of a gifter consisted of the intention to compensate his former concubine for the damage suffered as the result of their separation or to express his feelings towards the concubine who later became his wife or towards the concubine who took care of him during his illness, the cause of the contract of gift is not considered illegal (Mazeaud 2004, 468; Lambert 2006, 288).[50] Thus, the gift will be valid. The First Civil Chamber of the French Court of Cassation abandoned this traditional distinction pertaining to the cause of contract, and stated in a judgment rendered on 3 February, 1999 that the act of disposition without consideration made by a septuagenarian to his young mistress a few months before his death was not null for the immoral cause of the act, despite the fact that the author of the above-mentioned gift had made it in order to maintain an adulterous relationship with his mistress (Mazeaud 2004, 468).[51] Moreover, the Plenary Assembly of the French Court of Cassation has stated, in a judgment rendered on 29 October 2004

[48] Cass. Ass. plén. 25 October 2004, Bull. civ. 2004, Ass. plén. n° 12; Cass. 1ère, 3 February 1999, Bull. civ. I, n° 43, 29.

[49] Cass. civ. ch. 11 March 1918, DP, 1918, I, p. 100; Cass., req. ch. 8 June 1926, D. P. 1927, 1, 113 – See also: Cass., 1st ch., 3 December. 1991, n° of pourvoi: 90–17347; Cass. 1st ch., 11 October 1988, n° of pourvoi: 87–15343; Cass., soc. ch. 4th October 1979, Bull. civ. V, n° 680; Cass. 2nd ch., 10 January 1979, Bull. civ. II, n° 10, 7; Cass. 1st ch., 15 December 1975, Bull. civ. I, n° 365, 303.

[50] Cass. 1st ch., 26 June 1990, n° of pourvoi: 88–19760 – Compare with: Cass. crim. 21 Decembar 1971, Bull. crim. 1971, n° 365, 916; Cass. 1st ch., 6th October 1959, D. 1960, jur. 515.

[51] Cass. 1st ch., 3 February 1999, *Ibid.*

that an act of disposition without consideration is not null and void for the immoral cause when the author of the act, who is married, aims to remunerate the favors of a concubine.[52] If the Mauritian Supreme Court decides to follow the new position that the French Court of Cassation expressed in the judgments of 1999 and 2004, it will render any gift of professional income made by a married person to his concubine valid, even if the main mobile of the author of such a gift was to remunerate his concubine. We are of the opinion that such a solution is not the most suitable for the Mauritian Civil Law. It seems impossible to dismiss from the legal analysis of the cause of a gift of professional income made by a married person to his concubine, the legal obligation of loyalty between spouses, arising from the mandatory provisions of the Mauritian Civil Code (Lombard 2008, 123) (Article 212 of the Code[53]). This obligation of fidelity (loyalty) between spouses forms part of the directional public policy (*ordre public de direction*), as the fidelity between spouses is one of the fundamental values in Mauritian society. Consequently, the personal motive of the gifter, which would be establishment, resumption, continuation or reward of adulterous relationships, is explicitly contrary to the law and to public order in Mauritius (Article 212 of the Code). Moreover, the attempt by a gifter to buy the fidelity of his concubine by means of material goods does not deserve to be tolerated by Mauritian law, because such attempt is not in conformity with morals in Mauritius and is contrary to articles 6, 1131 and 1133 of the Civil Code. Fidelity of spouses is not a commercial goods in Mauritius and it is therefore *hors du commerce.*[54] *In conclusion, we approve the position of the Mauritius Supreme Court expressed in the judgment in Pool and Arthur Savy v. Delorie* of 1958[55] where the Court stated that a gift intended to start, continue, resume, or remunerate cohabitation relationships between a married person and his concubine is void for illegal or immoral motives, but the nullity of a gift may be avoided when the gifter seeks, for example, to repair the damage to a concubine who separated from the married person. It is easy to understand that the position of our Supreme Court is the same as the position held by the French Court of Cassation before the reversal made in 1999 and 2004. The validity of a gift made by a married person to his concubine will depend on the conformity of his motives to the law, public interest and the morality. Thus, in most cases a gift of professional income made by a married person to his concubine will be void from the point of view of Mauritian Law of Obligations, because the gifter seeks to remunerate his concubine, in one or another way. However, there may be some cases where the motive of the married person who

52 Cass. Ass. plén. 25 October 2004, *Ibid.*

53 "The spouses owe each other loyalty, help, assistance".

54 See articles 1128 and 1598 of the Mauritian Civil Code.

55 MR 266.

donates his professional income to his concubine are commendable. It may occur when the gifter wishes to repair the damage caused to the concubine whom he is about to leave or to thank her for having taken care of him during his illness.

4. CONCLUSION

We have attempted to show, after having provided a brief overview of the Mauritian Law on Matrimonial Property Regimes, that a gift of professional income made by a spouse to his concubine is not necessarily void. On one hand, this kind of gift is in conformity with Article 223 of the Mauritian Civil Code, providing that every spouse may dispose alone of their professional income. On the other hand, even if it is true that the above mentioned gift will often be void because the motives of the gifter are contrary to the law, public policy or good morals in Mauritius, it will not always be the case. It may occur that the gift of professional income generated by a spouse to his concubine does not violate articles 6, 1131 and 1133 of the Mauritian Civil Code, because the main motive of the gifter is commendable. The gift will thus be valid both from the point of view of the Mauritian Law on Matrimonial Property Regimes as well from the point of view of the Mauritian Law of Obligations.

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INTELLECTUAL HISTORY OF A TEXTBOOK: RADOMIR LUKIĆ'S *INTRODUCTION TO LAW* BETWEEN MARX AND KELSEN

Radomir Lukić's Introduction to Law *was a model textbook in Communist Yugoslavia for nearly fifty years. Still in use as a learning source in present-day Serbia, it combines Marxist theory of law with Kelsen's normativism in order to explain the legal rule as a social fact without denying its normative dimension. In order to discern the reasons for and patterns of this synthesis, the paper compares the first five consecutive editions of Lukić's textbook, as milestones of the author's intellectual evolution. The initial hypothesis is that Lukić's teaching was no more than a reinterpretation of his Parisian doctoral thesis from the late 1930s. Inspired by French theory of social law and despite being Marxist, his teaching was not of Marxist origin. As such, it facilitates understanding of the Communist theory of law, especially Marxist perception and reception of Kelsenian normativism.*

Key words: *Marxism. – Normativism. – Introduction to law. – Radomir Lukić. – Communist theory of law.*

1. INTRODUCTION

What may be the purpose of intellectual history of a particular textbook? In the case of Radomir Lukić's *Introduction to Law*, the scientific inquisitiveness derives from academic praxis. Not only have more than 50 generations of Serbian jurists gained their first insights into law from this book, but it has served as a model for nearly every other

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introduction-type textbook in the former Yugoslavia. Moreover, most of the contemporary Serbian authors are still using it, making Lukić's *Introduction to Law* more of a living legacy than a silent monument.[1]

Aware of it, Stevan Lilić offered a critical review of Lukić's' "class concept of the state as the organization having the monopoly of physical force, and of law as the will of the ruling class" resulting directly in the interpreting of administrative action as "exercise of state power" (Lilić 2006, 63).[2] According to Lilić, this anachronistic, yet still influential Marxist definition, explains the Serbian resistance to accept the modern concept of state administration as a public service. Although limited to the field of administrative law, this critical review obviously implies a boarder conclusion: as anachronistic, Lukić's perspective still generates harmful consequences.

The initial idea of this paper was to relativize Lilić's conclusion, not only because a definition need not necessarily be faulty due to its Marxist foundation, but precisely because Lukić's definitions were not exclusively of Marxist origin. It is a commonly known fact that his *Introduction to Law* was a syncretic work that combined Marxist theory of law with Kelsenian normativism. The fact that there is no analytical research dealing with the reasons for and patterns of this synthesis offers an excellent impetus for this study. Its initial hypothesis is that Lukić's *Introduction to Law*, as well as his theory in general, combined a sociological approach with normativism in order to explain the legal rule as a social fact without denying its normative dimension. Lukić's so-called objective law theory, formulated under the influence of pre-war French theory of social law, was adaptable enough to the terms of new, post-war ideology of the communist Yugoslavia. The history of his *Introduction to Law* is thus the history of this adaptation.[3]

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[1] Lukić's *Introduction to Law* is a true watershed that divides pre-1941 and post-1945 production of textbooks in this field. By its structure, definitions, choice of topics and the method of their presentation, this book has set the standards that are still generally accepted and observed. The only one (or two) recent exception(s) to this rule was to some extent Kosta Čavoški's *Introduction to Law*, used optionally from 1994 to 2011 at the Belgrade University Faculty of Law (or Ricardo Guastini's *Syntax of Law*, translated into Croatian by Luka Burazin, and from 2016 on in use as a textbook in University of Zagreb Faculty of Law).

[2] The fact that Stevan Lilić has already discussed Lukić's theory of state allows us to focus this study on his theory of law.

[3] In his endeavor to create a systemic Marxist-based theory of law, Lukić had no real competitor in the former Yugoslavia. But on some Marxist legal philosophy points and especially on Kelsen's pure theory of law, in 1963 Lukić clashed with Ljubomir Tadić (then University of Sarajevo Faculty of Law), who – unlike Lukić – was at the time very close to Lukács' interpretation of Marx and in many more ways critical of Kelsen, and afterwards a prominent member of *Praxis* philosophy school. Tadić's PhD thesis on Kelsen (in 1962) became an issue of a vigorous debate with Lukić in 1963 (Lukić, 1963a,

In order to illustrate the latter claim, this paper will compare the first five consecutive editions of Lukić's textbook perceived as milestones of his intellectual evolution which was, *grosso modo,* completed by the early 1960s: *Encyclopedia of Law* of 1946 (hereinafter *Encyclopedia*), *Theory of State and Law Learning Material* of 1952 (hereinafter *Material*), *Theory of State and Law II*, editions of 1954 and 1957 (hereinafter *Theory, ed. '54* or *ed. '57*) and the second edition of his *Introduction to Law* of 1961 (hereinafter *Introduction*, *ed. '61*). The focus will be on the way Lukić progressively modeled his fundamental legal categories apparatus, i.e. the notions of the legal norm, legal act and legal relation, as well as his theory of interpretation. To describe avenues of this twofold influence, the following Lukić's preferred sources will be given priority: Soviet textbooks that he was obliged to use during the late 1940s[4], and Kelsen's *General Theory of Law and State* that he himself translated in the early 1950s.[5] With regard to Lukić's intellectual background, the paper will

Lukić 1963b, Tadić 1963a, Tadić, 1963b). For more on this polemic, see Grebo 1979 and Basta 2019.

[4] These textbooks were written by authors from the so-called second generation of Soviet legal theoreticians. The first post-revolutionary generation of Soviet theoreticians, led by Stuchka and Pachoukanis, professed the "withering away of the state and law" and defined law as a system of social relations rather that a system of norms. After 1931, such an approach would have been ideologically eliminated and progressively replaced by another theory in line with the political needs and actions of Stalin's socialist state. This new Soviet socialist theory of state and law, incarnated in Andrey Vyshinsky and the second generation of Soviet theoreticians such as Golounsky, Strogovitch and Denisov, became less suspicious towards normativism and ready to adapt it to Marxist premises. Despite of the fact that Yugoslav theory of law came along with this teaching and was ready to accuse the first generation of Soviet authors as "vulgare economists of Trotskyist-Buharin attitude" (Lukić 1948, 615–619; translation by author), Yugoslav theoreticians were mostly interested in the early post-revolutionary period of sociological orientation (Tadić 1957; Džinić 1963; Anzulović 1967; Gams 1967). On the other hand, reviews and critical analyses of this mature Soviet theory of law remained extremely rare (Lukić 1948; 1957b; Popović 1980), notwithstanding Radomir Lukić and some other prominent Yugoslav authors, such as Jovan Đorđević in Belgrade or Ivo Krbek in Zagreb, who had adopted the same approach. This is most likely due to the rising detachment from the USSR after the Tito-Stalin split in 1948. A brief, but harsh ideological critical review of Denisov's textbook in 1950 confirms this turning point in Yugoslav legal science (Unknown Author /probably Radomir Lukić/ 1950, 165–166). Naturally, it does not mean that Lukić lost contact with and interests in the Soviet legal thought and its further evolution. On the contrary, a lion's share of his personal library at the time (until the 1960s) had been composed of Soviet and, generally, Marxist legal literature.

[5] Hans Kelsen's *General Theory of Law and State* was translated by Radomir Lukić and Milorad Simić and published as an edition of Belgrade-based legal review *Arhiv za pravne i društvene nauke* in 1951 under the title *Opšta teorija prava i države* (Kelzen 1951). All references to Kelsen's classical work in this text are taken from this Serbian edition that was apparently the main source of Lukić's normativism. Lukić's reading of Kelsen was mostly focused on his early writings, especially *Hauptprobleme der Staatsrechtslehre* and his Berkeley textbook of 1945 (Lukić 1950; 1951; 1955a; 1955b; 1983), and much less on his *Pure Theory of Law,* which Lukić considered a writing of

also point to the pre-war Serbian and French teaching books,[6] which have been mostly relied on – let's call it – classical theory of law that for the purposes of this paper designates dominant European pre-Kelsenian theories of law.[7] However, this paper does not take into consideration other post-war textbooks from the period of socialist Yugoslavia since they were all quite similar and came after Lukić's classical volume, so they may only indicate the importance of Lukić's influence and, consequently, corroborate the practical importance of this research.[8]

2. MARXIST-KELSENIAN SYNTHESIS

According to *The Great Soviet Encyclopedia*, "normativism as a whole is directed against the Marxist interpretation of law" since it holds that legal science must "disregard the social factors" and "that law must be studied in 'pure form' as a special normative sphere independent of social life and economic and political conditions." If this is the case, it is so because "normativism is based on the neo-Kantian idea that the 'ought' and the 'is' are inseparable from one another and that the former cannot be derived from the latter..."[9] Unburdened by this neo-Kantian dichotomy, Marxist theoreticians felt free to explain the legal rule as a normative phenomenon determined by its social background. After 1945 Lukić also followed such an approach,[10] but he left the door open

secondary importance that "added nothing really new to the author's general ideas" (Lukić 1950, 333).

[6] Especially the titles that had been pointed out by Lukić himself as literature and sources relevant to his work (Lévy-Ullmann 1917; May 1932; Du Pasquier 1937; Juliot de la Morandière *et al*. 1951) and listed under each chapter (Lukić 1957a) or after Introductory remarks (Lukić 1961a).

[7] For a detailed historical survey of the discipline in the civil law world (including 20th century Europe) before and after Kelsen, see Pattaro, Roversi 2016.

[8] Author of this article expresses his gratitude to the Judge Renata Pavešković, Head of the Velika Plana Court District, who kindly made it possible to consult the personal library of Professor Radomir D. Lukić that was bequeathed to this Court after 1999.

[9] *The Great Soviet Encyclopedia*, 3rd ed. (1969–1978, 1981), vol. 18, 1974, 382–383; cited according to Hasanbegović 2015, 69–70, n. 1. It seems that Jasminka Hasanbegović was the first one (at *loc. cit.*) who noticed a grave misprint in that Encyclopedia's wording: "If this is the case, it is so because 'normativism is based on the neo-Kantian idea that the 'ought' and the 'is' are inseparable from one another and that the former cannot be derived from the latter," instead of saying: "If this is the case, it is so because "normativism" is based on the neo-Kantian idea that the 'ought' and the 'is' are so separate from one another and that the former cannot be derived from the latter" (Hasanbegović 2015, 70).

[10] Lukić also claimed that Kelsen's starting point must surely be wrong since he denied that "normativity is a part of reality" (Lukić 1950, 334).

to normativism by recalling that its founding father Hans Kelsen had never really dismissed the Marxist class concept of law as wrong, but only as irrelevant for understanding the way normative side of law really functions (Lukić, 1955a, 234).

2.1. Legal Norm

The fourfold structure of the legal norm is probably the best-known feature of Lukić's *Introduction to Law*. Indeed, a brief survey of older and alternative Yugoslav legal literature of the time is illustrative enough: the pre-war Belgrade legal teachings never explained the legal norm in this way,[11] and the post-war Zagreb and Ljubljana legal teachings have been in this respect under Lukić's influence.[12]

The new understanding of sanction lies at the core of his doctrine. According to the oldest legal literature that Lukić refers to, the legal rule is a hypothetical statement compounded of only two elements (i.e. the disposition or legal rule *stricto sensu*, and its hypothesis as a qualifier describing, i.e. determining a fact or facts needed for the implementation of that rule). The sanction itself was only a mere guarantee of due observation of the legal rule as such (provided by another legal rule).[13] Kelsenian and Soviet legal theory, on the contrary, recognized the sanction as an integral element of the legal norm. However, the role of sanction remained disputable. Kelsen perceived the sanction as the normative element of primary importance since only the fact that sanction existed for certain behavior implies the norm imposing the opposite. Contrary to Kelsenian theory, Soviet theory remained closer to understanding of

[11] While Feodor Taranovski's *Encyclopedia of Law* (Taranovski 1923, 132–134) followed the classical legal theory and its twofold and hypothetical structure of the norm, Stojković's *Introduction to Law* of 1940, as well as Tasić's *Introduction to Legal Sciences* of 1941, did not discuss this issue at all. In postwar Serbian legal theory, the classical teaching of the norm was still argued by Toma Živanović in *System of Synthetical Philosophy of Law* (Živanović 1997, 65–67).

[12] Berislav Perić's *Structure of Law* and Oleg Mandić's *State and Law II* at the Faculty of Law in Zagreb and Gorazd Kušej's *Introduction to Legal Science* at the University of Ljubljana broke away from the classical teaching of their predecessors (Lanović 1942, 63–70) and adopted the Soviet threefold model of the legal norm (Mandić 1958, 21–24; Perić 1964, 15–16; Kušej 1966, 99–101). The fact that the first editions of all these Yugoslav textbooks appeared after 1957, and that they often explicitly referred to Lukić's writings, makes Lukić's influence on these authors more than probable. This influence is far more evident at universities in southern and eastern parts of former Yugoslavia, which did not have a long tradition in legal education.

[13] In other words, a sanction was understood as a certain legal rule that ensures implementation of another legal rule. "La sanction est la conséquence attachée par le droit à la violation d'une règle juridique; [...] C'est une règle de droit qui la determine" (Du Pasquier 1937, 107). Similar to this, Nikolai Korkunov (Korkunov 1922, 187) and Feodor Taranovski (Taranovski 1923, 282).

sanction as a necessary, yet secondary normative rule that only ensures the implementation of the primary one. This difference in reasoning is actually epistemological: from a Kelsenian strictly analytical perspective, the sanction (and the legal norm itself) makes sense only if its due implementation is guaranteed by another, superior sanction. Consequently, a legal order is considered a hierarchically organized series of sanctions that linearly enforce one another, ending with a logically needed but only hypothetical *Grundnorm*. For Soviet theory, with its allegedly scientific approach, the foundation of the sanction is empirical. Thus, Kelsen's logical and hypothetical *Grundnorm* has been replaced by a (categorical!?!) fact: the State. Consequently, the rule is made legal not by just any sanction, but only by the *state-provided* sanction.

Obviously, Lukić's fourfold formula was not created *ex nihilo*. Innovative, yet not original, it was more an important part of the Soviet legacy than his genuine doctrine. Namely, in his first post-war textbook of 1946, Lukić still argues in favor of the Soviet three-part formula: the legal norm consists of a hypothesis, a disposition and a sanction (Lukić 1946, 25–28).[14] He may have easily adopted this teaching from Soviet textbooks that had already been in use at the Belgrade University during the late forties. Moreover, the Golounsky-Strogovitch textbook was a unique officially approved teaching material at the time, so Lukić's *Encyclopedia of Law* was only complementary learning material, which was expected to remain coherent with the Soviet theoretical standpoints. The way Lukić understood sanction as a secondary disposition, and especially its grounding ultimately in the State, placed him clearly on the Marxist line of 20th century legal thought. After all, Lukić's fourfold structure of the norm was no more than the further crystallization of the Soviet formula achieved through a gradual emancipation of *delict* as the fourth, free-standing and "logically necessary" element of the norm.[15]

Yet, it would be wrong to think that this early Soviet influence on Lukić resulted from his political opportunism.

Incorporation of delict into the logical structure of the norm, actually, may also indicate Kelsen's influence on Lukić's writings. Namely, it followed his reading of Kelsen's *General Theory of Law*

[14] Cf. Soviet textbooks of Golounsky-Strogovitch (Golunski, Strogovič 1946, 217–219) or Denisov (Denisov 1949, 358). There is an evident influence of Feodor Taranovski's textbook, especially regarding the typology of norms (Taranovski 1923, 134–138).

[15] The emancipation of *delict* was rapid, but gradual. Lukić's 1946 *Encyclopedia of Law* mentioned it briefly (Lukić 1946, 53). The 1952 *Materials* elaborated sanction as the third element compounded of two elements: the secondary hypothesis (delict) and the sanction *stricto sensu* (Lukić 1952, 52–53). Lukić's 1957 *Theory of Law* had already recognized determination, i.e. description of a delict as an equally important element of the complete (or perfect, i.e. compound) legal norm (Lukić 1957a, 82–83).

and State, which emphasized the sanction as a primary disposition, and consequently the delict as hypothesis for the sanction. The fact that Lukić, unlike other Yugoslav theoreticians of his generation, especially those from Ljubljana and Zagreb who kept the Soviet threefold formula, recognized the description, i.e. determination of the delict as so-called secondary hypothesis of the so-called perfect legal norm, which includes ultimately the State sanction, supports the assumption of a simultaneous and combined Soviet and Kelsen influence on his work.

Another important part of Kelsen's teaching that slowly but surely snuck into Lukić's *Introduction to Law*, eventually becoming a common place in his understanding of the norm structure: abandoning both the classical and the Soviet concept of the norm as, *per definitionem*, a hypothetical statement. This resulted from Kelsenian elimination of the classical distinction between legal rule and its effective implementation through the court rulings or administrative legal acts. Since decisions contained in these two kinds of concrete legal acts are not hypothetical, but categorical stances, classical legal theory treated them as concepts differing from norms (Du Pasquier 1937, 81–90). It was Kelsen who shifted this perspective. Since a court or administrative decision derives from a statute or other decisions containing (or able of creating) general legal rules, likewise statutory or similar general legal rules themselves stem from constitutional ones, so there is no real difference in their *nature*, but only in the *degree* of their extent, accuracy and concreteness. They are all norms: the first ones are concrete, and the second type belongs to abstract (or general) ones. According to Kelsen, the hypothesis of a general legal rule is perhaps a regular, but irrelevant element of the norm structure and dynamics.

It seems that Lukić was strongly affected by the idea of abandoning the hypothetical character of legal norm as its structural necessity.[16] Not only did Lukić adopt Kelsen's position on this matter early on,[17] but he

[16] Lukić's enthusiasm for this idea was genuine. The Soviet theory of the time did not explicitly recognize the distinction between the general and concrete (or singular) norm. In Denisov's textbook, "a norm is a rule of, more or less, general character" (Denisov 1949, 355; translation by author). Golounsky and Strogovitch differentiated between the abstract and concrete rule, but only as two different types of the general rules or proscriptions created by the state (Golounsky, Strogovitch 1946, 215–216). The French textbooks from the late 1940s that Lukić consulted discuss this aspect of Kelsen's normativism only as an interesting, but not recognized doctrine (Du Pasquier 1937, 93–94).

[17] If Lukić's 1946 *Encyclopedia* was strongly influenced by classical pre-war theory, and implicitly adhered to the idea of the norm as a hypothetical stance, his 1952 *Material* had already spoken of general and concrete norms, and undoubtedly mentioned that "[...] certain theoreticians do not consider individual [i.e. concrete] norms as norms, but as an implementation of a general norm on a specific situation, which means that only general norms are – norms." (translation by author) In other words, his classical standpoint of 1946 had become thoroughly relativized in 1952.

pointed it out in a way that it became a starting point for his norm theory.[18] Since there are concrete (or individual) norms containing a hypothesis, and general norms deprived of it, Lukić implicitly reached the conclusion that the hypothetical form could not be *differentia specifica* of a legal norm.[19] Kelsen claimed pretty much the same, but he was less radical. Unlike Lukić, who in a way recognized absolute legal norms,[20] which some authors usually associate to legal principles, Kelsen considered general legal norm typically – i.e. by its nature – hypothetical (Kelsen 1949, 91). Additionally, if Kelsen spoke of the concrete (or individual) norm that contained a hypothesis, it was only of a secondary hypothesis, namely, of a delict, or disrespect of rule that implies the sanction, and never of a hypothesis of disposition (Kelsen 1949, 38).

2.2. Legal Act

It appears that, unlike his teaching of the norm structure, Lukić's definition of the legal act as an "act of will that creates a legal norm" (Lukić 1952, 65; translation by author),[21] was closer to normativism than to the Marxist theory of law.[22] He could not have found this definition in Soviet textbooks from the late 1940s nor in classical theory of law.[23] One

[18] His 1954 *Theory of State and Law* had started the exposition of his norm theory in the chapter titled "Hypothetical and Non-hypothetical Norms", giving the definition of norm and some introductory remarks (Lukić 1954, 70–71).

[19] Lukić says: "Obviously, it is possible to imagine a legal order deprived of hypothetical norms, since they are not indispensable. On the contrary, a legal order without non-hypothetical norms is inconceivable, since they are indispensable" (Lukić 1974, 202; translation by author).

[20] Though Lukić did not use the term "absolute norm", he certainly had in mind one of two possible types of general legal norms: the unconditioned (i.e. absolute) general legal rules, i.e. the general legal norms the implementation of which is not conditioned by the occurrence of any specific and qualified facts (Lukić 1974, 202). In this, Lukić clearly deviated from classical legal theory, which strongly denied the existence of absolute norms (Korkunov 1922, 176).

[21] This definition of the legal act, however, was completed by its additional specification in 1957. Namely, according to Lukić's *Theory*, a legal act could, indeed, be an act of will that creates a legal norm, but also an act of will that claims the existence of a condition for applying such a norm, i.e. a legal act could also claim the existence a qualified fact stipulated by the hypothesis of a certain legal norm (Lukić 1957a, 104). This twofold definition became a common feature of the later editions of Lukić's *Introduction* (1961a, 200; 1963a, 192; and 1974, 220).

[22] More specifically, closer to Adolf Merkl than Kelsen, since Lukić reffered to two Merkl's (Merkl 1923; Merkl 1967) and none Kelsen's work (Lukić 1957a, 103).

[23] Just like the classical theory of law, the Soviet authors were not familiar with this concept. Instead, they acknowledged legal sources as a form or manner of expressing legal norms (Denisov 1949, 393; Golunsky, Strogovič 1946, 149). On the other hand, both traditions, the Soviet and the classical one, discussed the notion of the legal act, but only as a legal fact that establishes, modifies or abolishes legal relations. For the oldest Serbian

might think that Lukić adopted Kelsen's definition of the legal act as a way to overcome *Hume's law* and find the philosopher's stone of legal theory: transcending the gap between fact and norm (i.e. make an *ought to be*, logically, if not empirically, interconnected with the social reality). According to Kelsen, the legal meaning of a certain fact originates from a norm that attributes certain juridical consequences to it. The norm itself, however, is no more than the legal meaning of another fact, qualified as normative by another legal norm, which is simply the legal meaning of another, superior fact, qualified as such by a superior norm, etc. The first traces of this specific act and norm dynamics had already been noted in Lukić's *Encyclopedia*. In his 1946 textbook, Lukić made the distinction between a judicial or administrative act and a statute since only the latter "contains those norms that legal acts are **based on** (since we have defined the legal act as a declaration of will **based** on a legal norm)" (Lukić 1946, 34; translation by author; emphasis in original). In other words, a legal act (a judgment or a contract), which is based on a legal norm, needs another act (a statute) to establish that norm. However, it would be wrong to believe that Lukić's adoption of normativism at this point was linear. In his 1952 *Materials*, Lukić does not pronounce on this, while in his 1957 *Theory* he claims that "creation of a legal act is regulated by another, superior legal act" (Lukić 1957a, 109; translation by author). Kelsen's formula is found only five years later, in the 1961 edition of his *Introduction to Law*: "One of the characteristics of the legal order is that it regulates its creation on its own [...] It means that, practically, legal norms are created by legal acts, and creation of a legal act itself is regulated by another, preceding legal norm contained in another, preceding legal act" (Lukić 1961a, 203; 1963a, 194; translation by author). Ten years later, in the 1974 edition of *Introduction to Law*, Lukić retained the same position: "It means that, practically, legal norms are created by legal acts, and that the creation of a legal act itself is regulated by another, preceding legal act" (Lukić 1974, 224; translation by author).

It should be noted, however, that in Lukić's view these processes of interchaining of norms with acts in a legal order always finish with "another, preceding act", not with "another, preceding norm." This means that the chain is closed by a (f)act, i.e. the Constitution as an expression of the supreme political will, and not by a constitutional, or any other *Grundnorm*. This indicates that Lukić had perhaps adopted a Kelsenian analytical perspective of the self-regulated legal order, but he did not

authors that followed the classical theory cf. Feodor Taranovski (Taranovski 1923, 159–160) or Toma Živanović (Živanović 1997, 280–286). For mainstream Soviet authors that have been translated into Serbian, cf. Golunsky and Strogovitch (Golunski, Strogovič 1946, 241–242) or Denisov (Denisov 1949, 424). Lukić did the same in his *Encyclopedia* (Lukić 1946, 33).

perceive it the same way. Unlike Kelsen, who used it in order to make an *ought to* logically connect, yet remain autonomous from the social reality, Lukić had never tried to emancipate the former from the latter, but intended to integrate them. Therefore, in his interpretation, a legal norm is also the content of a legal act, and, as such, a part of reality.

Defining the legal norm as the content of any legal act, it seems that in the beginning Lukić had not clearly differentiated between these two concepts. The confusion concerning legal norm and legal act was most obvious in his 1946 *Encyclopedia*. He claims there that "every legal norm consists of two elements: its form that determines its legal force and its content" (Lukić 1946, 38; translation by author), but he does not relate the form of the norm to its original legal source, as Soviet authors have done. On the contrary, he holds that it "is prescribed by another legal norm" (Lukić 1946, 38; translation by author). That is how he came to the hierarchy of norms as ordered by their legal force, yet, curiously enough, illustrated as a hierarchy of acts that starts with the Constitution and ends with statutes and regulations (Lukić 1946, 39). Six years later, in *Material*, Lukić would claim that it is the act, and not the norm, that has both the form and the content (Lukić 1952, 65–66), but a hundred-and-thirty pages later he insists that the legal force of a norm depends of its own form (Lukić 1952, 191).[24] This inconsistence was eliminated in his 1957 *Theory*, in which he claims the legal force of a norm is deduced from the form of the legal act that creates the norm (Lukić 1957a, 286). In this way Lukić's position has been clarified gradually: from 1946 all of Lukić's textbooks associated legal force both with the legal norm and the legal act, but from 1957 on it is clear that the legal force of the legal norm (and of the legal act, respectively) depends solely on the (elements of) form of the legal act that contains the given norm (Lukić, 1952, 71–72 and 191; 1957a, 103, 150–151 and 286; 1961a, 198–199, 278–279 and 276–277; 1963a, 190–191, 254–255 and 251–252; 1974, 219–220, 293–294 and 297).

Lukić's way of thinking about the relation between the norm and the act may come across as an oversight or a misunderstanding. Upon careful analysis, it is clear that it reflects his position that this relation is not based purely on the legal interchaining of legal norms with legal acts, as Kelsen thought, but on their common interaction with the third and crucial element of Marxist legal theory: the concept of legal relation.

2.3. Legal Relation

The Soviet definition of legal relation, which became Lukić's definition too, was not actually of Soviet origin. Its core is based on

[24] Similarly, form is a property of both the act and the norm (Lukić 1952, 96–97).

classical theory, which perceives law as a twofold phenomenon. According to Korkunov, who followed the older German legal doctrine, legal relation is but the *verso* of legal rule (i.e. a set of rights and obligations that the rule is to provide to legal subjects). Therefore, "[...] legal relations are also social relations, but governed by a legal rule [...]" (Korkunov 1922, 193). The concept of legal relation was well-known in this interpretation[25] and useful to Soviet legal theoreticians. It helped them overcome a gap between norm and reality through the dialectic understanding of history as a permanent and creative interaction between a social base and the legal superstructure.[26] According to some Soviet authors, like Piontkovsky and Ketchekyan, a norm is not an extra-empirical entity, but a social fact that comes into being through its practical implementation, transforming a social into a legal relation (Varga 1967, 192). Nevertheless, it seems that this overly realistic teaching has remained a minority standpoint of the Soviet legal theory which, for the most part considered legal relation only as a way of implementation of a norm, not as a way of its existence *per se* (Golunski, Strogovič 1946, 233; Denisov 1949, 411). Generally speaking, Marxist theory of law continued to rely on legal relation as a specific counterweight to norm, thus exceeding normativism.

Radomir Lukić's *Introduction to Law* tried to adapt this Soviet understanding of legal relation to Kelsenian normativism, which had never really considered this concept in any greater detail. In his attempt to explain the twofold nature of law as empirical *and* normative,[27] Lukić referred to Kelsen's notion of legal order as a concept unfamiliar to the Soviet authors of the late 1940s. Yet, even if he had really relied on Kelsen in defining the legal order, he did not perceive it as a purely normative phenomenon. Along with its normative side, considered a system of norms aimed at regulating the life of a society, every legal order in Lukić's opinion includes real social interactions as its empirical or factual side. There are still more differences as pertaining to Kelsen. As mentioned above, Lukić brought the legal norm and legal act in conjunction and inclined to keep them together, as two related elements on the normative side of the legal order.[28] He did not do the same concerning legal relation.

[25] As it was to pre-war Yugoslav theory of law, inspired by Korkunov or other theoreticians who broadly discussed this topic in their papers (Taranovski 1923, 138–147; Tasić 1941, 118–122; Živanović 1997, 275–280).

[26] There was, however, a broad discussion whether legal relation was part of the superstructure or was closer to the basis, or even if it united them in and by itself. For more details see Popović (Popović 1980, 47–48).

[27] Such influence of the classical tradition speaks in favor of the fact that Lukić defined a legal act both from its objective side (i.e. as an act creating a norm) and the subjective one (i.e. as an act of will that establishes, modifies or abolishes legal relation).

[28] This was not so from the very beginning; in *Encyclopedia* Lukić defined legal order as a system of norms without reference to any empirical or factual part of it (Lukić

Truth be told, in his 1952 *Material*, legal relation was the third element of the normative side of a legal order, along with the norm and the act (Lukić 1952, 51). Starting from 1957, legal relation in his teaching did not belong to either side. Just like in Piontkovsky's and Ketchekyan's papers, it was perceived as a link that kept the normative and the factual sides of legal order intertwined.[29] It practically meant that Lukić too was ready to recognize an order as *legal* only if it was *factual*. On the other hand, unlike Piontkovsky and Ketchekyan, who conditioned the validity of every single legal norm by its efficiency, Lukić preferred Kelsen's positions. In other words, he conditioned validity of a legal order by its overall efficiency, that of the system as a whole, and had never claimed that the validity of every single norm depended on its efficient implementation. On the contrary, the validity of a norm, i.e. its compliance with a superior norm in all (material or content-wise, and formal) aspects of its creation, remains its crucial qualifying feature as a legal and legitimate part of the legal order.

Although this chapter of the *Introduction to Law* may seem like Lukić's linear and consistent reception of Kelsenian ideas, this is not the case. In fact, his notion of the validity of norm was quite far from the Kelsenian one. His whole life, Lukić struggled with the definition of this concept, torn between a formal, strictly analytical concept of validity of norm, approaching Kelsenian normativism, and another, sociological understanding of validity as a social or even a psychological fact – a binding (individual or collective) consciousness that requires the respect of the norm – which he developed in his doctoral thesis in 1939. This point in Lukić's reasoning has already been the subject of analysis (Dajović 1995; Bozic 2020, 198–204) and will not be discussed here again because of its irrelevance for the topic of this paper. *Introduction to Law* had neither developed this topic more particularly, nor eliminated Lukić's dilemmas. Although personally deeply intrigued by the problem, Lukić was careful enough not to burden his students with it. Nevertheless, there are at least two less evident traces in his textbook that are indicative of his doubts. The first one is of lexical nature and refers to the declining use of the term *validity*, which from 1946 on has been gradually pushed into the background giving way to the alternative expression *positive law*.[30] The second clue is even more compelling. Up to 1957 Lukić had explicitly and unequivocally explained the validity of a norm as a feature dependent on its compliance with another, superior norm (Lukić 1946,

1946, 37).

[29] Expressed also in *Introduction* of 1961 and its subsequent editions – only in a different way.

[30] In 1946 *Encyclopedia*, 1952 *Material* and 1957 *Theory* Lukić used both terms equally. In all editions of his *Introduction*, starting from the second one of 1961, the use of validity was so reduced that it is nearly non-existent.

43; 1952, 189–190; 1957a, 285). After 1961, he made no additional effort to explain this concept.[31] In general, the subsequent evolution of Lukić's teaching, which, after the publishing of his monograph on *Interpretation of Law* in 1961, had been focused primarily on legal philosophy and not on general legal theory, tended towards a gradual return to his early ideas and the discreet renewal of his pre-war theory of objective law. Thoroughly inspired by the French theory of social law, such tendencies became evident in Lukić's later distinction between the formal and real validity and even more so in his interpretation of law.

2.4. Interpretation of Law

Of all the topics from Lukić's *Introduction to Law* discussed in this paper so far, his interpretative theory was the least syncretic combination of Kelsenian normativism and Marxist theory of law. There are, however, some hints indicating that Lukić's original theory of interpretation was not a free-standing part of his legal reasoning. It is *the* piece of the puzzle connecting the whole, also revealing most obviously its basically Marxist alignment. Regardless of its rapid emancipation of Soviet doctrinal teaching and progressive incorporation of an important Kelsenian element, the evolution of this interpretative theory unfolded along Lukić's mainstream thinking, heading towards the inception of the Marxist theory of natural law.[32]

For better understanding, it may prove useful to emphasize Lukić's detachment from the Soviet theory of interpretation, which he acquired early on. Inasmuch as he embraced Kelsenian understanding of the norm, Lukić's textbook, from its early editions, speaks not only of interpretation of the general norm, as discussed by Soviet authors, but also of the concrete (or individual) one (Lukić 1946, 59). This starting distinction is more significant than it may seem at first. Namely, according to 1940s Soviet textbooks, not only could a general norm be the exclusive subject of interpretation, but the *stricto sensu* interpretation was only the one undertaken *in abstracto* by the supreme state authorities. In other words, this meant that all those *in concreto* interpretations undertaken by legal practitioners were not *interpretations* at all, but rather simple *explanations*.[33] This distinction between the interpretation and explanation of a norm was based on Stalin's Constitution. According to the USSR

[31] A specific book chapter on the validity of the norm can be found in Lukić 1952, 191–192; 1957a, 285–287; the explanation of the meaning and nature of a positive (or a valid) norm in Lukić 1961a, 272 and 274; 1974, 309–316.

[32] Especially in his later years (Lukić 1979; Lukić 1980; Lukić 1986).

[33] The title of this chapter in the Golounsky-Strogovitch textbook is eloquent enough: *Explanation and interpretation of legal norm* (Golunski, Strogovič 1946, 221–232; translation by author). On the other hand, Denisov's textbook from the late 1940s abandoned this approach. According to Denisov's classification, there is an

supreme legal act from 1936, only the findings of the interpretation *stricto sensu* were compulsory for all judicial and administrative authorities with a law implementation mandate. The effects of the so-called *explanation* were limited strictly to a particular case covered by a judicial ruling or an administrative act. In other words, from the Soviet perspective, interpretation of the law was clearly separated from its immediate implementation. Notwithstanding that the first Yugoslav constitution (1946) was modeled after the Soviet one, and providing the highest state authority – Presidium of the National Assembly – with interpretative competencies of compulsory effect, Lukić did not embrace this Soviet theory of interpretation. His 1946 *Encyclopedia* had already relativized the Soviet distinction between interpretation and explanation, clearly stressing the highest importance of *in concreto* interpretations relative to the norm's direct implementation (Lukić 1946, 59). Several years later in his *Material* he modified the Soviet model even further by dividing all interpretations into those related to implementation and those that are not.[34] The Tito-Stalin split in the late 1940s and the resulting constitutional changes prompted further emancipation: the 1953 Yugoslav constitutional law removed these special interpretative capacities of the supreme state authority from the national legal system and introduced the classical concept of the legislator's authentic interpretation of law instead.[35]

Lukić seems to have paid much more attention to the theory of interpretation than the Soviet authors of the time did. Actually, the volume of his textbook chapter dedicated to this topic never stopped growing. While the Soviet authors were satisfied with some seven– or eight-pages explanations, Lukić used 24 pages in 1946, nearly 30 in 1952, over 40 in 1957, and around 70 in the 1974 edition of *Introduction to Law* for this purpose. It is without a doubt that no other part of his *Introduction to Law* gained in significance so rapidly and extensively, changing its form quite notably along the way.

authentic interpretation given by the lawmaker, as well as a casuistic interpretation of the administrative and judicial authorities applying the norm (Denisov 1949, 430).

[34] However, this emancipation from Soviet influence was not as radical as it might have seemed. Before the first edition of his 1963 *Introduction* 1, Lukić had kept the chapter on interpretation away from the chapter reserved to implementation of law. From then on, implementation and interpretation became two subchapters within a single chapter, entitled "Implementation of Law". Furthermore, although he had been continuously pointing out the relevance of interpretation by courts and administrative authorities, he denied its compulsory character the same way that the Soviet authors did (i.e. by emphasizing its limited effect restricted to a particular case, Lukić 1952, 137–140).

[35] It is noteworthy that Lukić had never accepted the authentic interpretation of law through an interpretative act, as the interpretation *stricto sensu*, but as the creation of a new legal norm that amended the older one. At this point, he did not stray far from some Soviet textbooks from the mid-1940s (Golunski, Strogovič 1946, 225), as well as from pre-war Belgrade authors dealing with classical theory (Taranovski 1923, 473–474).

From the beginning, Lukić tried to specify the very aim of interpretation, which the Soviet authors had not detected and defined. Naturally, their interpretations targeted the meaning of the legal rule, but they never specified what that meaning really ought to be. Since they believed that the meaning of a norm was achievable by its textual analysis, historical background and systemic context, it seemed that the Soviet authors implicitly perceived this meaning as the lawmaker's authentic will. However, by 1945, this so-called *subjective* meaning of a norm as the aim of its interpretation was heavily criticized and half-abandoned by the mainstream contemporary legal theory of the time. This was the reason why – if not already in his 1946 *Encyclopedia*, then surely in his 1952 *Material* and 1954 *Theory* – Lukić did not uncritically follow the Soviet approach but, instead, thoroughly discussed the *pro et contra* of both the subjective *and* objective theory of interpretation. The result of this decade-long self-questioning was a steady change of Lukić's course, which finally culminated in the second edition of his *Introduction to Law* in 1961. From then on, the aim of interpretation was to discern the objective, or, more precisely, the *right* meaning of the norm that coincides *grosso modo* with its *ratio legis.*[36]

The definition of this right meaning of a norm (perceived as *the meaning that a norm should have, had the lawmaker been aware of the social need protected by it,* not a meaning that the lawmaker simply gave to a norm) was provided for the first time in 1961, not evolving much since (Lukić 1961a, 316; 1985, 349).[37] In other words, the sense of a norm lay in a certain social need that should have been recognized and codified by the lawmaker. This was in perfect compliance with the Marxist vision of the permanent interaction between the law and the society. As part of the social superstructure, the law necessarily reflects the dynamics of the social basis and ultimately the interest of the ruling class. Consequently, positive legislation is a socially and historically determined, not a voluntaristic phenomenon. The purpose of law is, therefore, subject to rational and scientific discovery driven methodologically by the principles of historic materialism.

This undoubtedly jus-naturalistic profile of Lukić's theory[38] has been strongly emphasized throughout his teaching of the interpretative techniques. Basically, it was derived from the Soviet theory, which itself

[36] The concept of right meaning appeared earlier on in his work. For the first time, but without any definition, it was mentioned in the 1952 *Material* (Lukić 1952, 144–145) and again, more developed, in the 1954 *Theory* (Lukić 1954, 213–219).

[37] Actually, it is a year older. Lukić's presented this theory of interpretation for the first time in an article titled *The Right Meaning of Legal Norm* (Lukić 1960, 253–271).

[38] Lukić had never denied this. In fact, during the 1980s the Marxist natural law became one of his preferred topics (Lukić 1980; 1986).

borrowed a lot from the classical theory of law. For both the Soviet and the classical authors there have been two types of interpretative techniques. The first aimed at finding sensible meaning through linguistic and logical analysis of the normative text. The others fall into a category of analytical approaches and tools deriving the meaning of a certain norm from its broader historical or legal context.[39] Lukić modified this teaching in two segments. Initially, he reduced the initial set of four techniques by removing the linguistic one from it, only to introduce a new interpretative technique – the so-called *teleological* interpretation. Both these interventions are of equal importance.[40] Namely, Lukić did not simply replace the linguistic with the teleological interpretation. He singled out the former in order to promote its status to a privileged technique for achieving the basic, so-called *linguistic*, meaning of a norm. Regardless of the fact that the linguistic meaning was not necessarily the *right* one, it was the first step that anyone interpreting the norm should take. Its aim was to define an elementary framework of possible meanings as the starting point in the quest for the right one. In other words, whatever the right meaning of a norm may be, the search for it cannot cross over the boundaries that a linguistic interpretation had previously identified.

Lukić's insistence on the latter, limiting and linguistically defined framework of meanings may indicate his affinity towards Kelsen's theory of interpretation. However, a crucial difference in their reasoning questions this ostensible resemblance. Kelsen's idea that the interpreter's final choice is always a matter of their will (i.e. that the interpreter choses one of the meanings from a given linguistic framework) seemed unacceptable to Lukić. This Kelsenian semi-voluntarist conception of interpretation has been resolutely opposed by his idea of interpretation as a purely scientific undertaking: the right meaning of the norm could be the only one and it was always rationally discernable.

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[39] The Soviet interpretation theory remodeled the classical one, which has been paradigmatically presented in Korkunov's *General Theory of Law*, (Korkunov 1920, 486–492), however, the Soviet modifications were not substantial. Unsurprisingly, Golounsky and Strogovič treated all these techniques not as methods of *interpretation*, but rather as methods of *explanation* (Golunski, Strogovič 1946, 231). It seems that they also reduced the linguistic method to a *grammatical* one, while the research of semantic meaning was the subject of logical interpretation. However, the basic idea remained the same: that the so-called synthetic (i.e. historical and systematical) methods were to be consulted only if linguistic and logical methods failed to provide a suitable answer.

[40] The interventions did not develop simultaneously, though. Lukić had always insisted on the normative text as the reference frame for any interpretative work. On the other hand, there was no mention of the teleological method before 1954 (Lukić 1954, 231), and even then, it was a single-page explanation (Lukić 1957a, 243). Lukić's teaching of legal interpretation, as it was presented above, had not been completed before 1961 (i.e. in his study *Interpretation of law* and in the second and, from historical point of view, the most important edition of his *Introduction*).

What makes this quest for the right meaning a scientific endeavor is its method: the teleological interpretation. Its idea is to reveal the aim of a norm by exploring its social purpose. Since the aim of every single norm (as well as the whole legal order) in Marxist perspective is to exercise certain influence on the social reality by promoting and protecting the interest of the ruling class, and to that end to discern that interest, it is the aim that offers a plausible answer to the question of the right or objective meaning of a norm. Inasmuch the interest of a ruling class is not a consequence of aleatory circumstances, but rather that of historical dialectics, this teleological interpretation cannot be but an applicative method of scientific socialism.

Naturally, this was not an original invention by Radomir Lukić. Similar; incipient reflections could be found in Denisov's 1948 textbook (Denisov 1949, 434–436).[41] However, it did not necessarily mean that Lukić was directly inspired by this or any other Marxist author. Long before this Soviet textbook was published, Đorđe Tasić had suggested a similar approach, which relied on the French pre-war sociological theory of law determining the meaning of a norm, by its social purpose.[42] Such ideas were further developed in the Parisian doctoral thesis of Radomir Lukić, Tasić's young assistant. His 1939 doctoral thesis was inspired by Léon Duguit's writings and aimed at reconciling Kelsenian normativism with the sociological approach to law.[43] A decade later, it would be reinterpreted in a new ideological perspective. Eventually undoubtedly Marxist, Lukić's teaching on objective interpretation was not at all of Marxist origin.[44]

3. CONCLUSION

The very title of Radomir Lukić's textbook relativizes the common perception that it was a syncretic combination of Marxist legal theory and Kelsenian normativism. The fact that Lukić followed Soviet models from the late 1930s and 1940s, as well as that he preferred to deal with the

[41] Denisov was also the Soviet author who defined interpretation as an intellectual process of establishing the *right meaning* (Denisov 1949, 430).

[42] Tasić says: "In order to discern the meaning of a legal rule, we have to understand the way it is issued from the society and what that legal rule is expected to be, or what it could be expected to be, by taking into consideration the social circumstances and opinions." Later on, he used the term teleological *interpretation* to describe the concept (Tasić 1941, 81 and 84).

[43] This will remain Lukić's conviction until the end (Lukić 1995).

[44] This support the claim that "Lukić's Marxist explanation of law as a social phenomenon, however, can be reinterpreted in the broader terms of social conflict without undermining the whole system of his theory of law [...]" (Hasanbegović 2016, 660).

Theory of *State and Law*, rather than with the Theory of *Law and State* as Kelsen did, is indicative of the Marxist matrix in his textbook structure: The origin of Law is the State inasmuch the only legal rule worthy of its name is the one sanctioned by the supreme political authority. Understanding sanction as an integral element of the legal rule (i.e. the fourfold norm structure) was the logical outcome of this approach, which prevailed in the Soviet legal theory after 1931. Paradoxically, it was this very same Soviet etatism that justified incorporation of normativism into the Soviet and also Lukić's legal theorizing. Stalin's State was not the one that was perceived as withering away, but rather developing and growing stronger on its course of endorsing a socialist society in transition to communism. The Soviet state of the time, like any other, relied on law as a privileged means of promoting and protecting the interest of the ruling class. Instead of denying the perspective of State and Law, Soviet theory started justifying their needs and, consequently, rehabilitated the analytical studies of the law, as a normative phenomenon.

This turnover in the Soviet legal thought was well-received by Yugoslav theoreticians. After the Tito-Stalin split in 1948 and consequential Constitutional reforms, they felt inclined to experiment with normativism more liberally. In Lukić's case, this resulted in the gradual incorporation of a series of Kelsenian analytical categories and mechanisms, such as the legal norm, legal act and legal order, and their validity, reinterpreted and adapted to the Marxist premises, as described in this paper. Nevertheless, even if such historical circumstances undoubtedly instigated Lukić's synthesis, they had surely not caused it in its own right. Lukić's preoccupation was not of a political, but strictly a theoretical nature. From his early writings to his final days, Lukić strived to explain the legal rule as a social fact, without denying its normative aspect. This lifelong project was not particularly original, but it gave a structure and explained the inner logic of Lukić's Marxist-Kelsenian synthesis. Although syncretic, Lukić's work was most certainly not eclectic.

Lukić's theory of interpretation was the paradigm for his Marxist (actually French, inspired by Duguit and Gény) and Kelsenian synthesis. The core of this teaching – the idea that the right meaning of a norm is not the meaning assigned to it by the lawmaker, but the one the lawmaker should have given to a norm had they known the social need protected by the norm – complies perfectly with the Marxist understanding of law as a part of the social superstructure that must reflect the dynamics of the social basis (i.e. the interest of the ruling class), and must therefore be the subject of a rational and scientific discovery process, governed by the historical materialism method. This teaching, however, although

Marxist, was not of Marxist origin. It was a reinterpretation of Lukić's Parisian doctoral thesis from the late 1930s, inspired by the French theory of social law, mostly Duguit's and Gény's ideas that the sense of a norm lies in the social reality and needs to be discerned by legal science and duly codified by the lawmaker. From this perspective, legal norms are only formal expressions of social rules as empirical facts, so the law is but a technique formalizing sociological outcomes. Kelsenian normativism – tackling all those categories and mechanisms in the form of tools and skills comprising the legal discourse – was probably the best expression of this technique as an external, though not an essential aspect of law. To discern the latter, according to Lukić, legal theory *stricto sensu* should step back and yield to social science. Or is it, perhaps, to scientific socialism?

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CONSTRUCTING A TRAITOR: THE CASE OF GUICHARD OF TROYES, THE NOMINAL BISHOP OF BOSNIA IN THE EARLY FOURTEENTH CENTURY

In 1314 Bishop Guichard of Troyes was transferred from the lucrative Episcopal See of Champagne to the Episcopal See of Bosnia, with the seat in Diakovar (nowadays Djakovo, Croatia). This was the consequence of a lengthy trial that baffled both contemporaries and historians alike, and which included a plethora of charges – most notably high treason, murder of the Queen and her mother through witchcraft, heresy, etc. To explain beyond factual reality, the paper regards the concept of treason for which Guichard was tried. To comprehend the methods of construction of treason in Guichard's case, the paper examines features beyond the accusations and deposited witness testimonies: the social, religious and legal transformations; similarities with contemporary trials of the Templars and of the deceased Pope Boniface VIII. This will facilitate comprehension of the elements that construct or add to the concept of treason and the contemporary notions and institutions that permitted it.

Key words: *Guichard of Troyes. – Diakovar (Djakovo). – 14th century. – France. – Trials.*

1. INTRODUCTION

In 1314, from 23 January to 14 March, by the decision of Pope Clement V, Bishop Guichard of Troyes (1297–1308), was transferred

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to another see, the Episcopal See of Bosnia in Diakovar[1] (present-day Djakovo, Croatia) (Rigault 1896, 223).[2] The decision made was the final word of a protracted trial of Bishop Guichard that spanned six years (1308–1314), but which could be seen as going back even to 1300. In fact, the resolution brought by Pope Clement V can be considered a moot point, or a sort of compromise, as no judgment was passed. Despite the apparatus employed in the trial, it seems that the evidence was considered insufficient, or even inadequate and superfluous when both of his initial accusers claimed Guichard's innocence in their deathbed confessions. Furthermore, it did not help the substance of the case that those who gave the most damaging testimony were suspected of various transgressions (Strayer 1980, 310). In 1313, Guichard was in Avignon with Pope Clement V, who sheltered him there, and the following year the transfer took place (Rigault 1896; Cuttler 1981, 75). Whether Guichard ever reached Diakovar remains unknown, but rather unlikely (Rigault 1896, 225), but the end of his life, while not obscure, could be seen as the anticlimax of a very vigorous existence (Langlois 2012, 212–217). Improbability of his sojourn in Diakovar as the bishop of Bosnia is strengthened by the fact that he died in Champagne on 22 January 1317, soon after his resignation from the seat of Diakovar early on in the reign of Pope John XXII (Rigault 1896, 225–6; Strayer 1980, 312).[3]

[1] Name form Diakovar is used in this paper instead of its Hungarian form Diakovár, as this variant is accepted and employed in the literature regarding the theme of the paper.

[2] Abel Rigault makes this conclusion drawing on published documents predominantly, but not exclusively, pertaining to two publications: Theiner (1859) and *Regestum Clementis Papae V* (1884).

[3] After Guichard's resignation from the episcopal seat in Diakovar, Pope John XXII appointed a certain Benedict as the Bosnian administrator, but he did not stay at the post for long. After Guichard and Benedict had resigned from the Bosnian, and by proxy from "its subordinated Diakovar," episcopacy (*bosnensi et de Diacoipsi Bosnensi subiecti*) Pope John XXII (1316–1334) appointed Peter, the Cannon of Székesfehérvár, in a bull of 3 July 1317. The majority of published sources and literature erroneously considers that the aforementioned Benedict was the Bishop of Vác before he was appointed the Bishop of Diakovar. This error can be found in Pál Engel's independent list of Bosnian bishops, as well as in the list of Bosnian bishops that Engel created with László Costa. The error was further spread by Balint Ternovac. In the *Archontology*, however, Engel correctly mentions that "Benedict probably in all fact did not take the seat of the Bishop of Vác" (Engel 1996, I, 75, II, 132). It needs to be mentioned that Benedict could not have done this because in reality he had not been nominated as the Bishop of Vác. Benedict was rendered Bishop of Vác (*episcopum vaciensem*) by virtue of a misspellings, though he was, as only Daniele Farlati correctly puts it, "*episcopus suacensis*" i.e. Bishop of Svač. This error probably originates in the fact that the document on filling the truly vacant episcopal seat in Theiner's edition is placed just a few pages ahead of the charter on filling the seat of the Bishop of Svač. The town of Svač, on the border of medieval Zeta, present-day Montenegro and Albania, still exists today. This makes it easier to understand why Benedict, after stepping down from the Bosnian diocese, became archbishop of

The nature of Bishop Guichard's trial, the way that it was conducted, as well as its indeterminate conclusion, baffled contemporaries and historians alike, who tried to classify it as a court affair, a power struggle between the French king and the papacy, which accentuated intermingling between politics and religion, viewing it as a classic political trial. However, to understand it, it is necessary to see how charges of treason against Bishop Guichard of Troyes correlate to other types of accusations, and how they relate to the contemporary realities in which all the participants existed.

It is both interesting and important to mention that despite the title of Bishop of Bosnia with the seat in Diakovar, which Guichard held from 1314 until his death in 1317, his fate was not of particular interest to scholars of the region. It could be because Bishop Guichard most likely never reached the place of his new appointment, the reasons for which are not provided directly by ecclesiastical history nor the history of his trial. In all likelihood, Guichard attempted to wait out the situation and see whether it would be possible to continue his interrupted career in France, or in a less remote place. No significant amount of research has been done in Yugoslav historiography except from a noteworthy study in Croatian historiography published in the 1990s.

In the 1820s one of the first studies of trial of the bishop of Troyes appeared from the pen of Boissy d'Anglas (1822, 603–619). However, the standard source of information is the university thesis of Abel Rigault (1896), whose conclusions are largely considered valid today. It draws on twelve documents of different content that exist in Paris, at the Archives Nationales (Rigault 1896, vii) in Trésor des Chartes, and marked J 438 No. 1 through No.12 in continuo.

Historians studying the topic in subsequent generations drew on the same information, however, methodological developments since the nineteenth century allow for different approaches to the information, so a plethora of new nuanced conclusions could be reached.

Nonetheless, there are a number of recent studies about Guichard's case and originating in French historiography that were published at the beginning of this century.[4] Bishop Guichard's case is regularly mentioned in studies of the Avignon Papacy, and more specifically those of the times

Dubrovnik. In the Middle Ages, the bishops of Svač, just like the bishops of Bosnia earlier, were the suffragan of the archbishop of Dubrovnik. It should be noted that the diocese of Vác (*diocesan vaciensem*) has sometimes also been mistakenly identified with diocese of Bacs (*diocese bachiensem*). Similarly, occasionally the Kalocsa diocese (*dioecesem colocensem*) was confused by the papal office with the Colossus diocese (*dioecesem colosensem*) on Rhodes.

[4] The studies that should be mentioned are by modern French historian Provost (2003, 95–118; 2007, 83–103; 2010).

of King Philip the Fair and Clement V,[5] but also those that deal with a broad thematic spectrum, ranging from legal history to witchcraft, in Europe of the Late Mediaeval Period.[6]

To understand not only what actually happened for such a peculiar career course, but also what allowed for such a development in the given contemporary circumstances, it is necessary to appreciate the concept of treason for which he stood trial.

In order to understand the way treason is constructed in the case of Bishop Guichard of Troyes in early fourteenth century France, this paper will look at several essential features beyond the accusations and deposited testimonies of the witnesses on the transgressions of the bishop of Troyes. The transformative characteristics of the period in question will be considered in their social, religious and legal capacity, so that a more comprehensive assessment of the final outcome of the process may be achieved. This also implies that the paper will examine similarities with other contemporary trials that have been brought up by a number of scholars of Bishop Guichard's case over several centuries – most notably to that of the trial of the Templars and of the memory of the deceased Pope Boniface VIII, but also those of other ecclesiastical dignitaries in France. Finally, the very accusations against Bishop Guichard will be examined, not so much to detect truth or fabrication in them, but to understand them as elements that constructed or added to the concept of treason and the contemporary notions and institutions, which allowed for it.

2. THE EARLY FOURTEENTH-CENTURY SOCIAL, RELIGIOUS AND LEGAL TRANSFORMATIONS IN FRANCE

The early thirteen hundreds saw the expansion of the bureaucratic apparatus that primarily served the state, encroaching on justice, finance, as well as local government, as the king of France influenced more and more territories, creating the situation that was best defined by D. Nicholas as governed by "stifling bureaucracies took form, creating a situation where offices, which [were] brought and sold without regard to the professional credentials of the holder" (Nicholas 1999, 2–4).

The character of law also underwent changes, which in turn affected the concept of treason as well, as it became overly politicized in the early stages in the creation of the national state (Menache, 1998,

[5] On the reign of Philip the Fair see Favier (1978), Strayer (1980, particularly pages 300–313), on the papal reign of Clement V it is worth consulting Menache (1998, on Guichard's case: pages 84–87).

[6] For more on witchcraft and its context in 14th century France, see: Burns (2003).

87) in the hands of the strongest prince in France – who turned out to be the French king himself. The transformation of the notion of treason, which allowed for the royal power to contest other parallel authorities for jurisdictional prerogative, brought the king into a position to infringe up on the ecclesiastical jurisdiction (Cuttler 1981, 6, 54, 68–9).

The relationship between the head of the state and the head of the Catholic world was also affected, as the French kings perceived the popes as political leaders more than spiritual ones (Nicholas 1999, 5).The power struggle between the papacy and the king of France during that period also had an impact on a cleric or secular person who was accused of "any action that injured the king, the royal line, or the kingdom, or that otherwise diminished the authority of the crown – or was intended to do so" was committing treason (Cuttler 1981, 54). This transformation facilitated the possibility of Guichard's trial.

The connection between law and politics, in a society with a multitude of authorities, expressed itself through the political character of the struggle between the royal and the sacral elements of the late medieval society in France. It is within this phenomenon that the case of the bishop of Troyes and his contemporaries, the king of France, Philip the Fair and Pope Clement V needs to be viewed. Furthermore, the political interlink between the two authorities was caused by unchanged papal outlook on contemporary realities and had as a consequence diminishing of the papal influence, which was not overly criticized by the contemporaries either as confirmation of a political trend (Menache 1998, 86), or due to fear at the age of instability. King of France, Philip IV the Fair had to align his propaganda of the "most Christian King" with his actions to appear maintaining public order through his jurisdiction (Cuttler 1981, 54). Nonetheless, these actions may have not been solely directed by policy, as it would be anachronistic to discount for deep personal piety of medieval men; and King Philip IV the Fair had a fierce reputation for it.

These transformative features of the late medieval France and Europe in general, allowed for certain characteristics of the bishop of Troyes' trial, which caused contemporaries to view it as strange case of a court affair.

3. THE CASE OF GUICHARD, BISHOP OF TROYES (1308–1314)

By the order of Pope Clement V, passed at the meeting of the Estates in Tour on 9 August 1308, the ecclesiastical process against Guichard de Troyes was launched. The ecclesiastical commission that was charged with conducting the investigation into the accusations made against Bishop Guichard of Troyes, consisted of the Archbishop Étienne

Bécart of Sens, Bishop of Orléans, Raoul Grosparmi, and Bishop of Auxerre, Pierre de Sandstone.

> The order read: "It has come down to our ears that our venerable brother, the bishop of Troyes, though he deserves to be so called, has let himself go to damnable acts and worthy of execration, by soaking, at his shame, for the loss of his renown and his salvation, in the evil works of spells; that, by the effect of these practices, Jeanne, Queen of France, of illustrious memory, has suffered a cruel death; that said bishop Troyes, falling from bad to worse, sought to drink a poisoned beverage to our dear son and noble Sir Charles, Count of Anjou, while he was in Champagne, and our dear son in Christ, the illustrious King of Navarre, at that moment at Poitiers, a knight, and others, who had drunk of this poison, have died of it; that he has committed many other great and sacrilegious crimes, for the offense of divine majesty, the danger of bad example, and the scandal of the great number." (Rigault, 58–59; taken from Provost 2003, 2.)[7]

As Boissy d'Anglas noted correctly in the beginning of the nineteenth century, there were two parallel processes being conducted against the bishop of Troyes: the ecclesiastical and the secular.

It all started when in February 1308, the hermit Regnaud de Langres who resided in the hermitage of Saint-Flavit de Villemaur in the diocese of Troyes, escaped his abode fearing for his safety and arrived at Sens, with the intention to denounce Guichard, the incumbent bishop of Troyes, for a vast number of crimes, of which some were considered treason, as they affected the royal house. The hermit confessed to the bailiff of Sens, Guillaume de Hangest, that Guichard, bishop of Troyes, visited him, the hermit, in his hermitage at the time of death of Queen Jean of Navarre, the wife of King Philip IV the Fair. Namely, the hermit denounced the bishop of casting evil spells in the hermitage, which were directed at the Queen.

The death of Queen Jean was supposedly accomplished by creating a wax figure, resembling the queen, which was baptized, given the name of the queen, pricked with a needle and placed near the fire, after which the Queen was supposed to feel badly and would have died when the wax melted completely (Boissy d'Anglas 1822, 608).On his visits to hermitage, the Bishop was accompanied by one of his relatives, Jean de Fay, a Dominican monk, who accomplished in summoning the demons, and by a witch named Margueronne de Bellevillette (Rigault 1896, 74).

Following the success of the magic as the weapon against the Queen, the bishop of Troyes tried to manipulate the hermit to aid him

[7] Translation of the quotations from French into English was done by the author of the paper.

in concocting the poison that was supposed to be used on the King's son and brother. The hermit may have been the bishop's unwilling or unsuspecting collaborator in the case of practical magic, since due to his innocence he could not fathom the consequences, but it seems that he was well-aware that this type of crime concerned secular authorities, judging by the fact that he denounced the bishop of Troyes to the bailiff. Moreover, the hermit mentioned that the poison was already successfully used on knight Jean Romantis (Boissy d'Anglas 1822, 608).

The bailiff of Sens took the denunciation seriously and proceeded to investigate it by questioning witnesses. The witnesses of this first series are considered the most important for the case, as they "comprised structures, precise developed accounts" (Provost 2016, 120), which implied crimes not only of heresy but of treason as well, which was committed by "enchantments, manufacture of poison and invoking of supernatural." The bailiff of Sens, thus, questioned as witnesses the hermit, the witch, another hermit who cohabited in the same hermitage, and Guichard's chamberlain. When the evidence against Guichard accumulated in the course of the secular investigation of bailiff of Sens, he referred it to King Philip the Fair, who in turn pressured Pope Clement V to commence with the abovementioned ecclesiastical trial.

The first accusations of the ecclesiastical commission ordered by Clement V largely overlap with the accusatory articles combined by the bailiff of Sens. They contain the same charges, particularly focusing on the creation and the employment of the wax figure of Queen Jeanne and enchantments that resulted in her death, and on the poison preparation designated for the king's brother and eldest son. The charges were those implying directly treason, as they affected the royal House of Capete.

After this first inquiry by the ecclesiastical commission, and the withdrawal of bishop of Sens, the two other bishops continued with investigation through deposition of testimonies against Guichard (Boissy d'Anglas 1822, 611–613).

To twenty-eight articles prepared by the bailiff of Sens, many other describing Guichard's "enormous and sacrilegious crimes" were added, such was usury and simony, living openly with a nun as a concubine, as well as being a sodomite, adulterer and fornicator, a well-known sorcerer, who prior to Queen Jeanne killed several other people by poisoning them, and being not only a bastard child, but a bastard of an incubus called Petum, with whom his mother Agnes had been associating, whilst being married to his father (Boissy d'Anglas 1822, 613). More seriously, Guichard was accused of blackmailing innocents and giving pardon to heretics, and extort money from his victims (Provost 2003, 9).

Most importantly, it is in the course of these additional charges being brought up that we hear of Guichard's previous crimes, and of his previous

trial during the lives of Queen Jean of France and her mother Blanche d'Artois Countess of Champagne and Queen of Navarre. The inquiry of 1308–1309 brings into play the Guichard's previous trial several years earlier, when in the course of several years (probably between 1300 and 1302) he was accused of exciting a sedition against the Countess Blanche d'Artois in her province of Champagne, as an act of revenge for having been previously ousted from the king's council (Boissy d'Anglas 1822, 606). The bishop of Troyes did not stop at that; he had been accused of aiding escape of a canon of Saint-Etienne de Troyes, Jean de Calais, who was also the treasurer of the Champagne County and had been imprisoned in the Episcopal prison of Troyes, for embezzlement. Allegedly, Guichard had done it for a monetary fee (Rigault 1896, 21–22). To make the irony greater, the witness was Jean de Calais himself, who fled to Italy, where he eventually died (Strayer 1980, 301; Rigault 1896, 13–24, 21–22).The bishop of Troyes was never convicted of this offense. However, after the death of Blanch d'Artois, her daughter Jeanne, the Queen of France, succeeded in depriving Guichard of forty thousand l.t. of income through an agreement reached under mediation of the Archbishop of Sens, in August 1304 (Rigault 1896, 28–29; Langlois 2012, 212–217). Clement V's predecessor, Boniface XI, produced a citation against Guichard de Troyes, but with an act by Clement V in June 1307 the appearance of the bishop of Troyes before the pontifical court was postponed (Rigault 1896, 268–269; Provost 2007, 90).

A witness stated that Guichard poisoned a messenger that Queen Blanche of Navarre had dispatched to Rome to send word about his misdeeds (Boissy d'Anglas 1822, 614). Despite an unsuccessful affair, Guichard remained the bishop of Troyes, but never returned to King Philip the Fair's outer circle.

Reading the aforementioned history of the trial, historians have debated the nature of the trial: was it a "courtly affair" or should it be taken more seriously, as a "political trial", facilitated by the existing institutions (Provost 2007, 85). A number of possibilities remain open from a "historical distance" and related to the depositions of the witnesses. Historiography offers conflicting opinions on the existence of interested parties within the court and the church who "framed" the bishop of Troyes, bringing about his downfall.

In the early fourteenth-century France, however, when the construction of a traitor, or a person who committed treason, is in question, the creation of a "courtly affair" is one ingredient of a trial for treason that may have the features of a political trial. Thus, information on who Bishop Guichard of Troyes actually was and how he was perceived through the depositions is relevant. Guichard seemed to be a self-made man of the church, who despite rapidly rising through the ranks, was

apparently not skilled enough to navigate all the cracks. By 1273 he was the abbot of St. Ayoul of Provins, only to transfer to another monastery, being appointed the abbot of Montier-la-Celle in 1284, and finally the bishop of Troyes in 1298. Historians agree that he owed his promotion to Blanche d'Artois. It seems that he was very close to the family, since it may have been that he was a godfather to one of the king's sons, from his marriage to Blanche's daughter Jeanne (Rigault 1896, 11, 14; Strayer 1980, 301). In addition to clerical duties, Guichard was very skilled in finances and property management, as he enriched the monastery through his business acumen (Rigault 1896, 9, 10). The affair of letting Jean de Calais, the imprisoned treasurer, escape for a hefty bribe, not only ruined his career, but also put an end to any future dealings with Blanche d'Artois and his influence in Champagne.

It has been suggested that the nature of a courtly intrigue related to Guichard's trial may be visible in the fact that other highly-positioned clergymen close to Queen Jeanne awaited their chance and their turn; one such person was the Archdeacon of Vendôme, Simon Festu, who acted as the accuser of Guichard against Blanche d'Artois in the trial of 1300–1302. Having not met the standards of his royal protector, Guichard made himself vulnerable, falling prey to the game of power (Provost 2007, 92).

However, during the process Guichard was able to confess his wrongdoings. In front of the pontifical commissioners at St. Genevieve, Guichard denied all the charges except that he knew the hermit of Saint-Flavit and that he had sent him to the officials of Sens to be punished for crimes committed in the diocese of Troyes (Langlois 2012, 212–217). Having been reduced almost completely to personal defense, without the ability to establish technique of rationalization against the charges, Guichard conceded certain articles in his second interrogation; namely that he had given absolution to a heretic, for a sum of money, that he "made bad money", but "that he thought it (to be) good" (Boissy d'Anglas 1822, 616–617). However, he added that heresy had not been proven (in the case of bribe he received for giving the absolution to a heretic) (Langlois 2012, 212–217). It is worth mentioning that amidst the variety of accusations (some being rather general considering the type of trial) Guichard denied the charges of being the child of an incubus, stating that there were talks of succubus in their house, but only after his birth (Langlois 2012, 212–217), and despite their house always being full during his childhood, he asserted his legitimacy as such (Boissy d'Anglas 1822, 617). It seems that the bishop of Troyes was more concerned with the consequences of potential illegitimacy than those of his diabolic nature, despite the common fears of the time.

However, in addition to the elements of the crime, the possibility of heresy was present in the construction of treason in fourteenth-century;

in fact, general characteristics pertaining to the nature of a person were taken into consideration as is the case in many political trials. Thus, the persona of Guichard de Troyes was constructed through the depositions of the witnesses, which were on one hand unintentionally skewed by the very process of recording them (Provost 2003, 29),[8] but also by very present coercion.[9]

The features of this constructed person were important for the process, and this constructed Guichard came down to us. The image constructed is that of a morally and physically unencumbered person, greedy and brutal, and most importantly of diabolic nature, since only such a person would by physically and morally capable of committing treason. Essentially, it was necessary to demonize the opponent.

It is not an issue whether Guichard de Troyes and the bishop of Troyes, did or did not commit the crimes he was accused of,[10] since, as Provost pointed out, it is difficult to find the truth in depositions: "(...) involved in the production and recording of testimony a process of creation, in an approximation which is due to the impossibility of rendering by speech a situation passed in its entirety" (Provost 2003, 29).[11] Depositions are used to understand how such depiction was sufficient or essential for the (un)successful trial for treason. The constructed image of Guichard de Troyes was in contradiction to that of a good cleric (Provost 2003, 6–7). Bishop Guichard of Troyes found himself in the midst of the transforming idea of the "good bishop", whose creation occurred in the early fourteenth century. We will never know whether he did not

[8] Provost (2003, 29) offers a literary deconstruction of the text of the deposition and comments on it: "Nevertheless, this fixation, this final becoming of facts and positions are reinforced by the methods of writing and serialization. Under the authority of the investigators – of an institution that freezes the speech, immobilizes the speech, and confers on it its legitimacy – each one stands in its place, in a definite position, occupying a specific rank in the enumeration of the depositions." (Translation of the quotations from French into English was done by the author of the paper).

[9] All the witnesses swore that they were telling the truth without restraint. The king's people, however, had warned Margueronne, in the prison where she was, that it was necessary to tell the truth, by will or by force; and as Lorin had initially declared that he had never seen his master go out during the night, the bailiff of Sens had him suspended in the air, naked, with his limbs spread apart, shackled to the walls (Langlois 2012, 212–217).

[10] Langlois (2012, 212–217) discusses the rational possibility of accusations against Guichard, which sounds somewhat anachronistic given the period: "In short, he was no better than many others, whose fortuitousness did not cause the turpitudes to be as carefully collected and unveiled as his. But that he has kept a private demon in a glass jar, and that he has never bewitched or poisoned anyone, is what the stories of the hermit of Saint-Flavit and the Lombards, guardians of Noffo Dei, are not enough to establish." (the quote from French was translated by the author of the paper)

[11] Translation of the quotations from French into English was done by the author of the paper.

understand its significance and was unaware of the changes within the church, or he completely disregarded it as unimportant for him. Yet he allowed for the opposite image of him to be constructed.

However, he was not the only one who was caught in the changes and was not able to adapt quickly enough. There were cases of several bishops who fared similarly at the very beginning of the fourteenth century, but also the trial of the Templars, which chronologically coincided with his, as well as obviously extreme cases of the heretical trials of the last of the Cathars in Occitan.

4. THE TRIALS OF ECCLESIASTICAL DIGNITARIES, GUICHARD'S PROCESS AND THE CRIME OF TREASON

As mentioned previously, the early fourteenth-century notion of treason allowed a significant level of arbitration on the part of the king, therefore, it is not surprising that a number of trials of persons who should have been prosecuted by ecclesiastical courts, were also tried by the secular authorities, with different outcomes. It has been long established that there were similarities between the trials of Guichard de Troyes and other members of the church, regardless of their position in the ecclesiastical hierarchy, and some of the monastic orders, as well as the posthumous trial of Pope Boniface VIII. Thus, his arrest was not unprecedented in the notorious reigns of King Philip IV the Fair and Pope Clement.

The first case of royal officers partaking in the trial of a cleric was that of the bishop of Pamiers in Occitan, Bernard Saisset, in 1301, which also symbolizes "the first important treason trial of a cleric in later medieval France," "the first 'state trial' of any person" and "the first case of constructive treason by words in the later middle ages," for its blending of the two concepts of treason (Cuttler 1981, 74–75). Looking from the view point of legal history, S.H. Cuttler emphasizes how royal bureaucrats had a more important part in the trials of the clergy, more so than the king himself (Cuttler 1981, 74).

In the case of Guichard de Troyes, King Philip the Fair was in clear breach of clerical privileges, although he attempted to maintain the form of legality (Strayer 1980, 300). And if Clement V would have wanted to raise the issue, he would have had all the rights. However, it has been established that Clement V's compromise on this point was "the innovation" in the relation between the papacy and the French king, which drastically diverged from Boniface VIII's canonically warranted "militant move" in the case of the arrest of bishop of Pamiers in 1301 (Menache 1998, 86). One could have not expected that Clement V would act in the

same manner as his predecessor on the papal seat, against whose memory he opened the trial.

Bernard Saisset, the Bishop of Pamiers, was also a member of an old Occitan aristocratic family, and was struggling against the influence of Paris, which arrived in Languedoc also in the form of the bishop of Toulouse. Shouting against him, he was eventually denounced as a rebellion plotter for Occitan independence, siding with the Kingdom of Navarre and local counts. Saisset appeared in front of the king that same year, when he was charged with high treason and with heresy and blasphemy by the secular authorities, very similarly to Guichard, who was accused of desecration of the Eucharist.[12]Saisset escaped detention and fled to Rome, but eventually returned in 1308 when King Philip the Fair pardoned him under Clement V, and was reinstated as bishop of Pamiers.

The case of Bernard Délicieux, on the other hand, had a different ending. Délicieux was the prior of the Franciscan convent in Carcassone, Occitane, when in 1299 he led a revolt against the city's inquisitors, thwarting the arrest of two heretics sheltered in the Franciscan convent. He actively criticized the work of Bishop Castanet and the inquisitors, in front of the king, continuing preaching against the Inquisition in Languedoc throughout the following years. This eventually earned him reproach from Pope Benedict XI in 1304, who ordered his arrest, but due to his untimely death nothing came of it. Instead, Délicieux was placed under house arrest in Paris, and with the installment of Clement V was added to his entourage in Avignon in 1309, only to join the Spiritual Franciscan Convent in Beziers in 1310. However, in 1317 Pope John XXII charged him with disobeying the Franciscan Order, high treason against the French king, the murder of Benedict XI using spells and poison, and impeding the Inquisition and was found guilty of all charges except murdering Benedict XI (Théry 2002, 305). He died in prison.[13]

In comparison, Guichard's fate seemed somewhat less successful than Bernard Saisset's and far more positive than Délicieux's; yet it should be mentioned that Délicieux did not meet his end while under house arrest, placed there by the royal authorities. Just like Saisset and Délicieux, charges against Guichard contained more serious ones of high treason and murder by magic and poison, as well as those of heresy and blasphemy.

Guichard's vehement opposition to the transfer is understandable, since his punishment was harsher than that of Bishop Saisset, whose accusations were graver. It could not be that King Philip IV the Fair, due

[12] For more on Bernanrd Saisset, the Cathar movement in Languedoc and the Royal prerogative in the early 14th century see: O'Shea (2011).

[13] On Délicieux see: O'Shea, (2011), Friedlander (2009), Théry (2002, 301–306).

to his emotional attachment to his deceased wife Jeanne, never believed completely in lack of Guichard's involvement in her demise, although it was highly probable that the king had a personal involvement in the punishment (Strayer 1980, 310, 312 n. 45). It is unlikely that the king would have let Guichard off the proverbial hook only with the transfer to a far-off see, if he genuinely believed in Guichard's actual involvement in the death of the queen and her mother. It is far more likely that Guichard's punishment served to remind the bishop of his lower social background and that he owed his position of bishop of Troyes to Blanche d'Artois, Countess of Champagne, whilst Bernard Saisset was a southern aristocrat, protected by Pope Boniface VIII.

In all the mentioned cases the royal prerogative was activated on the basis of committed treason, where the royal power understood that crimes were perpetuated against the members of the Capetian dynasty. There are views in historiography on the unsuitability of Guichard de Troyes's trial in the general discussion of interactions between King Philip the Fair and the papacy, due to certain characteristics. Namely, Guichard did not represent provincial separatism, as Saisset did, and he was not against the workings of the Inquisition, nor was he accused of participation in a network of heresy, as the Templars were (Strayer, 1980, 300). On the other hand, Alain Provost set out to examine how similarities of these trials fit into the perspective of the relations (Provost 2016, 122). Nonetheless, it is entirely an issue of unsuitability of Guichard's trial in the part in the general discussion on the relation between the king and the Catholic Church, the suitability of this process in the emerging national state, since the mentioned relation was only one segment that was affected by its budding emergence.

5. THE TRIALS OF THE TEMPLARS, BONIFACE VIII AND GUICHARD DE TROYES

The relationship between the trials of Guichard de Troyes and those of the Templars and the deceased Pope Boniface VIII was noted very early in historiography as pertaining to examination of process against the bishop of Troyes. In the early the nineteenth century, Boissy d'Anglas stated in his imperfect articles that "Guichard was persecuted like the Templars" and for "similar motives" (Boissy d'Anglas 1822, 618–619), and linked the more fortunate ending of Guichard's trial to its long duration and the disappearance of the threats posed by the memory of Boniface VIII and the Templars. Thus, the political elements exceeded the usefulness of the trial (Boissy d'Anglas 1822, 618–619). In his seminal work on the process against the bishop of Troyes, Abel Rigault emphasized that Guichard's trial was not a simple trial of witchcraft or heresy, but it had

a more important, political significance at a time when the trial against the memory of Boniface VIII was to be conducted (Rigault 1896, iii-v). Modern historiography does not bypass the established convergence of these three trials, which stand out not only in their temporal plane but in the methods as well. The congruence between the processes against members of the Order of the Temple and the bishop of Troyes implies that the affair was to a degree instrumented by the King of France and his entourage in face of the papacy (Provost 2007, 92).

Looking at the three trials that occurred almost simultaneously, it is difficult not to see the convergence of the same people, who took part in them, thus shedding light on the formal and informal network of courtiers, but also of clerics with close ties to the king. Out of a number of personas, the names of the most mentioned in connection with the three trials are definitely Guillame de Nogaret, statesmen, councilor and keeper of the seal to King Philip the Fair and a certain Noffo Dei, a Lombard who was regarded as the denunciator of the Order of the Temple, among whose members he had previously spent some time.

Rigault believes the "intrigue of Guichard" to be entirely the result of Nogaret's machinations (Rigault 1896, iii-v). Before Rigault, Boissy d'Anglas was convinced that accusations made by Noffo Dei against Guichard would have had such a weight in order to provoke a legal disposition if not for actions of Nogaret, who behaved towards the bishop of Troyes with the same violence as towards the memory of Pope Boniface VIII and which he employed also in the prosecution of the Templars (Boissy d'Anglas 1822, 608). While Nogaret definitely had a part in the process, it is questionable how far his influence in it stretched, which demands further examining where, when and how he intervened. Noffo Dei, on the other hand, was firstly involved in Guichard's case when, together with Archdeacon Simon Festu of Vendôme, he accused the bishop of Troyes in front of Blanche d'Artois for facilitating Jean de Calais's escape (Boissy d'Anglas 1822, 605).

Nogaret's intercession in the Guichard case in 1307 is rather palpable, if for no other reason than because of the fact that a draft of the charges against the bishop of Troyes, created by Noffo Dei, were addressed to him, and although he may not have had much involvement with this draft, the second version of the accusation was undoubtedly done by his hand (Rigault 1896, 95–99; Strayer 1980, 307; Provost 2016, 122). The typical part of the charges is the one suggesting that Guichard was not only a traitor but a heretic as well, since he had only pretended to receive communion (Rigault 1896, 100–101).

As in the case of the Templars and Boniface VIII, in the process of bishop of Troyes there is a system to the charges that is rational and consistent, thematically structured (Provost 2016, 122), with the process

of accumulation providing additional effect (Provost 2003, 6),which thus organized and conceptualized served to support the construction of a traitor. The new charges that were subsequently added, concerning Guichard's general diabolic nature and his tyrannical conduct during his time as abbot, seem not to originate in Nogaret (Rigault 1896, 110–115; Strayer 1980 307). As in the cases of the Templars and of Boniface VIII, the royal officials took the charge of heresy as an addition that would have safeguarded the charge of treason – it served as an auxiliary charge, yet not less dangerous.

In the case of Pope Boniface VIII, the legal processes were conducted first against him during his life, and then posthumously against his memory over the course of eight years (1303–1311). Similarly, the charges against Boniface VIII were initially formulated only to be supplemented with additional claims, altering the focus of the accusations. Whilst the proceedings commenced with the main charge being Boniface VIII's lack of right to the papal seat, it became the charge of heresy. In the course of the proceedings some specific charges against him were made(heresy, simony, vengefulness), only to be supplemented with charges indicating heresy (denial of the immortality of the soul, transubstantiation, the existence of an afterlife and the efficacy of penance), as well as those serving defamation(fornication, sodomy, homicide, demonolatry and black magic), and those that could be taken as the crime against the state (bringing about the death of the pope Celestine V, intending the obliteration of the French king and the French people, the accountability for the loss of the Holy Land, in which the French Kings were heavily politically invested). Nonetheless, heresy, as the main charge in the case of Boniface VIII, needs to be viewed in both the legal and the political context, since the very attack meant an attack on the existing royal authority and its relation towards the papal authority. (Denton 2018, 119) The process against the memory of Boniface VIII ceased in a similar way as Guichard's: it was discarded after a political bargain was reached.

The system of adding charges to the accusation is also visible in the case of the Templars, when in 1307 the main charges during their arrest were "the denial and the spitting, obscene kissing and homosexuality, and idol worship" (Barber 2006, 202), and after the reopening of the case in 1308 the more organized catalog of 127 accusations was drawn up, falling into seven groups: denial of Christ, idolatry, refusal of sacraments, which together with hearing of confession and absolving of sins by the Grand Master and their lay leaders, was a similarity taken from the Cathar teachings. Furthermore, the accusation can be placed under homosexuality, undeserved material gain and obscure meetings. This method of dealing with enemies, which involved a combination of coercion, pressure, and outright brutality in questioning the accused or witnesses, together with

spreading of disinformation and defamation, and public hearings, has been understood as the trademark modus operandi of Nogaret and his ministers (Barber 2006, 202–203).

Furthermore, it is probable that Nogaret instituted a public meeting at the Île de la Cité, where the masses had the chance to hear Guichard's wrongdoings, as Nogaret used this method in the cases of the trials of Boniface VIII and Templars (Rigault 1896, 65; Strayer 1980, 308).

The attitude of the bishop of Troyes at the accusations was comparable to that of the Templars: while he was allowed to discuss the process step by step and to see, but not to touch the written evidence (which turned out to be forged), according to the canonical rules, he was forbidden to communicate with witnesses (Langlois 2012, 212–217). Similarly, the members of the Order of the Temple were prevented from defending themselves by the King and his ministers, regardless of irregularity or viciousness of the means by which this was achieved (Théry 2013, 127).

The temporal convergence of these three trials also suggests Nogaret's influence, as the divergence in temporal plane in which the process of the bishop of Troyes and that of the members of the Order of the Temple, in particular, were taking place, was more than a coincidence. The investigation against the bishop of Troyes commenced on 9 August 1308, while the Templars were arrested in 1307, Guichard de Troyes was moved to Diakovar in 1314, after he stayed with placed with Pope Clement V in 1313, while Jacques de Molay was executed in 1314 (Provost 2003, 3). As to the chronological parallelism with the posthumous process against Pope Boniface VIII, there is a more than unusual temporal overlap: both trials were announced at the Assembly of the Estates in Tours and the confrontation between the pope and the king, i.e. the king's men, occurred in Poitiers shortly after (Provost 2016, 125). Of the three cases, the case of the bishop of Troyes seems the least serious, almost auxiliary to those of the Templars and Boniface VIII, and was seemingly a supplementary factor of strain placed on Clement V by the royal prerogative (Provost 2016, 125).[14]

Despite the amount of evidence suggesting Nogaret's involvement in and influence on the trial of bishop of Troyes, modern historiography warns of over-dramatization of it; namely, it warns us that the trail against Guichard was more complex than a simple plot of eliminating an important man. However, Nogaret, who several years earlier had been administrating the province of Champagne, was certainly aware of Guichard and his actions (Provost 2007, 93–95).

[14] As early as the beginning of the nineteenth century, Boissy d'Anglas concluded the lack of usefulness of the Guichard's trial to King Philip IV the Fair after he got rid of the Templars.

These considerations of the chronological convergence of the three processes can tell of the construction of a traitor in the early fourteenth-century France. The common feature to all three was the charge of treason that was brought up among other accusations. Royal authority, this time in the person of Guillaume de Nogaret, was interested in exerting influence on the processes. Thus, the royal authority attempted to control development of the processes in time, either by bringing one to the end or by dismissing it, as it was deemed appropriate for widening of the royal prerogative. Therefore, traitor was a construct of the royal authority in a bid for power with the ecclesiastical authority at the time of the beginning of the formation of the national state and tentative attempts of centralization.

The process led against the bishop of Troyes was one in a series of trials in the early fourteenth-century France under King Philip the Fair, whose common feature is the convergence of politics and religion, with the most famous being the trials to the memory of Pope Boniface VIII and the Templars, with some cases against ecclesiastical dignitaries. Even if the details of the circumstance were different, they resemble each other very much in the procedural elements and the type of charges that were brought (Provost 2003, 3).

6. CONCLUSIVE REMARKS

Guichard, the nominal bishop of Bosnia with the seat in Diakovar (present-day Djakovo, Croatia), has remained known through history as the bishop of Troyes in the province of Champagne, France. The reason for it can be found in the likelihood that he never took the seat, but rather remained in France in his former diocese of Troyes, where he died on 22 January 1317 (Rigault 1896, 225 n. 4).[15] The transfer of Guichard to the Episcopal See of Bosnia, with the seat in Diakovar, was the outcome of a trial against him, which resulted in a sort of a compromise on the part of Pope Clement V.

The peculiarity of Guichard's case and its surprisingly positive conclusion has been established by comparison to similar contemporary cases. It took place at a time when the relations between the royal and papal authority were in its most serious crisis. The series of cases that started with Bernard Saisset's trial and ended with the trial of the Templars had the aim to establish King Philip the Fair as the ultimate guarantor of the Catholicism. The construction of the charges against the Templars,

[15] Guichard had previously resigned from the seat of Bishop of Bosnia, which can be deduced from the document which states that on the 3 July 1317, Peter was nominated the Bishop of Bosnia by Pope John XXII.

which was the most serious case, understood as constituting "heresy of the state", serving to subsequently construct a supreme royal authority, in contrast to the ultimate papal authority, is explained by Julien Théry (2013, 137).

All of the cases contained the same sequence of steps, which started with *infamia* and was followed by listing of atrocious crimes, whose nature required the prompt intervention of the royal authority, infringing on the process in the papal sphere of influence (Théry 2013, 129). It is noticeable that out of four cases around the years 1301–1314, which interrelatedness has been noted, only the trial of the Templars had fatal consequences, whilst Bishop Bernard Saisset of Pamiers was pardoned by King Philip the Fair and returned to his seat, the trial to the memory of the pope Boniface VIII was cancelled, and Guichard de Troyes became nominal bishop of a faraway see.

Although charge of the heresy was cited in all the cases, and in some it was more focal than in the others, in Guichard's trial this claim had the least central place, since the focus of the accusation was on his magical murder of two queens. Similarly, all the cases involved either the accusation of the improbable murders or plans for the King's annihilation. Guichard de Troyes was the least important participant of all the individuals or groups that stood trial and as such needed the least of the constructed charge of "heresy of the state" to be employed in his accusations, which, granted, were no less outlandish. Guichard's case, thus, can be viewed as the most apparent political of the trials with which it converged on the mentioned variety of planes, where focus on the heretical aspects was the least necessary for the construction of the traitor.

Construction of traitor in the early fourteenth-century French trials was facilitated by the change in jurisprudence that allowed for a wider concept of treason, which provided a theoretical foundation for the encroachment of the royal prerogative on clerical rights. This circumstance is particularly visible in Guichard's persecution as well as in those of other clerics, living or dead. The double trial, conducted both by secular and ecclesiastical authorities, which is a trait of ambiguous practice at times of change within the state and its institutions, provided features of a political trial. In other words, a treason trial in the case of clerics or members of religious orders was a process where the royal prerogative could assert its authority, through encroachment into ecclesiastical jurisdiction. Very often parallel temporalities of cases served to produce fruition of political aims, and a variety of almost off-the-shelf charges had an auxiliary function in the trials in securing the priority of the accusations of high treason.

All this was the situation in the process of Guichard, Bishop of Troyes. It was not necessarily a courtly affair, strategically aimed at bringing down a powerful man, as much as a case of opportunism on

the side of the royal authority for the sake of increased gain. After all, Guichard, as many of his contemporaries, got caught up in the murky waters of transformation of the society as a whole, including the notion of the ideal image of a bishop.

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CONTRACTUAL WAIVER OF CLAIM UNDER THE 1978 YUGOSLAV CODE OF OBLIGATIONS

The paper analyses validity of contractual waiver under the Yugoslav Code of Obligations. Generally, the effect of a waiver of claim under the Code would be an obligation to refrain from exercising a certain right that may be invoked as defence against the waived claim. Under the Code of Obligations, a waiver of claim is generally valid. There are cases where validity of the waiver is explicitly excluded. Is a waiver invalid only in cases where it is expressly forbidden? If not, what would be the criteria under which, irrespective of the fact that there is no express prohibition, a waiver would nevertheless fail to produce effects? Are there additional criteria if a future claim is waived? This paper deals with these issues, seeking to set the criteria under which a (generally permitted) waiver of existing and future claims shall not be effective in a concrete case under the Code.

Key words: *Waiver of claim. – ZOO. – Effectiveness of waiver. – Waiver of future claim.*

1. INTRODUCTION

Waiver is normally defined as an act of abandoning or refraining from asserting or exercising a right (*Collins Dictionary of Law* 2001, 403). Even though it originated in English law (on its history in England see Atiyah 1979, 165–167), it is not an entirely clear legal institution even within the common law world (*Black's Law Dictionary* 1999, 1574–1575, defines not less than ten different types of waivers). In English legal texts, it has been said that 'it must be confessed that the topic of waiver is not a clear one and awaits an authoritative modern statement' (Furmston 1991,

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565). In American doctrine it has been labelled a word of 'indefinite connotation' which, 'like a cloak, covers a multitude of sins', (Farnsworth 1999, 541, quoting Arthur L. Corbin). However, waiver is usually dealt with in textbooks on contract law (for law of England and Wales see Guest 1984, 434–438; Beatson 2002, 523–527; Treitel 1995, 321 and 322; for American law Farnsworth 1999, § 8.5, 540–544). *Waiver of claim* is aimed at refraining from asserting or exercising a claim, i.e. abandoning a right to demand something from an individual adverse party, typically a contractual partner. As an institution of common law, 'waiver of claim' has no direct and readily available counterpart in the civil law. Therefore, it needs to be 'translated' into the 'language' of civil law in order to properly identify the rules of local law applicable thereto.

Civil law systems generally regard claim (Serbian *potraživanje*, German *Forderung*) as a 'relative' right (*inter partes* right*, iura in personam*, as opposed to *erga omnes* rights, such as property right, i.e. *iura in rem* – Zweigert, Koetz 1998, 145). It represents a demand aimed at a specific adverse party to effectuate a performance – to give something, or pay a sum of money, or suffer some behaviour of the right-holder, or abstain from undertaking some action it would otherwise be entitled to carry out (claims requesting omission). A claim can either represent a special type of right – right of obligation (Zweigert, Koetz 1998, 145) – or it can be created by violation of some other right, which is itself not a claim (such as ownership and other property rights, intellectual property or personality rights). A waiver may be unilateral, when a right-holder waives a right by its unilateral statement, and may be a part of the contract, in which case the waiver is an integral part of the contract, and is undertaken as an obligation towards a particular person. A waiver may lead to the cessation of the waived right, when such a right ceases to exist altogether, or to the obligation of the person who waived the right to refrain from using it and the possibility for the other party to invoke the waiver in order to prevent the use of the right. Generally, so-called absolute rights, such as property rights (ownership, servitude, pledge, etc.), rights of intellectual property or (some) personality rights, which have an *erga omnes* effect, cease to exist when waived (which is often unilateral). On the other hand, so-called 'relative' rights, such as claims, do not cease by waiver, but their exercise may be prevented by invoking the waiver (this waiver is in most cases contractual). The latter also applies to the so-called 'transformation rights' (Serbian *preobražajna prava*, German *Gestaltungsrechte*), i.e. a right to alter a certain legal relationship by a unilateral constitutive declaration of will.

There is a general scarcity of legal texts or research on waiver in the Yugoslav doctrine based on the 1978 Code of Obligations[1] (*Zakon*

[1] Also translated into English as *Law on Obligation Relations* and *Law on Contracts and Torts*.

obligacionim odnosima, hereinafter: ZOO[2]). Not surprisingly, there is also not much case law on the issue. This is all due to the fact that waivers were not commonly used in local contractual practice until a decade or so ago. The use of waivers in contracts subject to the ZOO is not a 'homegrown' phenomenon, but rather a consequence of the fact that templates created for the use in England or other common law jurisdictions started to be used in the ZOO countries,[3] especially in transactions related to company law (privatizations, M&A). This was done by lawyers who, even in cases when they represented the local state, often did not have any real command of local laws (this applies to all former Yugoslav jurisdictions). This novel practice has not undergone academic analysis, therefore the permissibility, effects and types of waiver have not previously been examined in a systematic way in laws of the ZOO countries, and the doctrine of waiver – and how it actually operates – has not been developed.

This paper strives to provide a systematic analysis of what are regarded to be the requirements of validity of contractual waiver in the context of the existing ZOO. In doing so, unilateral waivers will not be examined. Even though unilateral waivers may produce legal effects (e.g. one may unilaterally waive ownership or any other property right, or personality right, or intellectual property right), it is deemed irrelevant for the topic of this paper and therefore the analysis will be restricted solely to the validity of the contractual waiver, i.e. the situation when a party to a contract waives its rights as an obligation undertaken towards the other party. Generally, the effect of waiver of claim under the ZOO would be an obligation to refrain from exercising the waived right, made towards a particular party, which such party may invoke as defence against such claim if it is asserted despite the waiver.

2. GENERAL CONDITIONS FOR VALIDITY OF WAIVER OF CLAIM UNDER THE ZOO

Several undisputed issues serve as the starting point of the analysis. Firstly, waiving a right (Serbian *odricanje od prava*) is by all means generally allowed under the ZOO. The ZOO mentions it explicitly on

[2] Official Gazette of SFR Yugoslavia Nos. 29/1978, 39/1985, 45/1989 – decision of the Constitutional Court and 57/89, Official Gazette of FR Yugoslavia No. 31/1993.

[3] ZOO is the *alma mater* of all codifications of the law of obligations in the countries of the former Yugoslavia (Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and North Macedonia, and it also still applies in Kosovo). The term 'ZOO countries' is used to denote these countries. All of those countries have altered and/or passed their respective 'ZOOs' after the breakup of Yugoslavia, but since the changes were not systemic, the rules of contract and tort law in all these countries remain essentially (sometimes even verbatim) the same.

more than ten occasions (the same applies to *Skica*[4]*). Waiver of a statute of limitation, waiver of a right to annul the contract for laesio enormis* or because of the changed circumstances (*rebus sic stantibus*, similar to common law concept of hardship), waiver of a right without consideration (which requires a special power of attorney for the agent), are just some of the situations in which the ZOO mentions waiver explicitly, thus making it beyond dispute that waiver of a right is generally possible, allowed and effective under the ZOO. This is without exception in doctrine – there is not a single textbook on civil law or law of obligation that would dispute the general possibility of enforceable waiver of right – some even elevate it to the level of methodological principle of civil law (Vodinelić 2012, 40–41).[5]

The next undisputed issue is that, contrary to the common law doctrine of contract law, waivers are not the subject of specific interest of legal doctrine dealing with contract law in the territory where the ZOO once applied as federal law. There is neither a comprehensive 'theory of waiver', nor any remotely systematic literature on waivers: they are mentioned occasionally, mostly when the statute refers to them. Therefore, a range of issues that begs to be answered has not yet been addressed in the doctrine, including the limits to the freedom to waive rights, i.e. the validity of waivers. Case law is of no help in this matter either, since, as already explained, the relative novelty of the use of waivers in contractual practice inevitably resulted in scarcity of case law.

The last undisputed fact is that the ZOO provides cases where the possibility of waiver is explicitly excluded (and so did *Skica*). For example, a debtor may not waive the statute of limitation prior to lapse of the period required for limitation.[6] Also, waiving in advance the right to annul a contract for *laesio enormis* is explicitly forbidden,[7] as well as waiving the right to fulfil a monetary obligation before its due date.[8]

Two questions remain: is a waiver forbidden *only* in cases where such prohibition is expressly provided for in the statute, or not? If not,

[4] The 1978 ZOO was based on a draft published in 1969 by Prof. Mihailo Konstantinović, called *Skica za Zakonik o obligacijama i ugovorima* [Sketch for the code of obligations and contracts]. This draft is referred to as *Skica*.

[5] Vodinelić says, when discussing the principle of transferability of civil law rights 'The norms of civil law, in majority of cases, allow the right holder to ... waive their right' (Vodinelić 2012, 40, own translation). He also emphasizes that waiver may lead to complete ceasing of the right, but also to temporary impossibility of enforcement. Last but not least, he warns that there are many exceptions to this rule, and for many various reasons – whereas he explicitly mentions that waiver is not possible if it would limit the freedom of the right holder excessively, e.g. waiving a right to annul an invalid agreement (Vodinelić 2012, 41).

[6] Art. 365 of the ZOO.

[7] Art 139 para 3 of the ZOO.

[8] Art. 398 para 2 of the ZOO.

what would be the criteria under which, irrespective of the fact that there is no express prohibition of waiver in the particular matter, a waiver would nevertheless fail to produce effects?

The answer to the first question seems to be clear: waiver may be ineffective and invalid not only where its ineffectiveness is expressly regulated by the statute, but also in other cases. For example, even though it is not expressly provided in the ZOO, waiving a right to seek annulment of a null contract, or waiving in advance the right to avoid a voidable contract is quite certainly not allowed.

The answer to the second question is much more complex, because of the number of criteria that can render a waiver inoperable is significant. Subsuming them under the notion of *ordre public*,[9] as it is usually done in the doctrine on limitations to the freedom of contract in general, is of little help in the concrete case, as the outer borders of the notion of *ordre public* are not always easy to chart. Instead, when speaking about waivers and their effectiveness, a parallel to the issue of freedom of contract and its (particular) limitations seems to be more useful.

In examining this issue under the ZOO, *Skica* remains a valid starting point, particularly Article 44. This article regulates the possibility of the party that performed an obligation from a formal bilateral contract lacking the required form, to request performance of the other party, rather than just restitution (return of its performance). *Skica* allows such a request for performance only if the required form is established for the protection of the very party requesting performance, 'and if in the concrete case the waiver of such protection is possible' (translated by author). The rationale of this provision would be that a precondition for the effective waiver is that the waived right has no significance to the general, common or public interest, but solely for the right-holder ('waivability'). Statutory rights and requirements may exist in both public and private interest, and only those not impeding the public interest may be waived. Moreover, they may be waived if that is possible in the concrete case, i.e. if the specific criteria that would exclude the possibility of waiver allow it. Thus, a scheme is established where the first level of analysis is ascertaining the general 'waivability' of a claim and the second is establishing whether the particular criteria that would exclude the validity of waiver (of a generally waivable right) exist.

Judging from the cases in which waiver is explicitly excluded, one might conclude that the law, in most cases, excludes the possibility of those waivers that would lead to violations of the principles of law of obligations provided in the ZOO – above all, the principle of the equality

[9] The notion is similar to the notion of public policy used in international private law, but it is not identical. On the notion of *ordre public* in Yugoslav doctrine, see Perović (1975, 99–165).

of parties and the principle of good faith. The ZOO provides for several examples that illustrate the point.

For instance, Article 597 paragraphs 3 and 4 of the ZOO, envisages a situation whereby in a lease contract concluded for indefinite period, the leased chattels present a health hazard. In that case, the lessee may terminate the agreement without notice, even if they knew of the hazard at the time of contract formation, and this right to terminate without notice cannot be waived. This illustrates that when a particular right is established, not only in the interest of the right-holder (here the lessee) but also in the public interest, such a right cannot be waived. A similar logic governs the exclusion of waiver of the statutory limitation period prior to its lapse.[10]

Furthermore, Article 92 of the ZOO provides in its first paragraph that the principal may restrict or revoke the power of attorney to an agent, even if they had contractually waived that right. In addition to being a consequence of the independence of the power of attorney from the contract on which it was based, this rule stems from the notion of the protection of personal freedom of the principal, who simply cannot be in the position to be bound by the will of the agent if they no longer wish so.[11] That would subject the principal, against their own will, to the will of the agent, and would result in a violation of the principle of equality of parties. Many other cases of explicitly excluding the possibility of a waiver have the same rationale.

Moreover, Article 136 of the ZOO allows the parties to waive the possibility to terminate or revise the contract for a specific changed circumstance, *provided it is not contrary to the principle of good faith*. Hence, the law is fairly explicit about the ground for excluding the possibility of waiver in this case.

Finally, Article 486 of the ZOO provides for a possibility to limit or exclude liability of the seller for material defects. According to the third paragraph of this article, if the buyer waived his right to terminate the sales contract for material defects, they would not be regarded as having waived other rights that are provided to them by the law in that situation (they 'retain' these rights). The rationale behind this provision is that the scope of the waiver should be interpreted narrowly. The same idea is contained in the rule that the waiver of the security right should not be interpreted as the waiver of the secured claim.[12]

In conclusion, it could be said that waivers are generally possible and recognized in civil law systems based on the ZOO. The effect of

[10] Art. 375 of the ZOO.

[11] The question is whether the time limited waiver would produce legal effects in this case or not; Serbian case law would most probably allow it.

[12] Article 345 of the ZOO.

a waiver of claim would be the obligation of the person who waived the claim to refrain from exercising that claim/right against the person towards whom the claim was waived. However, in order for a waiver to produce the desired effect, several conditions need to be met: firstly, the right waived must exist solely in the interest of the right-holder, i.e. not even partially in the public interest, otherwise the right cannot be waived (one can label this as the 'waivability' of a right); secondly, the waiver of a generally 'waivable' right will not produce the effect if, in a particular case, it were to violate the *ordre public*, particularly the basic principles of the law of obligations as defined by the ZOO, primarily the principle of equality of the parties (requiring that one party is not subjected to the other against its will, or excessively, to the extent that limits the freedom of one party more than allowed) and the principle of good faith (requiring also a minimum level of fairness and equity in the relation between the parties); thirdly, the waivers are to be interpreted strictly (narrowly).

3. WAIVER OF A FUTURE CLAIM

The deliberations set out in respect of the rules generally applicable to waiver of an existing claim also apply to the waiver of a future claim. However, there are two more issues that need to be addressed: the first relates to waiving a particular, *specified* future claim and its particularities, and the second to waiving an *unspecified* future claim.

As for waiving a particular future claim, apart from what was said about the general rules of waiver, two more points should be stressed.

The first is the fact that waiving a future claim is more susceptible to being in violation of the principle of equality and good faith. This is more or less self-explanatory: waiving a claim even before it came to existence has an inherent danger of abuse by the other contractual party, and always results in subjecting the waiving party to the party who benefits from the waiver. If such subjection is excessive, so as that it violates the freedom of the waiving party and thus the principle of equality of the parties, or if it is contrary to the good faith principle, the waiver will be ineffective. Therefore, the ZOO forbids in several places the waiving of a claim in advance, i.e. before it is established. Sometimes it is done explicitly, like in Article 139 para 3 of the ZOO, in regard to *laesio enormis*, which prohibits waiving the right to seek annulment of a contract on the grounds of excessive loss in advance, before the party actually learned that there is an obvious disproportion of mutual commitments. However, the prohibition is sometimes also contained implicitly, e.g. in case of voidable contracts: a party may not waive

its right to avoid a voidable contract in advance, before it learns that the contract is voidable. This stems from the very nature and notion of voidable contracts, and therefore, even if the party waives in advance the possibility to avoid a contract, for example, for error, in case an error by that party that provides grounds for avoidance to take place, such waiver will be ineffective. On the other hand, once the party knows it could avoid a contract on the grounds of error, it can effectively waive such a right. The reason for excluding the effectiveness of waiver in advance in these cases is the violation of the equality of parties and guaranteed inalienable level of freedom each party enjoys. This ground for rendering a waiver ineffective is more emphasized in the case of a future claim, and the leeway for effective waivers is thus narrower when a future claim is waived. There is a body of case law on forbidden waivers of future claims, and it mostly relates to statutory interest on the sum in arrears, salaries and other employment-related claims, as well as to some claims related to family law. As for the statutory interest, given its imperative nature, the courts decided that the claim to such interest cannot be validly waived in advance,[13] but only after it matures.[14] As for the claim related to salary and other employment related claims the courts said that, for example, minimum wages cannot be waived in advance '*not only because such waiver would contravene the principle of good faith from the provisions of the ZOO*, but also because it contravenes the constitutional provisions of the Constitution of the Republic of Serbia' (translated and italicized by author).[15] Similarly, the claim for severance payment cannot be waived in advance,[16] but can be waived by contract after it matures.[17] As for cases

[13] This was established at the 26th Joint Session of the Federal Court, the Supreme Courts of Republics and Autonomous Provinces and the Supreme Military Court, held on 30 October 1984, and subsequent case law has upheld such position – see Decision of Higher Commercial Court Pž. 7502/96, dated 20 February 1997, published in *Sudska praksa privrednih sudova* [Case law of commercial courts], Bulletin No. 2/1997, 58; Decision of Higher Commercial Court Pž. 3177/2000(1), dated 18 May 2000, published in *Sudska praksa privrednih sudova* [Case law of commercial courts], Bulletin No. 4/2000, 26**;** Decision of the Commercial Court of Appeals, Pž. 1228/2010(1), dated 25 March 2010, published in *Paragraf Lex*;

[14] Decision of the Commercial Court of Appeals Pž. 1228/2010(2), dated 25 March 2010, while acknowledging the fact that matured amount of statutory interest can be waived by contract, requires explicit expression in that sense.

[15] Decision of the Higher Commercial Court Pž. 1285/2008(2), dated 5 June 2008, published in *Paragraf Lex*.

[16] Decision of the Supreme Court of Cassation Rev. 2. 1494/2010, dated 27 May 2010, published in *Paragraf Lex* and on the website of the Supreme Court of Cassation.

[17] Decision of the Supreme Court of Serbia, Rev. II 1226/2001, dated 27 December 2001, published in *Bilten sudske prakse Vrhovnog suda Srbije* [Bulletin of the Case Law of the Supreme Court of Serbia], No. 1/2003, 90; also Decision of the Supreme Court of Serbia, Rev. 1266/2001 dated 20 June 2002, published in *Paragraf Lex*;

in family law, the courts decided that spouses cannot waive the right to request the division of their joint estate in advance.[18]

The second point that should be emphasised is that, when examining the waiver of future claims, one must keep in mind the rules of the ZOO on exclusion and limitation of contractual liability. Namely, similar purposes of the two institutions (waiving a specified future claim and exclusion/limitation of liability) provide grounds for analogous (*mutatis mutandis*) application of the rules on exclusion/limitation of liability (contained explicitly in the ZOO) to waiver of a future claim. Article 265 of the ZOO reads:

'Limitation and Preclusion of Liability

(1) A debtor's liability for intention or gross negligence may not be precluded in advance by contract.

(2) At the request by an interested contracting party, the court may, however, also annul the contractual provision on the exemption of liability for simple negligence, should such agreement be the result of the monopoly position of the debtor or, otherwise, of unequal mutual positions of the contracting parties.

(3) A provision of a contract shall be valid by which the highest amount of compensation is determined, unless such amount is in obvious disproportion to the damage and unless the law provides otherwise for the specific case.

(4) In case of limiting the amount of compensation, the creditor shall be entitled to full redress should the impossibility of performance of obligation be caused by wilful misconduct or gross negligence of the debtor.'[19]

The first two paragraphs clearly demonstrate the limits of the possibility of exclusion of liability, inspired by the principle of good faith; even if all liability is excluded, this will not be effective (by operation of law) if the liability is caused intentionally or in gross negligence, and even if it is caused by simple negligence, if the unequal position of the parties enables the one that has the upper hand to force the exclusion in the agreement (if the court finds so).[20] The same rationale for the limitation

[18] Decision of County Court in Valjevo, Gž. 704/2007, dated 13 June 2007, published in *Paragraf Lex*. The Court explicitly states that "the case is about a statement by which its issuer has waived her future right, ... so on that ground also the legal validity of the said statement may be questioned" (translated by author). This also indicates that waiver of future claims is more susceptible to being declared invalid than the waiver of an existing claim.

[19] Translation by Đurica Krstić, *The Law on Contracts and Torts*, Jugoslovenski pregled (Yugoslav Survey), Belgrade 1997, at *https://www.mpravde.gov.rs/files/The%20 Law%20of%20Contract%20and%20Torts_180411.pdf* (last visited 21 February 2020).

[20] For more details see Jankovec (1993, 363ff). Jankovec sees the roots of the limits of the possibility of exclusion/limitation in *ordre public* and the equity (1993, 366).

of liability is also present in the third and the fourth paragraph: gross disproportion between the limited amount and the actual damages, which violates the equivalence principle, precludes the limitation of liability; intentional non-performance or non-performance due to gross negligence, as violation of the good faith principle, also prevents the operability of the limitations. These rules were in application even before the ZOO was enacted,[21] and clear wording of the ZOO leaves little if any room for different interpretations. This is the most likely reason why there is no published case law on Art. 265 of the ZOO; the published cases deal with definitions of gross negligence and intent (wherein the doctrinal views are restated),[22] but not particularly the inapplicability of exclusion and/or limitation of liability if the damage was caused by gross negligence or intentionally.

By analogy, in the author's opinion the waiver of a right in advance is not effective if it is abused so as to exonerate the intentional or grossly negligent conduct of the adverse party. The rationale is that if a claim is waived in advance, the waiver should cover the situation in which the claim would arise out of the ordinary course of affaires, or out of simple negligence, and not out of bad faith conduct by the adverse party, i.e. intention or gross negligence. Also, if waiving a future claim would lead to gross disproportion between the performances of the parties in a bilateral contract, the waiver may not be effective because of the violation of the equivalence principle.

On the other hand, waiver of any future claim that may arise in a dispute between the parties, without any specification whatsoever, is in the vast majority of cases ineffective, in the author's opinion, because

[21] In one case, the exclusion of liability for damages caused by a lorry given to the plaintiff to use free of charge did not apply because the lorry was technically not in order, so after it crashed and thus caused damage to plaintiffs goods, the court found the damage to be caused by gross negligence of the defendant, thus the exclusion of liability did not apply (Decision of the Federal Court Gzs. 50/74, dated 24 December 1974, published in *Zbirka sudskih odluka* [Collection of Court Decisions], Book I (1976), Vol. 3, decision No. 317 at p. 137). In another case it was decided that the forwarder, which caused damage by simple negligence, is liable up to the limits set forth in his general terms and conditions, but for the damage caused by gross negligence or intent, the limits do not apply (Decision of the Supreme Court of Slovenia Sl. 213/76, dated 3 June 1976, published in *Zbirka sudskih odluka* [Collection of Court Decisions], Book II (1977), Vol. 3, decision No. 415 at p. 422). However, before the ZOO was enacted in 1978, there was also some case law excluding the very possibility to exclude or limit liability (for details see Mitrović (1983, 929), and case law quoted therein).

[22] 'A person acts grossly negligent if it doesn't use even the diligence that every average person would use' – Supreme Court of Croatia Gž 1956/78, dated 20 March 1979, published in *Pregled sudske prakse, Prilog Naše zakonitosti* [Review of Court Practice], No. 15, decision No. 141; In the decision of the Supreme Court of Serbia Rev. 2 1665/02 dated 9 August 2003, available at *http://www.sirius.rs/praksa/3886* (last visited 21 February 2020), gross negligence is defined as 'behaviour that does not satisfy the standard of reasonable, even sub-par diligent person' (translated by author).

it would most certainly lead to subsequent inequality of the parties and excessive limitation of freedom of the waiving party. Namely, such waiver would put a waiving party in a position of latent subordination to the other party, which (subordination) would materialize upon occurrence of the breach. It is highly likely that the courts under the ZOO would not allow it. It is quite seldom to have waivers formulated so broadly even in jurisdictions where waivers are much more ordinary than in the countries of the former Yugoslavia. Every factor that circumscribes and defines future claims waived (i.e. their grounds, value, or similar) potentially increases the effectiveness of the waiver. Consequently, *the more the waiver of future claim is specified, the better the chances it will produce effects*. Naturally, in every particular case one should take account of the general rules on waivers, and of the rules for waiving a specific future claim, in addition to the fact that waiving a bundle of future claims is additionally susceptible to being ineffective on grounds of excessive limitation of party freedom and violation of equality of the parties. It should be pointed out that this does not relate only to the equality at the time of formation of contract, but also to creating inequality subsequent to formation, in the contract fulfilment phase.

In conclusion, it could be said that in the case of waiving a future claim additional rules should be taken into consideration besides the rules applicable to waiving existing claims. Firstly, waiving a future claim is more susceptible to violations of the general principles of the ZOO than waiving an existing claim, since it inherently poses a danger to the principle of equality and borders the good faith requirement. Thus, the leeway for effective waivers is narrower when a future claim is waived. Secondly, in the case when a future claim is waived, one must bear in mind that such a waiver must not exonerate the adverse party from its intentional or grossly negligent behaviour, and may not result in excessive disproportion in the performances of the parties, all this through analogous application of rules related to contractual limitation and exclusion of liability. Lastly, given the fact that waiving a bundle of future claims (say, all claims that could arise from a given contract) would most probably be without effect, it can be concluded that the more the waiver of future claim is specified, the better the chances are that it will produce effects.

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O OGRANIČENOJ I USMERENOJ SLOBODI UGOVARANJA U UGOVORNOM PRAVU OSIGURANJA: FENOMEN „POKORAVANJA“ UGOVORA O OSIGURANJU

Autorka analizira primenu principa slobode ugovaranja na primeru ugovora o osiguranju, posebno onih potrošačkih. Na osnovu pozitivnopravne i uporednopravne analize uočene su dve determinante zakonskog uređenja ugovorne materije osiguranja. Prva je ograničena sloboda ugovaranja, koju autorka smatra vrhovnim načelom ugovornog prava osiguranja. Autorka navodi brojne primere u prilog tvrdnje da u ugovornom pravu osiguranja postoje ograničenja u slobodi odlučivanja da li će se ugovor zaključiti, u slobodi izbora saugovarača i slobodi uređivanja ugovornog odnosa osiguranja. Druga determinanta ugovornog prava osiguranja jeste usmerena sloboda ugovaranja, koja se ostvaruje tehnikom poluimperativnih normi. Zahvaljujući polukogentnom metodu zakonodavac postiže višestruke pravnopolitičke ciljeve, od kojih su najbitniji obezbeđenje zaštite potrošača usluga osiguranja i omogućavanje ugovornim stranama da ugovor u određenoj meri prilagode svojim potrebama. Autorka zaključuje da i u modernim kodifikacijama dominira nova paradigma slobode ugovoranja i zalaže se da srpsko pravo usvoji isti zakonodavni metod prilikom usvajanja lex specialis propisa o ugovoru o osiguranju.

Ključne reči: *Ugovor o osiguranju. – Ograničena sloboda ugovoranja. – Usmerena sloboda ugovaranja. – Zaštita slabije strane. – Nova paradigma slobode ugovaranja.*

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1. EMANCIPACIJA UGOVORNOG PRAVA OSIGURANJA – ODGOVOR NA RASTUĆE RIZIKE U MODERNOM DRUŠTVU

U XXI veku – veku sve većih rizika – osiguranje izbija na prvo mesto najkorisnijih usluga finansijskog tržišta. Praktični značaj osiguranja prate postepeno izdvajanje i emancipacija prava osiguranja kao sve značajnije grane prava i pravne discipline.[1] Takav razvoj je uočen samo u tržišnim privredama, gde je potražnja za osiguranjem izraz stepena rizičnosti najvećeg broja aktivnosti i svesti lica koja nose te rizike da se njima najbolje upravlja optimalnim osiguravajućim pokrićem (Merkin, Steele 2013, 3, 34–35). U našem pravu to nije slučaj. Decenijska samoupravljačka privreda uticala je na razvoj dirigovanog tržišta osiguranja, kome je period tranzicije poslužio kao oporavak od netržišnog poslovanja. Tek od početka XXI veka, kada je usvojen prvi tržišno obojen statusni propis osiguranja, stekli su se uslovi za prelazak na drugačiji model poslovanja i izdvajanje (ugovornog) prava osiguranja na ovim prostorima.[2] Ugovorni segment prava osiguranja dobija značaj u tržišnom modelu privređivanja, koji karakteriše postepeno otvaranje domaćeg tržišta i pojava novih vrsta osiguranja.

Distinktivna karakteristika tako oformljene grane prava (i pravne discipline!) predstavlja modifikovano načelo autonomije volje i slobode ugovaranja. Osobenost pravnih odnosa koje uređuje predmetna disciplina direktno se reflektuje na odstupanja od načela građanskog prava. Jedno od najznačajnijih odstupanja ogleda se u *uticaju nove paradigme slobode ugovaranja na materiju ugovoru o osiguranju*. Njena implementacija u ugovorni zakon dovela je do toga da se više ne može govoriti o načelu slobode ugovaranja u ugovornom pravu osiguranja, već o ograničenoj i usmerenoj slobodi ugovaranja.[3] Kao što ćemo u radu pokazati, takav zakonodavni pristup je odgovarajući.

[1] Emancipacija ugovornog prava osiguranja danas nije sporna. U razvijenim pravnim kulturama osiguranja stvaraju se uslovi za grananje te grane prava, u okviru koje se odvojeno razvijaju osiguranje od odgovornosti i životna osiguranja. Kako se transportno osiguranje odavno osamostalilo jer se istorijski odvojeno razvijalo, nema dileme da će u godinama koje dolaze ta grana prava beležiti dalju ekspanziju.

[2] Iako su temelji ugovornog prava osiguranja postavljeni Zakonom o obligacionim odnosima – ZOO (*Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93 i *Službeni list SCG*, br. 1/2003 – Ustavna Povelja, dalje: ZOO), pre više od četiri decenije, tek nakon usvajanja tržišnog zakona o osiguranju i prelaska na novi model poslovanja stvoreni su uslovi da ovaj deo ugovornog zakonodavstva dobije značaj.

[3] Neka druga načela – poput načela maksimalno dobre vere, načela obeštećenja i načela pojačane zaštite slabije strane – postaju sve značajnija u materiji ugovornog prava osiguranja. Inače, i na primeru načela savesnosti i poštenja može se videti u kojoj je meri osobena pravna materija kakva je materija osiguranja dovela do odstupanja od njegovog izvornog oblika. Tako se u svim udžbenicima uobičajeno govori o savesnosti i poštenju

2. UOPŠTENO O SLOBODI UGOVARANJA U UGOVORNOM PRAVU OSIGURANJA

Autonomija volje, odnosno sloboda ugovaranja kao njena manifestacija, predstavlja jedan od temelja ugovornog prava u gotovo svim pravnim sistemima.[4] To je slučaj i u našem pravu, budući da se u ZOO izričito kaže da su strane u obligacionim odnosima slobodne, u granicama prinudnih propisa, javnog poretka i dobrih običaja, da svoje odnose urede po svojoj volji.[5] Time sloboda ugovaranja dobija najviši rang. Taj princip se obično izražava u tri postulata: 1) sloboda odlučivanja da li će određeni ugovor biti zaključen ili ne; 2) sloboda izbora saugovornika i 3) sloboda određivanja sadržine ugovora (Perović 1990, 153–182; Orlić 1993, 19–35). Grananje slobode ugovaranja na ta tri pokazatelja je opšteprihvaćeno. Međutim, nijedna od pomenutih sloboda nije neograničena ni apsolutna. To ćemo ukratko pokazati na sledeći način. Sloboda da se ugovor zaključi ili ne zaključi egzistira u granicama zakona, budući da je zabranjeno zaključenje ugovora koji su protivni zakonu. Obrnuto, u nekim situacijama zakonodavac nameće obavezu da se zaključi neki ugovor. Sloboda izbora saugovarača takođe poznaje brojna ograničenja; počev od onih faktičkih (na čijem se suzbijanju radi) do onih čisto pravnih (poput diskriminisanja određenih lica zbog njihovih svojstava). Najzad, sloboda uređivanja sadržine ugovora trpi najveća ograničenja, posebno u potrošačkom sektoru. Dakle, sve i da ne postoji opšte ograničenje slobode ugovaranja u vidu javnog poretka, morala i prinudnih propisa, ona trpi brojna ograničenja inherentna samoj činjenici da je deo određenog pravnog poretka. Stoga je najbliže istini da su *granice slobode ugovaranja pokretljive i prilagođene vrsti predmetnih ugovora*, a u novije vreme i aktuelnoj epohi (Perović 1990, 153).

Načelno: svako ima pravo da odluči da li želi da zaključi neki ugovor, sa kim želi da ga zaključi, kada želi da ga zaključi i kakva će biti njegova sadržina (Soto 2008, 105).[6] Ta enumeracija manifestacija slobode ugovaranja – koja se sreće u skoro svim pravnim sistemima – pretežno je ilustrativnog karaktera. Takođe, u svim uporednim zakonima o obligacionim odnosima na skoro identičan način je izraženo da se svi oblici slobode ugovaranja moraju kretati u granicama prinudnih propisa, javnog

u pojačanom obliku ili načelu maksimalno dobre vere. Videti u: Petrović Tomić 2019a, 50–55.

[4] Autonomija volje strana predstavlja temelje tržišne privrede i slobodne konkurencije. Ona je intelektualno povezana sa slobodom preduzetništva (jer se ugovor posmatra kao pravni instrument ekonomske razmene!). Videti čl. 83 Ustava Republike Srbije (*Službeni glasnik RS*, br. 98/2006).

[5] ZOO, čl. 10.

[6] Ključni element svakog ugovora je volja. Njena zaštita je u osnovi principa autonomije volje.

poretka i dobrih običaja (ili morala). Time je uvedeno *osnovno ograničenje slobode ugovaranja* (Pérès 2009, 10). Ugovorne strane, dakle, nisu potpuno slobodne i suverene u izboru vrste ugovora koji će zaključiti (imenovanog ili neimenovanog) ni u određivanju njegove sadržine. Zakonodavac je postavio granice autonomije volje. Do tih granica saugovarači mogu da urade onako kako žele, odnosno onako kako odgovara njihovim interesima (Đurđević, Pavić 2016, 86). Preko toga se ulazi na teren zakonske intervencije, kojom se štiti opšti interes i koja u savremenom pravu poprima sve veće razmere (Perović 1975, 6).

U oblasti ugovora o osiguranju stvari su nešto složenije. Za potrebe primene načela slobode ugovaranja treba praviti razliku između komercijalnih i potrošačkih ugovora. Dok je u komercijalnim (velikim) rizicima načelo slobode ugovaranja jednako zastupljeno kao u ostatku ugovornog prava, u potrošačkom ugovornom pravu osiguranja postoji natprosečan broj ograničenja koja čine suvislim pitanje da li je sloboda ugovaranja i dalje jedno od načela prava osiguranja.[7] U potrošačkim osiguranjima načelo slobode ugovaranja ustupa mesto drugom načelu – načelu pojačane zaštite slabije strane. Zapravo, u odnosu tih načela može se uočiti jedna pravilnost: *postepeno jačanje značaja načela pojačane zaštite slabije strane obrnuto je proporcionalno postepenom smanjivanju značaja načela slobode ugovaranja. Tokom istorijskog razvoja prava osiguranja sloboda ugovaranja u ugovornom pravu osiguranja bila je u konstantnom povlačenju.* Ona je bila najizraženija u eri koja prethodi kodifikacijama ugovora o osiguranju. Čim je zakonodavac počeo da interveniše u taj ugovor, to je dovelo do uvođenja novih ograničenja i limita u ugovornoj moći osiguravača i ugovarača osiguranja.

Sloboda ugovaranja je u ugovornom pravu osiguranja ograničena u većoj meri nego kod ostalih ugovora. Zbog prirode tog kompleksnog ugovora (kojim se pribavlja složena i neopipljiva finansijska usluga) i tipične potrošačke pozicije strane koja pribavlja uslugu osiguranja zakonodavac natprosečno interveniše u ugovorni odnos osiguranja. Otuda smo skloni da za izvore ugovornog prava osiguranja tradicionalno vežemo obeležje *detaljizma* (Petrović Tomić 2018a, u štampi). Detaljizam regulative *relativizuje sva tri pokazatelja slobode ugovaranja*. Iz ugla osiguravača i osiguranika sloboda ugovaranja se svodi na slobodu izbora vrste ugovora o osiguranju koji se želi zaključiti. I to samo u domenu dobrovoljnih osiguranja. Ako je reč o nekom od rizika sa izraženom socijalnom konotacijom, ne postoji ni sloboda izbora pokrića, već se ugovor zaključuje radi ispunjenja zakonske obaveze. To je u skladu sa opštim odredbama ZOO, koji već na početku odeljka posvećenog zaključenju ugovora sadrži

[7] Načelo slobode ugovaranja u materijalnom pravu prati sloboda ugovaranja i kod izbora merodavnog prava. Ona je potpuno očuvana kada je reč o velikim rizicima i reosiguranju, dok je za masovne rizike uvedena stepenovana sloboda ugovaranja. Videti u: Petrović Tomić 2017a, 417–439.

član naslovljen kao obavezno zaključenje i obavezna sadržina ugovora (čl. 27).

Zapravo, mogli bismo reći da je sloboda ugovaranja u izvesnoj meri prevaziđena kategorija u ugovornom pravu osiguranja.[8] Početkom XX veka čuveni francuski teoretičar prava osiguranja *Maurice Picard izneo je mišljenje da sloboda ugovaranja ne igra skoro nikakvu ulogu u ugovoru o osiguranju* (Picard 1939, 137, 139). Iako je za ono doba to stanovište bilo skoro revolucionarno, nakon usvajanja Zakona o ugovoru o osiguranju – koji je sadržao priličan broj imperativnih normi – postalo je jasno o čemu je *Picard* govorio.

Postavlja se pitanje šta opravdava posve drugačiji pristup u ugovornom pravu osiguranja. U grani prava koja uređuje odnose između strana nejednake upućenosti u predmet transakcije i/ili nejednake ekonomske snage, *sloboda ugovaranja u izvornom obliku ne može da opstane*. Ona nosi onaj stepen rizika koje moderni zakonodavac nastoji da *kontroliše i kanališe* različitim instrumentima, od kojih je jedan od najstarijih i (najdelotvornijih!) ograničenje slobode ugovaranja. Tako nastaje nova paradigma slobode ugovaranja u značenju modifikovanog poimanja klasičnog principa obligacionog prava (Kessler, 1943, 631). Ona ne označava ukidanje slobode ugovaranja, već njeno prilagođavanje potrebama konkretnog ugovora i stepenovanje. U kojoj meri će biti ograničena sloboda ugovaranja, zavisiće najviše od značaja predmetnog pitanja za poziciju slabije strane. Ako je reč o pitanju čijom se regulativom direktno tangiraju interesi slabije strane, zakonodavac će pribeći ograničenju slobode ugovaranja kogentnim normama. Ako je, pak, za neko pitanje osiguravaču dovoljno pružiti smernice u kom pravcu treba da se kreće, zakonodavac se može zadovoljiti i usmerenom slobodom ugovaranja, koja se postiže polukogentnim metodom. I ZOO polazi od tzv. *nove paradigme slobode ugovaranja u oblasti ugovora o osiguranju*,[9] koja će se u narednim decenijama potvrditi na evropskom planu u odnosu na ugovorno pravo u celini.

Osim sektorskih (specijalnih) ograničenja slobode ugovaranja u ugovornom pravu osiguranja, u obzir dolaze i opšteprihvaćena ograničenja slobode ugovaranja – prinudni propisi, javni poredak i dobri običaji. Najzad, princip slobode ugovaranja u ugovornom pravu osiguranja najviše kompromituju delimična ograničenja, koja su takvog kvaliteta da ne ukidaju potpuno slobodu ugovaranja, već je usmeravaju na način koji je

[8] Fridman kaže da je jedna od fundamentalnih dogmi modernog prava ta da je svako slobodan da ugovora ono što želi, u meri u kojoj se kreće u granicama zakona. Videti u: Fridman 1967, 1.

[9] Tzv. *nova paradigma slobode ugovaranja* odgovara izmenjenim uslovima poslovanja. Razvoj industrije i tehnologije i potreba obezbeđenja bržeg odvijanja poslovnih transakcija doprineli su *depersonalizaciji ugovornih odnosa* i koncentraciji velike moći u rukama onoga ko se bavi pružanjem usluga ili prodajom roba.

zakonodavac odredio kao poželjan. Otuda ćemo *za potrebe ugovora o osiguranju uvesti distinkciju između ograničene i usmerene slobode ugovoranja*. I jedna i druga se pokazuju na osoben način na terenu ugovora o osiguranju. Dok se ograničena sloboda ugovaranja sreće i kod ostalih ugovora koje uređuje ZOO, druga je posve specifična i opipljiva upravo u materiji ugovora o osiguranju. Na osnovu uvida u zakonske norme pokazaćemo da ograničenje slobode ugovaranja više pogađa osiguravača. Da nije usvojen kogentni i polukogentni metod, on bi na osnovu dispozitivnog metoda unapred odredio fizionomiju ugovora o osiguranju na osnovu opštih i posebnih uslova osiguranja. Zakonodavac ga je sprečio u tome u meri u kojoj u odeljku posvećenom ugovoru o osiguranju dominiraju imperativne i jednostrano obavezujuće norme. S druge strane, i pored svih ograničenja i usmeravanja slobode ugovaranja osiguravača, njegova sloboda se ne može porediti sa slobodom ugovaranja osiguranika. Upravo zbog svoje neukosti osiguranik, i pored svih zakonskih intervencija, ostaje laka meta osiguravača. Stoga je izuzetno značajna sudska zaštita koja je predviđena potrošačkim propisima.

Najzad, za potrebe ovog rada treba praviti razliku između *spoljašnjih i unutrašnjih pokazatelja ograničene slobode ugovaranja* u ugovornom pravu osiguranja. Pod spoljašnjim ograničenjima podrazumevamo sve što pravni poredak nameće u pogledu načina na koji treba ispoljiti volju kako bi ugovor o osiguranju bio punovažan (poput forme ugovora).[10] Poenta je u tome da su to ograničenja koja se ne odnose na sam ugovor, to jest na njegovu esenciju i stvaralačku moć individualne volje, već na njegove spoljne manifestacije. S druge strane, unutrašnja ograničenja se odnose na sam ugovor, na zakonsko i apriorno propisivanje njegove sadržine. S obzirom na kvantitet i kvalitet i spoljašnjih i unutrašnjih ograničenja, sloboda ugovaranja u ugovornom pravu osiguranja vrlo je skučena.

3. OGRANIČENA SLOBODA UGOVARANJA – IMPERATIVNI METOD ZAKONSKE REGULATIVE UGOVORA O OSIGURANJU

Ograničenja slobode ugovoranja u ugovoru o osiguranju uočavaju se i pre nego se dotaknu limiti izraženi u generalnom ograničenju slobode ugovaranja. Zapravo, analizom regulatornog okvira osiguranja pokazaćemo da osiguravač, a naročito osiguranik, ne osećaju slobodu ugovaranja prilikom zaključenja tog ugovora u onoj meri u kojoj je to slučaj kada se zaključuje neki drugi (imenovani) ugovor. Stoga je opravdano reći da je nastupila *kriza načela slobode ugovaranja*, izazvana državnim intervenci-

[10] Naglašavamo: formalizam ograničava strane u načinu ispoljavanja volje, ali volja ostaje očuvana. Tako i: Perović 1990, 154.

onizmom u pravni posao osiguranja.[11] Kako je istakao profesor Konstantinović, evidentna je težnja da se ugovor disciplinuje, a kada je reč o ugovoru o osiguranju to se čini ne samo na nivou opšteg ugovornog propisa (ZOO) već i na nivou specijalnog zakonodavstva osiguranja sadržanog u različitim zakonima koji, primera radi, čine pravo obaveznog osiguranja (Konstantinović 1957, 20). Pokoravanje ugovora o osiguranju nastupa u svim segmentima ugovorne slobode, a najizraženije je u određivanju sadržine tog ugovora. Zapravo, zakonodavac je unapred odredio kako treba da izgleda sadržina ugovora o osiguranju.

3.1. Sloboda odlučivanja o tome da li će ugovor biti zaključen

Prilikom uređenja ugovora o osiguranju zakonodavac je iskoristio opštu normu koja pruža odstupnicu za ograničavanje slobode ugovaranja na dva načina: prvi je uvođenje obaveze da se zaključi neki ugovor, a drugi je određivanje sadržine ugovora, delimično ili u celini.

Prema ZOO, ako je neko po zakonu obavezan da zaključi ugovor, zainteresovano lice može zahtevati da se takav ugovor bez odlaganja zaključi. Takođe, odredbe propisa kojima se, delimično ili u celini, određuje sadržina ugovora sastavni su delovi tih ugovora, te ih upotpunjuju ili stupaju na mesto ugovornih odredaba koje nisu u saglasnosti sa njima. Ta zakonska opcija je značajno iskorišćena u oblasti ugovora o osiguranju. U brojnim posebnim propisima uvedena je obaveza zaključenja ugovora za osiguranika, a njoj je korelativna obaveza osiguravača koji se bavi obaveznim vrstama osiguranja da prihvati ponude koje ne odstupaju od uslova pod kojima on inače pruža ta osiguranja. Štaviše, ima primera da je uvedena obaveza osiguravača da prihvati ponudu za zaključenje ugovora i kod dobrovoljnih osiguranja. Najbolji primer je dobrovoljno zdravstveno osiguranje, koje je tek nedavno dobilo zakonsku legitimaciju (Petrović Tomić 2019b, 503–505). Dobrovoljno zdravstveno osiguranje nije u pravom smislu reči dobrovoljno. ZZO je, naime, uvedena obaveza za osiguravače koji se bave tim osiguranjem da zaključe ugovor o dobrovoljnom zdravstvenom osiguranju sa ugovaračem osiguranja pod uslovima propisanim zakonom i podzakonskim aktima za sprovođenje tog zakona, bez obzira na rizik kojem je osiguranik tog osiguranja izložen, odnosno bez obzira na godine života, pol i zdravstveno stanje osiguranika.[12] To je još jedan primer *ograničavanja slobode ugovaranja* u ugovornom pravu osiguranja. Zapravo, prema onome što piše u ZZO, osiguranik uživa slobodu ugovaranja, dok osiguravač ima obavezu da zaključi ugovor sa zainteresovanim licem.

[11] Profesor Đurđević koristi termin nesloboda ugovaranja, što je naročito opipljivo na primeru ugovora o osiguranju. Videti u: Đurđević 2018, u štampi.

[12] Zakon o zdravstvenom osiguranju, *Službeni glasnik RS,* br. 25/2019, čl. 172 st. 1.

Što se tiče obavezne sadržine ugovora o osiguranju, ona je u bitnim crtama propisana ZOO. Osim toga, u svim posebnim zakonima kojima se uvodi neki oblik obaveznog osiguranja postoje odredbe od kojih se ne može odstupati prilikom zaključenja ugovora. Odredbe kojima je unapred određena obavezna sadržina ugovora o osiguranju imaju dvostruk značaj. One, najpre, prema slovu ZOO, upotpunjuju slobodu ugovoranja ugovornih strana. To znači da se primenjuju paralelno sa onim o čemu su se ugovorne strane dogovorile. Drugo, njihov značaj još više dolazi do izražaja ako su strane eventualno ugovorile nešto što nije u skladu sa obaveznim zakonskim sadržajem ugovora. One tada stupaju na mesto ugovornih odredaba koje nisu u saglasnosti sa njima. One su, dakle, *korektivne norme*. To znači da po našem pravu za one ugovore čija je sadržina zakonom određena ta zakonska projekcija sadržine ugovora uživa primat u odnosu na slobodu ugovaranja. U meri u kojoj je sadržina ugovora obavezno određena zakonom strane ne uživaju slobodu ugovaranja.

Ako se zna da u oblasti osiguranja dominira zakonsko uređenje obavezne sadržine ugovora i da postoje još dva ograničenja slobode ugovaranja, lako je zaključiti u kom stepenu je derogirana sloboda ugovaranja. Nije stvar samo u tome da je ugovornim stranama nametnuta obaveza da pribave neki oblik osiguravajućeg pokrića. Njihovu slobodu ugovaranja više tangira zakonsko propagiranje obaveznog sadržaja tog ugovora, uz istovremenu prateću aparaturu sankcionisanja svake odredbe koja je u suprotnosti sa obaveznim zakonskim sadržajem ugovora, a koja je produkt dogovora strana.

Sloboda odlučivanja da li će ugovor biti zaključen ne postoji u izvornom obliku u ugovornom pravu osiguranja. Ona je ograničena na očigledan način u dva slučaja. Prvi je opštepoznati i odnosi se na *obavezna osiguranja*. Određene forme obaveznih osiguranja pojavile su se onog trenutka kada je u društvu sazrela svest o potrebi zaštite oštećenih lica. Ta potreba je pretpostavljena slobodi ugovaranja kao jednoj od vrhovnih vrednosti ugovornog prava. Najpoznatija obavezna osiguranja jesu osiguranja od odgovornosti (primera radi, osiguranje za štete usled upotrebe motornih vozila).[13] Iako se osiguranje od odgovornosti vlasnika motornih vozila ubraja u grupu obaveznih osiguranja, ono ne nastaje *ex lege*. I osiguranje od odgovornosti vlasnika motornih vozila za štetu pričinjenu trećim licima je ugovorno![14] To je slučaj i sa ostalim obaveznim

[13] S obzirom na njihov značaj, obavezna osiguranja su danas u ekspanziji. U razvijenim državama postoji ogroman broj obaveznih osiguranja (u Francuskoj ih ima oko 120).

[14] Ipak, u interesu zaštite trećih oštećenih lica, postoje slučajevi zakonskog automatizma, to jest delovanja obaveznog osiguranja i pored neizvršenja zakonske obaveze zaključenja ugovora. Dve najpoznatije situacije zakonskog automatizma su: 1) delovanje osiguranja u slučaju neosiguranog vozila i 2) delovanje osiguranja kada je šteta izazvana upotrebom nepoznatog vozila. Videti u: Ognjanović 2003, 47.

osiguranjima. Upravo u ugovornom karakteru svih obaveznih osiguranja treba videti prostor za slobodu ugovaranja.

Lice na kome je obaveza da zaključi neki oblik obaveznog osiguranja suočava se sa direktnim ograničenjem slobode ugovaranja. Ono, naime, ima zakonsku obavezu koju mora da ispuni.[15] Procena je zakonodavca da zbog stepena opasnosti ili zastupljenosti određenih rizika osiguranicima ne može biti prepušteno da odluče o tome da li će te rizike pokriti osiguranjem. Na primeru obaveznih osiguranja vidi se da ograničenje slobode ugovaranja pogađa obe strane: i osiguranika i osiguravača. Naime, osiguravač koji se bavi poslovima obaveznog osiguranja ima obavezu da prihvati ponudu za zaključenje tog osiguranja ako ona ne odstupa od uslova pod kojima on inače sprovodi to osiguranje.

Drugi slučaj ograničenja slobode odlučivanja o zaključenju ugovora tiče se *ugovorne obaveze* pribavljanja određenog tipa osiguranja. Reč je o ugovornom uslovljavanju lica da zaključe određeni tip osiguranja. Najfrekventniji primer je kasko osiguranje. Lizing kompanije su uslovima poslovanja predvidele obavezu korisnika lizinga da pribavi odgovarajući modalitet kasko osiguranja. Tako ugovaranje kasko osiguranja postaje ugovorna obaveza korisnika lizinga, koja utiče na veću zastupljenost kasko osiguranja u portfoliju domaćih osiguravača. Isti je slučaj i sa osiguranjem za slučaj otkaza, kojim banke uslovljavaju korisnike potrošačkih („keš“) kredita (Petrović Tomić 2017b, 91–112).

O ograničenju slobode ugovaranja govorimo i kada se zahteva *saglasnost trećeg lica kao uslov za zaključenje ugovora*. Takav je slučaj kod osiguranja života za slučaj smrti trećeg lica i osiguranja od posledica nesrećnog slučaja (Bonnard 2012, 326; Šulejić 2005, 468). U ZOO se precizira da se osiguranje života i osiguranje od nesrećnog slučaja mogu odnositi na život ugovarača osiguranja ili na život nekog trećeg lica. Ugovarač osiguranja ne može da odredi neko lice kao osigurano lice u osiguranju života za slučaj smrti bez njegove saglasnosti. Iz razloga zaštite ovog lica i očuvanja javnog poretka u oblasti osiguranja lica, zahteva se saglasnost tog lica, inače je ugovor ništav. Saglasnost osiguranog lica, koja očigledno mora da bude pribavljena prethodno (tj. do zaključenja ugovora!), ima cilj da obezbedi da se osigurano lice upozna sa svim okolnostima ugovornog odnosa čiji je akter, a posebno sa tim ko je ugovarač osiguranja, ko će biti eventualni korisnik, koliko je

[15] Primera radi, prema Zakonu o obaveznom osiguranju u saobraćaju – ZOOS (*Službeni glasnik RS*, br. 51/2009, 78/2011, 93/2012 i 7/2013 – odluka US), vlasnik motornog vozila *dužan je da zaključi ugovor o osiguranju od odgovornosti* za štetu koju upotrebom motornog vozila pričini trećim licima usled smrti, povrede tela, narušavanja zdravlja, uništenja ili oštećenja stvari, osim za štete na stvarima koje je primio na prevoz. Iako je krug lica koja mogu biti odgovorna u slučaju prouzrokovanja štete usled upotrebe motornog vozila potencijalno širi i obuhvata različita lica koja su u nekoj pravnoj vezi sa vozilom (vozač, garažista, ovlašćeni držalac, ostavoprimac), zakonodavac je obavezao samo vlasnika vozila da zaključi ugovor o osiguranju.

osigurana suma itd. Ta saglasnost mora biti data u polisi ili odvojenom pismenu prilikom potpisivanja polise, sa naznačenjem osigurane sume.[16] Smatra se da je time osigurano lice dalo svoj pristanak i na zaključenje ugovora i na visinu sume osiguranja. Ugovor o osiguranju života trećeg lica za slučaj smrti ništav je bez saglasnosti tog lica.[17] Na ništavost se može pozvati svako (apsolutna ništavost).

O tome u kojoj meri je ograničena sloboda ugovaranja osiguranika svedoči podatak da on, osim što u određenim slučajevima mora da zaključi ugovor, po zakonu u nekoliko slučajeva tokom određenog vremena ne može da izađe iz ugovornog odnosa osiguranja. Osiguranik se, dakle suočava kako sa nametanjem obaveze da zaključi ugovor, tako i sa ograničenjima koja tangiraju njegovo pravo da izađe iz ugovornog odnosa osiguranja. Slikovito rečeno, njegova sloboda ugovaranja napadnuta je sa svih strana. Tako je *osiguranik kod višegodišnjih osiguranja imovine zatočenik osiguravača*, koji može da povrati ugovornu slobodu samo ako je spreman da plati zakonsku „cenu" (Petrović Tomić 2015, 259–261). Naime, prema ZOO, kod ugovora zaključenih na period duži od 5 godina osiguranik može tek po isteku ovog perioda izjaviti da ugovor otkazuje, uz otkazni rok od 6 meseci. Zakonodavac je tokom tog perioda zamrznuo pravo osiguranika da izađe iz ugovornog odnosa, što je još jedno ograničenje njegove ugovorne slobode. Takvi ugovori se po pravilu zaključuju pod povoljnijim uslovima za osiguranika, uz odobravanje popusta. S tim u vezi, stav je sudske prakse da ako osiguranik raskine ugovor pre zakonom propisanog roka, ima obavezu da osiguravaču naknadi štetu koju trpi zbog prevremenog raskida. Šteta se obično sastoji u povraćaju odobrenih popusta i obavezi plaćanja premije za sve vreme za koje nije mogao legalno raskinuti ugovor (Belanić 2016, 121–137).

3.2. Sloboda izbora saugovarača

Ni sloboda izbora saugovarača nije neograničena. Polazeći od statusnih propisa, osiguravači mogu da se bave poslovima osiguranja tek nakon dobijanja dozvole za rad od Narodne banke Srbije. Već u zahtevu za izdavanje dozvole osnivači treba da se izjasne da li će se baviti poslovima životnog ili neživotnog osiguranja, odnosno da li će se baviti svim ili pojedinim poslovima iz neke od tih vrsta osiguranja. To, dakle, znači da osiguranik i kada zaključuje ugovore iz sfere dobrovoljnih osiguranja može da „bira" licenciranog osiguravača za one poslove osiguranja koji

[16] *„Uslov za zaključenje punovažnog ugovora o osiguranju za slučaj smrti trećeg lica je pismeni pristanak tog lica u pogledu samog zaključenja, ali i visine osigurane sume"* (Presuda Vrhovnog suda Srbije Rev. br. 5661/95 od 17. januara 1996. godine).

[17] U teoriji se postavilo pitanje da li osigurano lice može dati saglasnost kasnije (nakon zaključenja ugovora) i time ga osnažiti. U nemačkoj teoriji se takva mogućnost negira (jer je reč o apsolutnoj ništavosti), dok italijanski teoretičari ne isključuju tu mogućnost. Videti u: Ćurković 2009, 86.

su njemu potrebni. Njegova je sloboda izbora saugovarača ograničena zahvaljujući intervenciji statusnog zakonodavstva osiguranja. On, stoga, ne može da zaključi ugovor sa bilo kojim saugovaračem, već samo sa onim koji ispunjava striktne zakonske uslove da se nazove osiguravačem.

Osim toga, sloboda ugovaranja dodatno je ograničena u slučaju zaključenja obaveznih osiguranja: ugovor se mora zaključiti i to sa osiguravačem koji se bave poslovima obaveznih osiguranja.

Zakonska intervencija statusnog karaktera odražava se, dakle, na ugovorno pravo osiguranja. Zbog sistema dozvola koji važi u sektoru osiguranja sloboda izbora saugovarača je dodatno ograničena. Ta intervencija je značajna za zaštitu osiguranika i uopšte potrošača usluga osiguranja. Budući da zaključuju aleatorni ugovor sa stranom koja će biti dužna da ispuni obavezu u bližoj ili daljoj budućnosti, za njihovu zaštitu je ključno to što pravni sistem uvodi garantije likvidnosti i solventnosti osiguravača. Dakle, na ocenu stepena ograničenosti slobode ugovoranja u pravu osiguranja utiče ne samo ugovorni već i statusni zakon.

3.3. Sloboda uređivanja sadržine ugovora o osiguranju

Sloboda određivanja sadržine ugovora je, prema našem mišljenju, *okosnica slobode ugovaranja*, a ona je najviše ograničena u ugovornom pravu osiguranja. Ona znači da su strane slobodne da urede sadržinu ugovornog odnosa, to jest da stvore pojedinačne ugovorne norme čija pravna snaga nije ništa manja od pravne snage opštih zakonskih normi. Za ugovorne strane ima ogromnu važnost to što mogu da se dogovore o svim ugovornim klauzulama, a naročito o: rokovima za ispunjenje ugovornih obaveza; posledicama za slučaj docnje; osnovu raskida ugovora; načinu rešavanja sporova itd. Brojna ograničenja i detaljna regulativa ugovora o osiguranju čine ograničenom stvaralačku moć ugovornika.

Priznati slobodu ugovaranja kao zakonsku kategoriju uz istovremeno zakonsko određivanje sadržine ugovora o osiguranju u bitnim crtama u neku ruku je kontradiktorno. Međutim, za to postoji opravdanje u karakteristikama samog ugovora i potrebi da se zaštiti slabija strana. Zapravo, sloboda uređivanja sadržine ugovora u ugovornom pravu osiguranja svedena je na neznatan broj dispozitivnih normi. Uz to, ona je i u tom obliku ograničena uslovima osiguranja koje osiguravač donosi unapred. Pritom je isključena mogućnost pregovaranja o onome što je uređeno uslovima osiguranja. Dakle, sloboda uređivanja sadržine ugovora o osiguranju svodi se samo na izbor između konkurentskih uslova osiguranja – tzv. *contracts terms shopping* (Petrić 2013, 20).

Da bismo objasnili tu tvrdnju, podsetićemo se zakonodavnog metoda koji se koristi za ugovor o osiguranju. ZOO je za ugovor o osiguranju primenio tzv. *specijalnu zakonodavnu tehniku* koja se razliku-

je od metoda koji taj zakon koristi za ostale ugovore. Zaštita osiguranika kao slabije strane zahteva najveći broj imperativnih normi, dok je broj dispozitivnih značajno manji nego kod drugih ugovora. Uvođenje imperativnih normi nije motivisano samo zaštitom slabije strane (potrošača), već služi i ostvarenju drugih ciljeva, od kojih su najbitniji zaštita javnog poretka u osiguranju i posredno usaglašavanje uslova osiguranja kao izvanredno značajnog izvora prava osiguranja. Ne samo da su u ZOO uređena skoro sva pitanja ugovornog odnosa osiguranja već je to učinjeno tehnikom kogentnih normi. Osim većinskih imperativnih, ZOO sadrži manji broj dispozitivnih normi. To je odrednica po kojoj će ZOO ostati upamćen u istoriji prava osiguranja. Napominjemo da u materiji osiguranja, osim većinskih kogentnih i manjinskih dispozitivnih normi, postoje i tzv. polukogentne norme (jednostrano obavezujuće norme, poluprinudne norme). Poslednja „vrsta" normi predstavlja originalnost prava osiguranja, koja će tek tokom jačanja aktivnosti u oblasti zaštite potrošača na nivou Evropske unije postati rasprostranjeniji metod regulisanja ugovornog prava.

Čitanjem dela ZOO koji se odnosi na ugovor o osiguranju stiče se utisak da su skoro sva pitanja ugovora o osiguranju – počev od momenta zaključenja ugovora do njegovog prestanka – unapred uređena.[18] Već smo ukazali na to da je značajno obeležje pravnog režima ugovora o osiguranju na osnovu ZOO *detaljnost* regulative.[19] Postavlja se pitanje da li se to obeležje inače sreće u ugovornom pravu, koje obeležava princip autonomije volje.[20] Za poređenje sa ugovorom o osiguranju najbolji su ugovori o prevozu. I za njih važi princip detaljnog uređenja svih pravnih pitanja. Zašto? Zato što je princip detaljizma svojstven regulativi onih ugovornih odnosa koje karakteriše asimetrija snaga i informisanosti saugovarača. Kako drugačije obezbediti ne samo adekvatnu zaštitu osiguranika (ili korisnika prevoza) već i samo odvijanje tog ugovornog odnosa na poželjan način ako ne detaljnim propisivanjem prava i obaveza strana, odnosno unošenjem zabrana? *Princip detaljizma je, dakle, u službi očuvanja balansa u ugovornim odnosima koje karakteriše nejednakost u bilo kom obliku.* Osim toga, zahvaljujući principu detaljne regulative i mnoštvu

[18] Budući da je broj poluimperativnih i dispozitivnih normi u ugovornom pravu osiguranja brojčano manji u odnosu na imperativne norme, analiziraćemo prve dve kategorije normi (nap. aut.).

[19] Princip detaljizma nije prevaziđen ni na današnjem stupnju razvoja vodećih zakonodavstava osiguranja. Ako se analizira bilo koji moderni zakon o ugovoru o osiguranju – od nemačkog ili francuskog preko skandinavskih do britanskog ili nedavno usvojenog bugarskog zakona – stiče se utisak da zakonodavac ništa ne prepušta slučaju. Ovo zato što bi se svako propuštanje zakonodavca da neko pitanje uredi na kogentan ili polukogentan način moglo okrenuti protiv potrošača usluga osiguranja. Videti u: Petrović Tomić 2018b, 65–82.

[20] *Princip detaljizma praćen kogentnom i polukogentnom tehnikom regulisanja predstavlja dobitnu kombinaciju za ugovor o osiguranju.*

imperativnih normi nazire se ustanova javnog poretka u osiguranju. To je svakako još jedna od osobenosti kodifikacije ugovora o osiguranju u ZOO. Naime, u opštem delu javni poredak nije bio pomenut sve do novela iz 1993. godine.

Iako nesporno korisna, kombinacija natprosečnog korišćenja kogentnog metoda i detaljizma prilikom regulative skoro svih pitanja ugovornog odnosa potrošačkih osiguranja čini vrlo suženim manevarski prostor ugovornih strana za slobodu ugovoranja. Osim što se na taj način garantuju minimalna prava i interesi potrošača, osiguravačima se šalje nedvosmislena poruka da je taj deo pravnog prometa pod strogim nadzorom zakonodavca i da neće moći mnogo da odstupaju od *zakonskog modela prava i obaveza* koja proizlaze iz ugovornog odnosa osiguranja. Zapravo, na taj način se ispoljava javni poredak zaštite u oblasti osiguranja (Cardoso 2014, 96). Za osiguranje je specifično da se javni poredak delimično poklapa sa prinudnim propisima (Soto 2008, 120), iako nesporno obuhvata i vrednosnu komponentu (Tomić 2019, 40). Iako je on i jezički odvojen od prinudnih propisa u ZOO, javni poredak u osiguranju čine kogentni i polukogentni propisi.

Ograničenje autonomije volje ugovornih strana u obaveznim osiguranjima, osim u obavezi zaključenja ugovora, ispoljava se i kao nemogućnost da se odstupi od imperativnih zakonskih odredaba kojima je određen obim osiguravajućeg pokrića. Takođe, osiguravač ne može da unese isključene štete kojima bi se suzilo pokriće definisano zakonskim odredbama; ne može da isključi izmaklu dobit (iako ta mogućnost proizlazi iz ZOO), ne može da unese odredbu kojom se ne priznaje umanjenje vrednosti vozila zbog opravke, ne može da primeni godišnji procenat amortizacije na utvrđivanje štete na vozilu, ne može da isključi zakasnele štete iz pokrića itd. (Pak 2018, 238–239).

O posebnom kvalitetu ograničenja slobode ugovaranja govorimo kod kolektivnih ugovora. Sam mehanizam zaključenja tih ugovora – gde je centralna figura ugovarač osiguranja – čini utoliko tangiranom poziciju osiguranika, koji nema apsolutno nikakvu moć pregovaranja i uticaja na sadržinu ugovornih prava i obaveza. Mehanizmom kolektivnih ugovora o osiguranju još više se potencira athezioni karakter ugovora, budući da pripadnik grupe, to jest osiguranik, nema ni najmanju pregovaračku moć. On samo pristupa ugovoru u celini, i to na osnovu sporazuma ugovarača osiguranja i osiguravača (Goldie-Genicon 2008, 1).

Uz sve što je do sada pomenuto, slobodu ugovoranja ograničava još i mogućnost suda da oglasi nevažećim klauzule kojima se narušava ugovorna ravnoteža na štetu potrošača, uz istovremeno održavanje ugovora na snazi ako može opstati bez tih klauzula (Petrović Tomić 2015, 361–363). To znači da u oblasti osiguranja treba računati na dve vrste intervencija u ugovor o osiguranju: prva je preventivna i zakonskog je pore-

kla, a druga je reaktivna i sudskog je porekla. Zakonodavac je time uveo dva stuba zaštite slabije strane, čijim se sinergijskim dejstvom dodatno sužava polje primene slobode ugovaranja u ugovornom pravu osiguranja.

4. USMERENA SLOBODA UGOVARANJA – POLUKOGENTNI METOD ZAKONSKE TEHNIKE

ZOO sadrži programsku odredbu prema kojoj je odstupanje od ostalih odredaba (onih koje nisu imperativne), ukoliko nije zabranjeno ovim ili kojim drugim zakonom, dopušteno samo ako je u nesumnjivom interesu osiguranika. Postavlja se pitanje kako sa izvesnošću utvrditi da je norma poluimperativna. Takav zakonski metod podrazumeva prethodno tumačenje normi sa ciljem da se utvrdi da li pružaju mogućnost iznalaženja povoljnijeg rešenja iz ugla osiguranika.[21] Dakle, norma je poluimperativna ako dopušta samo odstupanja u jednom pravcu koji je generisan nesumnjivim interesom osiguranika. Minimum zaštite prava i interesa osiguranika koji pružaju polukogentne norme u isto vreme treba da trasira put osiguravaču ka poželjnom kvalitetu odstupanja od aktuelne regulative (Bataller, Latorre, Olavarria 2007, 35, 169). Mehanizmi koje pruža pravo osiguranja sastoje se, zapravo, u *doziranoj i unilateralnoj imperativnosti normi*. Iz polukogentnog karaktera normi proizlazi da su dopuštene klauzule kojima se poboljšava položaj osiguranika ili korisnika prava iz osiguranja priznanjem prava koja inače nemaju po zakonu ili odstupanjem od primene zakonskih odredaba koje nisu najpovoljnije za njih.[22]

S obzirom na to da su neka rešenja ZOO uveliko zastarela, poluimperativne norme pružaju mogućnost našoj praksi osiguranja da se ponaša kao da je regulatorni okvir mnogo moderniji nego što jeste.

Polukogentni metod ima višestruki značaj za ugovorno pravo osiguranja. Prvo, ta odredba ima ogroman značaj jer zahvaljujući njoj sloboda ugovaranja u oblasti tzv. kopnenih osiguranja nije potpuno ukinuta. Njome je inaugurisana usmerena sloboda ugovaranja kao vrednost koja se nadovezuje na zaštitu potrošača usluga osiguranja. Upravo postojanje poluprinudnih normi omogućava da ugovor o osiguranju bude izraz slobode ugovaranja, a ne zakonske projekcije pretpostavljenih prava i obaveza saugovarača. Zapravo, kada se tumače norme i zauzima stanovište o tome da li se od njih može odstupiti, neophodno je da tumač prava bude dobar poznavalac zaštite potrošača. U skladu sa takvim karakterom poluprinudnih normi, *potrošači se ne mogu odreći prava koja stiču na osnovu samog*

[21] Prema mišljenju profesora Šulejića, sledeće norme ZOO su poluprinudne: čl. 908, 913, 914 st. 3, 917, 932, 955. Videti u: Šulejić 2005, 51–52.

[22] *A contrario*, jednostane izmene kojima se odstupa na bilo koji način od imperativnih normi smatraju se nepravičnim klauzulama. Videti u: Barrientos 2016, 104.

zakona (Čikara 2010, 45). *Takođe, ništave su ugovorne odredbe kojima se odredbe zaštitnog karaktera menjaju na štetu potrošača. Uz to, ne može se odstupati od zakonskih odredaba na način kojim se tangira javni poredak u oblasti osiguranja niti odstupanja mogu biti na štetu osiguravača.*

Drugo, polukogentni karakter normi ima značajan uticaj na industriju osiguranja. Ono što je u njima regulisano u oblasti zaštite slabije strane predstavlja *polaznu osnovu za osiguravače*. Mogućnost odstupanja od zakonskih solucija može se kretati samo ka unapređenju (poboljšanju) položaja potrošača usluga osiguranja. Ili odstupanja od nepovoljnih ili zastarelih zakonskih solucija. Drugim rečima, ugovorne ili klauzule uslova osiguranja ni u kom slučaju ne smeju biti na štetu osiguranika ili uopšte nepovoljnije po njegove interese od minimalne zaštite koju pruža važeći regulatorni okvir. Navešćemo nekoliko poluprinudnih normi u prilog naše tvrdnje.

Prema ZOO, u osiguranju imovine, ako ugovarač osiguranja ne plati premiju koja je dospela posle zaključenja ugovora do dospelosti niti to učini koje drugo zainteresovano lice, ugovor o osiguranju prema samom zakonu prestaje po isteku roka od trideset dana od dana kada je ugovaraču osiguranja uručeno preporučeno pismo osiguravača sa obaveštenjem o dospelosti premije, s tim što taj rok ne može isteći pre nego što protekne trideset dana od dospelosti premije (čl. 913, st. 3). Polazeći od ZOO, osiguravač koji se odluči da pošalje opomenu ugovaraču osiguranja o dospelosti premije osiguranja trebalo bi da mu ostavi rok od bar trideset dana za plaćanje premije, uz pretnju prestankom ugovora ako obaveza ne bude izmirena u pomenutom roku. Što se tiče počeknog roka, nema smetnji za njegovu kvalifikaciju kao poluimperativne norme. Smatramo da normu treba tumačiti tako da obavezuje osiguravača da ostavi počekni rok od najmanje trideset dana. Ali, ako je on upoznat sa tim da ugovarač neće moći da izmiri obavezu u tako kratkom roku, nema smetnji da se počekni rok prolongira. To bi značilo da osiguravač osiguraniku može da ostavi i duži rok od 30 dana za izmirenje obaveze. To pravilo je u neku ruku zaštitnički nastrojeno prema potrošaču osiguranja jer uvodi dopunski to jest „novi" rok za izvršenje najznačajnije obaveze. Ako je osiguravač postupio u skladu sa tim pravilom, potrošač osiguranja ima na raspolaganju najmanje dodatnih 30 dana za ispunjenje obaveze. Njemu se daje naknadni primereni rok za ispunjenje glavne obaveze, što je dobro rešenje. Ako ga ne iskoristi i ne plati premiju, ugovor prestaje po samom zakonu istekom počeknog roka.[23] Takvo tumačenje nije samo u interesu osiguranika – kome se voljom osiguravača može pružiti duži rok za is-

[23] „Ako ugovorač osiguranja ne isplati premiju osiguranja dospelu po zaključenju ugovora, ugovor o osiguranju prestaje po samom zakonu protekom roka od 30 dana od uručenja preporučenog pisma osiguravača sa obaveštenjem o dospelosti premije" (Presuda Višeg privrednog suda, Pž. 6726/97 od 8. oktobra 1997. godine).

punjenje najbitnije zakonske obaveze – već je *in favorem* ugovora o osiguranju. Ostavljanjem dužeg roka za plaćanje dospele premije osiguranja povećavaju se šanse da ugovor opstane.

Norme o kojima je bilo reči predstavljaju primer poluprinudnih normi, te se od njih može odstupiti u interesu osiguranika. Tako je moguće počekni rok produžiti, ali ne i skratiti. Zaštitni karakter tih normi zabranjuje da se uslovima osiguranja predvidi automatski prestanak ugovora, to jest bez upućivanja opomene u slučaju da premija nije plaćena o dospelosti.

U osiguranju života postoje posebna pravila o posledicama neplaćanja premije osiguranja. Prema tim pravilima, osiguravač ne može tražiti isplatu premije sudskim putem. Ali, zakon mu daje mogućnost da redukuju sumu osiguranja na iznos otkupne vrednosti ili da raskine ugovor. Prva opcija je rezervisana za ugovore kod kojih se formira matematička rezerva, pod uslovom da su dotle plaćene bar tri godišnje premije. Druga opcija važi za ugovore koji nemaju matematičku rezervu. Naše je mišljenje da je prva opcija uređena poluprinudnim normama i da osiguravač može da izvrši redukciju sume osiguranja i nakon uplate dve godišnje premije osiguranja. Takvo tumačenje je u interesu ugovarača osiguranja i održavanja ugovora na snazi.

Prema ZOO, kada se dogodi osigurani slučaj, osiguravač je dužan da isplati naknadu ili svotu određenu ugovorom u ugovorenom roku koji ne može biti duži od 14 dana, računajući od dana kada je osiguravač dobio obaveštenje da se osigurani slučaj dogodio (čl. 919, st .1). Zaštita potrošača osiguranja ne bi bila potpuna da zakonom nije propisan rok u kome osiguravač treba osiguraniku da isplati naknadu ili osiguranu sumu (Schmitz 2015, 327–352). Za razumevanje zaštite koju naši potrošači osiguranja uživaju treba poći od toga da ZOO sadrži vrlo elegantnu formulaciju: osiguravač je dužan da isplati naknadu ili osiguranu svotu „u ugovorenom roku koji ne može biti duži od 14 dana, računajući od dana kada je osiguravač dobio obaveštenje da se osigurani slučaj dogodio“. Dakle, u pitanju je poluprinudna norma, kojom je uvedena ograničena i usmerena autonomija volje strana u pogledu roka za ispunjenje obaveze osiguravača. Strane mogu da se dogovore o skraćenju tog roka, ali ga ne mogu produžavati.

Treće, naše je uverenje da su jednostrano obavezujuće norme odigrale ključnu ulogu u razvoju ugovornog prava osiguranja. One predstavljaju mehanizam kojim je u isto vreme uspostavljen određeni stepen zaštite slabije strane, a i omogućava da se uslovima osiguranja odstupi od zakonskih rešenja i na taj način podstakne razvoj novih vrsta osiguranja. Takođe, uz malo dobre volje osiguravača, može se odstupiti od primene normi koje su očigledno nepovoljne po osiguranike. Takva praksa je uočena kod sankcionisanja nesavesno zaključenog nadosiguranja, gde se

osiguravači retko pozivaju na vrlo nepovoljne zakonske odredbe. Dakle, poluimperativnim normama se postiže kanalisana sloboda ugovaranja osiguravača kao strane koja pruža karakterističnu prestaciju. Stoga se može reći da su te norme u službi zaštite pojedinačnih (privatnih) interesa, dok su imperativne u službi zaštite javnog poretka u osiguranju.

Kada razmatramo novu paradigmu slobode ugovaranja, treba primetiti da je u osiguranju ta suštinska sloboda bar dvostruko ograničena. Prvo zakonom, a zatim uslovima osiguranja. Ono što je zakonodavac ostavio otvorenim primenom dispozitivnih ili poluimperativnih normi osiguravači po pravilu „zatvaraju" i zaokružuju uslovima osiguranja. Dakle, autonomija volje iz ugla osiguravača i postoji u određenom stepenu. Autonomija volje za osiguranika skoro da ne postoji. I u tome se ogleda (i potvrđuje!) položaj slabije strane! Sloboda ugovaranja u oblasti prava osiguranja – naročito pod uticajem zaštite potrošača – sve više se svodi na slobodu da se ugovor zaključi ili ne zaključi, osim kod obaveznih osiguranja, kao i na slobodu izbora osiguravača sa kojim će se zaključiti. Sve van toga je već uređeno zakonom ili uslovima osiguranja. Zbog toga se posebna pažnja posvećuje instrumentima zaštite ugovarača osiguranja ili osiguranika u vezi sa zaključenjem ugovora na osnovu uslova osiguranja (pitanje upoznavanja osiguranika sa njima, pitanje predaje uslova osiguranja, pitanje tumačenja nejasnoća u uslovima osiguranja i pitanje uklanjanja nepravičnih klauzula iz uslova osiguranja). Taj segment zakonodavstva osiguranja i dalje je u razvoju, sa izraženim nastojanjem da se poveća stepen zaštite potrošača.

Zapravo, korišćenje polukogentnog metoda čini da u oblasti ugovornog prava osiguranja može da se govori samo o *usmerenoj (kanalisanoj) slobodi ugovaranja*.[24] Samim tim, sloboda ugovoranja u materiji potrošačkih osiguranja svedena je na neznatan broj ugovornih klauzula, odnosno na tzv. satelitske klauzule.

5. NEOGRANIČENA SLOBODA UGOVARANJA – DISPOZITIVNI METOD

Dispozitivne norme su u oblasti ugovornog prava osiguranja generalno posmatrano rezervni igrači. One se primenjuju samo ako su ugovorne strane ostavile neko pitanje neuređeno. ZOO sadrži natprosečno mali broj dispozitivnih normi posvećenih ugovoru o osiguranju. To se direktno odražava na manji značaj načela slobode ugovaranja u izvornom obliku. Dok u većini ugovora koje uređuje ZOO ugovorne strane imaju

[24] Ugovor o osiguranju se može navesti kao primer ugovora na koji je primenjen princip ograničene autonomije kao tačke vezivanja u međunarodnom privatnom pravu. Videti u: Petrović Tomić 2017a, 417 i dalje.

zakonski mandat da se dogovore o najvećem broju pitanja, takav mandat nije dat ugovaraču osiguranja i osiguravaču. Njih je zakonodavac ograničio i/ili usmerio u najbitnijim pitanjima. Postavlja se pitanje na koju se vrstu elemenata osiguranja odnosi sloboda ugovaranja u izvornom obliku. Na osnovu analize ZOO dolazimo do zaključka da dispozitivni zakonodavni metod uglavnom dominira u uređenju onih elemenata koji nisu od krucijalnog značaja za očuvanje ravnoteže ugovorenih prestacija. Lako je uočiti da situacije koje ZOO uređuje dispozitivnim normama nisu od vitalnog značaja za zaštitu potrošača usluga osiguranja. Tako je stranama prepušteno da urede kako žele sledeća pitanja: momenat dospeća premije i mesto plaćanja; neke od isključenih šteta; mogućnost prepuštanja oštećene osigurane stvari osiguravaču; podosiguranje; prelaz ugovora na pribavioca osigurane stvari.

U ZOO je dispozitivnom normom uređeno pitanje roka plaćanja premija i mesta plaćanja premije. Modalitet i vreme plaćanja premije određuju ugovorne strane: premija se plaća u ugovoreno vreme i na ugovoreni način (Bigot 2014, 24, 560–561). Tako se može ugovoriti da se premija plaća odjednom ili kao tekuća, u ratama. Ako je ugovoreno da se premija plaća odjednom, dospeva u trenutku zaključenja ugovora i plaća se u jednokratnom novčanom iznosu. To se poklapa sa opšteprihvaćenom praksom osiguranja da se premija plaća unapred za određeni period osiguranja. Takav momenat određivanja dospelosti premije karakterističan je za ugovore zaključene do godinu dana. Takođe, u praksi ima slučajeva *kada iz prirode posla i sadržaja obaveze osiguranika proizlazi da premiju treba platiti odjednom*. To je slučaj sa svim kratkoročnim ugovorima u kojima je naznačen jednokratni iznos premije osiguranja, koji se odnosi na ceo period na koji se osiguranje zaključuje (Stanišić 2012, 178). Isto pravilo o plaćanju premije odjednom važiće i kada je osiguraniku uručena polisa u kojoj je naznačen iznos premije osiguranja, a nije određeno kada i na koji način će se platiti taj iznos (Stanišić, 2012, 178).

U praksi je mnogo češće da se strane sporazumeju da se *premija plaća posle zaključenja ugovora*. To je slučaj kod višegodišnjih ili dugoročnih osiguranja, gde premija ima karakter tekuće premije. *Tekuća premija* dospeva prvog dana tekućeg perioda osiguranja, a taj period se vezuje za svaku godinu osiguranja jer je osiguravačima tako najlakše da adekvatno obračunaju premiju. Takvo rešenje odgovara osiguravačima, koji se štite od insolventnosti osiguranika. Zapravo, premija se plaća unapred, na početku perioda pokrića i predstavlja protivtežu riziku primljenom u pokriće (Groutel *et al*. 2008, 380). Iako to zakonom nije *explicite* predviđeno, reč je o plaćanju prve premije osiguranja.[25] Ako je zaključenje

[25] Smatramo da je za otklanjanje svih nedoumica u vezi sa posledicama neplaćanja premije osiguranja korisno izmeniti domaće pravo po ugledu na nemačko. Najbitnije je uvesti zakonsko razlikovanje između prve i kasnijih (tekućih) premija (par. 37 i 38 nem. zakona). Tako, prema nemačkom pravu neplaćanje prve ili jednokratne premije daje pravo

ugovora praćeno ispostavljanjem polise, premija se obično plaća prilikom predaje polise osiguranja. Ako premija nije plaćena, osiguravač nije dužan da izdatu polisu preda ugovaraču osiguranja. Moguće je da se iznos tekuće premije na osnovu sporazuma strana podeli na obroke (rate), koji mogu biti mesečni, tromesečni ili šestomesečni, i taj sporazum se unosi u polisu ili ispravu koja se prilaže uz polisu. Ako je ugovoreno obročno plaćanje premija, dovoljno je da osiguranik plati jedan obrok da ne bi bila primenjena pravila o pravnim posledicama neplaćanja premije, osim ako strane nisu nešto drugo ugovorile.

Za zaštitu potrošača usluga osiguranja značajno je i zakonsko pravilo o mestu plaćanja premije osiguranja. U našem ZOO to pitanje je regulisano na način kojim se odstupa od opšteg pravila o mestu ispunjenja novčanih obaveza. Dakle, osiguranik je dužan da premiju plati u mestu svog prebivališta, ako ugovorom nije određeno neko drugo mesto.

Ugovor o osiguranju razlikuje se od ostalih ugovora po vremenskom momentu. Momenat zaključenja ugovora se obično ne poklapa sa momentom početka dejstava ugovora. U tom smislu je relevantno ono što piše u ugovoru kao dan početka osiguravajućeg pokrića. ZOO sadrži dispozitivno pravilo prema kome se kao dan početka osiguravajućeg pokrića smatra dvadeset četvrti čas dana koji je u polisi označen kao dan početka trajanja osiguranja, a ono traje do isteka poslednjeg dana roka za koji je osiguranje ugovoreno. Koristeći to pravilo, osiguravači često uslovima osiguranja drugačije uređuju početak dejstva njihove obaveze. Pritom naglašavamo da ugovor o osiguranju to jest pokriće deluje za budućnost. Od tog pravila postoji odstupanje u obliku tzv. povratnog osiguranja. Naime, osiguranje može da deluje retroaktivno ako zainteresovanoj strani nije bilo poznato da se osigurani slučaj dogodio, odnosno da je prestala mogućnost da se on dogodi. U tom slučaju ugovor pokriva određeni period pre zaključenja ugovora.

U potrošačkim osiguranjima imovinskog karaktera abandon nije uobičajen. Stoga *klauzula o napuštaju* – kojom se osiguraniku daje mogućnost da u slučaju delimičnog gubitka ili oštećenja predmeta osiguranja zahteva potpunu naknadu štete, prepuštajući osigurani predmet osiguravaču – mora biti izričito ugovorena (Groutel *et al*.2008, 981–982). Osnovna pogodnost koju dobija osiguranik jeste ostvarenje integralne naknade na mnogo efikasniji i lagodniji način. S druge strane, abandon za osiguravača može biti neisplativ, tako da za određene predmete osiguravači ne pristaju na napuštaj (na primer, kod osiguranja umetničkih predmeta i najmanje oštećenje znači depresijaciju – gubitak vrednosti).

osiguravaču da zahteva raskid ugovora dok plaćanje ne bude izvršeno, osim ako za to osiguranik nije kriv. Ako, pak, tekuća premija nije plaćena blagovremeno, osiguravač može u tekstualnoj formi odrediti osiguraniku na njegov trošak rok plaćanja koji mora iznositi najmanje dve nedelje. Detaljnije: V. Hahn 2009, 636–639.

Ako se, dakle, posebno ugovori, osiguranik posle nastupanja osiguranog slučaja osiguravaču može da prepusti oštećenu stvar i da dobije isplatu punog iznosa naknade iz osiguranja, pod uslovom da je spreman da plati određeni dodatak uz premiju osiguranja.

Što se tiče isključenih šteta, u svim osiguranjima štete prouzrokovane ratnim operacijama i pobunama isključene su iz pokrića. Ali, to je učinjeno dispozitivnim normama, što osiguraniku kome je potrebno šire pokriće pruža mogućnost da se dogovori sa osiguravačem. Isti je slučaj i sa štetama prouzrokovanim nedostacima osigurane stvari. Ovde treba primetiti razliku u zakonodavnom metodu prema vrsti isključene štete. Ako je reč o nekom od isključenja koje tangira javni poredak (poput namernog izazivanja osiguranog slučaja) ili prava osiguranika, zakonodavac ga uređuje imperativnim normama. I ne dozvoljava ugovornim stranama da od njega odstupe. S druge strane, ako je reč o isključenjima koja se tiču tehničke strane posla osiguranja ili delimično tangiraju aleatorni karakter ugovora, sloboda ugovaranja je neokrnjena.

Pravilo proporcionalnosti koje se primenjuje u osiguranju imovine dispozitivnog je karaktera. Već je u samom ZOO propisano da je osiguravač dužan da isplati potpunu naknadu sve do iznosa sume osiguranja, ako je ugovoreno da odnos između vrednosti stvari i sume osiguranja nema značaj za određivanje iznosa naknade. Pravilo proporcionalnosti, dakle, nije imperativna norma, te je ugovornim stranama ostavljeno da u ugovor unesu klauzule kojima se odstupa od primene tog pravila.[26]

Pravilo je da u slučaju otuđenja osigurane stvari i stvari u vezi sa čijom je upotrebom zaključeno osiguranje od odgovornosti prava i obaveze ugovarača osiguranja prelaze po samom zakonu na pribavioca, osim ako nije drugačije ugovoreno.[27] Prenos osiguranja, dakle, po zakonskoj pretpostavci, dešava se istovremeno sa prenosom svojine na osiguranoj stvari ili stvari u vezi sa čijom upotrebom je zaključeno osiguranje. Izuzetak je propisan za otuđenje motornog vozila. Ako se u toku važenja ugovora o osiguranju promeni vlasnik motornog vozila, prava i obaveze iz tog ugovora prelaze na novog vlasnika i traju do isteka tekućeg perioda osiguranja.[28] To je propisano ZOOS. Za razliku od ZOO – koji do-

[26] Iako je primena pravila proporcionalnosti posledica tehnike osiguranja, za osiguranike nestručnjake ono predstavlja oblik sankcije. Stoga su oni zainteresovani da se u ugovor unesu klauzule kojima se uklanja primena pravila proporcionalnosti. Videti u: Caillé 2003, 60.

[27] „Kada primalac lizinga otkupi osigurano vozilo pre isteka ugovora o osiguranju, ne može se osloboditi obaveze plaćanja premije, jer su prava i obaveze ugovarača osiguranja prešla po samom zakonu na pribavioca vozila“ (Presuda Privrednog apelacionog suda, Pž. 8371/2013(2) od 11. aprila 2014. godine).

[28] „Prava i obaveze osiguranika po zaključenom ugovoru o osiguranju vozila od autoodgovornosti prelaze na kupca vozila po samom zakonu u momentu zaključenja ugovora o kupoprodaji vozila, te stoga, prethodni vlasnik vozila ne odgovara za štetu prouzro-

pušta mogućnost da se drugačije ugovori – ZOOS to ne dopušta. Takvo rešenje uslovljava potreba da se obezbedi kontinuitet pokrića, imajući u vidu socijalnu konotaciju obaveznog osiguranja od odgovornosti imalaca motornih vozila.

6. ZAKLJUČNO O POKORAVANJU POTROŠAČKIH UGOVORA O OSIGURANJU

Evropsko privatno pravo na današnjem stupnju razvoja karakterišu bar dve tendencije. Prva je fragmentacija i usvajanje brojnih posebnih ugovornih zakona, kojima se uređuju različite oblasti prometa. Druga tendencija je pojava novih načela (poput načela pojačane zaštite slabije strane) i novih prava i obaveza (poput predugovornog informisanja). Ugovor o osiguranju potpuno prati te trendove, zbog čega je i distanciran od opšteg ugovornog prava kao konceptualne baze. U tom smislu proučavanje načela slobode ugovoranja u ugovornom pravu osiguranja predstavlja svojevrstan povratak korenima.

Na osnovu svega što je do sada rečeno možemo izneti sledeće zaključke.

Prvo, sloboda ugovoranja u ugovornom pravu osiguranja u toj meri je ograničena i kanalisana zakonskim odredbama da je potpuno opravdano zaključiti da ona nema značaj vrhovnog načela. To načelo danas više nosi prizvuk istorijskog značaja te nije pogrešno reći da je u izvesnoj meri prevaziđeno u ugovornom pravu osiguranja.

Drugo, smanjenje značaja načela slobode ugovoranja obrnuto je proporcionalno inauguraciji načela pojačane zaštite slabije ugovorne strane koje obeležava sve odnose za koje je karakteristična asimetrija snaga i informisanosti.

Treće, priroda predmetnog ugovora i položaj strane koja pribavlja uslugu osiguranja čine je podložnom zloupotrebama i narušavanju ugovorne ravnoteže na njenu štetu. Stoga je ZOO odstupio od principa slobode ugovaranja u izvornom obliku u uređenju ugovora o osiguranju. Njime su uvedene dve vrste modifikacija slobode ugovoranja. Prvu čine imperativne norme, kojima je uređena sadržina ugovora o osiguranju u bitnim crtama. U meri u kojoj je ugovornim zakonom uređena sadržina budućih ugovora može se govoriti o ograničenoj slobodi ugovaranja. Ovo utoliko pre što iz opštih odredaba ugovornog *lex generalis* propisa proizlazi da te odredbe vrše dve uloge: dopunjujuću i korektivnu. Drugu kategoriju odstupanja čine poluimperativne norme, kojima je uvedena kanalisana

kovanu od strane novog vlasnika u saobraćajnoj nezgodi koja se dogodila posle izvršene kupoprodaje“ (Presuda Okružnog suda u Zrenjaninu, Gž. broj 496/95 od 31. januara 1997. godine).

sloboda ugovoranja. Zapravo, naše je mišljenje da suštini ustanove osiguranja najviše odgovara *načelo kanalisane slobode ugovaranja*. Iako je kogentni metod najviše zastupljen u regulativi ugovora o osiguranju, prirodi tog ugovora više odgovara polukogentni pristup. Zakonodavac treba da uvede minimum zaštite osiguranika i da spreči osiguravača da uslovima osiguranja srozava etabliranu zaštitu. Ali, ako se želi obezbediti podsticajan regulatorni okvir osiguranja, zakonodavac treba da omogući osiguravaču da – pod uticajem tržišta osiguranja – odstupa od minimalne zaštite kako bi ponudio povoljnija rešenja uslovima osiguranja ili odstupio od nepovoljnih zakonskih solucija. S obzirom na zastarelost našeg regulatornog okvira, s jedne strane, i podnormiranost, s druge strane, polukogentni pristup omogućava osiguravačima da razvijaju dobru praksu osiguranja.

Četvrto, za oblast potrošačkih osiguranja karakteristične su dve vrste ograničenja: opšta (koja važe za celokupno ugovorno pravo, kao i ona iz odeljka posvećenog ugovoru o osiguranju) i sektorska (specijalna ograničenja, koja proizlaze iz specijalnog zakonodavstva posvećenog ugovoru o osiguranju). Time je suženo polje primene slobode ugovaranja i *rationae materiae* i *rationae personae.* Tako dojučerašnje načelo prvog ranga postaje princip ograničene primene.

Summa summarum, i savremeno pravo se adaptira kretanju modernog društva. To se na primeru ugovornog prava osiguranja najbolje vidi. Zakonodavac je do te mere intervenisao u ugovorni odnos da se pominjanje načela slobode ugovaranja javlja više kao posledica tradicije nego kao realnost. Njegova poželjnost danas se posmatra kroz prizmu izmenjene socijalne funkcije ugovora uopšte, a pogotovo potrošačkih ugovora. Osim zakonske intervencije, na sužavanje sfere uticaja načela slobode ugovoranja najviše utiču fenomen standardizacije ugovora i pojava opštih uslova poslovanja.

Sloboda ugovoranja u izvornom obliku može da opstane samo u slučaju kada su ugovorne strane jednake. Kao što je poznato, u modernom društvu to često nije slučaj. Stoga su zakonske intervencije i standardizacija ugovora dovele do stvaranja klime zaštite slabije strane uvođenjem ograničenja slobode ugovoranja. Naše je mišljenje da je u ugovornom pravu osiguranja izražena tendencija – nastala početkom XX veka – da se načelo slobode ugovoranja potiskuje. Tzv. zlatno doba ugovora polako ustupa mesto eri ograničene i kanalisane slobode ugovaranja. Time se uvodi princip dozirane slobode ugovaranja kao odgovor na izmenjene prilike poslovanja u sektorima kao što je osiguranje. Naime, prinudni propisi su preuzeli na sebe – radi povećanja pravne sigurnosti – deo onoga što je nekada potpadalo pod slobodu ugovaranja. Time je ostvarena ravnoteža između krute kogentnosti propisa i čiste slobode ugovaranja. Ta ravnoteža je pokretljiva s obzirom na različite vrste osiguranja i brojnost posebnih propisa. Tako je došlo do pokoravanja ugovora o osiguranju kogentnim propisima kao dodatni instrument pojačane zaštite slabije strane. Zapravo,

razlikujemo tri stepenika pokoravanja u oblasti ugovornog prava osiguranja. Prvi stepenik čine prinudni propisi na nivou opštih normi (poput ZOO). Drugi stepenik predstavljaju prinudni propisi u specijalnom zakonodavstvu osiguranja koji imaju primat nad prazninama u opštim propisima ili kada opšti propis upućuje na njih. Treći stepenik čine sudsko tumačenje i popunjavanje pravnih praznina nastalih kombinacijom prethodna dva stepenika.

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ABOUT RESTRICTED AND DIRECTED FREEDOM OF CONTRACTING IN INSURANCE CONTRACT LAW

Summary

The purpose of this article is to highlight the principle of freedom of contracting in the field of insurance contract. Based on Serbian law as it currently stands as well as comparative legal analysis two features of legal regulation of insurance contract are addressed. The first one is called restricted freedom of contracting, which is in our opinion one of the principles of modern insurance contract law. The second mark of insurance contract law is directed freedom of contracting realized by the technics of semi-imperative provisions. Thanks to the semi-imperative method the legislator achieves multiple goals, and such an intervention is, in our opinion, reasonable and necessary due to the protection of the weaker party and creating stimulating regulatory frame to the contracting parties. To conclude with the author advocates the adaption of the new Law on insurance contracts in Serbia as possibly significant step forward in developing insurance law.

Key words: *Insurance contract. – Restricted will autonomy. – Directed will autonomy. – Consumer protection. – New paradigm of freedom of contracting.*

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UTICAJ PREVARE KOJA POTIČE OD SAJEMCA NA PUNOVAŽNOST UGOVORA O JEMSTVU I PRAVA JEMCA – ŽRTVE PREVARE

Kada je prevarom sajemca naveden na zaključenje ugovora o jemstvu, jemac se može naći u prilično nezavidnoj poziciji jer je krug sredstava koje uspešno može da upotrebi da se zaštiti vrlo ograničen. Naime, kod prevare trećeg, punovažnost ugovora se može osporiti samo izuzetno: ako je saugovarač kriv za prevaru ili je ugovor dobročin, što je vrlo diskutabilno kada je reč o ugovoru o jemstvu. Još su manji izgledi za poništenje pozivanjem na pravila o zabludi: zabluda o solventnosti dužnika (kao najčešća) predstavlja zabludu o motivu koja je samo izuzetno pravno relevantna. Konačno, pravo na naknadu štete od sajemca – autora prevare može biti ograničenog dometa: najpre, postoji rizik da će šteta moći da se naknadi; potom, može se doći i do apsurdne situacije da prevareni jemac ne može odbiti regresni zahtev od sajemca – autora prevare (koji je platio dug), ali bi nakon toga mogao da se koristi pravom na naknadu štete.

Ključne reči: *Jemstvo. – Punovažnost ugovora. – Prevara od trećeg. – Zabluda o solventnosti dužnika. – Odnos između sajemaca.*

1. UVOD

Uporednopravna sudska praksa svedoči o tome da se jemci često pozivaju na činjenicu da su pri zaključenju ugovora o jemstvu bili žrtve zablude, najčešće o finansijskoj situaciji dužnika[1], te da ne bi ni pri-

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[1] Osim zablude o solventnosti dužnika, koja je najčešća, jemci se pozivaju i na zabludu o prirodi ugovora o jemstvu, zabludu o sopstvenoj solventnosti, zabludu o obimu obvezivanja, zabludu o osnovu, zabludu o postojanju drugog sredstva obezbeđenja

stali da jemče da im je ta činjenica bila poznata u trenutku zaključenja ugovora. Poreklo takve zablude jemca je, međutim, retko u prevarnim *radnjama* njegovog saugovarača – poverioca.[2] Prevara uglavnom potiče od trećeg, i to najčešće od dužnika: on ima najviše interesa da prikrije ili čak ulepša svoje finansijsko stanje kako bi privoleo jemca da pristane da jemči. Ipak, to ne mora nužno uvek biti slučaj. Istovremeno s razvojem ideje o uticaju prevare koja potiče od dužnika na punovažnost ugovora o jemstvu i razvojem predugovorne dužnosti obaveštavanja u korist jemaca a na teret poverilaca (Dabić 2018a, 220 i dalje), u uporednom pravu, posebno francuskom, pažnju je privuklo još jedno pitanje: da li i na koji način činjenica da je zabluda jednog sajemca o solventnosti dužnika izazvana prevarnim radnjama drugog sajemca može uticati na punovažnost ugovora o jemstvu i/ili odnos između sajemaca? To pitanje je predmet istraživanja i u ovom radu.

Naime, interesovanje za pitanje uticaja prevare koja potiče od sajemca u francuskom pravu je poraslo nakon jednog poznatog slučaja u francuskoj sudskoj praksi.[3] Okolnosti slučaja bile su takve da su dva para, supružnici Giner (*Giner*) i Ser (*Serre*), pristali da budu solidarni jemci za isplatu zajma koji je poverilac (banka) odobrio dužniku. Dužnik je ubrzo nakon toga pao u stečaj, jedan od sajemaca je namirio dug poveriocu, a potom se obratio svojim sajemcima sa regresnim zahtevom za nadoknadu njihovog dela duga. Oni su, međutim, odbili da pokriju svoj deo duga ističući da pri zaključenju ugovora o jemstvu nisu bili upoznati sa teškom materijalnom situacijom u kojoj se dužnik nalazio, te da ih je upravo sajemac koji je poveriocu isplatio dug svojim prevarnim radnjama naveo na zaključenje ugovora o jemstvu, znajući pritom da se dužnik nalazi pred stečajem.

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ili njegovog ranga, itd. (videti o tome, primera radi, u Simler 2008, 143–154; Barthez, Houtcieff 2010, 225–237; Bourassin, Brémond, Jobard-Bachellier 2014, 78–80; Mignot 2010, 77–80).

[2] Jedan od retkih primera može se naći u francuskoj sudskoj praksi. Naime, francuski Kasacioni sud je poništio ugovor o jemstvu zbog prevare koja potiče od poverioca, koja se ogledala u tome što je poverilac (banka) izričito potvrdio jemcu, pre zaključenja ugovora o jemstvu, da je finansijska situacija dužnika „zdrava" i da ne postoji nikakav rizik za jemca, iako je znao da je dužnik već bio u dugovima. Videti odluku francuskog Kasacionog suda (*Cour de Cassation*) – FKS od 7. februara 1983. godine, br. 81–15339. Sve odluke FKS koje se pominju u ovom radu bile su dostupne na sajtu *https://www.legifrance.gouv.fr/*, 15. avgusta 2019. godine.

Međutim, trebalo bi napomenuti da je u uporednom pravu prihvaćena mogućnost poništenja ugovora o jemstvu zbog prevare ćutanjem koju je učinio poverilac. Dakle, ako se poveriocu nešto zamera, to je retko vršenje prevarnih *radnji*, a mnogo češće to što je bio potpuno pasivan pri zaključenju ugovora o jemstvu, iako je bio svestan toga da dužnik neće moći da ispuni svoju obavezu i da će se teret ispunjenja gotovo sigurno prevaliti na jemca. Dozvoljavanje mogućnosti poništenja ugovora zbog prevare ćutanjem dovelo je do razvoja predugovorne dužnosti obaveštavanja u korist jemaca, a na teret poverioca (više o tome Dabić 2018a, 220 i dalje).

[3] Videti odluku FKS od 29. maja 2001. godine, br. 96–18118.

Kada stvari tako stoje, osnovna pitanja koja se postavljaju jesu sledeća: da li i do kakvih pravnih posledica vodi prevara koja potiče od sajemca? Može li se sajemac – žrtva prevare s uspehom pozivati na pravila o prevari ili pak o zabludi kako bi ishodovao poništenje ugovora o jemstvu? Ukoliko je odgovor pozitivan, pod kojim uslovima je to moguće? S druge strane, ako je odgovor negativan, koja sredstva preostaju sajemcu – žrtvi prevare kako bi se zaštitio?

2. MOGUĆNOST PONIŠTENJA UGOVORA O JEMSTVU POZIVANJEM NA PRAVILA O PREVARI KAO MANI VOLJE

Prva prepreka sa kojom se suočava jemac koji je prevarom namamljen da zaključi ugovor o jemstvu jeste ta što zakonodavac, i u našem i uporednom pravu, kao osnovno pravilo postavlja zahtev da prevara potiče od saugovarača, kako bi mogla da utiče na punovažnost zaključenog ugovora.[4] Obmana od trećeg, ma koliko odlučujuće delovala na volju jedne strane, samo izuzetno rađa pravo da se zahteva poništenje ugovora primenom pravila o prevari. Reč je, zapravo, o situacijama u kojima je saugovarač makar posredno doprineo tome da se druga strana nađe u zabludi, propustivši namerno ili usled nepažnje da je iz nje izvuče. Na prvom mestu, to je slučaj onda kada je druga ugovorna strana u vreme zaključenja ugovora znala za prevaru.[5] Svest o prevari trećeg i zloupotreba takve situacije obesmišljava činjenicu da prevara nije direktno posledica radnji saugovarača. *Fraus est celare fraudem* – u literaturi se navodi da, propustivši da je izvuče iz zablude, i saugovarač sâm vrši prevaru (Perović 1980a, 303; Vizner 1978, 297; Gorenc 2014, 438)[6] jer ga takvo ponašanje čini saučesnikom trećeg.[7] U pojedinim sistemima, među kojima je i naš,

[4] Zakon o obligacionim odnosima – ZOO, *Službeni list SFRJ,* br. 29/79, 39/85, 45/89 – odluka USJ i 57/89, *Sl. list SRJ*, br. 31/93 i *Sl. list SCG*, br. 1/2003 – Ustavna povelja, čl. 65, st. 1. Za ista ili slična uporednopravna rešenja videti, primera radi, čl. 1137 francuskog Građanskog zakonika – FGZ čl. 28, st. 1 švajcarskog Zakonika o obligacijama – ŠGZ, § 123, st. 1 nemačkog Građanskog zakonika – NGZ, §870 austrijskog Građanskog zakonika – AGZ.

[5] ZOO, čl. 65, st. 3.

[6] U slučaju obmanjujućih reklama proizvođača, kupac bi mogao da zahteva poništenje ugovora ako je prodavac, iz svog profesionalnog iskustva, znao da osobine proizvoda ne odgovaraju tvrdnjama iz reklame jer je dužan da o tome obavesti kupca. Videti Schmidlin 2012, 257.

[7] Saučesnikom se smatra i onaj saugovarač koji je „samo" bio svestan prevare i nju je iskoristio; nije neophodno da se dokaže da je između saugovarača i trećeg postojao prethodni dogovor o prevarnom postupanju trećeg. „Ako je između ugovarača i trećeg nekog bilo sporazumljenja, saučešća, ne baš onakvog kao što se traži u krivičnom pravu, nego ako je samo ugovarač znao za prevaru trećeg lica, ne htevši obavestiti o tome drugu stranu, to će dati povoda da se ugovor poništi" (Pavlović 2014, 213).

ide se čak i korak dalje, pa se smatra da prevara trećeg utiče na zaključeni ugovor ne samo onda kada je saugovarač za to znao nego i kada je *morao znati.*[8] Krivica saugovarača se ogleda u tome što je nepažnjom propustio da uoči prevaru trećeg, odnosno zabludu u kojoj se druga strana nalazi i izvuče je iz nje.[9] Stori (Story 1920, 162) takav propust slikovito objašnjava kao „prevarno slepilo" („*fraudulent blindness*").

Međutim, van pomenutih slučajeva, načelno se smatra da kod teretnih ugovora prevara od trećeg nema uticaja na punovažnost zaključenog ugovora.[10] Iako se takav stav kritikuje, posebno u materiji jemstva,[11] glavni razlog zbog kojeg se ograničava dejstvo prevare koja potiče od trećeg jeste u tome što posledice prevare ne bi trebalo da snosi nevini saugovarač; dakle, onaj kome se ne može ni na koji način prigovoriti da je kriv za zabludu druge strane. Prevara se posmatra više kao privatna kazna, a lični karakter kazne zabranjuje da se ona primeni na lice koje nije ni na koji način učestvovalo u doloznim radnjama (Ghestin 2013, 1169).

Primenjeno na problem kojim se mi bavimo, ukoliko bi se dozvolilo poništenje ugovora o jemstvu zbog prevare koja potiče od sajemca,

[8] ZOO, čl. 65, st. 3. Isto rešenje je prihvaćeno i u švajcarskom, austrijskom i nemačkom pravu. Videti ŠZO, čl. 28, st. 2; AGZ, § 875; NGZ, § 123, st. 2 (više o tome Dabić 2017, 84 i dalje).

[9] Kako naši pisci objašnjavaju, saugovarač je „prema jednom opštem toku stvari trebalo da zna za takve radnje" (Perović 1980a, 303), odnosno „zbog svoje nepažnje za nju (zabludu, prim. aut) nije znao" (Cigoj 1980, 204), odnosno „nije upotrebio onaj stepen pažnje koji se inače zahtijeva u takvim situacijama" (Vizner 1978, 297).

[10] Trebalo bi, međutim, pomenuti da se u uporednopravnim sistemima može naići i na druge izuzetke pravila da prevara koja potiče od trećeg nema uticaja na punovažnost ugovora. Neke od njih je kreirala sudska praksa, pa su naknadno implementirani u zakonske odredbe. Tako, prema § 123 (2) NGZ, ako neko treće lice stiče pravo iz ugovora koji se zaključuje, izjava kojom se ugovara korist za njega može se poništiti u odnosu na njega, u slučaju kada je treći znao ili morao znati za prevaru. U pojedinim sistemima sudovi su poništavali ugovore i onda kada prevara potiče od trećeg, a saugovarač za nju nije znao niti mogao znati, ukoliko se u ulozi trećeg lica nalaze subjekti koji pripadaju tzv. krugu saugovarača („*cercle du contractant"*), zbog čega se i ne mogu smatrati pravim „trećim" licima. Tu se prvenstveno misli na slučajeve kada prevara potiče od zastupnika saugovarača žrtve prevare, ali i tzv. prividnih zastupnika, zatim lica koja služe saugovaraču, poslovođe bez naloga i obećavaoca radnje trećeg (više o tome Dabić 2017, 90 i dalje; Videti i čl. 1138 FGZ i čl. 7:208 Nacrta Zajedničkog referentnog okvira (*Draft Common Frame of Reference* – DCFR).

[11] Reč je zapravo o ideji da je u materiji jemstva poistovećivanje dužnika sa svim trećim licima rezultat apstraktnog, nerealnog pristupa. Iako se odnos između poverioca i jemca zasniva na posebnom ugovoru, nema nikakvog smisla da se posmatra samostalno, nezavisno od drugih, a posebno odnosa između poverioca i dužnika. Štaviše, zbog akcesornosti, postojanje i dejstva ugovora o jemstvu „omeđena su sudbinom ugovora iz kojeg je nastala obaveza za koju se jemči" (Hiber, Živković 2015, 283). Na taj način se i formira trougao, trostrani odnos između poverioca, jemca i glavnog dužnika, u kome dužnik igra centralnu ulogu (više o tome Dabić 2018a, 223; Albiges, Dumont-Lefrand 2015, 58; Simler, Delebecque 2016, 79; Simler 2008, 159; Barthez, Houtcieff 2010, 238; François 2004, 96; Bourassin, Brémond, Jobard-Bachellier 2016, 80).

pokazalo bi se da je takva sankcija štetna za (nevinog) poverioca. On bi se, kao žrtva nesavesnosti trećeg, našao u vrlo nezavidnoj situaciji: s jedne strane, ne bi imao mogućnost naplate od dužnika zbog njegove insolventnosti, s druge strane, izgubio bi i mogućnost da se naplati od sajemca koji je ishodio poništenje ugovora o jemstvu kao žrtva prevare. Štetne posledice bi bile ublažene jedino time što bi poveriocu i dalje preostajala mogućnost da se namiri od drugog, odnosno preostalih sajemaca, među kojima je i sajemac koji je izvršio prevarne radnje – autor prevare (Legeais 2001, 145).

Drugim rečima, mogućnost poništenja pozivanjem na pravila o prevari postoji tek ukoliko se utvrdi da je saugovarač kriv za zabludu žrtve (jemca), makar i posredno.

Međutim, na ovom mestu, kada je reč o mogućnosti poništenja ugovora usled prevare koja potiče od trećeg, čini se važnim analizirati još jedan izuzetak koji se odnosi na dobročine ugovore.[12] Naime, prema čl. 65, st. 4 ZOO, ugovor bez naknade može se poništiti i kad je prevaru učinilo treće lice, bez obzira na to da li je druga ugovorna strana u vreme zaključenja ugovora znala ili morala znati za prevaru. Slična odredba se može naći i u drugim uporednopravnim sistemima.[13] Može li to pravilo da utiče na proširenje kruga slučajeva u kojima se može zahtevati poništenje ugovora o jemstvu zbog prevare koja potiče od sajemca (ili uopšte trećeg lica) makar u odnosu na slučajeve u kojima bi se jemstvo moglo označiti kao dobročino?

Odgovor na postavljeno pitanje umnogome zavisi od odgovora na jedno prethodno: da li ugovor o jemstvu predstavlja dobročin ili teretan pravni posao?

Priroda ugovora o jemstvu predstavlja jedno od vrlo diskutabilnih pravnih pitanja, o kojem je ujedno često diskutovano u materiji jemstva, koje umnogome prevazilazi okvire ovog rada. Ipak, predstavljeno na jedan uopšten način, može se reći da dok načelno postoji kakva-takva saglasnost oko toga da ugovor o jemstvu predstavlja jednostranoobavezni ugovor,[14] u pogledu utvrđivanja prirode jemstva kao dobročinog ili te-

[12] U literaturi se naglašava da se isto pravilo koje se primenjuje na dobročine ima primenjivati i na jednostrane pravne poslove. Razlog je u tome što autor jednostranog posla i nema saugovarača, te bi se svako lice koje vrši prevarne radnje moglo smatrati trećim (Poracchia 2001, 207–31; Heinich 2016, 581). Ima ideja da bi i tada trebalo suziti krug i prevaru uzimati u obzir samo ako potiče od lica koje stiče koristi od takvog posla (beneficijara) jer se samo u toj hipotezi mani volje pridružuje sankcija za delikt (Ghestin 2013, 1172–1173). Pomenuti izuzetak, međutim, nije moguće primeniti na jemstvo (koje je jednostranoobavezni *ugovor*) te neće biti predmet dublje analize.

[13] Videti primera radi, § 6:93 mađarskog Građanskog zakonika iz 2013. godine – MGZ; čl. 86 st. 2 poljskog Građanskog zakonika iz 1964. godine – PGZ.

[14] Ima shvatanja da se jednostrani karakter ugovora o jemstvu može dovesti u pitanje imajući u vidu da poverilac ima izvesne dužnosti prema jemcu, ali je pitanje koliko

retnog ugovora u teoriji i sudskoj praksi se može uočiti lepeza različitih shvatanja.

Jedan od uzroka razmimoilaženja u stavovima jeste u načinu na koji se posmatra jemstvo.[15]

Naime, kada se strogo posmatra samo ugovor o jemstvu i odnos između poverioca i jemca, nezavisno od odnosa između jemca i dužnika, odnosno poverioca i dužnika, postoje ozbiljni argumenti da se ugovor o jemstvu označi kao dobročin. Jemac za svoje obvezivanje od poverioca, načelno, ne dobija kontraprestaciju, drugim rečima, poverilac stiče korist od obvezivanja jemca bez obaveze davanja ikakve protivnaknade (vid. Barthez, Houtcieff 2010, 42 i tamo navedene autore). Međutim, takvo shvatanje pati od ozbiljne manjkavosti: u njemu se meša karakter jednostranosti s karakterom dobročinosti ugovora i polazi se od pogrešne premise da jednoobavezujući ugovor nužno mora biti dobročin. Osim toga, kako je lepo objašnjeno u našoj teoriji, „besteretnost odnosa između jemca i poverioca daje zamagljenu sliku odnosa u celini" (Hiber, Živković 2015, 319), pa se može pogrešno zaključiti da i profesionalni jemac (bankar) jemči dobročino, iako to očigledno nije slučaj – ako i ne stiče korist direktno od poverioca, svoju uslugu jemčenja naplaćuje od dužnika.

Pojedini pisci, pak, iako u fokusu imaju, takođe, samo odnos između poverioca i jemca, nude nešto drugačije objašnjenje, ali u prilog teretnosti jemstva: pošto se jemac ne obavezuje poveriocu da bi mu učinio bilo kakvu uslugu ili dobročinstvo[16] – ne postoji, dakle, *animus donandi* u odnosu na poverioca – ugovor o jemstvu bi uvek trebalo razumeti kao teretni ugovor (Simler 2008, 67). Problematičnost te ideje je u tome što ni ona ne odgovara stvarnosti: ako i postoji motiv jemca da učini uslugu, dobročinstvo, ono gotovo nikada nije usmereno ka poveriocu već ka dužniku.

Shvatajući ograničenja podele na dobročine i teretne pravne poslove kada je reč o ugovoru o jemstvu, ne čudi što pojedini pisci pribegavaju sasvim novoj kvalifikaciji ugovora o jemstvu kao „neutralnog" (Aynès, Crocq 2013, 91–92): u odnosu između jemca i poverioca, jemac nema nameru da pokloni, te se ne može smatrati dobročinim, ali, s druge strane, jemac ne očekuje ni protivnaknadu od poverioca, pa se ne može smatrati ni teretnim. Prema njima, dakle, jemstvo nije niti dobročino niti teretno. Ali, koja bi onda pravila trebalo primenjivati na ugovor o jemstvu? Takvom stavu se prigovara da se na taj način se problem kvalifikacije samo

te dužnosti mogu učiniti da se on smatra (pravim) dvostranoobaveznim ugovorom (više o tome Hiber, Živković 2015, 314 i dalje).

[15] O lutanju naše sudske prakse u vezi s tim više u Hiber 2015, 59 i dalje.

[16] U teoriji se pominje da bi, krajnje izuzetno, angažovanje jemca moglo imati dobročin karakter i u odnosu na poverioca. Simler (Simler 2008, 69) navodi kao primer slučaj kada bi se s namerom jemčilo za dužnika koji je očigledno insolventan i neće biti u mogućnosti da vrati dug, što zapravo predstavlja indirektan poklon poveriocu.

zaobilazi, a zanemaruje se njegova praktična vrednost (Hiber 2015, 67), koja se, između ostalog, vidi i iz pitanja može li se ugovor o jemstvu poništiti u svakom slučaju zbog prevare koju počini treći.

Uviđajući problematičnost tih shvatanja, pojedini pisci su razvili ideju da je, pri kvalifikaciji jemstva kao dobročinog ili teretnog pravnog posla, pogrešno ugovor o jemstvu posmatrati kao poseban ugovor, odnosno nezavisno od ostalih ugovora koji čine složenu ustanovu jemstva. Naprotiv. Ugovor o jemstvu se mora posmatrati u okviru trostranog odnosa koji se rađa između poverioca, jemca i dužnika, zbog čega se dobročin ili teretni karakter jemstva mora tražiti ne u odnosu između poverioca i jemca nego u odnosu između jemca i dužnika (Bourassin, Brémond, Jobard-Bachellier 2014, 57–58; François 2004, 21–22). A kada se stvari postave na takav način, više se argumenata može izneti da je jemstvo teretno.

Najpre, to je nesumnjivo slučaj ako jemac očekuje da će za preuzimanje obaveze jemčenja dobiti naknadu od dužnika, bilo direktnu bilo indirektnu. Teretni karakter jemstva je tada očigledan.

Međutim, ima shvatanja da bi se jemstvo trebalo smatrati teretnim i ako takva naknada nije ugovorena u odnosu između jemca i dužnika. Objašnjenje je u tome da jemac nema *intentio liberalis* ni prema dužniku jer, i ako ga poverilac pozove da namiri dug, on ima nameru da se naknadno namiri od dužnika, subrogacijom u poveriočeva prava. Drugim rečima, iako je prihvatio da jemči bez naknade, jemac se nije odrekao prava da zahteva od dužnika da mu isplati ono što je za njega platio, zbog čega bi se to očekivanje ostvarenja prava iz subrogacije moglo tretirati kao korist koju će jemac ostvariti.[17] U vezi s tim, međutim, ostaje pitanje da li se *intentio liberalis* može negirati samo zbog toga što jemac očekuje povraćaj plaćenog (Hiber, Živković 2015, 317). Prihvatajući da jemči bez naknade, jemac ipak čini „prijateljsku uslugu“ dužniku, na svojevrstan način ga kreditira, pojamljujući mu svoju kreditnu sposobnost i stavljajući svoju imovinu na raspolaganje (Barthez, Houtcieff 2010, 90). Uz to, jemac makar na određeno vreme snosi rizik insolventnosti dužnika bez ikakve naknade za to, u čemu bi mogao da se uoči dobročin karakter jemstva.

Naizgled deluje da je uzimanje u obzir odnosa između jemca i dužnika pri kvalifikaciji jemstva kao dobročinog ili teretnog logičnije i da više odgovara stvarnosti. Ipak, na kraju izlaganja o prirodi jemstva može se izneti kao ozbiljan argument činjenica da bi bilo u najmanju ruku neopravdano, ako ne i vrlo opasno, samo na osnovu toga prosuđivati može li se ugovor o jemstvu poništiti zbog prevare koja potiče od trećeg čak

[17] Ukoliko se unapred odrekao tog prava, tada postoji *animus donandi*, ali se onda menja pravna priroda posla – reč je o indirektnom poklonu, ne i jemstvu (Hiber 2015, 66, 70).

i onda kada poverilac za prevaru nije znao niti mogao znati.[18] Naime, iako je, uopšteno gledano, nesporno da jemstvo poprima karakter dobročinog onda kada jemac jemči iz prijateljskih pobuda, ne sme se zanemariti da takav čin dobročinstva nije usmeren ka poveriocu već ka dužniku, te nema dovoljno opravdanja da se poverilac podvrgne primeni strožih pravila koja se odnose na dobročine ugovore kada je reč o manama volje. To bi, uostalom, bilo na štetu nevinog poverioca koji pri zaključenju ugovora o jemstvu nije uticao niti bi mogao na bilo koji način da utiče na činjenicu da li će se jemac obavezati sa naknadom ili bez naknade od dužnika ili, štaviše, da li jemac želi da učini indirektan poklon dužniku odrekavši se (unapred) prava da od dužnika zahteva povraćaj onoga što će eventualno platiti za njega. To bi moglo da uruši jemstvo kao sredstvo obezbeđenja.

Ne čudi, stoga, što pojedini pisci izričito naglašavaju da dobročini ili teretni karakter jemstva, koji rezultira iz jednog spoljašnjeg odnosa u odnosu na ugovor iz kog poverilac izvlači svoje pravo, ne bi trebalo da menja režim koji se primenjuje na ugovor o jemstvu.[19] „Jedino bi odnosi između dužnika i jemca trebalo da budu pogođeni takvom kvalifikacijom, naročito kada je reč o primeni pravila koja se odnose na dobročine ugovore“ (François 2004, 23).[20] Drugim rečima, kada je reč o odnosu poverioca i jemca jemstvo bi trebalo posmatrati kao teretan pravni posao.

3. MOGUĆNOST PONIŠTENJA UGOVORA O JEMSTVU POZIVANJEM NA PRAVILA O ZABLUDI KAO MANI VOLJE

Onda kada (sa)jemac ne može da se pozove na pravila o prevari kako bi ishodovao poništenje ugovora o jemstvu zbog zablude o solventnosti glavnog dužnika, postavlja se pitanje: može li se on sa više uspeha pozivati na pravila o zabludi?

Kada je reč o analizi uticaja zablude o solventnosti dužnika na punovažnost ugovora o jemstvu, najpre bi trebalo napomenuti, mada se

[18] Ima, međutim, i drugačijih shvatanja. Stroži sistem koji se primenjuje na prevaru koja potiče od trećeg kod dobročinih ugovora uopšte ima se primeniti i na ugovor o jemstvu, koji se kvalifikuje kao jednostranoobavezujući, ali koji mora biti sklopljen iz prijateljskih pobuda i bez protivnaknade (Ghestin 2013, 1173).

[19] Čini se da je u tom smeru razmišljao i FKS, kada je u odluci od 20. marta 1989. godine, br. 87–15450, izneo da „i u jednostranoobaveznim ugovorima kakav je ugovor o jemstvu, prevara može uticati na punovažnost ugovora samo ukoliko potiče od saugovarača“.

[20] Pretpostavlja se da takva ideja stoji iza shvatanja iznetih u teoriji da, iako kvalifikacija jemstva kao teretnog ili dobročinog ima određenog teorijskog značaja, njen praktični značaj je slab (Barthez, Houtcieff 2010, 94).

podrazumeva sâmo po sebi, da se jemac ne može pozivati na pravila o zabludi kako bi ishodovao poništenje ugovora onda kada je glavni dužnik postao insolventan *nakon* zaključenja ugovora o jemstvu (Barthez, Houtcieff 2010, 227; Aynès, Crocq 2013, 79; Simler 2008, 146–147). Svaka naknadna insolventnost značila bi samo prostu promenu okolnosti koja, ma koliko značajna, ne može dovesti u pitanje punovažnost ugovora. Osim toga, pokriće rizika eventualne buduće dužnikove insolventnosti upravo i jeste predmet zaključenja ugovora o jemstvu. U suprotnom, kojoj bi svrsi služilo jemstvo ako bi jemac mogao jednostavno da se oslobodi svoje obaveze tvrdeći da nije mogao da zamisli da bi dužnik jednog dana mogao da se nađe u situaciji da ne može da vrati dug? Jemstvo bi kao ustanova potpuno izgubilo svoj smisao: rizik insolventnosti je u biću jemstva.

O zabludi o solventnosti dužnika, dakle, možemo govoriti samo ukoliko je insolventnost dužnika postojala *u trenutku* zaključenja ugovora o jemstvu.[21] Tu se prirodno nameće sledeće pitanje: o kakvoj vrsti zablude je reč?

Na prvi pogled moglo bi se učiniti da zabluda o solventnosti dužnika predstavlja zabludu o (bitnim svojstvima) ličnosti (Piedelièvre 2008, 55). U odnosu između jemca i dužnika, koji se često označava kao *intuitu personae*, solventnost dužnika nesumnjivo deluje kao odlučujući kvalitet dužnika: iako jemcu nije zabranjeno da svesno preuzme rizik sumnjive solventnosti dužnika ili pak rizik utvrđene insolventnosti, uobičajeno je da jemac pri zaključenju ugovora o jemstvu ne očekuje da će zaista biti u poziciji da mora da plati dug umesto dužnika. Kao i poverilac, i jemac na svojevrstan način kreditira dužnika, poklanjajući mu poverenje i pozajmljujući mu sopstvenu kreditnu sposobnost (Simler 2008, 146). Onda kada se utvrdi da je to poverenje bilo zasnovano na lažnim osnovama, smatraće se da je jemac bio u zabludi pri preuzimanju obaveze jemčenja. Međutim, sve i kada bi se prihvatilo da je solventnost, na svojevrstan način, bitno svojstvo ličnosti, specifičnost jemstva je u tome da se ugovor o jemstvu zaključuje sa poveriocem, a ne sa dužnikom. Njemu (poveriocu) se, dakle, suprotstavlja jemčeva zabluda. Iz tog razloga, ne može biti

[21] Na ovom mestu je korisno reći da se kao dodatan zahtev postavlja i činjenica da nije reč samo o prolaznim finansijskim poteškoćama dužnika već takvim da predstavljaju jasan signal da dužnik neće biti u mogućnosti da isplati dug o dospelosti. Ako bi dužnik u trenutku zaključenja ugovora o jemstvu bio insolventan ali naknadno postao solventan, „razlog" za poništenje ugovora bi otpao – jemac tada ne bi ni imao interesa da zahteva poništenje ugovora o jemstvu, a čini se da mu to ne bi trebalo omogućiti ni ako bi pokušao da se na takav način, iz nekog razloga, oslobodi svoje obaveze. U tom smislu, zabluda o insolventnosti se procenjuje u trenutku zaključenja ugovora, ali se u obzir mora uzeti i trenutak dospelosti dužnikove obaveze, tj. mora se utvrditi da li je dužnik u tom momentu solventan jer bi to značilo da je naknadno otpao razlog za poništenje ugovora o jemstvu (uopšteno o uticaju insolventnosti saugovarača na punovažnost ugovora Dabić 2018b, 288–289).

govora o zabludi o ličnosti jer je dužnik, čija je solventnost dovedena u pitanje, treće lice u odnosu na ugovor o jemstvu.

Zabluda o solventnosti dužnika druge je vrste. Ona zapravo predstavlja zabludu o motivu – solventnost dužnika je jedan od odlučujućih motiva koji opredeljuju jemca da pristane da jemči (Piedelièvre 2008, 55–56; Barthez, Houtcieff 2010, 228; Aynès, Crocq 2013, 79; Simler 2008, 146; Bourassin, Brémond, Jobard-Bachellier 2014, 79). Ali se u tome i ogleda glavni problem zbog kojeg sudovi nisu skloni da prihvate poništenje ugovora o jemstvu zbog zablude o solventnosti dužnika. Naime, zabluda o motivu se tradicionalno isključuje iz polja primene zablude i samo izuzetno utiče na punovažnost ugovora. Prvu grupu slučajeva u kojima motiv ulazi u kauzu čine dobročini ugovori,[22] ali u vezi s tim je već pruženo objašnjenje zašto bi na ugovor o jemstvu bilo pogrešno (ili makar pogubno, neopravdano) primenjivati pravila koja važe za dobročine ugovore. Ako se izađe iz domena dobročinih ugovora, u drugu grupu slučajeva u kojima motiv ulazi u kauzu spadaju određeni teretni ugovori, i to samo oni kod kojih je motiv unet u ugovorno polje (Cigoj 1980, 201; Perović 1980b, 260; Vizner 1978, 291).

Upravo su se tom logikom vodili francuski sudovi pri postavljanju zahteva, da bi se ugovor o jemstvu uopšte mogao poništiti zbog zablude o solventnosti dužnika, da je jemac solventnost glavnog dužnika podigao na nivo odlučujućeg uslova za zaključenje ugovora (o jemstvu) i time ga izričito uneo u ugovorno polje.[23] Isto važi i u slučaju zablude jednog sajemca o insolventnosti ne dužnika već drugog sajemca.[24]

Takva praksa ima svoje opravdanje. Ono se, prvenstveno, ogleda u potrebi zaštite poverioca (saugovarača) i očuvanju jemstva kao sredstva obezbeđenja. Bilo bi previše jednostavno za jemca da izbegne svoju obavezu tvrdeći da u trenutku zaključenja ugovora nije znao da je dužnik bio u tako lošem finansijskom stanju (Piedelièvre 2008, 55–56; Simler 2008, 146). To bi, u krajnjem, praktično isključilo mogućnost da se jemči za insolventnog dužnika, iako bi za dužnika to i te kako moglo biti korisno i predstavljalo „kartu“ za izlazak iz trenutnih finansijskih poteškoća. Osim

[22] Videti ZOO, čl. 62, u kome se predviđa da se kod ugovora bez naknade bitnom zabludom smatra i zabluda o pobudi koja je bila odlučna za preuzimanje obaveze.

[23] Videti primera radi, odluke FKS: od 25. oktobra 1977, br. 76–11441; od 2. marta 1982, br. 79–16538; od 19. marta 1985, br. 84–10533; od 11. februara 1986, br. 84–11117; od 11. decembra 1990, br. 89–14631; od 11. januara 1994, br. 91–17691. Takvom praksom francuski Kasacioni sud je odstupio od ranijeg stava prema kojem se poništenje ugovora o jemstvu zbog zablude o solventnosti dužnika načelno prihvatalo. Videti u tom smislu odluke FKS: od 1. marta 1972, br. 70–10313, od 7. maja 1975. godine, br. 74–10551.

O tome i u Barthez, Houtcieff 2010, 228–229; Simler 2008, 146 i 147; Bourassin, Brémond, Jobard-Bachellier 2014, 79.

[24] Videti odluku FKS od 26. juna 2001. godine, br. 98–12594.

toga, načelno nije zabranjeno da se jemči za insolventnog dužnika, naročito ako se njegov finansijski oporavak očekuje nakon što dobije sredstva od poverioca (Barthez, Houtcieff 2010, 228–229). Ako insolventnost dužnika i postoji u vreme obvezivanja jemca, to ne znači da će on nesumnjivo biti insolventan i u budućnosti, a to je jedino što može interesovati jemca (Bourassin, Brémond, Jobard-Bachellier 2014, 79).[25]

Međutim, takvom rezonovanju se može uputiti ozbiljna zamerka: koliko je zapravo realno očekivati da bi jemac mogao da ispregovara unošenje izričite klauzule po kojoj se solventnost glavnog dužnika podiže na nivo odlučujućeg uslova za preuzimanje obaveze jemčenja? Odgovor je negativan iz najmanje dva razloga. Prvo, poverilac (u čijoj su ulozi najčešće banke) je gotovo uvek ekonomski moćnija strana u odnosu na jemca i stoga je on (poverilac) taj koji diktira uslove pod kojima će se zaključiti ugovor o jemstvu (Bourassin, Brémond, Jobard-Bachellier 2014, 79). Drugo, sve i ako bi se, argumentacije radi, zanemario prethodni argument, teško da bi poverilac pristao da se unese takva klauzula u ugovor o jemstvu i iz razloga što bi to moglo da pobudi sumnju kod njega. Zašto uopšte jemac insistira na unošenju takve klauzule? Ima li on neke informacije o dužnikovoj finansijskoj situaciji koje on (poverilac) nema? Zašto bi jemac podizao na nivo uslova solventnost dužnika ako ima sve razloge da veruje da je ona ustanovljena (da je dužnik solventan)? (Simler 2008, 148) Takav zahtev jemca mogao bi da pokoleba poverioca ne samo u nameri da zaključi ugovor o jemstvu već i u tome da li bi dužnika uopšte trebalo kreditirati pa makar to bilo obezbeđeno jemstvom.

Postavljanjem zahteva da solventnost dužnika bude izričito ugovorena kao uslov pri zaključenju ugovora o jemstvu, sudska praksa je praktično „zatvorila vrata" mogućnosti poništenja ugovora zbog zablude o solventnosti dužnika (Cabrillac *et al.* 2010, 74–75). To je i razlog zašto je doktrina podeljena po pitanju tako stroge sudske prakse. Ako je u trenutku zaključenja ugovora o jemstvu finansijska situacija dužnika u takvoj meri preopterećena da je (gotovo) izvesno da dužnik neće biti u mogućnosti da vrati dug, odnosno da će jemac (gotovo) sigurno biti pozvan da plati umesto njega, osnovano se pitaju pojedini pisci, ne potkopava li se time sama priroda jemstva? Može li biti govora o *jemstvu* ako ne postoji nikakva alea (neizvesnost) u pogledu činjenice da će jemac platiti dug niti u pogledu mogućnosti za jemca da se naknadno regresira od glavnog dužnika? (Bourassin, Brémond, Jobard-Bachellier 2014, 79–80) Aktiviranje jemstva jeste uslovljeno neispunjenjem obaveze od dužnika, ali ono mora ostati u sferi „mogućeg".

Pretpostavlja se da je pod uticajem takvih kritika francuski Kasacioni sud ublažio svoj stav prihvatajući, u dosta citiranoj ali i kritikovanoj

[25] O stavu da FKS pravi razliku između insolventnosti i održivosti društva za koje se jemči videti Barthez, Houtcieff 2010, 229–230.

odluci iz 2002. godine, da uslov da je dužnik solventan može biti uveden u ugovorno polje i prećutno.[26]

Pojedini francuski pisci izrazili su bojazan da bi takav stav suda mogao da pokrene evoluciju u pogledu mogućnosti jemca da zahteva poništenje ugovora zbog zablude o solventnosti dužnika (François 2004, 92–93; Mignot 2010, 78; Cabrillac *et al.* 2010, 74–75). U čemu se, zapravo, ogleda problematičnost šireg prihvatanja takvog stava? Naime, da bi se moglo utvrditi da je solventnost dužnika podignuta na nivo uslova za zaključenje ugovora, mora se prethodno ustanoviti da je poverilac znao za (odlučujući) značaj koji jemac pridaje takvoj činjenici i da je pristao da se ona unese u ugovorno polje, makar to bilo i prećutno. Polazeći od toga, stvari se mogu odvijati na dva načina: prvi, da je poverilac bio svestan značaja koji jemac daje solventnosti dužnika upravo zato što mu je bilo poznato dužnikovo finansijsko stanje; drugi, da je poverilac morao biti svestan značaja koji jemac daje solventnosti dužnika iz prostog razloga što je i njemu sâmom takva okolnost bitna. Međutim, i u jednom i u drugom slučaju se pozivanju na pravila o zabludi kako bi se ishodovalo poništenje ugovora mogu uputiti zamerke. U prvom slučaju, otvara se pitanje kvalifikacije: ako je poveriocu bilo poznato finansijsko stanje dužnika, ne vodi li to zaključku da je možda reč o prevari ćutanjem od strane poverioca?[27] S druge strane, ako se krene putem da je poverilac morao biti svestan značaja koji jemac daje solventnosti dužnika iz prostog razloga što je i njemu sâmom takva okolnost bitna, zar to ne stvara opasnost da bi se u svakom slučaju moglo zaključiti da je prećutno ugovoren uslov da

[26] Reč je o odluci FKS od 1. oktobra 2002. godine, br. 00–13189: „*...la caution, tiers à la société cautionnée, avait entendu prendre le risque d'aider une société présentée comme en difficulté mais non de s'engager pour une société en situation déjà irrémédiablement compromise, et que la banque qui était en relation d'affaires avec cette société ne pouvait ignorer cette situation, et qui en déduit, dans l'exercice de son pouvoir souverain, que le caractère viable de l'entreprise était une condition déterminante de l'engagement de la caution, faisant ainsi ressortir que celle-ci avait fait de la solvabilité du débiteur principal la condition tacite de sa garantie*".

O tome i u Piedelièvre 2008, 56; Barthez, Houtcieff 2010, 229–230; François 2004, 93 fn. 4; Mignot 2010, 78; Cabrillac *et al.* 2010, 74–75; Simler 2008, 149; Bourassin, Brémond, Jobard-Bachellier 2014, 80.

[27] To bi se pitanje osnovano moglo postaviti i povodom odluke FKS od 1. oktobra 2002. godine. Naime, već se iz dostupnog teksta odluke može videti da je sud obrazloženje za poništenje ugovora video, između ostalih činjenica, i u tome da banka, koja je već nekoliko godina poslovala sa glavnim dužnikom, nije mogla da ne zna za njegovu nepopravljivo ugroženu situaciju. Osim toga, sud je cenio činjenicu da je jemac „treći u odnosu na glavnog dužnika", što znači da nije bio u mogućnosti da se sâm informiše o njegovoj finansijskoj situaciji, te da je „prihvatio rizik da pomogne društvu koje se nalazi u određenim poteškoćama, ali ne i da se založi za društvo koje se već nalazi u nepopravljivo ugroženoj situaciji". Ipak, ostaje pitanje nije li u takvoj situaciji adekvatniji osnov za poništenje prevara ćutanjem (o tome i François 2004, 93 fn. 4; Aynès, Crocq 2013, 79).

je dužnik solventan?[28] Drugim rečima, to bi značilo da je poništenje ugovora zbog zablude o solventnosti dužnika uvek moguće, eventualno uz jedinu prepreku da zabluda jemca mora biti neskrivljena, neizvinjavajuća. Time bi se urušilo jemstvo kao sredstvo obezbeđenja.

4. MOGUĆNOST ISTICANJA NEPUNOVAŽNOSTI JEMSTVA U ODNOSU IZMEĐU SAJEMACA

S idejom da se poverilac zaštiti od posledica poništenja ugovora o jemstvu zbog zablude koju nije skrivio, a time posredno i jemstvo kao sredstvo obezbeđenja, s jedne strane, i da se pruži zaštita i jemcu koji je prevarnim radnjama drugog sajemca naveden na zaključenje ugovora o jemstvu, s druge strane, francuski Kasacioni sud izneo je stav, u jednoj vrlo zanimljivoj odluci donetoj početkom 21. veka[29], koja je privukla dosta pažnje, da, iako se ništavost ugovora o jemstvu (u koji je jemac namamljen prevarom sajemca o finansijskom stanju dužnika) ne može isticati prema (nevinom) poveriocu, ona se može isticati naknadno, u regresnom postupku, u odnosima između sajemaca.

Okolnosti slučaja u kome je iznet takav stav predstavljene su ukratko u uvodnom delu ovog rada. Podsećanja radi, dva para, supružnici Giner (*Giner*) i Ser (*Serre*), pristali da budu solidarni jemci za isplatu zajma koji je poverilac (banka) odobrio jednom društvu (dužniku). To društvo je ubrzo nakon toga palo u stečaj, gospođa Giner je namirila dug banci-poveriocu, a potom se obratila supružnicima Ser sa regresnim zahtevom za nadoknadu njihovog dela duga. Oni su, međutim, odbili da pokriju svoj deo duga ističući da ih je upravo gospođa Giner prevarom navela na zaključenje ugovora o jemstvu time što se nije libila da se koristi lažima (posebno prikrivajući tešku materijalnu situaciju dužnika) kako bi ih nagovorila da jemče, znajući pritom da se dužnik nalazi pred stečajem. Mada francuski Apelacioni sud nije bio ubeđen tim argumentom, Privredno odeljenje Kasacionog suda je iznelo stanovište da se „...u odnosima između sajemaca, jemac može pozivati na ništavost ugovora o jemstvu zaključenog pod prevarom ako ona potiče od njegovog sajemca“.

Takvo ograničeno isticanje ništavosti ugovora o jemstvu samo u odnosima između sajemaca podržali su pojedini francuski pisci (Mortier

[28] „*N'est-il pas evident que, sauf circonstances particulières, la caution ne se serait pas oblige si elle avait su que le débiteur était déjà insolvable?*“ (Simler 2008, 148). Videti i Cabrillac *et al.* 2010, 74–75, kao i stav Rončevskog (*Rontchevsky*) koji tvrdi da imovinska situacija dužnika uobičajeno predstavlja element koji odlučujuće utiče na volju jemca da jemči i koji, stoga, nužno ulazi u ugovorno polje, te da poverilac ne može da ne zna da jemac, osim izuzetno, ne bi prihvatio da jemči za dokazanu insolventnost (Barthez, Houtcieff 2010, 229 fn. 82).

[29] Videti odluku FKS od 29. maja 2001. godine, br. 96–18118.

2002, 999; Legeais 2001, 145). Naime, iako se utemeljenje za takvu odluku nije moglo naći u (jezičkom) tumačenju odredaba kojima je pre izmena francuskog Građanskog zakonika regulisana prevara,[30] smatralo se da takvo rešenje jeste u skladu sa „duhom" pravila o prevari (Mortier 2002, 999). Najpre, ograničavanjem mogućnosti isticanja ništavosti ugovora o jemstvu samo u odnosima između sajemaca (ne i prema poveriocu) sprečava se da negativne posledice ništavosti trpi poverilac koji nije ni na koji način skrivio zabludu jemca. Drugim rečima, ograničeno rušenje ugovora o jemstvu neutralno je u odnosu na nevinog poverioca, što se smatra usklađenim sa smislom prevare kao ustanove – ona prvenstveno ima cilj da se sankcioniše deliktno ponašanje autora prevare, dok u drugi plan pada ideja da se zaštiti volja žrtve prevare. Osim toga, argument u prilog takvom stavu suda ogleda se i u tzv. međuzavisnosti jemaca: iako sajemci predstavljaju, jedan u odnosu na drugog, treća lica, među njima postoji velika međuzavisnost zbog čega se oni mogu označiti kao tzv. treća lica posebne vrste. Naime, kako navodi Mortije (Mortier 2002, 999), njihova specifičnost je u zajedničkom objektivnom i subjektivnim elementima: sajemci garantuju za isti dug, u odnosu na istog dužnika, u korist istog poverioca. Oni se, stoga, moraju ponašati lojalno jedni prema drugima, ne samo u fazi izvršenja ugovora već i u fazi zaključenja ugovora, iz više razloga: oni će možda biti dovedeni u situaciju da se obraćaju jedni drugima; teret insolventnosti jednog se deli među drugima; što je veći broj sajemaca, to se više smanjuje teret duga koji svako od sajemaca mora da snosi; konačno, rizik nestanka jednog jemca (bilo zbog njegove insolventnosti ili poništenja ugovora o jemstvu) prevaljuje se na preostale sajemce.

Međutim, takvom rezonovanju francuskog Kasacionog suda imalo bi se više toga prigovoriti.

Najpre, teško je teorijski objasniti ograničeno rušenje ugovora o jemstvu.[31] Ukoliko se žrtva prevare može pozvati na pravila o manama volje i to učini kako bi ishodila poništenje ugovora, takvo poništenje mora imati dejstvo prema svima, uključujući i poverioca (saugovarača); i obratno, ukoliko se nepunovažnost ne može isticati prema poveriocu (saugovaraču), onda ne bi trebalo da može da se ističe ni prema sajemcima (odnosno, drugim licima). Princip na kome počiva poništenje jeste „sve ili ništa".

S druge strane, čini se važnim naglasiti da to ne znači da jemac – žrtva prevare ostaje bez ikakvih mogućnosti ukoliko ne može da ishoduje poništenje ugovora. Imajući u vidu da se prevara sankcioniše i kao civilni delikt, žrtvi prevare se, uz zahtev za poništenje ili potpuno nezavisno od njega, tradicionalno priznaje pravo da zahteva naknadu štete od autora prevare. Primenjeno na problem kojim se bavimo u ovom radu, čak i

[30] Videti FGZ, čl. 1116 (pre izmena iz 2016. godine).

[31] „*On voit mal en effet, comment le cautionnement pourrait n'être nul que dans les rapports entre cofidéjusseurs*..." (Simler 2018, § 34).

ako ne može da ističe zahtev za poništenje prema svom saugovaraču (poveriocu), jemac ima mogućnost da zahteva naknadu štete od lica koje ga je prevarnim radnjama navelo na zaključenje ugovora – u našem slučaju od sajemca. Šta se, međutim, može javiti kao problem zbog kojeg je, pretpostavlja se, francuski Kasacioni sud izneo pomenuti stav, čija je pravna utemeljenost u najmanju ruku diskutabilna, da je ograničeno rušenje ugovora moguće? Naime, mada jemac – žrtva prevare ima pravo da zahteva naknadu štete od sajemca – autora prevare, takvo pravo se rađa tek ukoliko je šteta pretrpljena, a to će najčešće biti slučaj onda kada je on (sajemac – žrtva prevare) već isplatio poveriocu dužnikov dug ili je nekom od ostalih sajemaca (ukoliko ih ima) u regresnom postupku morao da nadoknadi deo duga koji su oni isplatili poveriocu. Međutim, kada se stvari odvijaju na način na koji su se odvijale i u slučaju pred francuskim Kasacionim sudom – da sajemac (navodni autor prevare) isplati dug poveriocu, a onda se s regresnim zahtevom obrati sajemcu (navodnoj[32] žrtvi prevare) – čini se da je prihvatanje ideje da se ništavost ugovora o jemstvu može istaći između sajemaca jedini način da se spreči nastanak štete za sajemca – žrtvu prevare i odbije regresni zahtev sajemca – autora prevare (Barthez, Houtcieff 2010, 239 fn. 117). U suprotnom, ako se ništavost ne bi mogla istaći prema sajemcu – autoru prevare, moglo bi se doći u apsurdnu situaciju: da sajemac – žrtva prevare ne može odbiti regresni zahtev sajemca – autora prevare, ali bi nakon toga mogao da se koristi pravom na naknadu štete od njega!

Još jedan važan prigovor bi se mogao uputiti stavu kakav je izneo FKS. Naime, čak i ako bi se, argumentacije radi, razmatralo prihvatanje mogućnosti ograničenog rušenja ugovora, takvo rešenje bi bilo opravdano samo kada je reč o odnosu između sajemca – žrtve prevare i sajemca – autora prevare. Drugim rečima, sajemac – žrtva prevare može isticati ništavost svog ugovora o jemstvu jedino prema sajemcu – autoru prevare, a ne i prema eventualnim drugim sajemcima. Međutim, to ne proizlazi jasno iz načina na koji je FKS izneo svoj stav, te formulacija da se „*u odnosima između sajemaca* (naglašavanje naše), jemac može pozivati na ništavost ugovora o jemstvu zaključenog pod prevarom ako ona potiče od njegovog sajemca“ rađa nedoumice. Naime, ukoliko ima više sajemaca, da li to znači da se ništavost može isticati ne samo prema sajemcu od koga potiče prevara već i prema ostalim sajemcima (ukoliko ih ima)? Čini se da bi potvrdan odgovor, kakav bi mogao da sledi iz jezičkog tumačenja stava FKS, logički teško mogao da opstane, a bila bi dovedena

[32] Termin „navodni“ je na oba mesta u tekstu iskorišćen iz razloga što u konkretnom slučaju koji se našao pred francuskim Kasacionim sudom zapravo nije dokazano da su ispunjeni uslovi za isticanje ništavosti ugovora o jemstvu, odnosno nije dokazano da sajemac (navodna žrtva prevare) nije znao za situaciju u kojoj se društvo (dužnik) nalazilo te da su prevarne radnje na koje se poziva odlučujuće uticale na njegovo jemčenje. Bez obzira na to što krajnji ishod nije bio takav da je ništavost uspešno istaknuta, FKS je izneo stav da je to moguće u odnosima između sajemaca. Videti odluku FKS od 29. maja 2001. godine, br. 96–18118.

u pitanje i njegova opravdanost. Razlog je u tome što bi time položaj nevinih sajemaca bio ugrožen: uspešnim isticanjem ništavosti ugovora o jemstvu u regresnom postupku prema svim sajemcima smanjuje se broj jemaca na koje se prevaljuje dužnikov dug (u slučaju insolventnosti), odnosno povećava se udeo koji svaki (preostali) sajemac ima u ukupnom dugu jer bi se na njih prevalio deo duga koji bi inače „otpao" na sajemca – žrtvu prevare. To bi dalje otvorilo pitanje nije li dovođenjem u zabludu jednog sajemca, sajemac – autor prevare zapravo indirektno stvorio tlo za potencijalnu štetu koju bi mogli da pretrpe i ostali sajemci. Kada imaju saznanja da će više lica obezbeđivati isti dug, to utiče na volju sajemaca pri zaključenju sopstvenog ugovora o jemstvu jer se rizik insolventnosti dužnika ne prevaljuje samo na njih već na sve sajemce. Iz tih razloga, u slučaju poništenja bilo kog ugovora o jemstvu, i za njih potencijalno nastaje šteta jer se povećava njihov udeo u ukupnom dugu. S tim u vezi, može se javiti pitanje da li bi se ostali (nevini) sajemci mogli pozivati na zabludu o postojanju ili obimu sredstava obezbeđenja[33] ili na drugi način prevaliti na sajemca – autora prevare onaj višak duga koji je prevaljen na njih time što je sajemac-žrtva istakao ništavost u regresnom postupku?

Pretpostavlja se da je upravo svest o potencijalnim opasnostima i pravnim problemima koji bi se pojavili ukoliko bi se (bukvalno) primenjivao stav FKS navela i pisce koji stav načelno pozdravljaju da naglase da bi taj stav trebalo protumačiti tako da se ništavost može suprotstaviti samo sajemcu koji je autor prevare; drugim rečima, da ne bi trebalo dozvoliti isticanje ništavosti ne samo prema (nevinom) poveriocu već ni prema ostalim (nevinim) sajemcima (Mortier 2002, 999).

5. ZAKLJUČNA RAZMATRANJA

Kada je jemac prevarom naveden na zaključenje ugovora o jemstvu od trećeg lica, uključujući i slučaj kada ona potiče od njegovog sajemca, moglo bi se zaključiti da se on nalazi u jednoj prilično nezavidnoj poziciji. Razlog je u tome što je njemu dostupan (ako je uopšte) vrlo ograničen krug pravnih sredstava koje bi mogao uspešno da upotrebi kako bi se zaštitio. Najpre, ukoliko bi želeo da napusti ugovorni odnos u koji je uvučen prevarom, jemac bi se suočio s vrlo ozbiljnim preprekama. Ugovor o jemstvu je moguće poništiti pozivanjem na pravila o preva-

[33] U francuskoj sudskoj praksi i teoriji se, inače, iznosi stav da se ostali sajemci, u slučaju ništavosti angažovanja jednog od sajemaca, mogu pozivati na zabludu o obimu sredstava obezbeđenja samo ukoliko su ti sajemci činjenicu očuvanja integralnosti jemstava podigli na nivo odlučujućeg uslova za njihovo sopstveno angažovanje. Opravdanje leži u principu nezavisnosti različitih garancija (sredstava obezbeđenja) te ništavost jedne ne utiče na ništavost ostalih garancija. Stoga se smatra da se od takvog principa može odstupiti samo ukoliko strane izraze volju da obezbede nedeljivost različitih akata garancija (Videti odluku FKS od 2. maja 1989. godine, br. 87–17599; François 2004, 92 fn. 1; Barthez, Houtcieff 2010, 234–235; Mignot 2010, 79 i 215; Legeais 2014, comm. 97).

ri kao mani volje jedino ukoliko bi se utvrdilo da je njegov saugovarač (poverilac) znao ili morao znati za prevaru. Ako, pak, nema krivice poverioca, a imajući u vidu preovlađujuće shvatanje da bi ugovor o jemstvu trebalo, osim izuzetno, smatrati teretnim poslom, punovažnost ugovora o jemstvu se tim putem ne može dovesti u pitanje. Još su manje šanse da bi se ugovor o jemstvu mogao poništiti pozivanjem na pravila o zabludi kao mani volje: zabluda o solventnosti dužnika predstavlja zabludu o motivu koja u teretnim pravnim poslovima može biti relevantna samo ukoliko je takav motiv uveden u ugovorno polje, što se praktično nikada ne dešava. Drugim rečima, jemcu – žrtvi prevare najčešće ostaje samo mogućnost da zahteva naknadu štete od autora prevare, svog sajemca. Međutim, i takvo sredstvo je ograničenog dometa. Prvo, postoji opasnost od rizika insolventnosti sajemca – autora prevare. Drugo, pravo na naknadu štete se rađa tek ukoliko je šteta pretrpljena, a to će najčešće biti slučaj onda kada je sajemac – žrtva prevare već isplatio poveriocu dužnikov dug ili je nekom od ostalih sajemaca (ukoliko ih ima) u regresnom postupku morao da nadoknadi deo duga koji su oni isplatili poveriocu. Međutim, ukoliko bi se desilo da sajemac – autor prevare isplati dug poveriocu, a onda se s regresnim zahtevom obrati sajemcu – žrtvi prevare, moglo bi se doći u apsurdnu situaciju da se ne može odbiti takav regresni zahtev i sprečiti nastanak štete za sajemca – žrtvu prevare, ali bi on nakon toga mogao da se koristi pravom na naknadu štete! Čini se da je upravo to navelo pojedine sudove u uporednom pravu da iznesu stav da, iako ne može svom saugovaraču (poveriocu), jemac može isticati ništavost u odnosima između sajemaca, dakle, u regresnom postupku. Takvo rešenje je, međutim, teško pravno objasniti. Ako se ugovor može poništiti, takvo poništenje mora imati dejstvo prema svima, i obratno. Osim toga, čak i ako bi se, argumentacije radi, prihvatila mogućnost „ograničenog rušenja" ugovora, isticanjem ništavosti u regresnom postupku, ona bi bila opravdana samo kada je reč o odnosu između sajemca – žrtve prevare i sajemca – autora prevare, a ne i prema ostalim (nevinim) sajemcima.

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LEGAL EFFECTS OF THE FRAUD ORIGINATING FROM THE CO-SURETY ON THE VALIDITY OF THE SURETY CONTRACT AND/OR THE RIGHTS OF THE SURETY (THE VICTIM OF THE FRAUD)

Summary

In case a surety concludes a contract due to fraudulent acts of his co-surety, he may find himself in a rather unenviable position. Remedies for his protection are very limiting. Namely, third parties' fraud only exceptionally leads to the annulment of the contract: if the contracting party is guilty of fraud; or the contract is gratuitous, which is very questionable for surety contract. The chances for annulment are even fewer if we apply the rules of mistake: mistake as to the debtor solvency represents a mistake as to the motif which is only exceptionally legally relevant. Finally, the right to ask damages from co-surety can also be of limited nature: firstly, there is a risk that the damages cannot be compensated; secondly, an absurd situation may occur that the victim of the fraud cannot reject the contribution claim from the co-surety but he may later on ask damages from him.

Key words: *Surety. – Validity of the contract. – Third party's fraud. – Mistake as to the solvency of the debtor. – The relation between co-sureties.*

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O KONVERZIJI UGOVORA U SRPSKOM PRAVU SA POSEBNIM OSVRTOM NA SUDSKU KONVERZIJU

Institut konverzije u našem pravu, čini se, ostaje neopravdano zapostavljen u teorijskim delima pravnika, a i zakonodavac mu posvećuje tek jedan član zakona. Uprkos tome, taj institut otvara brojna pitanja na koja naša teorija i praksa ne odgovaraju jedinstveno. U nedostatku potpunije zakonske regulative, teorija stvara i nove vidove konverzije, kao što je sudska konverzija, za koju ne možemo sa sigurnošću reći da ju je zakonodavac podrazumevao. Sudovi, naravno, prihvataju takvu teorijsku tvorevinu jer dobijaju jedan „elastičan" institut za rešavanje „nerešivih" sporova.

Pitanje konverzije ugovora postalo je veoma aktuelno u našoj teoriji i sudskoj praksi nakon nedavno donetog Pravnog shvatanja Vrhovnog kasacionog suda o punovažnosti valutne klauzule kod ugovora o kreditu u švajcarskim francima i konverziji.

Ključne reči: *Konverzija. – Sudska konverzija. – Ništav ugovor. – Nepostojeći ugovor. – Cilj ugovornika.*

1. O POJMU KONVERZIJE UGOVORA

Institut konverzije je definisan čl. 106 Zakona o obligacionim odnosima.[1] Tim članom je propisano da „kada ništav ugovor ispunjava uslove za punovažnost nekog drugog ugovora, onda će među ugovaračima važiti

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[1] Zakon o obligacionim odnosima – ZOO, *Sl. list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Sl. list SRJ*, br. 31/93 i *Sl. list SCG*, br. 1/2003 – Ustavna povelja.

taj drugi ugovor, ako bi to bilo u saglasnosti sa ciljem koji su ugovarači imali u vidu kad su ugovor zaključili i ako se može uzeti da bi oni zaključili taj ugovor da su znali za ništavost svog ugovora." Institut konverzije zakonodavac smešta u odsek o nevažnosti ugovora, tačnije među članove posvećene ništavosti. Otuda i ne iznenađuje što zakonodavac i definiše konverziju kao pretvaranje ništavog u punovažni ugovor.

O institutu konverzije je malo pisano. Ne može se reći da autori taj institut potpuno ignorišu, ali svakako ne ulaze u njegovu dublju analizu. Polazeći od jasne zakonske odredbe čl. 106 Zakona, među našim autorima nema spora o samoj definiciji konverzije. Stoga, konverziju definišu kao „preobraćenje jednog – ništavog ugovora u drugi, punovažan" (Krulj 1983, 356); „pretvaranje prvobitno apsolutno ništavog ugovora u drugi pravnovaljani ugovor..." (Vizner 1978, 106); situaciju „kada jedan ništav ugovor proizvede pravna dejstva nekog drugog ugovora" (Perović 1980, 366), odnosno kada „namesto onog pravnog posla kojim su strane htele da proizvedu pravna dejstva, a koji je ništav, stupa *ex lege*... jedan drugi pravni posao..." (Vodinelić 2012, 460). U uporednom pravu nailazimo na slične definicije konverzije. Tako, nemački zakonodavac reguliše konverziju u paragrafu 140 nemačkog Građanskog zakonika, dok italijanski zakonodavac to čini u čl. 1424 italijanskog Građanskog zakonika.[2] Konverzija se, dakle, i u nemačkom i italijanskom pravu[3] shvata kao „zamena" ništavog ugovora drugim, punovažnim, ali u skladu sa voljom ugovornika (Köhler 2009, 214; Rabitti 2012, 718). S druge strane, francuski Građanski zakonik ne poznaje institut konverzije, ali i francuski pravnici pišu o mogućnosti „rekvalifikacije" ništavog u neki drugi ugovor ukoliko su ispunjeni uslovi za njegovu punovažnost, što bi predstavljalo upravo definiciju konverzije (Chantepie, Latina 2016, 401).

Međutim, trebalo bi imati u vidu da naš zakonodavac i ne izdvaja kategoriju nepostojećih ugovora iz pojma ništavih,[4] te da stoga ne bi

[2] Čl. 1424 italijanskog Građanskog zakonika (u daljem tekstu IGZ) propisuje konverziju koja je u skladu sa voljom ugovornika, tako da bi sudija primenjujući čl. 1424 IGZ ispitivao da li konverzija odgovara volji ugovornih strana. Videti Alpa 2017, 362. Međutim, pojam konverzije obuhvata veliki broj različitih situacija, pa i onih koje izlaze iz okvira primene čl. 1424. Vid. Navarretta, Orestano 2012, 721.

[3] Videti čl. 1424 IGZ: „Il contratto nullo può produrre gli effetti di un contratto diverso, del quale contenga i requisiti di sostanza e di forma, qualora, avuto riguardo allo scopo perseguito dalle parti, debba ritenersi che esse lo avrebbero voluto se avessero conosciuto la nullità."

Videti par. 140 nemačkog Građanskog zakonika (u daljem tekstu NGZ): „Entspricht ein nichtiges Rechtsgeschäft den Erfordernissen eines anderen Rechtsgeschäfts, so gilt das letztere, wenn anzunehmen ist, dass dessen Geltung bei Kenntnis der Nichtigkeit gewollt sein würde."

[4] Iako zakonodavac u odseku o nevažećim ugovorima reguliše samo ništave i rušljive ugovore nesporno je da u pojedinim odredbama ukazuje i na situacije nepostojanja ugovora.

trebalo odmah, bez detaljne analize, zaključiti da se mogu konvertovati samo ništavi ugovori u užem smislu.

2. PRETPOSTAVKE ZA PRIMENU USTANOVE KONVERZIJE PREMA ZAKONU O OBLIGACIONIM ODNOSIMA

2.1. Ništav ugovor koji ispunjava uslove za punovažnost drugog

Smatramo da odgovor na pitanje koji nepunovažni ugovori mogu biti konvertovani u ponovažne ne bi trebalo da bude isključiv. Naime, ima autora koji smatraju da se čl. 106 ZOO može primeniti samo na apsolutno ništave ugovore, dok je prema mišljenju drugih institut konverzije namenjen isključivo nepostojećim ugovorima.

Uglavnom se polazi od toga da je vladajući stav u teoriji da samo ništavi ugovori mogu biti konvertovani. Međutim, pristupimo li detaljnijoj analizi stavova teoretičara koji se naizgled zalažu za to da samo ništavi ugovori mogu biti konvertovani, uočićemo da neki od njih iznose takav zaključak ili zbog toga što uopšte ne odvajaju nepostojeće od ništavih ugovora ili zbog toga što ne polaze od jasnih kriterijuma za razlikovanje te dve kategorije ugovora ili pak polaze od toga da mogu biti konvertovani samo ništavi, a ne i nepostojeći ugovori pa upravo po tome i nijansiraju definicije nepostojećih, odnosno ništavih ugovora.[5]

Da bi se odgovorilo na postavljeno pitanje, neophodno je poći od pojmova nepostojećih i ništavih ugovora[6], te analizirati *ratio* same odredbe ZOO o konverziji ugovora. Nakon toga, treba razmotriti slučajeve zakonske konverzije, te slučajeve konverzija sprovedenih sudskim odlukama kako bi se na pojedinačnim slučajevima utvrdilo da li je reč

[5] Pitanje je suviše kompleksno, te bi zahtevalo da bude ili tema posebnog članka ili deo nekog monografskog dela. Kako se autor već opredelio da temi nepostojećih ugovora posveti monografsko delo, to će i pitanje konverzije pravnonevaljanih nerušljivih ugovora naći tamo svoje mesto. Stoga, u ovom članku autor samo otvara pitanje, te daje naznake svog stava o tome koji ugovori mogu biti konvertovani.

[6] Pitanje definisanja nepostojećeg i ništavog ugovora i problematika njihovog razgraničenja predstavljaju suviše kompleksnu materiju i u velikoj meri bi prevazišli temu ovog rada. Stoga ćemo za potrebe članka citirati samo neke od francuskih pravnih pisaca, te njihovo shvatanje odnosa nepostojećeg i ništavog ugovora. Francuski teoretičari su još sredinom prošlog veka pisali o odnosu između pojmova nepostojećeg i ništavog ugovora ističući da se o ništavosti može govoriti samo kod ugovora koji postoje, te da stoga ne bi trebalo mešati ništavost i nepostojanje ugovora (Ripert, Boulanger 1957, 255). Novija francuska teorija takođe smatra da se ništavost mora posmatrati odvojeno od nepostojanja ugovora jer u poslednjem slučaju ugovor nije ni nastao, dok u prvom slučaju ugovor jeste nastao, ali je iz određenih razloga sankcionisan ništavošću (Fabre-Magnan 2007, 439–440). Smatramo da bi polazna tačka u razlikovanju bila, dakle, u tome da je ništav ugovor, za razliku od nepostojećeg, nastao, ali da takođe ne proizvodi pravno dejstvo jer je zabranjen – nezakonit i/ili nemoralan.

o konverziji ništavog ili pak nepostojećeg ugovora. S druge strane, da li će jedan nepostojeći ugovor u konkretnom slučaju moći da bude konvertovan, zavisi od razloga nepostojanja ugovora (Stanković, Vodinelić 2007, 182–183). Stoga smatramo da ne bi trebalo po svaku cenu težiti uopštavanjima.[7]

2.2. Kumulativno postavljeni zahtevi u pogledu cilja/namere ugovornika

Kada je u pitanju sama definicija konverzije sadržana u čl. 106 ZOO, moglo bi se postaviti pitanje u vezi sa sadržinom kumulativno postavljenih zahteva za njenu primenu. Naime, naš zakonodac kao pretpostavku za konverziju jednog ništavog u drugi punovažno zaključeni ugovor[8] zahteva da istovremeno budu ispunjena dva uslova. Međutim, mi postavljamo pitanje da li je neophodno da budu sadržana oba uslova u definiciji konverzije i da se pritom zahtevaju kumulativno. Dakle, drugim rečima, da li iz jednog uslova proizlazi drugi te, ukoliko je tako, da li je u slučaju ispunjenosti jednog uslova nužno ispunjen i drugi. U analizi ćemo poći od definicije konverzije sadržane u čl. 106 ZOO i paragrafu 140 NGZ.

Naš zakonodavac zahteva dva uslova za primenu instituta konverzije: prvi – da je sama konverzija u saglasnosti sa ciljem koji su ugovarači imali u vidu kad su ugovor zaključili, i drugi – da se može uzeti da bi ugovornici zaključili taj drugi ugovor da su znali za ništavost svog ugovora.

Cilj ugovornika se ogleda u samom ugovoru koji su ugovornici prvobitno zaključili, tačnije u njegovoj pravnoj prirodi, sadržini, odnosno u konkretno ugovorenim pravima i obavezama. Dakle, pri utvrđivanju cilja ugovornika trebalo bi ispitati da li je zaključeni ugovor teretan ili dobročin, te jednostrano ili dvostrano obavezujući itd., te nakon toga uvideti koje bi to obaveze ugovornici preuzeli i koja bi to prava stekli da je ugovor bio punovažan.

Neophodno je pažljivo se zadržati na načinu na koji zakonodavac formuliše drugi postavljeni cilj, naime, da se „može uzeti da bi oni (ugovornici) zaključili taj ugovor *da su znali* za ništavost svog ugovora“. Iz citirane formulacije proizlazi još jedan uslov za primenu konverzije, a to

[7] Poređenja radi, nesporno je da je ustanova konvalidacije rezervisana pre svega za polje rušljivih ugovora. Kada su u pitanju, pak, pravno nevaljani nerušljivi ugovori, konvalidacija je moguća samo izuzetno, i to onda kada je izričito predviđena. Nesporno je i da konverzija nije moguća kod rušljivih ugovora, ali je nesporno i da je moguća kod pravno nevaljanih nerušljivih ugovora. I tu ne bi trebalo težiti uopštavanju po svaku cenu već svaki slučaj posmatrati zasebno.

[8] Uz, naravno, ispunjenost uslova da ništav ugovor ispunjava uslove za punovažnost drugog ugovora u koji se i pretvara, o čemu je već bilo reči.

je da ugovornici u trenutku zaključenja ugovora nisu znali za njegovu ništavost. Otuda zakonodavac ističe da je bitno utvrditi da li bi ugovornici zaključili taj drugi (punovažan) ugovor da su znali za ništavost svog.

Nama se čini da je suvišno da ta dva zahteva stoje kao kumulativno postavljena. Naime, utvrdi li se da je konverzija u saglasnosti sa ciljem koji su ugovarači nastojali da ostvare (zaključenjem svog ništavog ugovora), iz toga bi proizašlo i da bi zaključili taj drugi ugovor da su znali za ništavost svog ugovora, iz prostog razloga što ukoliko bi zaključili taj drugi, to znači da i tim drugim ugovorom ostvaruju (bar u određenoj meri) svoj prvobitno postavljeni cilj. Obrnuto, ukoliko se utvrdi da bi ugovornici zaključili taj drugi da su znali za ništavost svog ugovora, iz toga logično proizlazi da je sama konverzija u skladu sa ciljem ugovarača (koji su nastojali da ostvare zaključenjem prvog ugovora).

U prilog takvom našem stavu ide i odredba par. 140 NGZ kojom je regulisan institut konverzije. Naime, par. 140 NGZ propisano je da „ako ništav pravni posao ispunjava uslove za punovažnost drugog pravnog posla, tada važi ovaj drugi pravni posao ako se može pretpostaviti da bi se njegova punovažnost želela da se znalo za ništavost“ (prevod preuzet iz Đorđević 2017). Dakle, za razliku od srpskog zakonodavca koji zahteva dva uslova, nemački zakonodavac zahteva samo jedan. Takvo rešenje nemačkog zakonodavca smatramo potpuno opravdanim, i to iz najmanje dva razloga, od kojih smo jedan već obrazložili. Drugo, iako smo naveli da iz prvog uslova koji zahteva srpski zakonodavac proizlazi drugi i obrnuto, ukoliko se zakonodovci (kao što je slučaj u nemačkom pravu) ipak opredele da propišu samo jedan od ta dva uslova, bitno je da to bude baš ovaj koji je propisao nemački zakonodavac. Naime, iz njega proizlazi još jedan neophodan uslov za primenu konverzije, a koji ni naš ni nemački zakonodavac ne propisuju izričito. Kao što smo već ranije istakli, iz formulacije da je bitno da se utvrdi da bi taj drugi punovažni ugovor bio „željen“ da se znalo za ništavost prvog proizlazi da je jedan od uslova za primenu konverzije – da ugovornici nisu znali za ništavost svog ugovora.

Uprkos tome što nemački zakonodavac (potpuno opravdano prema našem mišljenju) u definiciji konverzije ne pominje cilj koji su ugovarači nastojali da ostvare zaključenjem prvog ugovora, nemački teoretičari u komentaru par. 140 NGZ polaze od toga da zakonodavac dozvoljava primenu pravila o konverziji samo pod uslovom da pravni efekti konverzije odgovaraju ciljevima ugovornika (Koziol, Welser 2006, 192). Dakle, nesporno je da konverzija mora biti u skladu sa ciljem ugovornika, ali to ne mora biti propisano kao poseban uslov, kako ne bi nepotrebno opterećivalo zakonsku definiciju konverzije, a pritom proizlazi iz drugih propisanih uslova (Köhler 2009, 215).

Kada je reč o nameri ugovornih strana, kao kriterijum za ispitivanje ispunjenosti uslova za primenu konverzije trebalo bi uzeti i to da

postojanje novog ugovora (u koji je ništav konvertovan) više odgovara interesima ugovornika od ništavosti prvog ugovora (Koziol, Welser 2006, 192). Drugim rečima, ugovornicima koji su uvideli da je njihov željeni ugovor ništav ipak više odgovara da do konverzije dođe nego da do nje ne dođe. Ako ne može da proizvodi dejstvo prvobitno zaključeni ugovor, onda neka bar bude na snazi zamenski ugovor.[9] Pojedini autori navode da je pretpostavka za primenu instituta konverzije da se sa izvesnošću može uzeti da bi strane htele taj drugi zamenski ugovor (Gams, Đurović 1988, 271), a polazeći od činjenice da šira namera sadrži u sebi i užu nameru" (Stojanović 1976, 191).

Na samom početku rada naglasili smo da naš zakonodavac institutu konverzije posvećuje samo jedan član Zakona. Kada tome dodamo upravo izneto stanovište, potvrđeno i stavom nemačkog zakonodavca, da naš zakonodavac samo naizgled sadrži detaljniju definiciju konverzije, a da suštinski propisuje dva uslova koji se svode na jedan, zaključujemo da je institut konverzije veoma šturo regulisan. To smatramo veoma opasnim jer ta činjenica podstiče trend preterano široke primene te ustanove (prema našem mišljenju, primer za to bi bilo Pravno shvatanje Vrhovnog kasacionog suda).[10]

3. SUDSKA KONVERZIJA UGOVORA

3.1. Uvod

Prethodna dva pitanja imaju, pre svega, teorijski značaj. Da li ćemo zaključiti da je u konkretnom slučaju konvertovan ugovor koji ćemo svrstati u kategoriju tzv. nepostojećih ugovora ili, pak, da je došlo do konverzije ništavog ugovora, zavisi pre svega od toga na koji način i sa koliko preciznosti uspemo da razdvojimo nepostojeće od ništavih ugovora. Pitanje načina formulacije odredbe čl. 106 ZOO takođe ima teorijski značaj jer neće stvoriti probleme u praksi. Daleko je složenije pitanje da li se sudovi mogu i, ukoliko mogu, onda u kojoj meri uplitati u ugovorne odnose stranaka.

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[9] Termin „zamenski ugovor" predstavlja bukvalni prevod sa nemačkog jezika, ali ga mi smatramo izuzetno dobrim jer slikovito objašnjava proces do kojeg dovodi primena ustanove konverzije.

[10] Italijanski pravnici takođe kritikuju način na koji je regulisana ustanova konverzije u njihovom pravu (ističu da im je kao uzor poslužio par. 140 NGZ), smatrajući definiciju konverzije koja proizlazi iz norme neadekvatnom i nezadovoljavajućom jer sadrži u sebi brojne interpretativne zamke zbog čega je sudije umereno koriste, a što dovodi do odsustva sudske prakse u primeni tog instituta. Uočavamo, dakle, da je problem na koji ukazuju italijanski pravnici suprotan onom koji mi nalazimo u sadržini Pravnog shvatanja VKS. Vidi na primer Emanuela Navarretta, Andrea Orestano, 721.

3.2. O pojmu sudske konverzije u srpskom pravu

U određivanju pojma sudske konverzije koristićemo Vodinelićevu definiciju, i to iz dva razloga. Prvo, zbog toga što je predmet našeg interesovanja pre svega shvatanje instituta sudske konverzije u domaćem pozitivnom pravu, teoriji i sudskoj praksi. Drugi razlog je to što nam se čini da je Vrhovni kasacioni sud prilikom donošenja Pravnog shvatanja o punovažnosti valutne klauzule kod ugovora o kreditu u švajcarskim francima i konverziji imao u vidu Vodinelićevo shvatanje sudske konverzije (koje, doduše, nije potpuno poštovano). S druge strane, pomenuto Pravno shvatanje smatramo interesantnim jer je doneto nedavno i to od najvišeg suda u zemlji, a izazvalo je veliku pažnju pravničke javnosti. Tako Vodinelić smatra da sudska konverzija postoji onda kada „sud na osnovu opšte odredbe zakona o mogućnosti konverzije i opšteg ovlašćenja sadržanog u toj mogućnosti, utvrđuje da li su u konkretnom slučaju nepunovažnog posla ispunjeni opšti uslovi za konverziju, kao i to da li postoji neki drugi posao u koji bi preduzeti mogao da se pretvori s obzirom na opšte uslove za konverziju, a posebno s obzirom na to da li mu je dejstvo istovetno ili bitno slično preduzetom poslu, a ako je više takvih poslova, i da odredi u koji drugi se pretvara (Vodinelić 2012, 462)".

Iz citirane definicije sudske konverzije proizlazi sledeće: o sudskoj konverziji bi se govorilo onda kada ne bi bilo mesta voljnoj i zakonskoj konverziji, odnosno sudska konverzija bi postojala onda kada bi sud imao ovlašćenje da primeni čl. 106, i to čak i kada ne postoji sporazum stranaka (voljna konverzija) ni zakonska norma (zakonska konverzija).

Dakle, član 106 ZOO je formulisan na takav način da je postao predmet potpuno suprotstavljenih tumačenja. S jedne strane, mogli bismo zaključiti da tim članom zakonodavac samo definiše institut konverzije, propisujući neophodne uslove za njenu primenu. Osnov za primenu konverzije tada bi se nalazio ili u zakonu (zakonska konverzija) ili u saglasnosti volja ugovornih strana (voljna konverzija). Sud bi tada imao samo „kontrolnu" ulogu – u slučaju spora između ugovornih strana, ispitujući da li su u konkretnom slučaju ispunjeni uslovi za zakonsku ili voljnu konverziju, sud bi utvrđivao ispunjenost uslova za primenu čl. 106 ZOO. Sudska odluka bi, nesporno, imala deklarativno dejstvo.

S druge strane, jedan deo teorije stoji na stanovištu da, osim zakonske i voljne, postoji i sudska konverzija, te da član 106 ZOO nesporno daje sudu ovlašćenje da sprovede tzv. sudsku konverziju. Međutim, svesni toga da se nalaze na osetljivom terenu, ti teoretičari ograničavaju ulogu suda u dva smera: prvo, smatraju da bi sudska odluka i ovde morala imati samo deklarativno dejstvo i, drugo, prema njihovom mišljenju, sud nikada ne bi mogao sprovoditi sudsku konverziju *ex officio* već samo na zahtev ili po prigovoru (Vodinelić 2012, 463).

Smatramo da je sudska konverzija[11] polje na kojem može doći do preteranog mešanja sudova u ugovorne odnose, te da je tu neophodno promisliti imaju li sudovi ovlašćenja, a pre svega imaju li mogućnost da ispituju šta bi ugovornici želeli da su znali za nevaljanost prvobitnog ugovora te da li zamenskim ugovorom ostvaruju planirane ciljeve.

3.3. Inicijativa za primenu ustanove konverzije

Postavlja se pitanje kada će sudovi utvrđivati ispunjenost uslova za konverziju – da li na zahtev jednog ugovornika, oba ugovornika ili pak u toku postupka pokrenutog po nekom drugom zahtevu. Dakle, da li tužbeni zahtev mora sadržati zahtev za utvrđivanje ispunjenosti uslova za konverziju da bi se sud upustio u njegovo ispitivanje?[12] Tako Vodinelić smatra da sud nikada ne bi smeo da se bavi pitanjem konverzije *ex officio* već samo na zahtev ili po prigovoru (Vodinelić 2012, 463).

Takav stav smatramo izuzetno logičnim.[13] Praksa nas, međutim, demantuje. Nedavno doneto Pravno shvatanje Vrhovnog Kasacionog suda[14] upravo sadrži stav da bi u postupcima protiv banaka za utvrđivanje ništavosti ugovora o kreditu indeksiranih u švajcarskim francima trebalo izvršiti konverziju tih ugovora u ugovore o kreditu sa valutnom klauzulom u evrima.

Ključno pitanje u vezi sa sudskom konverzijom ugovora, dakle, jeste da li sudovi mogu primeniti institut sudske konverzije bez inicijative bar jedne ugovorne strane. Pođemo li od ideje očuvanja ugovora na snazi, sudovi bi imali ovlašćenje da odlučuju o konverziji ugovora i bez inicijative ugovornika.[15] Ideja bi bila u tome da se pokuša očuvati ugovor na

[11] Videti Hiber 2018, 67. Autor navodi da je „ideji da će presuda zameniti konačni ugovor, *posebno ako ne postoji zakonsko pravilo koje to izričito naređuje*, moguće (je) staviti značajne prigovore. Načelno je moguće postaviti pitanje ima li sud ovlašćenje da sačini ugovor umesto stranaka". Iako autor u članku govori o mešanju suda u ugovorne odnose, posmatrano iz ugla predugovora, smatramo da se autorova ideja, posmatrana u jednom širem kontekstu, i te kako može primeniti i u slučaju instituta sudske konverzije.

[12] U slučaju sporova protiv banaka, tužbeni zahtevi su bili usmereni na utvrđivanje ništavosti ugovora, odnosno raskid ugovora zbog promenjenih okolnosti. Nijedan tužbeni zahtev nije se odnosio na ispitivanje ispunjenosti uslova za konverziju ugovora o kreditu indeksiranom u švajcarskim francima u neki drugi ugovor. Ipak, stav Vrhovnog kasacionog suda jeste da bi takve ugovore trebalo konvertovati u ugovore o kreditu sa valutnom klauzulom u evrima, sa kamatnom stopom koja je važila za kredite u evrima u trenutku zaključenja ugovora o kreditu u švajcarcima.

[13] Takav stav, a citirajući Vodinelića, prihvataju i Bojan Pajtić, Sanja Radovanović, Atila Dudaš (2018, 397).

[14] Pravno shvatanje – punovažnost valutne klauzule kod ugovora o kreditu u švajcarskim francima i konverzija. U daljem tekstu: Pravno shvatanje VKS, *https://www.vk.sud.rs/sites/default/files/attachments/ Valutna%20klauzula_1.pdf*.

[15] Postavlja se pitanje da li bi se, u okviru tog stanovišta, dozvolilo sudovima da sprovode sudsku konverziju čak i onda kada nijedna ugovorna strana ne poriče ništavost, odnosno ne bori se za očuvanje ugovora.

snazi te da se spreči da se ugovorne strane oslobode ugovornih obaveza jer najčešće samo jedna ugovorna strana želi da „napusti" ugovor, dok drugoj ugovor i dalje odgovara. U prilog toj tezi ide i stav da se sudska konverzija sprovodi na osnovu pretpostavljene volje ugovornih strana.

Pođemo li od ideje da ne bi trebalo dozvoliti sudovima da se preterano mešaju u ugovorne odnose, onda bi svakako bilo poželjno da pretpostavka sudske konverzije bude postojanje inicijative makar jedne ugovorne strane.[16] Sud bi, dakle, mogao sprovesti konverziju samo na zahtev ili po prigovoru ugovornika.

Pođemo li, ipak, od toga da sudovi mogu odlučivati o konverziji čak i u situacijama kada inicijativa nije potekla od ugovornih strana, postavljamo pitanje nije li sudska odluka onda konstitutivna, a ne deklarativna. Međutim, čak i kada bismo se priklonili stavu da bi tu sudska odluka bila konstitutivna, ona bi morala imati retroaktivno dejstvo. Retroaktivno dejstvo bi bilo uslovljeno definicijom same konverzije, prema kojoj se, naime, nepunovažan ugovor konvertuje u punovažan u trenutku zaključenja prvobitnog nevaljanog ugovora.

3.4. Period neizvesnosti u pogledu postojanja i sadržine zamenskog ugovora

Sudska konverzija nosi sobom još jedan rizik. Naime, ugovorne strane ne znaju koja je sadržina zamenskog ugovora sve do okončanja sudskog postupka. Uprkos tome, taj zamenski ugovor je na snazi još od trenutka zaključenja prvog nevaljanog ugovora. Kako pomiriti ideju da se konverzija dešava u trenutku zaključenja ništavog ugovora sa činjenicom da će ugovornici tek nakon što bude okončan sudski postupak znati u koji se to punovažan ugovor pretvorio njihov pravnonevaljani ugovor?

Prvo, pitanje je koliko dugo oni neće znati da je njihov ugovor ništav te će ga možda u određenoj meri i izvršiti. Drugo pitanje koje sada otvaramo smatramo još kompleksnijim. Sudska konverzija nas dovodi u situaciju da ne znamo u kom smo ugovornom odnosu bili određeni vremenski period u prošlosti. Tako dolazimo do jedne paradoksalne situacije – nakon što saznamo da je prvobitno zaključeni ugovor ništav, postajemo svesni da nas

[16] Poređenja radi, francuski pravnici ni nakon velike reforme građanskog prava 2016. godine nisu smatrali da je korisno uvesti institut konverzije. S druge strane, prvi put *Code Civil* sadrži opštu normu kojom definiše ustanovu delimične ništavosti. Kada je u pitanju delimična ništavost, ne može se reći da francuski pravnici nisu poznavali tu ustanovu i pre 2016. godine, ali to su bile samo pojedinačne norme. Ipak, francuski pravni teoretičari poznaju ustanovu voljne modifikacije ugovora. Smatraju je veoma korisnom za građansko pravo jer ugovornicima daje brojne mogućnosti za prevazilaženje različitih poteškoća u izvršavanju obaveza. Francuski pravnici ostaju, dakle, verni ideji da sudovi ne bi trebalo da se preterano mešaju u ugovorne odnose ugovornika. Stoga oni i ne regulišu institut konverzije te tako i izbegavaju mogućnost eventualne sudske konverzije. Umesto mnogih videti Ghozi 1980.

taj ugovor više ne obavezuje, ali i dalje ne znamo da smo u nekom drugom ugovornom odnosu. Kako ugovornici sve do donošenja sudske odluke ne znaju da su u ugovornom odnosu, može se zaključiti da oni i ne mogu izvršavati svoje obaveze iz zamenskog ugovora. Taj problem je, naravno, daleko manji u slučaju zakonske, a posebno voljne konverzije.

3.5. Primena instituta sudske konverzije u praksi domaćih sudova

Čak i kada bismo prihvatili sudsku konverziju, postavilo bi se pitanje širine ovlašćenja sudova. Analiza pojedinih odluka naših sudova upućuje nas na sledeći zaključak: prvo, u pojedinim situacijama sudovi su postupali na osnovu inicijative jedne od ugovornih strana,[17] dok su pak u drugim sporovima to činili i mimo njihove inicijative,[18] a sve sa ciljem da utvrde da li su ispunjeni uslovi za konverziju jednog ništavog ugovora u drugi zamenski koji bi proizvodio pravna dejstva; drugo, postavlja se pitanje da li se može napraviti određeno „stepenovanje" u situacijama kada su sudovi postupali bez inicijative ugovornika. Naime, čini nam se da bi se nekada moglo reći da je sudska konverzija zaista opravdana,[19] u smislu da bi se sa velikom dozom sigurnosti moglo reći da je konverzija u skladu sa voljom ugovornih strana. U nekim drugim situacijama bismo možda mogli da dovedemo u pitanje ocenu suda da je konverzija sprovedena zbog toga što je to u skladu sa pretpostavljenom voljom ugovornika.[20]

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[17] Presuda Apelacionog suda u Novom Sadu, Gž. 1799/14 od 29. januara 2015, Ing-pro baza sudske prakse. Sud je u konkretnom slučaju utvrdio da nisu ispunjeni uslovi za konverziju ugovora o punomoćstvu u ugovor o zastupanju kako je neosnovano tvrdila jedna ugovorna strana. Da je, suprotno tome, sud smatrao da su ispunjeni uslovi za primenu čl. 106 ZOO, radilo bi se o sudskoj konverziji sprovedenoj na inicijativu jednog od ugovornika (budući da se osnov za konverziju ne bi nalazio ni u zakonu ni u sporazumu ugovornika).

Videti i Rešenje Višeg trgovinskog suda Pž. 9915/06, od 11. maja 2007, Ing-pro baza sudske prakse. Sud je i ovde zauzeo isti stav kao u prethodnom slučaju – da nisu ispunjeni uslovi za konverziju, i takođe je o konverziji odlučivao na inicijativu jedne ugovorne strane.

U tom smislu videti i presudu Okružnog suda u Čačku, Gž 1801/08 od 25. decembra 2008. Sud je odbio kao neosnovan tužbeni zahtev tužilje kojim je tražila da se utvrdi da poništeni ugovor o doživotnom izdržavanju proizvodi pravno dejstvo ugovora o poklonu jer je utvrđeno da je volja stranaka bila predaja stana davaocu izdržavanja nakon učinjenog izdržavanja, a ne da se stan pokloni.

[18] Videti Rešenje Vrhovnog suda Srbije, Rev. 1341/93 od 22. aprila 1993, Ing-pro baza sudske prakse. Vrhovni sud upućuje nižestepeni sud da ispita ispunjenost uslova za konverziju, iako u konkretnom rešenju ne vidimo da sud to čini na inicijativu stranaka. Isto vidi i u Rešenju Vrhovnog suda Srbije, Rev. 1613/94 od 20. aprila 1994. godine, Paragraf Lex, baza sudske prakse.

[19] Videti, na primer, Rešenje Višeg privrednog suda u Beogradu, 9766/96 od 12. februara 1997. godine, te način na koji viši sud upućuje niži da ispita da li su ispunjeni uslovi za konverziju „utvrđujući tačnu volju stranaka u odnosu na ugovor".

[20] Ovde imamo u vidu Pravno shvatanje VKS, o kojem će tek biti više reči u nastavku rada.

Čini nam se da analiza sudske prakse naših sudova opravdava stav koji zastupamo u radu, a to je da sudska konverzija otvara vrata za široka ovlašćenja sudovima, i to iz najmanje tri razloga. Prvo, svedoci smo stava da sudovi mogu primenjivati institut sudske konverzije i onda kada inicijativa za to nije potekla od ugovornika. Drugo, pođemo li od sadržine Pravnog shvatanja VKS, sudovi bi pristupali utvrđivanju ispunjenosti uslova iz čl. 106 i onda kada, bar prema našem mišljenju, i nije tako očigledno da postoji volja ugovornika. Treće, postoje slučajevi primene sudske konverzije čak i onda kada bi sprovedena konverzija bila potpuno u suprotnosti sa samom definicijom iz čl. 106 ZOO.[21]

4. SUDSKA KONVERZIJA IZ UGLA VRHOVNOG KASACIONOG SUDA REPUBLIKE SRBIJE

4.1. Uvod

Pravno shvatanje Vrhovnog kasacionog suda[22] interesantno je iz najmanje dva razloga. Prvo, ono predstavlja rešenje dugogodišnjeg problema zvanog „švajcarski franak", a drugo, u pitanju je ne samo stav najvišeg suda o punovažnosti valutne klauzule već i stav najvišeg suda o primeni instituta sudske konverzije. Stoga nas na ovom mestu ne zanima toliko shvatanje suda o punovažnosti valutne klauzule, jer će ono, prema svemu sudeći, teško zaživeti. Smatramo da je interesantno da iz sadržine pomenutog pravnog shvatanja izvedemo zaključak o tome kako najviši sud vidi svoja ovlašćenja u pogledu konverzije ugovora – kada može sprovesti tzv. sudsku konverziju, na koji način ispituje ispunjenost uslova za primenu te ustanove, odnosno kako utvrđuje pretpostavljenu volju ugovornih strana, te u koji je to zamenski konvertovan prvobitno zaključen ugovor.

[21] Videti presudu Vrhovnog kasacionog suda, Rev. 1424/02 od 3. oktobra 2002, Ing-pro baza sudske prakse. Ugovarači koji su zaključili punovažan ugovor o poklonu usmeno su ugovorili i doživotno izdržavanje poklonodavca. Vrhovni sud je zaključio da je nastupila konverzija ugovora o poklonu u ugovor o otuđenju stana za naknadu za doživotno izdržavanje poklonodavca. Dakle, sud je u konkretnom slučaju ustanovio da je ispunjen uslov iz čl. 106, te da je reč o konverziji ugovora o poklonu u ugovor o doživotnom izdržavanju. Naša kritika sudske odluke jeste u tome što sud prvo navodi da je ugovor o poklonu punovažan, a kasnije govori o konverziji upravo tog ugovora o poklonu, što je suprotno definiciji konverzije koja podrazumeva pretvaranje nepunovažnog ugovora u drugi punovažan.

[22] Prvu detaljnu analizu Pravnog shvatanja Vrhovnog kasacionog suda, čiji je deo napisan i pre nego što je najviši sud objavio obrazloženje svog shvatanja, dao je Živković (2019, 458–490). Komentar druge tačke Pravnog shvatanja videti u Živković 2019, 470–478.

4.2. Analiza nedavno donetog Pravnog shvatanja Vrhovnog kasacionog suda o punovažnosti valutne klauzule kod ugovora o kreditu u švajcarskim francima i konverziji

Vrhovni kasacioni sud uvodi pojam „uslovne ništavosti" valutne klauzule. Naime, nekada će valutna klauzula biti ništava, a nekada ne. U slučaju kada su ispunjena dva kumulativno postavljena zahteva, valutna klauzula će biti ništava.[23] Uprkos tome, i nakon što se utvrdi ništavost valutne klauzule, ugovor o kreditu će ipak proizvoditi pravno dejstvo.[24]

Iako bi se tako na prvi pogled učinilo, Vrhovni kasacioni sud ipak ne primenjuje odredbu čl. 105 ZOO. Smatramo da bi bilo logično da ništava valutna klauzula povuče ništavost celog ugovora jer ugovor ne može opstati bez te odredbe (teorijski bi mogao, ali kao dinarski kredit sa niskom kamatnom stopom, što je praktično nemoguće).[25] Međutim, sadržina tačke 3 Pravnog shvatanja upravo podseća na primenu delimične ništavosti jer ugovor o kreditu proizvodi pravno dejstvo nakon utvrđivanja ništavosti valutne klauzule. Sud je, dakle, tražio način da ne proglasi ništavost celog ugovora, ali da isključi indeksaciju u CHF i da je zameni valutnom klauzulom u evrima. Kako bi to sve postigao, VKS se ipak opredeljuje za odredbu čl. 106 ZOO. Da li je to bilo moguće?

Prvo, da bi mogao da se primeni institut konverzije, neophodno je da postoji apsolutno ništav ili nepostojeći ugovor. U konkretnom slučaju, nesporno je da je ugovor nastao, a čak i u slučaju ništavosti valutne klauzule, ugovor ostaje na snazi i proizvodi pravno dejstvo. To znači da mi ovde nemamo ništav ugovor već ugovor čija je jedna klauzula ništava, dok „ostatak", kao punovažan, nastavlja da proizvodi dejstvo. Uviđamo da najviši sud konverziju u ovom slučaju shvata kao zamenu jedne valutne klauzule drugom, a naime, nastoji da korisnike kredita u CHF dovede u jednak položaj sa korisnicima kredita u EUR.

Prema našem mišljenju, u tom slučaju ne samo da nema elemenata za primenu konverzije već sve i da je Vrhovni kasacioni sud svoje shvatanje započeo time da je valutna klauzula ništava te da ona povlači ništa-

[23] Videti tačku 2 Pravnog shvatanja VKS: „Ništava je odredba ugovora o kreditu o indeksiranju dinarskog duga primenom kursa CHF koja nije utemeljena u pouzdanom pisanom dokazu da je banka plasirana dinarska sredstva pribavila posredstvom sopstvenog zaduženja u toj valuti i da je pre zaključenja ugovora korisniku kredita dostavila potpunu pisanu informaciju o svim poslovnim rizicima i ekonomsko-finansijskim posledicama koje će nastati primenom takve klauzule."

[24] Videti tačku 3 Pravnog shvatanja VKS.

[25] Videti odredbu čl. 105, st. 1 ZOO kojom se reguliše institut delimične ništavosti.

Ništavost neke odredbe ugovora ne povlači ništavost i samog ugovora ako on može opstati bez ništave odredbe i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor zaključen.

vost celog ugovora, sud bi konverziju sprovodio bez inicijative ugovornih strana, tačnije *ex officio*.

Naime, nesporno je da ovde nije reč ni o voljnoj ni o zakonskoj konverziji. U pitanju su sudski postupci započeti sa ciljem da se utvrdi ništavost ugovora. Nijedna ugovorna strana nije zahtevala od suda da ispita da li su ispunjeni uslovi za primenu instituta konverzije, što bi, prema nekoj logici, ali i mišljenju vladajućem u domaćoj teoriji, bio preduslov sudske konverzije.

Čini se da takav stav najvišeg suda menja postojeće shvatanje sudske konverzije u domaćoj teoriji. Naime, nakon pomenutog pravnog shvatanja najvišeg suda, sudovi bi dakle mogli utvrđivati da li su ispunjeni uslovi za konverziju i bez zahteva, odnosno prigovora ugovornih strana, i to u svim onim situacijama kada bi sud na osnovu svoje diskrecione ocene ustanovio da je to celishodno u konkretnom slučaju, te da bi sama konverzija bila u skladu sa voljom i shvatanjima jednog razumnog čoveka (što bi se uzelo kao pravni standard).[26]

Ne možemo reći da takvo stanovište nema logike, a priznajemo i da je u službi očuvanja ugovora na snazi. Međutim, čini nam se da je to suviše široko tumačenje čl. 106 ZOO. Ako je zakonodavac nameravao da sudovima da takva ovlašćenja, zašto to onda ne bi i izričito učinio? Dakle, imajući u vidu pozitivno pravo naše zemlje, smatramo da je sudska konverzija jedna ustanova koju je stvorila teorija, a sudovi oberučke prihvatili kao način da se ipak izađe na kraj sa onim kompleksnim problemima u kojima je teško naći rešenje u skladu sa slovom zakona. Međutim, Vrhovni kasacioni sud je u svom tumačenju odredbe čl. 106 ZOO otišao mnogo dalje od teorije koja je stvorila institut sudske konverzije, dajući sebi ovlašćenje da sprovodi konverziju i onda kada ne postoji inicijativa ugovornih strana (pa i onda kada je ništava samo jedna odredba ugovora koja, prema samom Pravnom shvatanju, pritom ne povlači ništavost celog ugovora).

[26] Pravno shvatanje nas, donekle, podseća na modifikaciju ugovora na način na koji to shvataju francuski pravnici, i to onaj modalitet modifikacije prilikom koje se jedna ništava odredba ugovora menja drugom punovažnom i tako „spasava" čitav ugovor. Razlika je ipak ključna. U francuskom pravu je to moguće, ali sporazumom ugovornih strana. U našem slučaju, ne postoji sporazum ne samo o tome da se jedna klauzula zameni drugom već ni da se u slučaju ništavosti ugovora izvrši konverzija u drugi punovažan. Međutim, sud svoje ovlašćenje zasniva na pretpostavljenoj volji stranaka, koje bi u slučaju da su znale za ništavost prvobitno zaključenog ugovora želele konverziju u drugi punovažan. Videti Ghozi 1980, 145.

5. POJAM KONVERZIJE U SMISLU ZAKONA O KONVERZIJI STAMBENIH KREDITA INDEKSIRANIH U ŠVAJCARSKIM FRANCIMA

Svedoci smo i nedavnog usvajanja Zakona o konverziji stambenih kredita indeksiranih u švajcarskim francima[27] kojim su konačno rešeni problemi najvećeg broja korisnika kredita indeksiranih u švajcarskim francima.[28] Naime, problem zvani „švajcarski franak" postao je vremenom u Srbiji (ali ne samo u Srbiji nego i u drugim zemljama) socijalni problem. Višegodišnji rast vrednosti švajcarskog franka u odnosu na evro, a samim tim i na dinar, znatno je otežao ispunjenje obaveza velikom broju korisnika kredita koji su sa različitim bankama koje posluju u Srbiji zaključivali ugovore o kreditu. Konačno se 2019. godine (nakon što se veliki broj korisnika kredita već „naplaćao" enormno visokih rata) u srpskim pravnim krugovima pojavila reč „konverzija" kao zrno nade za zadužene. Ne samo da laicima nije bilo jasno šta to zapravo znači već se ispostavilo i da pravnici olako barataju tim terminom. Čak se laičko poznavanje prava te njihovo poimanje pojma konverzije više moglo uklopiti u kontekst u kojem je zakonodavac upotrebio pojam konverzije. Naime, u maju 2019. godine počeo je da se primenjuje Zakon o konverziji. Iako se konverzija pominje već u samom nazivu Zakona, nije reč o konverziji iz čl. 106 ZOO. Pre će biti da se zakonodavac poslužio tim terminom imajući u vidu konverziju jedne valute (CHF) u drugu (EURO). Nesporno je da ovde nije reč o pretvaranju ništavih u punovažne ugovore, a što bi predstavljalo definiciju ustanove konverzije. Pre će biti da je u pitanju neka vrsta izmene ugovora prethodno zaključenog između banke kao davaoca kredita, s jedne strane, i korisnika kredita, s druge strane, a u pogledu visine obaveze i kamate. Specifičnost takve izmene dužničko-poverilačkog odnosa jeste u tome što je sadržina izmena diktirana Zakonom o konverziji, te da je banka kao jedna ugovorna strana po slovu Zakona dužna da korisniku kredita indeksiranom u CHF ponudi izmenu ugovora u skladu sa tekstom Zakona. Stoga, pojam konverzije upotrebljen u najnovijoj zakonodavnoj praksi naše zemlje podrazumeva izmenu ugovora o kreditu indeksiranom u švajcarskim francima, na način što će se izvršiti konverzija preostalog duga u evre, te tako dobijeni iznos umanjiti za 38%.[29]

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[27] Zakon o konverziji stambenih kredita indeksiranih u švajcarskim francima, „Službeni glasnik RS", br. 31/2019, Bankarski krediti, Ugovor o kreditu i valutna klauzula, Biblioteka Pravni Informator, Intermex, Beograd 2019. U daljem tekstu: Zakon o konverziji.

[28] Preko 90% korisnika kredita je prihvatilo ponude banaka.

[29] Čl. 4, st. 1, 2 i 3 Zakona o konverziji: „Banka kod koje korisnik otplaćuje stambeni kredit, odnosno koja ima potraživanje po osnovu tog kredita na dan stupanja na snagu ovog zakona dužna je da ponudi konverziju preostalog duga po tom kreditu u dug indeksiran u evrima po kursu za konverziju.

Da li je Zakon o konverziji[30] bio odgovor na Stav Vrhovnog kasacionog suda zauzet povodom rešavanja problema zaduženih u švajcarskim francima ili je puka slučajnost što smo nakon višegodišnjeg čekanja rešenja dobili u izuzetno kratkom vremenskom periodu ne jedno, već dva rešenja!

6. ZAKLJUČAK

Nesporno je da je institut konverzije u našem pravu (ali i u drugim pravima koja imaju skoro identičnu odredbu) nedovoljno regulisan. Sama odredba čl. 106 ZOO predmet je različitih tumačenja – od toga da je u pitanju samo definicija konverzije koja podrazumeva samo zakonsku i voljnu konverziju pa do toga da je zakonodavac nastojao da pomenutom odredbom i sudovima dâ ovlašćenje da ispituju ispunjenost uslova za konverziju u odsustvo volje ugovornika (voljne konverzije) i zakonske norme (zakonske konverzije).

Sudska konverzija je tvorevina teorije, ali sa jasnim ograničenjima u primeni: prvo, sudska odluka ima deklarativno dejstvo i, drugo, sud ne može postupati *ex officio*. Sudovi „oberučke" prihvataju tu teorijsku tvorevinu i nastoje da je što elastičnije posmatraju. Nedavno doneto Pravno shvatanje VKS[31] samo potvrđuje da sa sudskom konverzijom ulazimo na vrlo osetljiv teren jer sudijama dajemo široka ovlašćenja za uređivanje ugovornih odnosa.

Preostali dug u smislu stava 1. ovog člana čini iznos glavnice na dan konverzije uvećan za iznos dospele, a nenaplaćene redovne kamate na dan konverzije.

Iznos dobijen konverzijom iz stava 1. ovog člana umanjuje se za 38%.

Banka je dužna da na iznos duga iz stava 3. ovog člana primeni kamatnu stopu prema ponudi koja je važila na dan 31. marta 2019. godine, za kredite indeksirane u evrima koji su iste vrste i ročnosti i imaju isti tip kamatne stope (promenljiva ili fiksna) kao i stambeni kredit."

[30] Smatramo da Zakon o konverziji zaslužuje još veću kritiku u pogledu toga da je donet prekasno. Zakon nejednako postupa prema korisnicima kredita u CHF. Iz ugla samih korisnika kredita primena Zakona bi se mogla posmatrati kao faktor sreće. Zakon najviše odgovara onima koji su kredit uzeli kasnije i na duži period otplate. Čini se, pak, da su ga drugi, koji su dočekali Zakon pred kraj otplate kredita, dočekali krajnje ravnodušno. Najveća nepravda Zakona jeste to što njime nisu obuhvaćeni oni koji su otplatili svoj dug prema banci. S druge strane, ta zakasnelost u donošenju zakona, najviše je odgovarala bankama jer su za sve to vreme iščekivanja rešenja korisnici kredita otplaćivali kredit.

S druge strane, da je zaživelo, Pravno shvatanje VKS omogućilo bi jednako postupanje prema svim korisnicima kredita.

[31] U pitanju su bili postupci korisnika kredita pokrenuti protiv raznih banaka ili radi utvrđenja ništavosti ugovora o kreditu indeksiranog u CHF ili radi raskida istih ugovora zbog promenjenih okolnosti. To shvatanje se osvrće samo na one postupke pokrenute tužbom za utvrđivanje ništavosti. Što se tiče postupaka pokrenutih radi raskida zbog promenjenih okolnosti, VKS o tome u trenutku pisanja ovog rada i dalje nije zauzeo stav.

Uprkos svemu što je do sada izneto u vezi sa Pravnim shvatanjem VKS, smatramo da se u njegovoj osnovi nalazi jedno veoma pravedno rešenje. Ostajemo i dalje pri stavu da se tu nije mogla primeniti odreba čl. 106 ZOO, odnosno da je primena konverzije u situaciji „švajcarskog franka" predstavljala suviše široko tumačenje pomenute odredbe. Međutim, Vrhovni kasacioni sud je svojim stavom ostvario više ciljeva: prvo, zaštitio je korisnike kredita indeksirane u CHF; drugo, izbegao je mogućnost da u budućnosti korisnici kredita u evrima pokreću sudske sporove smatrajući da su korisnici kredita u CHF „prezaštićeni"; sačuvao je sva sredstva obezbeđenja predviđena prvobitno zaključenim ugovorima indeksiranim u CHF.

Međutim, uprkos svojoj celishodnosti, pravičnosti, izuzetnoj akrobaciji da se u odredbama jednog sistemskog zakona nađe rešenje problema zvanog „švajcarski franak", Pravno shvatanje je doneto prekasno. Da je Vrhovni kasacioni sud reagovao ranije, on bi svojim stavom zaista zaštitio korisnike kredita u CHF. Ovako, nažalost, stav ostaje samo slovo na papiru, samo predmet teorijskih rasprava i tema teorijskih članaka.

Ipak, u nedostatku potpunije regulative ustanove konverzije, Pravno shvatanje VKS ostaje značajan korektiv do sada vladajućeg teorijskog tumačenja odredbe čl. 106 ZOO, u smislu davanja ovlašćenja sudovima da sprovode sudsku konverziju bez inicijative ijedne ugovorne strane, dovodeći tako u pitanje i stav da odluka suda u takvim postupcima mora biti deklarativna.

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ABOUT CONTRACT CONVERSION IN SERBIAN LAW WITH SPECIAL REFERENCE TO THE COURT CONVERSION

Summary

In theoretical works of domestic authors the institute of conversion seems to be unjustifiably neglected. Nevertheless, this institute raises a number of questions that our theory and practice do not answer uniquely. In the absence of more complete regulation, the theory created a new form of conversion (judicial conversion), for which we cannot be sure whether it could fall under the existing norms of our law. Courts, however, enthusiastically accept such theoretical creation and use it to resolve „unsolved" disputes.

Recently, the issue of judicial conversion has become very topical in our theory and practice due to numerous disputes against banks for determination of the nullity of credit agreements indexed in CHF. The recently adopted Legal opinion of the Supreme Court of Cassation on Validity of the Foreign Currency Clause in Credit Agreements in Swiss Francs and Conversion, speaks in favor of the actuality of the topic.

Key words: *Conversion. – Judicial Conversion. – Nullity. Non-existent Contract. – Legal opinion of the Supreme Court of Cassation*.

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PROCENA RIZIKA I NAPREDOVANJE U TRETMANU U KAZNENO-POPRAVNOM ZAVODU U SREMSKOJ MITROVICI

Procena rizika je jedno od osnovnih pitanja i predmeta interesovanja svih onih koji se bave analizom lica prema kojima se izvršava kazna zatvora. Nakon osnovnih teoretskih postavki, sagledavanja sadržine Upitnika za procenu rizika te relevantnih istraživanja u toj oblasti, u radu su predstavljeni rezultati empirijskog istraživanja koje su autori sproveli u Kazneno-popravnom zavodu (KPZ) u Sremskoj Mitrovici na uzorku od 150 osuđenika, koji su otpušteni iz te ustanove u periodu od 2016. do 2018. godine. U istraživanju se pošlo od hipoteza: (1) da najveći broj osuđenika primarno bude razvrstan u zatvoreno odeljenje zavoda, odnosno nepovoljniji tretman; (2) da najveći deo osuđenika napreduje u tretmanu u povoljniju kategoriju i (3) da oni osuđenici koji su napredovali u tretmanu češće dobijaju uslovni otpust. Hipoteze su sagledane pre svega sa aspekta procenjenog stepena rizika na osnovu Upitnika za procenu rizika i pripadnosti određenoj tretmanskoj grupi.

Ključne reči: *Upitnik za procenu rizika. – Procena rizika. – Tretman. – Uslovni otpust. – KPZ u Sremskoj Mitrovici.*

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1. UVOD

Kazna zatvora i dalje predstavlja stub sistema krivičnih sankcija, pri čemu njen značaj ne proizlazi iz njene česte primene, već iz toga što se od zaprećene kazne zatvora očekuje pre svega da ima generalno preventivno dejstvo i što neke druge sankcije ne bi mogle postojati bez nje (Stojanović 2016, 285). Sa aspekta penologije, odnosno prava izvršenja krivičnih sankcija, postupanje sa licima osuđenim na bezuslovnu kaznu zatvora predstavlja večitu dilemu, dok zamišljena skala postupanja ima svoje dve krajnosti. Prvu krajnost, koju karakteriše izrazito nehumano postupanje sa osuđenim licima, detaljno je opisao Hauard, predlažući načine za njihovo prevazilaženje (Howard 2015, 152–161). Određene njegove ideje i danas predstavljaju svojevrsne pravne standarde. Druga krajnost je primena načela humanosti u postupanju te principa *ultima ratio* i na polju izvršenja krivičnih sankcija. Čini se da je većina modernih zakonodavstava ipak okrenuta načelu humanosti, što bi na posredan ili neposredan način trebalo da dovede do smanjenja stepena prizonizacije (Clemmer 2009, 516–519), ali i do umanjenja deprivacija koje su naročito uočljive u ustanovama sa maksimalnim stepenom obezbeđenja (Sykes 2009, 520–527).

Koncept resocijalizacije, iako je od sedamdesetih godina prošlog veka dominantan koncept u većini zapadnih zemalja i kod nas, često se nalazio na udaru kritike jer nije dao očekivane rezultate u smislu smanjenja stope kriminaliteta i recidivizma (Ilijić 2013, 168). U svom članku koji se bavi novom penologijom Fili i Sajmon tvrde da se moderne kaznene politike kreću od individualizovanih rehabilitacionih modela ka više strateškim pristupima koji se oslanjaju na aktuarske tehnike kvantifikovanja i procenu rizika određenih zatvorenika, pri čemu se ne nastoji da se promeni prestupnik koliko da se izdvoje isključivo one osobe koje su izložene riziku ponovnog vršenja krivičnog dela i da se umanji potencijalni rizik koji oni predstavljaju po zajednicu (prema: Hannah-Moffat 2005, 30). Ipak, aktuelno stanje stvari u oblasti resocijalizacije prestupnika u zapadnim zemljama karakteriše uspon novih, konkurentnih paradigmi u koncipiranju tretmana, odnosno pokušaj da se odgovori na pitanje: šta, na koga i u kakvim okolnostima deluje (Simeunović Patić 2014, 192). Razvojem nauke i prakse, napušteni su i čisto subjektivni i tzv. aktuarski modeli instrumenata, pri čemu se današnje procene uglavnom zasnivaju na utvrđivanju rizičnih faktora, ali i potreba prestupnika. Na taj način identifikuju se određene oblasti vezane za ličnost ili socijalni kontekst procenjivanog lica, čime se tretman ciljano usmerava, a time i ostvaruje redukcija stepena rizika recidiva (Petković, Pavlović 2016, 163; Pavlović 2013, 213).

Iako danas postoje standardizovana pravila, do uvođenja pomenutih upitnika, najčešće su primenjivana uopštena uputstva, dok je rizik re-

cidivizma procenjivan prema prilično neujednačenim kriterijumima, što je rezultiralo voluntarizmom i arbitrarnošću (Jovanić, Petrović 2017, 96). To je i jedan od razloga, ne i jedini, zbog kojeg se institut uslovnog otpusta nedovoljno primenjuje u praksi (Vujičić, Stevanović, Ilijić 2017, 23).

Ipak, za razumevanje uslovnog otpusta važno je uočiti činjenicu da složena priroda uslovnog otpusta, zbog svoje čvrste funkcionalne povezanosti sa kaznom zatvora, a time i sa krupnim pitanjima koncepta kažnjavanja, svrhe kažnjavanja, kaznene politike, čini da uslovni otpust, zadržavajući istu normativnu osnovu, često značajno menja svoju svrhu, a posledično menja i svoj uticaj na ostvarenje svrhe kažnjavanja i ishode kaznene politike. Iako uslovno otpuštanje osuđenih lica predstavlja opšteprihvaćen institut sa dugom tradicijom, brojna sporna pitanja i polemike i dalje prate i zakonodavna rešenja i praksu uslovnog otpuštanja (Soković 2014, 35). Nasuprot pobornicima šire primene tog instituta, opstaje i argumentacija o opravdanosti ukidanja ranijeg uslovnog otpuštanja, pri čemu se u prvi plan ističe da je on nelogičan, kontraproduktivan, nepravedan u odnosu na žrtvu krivičnog dela, te da potencijalno ugrožava sigurnost građana (Soković 2016, 388). O tom pitanju slično se izjašnjava i Škulić, koji navodi da složenost pravne prirode uslovnog otpusta proističe iz toga što taj institut ima penološku komponentu i svodi se na mehanizam odgovarajućeg„nagrađivanja" osuđenika, s jedne strane, dok, s druge strane, po svom efektu praktično menja pravnosnažnu i izvršnu odluku suda o dužini kazne (Škulić 2016, 365).

Iako pravna priroda, a samim tim i svrha tog instituta nisu sporni ukoliko se komparativnim pristupom sagledaju stanja i tendencije u modernim krivičnim zakonodavstvima, Ignjatović s pravom ističe da, osim brojnih problema koji se javljaju u njegovoj primeni, a koji su na određeni način povezani i sa penalnim populizmom i sa medijskim pritiscima, postoje problemi i na zakonodavnom planu, budući da su uslovi za njegovu primenu u bitnoj meri menjani prilikom mnogobrojnih izmena ne samo materijalnog već i procesnog i izvršnog krivičnog zakonodavstva (*uz napomenu da je često bila prisutna i neusklađenost tri osnovna propisa koja regulišu tu materiju*). Dodatni problem je i sužavanje polja primene instituta uslovnog otpusta, donošenjem posebnih propisa, poput Zakona o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima iz 2013. godine (Ignjatović 2016, 54; 57–58). Problemi na koje je ukazao taj autor ponovo su aktuelizovani poslednjim izmenama krivičnog zakonodavstva iz 2019. godine.

Uvažavajući iznete probleme u praksi, u radu se pre svega polazi od stavova nauke i struke, te značaja standardizacije pravila postupanja formiranjem upitnika koji se primenjuju u radu sa osuđenim licima, što bi u najširem smislu trebalo da ima i određene posledice na primenu instituta uslovnog otpusta u praksi te redukciju recidivizma. Nakon osvrta na upitnike koji se primenjuju u zatvorskom sistemu u Republici Srbiji

i ukazivanja na pojedina značajna istraživanja procene rizika i uslovnog otpusta, u drugom delu rada predstavljeno je istraživanje koje su autori sproveli u januaru 2019. godine u KPZ u Sremskoj Mitrovici na uzorku od 150 osuđenika koji su otpušteni iz ustanove u periodu od 2016. do 2018. godine, sa ciljem da se sagleda ostvarivost mogućnosti za napredovanje u tretmanu, odnosno da li se i u kojoj meri, na osnovu procene rizika primenom upitnika, mogu ostvariti pogodnosti predviđene zakonskom normom, odnosno u kakvom su odnosu procena rizika i napredovanje u tretmanu.

2. PROCENA RIZIKA U ZATVORSKOM KONTEKSTU

Pitanjem procene rizika u zatvorskom kontekstu struka se već decenijama ozbiljno bavi širom sveta. Važnost te procene za osuđenika ogleda se u mogućnosti pružanja adekvatnog razvrstavanja, tretmana i resocijalizacije, ali i pružanja mogućnosti za napredovanje u tretmanu i uslovni otpust kao odgovor na napredak u resocijalizaciji. U Republici Srbiji se primenjuje OASys (*Offender Assessment System*), čija je standardizovana verzija uvedena u upotrebu u zatvorskom sistemu Srbije na osnovu Direktive o načinu rada službenika tretmana u zavodima, procedurama u radu i izgledu i sadržaju dokumenata tokom utvrđivanja, sprovođenja i izmene programa postupanja sa licima osuđenim za krivična dela i prekršaje i načinu primene Pravilnika o tretmanu, razvrstavanju i naknadnom razvrstavanju osuđenih lica. Važno je napomenuti da je standardizovanim pravilima predviđeno da postoje dve vrste upitnika: Upitnik za procenu rizika za osuđene na kaznu zatvora do i tri godine (u nastavku: Mali upitnik) i Upitnik za procenu rizika, kapaciteta i potreba osuđenog – preko tri godine (dalje: Veliki upitnik).

Adekvatna primena Malog upitnika unapređuje praksu razvrstavanja osuđenih sa više važnih aspekata. (1) Ovaj upitnik ujednačava kriterijume po kojima se vrši kategorizacija tako što se prema svim osuđenicima u intervjuu primenjuje isti set pitanja. Na taj način je postignuto da različiti procenjivači, nezavisno od stila svog rada, dođu do istih rezultata. Takođe, te rezultate je moguće veoma lako proveriti tokom tretmana i, ukoliko se ukaže potreba za time, ispraviti. (2) Rizik se procenjuje u različitim oblastima života, ponašanja i navika osuđenog, čime se izbegava bilo kakva eventualna proizvoljnost, predrasude ili pojednostavljivanje. (3) Takav način rada omogućava statističku analizu i dalje usavršavanje samog instrumenta, prateće dokumentacije o osuđenom i kvaliteta same procedure razvrstavanja.

Upitnik se velikim delom odnosi na statičke faktore, poput zaposlenja, primanja, porodičnih prilika, obrazovanja, stambenih prilika, okru-

ženja u kome je živeo osuđeni pre stupanja na izvršenje kazne zatvora i sl. Ipak, u drugom delu upitnika sagledava se odnos osuđenog prema kazni, koji se procenjuje na osnovu njegovog ličnog stava i otpora prema pravilima ponašanja i zatvorskom osoblju. Osim te ocene, predviđena su i dodatna ispitivanja sa psihološkog, pedagoškog i socijalnog stanovišta, koja se uzimaju kao osnov za utvrđivanje grupe i programa postupanja.

Za razliku od Malog, Veliki upitnik pruža mogućnost upoređivanja različitih načina procene rizika, pre svega kliničkog i statističkog (aktuarskog) modela, kako bi se iskoristile prednosti koje oni pružaju i izbegle mane i ograničenja insistiranja samo na jednom pristupu. Veliki upitnik omogućava statističku procenu verovatnoće ponovnog činjenja krivičnog dela. Osim statičkih, on sadrži i dinamičke faktore, poput podataka o životnom stilu, socijalnim kontaktima, porodičnim i bračnim odnosima, načinu razmišljanja, ali i podatke o boravku osuđenog lica u zatvoru (npr. disciplinske mere).

Koreni modela postupanja sa osuđenim licima koji se uočavaju u tzv. kliničkom metodu, odnosno u okviru prognoziranja kriminalnog ponašanja, predstavili su nemački autori Šid, Majverk i Švab (Schid, Maywerk i Schwaab). Taj model je imao nekoliko faza. U prvoj fazi autori su izabrali petnaest antropoloških i socijalnih činilaca koje su zapazili kod delinkvenata (neki od faktora postoje i u današnjim upitnicima, poput neredovnog rada, kriminaliteta pre punoletstva, ponašanja u kazneno-popravnom zavodu itd.), dok su u drugoj fazi proučavani (pred)delinkventi, koji su klasirani prema broju osobina u jednu od šest grupa (grupe su formirane na osnovu broja ostvarenih faktora rizičnog ponašanja), na osnovu čega je izračunat procenat povrata za svaku od grupa. Šid je izneo zaključak da je najmanja stopa povrata (3%) bila kod ispitanika klasiranih u prvoj grupi (nijedno nepovoljno obeležje), dok je kod onih lica koja su bila raspoređena u šestu grupu (ostvareno između dvanaest i petnaest nepovoljnih faktora) zabeležena najviša stopa povrata – 100% (prema: Ignjatović 2013, 62–63).

Slično tome, bračni par Gluk je predstavio tablice predviđanja, na osnovu kojih su sagledane tri grupe činilaca koje utiču na delinkvenciju (društvene – psihičke – psihijatrijske), a na osnovu kojih su dalje izrađene tri serije tablica. Osnovna zamisao je bila da će se, kada se analizira pojedini maloletnik, rezultat u sve tri tablice poklapati, te da će se na taj način ukazati na verovatnoću sa kojom će konkretni maloletnik postati delinkvent. Mada je to bio veliki naučni iskorak, prognostičke tablice su se i prema priznanju samih autora pokazale kao dosta nepouzdane budući da međusobno slaganje tablica nije prelazilo 70% (prema: Ignjatović 2013, 63–64). Polazeći od tog istraživanja, Sampson i Laub, u svojoj teoriji o zločinu i devijantnosti na životnom putu, poredili su efekte socijalnih veza odraslih putem sveobuhvatne mere antisocijalnog ponašanja

odraslih u grupi delinkvenata i kontrolnoj grupi, pri čemu su došli do zaključka da, nezavisno od maloletničke delinkvencije, najveći uticaj na kriminalitet odraslih imaju stabilnost posla i privrženost bračnom partneru (Sampson, Laub 2009, 459).

Klinički model je dijagnostički i počiva na profesionalnom prosuđivanju koje sprovodi stručnjak putem intervjua sa osuđenikom i iščitavanja dokumentacije, a zatim, koristeći svoje celokupno znanje i iskustvo, donosi zaključak o riziku koji predstavlja osuđeni za sebe i zajednicu. Međutim, istraživanja pouzdanosti te vrste procene prestupnika pokazuju da se na taj način ne može pouzdano utvrditi verovatnoća povrata osuđenih. Generalna slabost tih procena je u tome što su one suviše široke i nisu empirijski povezane sa pojmom povrata. Pojedini istraživači (Andrews, Bonta 2010; Petrich, 2015) sugerišu da pojedinačni, personalni faktori (uzrast, socioekonomski status, iskustvo, verovanja, stavovi) koji su u vezi i sa ispitivačem i sa osuđenim mogu stvoriti„prividnu vezu“ i dovesti do pogrešne procene. Ipak, ti autori su identifikovali dve kategorije faktora rizika za penološki recidiv: statičke faktore (npr. uzrast, prethodne osude), koji su aspekti prošlosti i ne mogu se menjati, i dinamičke faktore (npr. antisocijalne kognicije, vrednosti i ponašanje), koji se često nazivaju kriminogenim potrebama, promenljivog su karaktera te su stoga pogodna meta za tretman (Andrews, Bonta 2010, 27). Ti autori takođe smatraju da je najveći problem sa identifikovanim potrebama taj što su one izvučene iz metaanalize recidiva, a ne iz procesa odustajanja.

Statistički (aktuarski) model se razvio kao posledica prepoznavanja ograničenja kliničkog modela. U kontekstu predviđanja povrata, verovatnoća, odnosno rizik izračunava se upoređivanjem karakteristika osuđenog sa velikim uzorkom drugih osuđenika koji su recidivirali, a čije su se karakteristike pratile i evidentirale u višegodišnjem periodu. Istraživanja pokazuju da taj model generalno može veoma dobro predvideti verovatnoću povrata. Ipak, njegova primena na pojedinačnom slučaju ima određena ograničenja budući da počiva na informacijama iz prošlosti osuđenog, te samim tim nije u stanju da prikaže promene rizika i potreba konkretnog osuđenog. Njegove skale se ne mogu upotrebiti u predviđanju atipičnih događaja kao što su, na primer, teška seksualna i nasilna krivična dela. Takođe, postoji niska prediktivnost tog modela za stare i mlade prestupnike.

2.1. Procena rizika i uslovni otpust

U donošenju odluke o odobravanju uslovnog otpusta uzimaju se u obzir i spremnost samog osuđenika i uspeh samog otpusta (Bowman, Ely 2017, 546). Da bi se uslovni otpust razmatrao, procenjuju se različiti faktori rizika, od kojih su neki već ranije pomenuti, tzv. statički i dinamički faktori. Kompleksnost donošenja odluke o uslovnom otpustu je već ranije prepoznata (Mooney, Daffern, 2014: 386) jer se mora uzeti u obzir

veoma veliki broj faktora koji treba da očuvaju bezbednost i osuđenog lica i zajednice. U kontekstu uslovnog otpusta, statički faktori obuhvataju težinu krivičnog dela, kriminalnu istoriju, odnosno prethodne osude, i eventualne ranije uslovne kazne (Gendreau, Little, Goggin 1996, 583). Ta grupa faktora se smatra značajnom za predikciju recidivizma (Schlager, 2013: 149). Za razliku od njih, dinamički faktori rizika ukazuju na oblasti koje treba ciljati tretmanom (Andrews, Bonta, 2010: 46). U istraživanju faktora koji doprinose otpuštanju na uslovni otpust, Bauman i Eli (Bowman, Ely, 2017: 556) identifikovali su prethodne osude i izvršenje kazne zatvora kao faktore koji će umanjiti šanse za uslovni otpust, dok napredak u tretmanu i izostanak disciplinskih mera doprinose većoj šansi da osuđeno lice bude uslovno otpušteno. U drugim istraživanjima, slični faktori su se pokazali kao izuzetno značajni: težina i tip krivičnog dela, kriminalna istorija, institucionalno ponašanje, mentalna bolest i faktori koji se tiču žrtava, a koji u ovom tekstu neće biti posebno obrađeni (Kinnevy, Caplan 2008, 19; Caplan 2007, 20). U svom istraživanju faktora koji doprinose odluci o uslovnom otpustu, Muni i Dafern (Mooney, Daffern, 2014: 395) kao značajne faktore navode broj disciplinskih mera i skor na skali procene rizika, dok na njihovom uzorku demografske i varijable kriminalne istorije nisu značajno uticale na odluku o otpustu. Međutim, u drugim istraživanjima se težina krivičnog dela pokazala kao značajan faktor za donošenje odluke o uslovnom otpustu (npr. Fitzgibbon, 2008, 60).

Muni i Dafern (Mooney, Daffern 2014, 387) naglašavaju da veliki broj studija koje se bave istraživanjem procene rizika u kontekstu uslovnog otpusta zapravo naglašava problematiku nestrukturiranog donošenja odluka o uslovljavanju dela kazne, te se kao glavni, a ponekad i jedini faktor za donošenje te odluke uzima to da li će osuđenik ponovo izvršiti krivično delo nakon uslovnog otpuštanja (Gobeil, Serin 2010, 252). Sveobuhvatna procena rizika koja se može unaprediti primenom normiranih instrumenata za procenu rizika, kakav je OASys koji se koristi u Srbiji, doprinosi tome da odluka o uslovnom otpustu bude doneta na adekvatniji način, te unapređuje mogućnost praćenja rizika i potencijalne štete po zajednicu (Fitzgibbon 2008, 60).

U ekspertskoj analizi povrata koje je sprovela Stevanović sa saradnicima (Stevanović *et al*. 2018, 15) rezultati istraživanja ukazali su na to da osuđena lica koja imaju viši skor na upitniku za procenu rizika imaju i veću verovatnoću da ponove krivično delo, ali i da to krivično delo bude sa elementima nasilja. Do sada kod nas nije urađeno detaljno, sveobuhvatno istraživanje koje ispituje odnos uslovnog otpusta i procene rizika pomoću upitnika. Ipak, jedno istraživanje koje je pre nekoliko godina sprovedeno u Okružnom zatvoru u Zrenjaninu, na uzorku od 50 osuđenih lica, pokazalo je da neke od kriminalno-penoloških karakteristika (*ranija osuđivanost, penološki recidivizam, vrsta krivičnog dela, početna kategorija u tretmanu, adaptacija na zatvorske uslove, prihvatanje kazne,*

disciplinska kažnjavanost, nagrađivanje, rekategorizacija tokom tretmana i broj prethodnih molbi za uslovni otpust) ostvaruju statistički značajan uticaj na donošenje odluke suda o dodeli uslovnog otpusta, pri čemu sudovi pozitivne odluke donose najčešće za ona lica koja su ocenjena niskim stepenom rizika, a najređe za one osuđenike koji su ocenjeni kao visokorizični (Jovanić 2012, 180–183). Do sličnih rezultata došlo se i u jednom drugom istraživanju kojim je obuhvaćen 121 dosije osuđenih lica koja su otpuštena iz Okružnog zatvora u Užicu i Kazneno-popravnog zavoda u Padinskoj Skeli, u periodu od januara do juna 2016. godine, kada je takođe na nivou statističke značajnosti utvrđeno da lica koja su procenjena niskim stepenom rizika češće dobijaju uslovni otpust u odnosu na kategorije srednji i visoki stepen rizika (Petrović, Jovanić 2017, 54).

Na kraju ovog izlaganja treba imati u vidu da je procena odnosa između rizika procenjenog upitnikom i tretmana osuđenih lica još jedan predmet ovog istraživanja. Međutim, mnoge studije inostranih (Meredith, Speir, Johnson 2007, 3) i domaćih autora pate od metodoloških nedostataka, koje se pre svega tiču veličine uzorka, što znatno otežava izvođenje pouzdanih statističkih zaključaka. Iz tog razloga, u uzorak smo uključili 150 osuđenih lica, od kojih je polovini odobren uslovni otpust, kako bi izvedeni zaključci bili relevantniji, makar za ustanovu u kojoj je samo istraživanje sprovedeno.

3. EMPIRIJSKI DEO

3.1. Metodologija istraživanja

U ovom delu rada prikazani su rezultati istraživanja koje je sprovedeno u KPZ u Sremskoj Mitrovici u januaru 2019. godine. Ta ustanova je najveća kazneno-popravna ustanova opšteg tipa u Republici Srbiji, sa zatvorenim, poluotvorenim i otvorenim odeljenjem, te je samim tim moguće sagledati primenu upitnika kroz napredovanje / nazadovanje u okviru različitih tretmanskih grupa.

Kao glavni cilj istraživanja postavljamo sledeće: ispitati odnos između rizika procenjenog upitnikom za procenu rizika i karakteristika tretmana i otpusta osuđenih lica u KPZ u Sremskoj Mitrovici.

U skladu sa tako postavljenim ciljem, osnovni zadaci su: (1) sagledavanje opštih podataka o učiniocu i krivičnom delu; (2) primarna klasifikacija prema tipu odeljenja i tretmanskoj grupi; (3) sagledavanje radne angažovanosti i disciplinskog kažnjavanja osuđenih; (4) analiza tipa odeljenja i tretmanske grupe u trenutku otpusta; (5) sagledavanje odnosa između stepena rizika u trenutku otpusta i osnova otpusta (redovan istek / uslovni otpust).

Osnovne hipoteze koje će biti testirane u ovom istraživanju su: (1) da najveći broj osuđenika primarno bude razvrstan u zatvoreno odeljenje zavoda, odnosno nepovoljniji tretman; (2) da najveći deo osuđenika napreduje u tretmanu u povoljniju kategoriju i (3) da oni osuđenici koji su napredovali u tretmanu češće dobijaju uslovni otpust.

3.1.1. Uzorak

Uzorak istraživanja čine dosijei 150 bivših osuđenika koji su u periodu od 2016. do 2018. godine otpušteni iz KPZ Sremska Mitrovica. U trenutku istraživanja, u toj ustanovi je bilo 2.000 osuđenika. Ispitanici su birani postupkom randomizacije, primenom programa random.org. Podeljeni su u dve velike grupe: prvu grupu čine ispitanici koji su izdržali kaznu zatvora do tri i tri godine i na koje je primenjen Mali upitnik (N = 75), a drugu ispitanici prema kojima je izvršavana kazna zatvora u trajanju dužem od tri godine, odnosno na koje je primenjen Veliki upitnik (N = 75).

3.1.2. Instrument, mere i obrada podataka

Podaci o ispitanicima su preuzeti iz ličnih listova – dosijea osuđenih lica, pri čemu se registrovane sledeće varijable:

Godina rođenja. Starost merena egzaktnom godinom rođenja ispitanika.

Državljanstvo. Kategorička varijabla, koja deli ispitanika u grupe: 1 – državljani Republike Srbije i 2 – strani državljani.

Prebivalište (teritorijalna distribucija). Kategorička varijabla, koja deli ispitanike u pet grupa: 1 – Sever: Vojvodina, 2 – Sever: grad Beograd, 3 – Jug: region Šumadije i zapadne Srbije, 4 – Jug: region južne i istočne Srbije i 5 – AP Kosovo.

Obrazovanje. Kvalitativna varijabla sa 5 nivoa: 1 – bez škole, 2 – nepotpuna osnovna škola, 3 – osnovna škola, 4 – srednja škola i 5 – završena viša škola ili fakultet.

Krivično delo. Originalna varijabla, ima 29 kategorije koje predstavljaju egzaktni tip dela zbog kojeg je ispitanik izdržavao kaznu zatvora.

Tip krivičnog dela. Binarna varijabla, sa 0 su kodirana krivična dela bez elemenata nasilja, a sa 1 krivična dela sa elementima nasilja.

Dužina kazne zatvora. Varijabla koja predstavlja egzaktan podatak o dužini trajanja kazne zatvora, iskazano u mesecima.

Ranija osuđivanost. Dihotomna varijabla, označava postojanje ili nepostojanje prethodnih osuda.

Vrsta primenjenog upitnika. Binarana varijabla, sa 0 su kodirani ispitanici na koje je primenjen Mali, a sa 1 ispitanici ne koje je primenjen Veliki upitnik.

Odeljenje u kojem se ispitanik nalazio prilikom primarnog razvrstavanja. Kategorička varijabla sa 2 nivoa: 1 – poluotvoreno odeljenje i 2 – zatvoreno odeljenje.

Odeljenje u kojem se ispitanik nalazio u trenutku otpusta. Kategorička varijabla sa 3 nivoa: 1 – otvoreno odeljenje, 2 – poluotvoreno odeljenje i 3 – zatvoreno odeljenje

Radna angažovanost. Binarna varijabla, sa 0 su kodirani ispitanici koji nisu bili radno angažovani, dok su sa 1 kodirani oni koji su bili radno angažovani u toku izvršenja kazne.

Disciplinska kažnjavanost. Binarna varijabla, sa 0 su kodirani ispitanici koji nisu disciplinski kažnjavani, dok su sa 1 kodirani oni kod kojih su zabeležene disciplinske kazne.

Vanzavodske pogodnosti. Binarna varijabla, sa 0 su kodirani ispitanici koji nisu koristili vanzavodske pogodnosti, a sa 1 oni koji jesu.

Osnov otpusta. Kategorička varijabla sa 2 nivoa: 0 – uslovni otpust i 1 – redovni istek kazne.

Napredak u tretmanu. Dihotomna varijabla, označava postojanje ili nepostojanje napretka u tretmanu.

Stepen rizika prema poslednjoj evaluaciji. Kategorička varijabla sa 4 nivoa: 1 – nizak stepen rizika, 2 – srednji stepen rizika, 3 – visok stepen rizika i 4 – veoma visok stepen rizika.

Prikupljeni podaci su obrađeni u programu IBM SPSS 20.0.

3.2. Rezultati istraživanja

Deskriptivna statistika. U uzorku ispitivane populacije u trenutku prikupljanja podataka iz dosijea prosečan uzrast osuđenika iznosi M = 39,49, SD = 8,92, sa rasponom godina od 25 do 68. U trenutku početka izvršenja kazne zatvora, osuđenici su u proseku imali M = 34,22, SD = 8,96, uz uzrasni raspon od 17 do 63 godine. Svi ispitanici su muškog pola i državljani Republike Srbije. Teritorijalna distribucija je sagledana u skladu sa sistematikom koju primenjuje Republički zavod za statistiku, koji razlikuje sledeće statističke jedinice: sever (obuhvata grad Beograd i Vojvodinu), jug (s jedne strane obuhvata Šumadiju i zapadnu Srbiju, a s druge strane južnu i istočnu Srbiju) i AP Kosovo. U skladu sa iznetom sistematizacijom, najveći broj ispitanika (68,7%) ima prebivalište u nekom od mesta koja pripadaju statističkoj jedinici sever – Vojvodina, potom jedinici sever – grad Beograd (24,7%), dok je prisustvo ispitanika

iz ostalih statističkih jedinica neznatno – ukupno 6,7%. To je bilo očekivano, imajući u vidu da se u ustanovu u kojoj je vršeno istraživanje na izdržavanje kazne najčešće upućuju lica čije je mesto prebivališta u statističkoj jedinici sever. Kada je reč o obrazovanju, najveći broj lica ima završenu srednju školu (61,5%), potom nepotpunu osnovnu (21,6%), odnosno osnovnu školu (12,8%). Neznatno je učešće lica sa visokim obrazovanjem (3,4%) i lica bez obrazovanja (0,7%).

3.2.1. Podaci o krivičnom delu, tipu dela, kazni i ranijoj osuđivanosti

Najčešća krivična dela u datom uzorku su: neovlašćena proizvodnja i stavljanje u promet opojnih droga iz čl. 246 KZ (33,3%), teška krađa iz čl. 204 KZ i razbojništvo iz čl. 206 KZ (po 20%), nasilje u porodici iz čl. 194 KZ (3,3%), ubistvo iz čl. 113 KZ (2,7%), nedozvoljena proizvodnja, držanje, nošenje i promet oružja i eksplozivnih materija iz čl. 348 KZ i zloupotreba službenog položaja iz čl. 359 KZ (po 2%).

Tip krivičnog dela. Sagledavanjem svih krivičnih dela na osnovu kriterijuma postojanja, odnosno nepostojanja nasilja prilikom vršenja dela, pokazano je da je u ukupnoj strukturi više onih bez elemenata nasilja – 65,3%. Ukoliko se tip krivičnog dela posmatra u kontekstu Malog i Velikog upitnika, ne postoje značajne razlike u raspodeli nasilnih, odnosno nenasilnih krivičnih dela ($\chi2(1) = .294$, $p > .05$), tj. odnos je sledeći: (1) Mali upitnik: nenasilna dela 67,6%: nasilna dela 32,4%; (2) Veliki upitnik: nenasilna dela 63,4%: nasilna dela 36,6%.

Dužina kazne. Prosečna dužina kazne zatvora iznosi $M = 50,81$, $SD = 33,31$ meseci, pri čemu postoje znatne razlike kada se dužina kazne zatvora posmatra kroz instrumente za procenu rizika, što je i očekivano. Naime, ispitanici na koje je primenjen Mali upitnik u proseku su izdržali kaznu zatvora u trajanju od oko 28 meseci (dve godine i četiri meseca), dok su oni na koje je primenjen Veliki upitnik izdržali kaznu u prosečnom trajanju od oko 74 meseca (šest godina i dva meseca).

Najveći broj ispitanika (58%) nije imao ranije osude, a raspon ranijih osuda kreće se od jedne do petnaest. Ne postoje značajne razlike ukoliko se povrat posmatra u kontekstu upitnika za procenu rizika ($\chi2(1) = 2.296$, $p > .05$). Ne postoje značajne razlike u tipu izvršenog krivičnog dela s obzirom na to da li je lice prethodno osuđivano ili ne ($\chi2(1) = .409$, $p > .05$). Značajne razlike nema ni u dužini kazne za dela sa elementima nasilja i bez elemenata nasilja ($t(148) = –1.858$, $p > .05$), kao ni u odnosu na raniju osuđivanost ($t(148) = –.077$, $p > .05$).

3.2.2. Tretman osuđenih lica: radna angažovanost i disciplinsko kažnjavanje

Ukoliko se posmatra radna angažovanost, od ukupnog broja ispitanika, 66% njih je bilo radno angažovano u trenutku otpusta, dok preostalih 34% nije bilo radno angažovano (Tabela 1). Razlika između radno angažovanih i oni koji to nisu značajna je s obzirom na tip odeljenja ($\chi2(2) = 75.505$, $p < .001$).

Tabela 1.
Procenat radno angažovanih prema odeljenjima u trenutku otpusta

Radno angažovanje	Odeljenje pri otpustu (%)		
	Otvoreno	Poluotvoreno	Zatvoreno
Ne	0	10	90
Da	28,3	55,6	16,2

Kada je reč o vladanju, najveći deo osuđenika (68,7%) nije disciplinski kažnjavan niti opominjan. Kod onih koji su disciplinski kažnjavani, raspon kazni se kreće od jedne do osam izrečenih disciplinskih mera. Proporcija onih kojima jesu i kojima nisu izrečene disciplinske mere ne razlikuje se značajno zavisno od toga da li su ispitivani Malim ili Velikim upitnikom ($\chi2(1) = 2.171$, $p > .05$). Postoje značajne razlike u napretku u tretmanu u odnosu na radno angažovanje ($\chi2(1) = 78.553$, $p < .001$), postojanje vanzavodskih pogodnosti ($\chi2(1) = 112.434$, $p < .01$) i postojanje disciplinskih kazni ($\chi2(1) = 49.308$, $p < .01$, Tabela 2). Tokom tretmana, u većem procentu je došlo do napretka lica koja nisu imala disciplinske mere, lica koja su bila radno angažovana i lica koja su koristila vanzavodske pogodnosti.

Tabela 2.
Procenat osuđenih lica sa napretkom i bez napretka u odnosu na radno angažovanje, korišćenje vanzavodskih pogodnosti i izrečene disciplinske mere

Napredak	Radno angažovanje		Vanzavodske pogodnosti		Disciplinske mere	
	Ne	Da	Ne	Da	Ne	Da
Ne	89,4	12,6	87,1	0	19,8	82,9
Da	10,6	87,4	12,9	100	80,2	17,1

3.2.3. Tretman osuđenih lica: procena rizika

Primarno razvrstavanje osuđenih lica – 80,5% osuđenika je primarno bilo razvrstano u zatvoreno odeljenje zavoda, dok je svega 19,5% njih bilo razvrstano u poluotvoreno odeljenje. Ukoliko se primarno razvrstavanje posmatra u kontekstu vrste upitnika, primetno je da su u poluotvoreno odeljenje u čak 74,2% slučajeva razvrstavani učinioci prema kojima je izvršavana kazna zatvora u trajanju do tri godine. Ta razlika u raspoređivanju u određeno odeljenje u odnosu na primenu upitnika statistički je značajna ($\chi2(1) = 10.962$, $p < .01$). Kada je reč o pripadnosti tretmanskim grupama, ispitanici su češće bili raspoređeni u onu grupu koja pruža niži stepen proširenih prava i pogodnosti (76,7% njih je bilo raspoređeno u tretmansku grupu V2, u zatvorenom odeljenju, dok je 72,4% lica bilo raspoređeno u B2 tretmansku grupu u poluotvorenom odeljenju). Takvi rezultati su bili očekivani, imajući u vidu zakonsku normu. Ne postoje značajne razlike u razvrstavanju osuđenih lica prema tipu izvršenog krivičnog dela ($\chi2(1) = 3.200$, $p > .05$).

Razvrstanost osuđenih lica u trenutku otpusta. Najveći deo osuđenika je u trenutku otpusta bio raspoređen u zatvoreno odeljenje (40,9%), potom u poluotvoreno (40,3%), dok je najmanje njih bilo u otvorenom odeljenju (18,8%). Ipak, primetno je da su u trenutku otpusta osuđenici u svakom odeljenju bili razvrstani u tretmansku grupu koja pruža viši stepen proširenih prava i pogodnosti (Tabela 3).

Tabela 3.
Raspored po tretmanskim grupama prilikom otpusta

Tretmanska grupa	A1	A2	B1	B2	V1	V2
Procenat	85,7	14,3	75	25	60,7	39,3

Ukoliko se pripadnost odeljenju u trenutku otpusta sagleda u kontekstu Malog i Velikog upitnika, postoje značajne razlike ($\chi2(2) = 12.655$, $p < .01$), što je prikazano u Tabeli 4. Pojedinačno posmatrano, osuđenici prema kojima je primenjen Mali upitnik najčešće su ustanovu napustili iz zatvorenog odeljenja (35,8%), dok su oni na koje je primenjen Veliki upitnik, u trenutku otpusta najčešće bili raspoređeni u poluotvoreno odeljenje (46,3%). Ipak, kada je reč o otvorenom odeljenju, odnosno tretmanskim grupama A1 i A2, postoji bitna razlika u korist lica prema kojima je izvršavana kazna zatvora do tri i tri godine, budući da su oni u posmatranom uzorku tri puta češće bili raspoređeni u neku od dve navedene tretmanske grupe, koje pružaju najširi stepen proširenih prava i pogodnosti. Drugim rečima, svega 8,5% ispitanika koji su osuđeni na kaznu zatvora u trajanju dužem od tri godine napustili su ustanovu iz otvorenog odeljenja.

Tabela 4.
Raspoređenost osuđenika po odeljenjima, na osnovu upitnika – trenutak otpusta (u procentima)

	Otvoreno odeljenje	Poluotvoreno odeljenje	Zatvoreno odeljenje
Mali upitnik	31,3	32,8	35,8
Veliki upitnik	8,5	46,3	45,1

Stepen rizika u trenutku otpusta: najveći deo osuđenika (46,3%) procenjen je srednjim stepenom rizika, visokim stepenom rizika (28,2%), zatim niskim (22,2%), dok je najmanje njih ocenjeno veoma visokim stepenom rizika (3,4%). Kada je reč o proceni verovatnoće ponavljanja krivičnog dela, koju beleži isključivo Veliki upitnik, najveći deo ispitanika je procenjen srednjim stepenom (46,7%), potom visokim (37,3%), dok je najmanje njih ocenjeno niskim stepenom rizika (16%). Razvrstanost po odeljenjima prema stepenu procene rizika prikazana je u Tabeli 4. Kao što je očekivano, najveći procenat lica sa niskim stepenom rizika raspoređeno je u otvoreno odeljenje, najveći procenat sa srednjim stepenom rizika u poluotvoreno odeljenje, a sa visokim stepenom rizika svi osuđenici su razvrstani u zatvoreno odeljenje. Te razlike su statistički značajne ($\chi 2(4) = 209.918$, $p < .001$). Važno je pomenuti da procenjeni stepen rizika ujedno ne prati i raspoređenost osuđenog lica u neku od tretmanskih grupa unutar otvorenog, poluotvorenog ili zatvorenog odeljenja, u trenutku otpusta (Tabela 5). U datom uzorku, niskim stepenom rizika je ocenjeno 22,2% ispitanika, pri čemu je njih 18,8% bilo raspoređeno u tretmansku grupu A1/A2. Drugim rečima, 3,4% osuđenika je ostalo raspoređeno u tretmansku grupu B1, odnosno u poluotvoreno odeljenje. Slično je i sa licima koja su procenjena srednjim stepenom rizika, pri čemu je ta razlika izraženija, odnosno 6% ispitanika nije bilo raspoređeno u poluotvoreno odeljenje, iako su se na osnovu upitnika stvorili uslovi za premeštaj iz V1 u B2 tretmansku grupu. Na nivou posmatranog uzorka, dakle, 9,4% ispitanika nije napredovalo u tretmanu, iako su, makar na osnovu formalnih kriterijuma, bili ostvareni uslovi za to.

Tabela 5.
Raspored po odeljenjima u trenutku otpusta po stepenu rizika
(u procentima)

Stepen rizika	Odeljenje		
	Otvoreno	Poluotvoreno	Zatvoreno
Nizak	84,8	15,2	0
Srednji	0	79,7	20,3
Visok i veoma visok	0	0	100

Napredovanje u tretmanu. U navedenom smislu, napredak u tretmanu je na osnovu upitnika ostvarilo 59,1% ispitanika. Bez napretka je bilo 36,2% lica, odnosno to su ona lica koja su i prilikom primarnog razvrstavanja i u trenutku otpusta bila raspoređena u zatvoreno odeljenje. U uzorku je najmanje onih ispitanika koji su nazadovali u tretmanu – 4,7%, pri čemu je u svim slučajevima reč o licima koja su najpre napredovala u tretmanu, do poluotvorenog odeljenja i tretmanske grupe B2, a potom su usled učinjenih disciplinskih prestupa naknadno razvrstani u nepovoljniji tretman, odnosno u zatvoreno odeljenje i tretmansku grupu V1. U tabeli 6 prikazan je procenat lica koja su ostvarila napredak ili nisu napredovala u odnosu na procenjeni stepen rizika. Razlike u procentima su statistički značajne ($\chi 2(2) = 97.383$, $p < .001$).

Tabela 6.
Procenat lica koja su ostvarila napredak ili nisu napredovala tokom tretmana u odnosu na procenjeni stepen rizika

	Nizak stepen rizika	Srednji stepen rizika	Visok i veoma visok stepen rizika
Nema napretka	0	19,1	100
Ima napretka	100	80,9	0

Nema značajne razlike u napretku tokom tretmana između lica koja su učinila krivična dela sa elementima nasilja ili bez elemenata nasilja ($\chi 2(1) = 2.298$, $p > .05$).

Osnov otpusta. U pogledu osnova otpusta, postoji ujednačenost između dva sagledana osnova: redovan istek (50%) i uslovni otpust (50%). Kada se osnov otpusta sagleda u kontekstu napredovanja u tretmanu,

postoje značajne razlike u procentu lica puštenih na uslovni otpust ili nakon redovnog isteka kazne ($\chi 2(2) = 104.680$, $p < .001$). Svi ispitanici koji nisu napredovali ili koji su nazadovali u tretmanu otpušteni su nakon redovnog isteka kazne. Institut uslovnog otpusta je primenjen isključivo prema onim ispitanicima koji su ostvarili napredak. Ispitanici koji su ostvarili napredak u tretmanu, u smislu prelaska u poluotvoreno ili otvoreno odeljenje, ustanovu su u 85,2% slučajeva napustili po osnovu uslovnog otpusta; svih 14,6% ispitanika koji su ostvarili napredak u tretmanu, a koji su iz ustanove otpušteni usled redovnog isteka kazne zatvora, bili su raspoređeni u poluotvoreno odeljenje i tretmansku grupu B2. Drugim rečima, ispitanici koji su bili raspoređeni u tretmansku grupu B1 dobijali su uslovni otpust. Ne postoje značajne razlike u procenjenom stepenu rizika za lica koja su izvršila krivično delo sa elementima nasilja i bez elemenata nasilja ($\chi 2(3) = 7.108$, $p > .05$). Međutim, razlike postoje u odnosu na to da li je osuđeno lice povratnik ili nije ($\chi 2(2) = 33.166$, $p < .001$, Tabela 7), te su tako lica koja su ranije osuđivana češće procenjivana kao visokorizična nego lica koja nisu povratnici.

Tabela 7.
Procenat različitih stepena rizika u odnosu na povratništvo

Ranije osude	Stepen rizika		
	Nizak	Srednji	Visok
Ne	93,9	60,9	29,8
Da	6,1	39,1	70,2

4. DISKUSIJA

Instrumenti koji su uvedeni u praksu izvršnog krivičnog prava Republike Srbije predstavljaju dobru osnovu za rad tretmanskih službenika, iako bi se samim upitnicima, onako kako su formulisani, mogle uputiti određene zamerke. Osnovna objektivna zamerka jeste to da upitnici mahom ocenjuju prošlost osuđenika (statistički faktori rizika) ostavljajući vrlo malo mesta za menjanje skora u toku izvršenja kazne zatvora. To potencijalno može da dovede do neujednačene prakse u postupanju na nivou svih ustanova u Republici Srbiji u onim situacijama kada treba pronaći mehanizme da osuđeni napreduje iz jedne u drugu tretmansku grupu. To pitanje je posebno značajno kada se tretman osuđenog evaluira za potrebe određenih postupaka, od kojih je najkarakterističniji postupak koji se vodi pred sudom povodom podnete molbe za uslovni otpust. Strogo formalno

posmatrano, u smislu odredaba važećih propisa, pre svega Zakona o izvršenju krivičnih sankcija (ZIKS) i Pravilnika, ne postoje ograničenja da osuđenik u toku izvršenja kazne zatvora napreduje do tretmanske grupe A1, odnosno one grupe koja pruža najširi stepen prava i pogodnosti. Iz tog razloga oni koji primenjuju propise često zanemaruju činjenicu da tretmanska grupa A1, shodno pravilima tretmana, a naročito na osnovu upitnika za procenu rizika, nije maksimum za svakog osuđenog. Štaviše, ta grupa se u praksi pokazala kao retkost, što su pokazali i rezultati istraživanja, prema kojima je svega 16,1% osuđenika u trenutku otpusta bilo razvrstano u pomenutu kategoriju.

Uzorak od 150 ispitanika nije dovoljan da bi se mogli izvoditi opšti zaključci o usklađenosti norme i mogućnosti koje daje upitnik. Ipak, na osnovu dobijenih podataka može se zaključiti da su polazne hipoteze potvrđene.

Prva hipoteza, prema kojoj najveći broj osuđenika primarno bude razvrstan u zatvoreno odeljenje zavoda, odnosno nepovoljniji tretman, potvrđena je samim tim što je pokazano da je 80,5% ispitanika primarno bilo razvrstano u zatvoreno odeljenje, najčešće u V2 tretmansku grupu. Takav podatak je bio očekivan, imajući u vidu ne samo volju zakonodavca već i opšta pravila o postupku resocijalizacije i pripremama osuđenika za život nakon izvršenja kazne zatvora, koji bi trebalo postepeno da se razvija, od najnepovoljnije do najpovoljnije tretmanske grupe.

Druga hipoteza, prema kojoj najveći deo osuđenika napreduje u tretmanu u povoljniju kategoriju, takođe je potvrđena. Ipak, za razliku od prethodne hipoteze, čini se da je napredak velikim delom relativnog karaktera, budući da je suštinski napredak, u smislu prelaska iz jedne u drugu vrstu odeljenja, onako kako je predviđeno odredbama ZIKS-a, ostvarilo 59,1% ispitanika. Maksimalan napredak do otvorenog odeljenja ostvarilo je svega 18,8% ispitanika. Međutim, nezavisno od formalnih kriterijuma te činjenice da je umanjenje ukupnog skora na upitniku za 40,9% osuđenih lica bilo nedovoljno za prelazak u srednji stepen rizika, primetan je svojevrstan napredak i 15,9% ispitanika, budući da su oni premešteni u povoljniju tretmansku grupu – V1. Podatak koji bi donekle mogao biti problematičan jeste da postoje i ona lica koja su ostvarila napredak u smislu procene rizika, ali taj napredak nije praćen premeštajem iz zatvorenog u poluotvoreno odeljenje. To je posebno značajno za ona lica koja su ostvarila mogućnost prelaska iz zatvorenog u poluotvoreno odeljenje, budući da je objektivni uslov za dodeljivanje proširenih prava i pogodnosti vanzavodskog karaktera upravo procenjen srednji stepen rizika. Drugim rečima, ukoliko neko lice ostane razvrstano u zatvoreno odeljenje, ne postoji mogućnost da osuđeniku budu dodeljene najpovoljnije pogodnosti, koje se koriste izvan zavoda. Takođe, dobijeni podatak da 6% ispitanika nije dobilo premeštaj u poluotvoreno, a 3,4% u otvoreno odeljenje, i pored ostvarenog formalnog kriterijuma, ne bi trebalo usko

tumačiti već bi taj problem trebalo sagledati u kontekstu prenaseljenosti ustanove, koja nije praćena adekvatnim uvećanjem broja zaposlenih u tretmanu, koji bi u svakom trenutku mogli da deluju efikasno, te objektivne okolnosti – planiranog isteka kazne, usled kojeg zaposleni u tretmanu nekada svesno ne menjaju program postupanja već se odlučuju za druge vidove podrške osuđenom koji bi uskoro trebalo da napusti ustanovu. Najzad, ne bi trebalo zaboraviti da određena lica ne ostvaruju napredak u tretmanu jer ne prihvataju pravila formalnog sistema, odnosno odlikuje ih ponašanje koje nije u skladu sa normama kojima se reguliše izvršenje kazne zatvora, te u tom smislu postoje i situacije u kojima druge službe, poput službe obezbeđenja, iz opravdanih razloga ne daju pozitivno mišljenje za premeštaj u poluotvoreno odeljenje.

Treća hipoteza, prema kojoj oni osuđenici koji su napredovali u tretmanu češće dobijaju uslovni otpust, potpuno je potvrđena za one ispitanike koji su u trenutku otpusta bili razvrstani u otvoreno odeljenje, tretmanske grupe A1 i A2, budući da su svi oni uslovno otpušteni. Takođe, u uzorku je primetno da su svi ispitanici koji su razvrstani u tretmansku grupu B1, u poluotvorenom odeljenju, uslovno otpušteni, dok su oni koji su bili razvrstani u B2 tretmansku grupu češće napuštali ustanovu usled redovnog isteka kazne, odnosno svega dva ispitanika iz te grupe je uslovno otpušteno. Kao što je i bilo očekivano, ispitanici koji su u trenutku otpusta bili razvrstani u zatvoreno odeljenje ustanovu su napustili po osnovu redovnog isteka kazne. Dobijeni podaci mogu se pozitivno tumačiti u smislu odredaba kojima se reguliše institut uslovnog otpusta. Takođe, ovi nalazi su u skladu sa ranijim istraživanjima u zemlji i inostranstvu, u kojima je pokazano da lica koja napreduju u tretmanu te budu procenjena nižim stepenom rizika i imaju manje disciplinskih mera imaju značajno veće šanse da budu uslovno otpuštena.

Uspeh u tretmanu tradicionalno se sagledava na osnovu dve osnovne pretpostavke: radna angažovanost i dobro vladanje osuđenog, odnosno izostanak disciplinskog kažnjavanja. Iako moderni sistemi uključuju mnoge druge vidove postupanja koji ukazuju na uspeh u tretmanu, čini se da su se pomenuta dva ipak ustalila u višedecenijskoj praksi, budući da na nedvosmislen način ukazuju na pozitivne ili negativne promene u ponašanju osuđenika. Procenat radno angažovanih i osuđenika koji to nisu (Tabela 1) može biti takav iz razloga što u okviru određenih individualnih ciljeva nije bilo predviđeno traženje zaposlenja u ustanovi već adaptacija na sistem (osuđenici koji su u trenutku otpusta bili raspoređeni u V1 ili V2 tretmansku grupu, u zatvorenom odeljenju). Rezultati ukazuju na to da su, kao što je i očekivano, napredak u tretmanu u većem procentu postigla ona osuđena lica koja su bila radno angažovana, koja su koristila vanzavodske pogodnosti i koja su bila dobrog vladanja, to jest nisu imali izrečenih disciplinskih mera.

Napredovanjem, u smislu odredaba ZIKS-a, pre svega se smatra prelazak iz zatvorenog u poluotvoreno, odnosno poluotvorenog u otvo-

reno odeljenje, budući da se stepen proširenih prava i pogodnosti koja mogu biti dodeljena osuđenom pre svega sagledavaju u kontekstu pripadnosti odeljenju, a nakon toga i pripadnosti nekoj od tretmanskih grupa koje su predviđene Pravilnikom. Podatak da 36,2% osuđenika nije napredovalo u tretmanu ne treba usko tumačiti, u smislu da nije ostvaren bilo kakav napredak u tretmanu. U praksi se dešava da određeni osuđenici napreduju, u smislu smanjenja skora na upitniku, ali ne u dovoljnoj meri da bi prešli iz jedne kategorije rizika u drugu, nižeg stepena. Ukoliko bi se napredak sagledao i u tom kontekstu, odnosno ako bi napredovanjem bila obuhvaćena i ona lica koja su napredovala iz V2 u V1 tretmansku grupu, u okviru visokog stepena rizika, onda bismo mogli reći da je bilo kakav napredak u tretmanu ostvarilo 75% ispitanika.

Na osnovu dobijenih podataka, pre svega sa aspekta uticaja procene rizika na napredak u tretmanu, ali i dodeljivanja uslovnog otpusta, može se zaključiti da jedino krajnosti nisu sporne. Oni koji su procenjeni niskim stepenom rizika i raspoređeni u otvoreno odeljenje (tretmanske grupe A1/A2) zasigurno će dobiti uslovni otpust, dok će oni koji su procenjeni visokim i veoma visokim stepenom rizika i raspoređeni u zatvoreno odeljenje (tretmanske grupe V1 i V2) sigurno napustiti ustanovu po osnovu redovnog isteka kazne. U narednim istraživanjima pažnju je neophodno usmeriti na srednji stepen rizika i tretmanske grupe B1 i B2, budući da je, strogo formalno posmatrano, za obe grupe predviđena mogućnost korišćenja istih vanzavodskih pogodnosti, ali ne i nužno primena uslovnog otpusta kao najšireg prava – mogućnosti za jedno lice prema kome se izvršava kazna zatvora. Takođe, treba sagledati i mnoge druge faktore koji se procenjuju u upitniku kako bi se dobili precizniji podaci o varijablama koje su potencijalno značajne za tretman, a posledično i za primenu određenih pravnih instituta.

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RISK ASSESSMENT AND ADVANCEMENT IN TREATMENT IN SREMSKA MITROVICA CORRECTIONAL FACILITY

Summary

Risk assessment is one of the main areas of interest of experts dedicated to the analysis of offenders convicted to imprisonment. After theoretical assumptions, consideration of the Risk Assessment Questionnaire and relevant research in this area, we present results of an empirical study conducted in PCI Sremska Mitrovica, on a sample of 150 offenders released between 2016 and 2018. The basic hypotheses were: (1) most offenders are primarily classified into closed wards; (2) most offenders advance during the treatment into a more favorable category, and (3) those who have advanced are paroled. The hypotheses are analysed from the aspect of estimated risk based on Risk Assessment Questionnaire and being in a particular treatment group. These hypotheses have been confirmed.

Key words: *Risk Assessment Questionnaire. – Risk Assessment. – Treatment. – Parole. – PCI Sremska Mitrovica.*

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JOHN MAYNARD KEYNES' *THE ECONOMIC CONSEQUENCES OF THE PEACE*: A CENTENNIAL REVIEW**

"I fought that war to preserve justice in this world. As far as I understood, I wasn't taking part in a vendetta against the German race".

Lord Darlington, *The Remains of the Day*, Ishiguro (1989, 67).

1. INTRODUCTION

It was November 1919 when John Maynard Keynes, perhaps one of the most celebrated economists of the 20th century, submitted the manuscript of his *The Economic Consequences of the Peace* to the publisher.[1] Not only did the book become an extraordinary publishing success, with an outstanding number of copies sold and numerous translations into other languages, but it had an enormous impact on both the general public and decision-makers; the impact that, especially in

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[1] The book was originally published by MacMillan and Co. Limited, London, 1920, in the first quarter of that year. It is the reprint published by Freeland Press in 2017 that is used for this review. All pages of the book in the review refer to the 2017 reprint.

the case of the former, has lasted to the present. Academics were not indifferent to it and because all of this, the book was a springboard for the author's ascent to the status of world-wide celebrity economist, perhaps the first in the history of the trade.

The book and its insights have been recurrently revisited in the past 100 years, like on the occasions of the economic and military ascent of Germany under the National Socialist regime, the end of the Second World War and reconstruction of Europe, and the recent eurozone sovereign debt crisis, for example. Doubtless, it has provided food for thought for decades, perhaps a full century.

The aim of this review is to, with centennial hindsight, analyse the book and its academic contribution. The review is not to evaluate the impact of the book on the general public opinion and in that way on the policies that were formulated, though that significant impact is to be acknowledged. Accordingly, the review deals only with the methodological issues of the book, with its features as an academic contribution, and with ten select, non-exclusive fallacies that the book has created. The character of the book is then evaluated and some possible explanations regarding that are suggested. The conclusion follows.

2. METHODOLOGICAL ISSUES

The author is very specific about the purpose of the book. It is "to show that the Carthaginian Peace is not *practically* right or possible" (Keynes, 1920, 14–15; italic in Original). Of course, the term "Carthaginian Peace" refers to the peace treaty with Germany (i.e. the Treaty of Versailles, hereafter the Treaty) and both its economic and, up to a point, political consequences. Keynes is even more specific in describing his approach, underlining that he is "mainly concerned in what follows, not with the justice of the Treaty, – neither with the demand for penal justice against the enemy, nor with the obligation of contractual justice on the victor – but with its wisdom and with its consequences" (Keynes, 1920, 26). The author's concern regarding the future occupies both his mind and the pages of his book to such an extent that the reader occasionally feels as if the war did not happen at all and that the Paris Peace Conference (hereafter the Conference) is or at least should be a gathering of old friends to discuss their common future. That feeling is reinforced as Keynes does not restrict himself to specifying the aim of the book, so he also offers his view about the task of the Conference itself: "to honor engagements and to satisfy justice; but not less to re-establish life and to heal wounds" (Keynes, 1920, 10).

The book is based on a very strong personal touch of the author who was, in his own words, "temporarily attached to the British Treasury during the war and was their official representative at the Paris Peace Conference up to 7 June 1919" and he "also set as deputy for the Chancellor of the Exchequer on the Supreme Economic Council" (Keynes, 1920, i). Accordingly, there is no doubt about Keynes' active role at the Conference as a senior official, a person in a position to influence the outcome. Such a role usually produces at least two outcomes: one is an abundance of relevant information collected during many eventful days at the Conference and through access to various information hidden from the public; the other is a personal touch in writing about the Conference – which is not always the ally to the author.

The latter is evident. Perhaps it is mostly the personal touch that provides vivid sketches of the main characters: the crucial participants of the Conference. For example, Woodrow Wilson, the US president "was not a hero or a prophet; he was not even a philosopher; but a generously intentioned man, with many of weaknesses of other human beings, and lacking that dominating intellectual equipment which would have been necessary to cope with the subtle and dangerous spellbinders..." (Keynes, 1920, 16). Even worse for the US president "...this blind and deaf Don Quixote was entering a cavern where the swift and glittering blade was in the hands of the adversary" (Keynes, 1920, 17). Whoever the adversary was, perhaps the US president would not have been blind and deaf had he followed the authors' advice.

The sketch of Clemenceau is not only very detailed, but at least ostensibly very gracious, since for Keynes, he is "by far the most eminent member of the Council of Four and he had taken the measure of his colleagues" (Keynes, 1920, 11). The author obviously likes the way Clemenceau talks, behaves and even dresses, but the problem with the French prime minister is not with him personally but with his aims as he believes "in the view of German psychology that the German understand nothing but intimidation... Therefore you must never negotiate with a German or conciliate him; you must dictate to him" (Keynes, 1920, 13).[2] Although the author provides no evidence for such Clemenceau's beliefs, very early on in the book the reader is provided with a prime suspect for the Carthaginian Peace, brought on by the Conference.

There is no detailed sketch of UK Prime Minister Lloyd George,[3] but the author assesses him as a seasoned and skilful politician. He

[2] Annoyed with such an intrusion in the personalities of the Conference participants, Taussig (1920, 383–384) in his review of the book points out that "This degree of intimacy with the character of the actors is vouchsafed only to writers of fiction".

[3] The reasons for Keynes' decision not to include a sketch of Lloyd George in the book are provided in Harrod (1971). The sketch is not magnanimous to Lloyd George

possesses “swiftness, apprehension and agility” (Keynes, 1920, 17) and “his natural instincts are... right and reasonable” (Keynes, 1920, 53). All the problems stemming for the UK prime minister are due to his decision to call for general elections immediately after the Armistice, which Keynes considers “an act of political immorality” (Keynes, 1920, 52). In the election campaign Lloyd George promised substantial wealth transfer from Germany to the UK constituency and because of this harsh reparation terms were imposed on Germany in the Treaty. In short, the UK prime minister is a political opportunist whose immoral behaviour made him a secondary suspect for the Carthaginian Peace.

Although the book does not contain sketches of any members of the German delegation, there are extensive and affirmative quotations of the main address by the head of German delegation, Foreign Minister Ulrich von Brockdorff-Ranzau, emphasising the values of the German reply with the “justice and importance of much of its content” and a “truly broad treatment and high dignity of outlook” (Keynes, 1920, 26). Alas, these qualities were not relevant with the ardent determination of the two to make the Carthaginian Peace and the blindness and deafness of the US president preventing him from stopping them in their endeavour.

As in many other cases, the bold judgments and uncompromising insight of the author are not followed by any evidence or at least the evidence is not cross-checked. Many of the insights are nothing but assumptions treated as axioms, like those of the motives of the peoples and nations. For example, “it was the policy of France to set the clock back and to undo what, since 1870, the progress of Germany had accomplished. By loss of territory and other measures her population was to be curtailed; but chiefly the economic system, upon which she depended for her new strength, the vast fabric built upon iron, coal, and transport, must be destroyed” (Keynes, 1920, 14).[4] Furthermore, on a more personal level, “Clemenceau’s aim was to weaken and destroy Germany in every possible way,... he had no intention of leaving Germany in a position to practise a vast commercial activity” (Keynes, 1920, 58). Keynes provides no evidence supporting that insight. Contrary to this insight, it is far more logical, taking into account the situation in his country after winning the war, that Clemenceau’s aim was, in the short term, to facilitate

(“this half-human visitor to our age”), especially regarding his motives. Skidelsky (1983) provides the omitted part of the book on Lloyd George.

[4] Nonetheless, in the other section of the book, considering the issue of the Allies countries’ public expectations, Keynes himself contradicts this insight. “The more extravagant expectations as to Reparation receipts, by which Finance Ministers have deceived their publics, will be heard of no more when they have served their immediate purpose of postponing the hour of taxation and retrenchment” (Keynes, 1920, 36). So, according to this insight, it is about domestic public opinion, not about destroying Germany after all.

reconstruction of the French industrial (primarily mining) facilities and infrastructure, destroyed by the German armed forces, as well as to ensure that France will service its financial obligations to the creditors (mainly the US), and in the long term to obtain sustainable national security for France against Germany and its invasion. With centennial hindsight and with insight in an abundance of documents, historiography confirms this very logic (MacMillan, 2001; Tooze, 2014; Neiberg, 2017; and Sharp, 2018).

Not only is evidence not provided throughout the book, but there is patronising attitude towards the countries on the winning side. For example, Keynes specifies that "If the European Civil War is to end with France and Italy abusing their momentary victorious power to destroy Germany and Austria-Hungary now prostrate, they invite their own destruction also, being so deeply and inextricably intertwined with their victims by hidden psychic and economic bonds" (Keynes, 1920, 1–2). Not only that, according to the author, although uncorroborated by evidence, destruction is the aim of France and Italy, but the leaders of these two countries are not aware of their own destruction in due course, if they accomplish that aim.

In cases when evidence is provided in the book, it is not cross-checked. For example, Keynes points out that the official at the Conference "learnt from the lips of the financial representatives of Germany and Austria unanswerable evidence of the terrible exhaustion of their countries" (Keynes, 1920, 3). It is undisputable, nonetheless, that there were strong incentives for the financial representative of the two countries not to tell the truth, not to be unbiased and to overestimate the difficulties and exhaustion in their own countries, not only hoping, but actively trying to achieve that the peace terms regarding reparations are not so harsh for them. Nonetheless, the author takes these testimonies for granted and builds his case of that evidence, without any independent testimony. One way or the other the word *incentive* is hardly mentioned in the book. The economics of the time, obviously, did not understand properly the role of incentives, but that methodological drawback can lead to the wrong conclusions.

From time to time, Keynes claims that his own strong value judgments, whatever the ground for them is, are widely accepted, almost a conventional wisdom. "The judgment of the world has already recognized the transaction of the Saar as an act of spoliation and insincerity" (Keynes, 1920, 33). It is hardly probable that the world was very focused on the transaction of the Saar in spring of 1919 and it is very unlikely that France, no doubt a part of the world, shared that very value judgment.

Taking into account these methodological drawbacks, it is not surprising that the book produced a number of fallacies. With centennial

hindsight, this review addresses only ten of them. The analysis of some of these provides evidence on further methodological flaws of the book.

3. FALLACIES OF *THE ECONOMIC CONSEQUENCES OF THE PEACE*

3.1. 1st Fallacy: The Treaty is Not Fair to Germany

Keynes first objection, that the Treaty is not fair to Germany, is based on the procedural grounds as the author takes into account the sequence of events that have led to the Treaty. After a military disaster on the Western Front and the collapse of the German Army, though not mentioned by the author, it was the German Government, based on the advice of the military leaders, which on 5 October requested the ending of the war, in a note to the US president, accepting the Fourteen Points. Following the exchange of notes, and after the final note of the US administration (signed by Secretary of State Robert Lansing, on the behalf of the president) on the behalf of all the main Allies on 5 November, stipulated that the peace terms will be based on the Fourteen Points (formally referred to as the speech of 8 January) with some additional provisions. One of them is that "compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea and from the air".[5] Based on that note, the German Government formally requested negotiations for an armistice on 7 November. On 11 November an armistice agreement was signed and became effective on the same day.

According to Keynes, the Treaty is essentially a breach of "the Contract between Germany and the Allies resulting from the exchange of documents" and the contract provisions are "plain and unequivocal" (Keynes, 1920, 24). The first problem with that insight is that there was no contact whatsoever between the governments and the only document that the German side signed is the Armistice agreement.[6] The exchange of notes cannot be considered a contract and no contractual obligations for the parties can be generated from such an exchange. Furthermore, many provisions of the Fourteen Points and subsequent speeches of the US president are nothing but principles. Even Keynes writes about "spirit, purpose and intention" (Keynes, 1920, 25) and these elements simply do

[5] The document is retrieved from: *https://history.state.gov/historicaldocuments/frus1918Supp01v01/d385* (last visited 10 January 2020).

[6] The Armistice Agreement is not very extensive on economic issues. There is only one general provision in the Agreement: "Reparation for the damage done" (Article XIX). It is quite impossible to demonstrate that such a general provision had been violated by any peace treaty based on the Agreement.

not constitute contractual obligations, so obligations of that kind cannot be violated. Finally, Keynes does not specify which of the Fourteen Points (some of them impose very specific obligations on Germany, like the one of the returning of Alsace-Lorraine to France) have been violated by the Treaty. The reason is obvious: none of them were.

Cornered with all the arguments against his thesis regarding breaching of the Contract, Keynes conveniently (for him) jumps on to other territory – the vague one of international morality. "The German commentators had little difficulty in showing that the draft Treaty constituted a breach of engagements and of international morality comparable with their own offence in the invasion of Belgium" (Keynes, 1920, 26). Leaving aside unbiasedness of the German commentators and invasion of Belgium as a comparison yardstick, it is now evident that even Keynes is not taking his notion of the contract violation seriously but moves to the elusive territory of "international morality" and its violation. The standard of proof in that territory is, how conveniently, very flexible.

This section of the book is, however, very informative. It is now evident that the German side was informed *ex ante*, i.e. before the armistice negotiations started, that compensation would be made by Germany for all the damage done to the civilian population and their property and that the German war was one of aggression.[7] Based on this information, among other things, the German side accepted the terms and started the armistice negotiations. As to the procedural fairness of the peace process, and the Treaty as its outcome, this section of the book, whatever the intention of the author may have been, demonstrates that the process was not unfair.[8] Whether the sides were satisfied with the outcome is an entirely different question.

[7] The concept of compensation of the damage to the civilian population and its property stipulated by Wilson's speeches and the note, and employed by the Conference is quite distinctive to the concept of indemnity in which one side (a defeated one) covers all the war costs of the other, winning side. Germans enforced that very concept about eight months before the Armistice, in the Treaty of Brest-Litovsk with Russia. There was a long tradition of Germans adhering to this concept, as indemnities were paid by France after the Franco-Prussian War in 1871, as stipulated by the peace treaty imposed by Prussia/ Germany. This tradition was shared by other nations.

[8] It is a bit puzzling that Keynes does not mention in the book a specific feature of the Conference that could be the ground for considering the peace process unfair: there were no negotiations with Germany, i.e. its representatives, over the terms of the Treaty. Instead, as Clark (2017, 290) points out "draft terms formulated in copious detail were presented to the Germans, in effect on a take-it-or-leave-it basis". That was not the idea at the beginning of the Conference, at least not the idea of the British and American representatives, but it prevailed by March 1919. Sharp (2018, 38) provides the reasons why the crucial decision makers changed their opinion during the Conference, being aware of the fragility of their alliance. Whatever the reasons were, the take-it-or-leave-it approach of the Allies provided grounds for German's public relations effort to proclaim that the Treaty is nothing but a *Diktat*.

3.2. 2nd Fallacy: The Great War Did Not Happen at All

Surprisingly, there is no chapter on the war in the book. Chapter II, "Europe Before the War", is followed by Chapter III, "The Conference", as if nothing happened between Europe before the Great War and the Conference. For a hypothetical *tabula rasa* reader of the book, the main question would have been what was the Conference about, because there is virtually no information in the book about it.

Here and there, though, there is some information, for example, that Germany invaded Belgium, although there is no information about the invasion of France, and that the British merchant fleet suffered some losses, though it is not mentioned that these losses were due to the unrestricted submarine warfare by the German Navy. Nonetheless, apart for this scattered intelligence, there is no general information about the war. Not only is there no information on the role of Germany in starting the Great War, or information that the war was not conducted on German territory, but also there is no information that it had virtually no effect on German industrial capacities, infrastructure and its merchant fleet.

What is particularly missing from the book are the insights about how the war damage to the civilian property on the occupied territories had been created. It was "Germany's deliberate sabotage of mines, factories, orchards and other property in the 1918 retreat and even after the Armistice..." (Sharp, 2018, 37) that are not mentioned in the book. It was the deliberate flooding of coal mines in northern France, the source of its cooking coal, during the 1918 German retreat, that had a substantial impact, because it took a decade to restore normal production. Furthermore, "during the fighting, whole industries were removed to Germany from France and Belgium" (Marks, 2013, n. 52). After the Armistice, some of the property that could be moved easily, like rolling stock, agricultural equipment, seed and cattle, was deliberately moved to Germany after the Armistice and contravening the Agreement, as a segment of "economic warfare" even subsequent to the straightforward one (Marks, 2013, 643 and n. 52). Accordingly, the damage done to civilian property in Belgium and France was not damage that was the unintended consequence of warfare, i.e. legitimate military activities, restricted to the battlefield, but the result of deliberate, widespread and very well-organized actions by the German armed forces. In short, it was the intentional infliction of damage unrelated to the war effort.

Although unrestricted submarine warfare practice by the German Navy was not an unintended consequence of naval warfare, but its essential and unavoidable part, it was also a deliberate, widespread and very well-organized activity directed at the destruction of civilian property. None of these events and actions are even mentioned in the book. As the author is obsessed with the future, this could be an explanation for neglecting the

past, although in that case Chapter II "Europe before the War" should not have been included in the book. It would be highly speculative to consider the reasons for such inconsistency. One way or the other, according to the book the Great War did not happen at all.[9]

3.3. 3rd Fallacy: Death Sentence for Many Millions

In response to the draft Treaty that was delivered to the German Government, its Foreign Minister Ulrich von Brockdorff-Rantzau addressed the Conference with a three-hour response. Keynes extensively quotes this address with its final sentence: "'Those who sign this Treaty will sign the death sentence of many millions of German men, women and children'" (Keynes, 1920, 90), and finally subscribe to the view, as Keynes' following sentence in the book is simply "I know of no adequate answer to these words" (Keynes, 1920, 91). In short, millions will die.

In hindsight, there is no evidence that a single German man, woman or child died as a consequence of the signing the Treaty.[10] But this insight is a bit trivial. What is much more important is what is missing in the book: Keynes does not comment on the features and results of the German approach to addressing the Conference. The author is, to use his own words describing the US president, blind and deaf in this case. For a side that would like to change the draft Treaty, this approach was far from effective. Three hours of the speech in legalistic German, described as pedantic, with the speaker sitting contrary to diplomatic protocol (Tampke, 2017, 139), and the content full of accusation of the Allied countries, their governments, i.e. the participants of the Conference that Brockdorff-Rantzau was addressing, did not go well with them. On his way out the US president commented: "Germans are really a stupid people. They always made the wrong thing... They don't understand human nature. This is the most tactless speech I ever heard" (Tampke, 2017 139; Neiberg, 2017, 73). Lloyd George agreed: "it was deplorable to let him talk" (Tampke, 2017, 139) and confess to Clemenceau that "the speech at long last made him understand why French hate the Germans as much as they did" (Neiberg, 2017, 73).

So, there is no doubt that Brockdorff-Rantzau did a poor job of making Germany's case at the Conference and convincing the representatives of the Allies to be more benevolent to his country in the

[9] Nonetheless, as demonstrated by Boff (2019), even focusing only to the ostensible consequences of the war, i.e. the aims accomplished by the war, the book played a major role in constructing the image in Great Britain of the Great War as "a mass slaughter of epic futility".

[10] Mantoux (1944), also in hindsight, provides a list of Keynes' predictions from the book that proved to be wrong, especially those regarding iron and steel output, and the output and productivity of the coalmines in Germany and Europe.

terms of the Treaty. Nonetheless, that does not necessarily mean that Germans are stupid, to use the words of the US president, but perhaps that the priorities of von Brockdorff-Rantzau and the German government were something else. The content of the speech, its structure (he made his own Fifteen Points, one more than Wilson) and the information that he leaked the speech to the press before the Conference counterparties have a chance to see it (Neiberg, 2017, 73), infer that this speech was nothing but a public relations exercise and that "was chiefly addressed to the German domestic audience" (Tampke, 2017, 139).

Such an orientation of the German Government delegation was rather rational in the time when it was inevitable that Parliament was about to take a vote on ratifying the Treaty that would be imposed on Germany, so it was the executive government's legitimate policy to ensure that none of the members of the cabinet were labelled as traitors in the wholesale political accusations that could be expected. Accordingly, this specific government policy is not a problem. The problem is that the author of the book fully subscribed himself to such a policy, and the PR activities in its implementation. And that very subscription made his predictions, not only about the many millions of deaths, quite wrong.

3.4. 4th Fallacy: The Role of German Fleet and Colonies

Keynes is appalled by a provisions of the Treaty that "Germany has ceded to the Allies all the vessels of her mercantile marine exceeding 1600 tons gross, half vessels between 1000 tons and 1600 tons,..." and "has ceded to the Allies all her rights and titles over her oversea possessions" (Keynes, 1920, 27). The reason for such attitude on the part of the author can found in his insight that "The German economic system as it existed before the war depended on" among other things "Overseas commerce as represented by her mercantile marine, her colonies... and the overseas connections of her merchants" (Keynes, 1920, 27).

The problem about this author's insight is that he himself undermines it in the book. The statistics on the first and second largest customer as well as the first and the second largest source of supply includes only European, most of them neighbours, not overseas countries, let alone colonies (Keynes, 1920, 7). German investments were focused in Russia, Austria-Hungary, Bulgaria, Rumania and Turkey (Keynes, 1920, 7) – hardly overseas countries, and definitely not German colonies. A table on the regional structure of German foreign trade in 1913 (Keynes, 1920, 77) identifies the United Kingdom, Russia and the United States as the main foreign trade partners – although the US is an overseas trade partner; there is no foreign trade role of German colonies whatsoever.

Although the author himself undermines the case for economic relevance of Germany overseas trade and the economic role of German colonies, he believes that requisition of the vast segment of German merchant fleet would have adverse effects on German economy. "Germany will have to pay to foreigners for the carriage of her trade such charges as they may be able to exact, and will receive only such conveniences as it may suit them to give" (Keynes, 1920, 27). The reader is confounded by this sentence. It is not clear what the problem is: the sheer fact that foreign shipping companies will transport German export and import or the fare that the German exporters and importers will bear, or both. As to the first issue, merchant fleet is not a navy; it consists of companies that provide maritime transportation services on the international market on commercial grounds and it provide it to the foreign trading commercial companies, not to nations. Hence, it is irrelevant whether German export or import, arranged by the foreign trade companies, is transported by a German or, say, a US shipping company and which companies are paid for that service. As to the fares, there is a single equilibrium price on the international maritime shipping market, established by competition of the maritime shipping companies in that market, and there is a no evidence that there was any incentive for price discrimination against transportation of German merchandise, either its export or import.

The equilibrium price of international commercial shipping at the time was most likely higher than before the war, due to the lack of supply of the service, because of the capacity constraint created by unrestricted submarine warfare of the German Navy, and destruction of substantial shipping capacity of the merchant Allied fleet, especially Great Britain's. Nonetheless, Keynes just does not mention these losses, nor that these loses were quite a justified rationale for the requisition of the German fleet in order to compensate for the damage done to civilian property – merchant ships,[11] let alone that in due course high equilibrium prices of maritime transportation provide incentives for shipbuilding and expanding the supply of this commercial service, bringing the prices down.

Finally, the quoted sentence reveals Keynes' mercantilist attitude: Germany should have its own merchant fleet and only that fleet should be used for the maritime transportation of German exports and imports, i.e. it should not "pay foreigners" for that service, even if the foreign companies are more efficient and thus, due to competition, provide better commercial terms. The same attitude can be spotted in the case of the coal industry and Keynes' attitude towards border rearrangements that would award Upper Silesia to Poland. "Economically it is intensely

[11] In another chapter Keynes specifies that the total losses of the British mercantile vessels numbered 2,479, with an aggregate of 7,759,090 tons gross (Keynes, 1920, 50). Keynes does not provide the comparable figures for the requisition of the German merchant fleet, so the reader cannot conclude which part of the British merchant fleet losses had been compensated by the requisition of the German merchant fleet.

German; the industries of Eastern Germany depend upon it for their coal; and its loss would be a destructive blow at the economic structure of the German State" (Keynes, 1920, 34). As if those coalmines did not have incentive to earn profit by exporting the coal to traditional customers in eastern Germany, supplying it with coal instead of searching for virtually non-existent new customers in their own nation state. Obviously, Keynes downplays or even neglects the virtues of free international trade, violating one of the Fourteen Points, and implicitly subscribing to autarchy as a preferred option, at least for Germany.[12]

In short, Keynes' writings in the book about German colonies and its merchant fleet could be described, by borrowing the title "much ado about nothing".

3.5. 5th Fallacy: The Damage Done and the Reparations

Keynes does not doubt the principle that "compensation will be made by Germany for all damage done to the civilian population of the Allies and to their property by the aggression of Germany by land, by sea, and from the air", as there is a clear difference between the concept of compensation to the civilian population and indemnities for the general costs of the war. The devil is, as usual, in the details, with three specific interrelated questions. First, what constitutes the damage? Second, how should the damage be calculated? Third, what is the amount of damage?

As to the first question, physical damage to the civilian population property is beyond dispute. The implication is that the physical damage is limited to the direct actions of the German armed forces, i.e. the German Army in the occupied parts of Belgium and France, and the German Navy on the sea against Allies, mainly the British merchant fleet. Nonetheless, the expectations of the British constituency were higher, taking into account that France and Belgium would receive bigger amount of compensation due to the occupation of their territory. So, it was the UK prime minister's idea that the compensation should include amount of the allowances granted during the war by the Allied Governments to the families of mobilised persons and the amount of the pensions and compensation in respect to the injury and death of combatants, payable by these governments. Keynes opposes the idea and rightly so. This is not compensation of civilians, but the compensation of governments. The author rightly points out that, by using the same logic, general costs of war are costs to the taxpayers, i.e. civilians, hence indemnities for the general costs of war should be treated as compensation of the civilians for the

[12] As demonstrated by Aly (2005) and Tooze (2006), escaping international trade and creating self-sufficient autarky – since Germany must control everything – was precisely the economic motive for the imperial expansion of Nazi Germany, especially in the East. Acquiring the *Lebesraum* is exactly that – gaining resources and organising their exploitation, including the slave labour, under own terms.

damage (increased taxes) done to them because of the war. Nonetheless, the political economy argument won, and these compensations were, at least in principle, included in the reparations.

The second question is how the damage should be calculated. Keynes is annoyed with the various high figures circulated by the representatives of the Allies and he boldly steps forward with his own estimate, done in a vague way that is incomprehensible to the reader, ostensibly based on the pre-war census data of the national wealth of Belgium and France.[13] His back-on-the-envelope calculation of the physical damage ends up with US$ 10.6 billion, rounding it down to 10 billion, concluding that "it would have been a wise and just act to have asked the German Government at the Peace Negotiations to agree to a sum of $10,000,000,000 in final settlement, without further examination of particular" (Keynes, 1920, 51). Nonetheless, as to the figure, the proper way to calculate the damage is to calculate the replacement costs of the civilian property. That procedure takes time to complete and the result definitely could not have been delivered during the Conference. It is very likely that this very method was used by the US Army Corps of Engineers, which finished its report in 1921, estimating the total damage to the Allies, excluding Czechoslovakia, Russia and Poland, at US$ 40 billion (Brunett, 1965, 46), four times more than the Keynes' own estimate.

The German counter-proposal, made during the Conference, before any figure was stipulated by the Allies, at US$ 25 billion is embarrassing for Keynes, as it is two and a half times larger than his own calculation, so he downplays the proposal, evaluating the proposal as "somewhat obscure, and also rather disingenuous" (Keynes, 1920, 86). Furthermore, Keynes is patronising towards German delegation, specifying that "... [they] would have done better if they had stated in less equivocal language how far they felt able to go" (Keynes, 1920, 87). But Keynes substantially downplays the German counter-proposal with figures. First, the author subtracts US$ 10 Billion from the amount Germany offered ostensibly on various credits (four kinds of them) in their counter-proposal. Keynes just specifies that US$ 10 billion figure is a rough estimate of all the credits, although he provides no clue to how he came to that figure. One way or the other, this reduces the amount to US$ 15 billion. Then, according to Keynes, one should "halve the remainder in order to obtain the present value of a deferred payment on which interest is not chargeable. This reduces the offer to $7,500,000,000" (Keynes, 1920, 87).[14]

[13] The only transparent Keynes' calculation is the compensation for the sunk British merchant fleet vessels, calculated at the US$ 200 per gross ton (Keynes, 1920, 50).

[14] Unfortunately, Keynes does not provide the elements for his calculation of the present value: time frame and discount factor, so that it may be repeated based on other nominal values.

Ostensibly, this makes the German offer (US$ 7.5 billion) for reparations smaller that Keynes' recommendation (US$ 10 billion) and the embarrassment will hopefully disappear. The only problem is that the comparison of these two figures is not methodologically correct, since Keynes compares nominal, i.e. face value, of his recommendation with the present value of the German offer. Accordingly, Keynes' recommendation should be expressed in terms of its present value. The author breaks down his recommendation into the following elements: (1) Further credit of US$ 2.5 billion on various grounds, leaving its nominal value to US$ 7.5 billion. (2) The remaining balance "should not carry interest pending its repayment, and should be paid by Germany in thirty annual instalments, beginning in 1923" (Keynes, 1920, 102). With a discount factor of 3% (quite reasonable for the time), the present value of the figure of the reparations Keynes recommended is US$ 3 billion. With a methodologically correct comparison, i.e. comparison of the present values, the German offer to the Conference was 2.5 times greater than Keynes' recommendation for reparations.

At the end of the day, the Conference did not specify any figure or formula for German obligations but left the task to the Reparations Commission. The amount that was set for paying by the Reparations Commission in London in May 1921 was effectively US$ 12.5 billion,[15] slightly more than what was Keynes' recommendation in the book and much less than US$ 40 billion, the amount that, according to his "rough estimate, the Treaty demands of her [Germany]" (Keynes, 1920, 87).

As to the reparations, the crucial conceptual question is: was it better to have a round and finite figure however it may have been calculated, or to have the decision on the number that is flexible, that would in due course take into account Germany's changing capacity to pay. Keynes insists that the Conference should have set a defined figure of the reparations and should not have left it to the Reparations Commission. Insight from the modern theory of economic regulation suggests that the finite figure is better as it creates an incentive for efficiency, as the surplus above that figure is left to the regulated entity. The problem with that approach is that such a figure can be set too high, above the damage done and the other party's capacity to pay, or too low, below both values. The probability of both errors increases if the job is done hastily, during

[15] This was the total amount of A and B bonds (with thirty years maturity) issued by Germany to the Reparation Commission. Nominally, the amount of the reparation was US$ 33 billion and that included C bond. It was obvious that these bonds would never been issued and that the total figure of the German reparation was set only for calming down domestic constituency in the UK and France. According to Feldman (1995), information that the C bonds would not be issued was communicated to Germany through diplomatic channels. Germany's annual obligation was set at US$ 500 million plus 26% value of its export. Marks (1969) considers this outcome as tremendous victory for Germany.

the Conference and under pressures from the constituencies of the Allied countries.

It is reasonable to conclude, following Marks (1969) and Ritschl (2012), that the decision to postpone setting the figure to 1921 made the reparation figure smaller than it would have been had it been set during the Conference, since the passions and expectations of the Allies public opinion moderated.[16] Furthermore, skilful presentation of the Reparations Commission decision in terms of public relations made constituency of the Allied countries happy with the nominal figure that looked like substantial – it was far above Germany's actual burden. There was no room for such a compromise at the Conference.

The Reparations Commission established that the annual burden of Germany should have two tiers: one fixed and the other variable, specified as a percentage of its export. On one hand this does not violate Keynes' idea of a definite figure for reparations, and on the other it takes into account German capacity to pay, measured by its export. Not only that the notion of capacity to pay is taken into account, but such a scheme takes into account that this capacity is variable in time.

It is now the very concept of capacity to pay – the central topic of the book – that should be thoroughly explored.

3.6. 6th Fallacy: Germany's Capacity to Pay

Perhaps the most famous or rather infamous argument associated with Keynes' book is the one about Germany's capacity to pay the reparations. In a nutshell: Keynes' position is that German capacity to pay reparations was limited to US$ 10 billion, by strange coincidence, exactly the same figure that Keynes presents a few pages earlier as the amount of damage done by Germany, and far below what Keynes expects that the total amount of German obligations would be (US$ 40 billion). That very coincidence, and the round and definite figure, and the lack of any methodological explanation how the calculation was done, undermines the credibility of both figures and the methodology by which Germany's capacity to pay was estimated.

The first methodological problem of the book is that the concept of capacity to pay employed by Keynes in completely static, based only on the foreign trade balances recorded in that last pre-war year, adjusted only for Germany's (estimated) territorial losses. Effectively, according to Keynes, a country's capacity to pay does not change in time, economic agents and government do not respond to incentives, for example those

[16] As Marks (1969, 357) put it "The preference for leaving the sum unsettled stemmed not only from political difficulties but also from the hope that, as wartime passions abated, a more moderate settlement would be possible".

created by the reparations, or to external shocks. With such an attitude, it was inevitable to conclude that Germany's capacity to pay was constant and rather low.[17]

The second methodological problem of Keynes' analysis is that there is no time frame for paying the reparations, i.e. capacity to pay is not considered over time. The same amount of the obligation spread over say 20 or 40 years is something completely different as the capacity to pay is ultimately linked to the GDP of the country and its share of the annual instalment, i.e. the outflow to the GDP that matters. After all, capacity to pay is nothing but the share of the GDP that can be extracted from a country without a detrimental effect on its day-to-day economic life and economic growth. In addition to that, the longer the time frame, the more time there is for economic agents and the economy as a whole to adjust to the new conditions, to grow and to increase their capacity to pay.

Neglecting the link between Germany's capacity to pay and its GDP/GNP is the third methodological weakness, as Keynes considers the capacity to pay only as the foreign trade surplus, as the reparations payment "can only be made by Germany over a series of years by diminishing her imports and increasing her exports, thus enlarging the balance in her favour which is available for effecting payments abroad" (Keynes, 1920, 72). Based on this insight, Keynes wrongly assesses Germany's pre-war trade balance as the only ground for evaluating its capacity to pay, entirely neglecting the relationship between reparatory obligations and the GDP.[18] Furthermore, Keynes neglects that the reparations are paid (by the government) inevitably from the budgetary surplus, and such a surplus must be achieved for the reparations to be paid.[19] In hindsight, it is clear from the sequence of events following the Treaty that Germany's

[17] Even an episode unrelated to the German economy demonstrates that even static (asset based) capacity to pay is not constant, as the destructive capacity of the German military elite should not be underestimated. The capacity to pay is diminished by scuttling the ships of the captured German Navy, which the German counterproposal identified as assets that would be counted as reparation to the Allies, due to a decision of Admiral von Reuter's decision to scuttle, a few days before signing the Treaty, the whole German squadron interned at Scapa Flow. Keynes does not mention this event in his book.

[18] Ritschl (2012) calculated the ratio of public debt in 1921 to the GNP for France, Great Britain and Germany (including reparations), demonstrating that the German ratio (147%) was only slightly higher than the British (144%) and French (135%). Furthermore, if this, international economics approach is accepted, it is not trade balance that should be considered, but the payment balance, both the current and the capital, since it is the flow of finances (money) that is relevant, not the flow of goods.

[19] For this consideration, it is irrelevant how the budgetary surplus is achieved. For example, it can be achieved by decreasing domestic consumption, both private (by increased taxation, decreasing the level of available income) or public. Alternatively, it can be achieved by borrowing either domestically or internationally, for example by

frequent defaults on reparations were due to a budgetary deficit (Tooze, 2016), and that the deficit was primarily due to the low taxes (McMillan, 2001).[20]

Ten years later, and following the Dawes Plan, the author accepts (Keynes, 1929) that there is not one but two separate problems, a budgetary and a transfer problem, and that budgetary surplus is a necessary condition for paying reparations. Then Keynes focuses to the transfer problem, i.e. the way that the budgetary surplus is transferred to the other countries, neglecting that Germany in the 1920s had recorded a surplus on the balance of payment, as the total inflow from abroad, mainly due to the US loans, had been greater than the outflow. Keynes specifies that decreasing German real wages is inevitable for increasing export, generating the trade balance surplus and solving the transfer problem. Nonetheless, as demonstrated by Ohlin (1929), the problem is not on the supply, but on the demand side, as surplus on the balance of payment increased the German demand for domestically produced goods (consequently decreasing German export) and increased the German demand for imported goods (increasing German import and undermining the foreign trade balance surplus or generating its deficit). Accordingly, the surplus on the payment balance (including reparations as the outflow) creates the transfer problem.[21] The political consequence of elimination of the balance of payment surplus would be the decrease in the purchasing power of German consumers and their living standard.

The problem with Keynes' concept of Germany's capacity to pay was recorded immediately after the publication of the book. Day (1920, 305) points out: "The question of what the Germans 'can' pay involves social and political factors which are going to have immensely more influence on the sum that Germany actually does pay than are economic theories or antiquated economic facts". Hence, the alternative concept of Germany's capacity to pay could be a political economy one, basically a concept of willingness to pay. As demonstrated by Sharp (2018, 40), there are three basic disagreements between the Allies and Germany at the Conference and after the signing the Treaty: "that its [Germany's] pre-

emission of bonds. Hence, the broad concept of budgetary surplus is used in this paper, irrespectively of the political consequences of how the surplus is achieved.

[20] MacMillan (2001, 196) provides a political explanation of the low taxes in post-war German, inherited from the war period, as the war effort was funded by bonds based on domestic borrowing from the population, with the idea that indemnities paid by defeated countries will provided cash flow for paying back the war loans. The terms of the Treaty of Brest-Litovsk and the Treaty of Bucharest support this explanation.

[21] Carlson and Jonung (2019) provides a thorough and detailed review of the debate between Keynes and Ohlin in the transfer problem, as well as the opinion of Swedish economists of Keynes and his contributions, and not only the one discussed in this paper. Coming back to the transfer problem debate, according to the economists they refer to, there is no doubt that Ohlin won the argument.

war behaviour was the main cause of the war; that it has fought the war using foul means; and that the military outcome was a decisive defeat". For the German political elite and constituency, none of these statements were true and they both saw no reason to pay the reparation because, according to them, Germany did not start the war, did not lose it and fought it in a legitimate way. Accordingly, Germany's political economy capacity to pay was very low, if not zero, because this, according to German public opinion, was something unjustly imposed to Germany.[22] The consistent efforts of various German governments to act according to the preferences of the constituency and to sort out the reparation issue during 1920s indirectly confirmed this conjecture.

The insight that Germany's willingness to pay is much more important than its capacity to pay is nothing new. The recent contribution to the reparation debate (Ritschl, 2012) frames the issue within the modern theory of sovereign debt theory (Eaton, Gersovitz and Stiglitz, 1986) based on insight of incomplete contract, i.e. imperfect and costly mechanism for creditors to extract payment of contract obligations. The conclusion is that these mechanisms were rather feeble and agree with Manutoux (1944), and his insight that German reparation defaults basically were due to lack of willingness to pay on the part of the Germans and lack of determination to enforce the payment on the part of the Allies, due to the substantial costs of that enforcement, as demonstrated in the occupation of Ruhr, induced by Germany's default on reparation obligations.[23]

In short, in hindsight, it is evident that Germany was not missing capacity but rather the willingness to pay the reparations.

3.7. 7th Fallacy: All-out debt relief and investment fund as a panacea

In addition to his counter-proposal regarding German reparations, already discussed in the Section 3.5, Keynes proposes two additional

[22] This is also the position of Marks (2013) who claims that in 1921, when the reparation burden was specified, Germany could not pay it, as it was politically and psychological impossible, because of the intense public emotions. These emotions were created by the German political and military elite. One of the mechanisms used to achieve this was that Article 231 of the Treaty stipulates that the Germany accepts responsibility for the losses and damages to property "by the aggression of Germany", which German elite interpreted as "the war guilt article", i.e. as Germany accepting responsibility for the outbreak of the Great War. Nonetheless, Article 232 specifies that it is "by the aggression of Germany by land, by sea and from the air", the same formulation that was used in Lansing's note. The word aggression in these articles obviously refers to the character of German military operations, i.e. to the property on the territory of the Allies and ships under Allies' flags, not to the responsibility for the outbreak of the war.

[23] Ritschl (2012) goes far beyond this insight and constructs different periods regarding Germany's incentives to service the reparation obligations during 1920s and early 1930s, with the implementation of various financial schemes (the Daws Plan, the Young Plan, etc.) up to Hoover Moratorium on debt/reparations in 1931.

international financial schemes for post-war Europe, both deeply affected the United States.

The first proposal is "for the entire cancellation of Inter-Ally indebtedness (that is to say, indebtedness between the Governments of the Allied and Associated countries) incurred for the purpose of war" (Keynes, 1920, 106). Keynes believes that this proposal "to be absolutely essential to the future prosperity of the world" (Keynes, 1920, 106), although he does not provide any evidence to support this bold declaration.

Undoubtedly, the level of Inter-Ally war-generated pubic debt is significant, about US$ 20 billion, according to Keynes, about double of what he thinks is the war damage done by Germany.[24] The United States is only a lender (US$ 10 billion); the United Kingdom is a net lender (US$ 4.5 billion), but a debtor to the United States; France is net debtor (US$ 3.5 billion); and the biggest net debtor is Italy (US$ 4 billion). Although Keynes does not mention this explicitly, it is evident that reparations paid by Germany are crucial to France and, to some extent Italy, to service their debt obligations to the United States. Hence, the reader is tempted to infer that if there is a cancellation of that kind, then both the pressure for Germany to pay the reparations would be reduced.

Keynes has no dilemma that in this field, America is a key player. "It is from the United States, therefore, that the proposal asks generosity" (Keynes, 1920, 107). But what is that the US administration will gain from it? Keynes points out that "A debtor nation does not love its creditor" (Keynes, 1920, 109), more a declaration of a poet than an economist, but perhaps the US administration, at the time of rising isolationism in the country, considered preserving these financial assets abroad as a reasonable leverage for at least some influence in European affairs. What would be the cost for the US government for such a move? Keynes does not provide the answer to this question, but it is easy to grasp. Because most of these loans were based on Liberty Bonds purchased by US households, the US Government would have to compensate them and that would mean more taxation of its own constituency, now or in due course – Riccardinan equivalence stands. Hence, only costs, with no political benefit whatsoever. It was not strange that Keynes' proposal was turned down by the Americans.

At the end of his plea for debt cancelling Keynes points out: "The existence of the great war debts is a menace to financial stability

[24] The figure specified in the book is not accurate because Soviet Russia, which is only a debtor, proclaimed sovereign default on 4 February 1918 (ten months before the manuscript of the book went to press) with repudiating all the obligations of Imperial Russia, meaning all of Russia's sovereign debt. Keynes does not mention that default or intention of the Soviet Government in the area of international finance. Accordingly, the total amount of the debt should be reduced by roughly US$ 3.8 billion. Malik (2019) provides substantial details and a thorough analysis of the sovereign default of Soviet Russia in 1918, that includes all international and domestic obligations of the Government.

everywhere. There is no European country in which repudiation may not soon become an important political issue" (Keynes, 1920, 109). In hindsight, it is evident that Keynes' prediction was wrong. Again.

The other Keynes proposal is an international loan of US$ 1 billion: a working capital loan for European countries, because "It will be very difficult for European producers to get started again without a temporary measure of external assistance" (Keynes, 1920, 111). Keynes supports the idea of what should be "an international loan in some shape or form" (Keynes, 1920, 111) and he "does not propose to enter on details" (Keynes, 1920, 112), but he is positive about two things. First that the lender should be the US Treasury and that this is a working capital loan, i.e. not a reconstruction loan. In short, and between the lines, since French and Belgium industrial capacities, as well as the UK merchant fleet, will be reconstructed by the German reparations, by earmarking the loan as working capital, Keynes effectively send the signal that there is no need for reconstruction of German industrial capacities and German economy altogether. For an obvious reason: there was no destruction whatsoever.

As to the feasibility of the loan, Keynes had no second thoughts about it. "In short, America would have postponed her own capital developments and raised her own cost of living in order that Europe might continue for another year or two the practices, the policy, and the men of the past nine months" (Keynes, 1920, 111). Then, Keynes is even more explicit: "If I had influence at the United States Treasury, I would not lend a penny to a single one of the present Governments of Europe" (Keynes, 1920, 112). Hence, the author himself spotlights the infeasibility of his own proposal. Being aware of it,[25] Keynes proposes a long-run solution. "A great change is necessary in public opinion before the proposals of this chapter can enter the region of practical politics, and we must await the progress of events as patiently as we can" (Keynes, 1920, 113). Nonetheless, the issue is that the solution for the short-term problem, if it occurs at all, is inevitably long-term, due to a timeframe of the change of public opinion. The lack of working capital cannot wait for years to be solved. It will be solved one way or the other, by adjustments of economic agents; it could be inferior (with lower level of output), but it will be solved. Hence, the grand scheme that Keynes proposed several years, which enables the public opinion to change, would just be useless.

3.8. 8th Fallacy: Soviet Russia is Neglected

Russia was not represented at the Conference, there is no question about that. Among other good reasons why it was not invited, the most

[25] In hindsight and with Paris bridges 1968 graffiti flavour, this kind of proposal appears to be consistent with the notion of "Be realistic, demand the impossible!", the guideline attributed to Ernesto Che Guevara.

important one was a dilemma whom to invite: the Soviet Government or the White rebels fighting against it. Within that framework, Keynes is not necessarily concerned with the long-run prospects for Russia, but for short-run consequences of economic prosperity of the two countries: Germany and Russia, ostensibly for some of their neighbours.[26]

For Keynes the biggest and perhaps the only problem is how to obtain the export of Russian wheat for the European market in 1920. He had some clues that there were some problems with agricultural production in Russia. Keynes stuck to euphemisms, both for the description of the problem: "The present productivity of the Russian peasant is not believed to be sufficient to yield an exportable surplus on the pre-war scale". (Keynes, 1920, 115), as well as the explanation of its causality: "The reasons for this are obviously many, but among them are... absence of incentives to production caused by the lack of commodities in the towns which the peasants can purchase in exchange for their produce" (Keynes, 1920, 115). This is Keynes' contribution about something that historiography recorded as the massive famine in the Russian Civil War, due to the substantial drop of the agricultural output. This happened because peasants were killed and/or drafted by the both sides; crops and farms were looted and burned, transportation lines and distribution centres were destroyed, privately property rights massively violated, to use contemporary language, in the conditions where new (international) wars had been either going on or could be expected soon near the western borders of the new Russia, irrespective of whether it would be Soviet or not. In such conditions, peasants had only one incentive: to save their own lives and the lives of their families. It is the hindsight of historiography that provides all these details, but it is documented (MacMillan, 2001; Tooze, 2014, Sharp, 2018) that substantial information about developments in Russia, including the agriculture, reached Paris in the spring of 1919 and the Conference, as their participants discussed them and exchanged views about the future of Russia and what the position the Conference should take on it.

Nonetheless, Keynes even at the end of 1919 (when the manuscript of the book had been submitted to the publisher), subscribed to the view that the main reason for the lack of exportable surplus of Russian agricultural products is the lack of commodities in towns that peasants can purchase. His recommendation was straightforward and for the already experienced reader (the Russian issue is mentioned in the last chapter of the book) hardly surprising: "Germany.... has the experience, the incentive, and to a large extent the materials for furnishing the Russian peasant with the goods of which he has been starved for the past five

[26] Keynes description of some of them is sarcastic beyond good taste even at that time. "Yet, unless her great neighbors are prosperous and orderly, Poland is an economic impossibility with no industry but Jew-baiting" (Keynes, 1920, 114).

years" (Keynes, 1920, 115). It is as if there is no problem with working capital (the reason for the recommended international loan), no problems regarding the civil war in Russia and its consequences, etc. A sarcastic reader might comment that perhaps the Brest-Litovsk Treaty should be resurrected to provide the institutional background for the suggested arrangement.

Irrespective of to what extent Keynes' recommendation is plausible, it is evident that he was completely focused on the short-run issues, and only one of them: supplying grain to the European market for 1920/1921. He was not concerned with the long-run future of Russia, political or economic, the future of the Revolution and Bolshevism, its impact to Central and Eastern Europe. In that way, his position is completely consistent with his credo "In the long run we are all dead".[27]

3.9. 9th Fallacy: The Treaty and the Rise of National Socialism

Considering the rise of National Socialism in Germany, and the outbreak of the Second World War as an almost inevitable consequence of the Treaty, is definitely not a fallacy of the book, but the widespread fallacy that the book had contributed to. There is only a vague guess in the book about the possible political consequences of this sort.[28] It is in reading the book in hindsight that a causality chain can be established. The harsh economic terms of the Treaty, i.e. outflows due to reparations well beyond Germany's capacity to pay, destabilised Germany economically, undermined its economic potentials, that denied post-war Germany economic growth, so it plunged into wholesale recession, which impoverished substantial segments of society and these segments became the power base for the advent of the National Socialist Party and Adolf Hitler himself. Marks (2013) provides an extensive list of historians who have subscribed to this view (though not necessarily to every detail of the causality chain), and Sharp (2018) provides such a list of diplomats, including George Kennan, Henry Kissinger and Douglas Hurd, as well as *The Economist* which in the millennial special specified that "The final crime was the treaty of Versailles, whose harsh terms would ensure a second world war".

Obviously, the impact of Keynes' book on this school of thought cannot be underestimated. But the crucial question is whether there is any evidence to support the mentioned causality chain. As to economic

[27] It was von Mises (2005, 130) who responded to this motto saying "nearly all of us outlive the short run and... spend decades paying for the easy money orgy of a few years".

[28] "You cannot restore Central Europe to 1870 without setting up such strains in the European structure and letting loose such human and spiritual forces as, pushing beyond frontiers and races, will overwhelm not only you and your 'guarantees', but your institutions, and the existing order of your Society" (Keynes, 1920, 15).

growth, in hindsight, there is no evidence to support it, because the average annual growth rate of the Germany economy in a decade that followed the Treaty was 5.8% – quite a high growth rate.[29] Obviously, the reparation burden was not a significant constraint to the dynamics of the German economy. This insight is supported by the data on the outflows due to the reparations expressed as the share of the GDP. In only two years (1921 and 1922) it was more than 5%, and the average for the period was 3.4% of the GDP.[30]

This clearly demonstrates that the reparations obligations were well within the German capacity to pay, that the capacity was not a static concept and the only proper way to express it was as the share of the GDP. The other important point was that it was not the total amount of the burden that mattered; what mattered was the outflows to service that burden compared to the GDP and the prospects for financing that outflow by borrowing funds. What actually happened in the 1920s was that Germany, with the conclusion of the Dawes Plan, started to borrow from the Wall Street, i.e. United States private financial institutions, and that the inflow of funds was greater than the total outflow, reparations included. Hence, in the decade after the Treaty and before the advent of the Great Depression to Germany (it was effectively in 1931), the country recorded substantial economic growth. Had the Treaty's economic terms been really harsh, there would have been no economic growth in Germany in the first decade after the Treaty. Nonetheless, the growth was substantial.

The other important fact was the election results of the Germany far-right political parties and their representatives. The National Socialist party candidate for the president, a war hero, at least for Germans, recorded only 1.1% of the votes in the 1926 presidential elections, and the National Socialist Party, whatever name it used, was not able to get more than 5% of votes on the parliamentary elections before the 1930s. The political success of the party came only after the full-blown Great Depression in 1931. Had the Treaty's economic terms been really harsh, there would have been mass impoverishment and emergence of the winning far-right in Germany in the first decade following the Treaty. Nonetheless, there was no political success of the far-right in Germany at that time.[31]

[29] Based on data from Tooze (2014, 369) who compiled data from Schuker (1988) and cross-checked it with Bresciani-Turroni (1937) and Webb (1989). The data is on the national income, which was at the time the equivalent measure of the GDP. The annual average growth rate included the negative growth rate of –14.3% for the year 1923 – a hyperinflation year. According to Ritschl (2012, 5), after hyperinflation, Germany experienced its own version of the Roaring Twenties.

[30] Tooze (2014, 369). Reparation outflows are specified as reparation items in the German balance of payment and this outflow included cash transfers, payments in kind and all other charges.

[31] This is not to deny that the Treaty produced substantial grievance of Germany's constituency, not only because of the reparations, but also because of the loss of colonies

3.10. 10th Fallacy: The Relevance of the Book for Modern Sovereign Debt Crises

Naturally, this is not the fallacy of the book itself, but the fallacy created by the admirers of Keynes and the book. The wisdom of Keynes from the book is praised even today and is seen as missing in the consideration of the modern sovereign debt crisis and other economic and social evils of the time. Moore (2012) even titles his contribution, a review of the book, as "Keynes' wisdom is perfect for the eurozone", though from the text it is not clear what is the specific wisdom of the book that the author has in mind and why it is perfect for the eurozone. Pettifor (2019, 492), who thinks that the book is "a bold, eloquent work unafraid of the long view", even considers that the "Golden Age" period, during the several decades after the Second World War, was due to economic policies Keynes recommended in the book. Carabelli and Cedrini (2014) focus to Keynes' suggestion regarding the magnanimity related to debt forgives as a possible precondition for building trust for cooperation, overcoming antagonisms between the actors with the eye on the Europe's sovereign debt crisis in the 21st century.

It is a bit surprising that a hundred years of development of economics is simply neglected and Keynes' insights from the book are used for policies that should tackle modern issues. Development in the field of sovereign default theory and methodological development in the debt sustainability analysis have been substantial since the early 1920s, as well as development of financial markets and instruments used on these markets. The debate on the sustainability of Greece's sovereign debt clearly demonstrated that modern methods of economic analysis provide a rather clear answer to the question. Why these answers were neglected by policy decision makers is provided by modern political economy.[32] There is hardly a need for Keynes' topical insights, provided 100 years ago, for proper consideration of contemporary sovereign debt crises.[33]

This concludes a non-exclusive list of fallacies of Keynes' book.

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and territory (about 13% of its pre-war area), take-it-or-leave-it approach of the Allies, and general treatment of Germany as a county that lost a war. These sentiments, fuelled by effective public relations strategy of German political elite, sustained in the whole interwar period. It was in the aftermath of the Great Depression that these sentiments paved the way for the German far-right to win the power, but it is indisputable that the Treaty did not produce the Great Depression. Hence, acknowledging the grievance of Germany's constituency does not provide any evidence for the economic hardship due to the Treaty – advent of National Socialism causality link.

[32] Alesina, Favero and Giavazzi (2019) provide a comprehensive review of the debate and the results of the Greek sovereign debt crisis and its impact to eurozone stability.

[33] Annas, Pienkowski and Rogoff (2020) provide a thorough insight of modern sovereign debt theory and best practices, demonstrating how advanced this discipline

4. POSSIBLE SOURCES OF THE FALLACIES

What is the source for these and other fallacies of the Keynes book? The straightforward answer is the character of the book. It was noticed in a very early review of the book that "It is written by an economist on an economic subject, but it is not, and cannot have been designed to be, a contribution to economic literature. It is a political tract. ...it is meant to rouse public interest and to force political action, and to reach that end it follows methods which are far removed from those of the strict scientist". (Day, 1920, 301).

In modern language, Keynes' book is an advocacy piece, not a well-balanced academic contribution. And it was a very powerful advocacy piece, as "It was the power of its political polemic rather that the cogency of its economic analysis that generated its reputation" (Clark, 263). The book was aimed at and was very successful in swinging public opinion, primarily in Britain, against the Treaty and for a lenient reparation policy towards Germany. There was no need to swing German public opinion, and the French was unlikely to change. The effects of that swing have endured for many years as well as the reputation of the book. As Marks (1969, 364) points out "It is probably impossible to exaggerate the influence of *The Economic Consequences of the Peace*. A whole generation of the intelligentsia, especially in the English-speaking world, came to believe that the reparations burden under the Versailles Treaty was both vicious and unpayable". It is precisely because the book is an advocacy contribution that the fallacies were very likely created.

The durability of the effects of the book on the public opinion is a bit puzzling, as the book was obviously written with the short-run objective: swinging public opinion and shaping policies towards Germany immediately after the end of the Conference. Such an orientation means that the recommendations of the book are followed by predictions of what would happen if the recommendations are not implemented, basically a threat of what would happen if the recommendations are not accepted.[34] In principle, this is a risky strategy of the author, because if that does not happen, if the predictions do not come true, the book loses its creditability in the long run. Although it is evident in hindsight that many of Keynes' predictions did not come true, the main one being about the gloom and doom of Germany's economy post-Treaty, the impact of the book on public opinion has been very durable, and for the general public at least,

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of economics is. Browsing this book provides information on what is missing from the Keynes' analysis of Germany's capacity to pay.

[34] This approach is based on the assumption of the inevitability of the events, the inevitable cost of advocacy approach. Modern historiography has demonstrated (MacMillan, 2009) that nothing is inevitable in history.

the credibility of the book has not been undermined. This puzzle is yet to be explained, especially taking into account that there is evidence that Keynes himself regretted having written the book.[35]

The other important question is why a splendid economist, endowed with all the methodical knowledge in the economics of that time, decided to write an advocacy book with all the methodological shortcomings, some of them identified in early reviews (Day, 1920; Taussig, 1920) and some of them referred to in this review. An additional question could be why write an advocacy book favouring Germany. One could explain that by his inner moral need. Kasper (2010) points out Keynes' legacy as a public intellectual, motivated throughout his lifetime by an inner moral need to voice the truth in times of social crises. Even if this idealistic view of Keynes is accepted, the question remains regarding the "voice of truth", as truth can hardly be discovered through advocacy, but rather through rigorous academic study. This is obviously not a promising way of considering the answer to the question why the book was written in the way that it was.

Neither is an opposing view about Keynes as a moral villain, a German agent who deliberately worked for the German cause because his Germanophile sentiments, not divergent from the attitude of his social class and peer group and perhaps due to the conflict of interest, as suggested by Tampke (2017).[36]

Even if Germanophilia is not a proper word, sympathy for Germany, its culture, accomplishments and civilisation were not missing from British society and especially its intellectual elite at the end of the 19th and the beginning of the 20th century, as described by Clark (2013), who takes that attitude into account in the analysis of the environment in which the decisions that eventually lead to the Great War were made

[35] According to the testimony of Wiskemann (1968, 53), after 1936, when Germany was in full economic and political swing, under the new National Socialist administration: "I met Maynard Keynes at some gathering in London. 'I do wish you had not written that book', I found myself saying (meaning *The Economic Consequences*, which the Germans never ceases to quote) and then longed for the ground to swallow me up. But he said simply and gently 'So do I.'".

[36] The ostensible conflict of interest was due to Keynes who "fell in love with a German financial delegate to the conference, the banker, Dr. Melchior". (Tampke, 2017, 206), an event mentioned by Skidelsky (1983). Clark (2017, 289) quotes Keynes' words "In a sort of way, I was in love with him" from the essay to be read to the Bloomsbury group, explaining that Keynes "fed Bloomsbury appetite for sexual innuendo". MacMillan (2001) downplays the whole affair, being sceptical that anything like that really happened. Ferguson (1998, 400–401) shed more light on the relations between Keynes and Melchior, providing evidence that the Keynes proclamation of love refers to the Melchior intellect and his analysis. It seems that the conflict of interest explanation is not found on facts, though its consideration provides additional evidence of Keynes' unconstraint belief in accuracy of the inputs provided by the German representatives.

– a process that he characterised as sleepwalking. Keynes was a part of that elite and shared its value judgments. Furthermore, Keynes was a member of Bloomsbury Group, whose members shared a pacific stance and perhaps his engagements in the UK Treasury during the war created the need for redemption. One way or the other, Keynes personality was complicated and a simple answer to the question of motives for such a book will apparently be lacking.

Furthermore, it is inevitable to take into account the strong personal touch in the book, originating, among other things, from the frustration and perhaps even malevolence of the author whose ideas were rejected at the Conference, or at least not fully appreciated by the crucial decision makers of the Treaty. Perhaps this frustration, which does not necessarily contradict the genuine feeling of injustice, can explain some of the passages in the book, its bitter style and main findings. It is understandable – John Maynard Keynes was only human, save the view of his most ardent supporters.

Perhaps the story of the motives should be moved to fiction and *The Remains of the Day* character of Lord Darlington (Ishiguro, 1989). It was he, a noble, honest and old fashion English gentleman, a man of virtue, who participated in the Great War, but he thinks that after his side won, there should be no more animosity between England and Germany. He feels sympathy for the suffering of the Germans, and genuine regret and guilt about the post-Versailles treatment of Germany, hence he decides to do something about it. Darlington Hall is a place of these efforts, but he never understood the true German agenda and the way he has been used in it. Perhaps the biggest difference between Lord Darlington and Lord Keynes is that the former ended up being labelled a Nazi sympathizer and a traitor, which ruined his reputation and left him a broken and disillusioned old man at his death. Contrary to that, Lord Keynes' glory as an economist of a superior mind and a person of superior morality lived on to our days.

5. CONCLUSION

John Maynard Keynes' *The Economic Consequences of the Peace* is an advocacy book and because of this it is inevitably biased. Its target audience was the general public, aiming to create the public opinion that would support recommended policies, favouring Germany. It made no academic contribution whatsoever.

In hindsight, it is evident that the book created many fallacies, some of them considered in this review, and that many of the predictions from the book were wrong. Perhaps the most important wrong prediction was

that Germany would be economically ruined by the terms of reparations imposed by the Treaty. Contrary to that, Germany bounced back after the Great War. The thesis that the harsh economic treatment of Germany by the Treaty is to be blamed for the advent of National Socialism is at odds with the facts.

Perhaps the greatest puzzle is why an advocacy book that was so wrong about so many things made such an extraordinary impact on both academia and the general public opinion for so many years. Its reputation is alive and well, it seems, even after 100 years. This is the puzzle that remains to be solved.

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Basu, Kaushik. 2018. *The Republic of Beliefs: A New Approach to Law and Economics*. Princeton: Princeton University Press, 238.

In the words of former UK Prime Minister Gordon Brown, "In establishing the rule of law, the first five centuries are always the hardest." (p.5) How and why does "the law of the books" transpose into real-life practices? How can simple "ink on the paper" explain change in human behavior?

Intuitively and without reading extensive legal scholarship on this matter, underpinned by contributions from other fields such as philosophy, sociology, and economics, the answer is straightforward. It is the threat of sanction with a certain probability that induces people to abide by the rules. Kaushik Basu, former chief economist at the World Bank, calls into question this trivial conjecture, inspired by numerous examples of excellent policies that did not produce the desired effects: from food subsidies for the poor to anti-corruption laws. In his latest book, Basu promises to offer new methodological underpinnings to the study of law effectiveness and implementation, which he denotes as the "focal point approach with behavioral features". Abstract as it may appear, it is only towards the end of the book that the reader is able to fully grasp the multifaceted meaning of this term. The underlying idea, which the author develops through different game theory models, is that the difference between laws that are followed and those overlooked lies in the beliefs of ordinary people and their expectations about the beliefs of other members of society.

The structure of the book can be divided into two parts. In the first several chapters the author develops a new methodological approach within law and economics, followed by a discussion of potential avenues of application. In the second part, he explores how the new approach interacts with some of the closely interconnected concepts of social norms, politics, and legitimacy.

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Despite high regard for the law and economics as a discipline, Basu has skeptical views on "neoclassical law and economics". Before diving into its flaws and inconsistencies, the author offers a primer on standard models of game theory to cater to readers with limited background in economics. Using mainly the prisoner's dilemma as an example, the author explains the concepts of interactive rationality and the Nash equilibrium – a situation in which no single individual can do better by unilaterally deviating to a different behavior i.e. strategy, given the set of feasible strategies. Such an equilibrium may nevertheless be inferior from society's point of view – all individuals may be better off if they decide to cooperate. This is where the law steps in, by punishing those individuals who defect, changing individual payoffs, and steering society towards better outcomes. In other words, the law makes cooperation in everyone's best interest.

At this point, the author introduces, in his view, the major fault line in conventional law and economics thinking. He takes for granted that enforcers of the law are "robots who will automatically do what the law asks them to do" (p. 35). If everybody ignores "the ink on the paper" and continues behaving in the same way after the enactment of the law, their payoffs will remain the same. For this reason, the author emphasizes the need to include enforcers of the law, i.e. the police, the magistrate, the government, into existing game-theoretical models as players. From there, the author derives the central thesis of the book: once the game is fully described, once all players are taken into account, the law itself cannot change payoffs; it can merely guide individual behavior to one of the preexisting equilibria. This striking and, at first glance, counterintuitive conjecture is further developed through the concept of the law as the focal point.

The idea behind the focal point is that once people face the problem of selecting one among multiple equilibria, they need some sort of guidance that directs their behavior to a superior equilibrium. The author illustrates this again using the framework of the prisoner's dilemma, with the "tweak" of introducing the law enforcer as the third player. The enforcer decides whether to enforce the law against the other two players, i.e. the citizens, who can cooperate or defect. In the example that the author uses, there are two equilibria: one in which the two players defect and the law enforcer chooses not to enforce the law, and other one in which the two players cooperate and the law enforcer chooses to enforce the law. The main argument used here is that the enactment of the law merely changes people's expectations of how others will behave, including the law enforcer, leading the players to choose the superior equilibrium (in the example at hand, the cooperation). From there, the author advances an argument as to why some laws are not implemented in real life: they

simply direct players to a non-equilibrium point, in which at least one of the players, the citizens or the law enforcer, is better off not behaving in the way recommended. At a more intuitive level, what the author tries to argue is that a law will be followed only if citizens hold expectations that the law will be enforced against them in the case of non-compliance, and this usually holds in societies in which state agents bear consequences if they choose not to act on an infringement of the law. When arguing that the law itself does not change the payoffs of players, the author claims that, at least theoretically, a society can punish individuals who defect even in the absence of the law. The law merely makes such expectations more salient.

There are several inconsistencies in this approach. It is counterintuitive that, in the game that Basu uses as an example, the enforcer of the law (e.g. the police officer) has lower payoff if they choose enforcement as opposed to non-enforcement. Presumably, this is because enforcement creates costs. However, it is unclear what may incentivize the police officer to choose to enforce the law. If it is the threat that they will be punished by someone higher in the hierarchy, as the author suggests (p. 52), there should be costs associated with non-enforcement, which are not presented in Basu's model. If one would consider such costs, it is difficult to contemplate how they can exist in the absence of the law. To use one of Basu's real-life examples, while it may be theoretically possible for a police officer to punish someone who exceeds the speed limit of 70 m/h even without the law, it is unclear why the police officer would face negative consequences if they omit to do so. Put differently, only the law can change the incentives of the police officer, and thus, the expectations of potential infringers, which implies that the law has to change the payoffs of players, contrary to what the author claims. Alternatively, if the incentives of the police officer are perfectly aligned with the interests of society as a whole, and therefore they are inherently inclined to behave in society's best interest, the question is how is such an interest articulated. If one nevertheless supports Basu's proposal that the game theoretical models looking into law effectiveness should be expanded to include the law enforcer, it is unclear why the model does not include several players each representing a different level of enforcement, including judges, the government and the constituency. This is partially addressed in the subsequent chapter when the author discusses an extensive-form game in which in period three there is another game played between the policeman and the magistrate. Complexity appears to be an obvious drawback when one tries to offer a full account of why laws are obeyed.

There is another related question that the author tries to answer in the subsequent chapter. If all the outcomes and associated payoffs of the

game were available even before passing the law, how can the law make any difference? Isn't that just a "cheap talk", to use the jargon of game theorists? If the enactment of the law is a costless announcement, it is expected to be inconsequential. The author argues that the enactment of the law might not be costless for the individuals engaged in the process. Once the lawmaker is included in the game, the costs that the lawmaker incurs produce the "burning money" effect, i.e. it serves as a signal what they intend to do, again directing society to one of the equilibria. After reading this chapter, the reader is likely to remain puzzled by the question as to who is the lawmaker: the constituency, which is also subject to the same law, or an abstract ruler with some exogenously given preferences.

In an attempt to further address potential controversies of his approach, Basu discusses the distinction between laws and social norms. Here, he reiterates the main thesis of the book that, in a well-defined game, any outcome that can be achieved by the use of laws, can be achieved without laws. In the author's view, social norms, similar to laws, are "nothing but a convention that helps you guess what the other is likely to do" (p.93). He uses three interesting examples in which societies can settle in different equilibria: (un)punctuality, discrimination, and child labor. In the first example, he explains how less punctual societies are caught in an unpunctual equilibrium: if one expects that the other person will be late, one is better off being late, too. As to societies with widespread discrimination in labor markets, the author claims this it is rational behavior in markets with a strategic complementarity. If other members of society discriminate in favor of a certain group, hiring a member of this group leads to higher productivity. In other words, one may discriminate simply because a certain race, gender or caste matters to others. However, they might be reasoning in the same way. Along similar lines, Basu offers an interesting explanation as to why child labor might be prevalent in some societies, as a consequence of a rational behavior. In his view, this is a cooperation game between parents, i.e. low-skilled workers who settle in a bad equilibrium of sending children to work and themselves earning low wages, instead of withdrawing children from the labor market, which in turn would increase adult wages. From there, the author claims that the fundamental difference between social norms and laws is that the former is self-enforcing, whereas the latter requires the involvement of functionaries of the state taking certain actions. There are two issues with this reasoning that are unclear. Firstly, social norms, in contrast to morals, are not self-enforcing; they simply require a less formal mechanism of enforcement by society in comparison to laws. Secondly, Basu does not discuss how issues in the society that are addressed by social norms are different from those that require legal intervention. One potential avenue of thinking is that these are essentially different games played. In the first two examples (relating to punctuality

and discrimination), the interests of the players are not conflicting. This is essentially a coordination problem that can be overcome with a social norm. The issue of child labor can be modeled as a cooperation game in which the outcome of children not working is not an equilibrium. Thus, a legal "nudge" may be more necessary.

Furthermore, the author discusses how the focal point approach may explain some issues relating to politics and corruption. First, he makes interesting observations on how different forms of dictatorships and non-democratic regimes can be maintained without the need or capacity of the regime to hurt anyone directly. It is the common expectation or fear of punishment and ostracism from other citizens, in the event that one is disloyal to the regime, that allows the dictator to stay in power. As the author puts it. "If you believe that others do not want to be disloyal, you will not want to be disloyal; and this behavior is the Nash equilibrium" (p. 127). Along similar lines of reasoning, Basu explains how freedom of speech is curtailed in different societies despite being entrenched in the laws and the constitution. However, this holds only if a citizen's gain from being disloyal is not substantial, which explains different forms of rebellion against undemocratic systems. Finally, the author explains the prevalence of corruption is some societies. Once again, the root cause is "a shared belief that using public office to benefit oneself [...] is widespread, expected and tolerated" (p. 142). This is how society gets caught in an equilibrium in which everyone is corrupt.

The last central idea that the author develops in the book is the relation between the focal point approach and the concept of legitimacy. Surprisingly, Basu makes an abrupt disconnection from the rational choice assumption embraced throughout the book. In line with behavioral economics findings that individual preferences are not always exogenous and immutable, what he proposes here is "the focal point approach with behavioral features". In sharp contrast to what he argued previously, he admits the possibility that the law may change the game played. However, the change in outcomes comes from changed preferences and values of people who, once the law is enacted, "feel pangs of conscience" (p. 163) to choose a strategy that is not law-abiding. The author then turns to the discussion of why law-abiding outcomes do not always reside in the idea of the legitimacy of laws, as widely debated among legal scholars. In his view, individuals may abide by the law because it is in their best interest, despite feeling resentful about the law. Here again, one may find contradictory how the law can legitimize certain behavior in one context, and at the same time influence behavior despite a lack of legitimacy in another context, as explained by the author.

Overall, the reader of the book is likely to remain unconvinced that the new approach elaborated in this book has the potential to revolutionize

how law and economics addresses the problem of law implementation. Regardless of several caveats discussed earlier, Basu puts forward several convincing ideas and insightful lessons for countries struggling to establish rule of law. The law acts as a socially self-enforcing mechanism if people hold the belief that others will behave in accordance with the law. Therefore, it may take a long time before a new law replaces the old focal points (customs or social norms) and becomes the most salient coordinator of behavior. Similarly, societies that are generally more law-abiding are those in which civil servants, i.e. functionaries of the state, will punish one another for not doing their job. Once such behavior becomes a common belief, an entire set of different laws will be enforced.

No doubt that this book will be intellectually stimulating for anyone interested in the issue of law enforcement, even those readers with little prior knowledge of game theory concepts. Its elegant and engaging style makes it a pleasant read.

Nikola Ilić*

Thomas J. Miceli. 2019. *The Paradox of Punishment: Reflections on the Economics of Criminal Justice*. London: Palgrave Macmillan, 229.

Thomas J. Miceli is Professor of Economics at the University of Connecticut (USA), with significant works in law and economics, and applied microeconomics.[1] He has published a new intriguing book exploring the criminal justice system from an economic standpoint. Such a perspective, of course, is not a new one,[2] but the author offers valuable insights which could challenge conventional wisdom.

The book is divided into three main sections: Competing Economic Theories of Crime (part I), The Institutional Structure of Punishment (part II), and the Other Objectives of Punishment (part III), followed by the fourth and final section – Concluding Remarks (part IV). Through all the chapters, it seems the underlining idea is to whittle down fundamental issues related to the economics of criminal justice and to offer alternative insights.

Starting with economic theories of crime, the author explains the traditional normative theory on the economics of criminal justice and juxtaposes it with the positive theory. As a starting point, both theories imply the concept of crime as a (non-consensual) exchange, and punishment as a price for that exchange. For instance, if party A (offender) takes something of value from party B (victim), party A is then required (by the forceful intervention of the state) to pay the cost of the item they have taken. For everything else being equal (*et ceteris paribus*), as the

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1 Some of Miceli's most recent books are *The Economic Approach to Law* (2017), *Contemporary Issues in Law and Economics* (2018), and *Law and Economics: Private and Public* (2018).

2 The economic analysis of crime and punishment may be found in the early works of Montesquieu (1748), Beccaria (1764), and Bentham (1780). However, the subject was mostly neglected by economists for centuries, until it was revived by Gary Becker in his famous article Crime and Punishment: An Economic Approach (1968).

price of a crime increases, quantity of supply decreases; and conversely, as the price of a crime decreases, quantity of supply increases. The main difference between the normative and positive theory is reflected in their goals and consequently, in the specification of the price of crime. The author emphasizes that Becker's normative theory (1968) focuses on the optimal deterrence and overall welfare maximization, while Adelstein's positive theory (1981) focuses on the retribution and corrective justice in individual cases. Thus, due to the different goals they strive for, the two theories envision significantly different punishment schemes. Miceli explains the differences in detail, and he also offers a goldmine of references for anyone who would be interested in investigating the distinction further.

The second part of the book examines how the two competing theories manifest themselves in practice, by analysing the institutional structure within which criminal policy is formulated. As an example, the author takes the United States legal system, but all the insights and the same methodology may be applied in any given institutional setting. The main point is to observe the legal rules as "rules of the game", and the offender and the government as "players", i.e. to apply game theory to the crime and punishment procedure. In doing so, Miceli elegantly demonstrated that the timing of punishment specification plays a crucial role in how efficient the criminal justice system will be. In the first place, punishment is specified by the legislator *ex-ante*, and subsequently, by the judges who implement the prescribed sentence *ex-post*. In this sense, the legislator places more weight on deterrence, by enacting the law and sending a credible signal to all potential offenders that law-breaking will result in a punishment. Contrary to that, judges confront actual offenders, and they are more inclined to impose "fair" sanctions, based on the circumstances of the case at hand. Thus, in Miceli's words, the interplay between legislator and judges reflects an ongoing balancing act between the competing theories, with the legislator emphasising deterrence (Becker's model) and judges stressing retribution and corrective justice (Adelstein's model). Furthermore, in the same part of the book, the author introduces a new player into the game – the prosecutor, thus expending the analysis to include plea bargaining.

In the vast majority of legal systems, plea bargaining involves negotiations between the prosecutor and defendant over the mutually acceptable sentence. Thus, the outcome of the plea bargaining depends on many factors, including parties' expectations about the possible result of a trial, collected evidence, available procedural safeguards of the defendant's rights during the trial, etc. The principal objection to plea bargaining is the real possibility of making a type I error or a type II error during the negotiations. In other words, innocent defendants may be

falsely convicted as a result of bargaining, and guilty defendants may get mitigated sentence. In this sense, Miceli raises the question of how plea-bargaining affects deterrence and whether it may achieve "justice", i.e. appropriate punishment for guilty defendants and exoneration of innocent? Along with many insightful explanations, the author offers a two-folded answer to the raised questions: i) if offenders rationally anticipate that they will be punished within the plea bargaining procedure, then the prescribed sentences (by law) may have a relatively modest effect on their behaviour; ii) since the type II error is relatively more frequent in the plea bargaining procedure compared to the type I error, a compulsory prosecution system better fits the goals of retribution and corrective justice. Miceli concludes by quoting himself and his co-author: "plea bargaining is more likely to evolve in systems that emphasize the protection of innocent defendants, and systems that stress punishing the guilty are more likely to be able to sustain a regime of compulsory prosecution" (Adelstein and Miceli, 2001, p.60). However, some of the readers may think that the main problem is not in plea bargaining. In that sense, Easterbrook (1983) notes that even if an innocent defendant is convicted as the result of plea bargaining, the source of injustice is not in the bargain – it is, instead, in the fact that innocent people may be convicted in trial. And *vice versa*, in the case when offenders are not punished adequately, i.e. when they get mitigated punishment as a result of plea bargaining, the source of injustice lies with the fact that they could be exonerated during the trial. All the mentioned disadvantages of plea bargaining are, in fact, the reflection of the trial's failures, and it seems that Miceli persistently analyses that reflection instead of facing the real source of the problem.

The third part of the book undertakes a broader view of criminal justice, which includes analysis of the behaviour of repeat offenders, collective responsibility and the limits of punishment. It is not clear why or how the author selected these issues in the third section. One way or the other, Miceli starts with the theme of repeat offenders and marginal deterrence, i.e. poses a question of how punishment scheme should be structured to deter those who have already committed a crime from committing further criminal acts. Between the two extremes – applying the same legal rules for repeat offenders (the same sanctions, or "free redemption") and employing more strict penalties due to previous criminal activities, the author suggests the moderate approach. Metaphorically speaking, Miceli explains that: "[...] by making those early sins essentially costless, free redemption may not lower overall sinning at all but merely shift it backward in time. In contrast, attaching some positive price to early sins (a stick), while still holding out the prospect of redemption (the carrot), can perhaps reduce overall sinning". The whole issue of the behaviour of repeat offenders' behaviour is presented in a very interesting

way by using the Prodigal Son parable.[3] At the same time, the engaging story is followed by the formal and precise economic model of repeat offenders and marginal deterrence. Everything seems bright and polished in this part of the book except the fact that the reader cannot find any convincing explanation of how big the "stick" and "carrot" should be, i.e. how exactly the punishment and redemption of repeat offenders should be structured.[4]

The second topic in the third part examines punishment and collective responsibility. It is common knowledge that collective responsibility in criminal law is a relic of the past. Still, Miceli tries to explain the historical path from collective to individual responsibility and, more importantly, he tries to justify the existing exemptions from individual responsibility and prove their relevance in a broader context of deterrence and retribution. While searching for answers, the author quotes Joel Feinberg (1991) who noted that "the demise of collective responsibility throughout the course of human history has not necessarily occurred because individual responsibility is an eternal law of reason toward which society has been striving in an ongoing quest for a more civilized world, but rather because the conditions that may have made it reasonable or necessary in ancient times are rarely present today". Guided by these thoughts, Miceli identifies the conditions that have been altered over time and, as the most important one, he stresses the available technology. Namely, new technology provides for more efficient law enforcement, i.e. it decreases enforcement costs and the costs of making type I errors (the price of wrongful punishment). Thus, with a better-calibrated system of individual responsibility and sanctioning, both deterrence and retribution becoming more emphasised in comparison with a collective responsibility system. The author concludes that: "[...] as technology improves, even a vengeful society may eventually find it desirable to switch to individual punishment". This conclusion is strongly supported by the set of equations explaining the optimal choice between individual and group punishment. The author demonstrates that if the effective sanctioning in the two systems is the same, random individual and collective punishment are equally desirable. Furthermore, he explains that when the technology of detection is sufficiently effective, "individual punishment will necessarily yield strictly greater welfare than group punishment".

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[3] The author explains a broader concept of free redemption through the biblical story of two brothers and the forgiving father. For more details on this story see: New Testament (Luke 15: 11–32).

[4] For instance, Begović (2015) explains several factors that should be considered when determining a sentence for repeat offenders, such as asymmetry of information and the probability of sentencing.

Finally, the third main topic in the third part explores the limits of punishment by using an interesting metaphor of angels and bad men. Miceli uses Madison's (2008) observation – "if men were angels, no government would be necessary", and as the opposite, he uses Holmes' (1963) "bad men", who are amoral actors motivated solely by the threat of punishment.[5] In the given context, Miceli examines the limits of law as the ability of (legal) regulation to structure human behaviour. Angels are obedient, and thus the enforcement costs are lower with a more significant share of angels in a society. Yet, every community has a certain percentage of bad men, and it would not be efficient to make all harmful conducts in a community "illegal", and accordingly to punish all lawbreakers. Thus, Miceli states, it would be more efficient to have some complementary constraints to human behaviour, in addition to law, such as religion and morality. That could increase the share of angels in a community, improving the enforcement efficiency, and decreasing related costs. Miceli inclines to Friedman (2004) who noted that "[...] punishment is, in a way, only an add-on to the powerful work of social norms; an important one to be sure", but the author does not analyse in detail the interaction between these different sets of social norms, even though that could be crucial for the limits of punishment.

Lastly, in the concluding remarks, Miceli summarises the main three parts of the book and all the mentioned topics referring to the paradox of punishment. That curious paradox has its reflection in a continuing conflict between two fundamentally different goals to which criminal law strives: deterrence and retribution. Every criminal policy that strengthens deterrence could, at the same time, deteriorate corrective justice and *vice versa*. It seems one would need a magic wand to accomplish these two opposed goals simultaneously or at least the economic analysis of crime and punishment to determine what is the optimal proportion of the different motives within the same criminal policy. No matter how detailed Miceli is in conducting his analysis, he undoubtedly successfully explains the essence of the punishment paradox. Also, along with alternative insights, the author provides an extensive list of useful references for future research in the field of economic analysis of criminal justice.

Paradoxically, Miceli concludes his book by stating that criminal justice reform is mostly a question of social values and so it is not fundamentally an economic issue. In Miceli's words, the economic analysis takes preferences as a given and thus can help increase efficiency of the criminal law enforcement, but "it cannot tell society what values it should embrace, or what outcomes are just".

[5] Holmes (1897) observes: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict".

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Dr Sima Avramović*

LJUBICA KANDIĆ
(1925–2019)

Postoje ljudi takve snage duha i životne energije za koje ponekad pomislimo da nikad neće otići sa ovoga sveta te se njihov odlazak, ma koliko godina imali, uvek čini preranim. Profesorka Kandić je bila jedna od takvih stamenih osoba, energična i u poznim godinama svog života, inteligentna, britkog uma i zadivljujuće moći zapažanja, odlučna, nepokolebljiva, istrajna, ponosna, dostojanstvena i uvek nekako sva svoja, sa potrebnom distancom, a istovremeno dovoljno bliska. Jednom rečju prava *lady*, kojoj bi dobro pristajao i epitet „čelična". Tako je i otišla, gotovo bi se moglo reći u jednom danu, kao da je sama procenila da joj je došlo vreme.

Profesorka Ljubica Kandić je, sa mnogim slavnim imenima posleratnog Pravnog fakulteta Univerziteta u Beogradu druge polovine 20. veka, obeležila jednu epohu u istoriji te institucije, vreme ekspanzije visokoškolskog obrazovanja u zemlji i vreme razvoja pravnoistorijske nauke u novim teorijskim okvirima.

Za razliku od Kraljevine Jugoslavije, u kojoj su postojala samo tri pravna fakulteta – u Beogradu (sa Odeljenjem u Subotici), Zagrebu i Ljubljani, to je bilo doba kada su se rađali novi pravni fakulteti u Srbiji i širom novoformirane, socijalističke Jugoslavije. Profesorka Kandić je sa neizmernim požrtvovanjem i entuzijazmom učestvovala u stvaranju Pravnog fakulteta u Novom Sadu, Nišu, Kragujevcu, Prištini, Skoplju, Podgorici, i gde sve ne. Njeni postdiplomci su postajali profesori na svim pravnim fakultetima širom Jugoslavije, koji su i posle raspada te države sa ponosom isticali da su bili njeni studenti, magistri i doktori, trajni poštovaoci Pravnog fakulteta Univerziteta u Beogradu. Formiranje mnogih generacija pravnih istoričara, od Vardara pa do Triglava, jedan je

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od najvažnijih ljudskih i profesionalnih tragova koje je naša profesorka ostavila. Sa nama za njom tuguju i naše kolege, pravni istoričari iz Ljubljane, Zagreba, Splita, Banja Luke, svi koji su čuli za njen odlazak, a neki su i lično došli da je isprate. To je onaj najvažniji spomenik koji je sebi za života podigla, ostavljajući samo lepe uspomene svima sa kojima je sarađivala. Skoro je tri decenije od kako je u penziji, a njeno prisustvo, simpatije prema njoj i poštovanje koje Fakultet ima za nju jednako su snažni kao i u vreme kada je bila aktivna.

Bila je srećna što je njen profesor bio Albert Vajs, intelektuac svetskog formata, izuzetni erudita i veliki pedagog, čovek od koga se imalo šta naučiti. Na Fakultet je došla sa 25 godina (1950) i 40 godina je razvijala opštu istoriju države i prava i druge pravnoistorijske discipline, koje je vodila sve do svog penzionisanja (1990). Zajedno sa prof. Vajsom bila je autor udžbenika *Opšta istorija države i prava*, koji se više decenija koristio kao literatura ne samo na našem već i na skoro svim drugim fakultetima njene nekadašnje, velike domovine. Sačinila je i poznati *Praktikum* za taj predmet, sa izborom najvažnijih zakonskih i drugih izvornih tekstova iz pravne istorije, koji može i danas svakome biti zanimljivo i koristno štivo.

Njena radna energija i stvaralački entuzijazam bili su neiscrpni. Naša profesorka je i posle penzionisanja ostala vezana za svoj Fakultet, nastavljajući još jedno svoje životno delo – *Istoriju Pravnog fakulteta u Beogradu*, počev od 1808. godine. Veliki, čak daleko najveći deo te jedinstvene višetomne edicije plod je njenih istraživanja i izašao je iz njenog pera. Iako već u devedesetim, nosila se mišlju i podsticala svoje kolege da se poduhvat nastavi i napiše istorija Pravnog fakulteta u Beogradu od 1945. do sedamdesetih godina XX veka. Njena *Istorija Pravnog fakulteta od 1905. do 1941. godine* u dve knjige, čiji je jedini autor, nije samo istorija institucije i njenih nastavnika već i svedočanstvo jednog vremena. To je istorija Srbije u malom, posmatrana na mikrouzorku, koja se prelamala kroz živote istaknutih intelektualaca, profesora, studenata i same ustanove, ocrtavajući njihovu pojedinačnu i kolektivnu povest.

A profesorka Kandić je i sama ušla u tu povest. I to ne samo kao istraživač, pisac i profesor. Ona će ostati zapamćena kao prva žena – dekan Pravnog fakulteta u Beogradu. Dekan u turbulentnim vremenima s kraja osamdesetih godina prošlog veka, trudila se da na Fakultetu ublaži brojne potrese i da sačuva kolegijalne odnose. Pritom je izgarala da u njenom mandatu obezbedi izgradnju Aneksa zgrade našeg Fakulteta. Bez tog njenog graditeljskog poduhvata, kojim je obezbeđeno oko 1.500 kvadratnih metara novog, modernog prostora, Pravni fakultet u Beogradu danas ne bi imao uslove za funkcionisanje i akreditaciju. Dalekovido je shvatila da je, osim velikog broja kabineta, Fakultetu neophodna reprezentativna,

moderna Konferencijska sala, koja je danas ponos i jedan od znakova raspoznavanja naše ustanove, pa i Univerziteta u Beogradu.

Vodila je računa o svemu – od obezbeđivanja sredstava za gradnju, borbe sa izvođačima radova, do kvaliteta, funkcionalnosti i izgleda tog prostora. Suočavala se i sa nerazumevanjem i otporima u delu kolektiva koji je, u poznatom srpskom maniru, nalazio mane čak i jednom tako nasušno potrebnom i neupitnom poduhvatu. Ali je svojom odlučnošću, preduzimljivošću i upornošću lomila sve prigovore. Uspela je da ostavi za sobom svoj beleg na koji je s pravom bila ponosna i, čini se, smatrala ga je jednim od svojih najvažnijih fakultetskih legata. Fakultet joj se nedavno, srećom još za života, odužio postavljanjem jedne skromne, mesingane table na ulazu u Aneks, sa ubeleženim tragovima tog njenog dragocenog doprinosa Pravnom fakultetu.

Taj trenutak, ta njena sreća i fotografija ispred table posvećene njenom neimarskom delu, svakome od nas ko je tom prilikom bio prisutan ostaće u sećanju kao trajna uspomena na nju i njen poslednji boravak na njenom Fakultetu, koji je doživljavala kao svoju drugu kuću. Verujem da bi i ona želela da je uvek pamtimo tako nasmejanu, razdraganu i ponosnu na svoje delo, koje ostaje njen trajni pamjatnik.

Osim materijalnih tragova, njenih knjiga, članaka i projekata, za njom ostaje i mnogo drugog što je učinila za svoj Fakultet, za razvoj naučnog podmlatka, za afirmaciju pravne istorije, ostaju iskrena prijateljstva, dragoceni saveti, uzor kako se voli svoja ustanova, kako se brine o svojim kolegama i svojoj porodici. Jednom rečju, profesorka Ljubica Kandić ostaje trajan primer časnog i dostojanstvenog ljudskog i akademskog puta.

Milena Polojac, PhD*

HANS ANKUM
(1930–2019)

Professor emeritus, Hans Ankum (*Johan Albert Hans Ankum*), *Doctor Honoris Causa* of the University of Belgrade and one of the greatest scholars of Roman law of our day, passed away on 3 June 2019, in Amsterdam, at the age of 88. He was graced with an extraordinarily active and vital energy, acumen and an outstanding gift of oratory. His enthusiasm and missionary dedication to the history of law, especially the preservation and spreading of the influence of Roman law, is widely known in legal historian circles. Being very sociable, approachable, and generous, he had a great number of professional and friendly contacts all over the world. All this, however, can hardly describe the unique personality of this Dutch coryphaeus of Roman law.

His professional life was predominantly linked to the University of Amsterdam (*Universiteit van Amsterdam*) and its School of Law (*Faculteit der Rechtgeleerdheid*). It is there that he studied and graduated (1948–1953), thereafter receiving his doctoral degree in 1962, with his thesis on the history of the *actio Pauliana* (*De geschiedenis der 'actio Pauliana',* which included a summary in French). He worked at that University for thirty years (1965–1995) as a professor of Roman law, legal history and legal papyrology, until he retired as professor *emeritus.* He held the positions of Department Head (1976–1978, 1990–1992), and Deputy Dean of the University of Amsterdam (1979, 1984, and 1985). His lectures were brilliant and inspirational for the students. Shortly after moving to the Amsterdam School of Law, from the School of Law in Leiden, where he started his university career, he founded *Forum Romanum,* a club gathering admirers of ancient history and law, and also organized numerous excursions and workshops, as well as playing host to many foreign professors and scholars. He mentored the doctoral theses

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of many distinguished Dutch jurists and Roman law experts (Arthur Hartkamp, Peter Kop, Jan Willhem Tellegen, Olga Tellegen Couperus, Laurens Winkel, Boudewijn Sirks, Eric Pool, Noordraven, etc.) As an active professor, he fought relentlessly for the status of Roman law and legal history in the law school curriculum, and ultimately succeeded in his effort.

In 1986 he became a member of the Dutch Royal Academy of Sciences, and in 1992, the Queen of the Netherlands made him a knight of the Order of the Lion of the Netherlands.

His career, however, extended far beyond the confines of the Netherlands. He was a man who could not be stopped by any borders, in the true meaning of the word. A superb connoisseur of foreign languages (he was fluent in French – especially after his specialization in Paris, which created his lasting bond with the French language and literature – as well as in German, English, Italian, and Spanish), Hans Ankum was an inexhaustible world traveller, from 1965 on. He was a visiting professor at numerous universities in Europe, South Africa, the United States of America, South America and Japan.

He was also tireless as an active participant at numerous conferences and seminars that he himself had organized, and at those that he attended, never missing a single one of them, even when his health and his advanced age barely permitted him to do so. His focus and his alertness during the lectures, even when he seemed to have dozed off, and then, the questions he raised and his lively, encouraging discussion, without any desire or intention to impose his authority, all of that characterized the atmosphere at the conferences and seminars where Hans Ankum imprinted unique and exceptional tone.

The SIHDA (*Société Fernand de Visscher pour l`Histoire des Droits de l`Antiquité*) occupied a special place on the list of his priorities and in his heart. He was the informal coordinator and *spiritus movens* of that most democratic gathering of Roman law experts and legal historians, which he always rightly referred to as *societas amicorum.* He never missed a single session, and the last one he attended was in Krakow, in the autumn of 2018. He often stressed that Roman law had helped him make friends with people from all over the world whom he would never have met had it not been for Roman law.

His academic competence and renown, as well as his extraordinary international activity qualified him for becoming a member of the editorial boards of numerous Roman law and legal history journals (*IVRA, RIDA, Orbis Iuris Romani, Seminarios Complutenses*). He was a member of the academic boards of the Roman law associations *Centro romanistico Copanello,* and *Academia Constantiniana.* As a regular member of the panel of judges for the *Gerard Boulvert* award for the best first monograph

in the field of Roman law, he was always updated on the activities of young scholars, for whom he always had special sympathies, supporting them and encouraging them with great enthusiasm.

The broad spectrum of his scholarly research, the number of papers he has written, as well as their quality, deserve special attention. His doctoral thesis on the history of the *actio Pauliana* is of extraordinary scope and profoundness, encompassing the entire history within the framework of the antique Roman law, followed by its reception in the Middle Ages, to modern law (Ankum, J. A. 1962. *De geschiedenis der actio Pauliana.* Zwolle: 491). The later phase of his work was dominated by articles dedicated to private Roman law of the classical period, based on a profound and detailed analysis of the sources. His entire opus, also including book reviews, necrologies and other texts, exceeds 350 bibliographical units.

In one of his addresses, Hans Ankum explained his relationship towards Roman law in the following words:

*"During nearly sixty years I worked mainly in the field of antique Roman law, which we call often "droit romain romain" to distinguish it from medieval Roman law...I studied Roman law from the XII Tables to Justinian`s legislation as a student, as a promovendus, as an assistant, as a lecturer, as a professor during 32 years and as an emeritus. One could wonder whether there came never a moment of "déjà vu" or of diminishing interest in the sources of Roman law. I have now still eight minutes to explain you why I had, apart from the hours dedicated to the translation of long postclassical imperial constitutions for the Dutch translation of the Corpus Iuris Civilis, in sixty years never a boring moment, when I was busy with Roman law. The main reasons are the astonishing richness of thoughts and solutions formulated in the works of the classical Roman lawyers of the first three centuries A.D. – preserved to us mainly in and partly outside of the Digest – and the impressing high level of their reasonings" (*Ankum, Hans, 2008. Address pronounced in Charles University Prague on 7th April 2008 after having received the degree of *doctor honoris causa* in legal sciences, *Orbis Iuris Romani,* 12: 117–120).

On the occasion of his 65th birthday and his retirement, his colleagues and friends, eminent Roman law experts and legal historians, dedicated a two-volume collection of articles to him (Robert Feenstra, Arthur S. Hartkamp, J. E. Spruit, P. J. Sijpesteijn, L. C. Winkel (eds.) 1995. *Collatio iuris romani, études dédiées à Hans Ankum à l`occasion de son 65e anniversaire,* I-II. Amsterdam: J.C. Gieben). This publication includes a bibliography of his papers, numbering 234 bibliographical units written during the period from 1994 until his retirement.

An anthological collection of 25 selected articles by Hans Ankum, entitled *Extravagantes, Scritti sparsi sul diritto romano* (a cura di Carla

Masi Doria e Johannes Emil Spruit), was published in Naples in 2007, by publisher *Jovene editore,* in their *Antiqua* edition, which has, so far published a total of 93 oeuvres by the most eminent Roman law experts and legal historians. This collection also includes a supplement to the bibliography, i.e. a list of the papers Hans Ankum published from 1995 until the printing of the publication. Naturally, the publication includes only a small number of papers from his inexhaustible workshop (e.g. La "codification' de Justinien était-elle une veritable codification?; Was Justinian`s *Corpus Iuris Civilis* a Codification?; Pap. D.21.2.65: the legal Position of two Heirs who sold a thing mortgaged by the Deceased; La laconisme extreme de Papinien; Le *minor captus* et le *minor circumpscriptus* en droit romain classique; Gab es im klassischen römischen Recht eine exception und eine replication *legis Laetoriae*; Alcuni problemi concernenti la responsabilità per evizione del venditore nel diritto romano classico; Eviction of servitudes in Roman law; El character jurídico de la action *legis Aquiliae* en el derecho romano classico; Römisches Recht im neuen niderländischen Bürgerlichen Gezetzbuch).

As the winner of the Ursicino Álvarez Award in Spain, Hans Ankum acquired his second anthological collection of articles. The compendium comprising 15 of his articles was published in Madrid in 2014, under the title *Nueva antología romanística* in the *Colección Premios Ursicino Álvarez* edition by prominent Spanish publisher Marcial Pons (e.g. Towards a rehabilitation of Pomponius; *Quanti ea res erit in diebus xxx proximis* dans le troisième chapitre de la *lex Aquilia*: un fantasme florentin; Actions by which we claim a thing (*res*) and a penalty (*poena*) in classical Roman law; La noción de *ius publicum* en Derecho Romano; Papiniano, un jurista oscuro?; Fusion and 'transfusion' of legal institutions in Justinian`s *Corpus Iuris Civilis*; D.21,2,66 pr. Eine schwierige Papanianstelle über die auctoritas-Haftung des Verkäufters im Fall umgekerhrter Eviktion).

The anthology also lists a bibliography of papers now including 327 bibliographical units, i.e. papers, published in the period from 1952 to 2013.

His academic contribution, as well as his renown, and the influence he wielded in the international academic community resulted in his acquiring the rank of *Doctor Honoris Causa* at seven universities, namely: in France – Aix-Marseille (1985), in Belgium – Vrije Universiteit Bruxelles (1986), in Germanu – Bochum, Ruhr Universität (1995), at the University of Belgrade (2005), at Charles University in Prague (2008), in Spain – Univesidad de Murcia (2015), and in Bulgaria – UNWE Sofia (2015).

Hans Ankum fostered collegial relations and friendships with many colleagues from the University of Belgrade Faculty of Law, as well as of faculties of law in Novi Sad, Niš, Kragujevac, and other universities of

the then common country of Yugoslavia: in Podgorica, Split, Banjaluka and Skoplje.

His relationship with our School of Law was a very long and rich one. He summed it up in his brief address on the occasion of receiving the *Doctor Honoris Causa* degree at ceremony organized on 21 October 2005, at the Rectorate of the University of Belgrade:

'*My contacts with colleagues in Belgrade started with Dragomir Stojčević who, after having read a paper for the Amsterdam Roman Law Group called "Forum Romanum", founded a "Forum Romanum" in this town that will celebrate tomorrow its seventh lustrum. There were early contacts – and there still are contacts – with Madame Jelena Danilović who read in the nineteen sixties at the congresses of the Société d`Histoire du Droit vivid papers on the old private law of Dubrovnik and who came several times for lectures of Roman law to the Netherlands. With my friend Obrad Stanojević my contacts started thirty years ago; the first point of common interest was the Roman lawyer Gaius on whom he wrote an interesting book defending Gaius` excellent qualities as a lawyer, the French version of this book appeared in the Netherlands. The mixed friendly and scientific connections continued with younger colleagues as Sima Avramović, one of the rare specialists on old Greek law, Miroslav Milošević, a learned Romanist whom you can only meet in Belgrade, Milena Polojac, who wrote her thesis on the actio de pauperie partly in Amsterdam and Žika Bujuklić, for whom I followed during many years everything that was published on Roman republican legislation."* (Ankum, Hans. 2005. Connections in Roman Law between Amsterdam and Beograd. *Orbis iuris romani* 10: 263–264).

It was thanks to the interceding of Hans Ankum that the monograph on Gaius, written by our professor Obrad Stanojević, was published in Amsterdam, in 1989, in French (Stanojević, Obrad. 1989. *Gaius noster: plaidoyer pour Gaius.* Amsterdam: J. C. Gieben within the framework of the edition *Studia amstelodamensia ad epigraphicam ius antiquum e papyrologiam pertinentia).* Later on, writing an article dedicated to Hans Ankum, Obrad Stanojević noted:

"For our Hans I have always felt an admiration and, by time, friendship and gratitude. Admiration for his energy, his ability to answer promptly all correspondence by handwriting (not always legible, though). For his skills to teach young Romanists how to survive within the Ocean of the literature and how to use the Digest. Friendship and gratitude for his extrovert and kind nature and for his readiness to help. He has not only offered me to publish my book on Gaius, but he has personally corrected my French (minus quam perfect) and has asked another noble character of our Society, Jacques Michel to give me a hand in that respect. His club Forum Romanum was shown nice results in the last

30 years of existence. Hans has visited our club in many occasions and has spoken about Hugo Grotius, commodatum, praetorian ownership and other topics. This paper...., I am dedicating to Hans ANKUM, to HANS NOSTER." (Stanojević, Obrad. 1997. Gaius and Pomponius. Notes on David Pugsley, *RIDA* XLIV: 333–356)

In 1993, when Serbia was under international sanctions, Hans Ankum, lead organizer of SIHDA in Amsterdam at the time, provided visas for our professors, teachers and associates, as well as covered all the relevant costs.

He sent hundreds, and even thousands of photocopied pages of literature to all those who needed them. He handled all of that on his own, himself operating the copying machine, and the envelopes addressed in his distinct handwriting reached every corner of the world, and all those who needed them, wherever literature was in short supply. He was able to eliminate all the obstacles to accomplish his final goal. If he could not provide the literature any other way, he would purchase the books himself and send them as gifts.

He published in our country, the then State of Serbia and Montenegro, some of his most successful lectures, subsequently transposed into articles (Ankum, Hans. 2001. Was Justinian`s Corpus iuris civilis a codification? *Zbornik Pravnog fakulteta u Podgorici* 32: 9–22; Ankum, Hans. 1/2006. Rescripts of Roman emperors promulgated until the end of the reign of Diocletian in 305 A.D. *Zbornik Pravnog fakulteta u Novom Sadu* (Collected Papers Novi Sad Faculty of Law) 40: 9–18; Ankum, Hans. 2007. *Extravagantes, Scritti sparsi sul diritto romano*. Napoli: Jovene editore).

All of this, as well as many other details were evoked with gratitude by Sima Avramović, Žika Bujuklić and Milena Polojac, at the commemoration organized by the Department of Legal History several days after receiving the sad news about the death of Hans Ankum.[1]

My study visit and stay in Amsterdam was, no doubt, the most inspiring event and experience at the beginning of my academic career. Daily visits to the library of the Amsterdam School of Law, where Hans Ankum used to come regularly, my discussions with him about my doctoral thesis, and the manner of communication in which he absolutely never showed any inclination to act as a senior authority in relation to a beginner, his enormous personal library, his invitation for me to deliver a lecture at the Amsterdam Forum, all of these were a huge intellectual impetus and support for me. This extended on to other conferences and seminars, then, through his participation in the committee assessing the

[1] Department of Legal History organized a commemoration on the 11th of June 2019, dedicated to Professor Hans Ankum.

defence of my doctoral thesis at the Faculty of Law in Belgrade, as well as through his assistance in my work on the preparation of my book, which was to be published in English, and equally, in the most difficult moments of my academic career. I have tried to express my gratitude and profound respect for him in my regular contacts with him, especially in the form of correspondence, which never ceased, until the last days of his life.

His academic legacy will remain for the generations to come, reminding us of the greatness of Roman law, and teaching us the skills of exegesis. We shall remember him not only as a brilliant and admirable scholar and professor, but also as a great friend who was with us in moments of joy, as well as in difficult times. His numerous separates and letters written in his specific handwriting will remain as mementoes of a man who fostered friendships and was sincerely interested in the lives of his friends and their families. Neither age nor health problems could stop Hans Ankum in his intention to live the life he loved. He kept writing articles, attending congresses, writing letters to his friends, while his greatest passion – classical music – was his haven. It escorted him to eternity after the last of the numerous concerts he attended at his favourite *Concertgebouw.* His extraordinary personality will remain in the hearts of all those he generously supported, and whose lives he has immensely enriched. And there are so many of them.

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1. naslovna strana,

2. apstrakt i ključne reči,
3. rukopis i spisak literature,
4. dodaci, tabele i slike.

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Naslovna strana rukopisa treba da sadrži sledeće podatke:

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2. APSTRAKT I KLJUČNE REČI

Tekstu prethodi apstrakt koji je strogo ograničen na 150 reči. Apstrakt ne sme da sadrži neodređene skraćenice ili reference.

Molimo vas da navedete pet ključnih reči koje su prikladne za indeksiranje.

Radovi na srpskom jeziku treba da sadrže apstrakt i ključne reči i na srpskom i na engleskom jeziku. U tom slučaju, apstrakt i ključne reči na engleskom jeziku treba da se nalaze iza spiska literature.

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Zbog anonimnog recenziranja, imena autora i njihove institucionalne pripadnosti ne treba navoditi na stranicama rukopisa.

Tekstovi moraju da budu napisani u sledećem formatu:

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– margine: 2,5 cm,
– font: Times New Roman,
– razmak između redova u glavnom tekstu: 1,5,
– razmak između redova u fusnotama: Easy,
– veličina slova u glavnom tekstu: 12 pt,
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– numeracija stranica: arapski broj u donjem desnom uglu stranice.

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The United Nations Commission on International Trade Law – UNCITRAL

Brojevi od jedan do devet pišu se slovima, veći brojevi pišu se ciframa. Datumi se pišu na sledeći način: 1. januar 2012; 2011–2012; tridesetih godina 20. veka.

Fusnote se koriste za objašnjenja, a ne za navođenje literature. Prosto navođenje mora da bude u glavnom tekstu, sa izuzetkom zakona i sudskih odluka.

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1.1. Prvo slovo veliko

1.1.1. Prvo slovo veliko kurziv

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Svi citati, u tekstu i fusnotama, treba da budu napisani u sledećem formatu: (autor/godina/broj strane ili više strana).

Domaća imena koja se pominju u rečenici ne treba ponavljati u zagradama:

– Prema Miloševiću (2014, 224–234)...
– Rimski pravnici su poznavali različite klasifikacije stvari (Milošević 2014, 224–234)

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– Prema Kociolu (Koziol 1997, 73–87)...
– O tome je opsežno pisao Kociol (Koziol 1997, 73–87).
– Koziol, Helmut. 1997. *Österreichisches Haftpflichtrecht*, Band I: Allgemeiner Teil. Wien: Manzsche Verlags– und Universitätsbuchhandlung.

Domaća dela se citiraju pismom kojim su štampana. U spisku literature delo štampano latinicom navodi se samo latinicom, a delo štampano ćirilicom navodi se ćirilicom i latinicom, pri čemu se latinična referenca stavlja u zagrade:

– Prema Miloševiću (2014, 347–352)...
– Milošević, Miroslav. 2014. *Rimsko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu – Dosije studio. (Milošević, Miroslav. 2014. *Rimsko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu – Dosije studio.)
– Vukadinović (Vukadinović 2015, 27) ističe da jemac ispunjava tuđu, a garant svoju obavezu.
– U literaturi se navodi (Vukadinović 2015, 27)...
– Vukadinović, Radovan. 5–6/2015. O pravnom regulisanju posla bankarske garancije u novom Građanskom zakoniku. *Pravni život* 64: 17–36.

Poželjno je da u citatima u tekstu bude naveden podatak o broju strane na kojoj se nalazi deo dela koje se citira.

Isto tako i / Isto / Kao i Konstantinović (1969, 125–127);

Prema Bartoš (1959, 89 fn. 100) – *tamo gde je fusnota 100 na 89. strani*;

Kao što je predložio Bartoš (1959, 88 i fn. 98) – *tamo gde fusnota 98 nije na 88. strani*.

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(videti, na primer, Bartoš 1959; Simović 1972)

(videti posebno Bakić 1959)

(Stanković, Orlić 2014)

Jedan autor

Citat u tekstu (T): Kao i Ilaj (Ely 1980, broj strane), tvrdimo da...

Navođenje u spisku literature (L): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

T: Isto kao i Avramović (2008, broj strane), tvrdimo da...

L: Avramović, Sima. 2008. *Rhetorike techne – veština besedništva i javni nastup.* Beograd: Službeni glasnik – Pravni fakultet Univerziteta u Beogradu. (Avramović, Sima. 2008. *Rhetorike techne – veština besedništva i javni nastup*. Beograd: Službeni glasnik – Pravni fakultet Univerziteta u Beogradu.)

T: Vasiljević (2007, broj strane),

L: Vasiljević, Mirko. 2007. *Korporativno upravljanje: pravni aspekti*. Beograd: Pravni fakultet Univerziteta u Beogradu. (Vasiljević, Mirko. 2007. *Korporativno upravljanje: pravni aspekti*. Beograd: Pravni fakultet Univerziteta u Beogradu.)

Dva autora

T: Kao što je ukazano (Daniels, Martin 1995, broj strane),

L: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

T: Kao što je pokazano (Stanković, Orlić 2014, broj strane),

L: Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo.* Beograd: Nomos. (Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo.* Beograd: Nomos.)

Tri autora

T: Kao što su predložili Sesil, Lind i Bermant (Cecil, Lind, Bermant 1987, broj strane),

L: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

Više od tri autora

T: Prema istraživanju koje je sproveo Tarner sa saradnicima (Turner *et al*. 2002, broj strane),

L: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

T: Pojedini autori smatraju (Varadi *et al*. 2012, broj strane)...

L: Varadi, Tibor, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić. 2012. *Međunarodno privatno pravo*. 14. izdanje. Beograd: Pravni fakultet

Univerziteta u Beogradu. (Varadi, Tibor, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić. 2012. *Međunarodno privatno pravo*. 14. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.)

Institucija kao autor

T: (U.S. Department of Justice 1992, broj strane)

L: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

T: (Zavod za intelektualnu svojinu Republike Srbije 2015, broj strane)

L: Zavod za intelektualnu svojinu Republike Srbije. 2015. *95 godina zaštite intelektualne svojine u Srbiji*. Beograd: Colorgraphx. (Zavod za intelektualnu svojinu Republike Srbije. 2015. *95 godina zaštite intelektualne svojine u Srbiji*. Beograd: Colorgraphx.)

Delo bez autora

T: (*Journal of the Assembly* 1822, broj strane)

L: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

Citiranje više dela istog autora

Klermont i Ajzenberg smatraju (Clermont, Eisenberg 1992, broj strane; 1998, broj strane)...

Basta ističe (2001, broj strane; 2003, broj strane)...

Citiranje više dela istog autora iz iste godine

T: (White 1991a, page)

L: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal*. April 4.

Istovremeno citiranje više autora i dela

(Grogger 1991, broj strane; Witte 1980, broj strane; Levitt 1997, broj strane)

(Popović 2017, broj strane; Labus 2014, broj strane; Vasiljević 2013, broj strane)

Poglavlje u knjizi

T: Holms (Holmes 1988, broj strane) tvrdi...

L: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240. *Constitutionalism and Democracy*, ed. John Elster, Rune Slagstad. Cambridge: Cambridge University Press.

Poglavlje u delu koje je izdato u više tomova

T: Švarc i Sajks (Schwartz, Sykes 1998, broj strane) tvrde suprotno.

L: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–664, *The New Palgrave Dictionary of Economics and the Law*, Vol. II, ed. Peter Newman. London: MacMillan.

Knjiga sa više izdanja

T: Koristeći Grinov metod (Greene 1997), napravili smo model koji...

L: Greene, William H. 1997. *Econometric Analysis.* 3. ed. Upper Saddle River, N.J.: Prentice Hall.

T: (Popović 2018, broj strane),

R: Popović, Dejan. 2018. *Poresko pravo*. 16. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu. (Popović, Dejan. 2018. *Poresko pravo*. 16. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.)

Navođenje broja izdanja nije obavezno.

Ponovno izdanje – reprint

T: (Angell, Ames [1832] 1972, 24)

L: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Članak

U spisku literature navode se: prezime i ime autora, broj i godina objavljivanja sveske, naziv članka, naziv časopisa, godina izlaženja časopisa, stranice. Pri navođenju inostranih časopisa koji ne numerišu sveske taj podatak se izostavlja.

T: Taj model koristio je Levin sa saradnicima (Levine *et al*. 1999, broj strane)

L: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

T: Na to je ukazao Vasiljević (2018, broj strane)

L: Vasiljević, Mirko. 2/2018. Arbitražni ugovor i interkompanijskopravni sporovi. *Anali Pravnog fakulteta u Beogradu* 66: 7–46. (Vasiljević, Mirko. 2/2018. Arbitražni ugovor i interkompanijskopravni sporovi. *Anali Pravnog fakulteta u Beogradu* 66: 7–46.)

T: Orlić ističe uticaj uporednog prava na sadržinu Skice (Orlić 2010, 815–819).

L: Orlić, Miodrag. 10/2010. Subjektivna deliktna odgovornost u srpskom pravu. *Pravni život* 59: 809–840.

Citiranje celog broja časopisa

T: Tome je posvećena jedna sveska časopisa *Texas Law Review* (1994).

L: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance,* special edition 72: 1203–1702.

T: Osiguranje od građanske odgovornosti podrobno je analizirano u časopisu *Anali Pravnog fakulteta u Beogradu* (1982).

L: Anali Pravnog fakulteta u Beogradu. 6/1982. *Savetovanje: Neka aktuelna pitanja osiguranja od građanske odgovornosti*, 30: 939–1288. (*Anali Pravnog fakulteta u Beogradu.* 6/1982. *Savetovanje: Neka aktuelna pitanja osiguranja od građanske odgovornosti*, 30: 939–1288.)

Komentari

T: Smit (Smith 1983, broj strane) tvrdi...

L: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

T: Prema Šmalenbahy (Schmalenbach 2018, broj strane), jasno je da...

L: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–55. *Vienna Convention on the Law of Treaties: A Commentary*, eds. Oliver Dörr, Kirsten Schmalenbach. Berlin: Springer-Verlag GmbH Germany.

T: Perović (Perović 1980, broj strane) tvrdi da...

L: Perović, Slobodan. 1980. Član 45. Predugovor. 221–224. *Komentar Zakona o obligacionim odnosima*, ur. Slobodan Perović, Dragoljub Stojanović. Gornji Milanovac: Kulturni centar – Kragujevac: Pravni fakultet Univerziteta u Kragujevcu.

Članak u časopisu ili dnevnim novinama bez autora

T: objavljeno u *Politici* (2019)

L: Politika. 2019. Srbija snažno posvećena evropskom putu. Mart 2019. (*Politika*. 2019. Srbija snažno posvećena evropskom putu. Mart 2019)

T: Kao što je objavljeno u časopisu *Newsweek* (2000)...

L: Newsweek. 2000. MP3.com Gets Ripped. 18 September.

Članak u časopisu ili dnevnim novinama sa autorom (autorima)

T: U *Vremenu* je objavljeno (Švarm, Georgijev 2018) da...

L: Švarm, Filip, Slobodan Georgijev. 2018. Razgraničenje je model u skladu sa politikom etničkog čišćenja. *Vreme*. Avgust 2018.

T: (Mathews, DeBaise 2000)

L: Mathews, Anna Wilde, Colleen DeBaise. 2000. MP3.com Deal Ends Lawsuit on Copyrights. *Wall Street Journal*. 11 November.

Neobjavljeni rukopis

T: (Avramović, Todorović 2017)

L: Avramović, Pavle, Nenad Todorović. 2017. Sticanje bez osnova u rimskom pravu. Neobjavljen rukopis. Univerzitet u Nišu, Pravni fakultet, avgust. (Avramović, Pavle, Nenad Todorović. 2017. Sticanje bez osnova u rimskom pravu. Neobjavljen rukopis. Univerzitet u Nišu, Pravni fakultet, avgust.)

T: (Daughety, Reinganum 2002)

L: Daughety, Andrew F., Jennifer F. Reinganum. 2002. Exploiting Future Settlements: A Signaling Model of Most-Favored-Nation Clauses in Settlement Bargaining. Unpublished manuscript. Vanderbilt University, Department of Economics, August.

Radni dokument

T: (Stojanović, Savić 2017)

L: Stojanović, Ognjen, Martin Savić. 2017. Pravna priroda ugovora o kreditu. Radni dokument. Institut za pravo i finansije, Beograd. (Stojanović, Ognjen, Martin Savić. 2017. Pravna priroda ugovora o kreditu. Radni dokument. Institut za pravo i finansije, Beograd.)

T: (Eisenberg, Wells 2002)

L: Eisenberg, Theodore, Martin T. Wells. 2002. Trial Outcomes and Demographics: Is There a Bronx Effect? Working paper. Cornell University Law School, Ithaca, NY.

Numerisani radni dokument

T: (Tomić, Pavlović 2018)

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T: Za reference u tekstu koristiti skraćenice (VSS Rev. 1354/06; CJEU C-20/12, ili Giersch and Others; Opinion of AG Mengozzi) konzistentno u celom članku.

L: Ne treba navoditi sudsku praksu u spisku korišćene literature.

Zakoni i drugi propisi

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L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilozima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilozima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

Slike se prilažu u fajlovima odvojeno od teksta i treba da budu jasno obeležene.

Ne treba koristiti senčenje ili boju na grafičkim prikazima. Ako je potrebno vizuelno istaći pojedine razlike, molimo vas da koristite šrafiranje i unakrsno šrafiranje ili drugo sredstvo označavanja.

Ne treba koristiti okvir za tekst ispod ili oko slike.

Molimo vas da koristite font Times New Roman ako postoji bilo kakvo slovo ili tekst na slici. Veličina fonta mora biti najmanje 7.

Grafici ne sadrže bilo kakvu boju.

Naslovi slika su navedeni i na zasebnoj stranici sa dvostrukim proredom pod nazivom – Legenda korišćenih slika.

Slike ne mogu biti veće od 10 cm x 18 cm. Da bi se izbeglo da slika bude značajno smanjena, objašnjenja pojedinih delova slike treba da budu postavljena u okviru slike ili ispod nje.

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